

Article

Challenging Authoritarianism through Law: Potentials and Limit

Fu Hualing^{*}

ABSTRACT

The potentials and limit of legal reform in an authoritarian state is a fascinating issue. Scholars and practitioners have argued whether legal reform can soften the edge of an authoritarian system and eventually liberalize it, or whether the legal reform would simply further entrench the authoritarian rule. This paper attempts to contribute to this debate by examining the efforts of activist lawyers in China in mobilizing law to protect and promote rights, and the implications of their legal activism on China's political and legal development. The Communist Party has created an autonomous profession of lawyers and now has to live with the challenges it poses.

Keywords: *Public Interest Litigation, Legal Activism, Access to Justice, Rights Lawyers, Civil Society*

^{*} Professor, Faculty of Law, the University of Hong Kong. E-mail: hlfu@hku.hk. The author would like to thank the reviewers for National Taiwan University Law Review for their critical comments. The author would also like to thank the following people for commenting on the earlier versions of this paper: Richard Cullen, D W Choy, Don Clarke, Deborah Davis, Michael Dowdle, Stephen Mau, Eva Pils, Sun Ying, and Lynn White.

CONTENTS

| | |
|---|-----|
| I. INTRODUCTION | 341 |
| II. POLITICAL LAWYERING IN CONTEXT | 342 |
| III. THE DEVELOPMENT OF PIL | 348 |
| IV. THE POLITICS OF POLITICAL LAWYERING | 352 |
| V. CONCLUSION..... | 359 |
| REFERENCES | 361 |

I. INTRODUCTION

This paper studies the role of lawyers in China's emerging contentious politics. It aims at describing, in a broad outline, the origin, development and limit of public interest lawyering and the legal and political implications of those development to China's authoritarian political system. *The potentials and limit of legal reform in an authoritarian state is a fascinating issue. Scholars and practitioners have argued whether legal reform can soften the edge of an authoritarian system and eventually liberalize it, or whether the legal reform would simply further entrench the authoritarian rule.*¹ This paper attempts to contribute to this debate by examining the efforts of activist lawyers in China in mobilizing law to protect and promote rights, and the implications of their legal activism on China's political and legal development. Activist lawyers come in different shapes and take different political stance.² This paper refers the politically moderate lawyers to as public interest lawyers and their politically more challenging colleagues as *weiquan* lawyers, rights lawyers, or political lawyers. These terms will be used interchangeably in this paper.

This paper is divided into five parts. Following this introduction, Part Two puts activist lawyers in China into perspective by identifying the political and legal forces that promote or contain the development of legal activism, arguing that the rule of law promotion and expansion of legal rights in China, without politics, have created strong incentives and limited opportunities for activist lawyers. Part Three of the paper identifies five changes in public interest litigation in China over the past decade or so. Those changes vary in pace and intensity, but they are all visible and reinforce each other. There are significant developments in PIL in China and lawyers have become more demanding, aggressive and challenging. Part Four discusses government responses to activists lawyers and the politics in legal activism in China, arguing that the current pushback by the government in restricting aggressive public interest lawyering is, in part, a response to the growth of legal activism in China in the past decade. Legal reform in China necessitates activism on the part of lawyers, but at the same time the political stagnation suffocates the very activism the rule of law reform demands. Part Five is the conclusion.

1. See, e.g., Thomas Carothers, *The 'Sequencing' Fallacy*, 18(1) J. DEM. 12, 12-27 (2007); Malcolm MacLaren, *'Sequentialism' or 'Gradualism'? On the Transition to Democracy and the Rule of Law* 1-11 (NAT'L CTR. OF COMPETENCE IN RESEARCH: CHALLENGES TO DEMOCRACY IN THE 21ST CENTURY, Working Paper No. 38, October 2009), available at <http://www.nccr-democracy.uzh.ch/publications/workingpaper/pdf/wp38.pdf> (last visited May 29, 2010); TOM GINSBURG & TAMIR MOUSTAFA, *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIME* (2008).

2. Fu Hualing & Richard Cullen, *Weiquan (Rights Protection) Layering in an Authoritarian State: Building a Culture of Public Interest Lawyering*, 59 CHINA J. (2008).

II. POLITICAL LAWYERING IN CONTEXT

The single golden thread that runs through the 30-year reform in China is economic development through privatization, industrialization and marketization.³ Parallel to economic reform and in support of economic growth, the political and legal reform has evolved in distinct stages, with different policy goals and priorities in each stage.

