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Main Feature

Voices against Discrimination: Chinese Citizens Challenge Discriminatory Regulations and Practices

In April 2003, Zhou Yichao (周一超), a college graduate from Jiaxing, Zhejiang Province (浙江省嘉兴市) walked into a government office and attacked two officials in charge of hiring civil servants, killing one and injuring another. Zhou had successfully passed the city's civil service qualification examination but later learned that he was being rejected because he had tested positive for Hepatitis B. Zhou was sentenced to death in September 2003. (Xinhuanet 新华网, September 5, 2003) During his trial, nearly 4,000 people, most of whom HBV carriers, petitioned the court for leniency. (China Newsweek 《新闻周刊》, December 18, 2003) Zhou was executed on March 2, 2004. (Xinhuanet, March 3, 2004)

According to experts, approximately 60% of the population in China has been exposed to the Hepatitis B virus (HBV) and over 120 million people or 10% of the population are either carriers of the HBV or are infected by the virus. (Beijing Youth Daily 《北京青年报》, December 18, 2003) HBV is primarily transmitted by blood and blood products, through sexual contact and from mother to infant. Only those who are acutely or chronically infected exhibit symptoms of the disease; other carriers pose no threat to people around them. However, because there is currently no cure for Hepatitis B and many Chinese continue to believe that it can easily spread, HBV carriers face many types of discrimination in their education, marriages and most notably in employment. Despite guidelines issued by Chinese health authorities allowing HBV carriers (as opposed to those who are infected by the virus) to work in industries other than food services and nursery schools (Regulations on the Prevention and Control of Viral Hepatitis 《病毒性肝炎防治法规》(1984)), they are virtually excluded from most low-level government civil service positions and from employment in more established state and private companies.

As of 2003, all of China's 31 provinces, municipalities directly under central government control and autonomous regions required physical examinations for all applicants of entry-level civil service positions. Twenty-eight rejected all those who tested positive for HBV; the remainder accepted only those HBV carriers who were non-infectious. (China Newsweek, November 14, 2003) Similar practices are also widespread outside the government. In Suzhou, Jiangsu Province (江苏省苏州市), over 2,000 Chinese and foreign companies located in the Suzhou Industrial Park (苏州工业园) utilize a central medical facility to screen out job applicants with HBV. Once

an applicant is tested positive, the information is shared among all companies, most of which refuse to hire HBV carriers. (China Newsweek, December 18, 2003)

The discrimination faced by HBV carriers is hardly the only type of discrimination practiced by Chinese employers: gender, age, place of household registration, and even height and weight are commonly taken into consideration in hiring and dismissal decisions.

While such discrimination has occasionally been noted and questioned, Chinese have long accepted it as a matter of course and as something that they could do little to change. China's labor market, in which demand for jobs far outstrips supply, means that employers get to call the shots. In November 2003, nearly 10,000 people applied for 600 civil service positions offered by the Beijing municipal government (Beijing Evening News 《北京晚报》, November 13, 2003) while 36,000 applicants vied for 7,900 civil service positions in the central government and other state-level government offices (Beijing Morning Post 《北京晨报》, November 3, 2003). For rural migrants from poorer regions, almost any job is acceptable. To make things worse, workers and job applicants have few places to turn to for redress against discriminatory practices. Although Article 12 of China's Labor Law 《劳动法》 expressly prohibits discrimination based on race, nationality, sex and religious belief, no other laws or regulations exist for enforcing such anti-discrimination provision. Nor is there any mechanism for victims of employment discrimination not specifically prohibited by law to seek any legal remedy. Few lawyers are willing to take on what they view as a quixotic attempt to challenge well-accepted discriminatory practices. Under such a market and legal climate, government agencies as well as employers from state-owned enterprises and the private sector routinely and openly engage in discriminatory hiring and dismissal practices without a second thought.

One need to look no further than the information required in a typical job application form to understand the extent of the problem: name, sex, age, ethnicity, education, place of birth, family background, height, health, work experience, plus a picture of the applicant—each could be used and has been used by Chinese employers as grounds for discrimination. An anecdote widely circulated in the Chinese press describes an able young job applicant who was refused a job because her last name was Pei (裴), which in Chinese has the same pronunciation as the word for losing money (陪). Below is a closer look at some of the areas where widespread employment discrimination exists today.

Gender. Despite the express prohibition against gender discrimination under the PRC Labor Law, discrimination against women is among the most flagrant in China's job market. The government itself continues to maintain different retirement ages for male and female civil servants. The long-standing government policy of "equal pay for equal work" (同工同酬) for men and women, which had propelled a high percentage of Chinese women into the workforce, has not stopped women from being forced out of failing state-owned enterprises at a higher rate than men. According to a report entitled "China's Unemployment Problems and Employment Strategies" (中国的失业问题与就业战略) by well-known Chinese economist Hu Angang (胡鞍钢) in 1998, women accounted for 60% of the workers who lost their jobs at China's state-owned enterprises.

For the younger generation, the entry barrier for female college graduates seemed to have received the most media attention. During each hiring season, reports such as the following Xinhuanet story begin to surface: a job fair in Beijing for female college graduates was cancelled when only five companies accepted the invitations sent out to 500 companies nationwide. According to the event's sponsors, many of the companies contacted openly declared their unwillingness to hire female graduates. (December 24, 2002) According to a 2002 survey by the Jiangsu Province Women's Federation (江苏妇联), 80% of the female college graduates surveyed experienced discrimination during their job search and 34.3% had experienced multiple rejections by potential employers. (Chinanews.com 中国新闻网, October 6, 2002) The same survey also showed that given the same qualifications, the hiring rate of male graduates was 8% higher than that of the female graduates. At the Capital Normal University (首都师范大学) in Beijing, 70% of the 2003 graduates who had not found jobs by August that year were women. Those fortunate enough to land jobs reported more difficult job searches than men and many had to settle for less desirable positions. As a result, more women now choose to remain in school to pursue higher degrees. (Xinhuanet, August 26, 2003) Many employers justify their discriminatory practices on the ground that the child-bearing age of young women increases labor costs and that "females in general are less creative and aggressive than men". (Xinhuanet, December 24, 2002) Some employers even require young female graduates to agree not to have children within a number of years after their hiring. (Chinanews.com, July 15, 2003)

Residency. China's household registration system (户籍制度), under which all citizens are assigned either a rural or urban resident classification based on their parents' origin, has effectively relegated the millions of rural men and women who have migrated to cities seeking work to second class status. While they are eagerly recruited—and exploited—for work in the construction and hygiene industries and other low-paying manual labor jobs, they are banned from most other occupations. For example, in 1996, the Beijing Labor Bureau (北京劳动局) issued a directive under which only 12 out of 204 listed occupations in Beijing were open to migrant workers. Beijing had since issued new directives each year to further limit the types of occupations open to migrants. (China Financial Times 《中国经济时报》, January 10, 2003)

In addition, state benefits which are taken for granted by urban workers—education through high school, medical care, unemployment insurance—are not available to migrant workers or their families during their stay in cities. As Zhang Shuguang (张曙光), Executive Director of the Unirule Institute of Economics (天则经济研究所), a leading independent think-tank in Beijing pointed out, the household registration system has "created two different pay scales in the labor market of urban and economically developed areas. On the one hand is the labor market for locals, which, in addition to wages, provides housing, social security, education and training. On the other hand is the labor market for migrant workers, which does not provide any benefits other than wages. Despite the repeated increases in wages and benefits for urban workers, the migrant workers' wages and benefit status remain unchanged. ("From Free Movement of Labor to Freedom of Movement of the Population" 《从劳动力自由流动到人口自由迁徙》, March 10, 2002, www.unirule.org.cn)

Age. In today's job market, age discrimination is no longer reserved for China's old. Thousands of middle-aged workers who have been laid off from failing state-owned enterprises now must seek reemployment. Many employers, however, are only willing to consider much younger job applicants. According to one study, 82% of the employers surveyed imposed an age requirement of 35 and below. Only 1% of them did not impose any age requirement. (*Source: The Top Tens of 2003 《十破惊天 2003》*, the Beijing Publishing House (北京出版社), 2004). Even agencies under China's central government impose age limits for their civil service positions. For the 2004 civil service recruiting season, the age requirement for positions at various central government agencies ranged from 22 to 35. (China Financial Times, January 14, 2004) According to statistics published by the Beijing Statistics Bureau (北京市统计局), 38% of the city's 3,840,000 unemployed in 2000 were between the ages of 35 to 44, making it the single largest age group among Beijing's unemployed. That percentage increased to 40% in 2002. (Chinanews.com, July 24, 2003)

