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**The Sun Zhigang Incident and the Future of Constitutionalism:
Does the Chinese Constitution Have a Future?**

By
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(1) The Sun Zhigang Incident

In March 2003, Sun Zhigang, a young man from Hubei Province, was detained by police in Guangzhou, Guangdong Province under the custody and repatriation administrative detention system due to not having a temporary residence permit for the city. After three days in a custody and repatriation centre, Sun died, beaten to death. The *Southern Metropolis Daily* report of Sun's death¹ aroused a lot of anger and discussion among the Chinese people and led to further reports by the traditional media and on discussion on the internet. Dr. Xu Zhiyong, Dr. Yu Jiang, and the author watched this unfold closely, communicating via BBSes, email, and telephone. They decided to issue an open letter in response² with the following strategy:

- Sun Zhigang would not be referenced directly due to the ban on mention of his name following the intense reporting of his case.
- No list of substantive human rights violations that typically occurred in the custody and repatriation system would be included.
- The argument would be based on the People's Republic of China (PRC) Constitution and on the then new *Law on Legislation*.³ The main argument was that the custody and repatriation regulation system had clearly violated the Constitution as well as laws and regulations at the state level. They would note that the National People's Congress (NPC) Standing Committee holds the power to review any law or regulation and that any citizen has the right to suggest that the NPC review a law or regulation and declare it unconstitutional, per Article 37 of the Constitution and Articles 8, 9, and 87 of the 2000 *Law on Legislation*.
- When and how to publicize the open letter and which newspaper(s) to choose.⁴

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¹ "The Death of the Interned Inmate Sun Zhigang" [被收容者孙志刚之死], *Southern Metropolis Daily* [南方都市报], 24 April 2003.

² See Yu, Jiang, Teng, Biao, and Xu, Zhiyong, [俞江、滕彪、许志永], "Proposal on Reviewing the Measures for Internment and Deportation of Urban Vagrants and Beggars" [关于审查《城市流浪乞讨人员收容遣送办法》的建议书] 14 May 2003, <http://law-thinker.com/show.asp?id=1959> (accessed 30 December 2013). See also Zhao, Xiang and Wan, Xuezhong [赵翔、万学忠], "Three Citizens Suggest a Review of the 'Internment Law' [sic], and Experts Enthusiastically Support This" [三公民建议审查《收容法》有关令家给予积极肯定], *Legal Daily* [法制日报], 18 May 2003.

³ *Legislation Law of the People's Republic of China*, issued by the Standing Committee of the National People's Congress, promulgated 14 March 2000, effective 1 September 2000, http://english.gov.cn/laws/2005-08/20/content_29724.htm (accessed 30 December 2013).

⁴ For further information on strategies considered, see Teng, Biao, "Knowledge, Media, Power, and the Sun Zhigang Incident" [孙志刚事件：知识、媒介与权力], 25 October 2004, http://blog.boxun.com/hero/tengb/19_1.shtml (accessed 30 December 2013).

It need not be said that constitutional review is a vitally important power, as can be evidenced by the well-known American case of *Marbury v. Madison*.⁵ It is widely held in the PRC that the power of constitutional review lies with the NPC in accordance with the Constitution (Articles 62, 67). However in 2003, the NPC had yet to executed this power; their failure to do so could be viewed as a potential customary law or unwritten constitutional law. Thus to kill two birds with one stone—the open letter—the following goals were set out:

1. The abolition of the custody and repatriation system. This would require the abolition of the *Measures for Internment and Deportation of Urban Vagrants and Beggars*, the State Council regulation forming the legal basis of the system.
2. The initiation of a constitutional review procedure by the NPC. The authors hoped to promote a constitutional review system in China. While they realised this would be a difficult feat, they hoped to force the NPC and the State Council into a corner checkmate using pressure from the public.

In May 2003, He Weifang, Xiao Han, and three other scholars sent an additional letter to the Standing Committee of the NPC requesting a special investigation into the implementation of the Custody and Repatriation system after the death of Sun Zhigang.⁶ This letter attempted to activate the long-dormant Article 71(1) of the PRC Constitution, which states, "The National People's Congress and its Standing Committee may, when they deem it necessary, appoint committees of inquiry into specific questions and adopt relevant resolutions in the light of their reports."⁷

On June 16, 2003, the State Council abolished the *Measures for Internment and Deportation of Urban Vagrants and Beggars* and issued new legislation on social assistance, the *Measures for Assisting Vagrants and Beggars with No Means of Support in Cities*⁸—essentially relabeling the custody and repatriation centres as "social aid centres" and retaining the framework of the system. Further, the government was smart enough to avoid initiating a constitutional review.