The political and legal reform started in the aftermath of the Cultural Revolution. There was, since the late 1970s and throughout the 1980s, a consensus between political elites and the masses that China desperately needed democratization and the rule of law. Reform in the first decade was defined by a consistent call for, and concerted effort to promote, the liberalization of thought and change in the political structure. There was first of all a decisive ideological shift from revolution to modernization and the adaptation of legal-rationality as the basis of the legitimacy of the Chinese Communist Party (hereafter "Party" or "CCP") to replace the Maoist revolutionary ideology.⁴ On top of the ideological shift, political and legal institutions were re-designed to embrace the creeping value of democracy and the rule of law.⁵ In sum, the lack of democracy and the rule of law within the ruling party were regarded as the cause of the Cultural Revolution, and ideological and institutional adaptation of democratic values was expected to improve political participation, enhance political accountability and bring order and stability to political life.

There might be less understanding as to how the rule of law actually operated on the ground, and there was a high degree of idealization of the achievements which could be obtained through the rule of law and democracy, but there was nevertheless a strong political will to explore the potential. China at that time remained largely isolated from the world. Without confidence in its own political system and desperate in reaching out for capital, technology and ideas, China was eager to learn and to adopt these Western ideas.

The reform was one led by the central government. It is important to note that the CCP, at least a faction of it, was progressive, better informed and reformed-minded: Deng Xiaoping (鄧小平) led the open-door policy and was instrumental in the political emancipation in the early 1980s. His

3. CHINA'S GREAT ECONOMIC TRANSFORMATION (Loren Brandt & Thomas G. Rawski eds., 2008).

4. RICHARD BAUM, BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING (1994); HARRY HARDING, CHINA'S SECOND REVOLUTION: REFORM AFTER MAO (1987); FREDERICK C TEIWES, LEADERSHIP, LEGITIMACY AND CONFLICT IN CHINA: FROM A CHARISMATIC MAO TO THE POLITICS OF SUCCESSION (1984).

5. ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (2004); RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002).

followers, including Hu Yaobang (胡耀邦) and Zhao Ziyang (趙紫陽), were the most liberal-minded politicians in that period. In the shadow of the government-led political reform, there was a consensus that the government was making the correct choice and the society was supportive of government policies. For a brief moment, there was a healthy interaction between the state and the society in inching toward political openness despite of the four core basic principles that were entrenched in the 1982 Constitution and the occasional resistance from the conservative faction of the Party.

The political and legal reform in that period was mostly ground-breaking in terms of both the breadth and depth of the reform. It also had a visible political dimension and was strongly associated with democratization and liberalization, with the Party initiating a series of reform policies to liberalize the congresses, to democratize village governance, to separate the judiciary from the local CCP control, and, above all, to free the media.⁶ The first stage of reform witnessed a vibrant discussion about the need for democracy within the ruling CCP, which eventually resulted in a violent confrontation between the liberal and conservative factions and leading to the bloodshed in the Tiananmen Square in 1989.⁷

The agenda for political democratization and legal reform ended tragically in 1989, with the Tiananmen Square crackdown changed the reform path fundamentally. Although the crackdown dashed the hope of political liberalization and ended experimental programmes on incremental democratization and institutional independence from excessive political control, it did not lead to the demise of the rule of law. After a short lapse, the rule of law was revived decisively under a different name. Less than two years after the crackdown in Tiananmen, Deng Xiaoping, China's then-paramount leader, made a historical tour to Southern China in early 1992 in which he demanded the deepening of China's economic reform.⁸

Legal reform became sharply focused on the creation of a legal framework for market activities and the promotion of personal freedom, and, social and economic rights.⁹ While the government halted political reform and democratization, the government also initiated a grand scale of economic liberalization and legislative expansion of rights and freedom in the personal, social and economic spheres. However, the development was

6. ANDREW J. NATHAN, *CHINESE DEMOCRACY* (1985); Kelvin O'Brien & Lianjiang Li, *Accommodating 'Democracy' in a One-Party State: Introducing Village Elections in China*, 162 *CHINA Q.* 465-89 (2000); CHIN-CHUAN LEE, *CHINA'S MEDIA, MEDIA'S CHINA* (1994).

7. *THE CHINESE PEOPLE'S MOVEMENT: PERSPECTIVES ON SPRING 1989* (Tony Saich ed., 1990).

8. Barry Naughton, *A Political Economy of China's Economic Transition*, in *supra* note 3, 91-135 (Brandt & Rawski eds.).

9. Donald Clarke, *China: Creating a Legal System for a Market Economy*, GEO. WASH. U. L. SCH. PUB. L. RES. PAPER NO. 396 (Report Prepared for the Asian Development Bank, 2007), available at SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1097587 (last visited Oct. 5, 2010).

characterized by the promotion of the rule of law without politics — the promotion of a creeping rule of law and the development of legal rights as an alternative to democratization.