Height, Weight and Physical Appearance. The tales of two young women recently ignited much debate in the Chinese press about employment discrimination based on one's physical attributes: A Tianjin (天津) woman underwent plastic surgery to improve her appearance after being rejected by more than 1,000 potential employers during her ten-year job search (Xinhuanet, July 31, 2003). In Wuhan (武汉), a college graduate who had been rejected by 10 potential employers decided to include a sexy picture of herself in her future job applications (Wuhan Morning Post 《武汉晨报》, November 23, 2002). Should employers be allowed to discriminate on the basis of an applicant's physical attributes? Why not? Most of the same local governments that reject HBV carriers from their civil service positions also impose height and weight requirements. In Anhui Province (安徽省), males must be no less than 160 cm (5 ft. 3 in.) in height and weigh no less than 50 kilograms (110 pounds) and females must be no less than 152 cm (5 ft.) in height and weigh no less than 40 kilograms (88 pounds). Hunan Province (湖南省) requires its male civil servants to be at least 160 cm (5 ft. 3 in.) in height and weigh no less than 45 kilograms (99 pounds) and females to be above 150 cm (4 ft. 11 in.) in height and weigh no less than 40 kilograms (88 pounds). (*Sources: China Financial Times, April 8, 2003 and February 13, 2004*) In 2003, the personnel bureau of Yiyang (益阳市), Hunan Province became well-known for rejecting a man who received the highest score in its civil service qualification exam but fell short of its height requirement by 5 millimeters (0.2 in.). (Qianlong.com千龙网, October 7, 2003)

Fighting Back: Legal Challenges against Discriminatory Regulations and Practices

In an indication of how profoundly Chinese society is changing, voices are now being raised against discrimination. Over the past year, there has been widespread and sympathetic media coverage of individuals and groups who have been subject to some form of discrimination. Direct questioning of the laws and policies that treat migrant workers unequally from urban residents has appeared. Even subtle changes to the official language that could be considered derogatory to certain sectors of Chinese society are being introduced: the term “外来人口” or “population [people]

from outside" (usually translated as "migrant workers" in English), has been officially discarded for "流动人口" ("floating population").

This new questioning of discrimination, coupled with growing rights consciousness, has even given rise to citizens taking legal action to challenge discriminatory regulations and practices. In spite of the lack of law to strike down discriminatory practices or to provide remedies from unequal treatment, a handful of determined citizens and lawyers have begun fighting back against some of the more egregious discriminatory hiring practices of government agencies by filing administrative adjudication suits against them. Under China's Administrative Adjudication Law 《行政诉讼法》 (1990), citizens have the right to bring lawsuits (行政訴訟案) against government bodies for violating the law or procedures. Such efforts have made "more and more people realize and understand that the best way to promote social progress and protect basic human rights is not necessarily in making dramatic appeals as a group, but in repeatedly insisting on personal freedom one case at a time and fighting over every detail." (China Newsweek 《新聞周刊》, November 24, 2003) The intense media coverage these lawsuits received in China has already led to changes outside the courtroom: a number of local governments have either revised or dropped their discriminatory requirements with respect to height, weight and HBV status from their civil service hiring regulations.

In January 2003, Jiang Tao (蔣韜), a recent graduate of Sichuan University (四川大學) brought an administrative action in Chengdu, the capital of Sichuan Province (四川省成都市) against the Chengdu Branch of the People's Bank of China (中國人民銀行成都分行) for height discrimination. Mr. Jiang, who is 165 cm (5 ft. 5 in.) in height, alleged that the bank's 168 cm (5 ft. 8 in.) height requirement for male applicants precluded him from applying for a civil service position at the government bank, therefore violating his constitutionally-protected equal rights to be employed by a government agency and his political right to participate in the management of state affairs. The case was tried in April 2003. Although the plaintiff's claims were rejected by the court, the defendant bank abandoned the height requirement soon after the lawsuit was filed, most likely as a result of the adverse publicity generated by the case. (Beijing Youth Daily, December 20, 2003) According to the plaintiff's lawyer, Professor Zhou Wei (周偉) of Sichuan University Law School (四川大學法學院) and Shanghai University Law School (上海大學法學院), the height discrimination case represents the first time that a Chinese court has accepted a lawsuit explicitly based on a constitutional rights claim. (Procuratorial Daily 《檢察日報》, April 28, 2003) (In *Qi Yuling vs. Chen Xiaoqi* (齊玉苓控告陳曉琪案), the 2001 case widely described as China's first constitutional rights case, the plaintiff's constitutional right to education was one of several bases for her claim. The final court decision did not directly uphold the right, but ruled that violation of the right was grounds for compensation.)

In another case, a contract worker who had been working at the Shenzhen State Tax Bureau (深圳國稅局) for seven years was rejected for a permanent position despite having passed the civil service qualification examination because she failed to meet the height requirement set by the Guangdong Province Personnel Bureau (廣東省人事廳). In February 2003, she filed an administrative suit with the Futian District People's Court (福田區人民法院) in Shenzhen against both the Guangdong Province

Personnel Bureau and the Shenzhen State Tax Bureau alleging height discrimination. The court refused to consider her case, stating that the "hiring and firing practices of state agencies are not within the court's jurisdiction over administrative adjudication suits and that the plaintiff had provided insufficient evidence to establish her claim. In February 2004, the Shenzhen Municipal Intermediate People's Court (深圳市中级人民法院) turned down her appeal, stating that the "recruitment of civil servants pursuant to certain hiring standards is part of the internal personnel management of a state administrative agency" and that "any claims arising from such administrative function is outside the jurisdiction of the People's Courts over administrative adjudication suits". (Source: New Beijing Daily 《新京报》, February 10, 2004) Notably, Guangdong subsequently dropped the height requirement from its civil service hiring regulations.

A third height discrimination case was brought by a woman who fell short of the civil service height requirement in Zhejiang Province. The Anji County People's Court (安吉县人民法院), where the plaintiff filed her administrative suit, refused to consider her case. (People's Daily 《人民日报》, March 31, 2003) Yet, in February 2004, Zhejiang also dropped the height requirement from its civil service health examination standards. (China Youth Daily 《中国青年报》, February 2, 2004)

The most high profile employment discrimination case to date was brought by an HBV carrier in November 2003 in Wuhu, Anhui Province (安徽省芜湖市). The plaintiff, 25-year old college graduate Zhang Xianzhu (张先著), received the highest score in the Wuhu civil service qualification examination but was rejected because he had tested positive for HBV. Unlike the Zhejiang graduate whose nearly identical rejection due to his HBV status drove him to violence (see story at beginning of this article), Zhang filed an administrative suit with the Xinwu District People's Court (新芜区人民法院) in Wuhu, alleging that the ban against HBV carriers was a discriminatory practice which violated his constitutional rights of equality and political participation. (Beijing Youth Daily 《北京青年报》, November 14, 2003)

Zhang's case, which was tried in December 2003, received national media attention. Public interest in the case stemmed in part from the fact that Zhang was supported by a virtual community of well-educated HBV carriers who met through the Internet. These supporters sought to use Zhang's case to organize and change the fate of China's 120 million HBV carriers. According to a report by China Newsweek, Zhang met his supporters as soon as he posted his story at an online bulletin board system "www.hbv.com" (肝胆相照, the "HBV BBS") which was founded by HBV carriers as an online support group and boasted 12,000 registered users by the end of 2003. (December 18, 2003) They urged him to seek legal remedies, gave advice on his litigation strategies, contacted the media and called on fellow HBV carriers to show their support by attending Zhang's trial. Through the HBV BBS, Zhang's supporters also organized and submitted a petition signed by 1,611 HBV carriers to China's National People's Congress (全国人民代表大会), requesting a constitutional review of all existing government regulations which excluded HBV carriers from the ranks of the civil servants and calling for the enactment of special legislation aimed at protecting China's HBV carriers from employment discrimination. (New Beijing Daily, November 26, 2003)

Behind Zhang's case was also Professor Zhou Wei, the constitutional law scholar who represented the plaintiff in China's first height discrimination case. According to one report, Professor Zhou, who had contacted Zhang through the HBV BBS to offer him free legal representation, had been actively searching for a "ground-breaking" HBV discrimination test case in the area of civil service hiring practices. (Chengdu Evening Post 《成都晚报》, November 29, 2003) During trial, Professor Zhou argued that the government regulations which the defendant relied on to reject HBV carriers for civil service jobs violated the provisions under the PRC Constitution (宪法) which guaranteed equality for every citizen before the law (Article 33) and granted every person the political right to participate in the affairs of the state (Article 2) as a civil servant. (Chengdu Evening Post, December 20, 2003)