It is not the author's opinion that the Sun Zhigang Incident and the events which followed aided in the promotion of constitutionalism in the PRC. However, the following points on what did occur should be made.

1. Great progress was made in the protection of human rights. After all, the custody and repatriation centres were abolished. Yet while the government did abolish the centres, they also created social aid centres for vagrants. Nominally, these social aid centres existed on a voluntary basis—vagrants were to enter on their own will—however, it was soon evident that, in practice, the government used these stations to detain people against their will.⁹

⁵ See, e.g., "MARBURY v. MADISON," The Oyez Project at IIT Chicago-Kent College of Law, http://www.oyez.org/cases/1792-1850/1803/1803_0/ (accessed 30 December 2013).

⁶ "Five Legal Scholars Call on NPC to Initiate Special Procedures to Review Sun Zhigang Case" [五位法学家提请人大启动特别程序调查孙志刚案], *China Youth Daily* [中国青年报], 28 May 2003, http://news.xinhuanet.com/legal/2003-05/28/content_889767.htm (accessed 30 December 2013).

⁷ Article 71, *Constitution of the People's Republic of China*, adopted by the National People's Congress, promulgated 4 December 1982, amended 14 March 2004, http://english.gov.cn/2005-08/05/content_20813.htm (accessed 30 December 2013).

⁸ *Measures for Assisting Vagrants and Beggars with No Means of Support in Cities* [城市生活无着的流浪乞讨人员救助管理办法], issued by the State Council, promulgated 20 June 2003, effective 1 August 2003, http://www.gov.cn/zwggk/2005-05/23/content_156.htm (accessed 30 December 2013).

⁹ Near the end of 2003, the author conducted an on-site investigation of one such social aid centre to learn of the conditions at the centres, spending three days and nights at the centre disguised as a migrant worker who had lost his wallet, and thus identity information. He found that there were people who had entered on an

2. In May 2004, the State created a special office for dealing with complaints about unconstitutionality of administrative regulations brought by ordinary people, called the Regulations Filing and Review Department [法规审查备案室] under the Legislative Affairs Commission of the NPC Standing Committee and staffed by 20 persons.
3. The concept of "constitutional review" became popular. The author has promoted the idea of 'making the Constitution come alive' In several articles.

There have been many other efforts to make the Constitution come alive. Among them was the 2007 open letter by Mao Yushi et al calling on the NPC to declare the regulations on which the Re-education Through Labour system was founded unconstitutional.¹⁰ So far this and several other attempts have not been successful.

(2.) The Rights Defence Movement and the Future of Chinese Constitutionalism

a) The Sun Zhigang Incident and the Rights Defence Movement

The Sun Zhigang Incident is often considered as a successful model of civil rights protection, a model of constructive interaction between state officials and the people. However, any similar case, wherein citizen action and interaction with state officials leads to the abolition of an evil law, has yet to be seen. So while the Sun case is a classic case of such constructive interaction, it has not become a model in China for how change gets done. Even when better strategies or tactics are used by average people to try to effect change, or when more powerful or persuasive arguments are made, one cannot and should not expect that an open letter or other civic actions could lead to a constitutional review or to the abolition of an unconstitutional law or regulation.¹¹

Yet the Sun Zhigang Incident did make a difference. Together with other events in 2003, it led to an awakening of rights consciousness in China. Other important incidents in 2003 concerned the criminal cases of entrepreneur Sun Dawu,¹² activists bloggers Du Daobin¹³ and "Stainless Steel Rat"

involuntary basis, e.g. petitioners, beggars, the mentally ill, and witnessed one person held there being beaten one night. However, it cannot be said that such is the case in all centres. For an account of a reporter's experience at a legal aid station in Changsha, Hunan Province in 2013, see, "Probe after Reporter Beaten Up at Shelter", *Shanghai Daily*, 10 January 2013, http://www.china.org.cn/china/2013-01/10/content_27641185.htm (accessed 30 December 2013).