This law and economic development discourse is a familiar one: market economy requires certainty, stability and predictability for domestic economic players as well as foreign investors; and, legal rules are necessary to establish a framework for economic transaction and to regulate the behavior of parties involved in the transactions.¹⁰ As a result, the Party/state should respect and obey the rules of the market. To achieve a market economy and ensure sustainable economic growth, the “invisible hand” of the market should replace the visible meddling of the government. Law is necessary to provide an order for market transactions and to reduce government intervention in economic activities.¹¹ After all, the market economy was commonly referred to as the rule of law economy.

To be meaningful players in the market, citizens require the necessary rights and freedoms. The market reform necessitates a larger realm of personal freedom, including freedom to contract, freedom to engage in private business and the right to private property. Law in China reacted responsively to the increasing need of legal protection of rights and freedom of individuals in the marketplace. Parallel to the expansion of economic freedom is the demand for rights and freedom in the more political spheres, including personal freedom, and the rights to conscience, religion and free expression. The second stage witnessed the age of rights with a legislative exploration of private and public law rights. All this was accompanied by the landmark signing of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR),¹² CCP’s endorsement of the rule of law, and the entrenchment of the rule of law and human rights in the Constitutional Amendments in 1999 and 2004 respectively.

A significant new development in the 1990s was administrative reform. Instead of democratization, the CCP has promoted “administration according to law” as the central aim to compensate for the lack of political initiatives. The National People’s Congress passed the landmark Administrative Litigation Law in 1989 which created a general power of judicial review of

10. For a critical review of the literature on law and development in the China-specific context, see Donald Clarke et al., *The Role of Law in China’s Economic Development*, in *supra* note 3, at 375-428 (Brandt & Rawski eds.); Donald Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89 (2003).

11. For the Chinese discussion on the need of law for economic development, see Albert Chen, *Rational Law, Economic Development and the Case of China*, 8 SOC. & LEGAL STUD. 97 (1999). See also Clarke, *supra* note 9.

12. China signed the ICESCR and ICCPR in October 1997 and October 1998 respectively. However, while the former was ratified in February 2001, the latter has not yet been ratified.

administrative acts. This was followed by the enactment of the State Compensation Law in 1994; the Law on Administrative Punishment in 1997; the Law on Administrative Reconsideration in 1999; the Law on Legislation in 1999; and the Law on Administrative Licensing in 2003. The administrative reform served to create a “thin version” of the rule of law in China: a law-abiding government with defined legal procedures and mechanisms of accountability and redress.¹³ Through enhancing accountability, reducing corruption and more effective implementation of law, the CCP intended to use executive reform to capture the rising demand for rights and to contain social conflicts.¹⁴

China was fully integrated into the international community in the 1990s,¹⁵ and the international engagement becomes an additional force for promoting (commercial) rule of law in China. Economic reform in the age of globalization necessitated closer economic relations between China (as the world’s factory) and its trading partners (where the markets are located). Economic interdependence also forced China to participate in, and to a lesser degree, comply with, international rules. China’s accession to the World Trade Organization (WTO) became a catalyst of legal reform in promoting the commercial rule of law. Indeed, it has been pointed out that the Chinese government seized the opportunity to launch its own WTO-plus reform to improve the quality of government service, such as increasing the predictability of administrative rules and the transparency of executive processes.¹⁶ The increasing engagement with the international community has also placed a strong demand for accountability toward the international human rights regime into which China is integrating.

There has been tremendous growth on the supply side of the rule of law as demonstrated in the acceleration of law-making activities, the increase in the empowering legal provisions, the putting-in-place of facilitative legal procedures and mechanisms, and the enhancement of the institutional capacity of courts.¹⁷

More importantly, there is also a strong development on the demand

13. For a discussion of the concept of thin rule of law in the Chinese context, see PEERENBOOM, *supra* note 5.

14. Zheng Ge, *Toward Regulatory Neutrality in a Party-State? A Review of Administrative Law Reforms in China*, in LEGAL REFORMS IN CHINA AND VIETNAM: A COMPARISON OF ASIAN COMMUNIST REGIMES 109 (John Gillespie & Albert H.Y. Chen eds., 2010); Albert Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125 (1999).

15. Lee Branstetter & Nicholas R. Lardy, *China’s Embrace of Globalization*, in *supra* note 3, at 633-82 (Brandt & Rawski eds.).