Publicly, Professor Zhou downplayed the importance of the outcome of the case, emphasizing that the Wuhu court's decision to be the first in the nation to even consider the HBV discrimination case was far more significant. (Chengdu Evening Post, December 20, 2003) Several articles and newspaper interviews by Wang Yi (王怡), a legal scholar at Chengdu University (成都大学) in Sichuan who had been close to the case, provide some insights into the legal impact that Professor Zhou hoped to achieve. According to Wang, the primary goal of the case was to push for expanding the application of a judicial interpretation (司法解释) issued by China's Supreme People's Court (最高人民法院) in 2001. In it the nation's highest court advised a provincial-level high court to invoke provisions of the PRC Constitution in its adjudication of a civil case involving alleged violations of the plaintiff's right to education (the "Right to Education Interpretation"). Specifically, Wang contended that the HBV case would achieve its highest value if the Wuhu court would rule on the legality of the Anhui civil service physical examination standards on constitutional grounds, thereby (1) extending the application of the constitutional principles beyond civil cases to administrative adjudication suits and (2) bringing the spirit of the high court's directive to the lower level courts' decision-making. Alternatively, if the court chose to avoid invoking the constitutional provisions and rule instead on the legality of the Anhui civil service physical exam standards based on existing central government-issued laws and regulations, it would still open the door for meaningful judicial review of regulations issued by local governments. (Sources: China Newsweek, November 24, 2003; New Beijing Daily, November 15 and November 17, 2003; and Chengdu Evening Post, November 29, 2003)

On April 2, 2003, the Wuhu court issued its judgment, in which the court affirmed the validity of the government regulation while ruling that the decision by the defendant to refuse hiring the plaintiff based on his HBV status lacked sufficient evidence. The court refused to grant Zhang's request to be reconsidered for the civil service position, citing conclusion of the recruitment season. (Beijing Youth Daily, April 3, 2004) The plaintiff's lawyer expressed satisfaction with the outcome, stating that it "demonstrated the judiciary's concern for human rights" and that it set a precedent for expanding the scope of judicial review to administrative lawsuits, even though the Anhui court failed to invalidate the discriminatory government regulation on constitutional grounds. (Procuratorial Daily, April 5, 2004) For reactions from the HBV community about the court's ruling, see the "Heard on the Web" column of this issue. While the case was pending, two provinces revised the HBV screening

standards of their civil service hiring regulations: In Zhejiang Province where a rejected HBV applicant attacked two civil service hiring officials in 2003, HBV carriers who are tested non-infectious are no longer excluded. Hunan Province also announced similar changes. (Source: China Youth Daily 《中国青年报》, February 2, 2004 and Xinhuanet, April 2, 2004)

The significance of HBV discrimination case, aside from its outcome and the changes it brought along, also lies in the litigation strategy of Professor Zhou Wei, a pioneer of anti-discrimination litigation in China. Zhou is among an increasingly vocal group of Chinese legal scholars and practitioners who, encouraged by the Supreme People's Court's Right to Education Interpretation, are trying to develop a mechanism for upholding constitutional rights and reviewing the constitutionality of laws through the court system (宪法司法化). Knowing that both the Sichuan height discrimination case and the HBV discrimination case presented the legal challenge of lacking specific laws prohibiting discrimination against civil service applicants, Professor Zhou pushed the envelop by asking the courts to directly invoke constitutional principles in deciding rights violations and to review the legality of the government's rules and actions on constitutional grounds. Such ground-breaking efforts, although fascinating to Chinese and Western observers, face formidable obstacles in the current Chinese political and legal environments. One such hurdle is the legal difficulty posed by the limited power of judicial review in administrative adjudication suits. Under the Chinese Administrative Adjudication Law, a court may either confirm or reverse the government's "concrete administrative actions" (具体行政行为) (Article 54) but has no authority to review "abstract administrative action" (抽象行政行为), defined as "administrative rules and regulations or decisions and decrees issued by administrative agencies with general binding authority" "行政法规、规章或者行政机关制定、发布的具有普遍约束力的决定、命令" (Article 12). Although some legal experts have argued that the PRC Law on Legislation (立法法), enacted in 2000, leaves room for court to review regulations issued by local governments which are below the level of "administrative regulations" issued by the central government and to disregard such regulations when they conflict with national-level laws, Chinese courts have been reluctant to adopt such an interpretation. The courts in Shenzhen and Zhejiang in the two height discrimination cases apparently took the cautious approach by refusing to consider the cases on jurisdictional grounds. The courts' reluctance seems well justified. In 2003, a judge from Hunan Province (湖南省) almost lost her job for ruling that a local regulation conflicted with a national law. (See story in the "Case Files" column of this issue.)

The introduction of constitutional adjudication is more difficult in a country where the nominally-elected National People's Congress, not the courts, is vested with the ultimate power of constitutional review and interpretation. Even though the Supreme People's Court Right to Education Interpretation was careful in limiting the concept of constitutional adjudication to the application of the relevant constitutional provisions in rights cases and not judicial review of the constitutionality of government rules and regulations, it has been criticized by some as incorrect, unnecessary and bordered on "judicial power-grabbing" (司法抢滩). ("Misleading Discourse of 'Constitutional Adjudication'?—Discursive Dilemma of "Constitutional Adjudication" and Constitutional Dilemma of Transformative State" "宪法司法化的“误区”？—从“宪法司法化”的话语悖论看国家转型的宪政悖论" by Jiang Shigong (强世功), 2002) As one

law professor pointed out, adopting a system of constitutional review of administrative regulations by the judiciary would mean “transferring the power of constitutional supervision and implementation which is currently held by the National People’s Congress and its Standing Committee as well as the power of constitutional interpretation which is held by the Standing Committee of the National People’s Congress to the Supreme People’s Court. This in turn means that the highest adjudication authority would obtain the same or equal constitutional status as the organ which holds the ultimate state authority. In essence, this would mean a fundamental change in our country’s political system. This is no longer a question of whether [we] have the ‘courage and determination to boldly overcome traditional concepts and ideas’, but a question of whether we should fundamentally break out of the existing constitutional framework.” (“The Rights and Wrongs of ‘Constitutional Adjudication’—A Few Problems Arising from the Study of the Applicability of Constitutional Adjudication” ‘宪法司法化’ 引出的是是非非——宪法司法适用研究中的几个问题’ by Tong Zhiwei (童之伟), Chinese Lawyer 《中国律师》, December 2001 issue)

Whether or not China’s legal system is able to break out of the existing constitutional framework will determine whether its citizens, including those who are facing employment discriminations, would have any meaningful way of realizing the rights bestowed upon them by law. In the words of one commentator, “To guarantee citizen’s rights, [we must] not only write such rights into law; more importantly, we must implement mechanisms to prevent and redress any violations of such rights. ... Rights without guarantee are worthless. We need to strengthen our effort to perfect mechanisms for [challenging] violations of rights. Only then will the rights of citizens be more than *rights on paper*”. (China Youth Daily, October 17, 2003, a portion of the preceding quote was translated by Keith Hand, China Rule of Law Developments VII, November 14, 2003)

Legal Reform

Recent Developments at China's Legal Forefront

Enforcement of Civil Judgments: Harder than Reaching the Sky. These days, it is hard to know whether to be optimistic or pessimistic about the future of China's judiciary. On the one hand, there is the growing recognition that the work of courts is different from other government bodies, reflecting a trend towards professionalization, acceptance by courts of increasingly complex cases and greater emphasis on procedural regularity. On the other hand, a number of deep-rooted problems seem to have worsened in recent years. One of those is courts' inability to enforce their judgments. As admitted by Xiao Yang (肖扬), President of China's Supreme People's Court (最高人民法院, SPC) during the court's annual work report to the 10th National People's Congress (第十届全国人大) in March 2004: "The difficulty of executing civil and commercial judgments (执行难) has become a major 'chronic ailment', often leading to chaos in the enforcement process; there are few solutions to the problem". (www.court.gov.cn) Since the late 1980's, the subject of difficulty in enforcement has been a regular theme of the SPC's annual work reports to the national legislature. Despite direct orders from the top Communist Party leadership and numerous campaigns by both the SPC and lower Chinese courts to remedy the situation, the inability of courts to enforce their decisions, whether for compensation of damages, payment of debt, or ownership of property, continues to be a widespread and serious problem described by many as "harder than reaching the sky" (难于上青天).

During a recent online discussion hosted by China Courts Net (中国法院网) and People's Net (人民网), Ge Xingjun (葛行军), the head of the SPC's Judgment Enforcement Division (执行办公室) revealed the following statistics regarding the nationwide enforcement rate for civil and economic judgments: 40% at provincial people's high courts, 50% at intermediate people's courts and 60% at basic level people's courts. (www.bbs.chinacourt.org 法制论坛, March 11, 2004) A judge from Shandong Province (山东省) however, reported in 2002 that the enforcement rate was as low as 30% in economically less developed regions. (Qilu Evening Post 《齐鲁晚报》, November 26, 2002) While such numbers may not be the best indicator of the underlying problem (among other things, it is not clear what qualifies as a judgment that has been enforced and one that has not), the difficulty of enforcing judgments is clearly evident in the numerous reports routinely carried by the Chinese press.