¹⁰ Mao, Yushi et al [茅于軾等], "Citizens' Proposal to Abolish the Re-education Through Labour System" [关于废除劳动教养制度的公民建议], 4 December 2007, <http://www.aboluowang.com/2007/1204/65722.html> (accessed 30 December 2013).

¹¹ To note, there is not even a procedure for reviewing the constitutionality of the NPC's laws and regulations in either the Constitution or the *Law on Legislation*.

¹² Sun Dawu (孙大午), a businessman, publically denounced official bribery in private business at multiple universities in early 2003; he was later arrested and sentenced to three years in prison in 2003 on charges of "illegally accepting public funds". See "Speaking Out: Businessmen Are Starting to Challenge the Authorities," *The Economist*, 30 December 2003, <http://www.economist.com/node/2313388> (accessed 30 December 2013).

¹³ Du Daobin (杜導斌) was arrested in 2003 and given a suspended sentence of three years in 2004 on charges of "inciting subversion of state power". In 2011, Du, along with others, later sued Cisco Systems in the US assisting in the PRC in monitoring Chinese online users and suppressing dissent after building the Golden Shield online censorship system. See "China Sentences Cyber-Dissident, Widens Web Crackdown," Radio Free Asia, 11 June 2004, <http://www.rfa.org/english/news/technology/138362-20040611.html> (accessed 30 December 2013); Moses, Ashley, "Fighting China's Golden Shield: Cisco Sued over Jail and Torture of Dissidents," *The Sydney Morning Herald*, 16 August 2011, <http://www.smh.com.au/technology/technology->

(Liu Di),¹⁴ as well as the Li Siyi Incident¹⁵ and the emergence of independent candidates in elections for people's congresses at the lower levels.¹⁶ Thus 2003 is generally regarded as a year of great symbolic significance for the Chinese human rights defence movement. Looking back at the past decade, one can therefore safely say that the Sun Zhigang incident was one of the most important historical events not only in the traditional media, internet activism, and the legal system, but also in the rights defence movement.

The author has written several articles analysing the social background and political meaning of the human rights defence movement.¹⁷ Below are some ideas on the impact the rights defence movement has had on constitutionalism and the protection of human rights in China.

b) Further Effects on the Rights Defence Movement

Additional effects of the movement triggered by the Sun Zhigang Incident on China and the rights defence movement can be summarised in the following.

Firstly, it revealed deep and intrinsic contradictions inherent to the text of the PRC Constitution. There are many individual rights—freedom of speech, religious freedom, freedom of association, the right to vote—set forth in Chapter 2 of the Constitution which cannot be protected adequately against the public power defined and set out in Chapter 1 and the other chapters which deal with the organization and distribution of state power as based in democratic dictatorship, Marxist-Leninist ideology, Mao Zedong Thought, and the Four Basic Principles. In order for these rights to be protected, a separation of powers and judiciary would be required. Thus there is an inherent contradiction between the constitutional arrangements for individual rights and public power, even though in Chinese these words—"rights" (权利, quánlì) and "power" (权力, quánlì)—are, confusingly, pronounced exactly the same.

It actually seems impossible to have both a good human rights protection system and a one-party system. One could question why a chapter about fundamental rights was even drafted in the Constitution when it is not supposed to be enforced at all. This can also be seen from the Preamble of the Constitution which entirely contradicts the spirit of modern constitutionalism.

Secondly, the incident raised the issue of legitimacy. Legitimacy is something which political systems do well to acknowledge. Per Patrick Riley, since the 17th century, the foundation of political legitimacy can no longer be built on "patriarchy, theocracy, divine right, the natural superiority of one's betters, the naturalness of political life, necessity, custom, convenience, psychological compulsion,

[news/fighting-chinas-golden-shield-cisco-sued-over-jailing-and-torture-of--dissidents-20110816-1ivkv.html](http://www.wired.com/politics/law/news/2003/12/61420) (accessed 30 December 2013).

¹⁴ Liu Di (刘荻), who blogged online as "Stainless Steel Rat" (不锈钢老鼠), was detained in 2002 for online posts on sensitive political topics. She was released in 2003. See "Stainless Steel Mouse That Roared," Reuters, 1 December 2003, <http://www.wired.com/politics/law/news/2003/12/61420> (accessed 30 December 2013).