To begin with, China's courts lack the authority and stature to command obedience to their decisions, especially when such decisions affect other government branches and officials. According to one unnamed Shandong judge in charge of enforcing judgment, as much as 70% of his caseload was influenced by directives from local government and Communist Party officials. (Shandong Xinhuanet, December 13, 2003) The situation involving debt obligations of China's village and township enterprises (乡镇企业) also illustrates the weak political position of the courts. As reported by the Legal Daily 《法制日报》 on April 29, 2003: "The execution [of judgments] against village and township enterprises is a major headache for courts. While such enterprises were once the most promoted economic model, their very

existence masks an inherent conflict: the village and township governments are not economic entities, yet their enterprises have a direct and subordinate relationship with these governments. When things go well everyone is happy. But if an enterprise becomes bankrupt due to poor management, its village or township government is unable to assume its debt. ... Of the 30 villages and townships in Tongshan County, Jiangsu Province (江苏省铜山县), 20 became defendants in debt enforcement actions. ... Some local officials do not even bother to meet with judges coming over to execute the judgments and there is nothing the judges can do about it." Judges in China understand their predicament. "I have been to meetings held by the city's People's Congress", said a judge from the enforcement bureau of a city-level court in Liaoning Province (辽宁省), "These meetings are filled with officials from towns and villages which are the subject of debt enforcement actions. How can we afford to offend them? Every village and township produces seven to eight delegates to the [city's] People's Congress. The Court's [annual] work report has to be approved by them." (Legal Daily, *id.*) The report went on to observe that this comment came from a judge with over 10 years of experience who "naturally understood that the same officials from the villages and townships could head the Court someday, or become the Vice Mayor or the Vice Chairman at the People's Congress".

Whether a judgment can be enforced is often a contest of influence or power. China's official newspaper, the People's Daily (《人民日报》), recently carried a prominent story about a judgment which remained unexecuted for six years despite interventions by the provincial People's Congress and the provincial high court. The judgment, issued in 1996 by the Fuyang Intermediate People's Court (阜阳中级人民法院) in Anhui Province, involved a commercial dispute between two local companies. The enforcement efforts undertaken by the same court were repeatedly blocked by the defendant, a company headed by a man who was a delegate to the People's Congress of Fuyang and the Vice Mayor of an adjacent town, Jiesshou (界首市). The stalemate continued for four years until the top leadership of two successive provincial People's Congresses intervened in 2001 and 2002, which led to the Anhui Province People's High Court (安徽省最高人民法院) twice sending its own enforcement officers to execute the judgment. Despite such unprecedented pressure from above, the defendant still managed to disregard the execution order, eventually filing for bankruptcy in 2003. The Anhui People's High Court attributed its and the Fuyang Intermediate People's Court's inability to take compulsory measures against the defendant to the official positions held by the head of the company. "This has resulted in a history of the [defendant] company repeatedly resisting the courts' enforcement efforts", said the Anhui People's High Court in one of its reports. (People's Daily, October 24, 2003)

Local protectionism is another contributing factor to the country's enforcement difficulties, particularly in enforcing judgments rendered by courts outside the local jurisdictions. When a defendant or his assets is located outside a court's geographic jurisdiction, a Chinese court may either send its own officers to execute the judgment in the foreign jurisdiction or "entrust" another court in that foreign jurisdiction to execute the judgment (委托执行). One Beijing court estimated that only 10% of its entrusted enforcement cases were executed and another 40-50% never received any response from the entrusted courts. (Legal Daily, April 29, 2003) Many local governments require courts from other jurisdictions to apply for their approval

before executing a judgment against a local defendant. (Shandong Xinhuanet, December 23, 2003) Sometimes, the litigants' places of residency solely determine the outcome of an enforcement action. A court in Sichuan Province (四川省) delayed enforcing its own judgment against a local company for three years because the judgment creditor was from outside the province. Such inaction, as the court explained, was based on an unwritten local policy which required prior approval by the local Communist Party when the execution of a judgment involved the loss of local assets to outsiders. When the Sichuan Province People's High Court finally intervened by designating another court to execute the judgment, the first court promptly followed its local government's instructions to help the defendant falsely file for bankruptcy. (Sichuan Daily 《四川日报》, January 12, 2004)

Among individual cases, the enforcement of compensation awards to victims of traffic accidents and the collection of fines in criminal cases in China's more impoverished rural areas are most difficult for many Chinese courts. In one instance, a young boy from Shanxi Province (山西省) sustained severe injuries after being run over in 1996 by a tractor operated by another peasant. Eight years later, his family was still unable to collect the RMB40,000 (US\$5,000) of medical expenses they had incurred. It turned out that the driver's only assets consisted of his ramshackle cave dwelling and a few pieces of old furniture. The victim's family's only hope was for the driver to get married someday so they could take his dowry. Many Chinese peasants operate motor vehicles without insurance. When accidents occur, they either skip town or are able to avoid compensating the victims simply by being poor. Equally hard to enforce are court orders of criminal fines or compensation for victims of crimes. Many criminal defendants are themselves destitute, prompting judges to look at the defendants' financial circumstances before issuing fines or compensation orders. "One must be realistic ... if the only thing of value at a criminal defendant's home is a hot water bottle", said a judge from Qinghai Province (青海省). (Source: Legal Daily, April 29, 2003) The SPC estimated that between 30-40% of the applications for compulsory enforcement accepted by courts nationwide were impossible to execute due to the defendants' lack of assets. Under Chinese laws, a judgment creditor may apply to the court for compulsory enforcement when voluntary compliance is not forthcoming. "The People's Courts should not have taken these cases in the first place. This is not an issue of enforcement difficulty. Yet the enforcement efforts involved in such cases have attracted the most complaints from applicants of such fruitless enforcement actions", said Ge Xingjun of the SPC. (www.bbs.chinacourt.org, *id.*)

Judgments involving general commercial and economic disputes also face mounting enforcement difficulties. In Beijing, during the first six months of 2003, the value of unexecuted civil and economic judgments (consisting mostly of bank loan defaults and real estate disputes) was twice as much as that of those executed. (Beijing Evening News 《北京晚报》, November 12, 2003) In Yantai, Shandong Province (山东省烟台市), 65% of the approximately 40,000 civil and economic judgments rendered by the city's intermediate people's court every year require compulsory enforcement due to judgment debtors' refusal to voluntarily comply with the court orders. (Shandong Xinhuanet 新华网山东频道, March 15, 2003) Many of China's banks, already laden with bad debt as a result of questionable and unsound lending practices, have been hit hard by unenforceable loan default judgments. As of the end

of 2002, three of China's largest state-owned banks, China Construction Bank (中国建设银行), China Agricultural Bank (中国农业银行) and China Industrial and Commerce Bank (中国工商银行), had a total of RMB8 billion (US\$1 billion) of uncollected loan default judgments stranded in the court system of Shandong Province alone, most of which had been outstanding for long periods of time. (www.legalinfo.gov.cn 中国普法网, December 23, 2003) According to local judges, there is a growing trend of corporate borrowers attempting to evade debt obligations by either shifting assets to newly-created entities or falsely declaring bankruptcy. (Shandong Xinhuanet, *id.*) Often times, however, even if assets are available to satisfy defaulted debt obligations, as in the case of many unprofitable medium and large state-owned enterprises, lenders cannot liquidate the pledged factories and equipment for fear that it would lead to thousands of workers losing their jobs.

In recent years, the difficulty in enforcement also contributed to the growing problem of China's 94 million migrant workers being unable to collect wages from their employers. According to the All China Federation of Trade Union (全国总工会), as of 2003, the unpaid wages of migrant workers reached RMB100 billion (US\$12.5 billion). (www.sofang.com 搜房新闻中心, December 25, 2003) In 2003, five hundred migrant workers from Anhui Province made national news by successfully suing to recover unpaid wages from the general contractor and builder of a construction project in Beijing. The difficulties they encountered in collecting on their judgment soon hit the headlines again. According to the Beijing News 《新京报》, despite a personal call for help from the Mayor of Beijing, the enforcement of their judgment yielded no results from the cash-strapped defendants and the court's effort to auction off the construction project was blocked by competing claims from other creditors. (January 10, 2004) It eventually took three courts, including the Beijing People's High Court (北京市最高人民法院), to "persuade" other creditors to back off from their claims so that the migrant workers could go home with their pay before the Chinese New Year. (www.sofang.com, January 16, 2004)

Under Section 313 of China's Criminal Law (刑法), resisting the execution of a court judgment by a debtor is a criminal offense subject to up to three years of imprisonment, detention or fines. In August 2002, China's National People's Congress issued a legislative interpretation to extend criminal liability under Section 313 to guarantors, those who are responsible for assisting the execution of judgments and civil servants who conspire with judgment debtors to thwart the execution of court judgments. (Xinhuanet, September 11, 2002) However, because courts must rely on the police and prosecutors to make arrests and file charges, many judges found this process cumbersome, making Section 313 hard to implement. (China Youth Daily, March 18, 2003) In October, the Beijing People's High Court, together with the city's police and the procuratorate issued an order which allowed law enforcement agencies to bring criminal charges against those who resist the enforcement of court judgments. (Xinhuanet, October 10, 2003) Such joint efforts may result in more criminal prosecutions but their effectiveness will continue to depend on the diligence of the police and the prosecutors.

Chinese courts at all levels have been exploring other new and sometimes novel solutions to increase the rate of judgment enforcement and to alleviate the public dissatisfaction with the courts' performance, even though the desired effect of such

measures remains highly uncertain. In each of Sichuan and Shandong provinces, the Provincial People's High Court has been given the authority to intervene in difficult enforcement cases, either by designating a different lower court to take over the matter or by deploying its own judgment enforcement officers. (Sichuan Daily, January 12, 2004 and Shandong Xinhuanet, *id.*) Many other courts, including the SPC, began publishing names of the judgment debtors over the Internet; courts in Tianjin even offered rewards to the public for leads to judgment debtors' assets. (Xinhuanet, September 10, 2003 and January 18, 2004) In Guangzhou and elsewhere, lower courts issued orders restricting excessive consumption by judgment debtors, including prohibiting them to go to fancy restaurants, travel by air or purchase real estate until their obligations are satisfied. However, these anti-consumption orders, which relied on the public to report on violations by judgment debtors, are themselves impossible to enforce. (Legal Daily, April 30, 2003)

Governance

Government Reform and Public Administration

Local Governments Pay High Prices for Talent: Releasing Sharks into the Fish Tank? Over the past decade, China has attempted to establish a modern civil service system by introducing elements of a more responsible government and long-term political reform. In civil service recruitment, while Party affiliation remains paramount in judging an applicant's qualifications, merit-based examinations have also been introduced in the recruitment process, especially for entry-level positions. The latest experiments came from a number of local governments which set up special programs to recruit technical talent on short-term contracts with pay levels many times higher than those of regular civil servants. These experiments have attracted much attention in a system where life tenure and low pay with generous perks are usually associated with what it means to be a government worker.

The monthly base salary of a civil servant in China starts at a paltry RMB110 (US\$13.75), supplemented by seniority, rank and title adjustments, with the highest monthly salary tops at RMB1,050 (US\$131) for government ministers. However, according to a spokesperson from the Ministry of Personnel (人事部), generous perks and benefits, including free or low-priced housing and other in-kind subsidies, make up a large portion of Chinese civil servants' income, although such benefits vary by region and differ among government departments. Cao Yuanzheng (曹远征), a senior economist at the Bank of China (中国银行), believed that Chinese civil servants' low base salaries and the small pay differential gave them little incentive to work hard. "Without sufficient incentives while at the same time possessing much power, [the civil servants] are very likely to abuse their power", warned Cao. In addition, although civil servants in China undergo annual evaluations and may in theory be dismissed for poor performance, the fact that very few are ever dismissed on performance grounds means that they essentially enjoy life tenure, making personnel redundancy a major problem for the government. Based on statistics released by the Ministry of Personnel, between 1996 and 2002, 17,857 out of 5,000,000 civil servants were dismissed, representing a rate of less than 0.06% per year. On the other hand, 28,626 civil servants voluntarily left their government jobs during the same period, many of whom lured by higher pay in the non-government sector. Their departure left many government departments in need of personnel in specialized areas such as finance, law, taxation, foreign languages and information technology. (Sources: Caijing Magazine 《财经杂志》, December 3, 2003 and Southern Weekend 《南方周末》, December 15, 2003)

In June 2002, the provincial government of Jilin (吉林省) became the first in the country to issue regulations which allowed the hiring of so-called "government employees" (政府雇员) outside the ranks of civil servants at salaries many times higher. In July 2003, through a series of competitive examinations, two highly-qualified information technology specialists were hired as "government employees" (政府雇员) for an Internet system development project of the provincial law enforcement agency. Their annual salaries of RMB100,000 (US\$12,500) each were nearly eight times the average annual salaries of regular civil servants in the provincial government (Under Jilin's plan, the most senior-level government

employees would receive as much as RMB198,000 (US\$24,750) in annual salaries). The new government employees carry no administrative titles and exercise no administrative power. Nor are they counted toward any government hiring quotas. More significantly, they are hired under contracts ranging from one to three years which may be terminated earlier due to poor performance and they do not enjoy any benefits or perks typically associated with the civil service positions. (Source: Xihuanet Jilin 新华网吉林频道, October 7, 2003) Following Jilin's lead, other local governments soon launched similar programs. In August 2003, the city of Wuxi, Jiangsu Province (江苏省无锡市) announced that it would hire four senior contract consultants at an annual salary of RMB500,000 (US\$75,000) each. (Yangzi Evening Post 《扬子晚报》, August 26, 2003) In Hunan Province (湖南省), four foreign language specialists were sought by the government to assist in negotiating contracts with foreign companies. (Beijing Youth Daily 《北京青年报》, August 1, 2003) In September 2003, the city of Zhuhai, Guangdong Province (广东省珠海市) began recruiting government employees with annual salaries ranging from RMB40,000 (US\$5,000) to RMB100,000 (US\$12,500). (Beijing Youth Daily, *id.*) In November 2003, Shanghai hired 11 specialists on contract from Hong Kong, two as "government employees" to take over existing civil service positions. (Xinhuanet 新华网, November 24) Since the beginning of 2004, the municipal governments of Guangzhou, Guangdong Province (广东省广州市) and Changsha, Hunan Province (湖南省长沙市) both started their own government employee programs. (Southern Metropolis Daily 《南方都市报》, February 23, 2004 and Sanxiang Metropolis Daily 《三湘都市报》, February 24, 2004)

When Jilin first introduced the government employee program, their official justification was that it was an emergency measure supplementing the government's shortage of talent in certain specialized areas. But one high-level Jilin official soon coined the phrase, the "Shark Effect" (鲨鱼效应), by likening the new hires to sharks being released into a fish tank: "To avoid being eaten by the sharks, the sardines have to move faster". (China Newsweek 《新闻周刊》, January 19, 2003) Other local governments have been equally direct about the reason behind their new programs: The head of Zhuhai's personnel bureau wanted to use the program to "attract the best talent to the government" (Beijing Youth Daily, *id.*) while the Mayor of Changsha hoped that the program would bring a "breakthrough to the traditional civil servant hiring and retention system" (Sanxiang Metropolis Daily, *id.*). Will such government employee programs have the desired "shark effect" to motivate Chinese civil servants to work more efficiently or trigger fundamental changes to the country's civil service system? Both the media and the public seemed quite divided on the issue. The following are excerpts of some of the views on both sides:

"Government employee programs represent a new and flexible recruiting mechanism compared to China's conventional administrative management system. ... It should be viewed not only as a supplemental measure utilized on an emergency basis, but as a breakthrough to the existing government hiring practices. Ideological qualifications used to be paramount for government recruits. Government employees, however, must first and foremost possess professional skills which ordinary civil servants do not have." (Xinhua Jilin, October 17, 2003, quoting Li Dezhi (李德治), Assistant Dean to the School of Public Administration at Jilin University (吉林大学行政学院))

"The emergence of government employee programs has shocked the Chinese mentality of officialdom worship (官本位意识). Government employees can make a living based on their skills and do not need to depend on being promoted through the ranks. They do not have to deal with the complex personal relationships within the government, which will help to change the way the government functions and improve efficiency. ... By introducing market elements and contract relationships, the programs also provide a solution to the problems of narrow exits for government workers, life tenure and irrational movement of personnel." (21st Century Jobs 《21世纪人才报》, January 6, 2004)

"The significance of implementing government employee programs goes well beyond 'fulfilling the government's special need for certain talents'. ... From the day they are hired, government employees will always remember that they are 'employees' and can be fired at any time. The portion of their salaries which are many times higher than those of regular civil servants should be viewed as their high 'cost of unemployment'". (Market Journal 《市场报》, July 18, 2003)