¹⁵ Li Siyi (李思怡) was the three-year-old daughter of a heroin addict who starved to death in her Chengdu, Sichuan Province home. Li was in her home alone for 17 days after her mother was arrested and not permitted to return home to care for her daughter, or to notify neighbours or relatives of her daughter's condition. See Ye, Miao, "Child's Death Turns Up Heat on China's Police," Asia Times Online, 28 June 2003, <http://www.atimes.com/atimes/China/EF28Ad01.html> (accessed 30 December 2013).

¹⁶ Wang, Ying, "Reform and Changes in Urban Governance," in Li, Qiang (ed), *Thirty Years of Reform and Social Changes in China* (2010).

¹⁷ Several of these articles have been archived on Boxun at <http://blog.boxun.com/hero/tengb/> (accessed 30 December 2013).

or any other basis."¹⁸ Instead, it must be based on consent which is expressed in elections, which sanction the use of public power through voluntary individual behaviour. Only these, combined with due respect for basic rights, can justify use of state coercion. Due to the influence of modern society, a regime's only source of legality is the endorsement of its power through methods such as elections and voting.

In other words, there can be no legitimacy without democracy.

The Communist Party of China's (CPC) regime has been troubled by issues of legality and legitimacy since the founding of the People's Republic of China in 1949. The preamble of the first Constitution in 1954, and in every amendment since, has been an assertion of legitimacy, reviewing historical events and summarizing laws and objectives in order to establish the legitimacy of the CPC's rule. This is done by claiming the natural superiority of the CPC as, e.g., an exceptional organization and the "vanguard of the proletariat."¹⁹ They invoke the notion of historical inevitability of CPC rule, yet none are able to extenuate Mao Zedong's direct statement that "Political power comes from the barrel of a gun."²⁰ Yet while the gun may be able to win political power, it cannot create its legitimacy.

Thirdly, the rights defence movement which grew out of the events following the Sun Zhigang Incident has increased popular concern for rule of law, constitutionalism, and human rights. The movement has made these large, abstract goals more concrete and relevant for individual person who fight for their rights in their daily lives. This is why an increasing number of average people have joined the movement, including lawyers, netizens, writers, intellectuals, farmers, students, and petitioners. While these average people try to resolve the issues affecting their own lives, they also fight for greater, more abstract rights: the freedoms of speech, of the press, of assembly, of association, of procession, and of demonstration; the right to vote; freedom of religious belief; property rights; personal liberty, and the freedom of movement, among others.

Some of these ideas—freedom of political organization, the right to vote, a free press—had been raised by intellectuals, students, and activists during the democracy movement in the 1980s and 1990s as they protested official corruption.²¹ In the rights defence movement, however, these ideals remain, yet the focus has moved more to individual cases of injustice in order to broaden their appeal for ordinary people. This has helped in constructing a larger narrative for the movement from many small narratives—the thousands of cases in which ordinary people have fought for their rights, and it has forged a closer connection between liberal intellectuals and ordinary people.

We may, if we are lucky, see a further development of positive forces and energies in civil society. If things go well, the rights defence movement can play a vital role in the promotion of rule of law, constitutionalism, and human rights in China.

¹⁸ Riley, Patrick, "How Coherent Is the Social Contract Tradition?" *Journal of the History of Ideas*, 34, no. 4 (1973), <http://www.jstor.org/stable/2708887> (accessed 30 December 2013).

¹⁹ *Constitution of the Communist Party of China*, adopted 28 August 1973, http://www.marxists.org/subject/china/documents/cpc/CONSTITUTION_CPC.htm (accessed 30 December 2013).

²⁰ Mao, Zedong, *Quotations of Chairman Mao* (1964).

²¹ See e.g. Han, Theodore, *Tiananmen Square Spring 1989: A Chronology of the Chinese Democracy Movement* (Berkeley: University of California Institute of East Asian Studies, 1992); Bond, Sherry "An Archive of the 1989 Chinese Pro-Democracy Movement," *British Library Journal*, 17 (1991), <http://www.bl.uk/eblj/1991articles/article13.html> (accessed 30 December 2013); Black, George and Robin Munro, *Black Hands of Beijing: Lives of Defiance in China's Democracy Movement* (1993).