"The highest annual salary of RMB198,000 (US24,750) offered by Jilin Province equals the total amount of salaries earned by a regular civil servant for 20 years in poor areas like ours. That is simply shocking! ... Given the increasing employment pressure in our country evidenced by headlines such as 'Beijing University Graduate Selling Meat' and 'Ph.D. Unemployed', wouldn't these unemployed 'graduates' and 'Ph.D.s' be qualified to do the same work for the government? ... Since government employees 'do not have administrative functions, do not exercise administrative powers and are not part of the government's administrative hiring quota', they also do not pose any threat to the status quo of the existing civil servants. In other words, they are like cars running on two separate tracks, one not affecting the other. The difference in their salaries and the permanency of their positions will not necessarily translate into the [eventual] dismissal of the civil servants because government employees performed better. Nor does it mean that civil servants would lose their 'iron bowl' or that their bonuses and promotions would be affected in any way. How can anyone be so sure that such a setup would have any 'shark effect' on civil servant? If there is any 'effect', it would be the loss of self-esteem by the civil servants." (www.hn.rednet.com.cn 红网, December 15, 2003)

"Government employee positions are so far limited to technical and other professional personnel. While they meet the government's need for highly qualified technical specialists, they do not represent a general trend and therefore unlikely to have any 'shark effect'." (China Taxation News 《中国税务报》, December 29, 2003, quoting an official from a central government ministry)

"More people are skeptical as to whether the high salaries offered by Jilin would be enough to attract the best talent. Some experts believe that even though the investment seems substantial from the government's perspective, it is not much compared the expertise of those the government needed the most, especially senior experts in the computer field who could easily command far more than RMB200,000 (US\$25,000) in big cities like Beijing." (Xinhuanet Jilin, October 17, 2003)

"Some civil servants find the government employee programs 'hard to swallow'. They maintain that plenty of talent can be found within the ranks of civil servants and that their abilities are constrained by the limitations of the system. In their eyes, this is yet another example of 'wasting talent' by abandoning the talent from within while seeking 'foreign aid' elsewhere." (China Youth Daily 《中国青年报》, January 3, 2003)

"What can a [government employee] accomplish? We know that most of the government workers' jobs involve carrying out orders from their superiors. Major decisions are made by municipal Communist Party committees and leaders in city governments. As a government employee, no matter how capable you are, the nature of your work is limited to providing services and advice, not decision-making. ... It does not make any sense to pay those without the responsibilities more than those with the responsibilities." (Internet posting on the People's Forum at www.people.com.cn (人民网人民论坛), February 5, 2004)

"A government employee needs to work with the civil servants and his superior in the government department he is assigned. What if disputes or conflicts arise? How should they be handled?" (Chinese Times 《时代潮》, Issue No. 3, 2003)

Whether the new government employee programs can bring about the "shark effect" remains to be seen; however, their increasing popularity may embolden local governments to explore the possibility of applying the same concept to their general civil service recruitment and retention practices. In February 2004, the municipal government of Shenzhen, Guangdong Province (广东省深圳市) became the first in the country to announce plans to convert a portion of the civil service positions at its government offices and institutions (机关事业单位) into contract positions. (Southern Daily 《南方日报》, February 16, 2004) On the other hand, given the central role of the Communist Party in controlling civil service recruitment (including the hiring of the new government employees), it is unlikely that such programs would lead to significant changes. As stated by one official from China's Ministry of Personnel, the civil service system in China strives to "uphold the basic principles of the Communist Party, instead of being politically neutral; adhere to the rule of Party management of the cadres, instead of transcending Party lines; and maintain a recruitment standard that requires combining ability with political virtues (with the latter being paramount), instead of emphasizing personal ability." (China News Agency 《中国新闻社》, August 17, 2003) In addition, the primarily technical nature of the new government employee positions and the short duration of their appointments also raise questions as to whether they could really make a difference in the way the government operates.

Jiangsu Taxi Drivers Struggle to Keep Operating Permits. In September 2003, the transportation bureau of Zhangjiagang, Jiangsu Province (江苏省张家港市) issued a controversial policy to phase out existing individual taxi operating permits and to auction off new permits only to those with an ownership of 50 or more taxis and a one-time capital injection of RMB12 million (US\$1.5 million). The policy was a reversal of an existing practice which allowed individual taxi drivers to hold operating permits. During the early 90's, Zhangjiagang had for a period of time issued

operating permits to individual taxi drivers for a token sum and later allowed these permits to be renewed for eight-year terms upon payment of RMB40,000 (US\$5,000).

By the time the new policy was announced, approximately one-fifth of the taxis in Zhangjiagang were operated by individual drivers, most of whom had spent as much as RMB200,000 (US\$25,000) on expiring permits sold on an active secondary market. Their only chance of recouping such investments was through renewing the expiring permits. Under the new policy, which became effective in January 2004, the local transportation bureau no longer renews individual taxi operating permits when they expire. Instead, drivers must now be employed by one of several local taxi companies which qualify to bid for the new taxi operating permits through public auction. As individual operators, these taxi drivers can earn an average of RMB5,000 (US\$625) per month, while as employees at the local taxi companies, they must pay their employers a management fee of more than 10% of their monthly earnings. Given that the local taxi companies generally shift all operating expenses and liability to individual drivers, the new policy, according to one local taxi driver, did nothing more than enabling taxi companies to use their monopoly over operating permits to extort a management fee from the drivers. The transportation bureau maintained that its policy was a simple redistribution of public resources aimed at promoting large-scale operation and efficient management for the local taxi industry. Many taxi drivers in Zhangjiagang, however, suspected a more sinister motive: a number of the city's top transportation officials have been holding key management positions at the largest local taxi company, known among taxi drivers as the "little treasury" for the same officials.

Angry at seeing their investments evaporate overnight and at the sudden change in the "rules of the game" which potentially benefit government officials personally, Zhangjiagang taxi drivers sent their representatives to petition both the provincial government and the central government in Beijing for relief. Thirteen taxi drivers also challenged the legality of the new policy in court, arguing that it unfairly discriminated against individual taxi drivers and contradicted a number of higher level regulations which permitted individual taxi operations. Their efforts were met with repeated harassment, including detention of several of the petitioners, by the local police. The 13 plaintiffs had to abandon their legal challenge on the date of the trial when their complaint was inexplicably altered by local court personnel. (*Sources*: China Youth Daily, December 23, 2003 and Economic Observer 《经济观察报》, February 16, 2004)

The debate over privatization versus state enterprise monopoly of China's fast growing taxi industry has been a hot topic in many Chinese cities. Since 1998, the government of Wenzhou, Zhejiang Province (浙江省温州市), one of China's most reform-oriented cities, became the first in the nation to issue taxi operating permits to individual drivers and allowed such permits to be freely transferred at market prices. In 2003, the Beijing municipal government abolished the commission system which forced taxi drivers to pay an exorbitant fee to taxi companies, the only ones permitted to operate taxis in Beijing. The situation in Zhangjiagang, however, touched on issues beyond the debate of government monopoly or even the lack of respect for private property. As one commentator observed, "When so many local governments have for so long both acted as referees to the 'rules of the game' and

as representatives of special interests to participate in the game, the interests of the public inevitably suffer. The public will increasingly lose faith in the government, resulting in the ultimate loss of credibility and authority by the government". (The New Beijing, January 1, 2004)

Budget Review by Guangdong Province Delegates: 2004 Update. In our January 2004 issue, we carried a story about the Guangdong People's Congress' delegates being able to review for the first time a detailed provincial government budget during their annual session in January 2003. The Southern Weekend 《南方周末》 reported in February 2004 that during the second session of the 10th Guangdong Province People's Congress (广东省第十届人民代表大会), delegates were again presented with a detailed 2004 budget. The new budget covered the RMB22.51 billion (US\$2.81 billion) spending plans for the 115 provincial-level government agencies in Guangdong. This time, the Guangdong delegates were able to ask provincial finance officials about specific line items and to question the appropriateness of certain expenditures at special budget discussion sessions. In one instance, a number of delegates complained about a proposed RMB36.48 million (US\$4.56 million) expenditure for five government-run preschools operated solely for children of the provincial government workers. "The public should finance the civil servants, but not their sons," commented one delegate. Unsatisfied with the explanation provided by finance officials that the government subsidy to the preschools was justified under the current policy, the delegates submitted a bill requesting the government to decrease and eventually eliminate such expenditures.

Overall, the Guangdong delegates seemed pleased with the improved presentation of the 2004 budget, especially in terms of additional explanations provided regarding some line items. Such explanations were not present in the 2003 budget, which made it difficult for delegates to understand the budget. On the other hand, two issues which were raised during the 2003 budget review process continued to draw criticism from the delegates. Like the 2003 budget, the 2004 budget arrived shortly before the annual session, giving delegates very little time to engage in meaningful review. Little progress seemed to have been made since 2003 with respect to establishing a provincial legislative budget oversight committee to review the budget in advance. The current budget also came affixed with a "Confidential/Return after Review" stamp, despite calls from delegates during the 2003 annual session to make the government budget plan a public document. Many delegates urged that portions of the government budget for 2005, to the extent that they are "closely related to the interests of the public" (e.g. education, health, employment and social insurance and state land management), be made available for public examination.

The level of scrutiny by the People's Congress of the government budget in Guangdong, although still very limited, puts Guangdong in the forefront of governance reform in China. The fact that budgetary review remains a prominent feature on the Guangdong legislative agenda reflects the government's willingness to allow the provincial people's congress to become more involved in the budget review process. In the words of one observer, "The [Guangdong] People's Congress is gradually getting a taste for what it really feels like to be an organ of state authority". (Source: Southern Weekend, February 19, 2004)

Case Files

Notable Legal Cases

Luoyang City “Seed” Case Highlights Chinese Courts’ Lack of Authority to Declare Laws Invalid. In 2003, Li Huijuan (李惠娟), a female judge at the Luoyang Municipal Intermediate People’s Court in Henan Province (河南省洛阳市中级人民法院) nearly lost her job for declaring in a civil case that provisions of certain local regulations were invalid due to their conflict with a national law. The incident, which received wide media coverage in China and became the subject of much debate in legal circles, underscores the lack of a workable mechanism to resolve conflicts between national and local (lower-level) laws under the current legal and political system. The case in question involved a contract dispute over the delivery of corn seed between a seed propagator and a buyer. The issue facing the panel of judges hearing the case was whether they should, in calculating damages, apply market price for the corn seed in accordance with provisions of the PRC Seed Law (种子法) or follow the “government-set price range” (政府指导价) set forth under the local seed pricing regulations approved by the Henan Province People’s Congress (河南省人大), the local legislative body. Judge Li, who presided over the panel, rejected the pricing provisions of the local regulations on the ground that they conflicted with the national Seed Law. In so declaring, Judge Li and another judge who approved the language in her ruling, drew strong criticism from leaders of the Henan Province People’s Congress. They were accused of encroaching upon the legislative authority by engaging in illegal judicial review and therefore violating the law. The legislative body also demanded that the Luoyang court remove the judges from their posts. The local court initially heeded such demand by removing the judges but later, faced with mounting media outcry over the harshness of its decision, backed down and reinstated the judges. (Sources: 21st Century Economic Report 《21 世纪经济报道》, November 17, 2003 and China Youth Daily 《中国青年报》, February 6, 2004)

Judge Li defended her decision by citing Article 64 of China’s Law on Legislation (立法法), which provides that “where a national law or administrative regulation enacted by the state has come into force, any provision in the local decree which contravenes it shall be invalid”. (China Youth Daily, *id.*) However, the Henan Province People’s Congress and court officials both maintained and many experts agreed, that under China’s constitutional and legal framework, only the Standing Committee of the National People’s Congress (全国人民代表大会常务委员会) has the authority to adjudicate conflicts between local regulations and national laws. The appropriate way for courts to handle conflict of laws cases, according to a senior judge at the Luoyang court, is to suspend the adjudication process and report the conflict to the Supreme People’s Court, which shall then refer the matter to the Standing Committee for final adjudication. (21st Century Economic Report, *id.*) In reality, the Standing Committee, which convenes every two months for five to seven days each time, rarely fulfills its review function. According to Professor Jiang Ping (江平) of the China University of Politics and Law (中国政法大学), the Standing Committee had never revoked any conflicting local regulations; nor were there any detailed procedures in place for reviewing conflicting local laws. (21st Century Economic Report, *id.*) The reason that the national legislative body had not been flooded with requests from courts to review inconsistent local regulations, according to another legal scholar Cai Dingjian

(蔡定劍), is that in practice, many courts simply apply the law with the higher legal authority while keeping silent on the reason of their rulings, thereby sidestepping the issue of improper judicial review. (Legal Daily 《法制日报》, November 20, 2003)

A case in point was a lawsuit filed by a blind man at the Beijing Xicheng District People's Court (北京市西城区人民法院) alleging that the Beijing subway authority had violated China's Law on the Protection of Disabled Persons (残疾人保护法) by requiring him to pay subway fare. The subway authority defended its practice as being consistent with the regulations issued by the Beijing Municipal People's Government (北京市人民政府) which permitted free rides only to those who could produce a disability certificate issued by the Beijing government agency in charge. The court ruled that the plaintiff, who was visiting Beijing at the time and did not possess the requisite disability certificate, was entitled to the free ride in accordance with the national law, but the defendant did not err in following the local regulations. The court admonished the defendant, however, that when dealing with disabled passengers from outside Beijing, it "should have handled the situation more appropriately from the perspective of strengthening the protection of the legal rights of the disabled and of giving those from outside Beijing the same privilege as those from Beijing". (Qianlong.com千龙网, January 3, 2004) An unnamed delegate to the National People's Congress observed that had Judge Li taken the same approach as the Beijing court, instead of expressly citing conflict of laws as grounds for the court's decision, her ruling would not have generated such controversy. This view was shared by many judges. (21st Century Economic Report, *id.*)

As more new laws and regulations are being promulgated in China by governments at all levels, the amount of conflict and inconsistencies between local and national legislation have also increased considerably, "causing confusion and new difficulties in the application of the laws". (www.china.org.cn 中国网, February 5, 2004) As a result, more administrative adjudication suits (行政诉讼案) are being brought by citizens seeking to reverse government actions based on local regulations that conflict with national laws. However, under China's Administrative Adjudication Law 《行政诉讼法》 (1990) pursuant to which these suits were filed, judicial review is limited to "concrete administrative action" (具体行政行为) and does not reach "abstract administrative action" (抽象行政行为). Local regulations, which often dictate the government's "concrete action", generally fall under the category of "abstract administrative action". In dealing with such conflict of laws issues, local courts generally either decline to consider the claims or quietly follow the national laws as the Beijing court did in the subway fare case, resulting in much uncertainty for litigants. In the last two years, the local courts in Guangdong Province (广东省) and Zhejiang Province (浙江省), citing lack of reviewing authority, refused to consider two height discrimination suits involving challenges to the provincial governments' civil service hiring practices and policies. At the same time, the court in an Anhui (安徽省) Hepatitis B discrimination case entertained similar claims and substantively reviewed the validity of the local regulation in question. (See discussions in the "Main Feature" column of this issue). In 2003, a well-publicized case in Nanjing, Jiangsu Province (江苏省南京市) that sought to force a local government to amend its outdated rules was rejected by the local court, dashing the hope by many in China that the case would set a precedent for judicial review of local regulations. In that case, a company sued

a district-level government in Nanjing for its failure to amend an outdated rule on compensation for forcible home demolition (拆迁补偿) that conflicted with newer and higher level regulations issued by the Nanjing municipal government. The court ruled that the “promulgation, revocation and amendment of the local government rule” in question were “abstract administrative action” not subject to judicial review. (*Source*: China Youth Daily, June 13, 2003)

The lack of review mechanism for conflicting or inconsistent local regulations has prompted calls for expanding the courts’ judicial review authority. As Professor Jiang Ming’an (姜明安) of Peking University Law School (北京大学法学院) pointed out: “Given that the Constitution has set forth the principle of judicial unity and that the Law on Legislation has stipulated the hierarchy of [our] laws, regulations and rules, when a court faces two conflicting laws on the same issue during the adjudication process, it should be allowed to choose the applicable law of the higher legal authority; it should not be required to submit the issue to higher levels of courts, to the point that it must wait for a final answer from the Standing Committee of the National People’s Congress.” (21st Century Economic Report, December 27, 2003) Others have proposed to amend the Administrative Adjudication Law to allow courts to review local regulations and to grant the Supreme People’s Court (最高人民法院) the final adjudication authority with respect to the validity of local regulations and the related conflict of laws issues. (See Zhang Xiaoling (张小玲), “Constitutional Considerations Regarding the Li Huijuan Incident” “对李慧娟事件的宪法思考”, <http://www.law-lib.com>, November 22, 2003 and Han Zhe (韩哲), “Establishing a Sound Adjudication Mechanism for Conflicts of Law” “建立法律冲突的良性解决机制”, 21st Century Economic Report, November 24, 2003) Whether such changes could be effected any time soon will depend on the pace of China’s political reform and whether some element of checks and balances will be introduced into the current political and legal structure. Even if the Chinese judiciary were granted the power to review local regulations, it would be hard to expect local judges, who are usually appointed and paid by local governments, not to side with local interests when faced with conflict between local and national laws.

Priceless Grapes. It started out as a petty theft. In August 2003, four migrant workers were caught stealing 25 kilograms of grapes after helping themselves to generous portions of the exceptionally tasty morsels from a fenced-in garden in Beijing. Little did they know that the grapes were part of a nearly completed ten-year RMB400,000 (US\$50,000) research project at the Beijing Academy of Agriculture and Forestry (北京农林科学院). Determining the value of the stolen grapes and what crime, if any, the migrant workers had committed turned out to be quite a challenge for both the police and the prosecutors. Under provisions of China’s criminal law, the threshold for criminal theft charges in cities such as Beijing is RMB1,000 (US\$125) with a maximum of three-year sentence; if the amount of the theft exceeds RMB10,000 (US\$1,250), the jail term maybe as long as ten years. The researchers claimed that the theft had destroyed the chain of their research, causing irrevocable damage on the eve of the grapes being certified for commercial production. However, because their work was still at the research stage, the grapes did not have any readily available market value. After consulting with legal experts and obtaining an official valuation from the Beijing Pricing Bureau (北京物价局), the police determined that the direct economic loss incurred by the grape theft was

RMB11,220 (US\$1,402.5), representing the loss of researchers' time and labor, cultivation expenses and the loss of the integrity of an entire year's research as a result of some of the grapes being consumed. Based on this price tag, the Beijing Haidian District People's Procuratorate (北京市海淀区检察院) formally charged three of the four migrant workers with criminal theft in September 2003, earning the case the nickname, the "Case of the Priceless Grapes" (天价葡萄案). In January 2004, it was revealed that the prosecutors, still unsatisfied with the valuation provided by the police, ordered further investigations into the matter.

From the outset, legal experts, including those consulted by the police and the prosecutors, questioned whether the migrant workers' minor transgression without knowing the value of the grapes would amount to criminal theft in the first place. According to one expert, whether or not a court would accept the valuation submitted by the prosecutors would determine whether the charges could stand against the migrant workers and the amount of sentencing they would receive if convicted. Until then, the migrant workers already paid dearly for their fancy taste: they have been under arrest since August 2003 and under the PRC criminal law, in cases involving complex evidentiary issues, criminal suspects can be held for up to 14 months before trial. (*Sources*: Beijing Youth Daily 《北京青年报》, August 22, 2003 and January 15, 2004)

The New Beijing Daily 《新京报》 reported on May 28, 2004 that, after further investigations, the police reset the value of grapes at several hundred yuan and the three migrant workers would soon be released on bail and the case against them will likely be dropped.

Heard on the Web

Excerpts of Online Postings in China

Reaction to Decision in China's First HBV Employment Discrimination Case.

On April 2, 2004, the Xinhui District People's Court in Wuhu, Anhui Province (安徽省芜湖市新芜区人民法院) issued its decision in the anti-discrimination suit challenging governmental hiring policies and practices which excluded Hepatitis B virus (HBV) carriers from civil service positions. The court, which ruled that the government's decision to reject the plaintiff was invalid, nevertheless affirmed the validity of the government regulations and refused to order the defendant government agency to re-employ the plaintiff. (See discussions in the "Main Feature" column of this issue) Reactions were mixed in China's largest online community of HBV carriers, www.hbvhbv.com where the plaintiff (under the pseudonym "Song Yue" (松月)) first sought help and whose members were active supporters of the lawsuit. The following are excerpts of some of the postings on the website:

- ▶ Song Yue may appear to have won the case but the verdict does not have any substance. The court seemed to have been caught up between the pressure from the media and its inability to change the current system. It is disappointing!
- ▶ Such a farce after all that went into the case. ... Song Yue, you have in fact lost the case. I hope you will appeal the decision, not only to fight for your own rights, but for the rights of 130 million of us [HBV carriers].
- ▶ This is not a bad decision, thanks to the pressure from the media. If it were not for the amount of media coverage, Song Yue would have lost for sure. The court was really waiting for signals from higher up: If the central government or the Premier had reacted unequivocally, Song Yue would not only have won, he could have gotten his position back. ... The purpose for bringing this lawsuit has essentially been achieved. Our primary goal was to raise awareness about HBV and the hardship we face so that the leadership would pay attention to the welfare of the HBV carriers as a whole.
- ▶ The verdict is better than expected. It is encouraging that the case ended in the court ruling in Song Yue's favor. Although the ruling did not substantively benefit the plaintiff, it is a legal declaration that discrimination against HBV carriers by the government is illegal and it will make government agencies think twice before promulgating future health screening policies for [civil service] recruitment. At the very least, we have seen several provinces amend their policies to allow our comrades [HBV carriers] who are not infected with HBV to apply for civil service positions, which represents quite a progress. Obviously this is not the ultimate result we are looking for. So long as discrimination continues to exist and that personal health information continues to be disclosed to employers, our goal of guaranteeing the rights of HBV carriers would still be out of reach.

(Source: www.hbvhbv.com 肝胆相照, April 2, 2004)

Will the New Constitution Better Protect Our Rights? On March 14, 2004, a new constitutional amendment was adopted by China's 10th National People's

Congress (第十届全国人民代表大会, NPC). The following discussion on Xihuanet (新华网) is a reflection of some of the public's view on what the new Constitution means to them:

- ▶ [It means] spending money on lawyers to bring suits and then pay more to thank them.
- ▶ The Constitution comes from high up but there is resistance from below. Ordinary citizens are powerless about the local authorities who are subject to no control or oversight.
- ▶ So long as there is not an environment for free press, nothing can protect our constitutional rights. For example, if a high-ranking leader such as Cheng Weigao (程维高) did not like you, a word from him would instantly wipe you off the face of the earth. [Editor: Cheng is the ex-Communist Party chief in Hebei Province (河北省) who was removed from his post on corruption charges]
- ▶ The implementation of the Constitution requires oversight: oversight within the Communist Party, oversight by the NPC and the National Political Consultative Conference (全国政协委员会), judicial and administrative oversight, as well as monitoring by the media and the public.
- ▶ The authority of the Constitution can only be maintained in a constitutional system; only then can we expect our constitutional rights be protected.
- ▶ The central government has made political reform a priority. The current reform is different from the empty slogans of the past and some changes are in fact quietly taking place. Political reform is critical because other reforms rely on it.
- ▶ How does [the Constitution] define the legal status, legal relationship, authority and responsibilities of organizations such as political parties, the trade unions, the Communist Youth League (共青团) and the Women's Federation? What is their relationship with ordinary citizens? Whose power and interests stand to gain the maximum protection of the Constitution and the laws? The answer is not clear.
- ▶ A Constitution is supposed to be a country's basic law which has the highest authority. But for various reasons, the provisions of our Constitution cannot be invoked by courts as legal basis in adjudicating cases. In other words, the Constitution cannot be used in legal adjudication, nor do our courts have the authority to engage in constitutional review. Thus our Constitution is still quite superficial and hollow. Only when the provisions of the Constitution are "judicialized" can its provisions have any substance. In other words, the NPC and its Standing Committee (人大常委会) need to promulgate corresponding laws; the State Council (国务院), when necessary, will issue regulations based on these laws; and finally if necessary, the Supreme People's Court (最高人民法院) will issue corresponding judicial interpretations. Only then can courts adjudicate cases based on these laws, regulations and judicial interpretations and therefore provide the only recourse for

the rights of the citizens. Legal reasoning tells us that “having rights without recourse is the same as having no rights”.

► If there is no liability associated with constitutional violations, the Constitution is nothing but a piece of paper. We urgently need to establish a mechanism of finding such liability.

(Source: Xinhua Forum [新华论坛, www.forum.xinhuanet.com](http://www.forum.xinhuanet.com), April 11, 2004)

No Laughing Matter: What to Look for in Job Applicants. What do Chinese employers look for in a job applicant? Perhaps the following joke sheds some light:

I went to visit a friend who runs a successful software company. He was interviewing a college student: “Here is a Rubik’s Cube”, said my friend to the student. “Can you turn the six sides into six different colors, like what I am doing?” The young man was hesitant. “If you need some time, take it home. I will be here until Friday”, said my friend.

Later my friend explained that he had to consider the college student for a position because the student came with powerful backers. My friend was using the Rubik’s Cube to test what position would suit him. “If he takes the cube apart and rearranges the pieces, he is bold and decisive. I would send him to marketing. If he paints the six sides in different colors, he could be a good software developer. If he can solve the problem by this afternoon, he is very smart and has good comprehension. I would ask him to be my assistant. If he completes the puzzle before Wednesday, he must have had help, which means he is popular. He can work in customer service. If he can solve the problem by Friday, he is a hard worker and can be a low-level programmer. If he comes back and says that he was unable to find a solution, he is honest. He can be my accountant. If he does not come back, then there is nothing I can do for him.”

The next day, I saw my friend again and asked him about the Rubik’s Cube. My friend looked quite pleased with himself, “I must hire that kid. He returned the cube to me this morning. Guess what, he bought me another one! He said that he could not find a solution so he bought a bigger and better one for me.” I asked, “What does that tell you?” My friend lowered his voice, “He will be great for pirating software!”

(Source: Originally from Blogchina.com, reprinted on Powerful Nation Community [人民网强国社区, http://bbs.people.com.cn](http://bbs.people.com.cn), April 16, 2004)

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