16. Sarah Biddulph, *China’s Accession to the WTO: Legal System Transparency and Administrative Reform*, in CHINA AND THE LONG MARCH TO GLOBAL TRADE: THE ACCESSION OF CHINA TO THE WORLD TRADE ORGANIZATION 154 (Sylvia Ostry et al. eds., 2002).

17. See CHEN, *supra* note 5; PEERENBOOM, *supra* note 5.

side of the rule of law. A key indicator in the development on the demand side is the emergence of civil society forces in China characterized by the mushrooming of associations and non-governmental organizations (NGOs), along with a new wave of volunteerism, civic culture and moral reasoning.¹⁸ Within the context of cultural and institutional changes, there is also a growth in demand for rights and the rule of law in the society. The social and economic changes characterized by migration, job lay-offs, economic exploitation, or, more recently, land grabbing, created tremendous stress and frustration in people's livelihood. These have been felt most strongly by the already vulnerable groups in the society who are slowly, but gradually, stepping forward to air their grievances and demand their rights. In public forums, these groups — including migrant labors, unpaid workers, abused wives, harassed women, demobilized soldiers, people suffering from hepatitis B virus (HBV), HIV/AIDS and other diseases, and, many others whose property and other rights may have been infringed upon — have all demanded remedies as provided by law for the injustice that they may have suffered.¹⁹

The thesis of rightful resistance, as developed by O'Brien and Li, captures well the demand for rights in China's emerging civil society. By rightful resistance, O'Brien and Li refer to:

[A] form of popular contention that operates near the boundary of authorized channels, employs the rhetoric and commitments of the powerful to curb the exercise of power, hinges on locating and exploiting divisions within the state, and relies on mobilizing support from the wider public.²⁰

Rightful resistance thus consists of legally sanctioned actions taken to protect one's legal rights. In carrying out rightful resistance, the resisters strategically engage the state, exploit the gaps within the state, and change the society.

Rightful resistance emerges because of the increase in political opportunities in China, broadly defined as the widening of gaps between the

18. Yunxiang Yan, *The Good Samaritan's New Trouble: A Study of the Changing Moral Landscape in Contemporary China*, 17(1) SOC. ANTHROPOLOGY 9 (2009).

19. For the literature on civil society demand for rights, see CHINESE POLITICS: STATE, SOCIETY AND THE MARKET (Peter Hays Gries & Stanley Rosen eds., 2010); Mary Gallagher, *Mobilizing the Law in China: 'Informed Disenchantment' and the Development of Legal Consciousness*, 40(4) LAW & SOC'Y REV. 783 (2006); Mi Shih, *Legal Geographies — Governing through Law: Rights Based Conflicts and Property Development in Shanghai*, 31(7) URB. GEOGRAPHY 973 (2010); Keith J. Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China*, 45 COLUM. J. TRANSNAT'L L. 114 (2006).

20. KEVIN O'BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* 2 (2006).

improved and increasing legal rights in law and policies (offered by the central authorities), and, the violation of legal rights in action (by the local governments). This “structural opening” provides the context for rightful resistance to develop. In addition, social groups’ appreciation of the opportunity, willingness and ability to exploit the gap between law and practice is another important condition for rightful resistance. Because of the improved transportation and communication, the penetration of mass media, and many other social and economic changes brought about by economic reform in China, citizens have become more aware of their rights and are prepared to assert and defend them.²¹

The demand for rights in the society is rising. Netizens are engaging in online activism;²² workers are taking to the streets;²³ citizens are organizing themselves through associations;²⁴ and petitioners have taken law into their own hands. But there is a widening gap between the supply of legal rights and legal institutions and the demand for them, hence a resulting crisis in channeling all the grievances into the institutional channels. This gap and the resulting crisis place a strong demand as well as offer opportunities for lawyers and other intermediaries to improve access to justice and to make an effective connection between the world of conflict and the world of conflict resolution.²⁵ There is an increasing demand for lawyers and their services.

Against this backdrop, China has witnessed a steady increase in law schools and student admissions; an expansion of legal aid services; and a growth in the number of partnership law firms and lawyers.²⁶ There is also an important institutional change. That was the separation of the legal profession from direct government administration, thus the socialization of the profession. In 1996, the Chinese legislature passed the landmark Lawyers’ Law which changes the identity of Chinese lawyers from “state legal workers” on government payroll to private legal service providers.²⁷

Critics are correct that lawyers are embedded in the political system; that government can still control the legal profession as if it were government-owned; and that most lawyers try to maintain close ties with government officials in order to advance their legal careers.²⁸ It is also true

21. *Id.*

22. GUOBIN YANG, THE POWER OF THE INTERNET IN CHINA: CITIZEN ACTIVISM ONLINE (2009).

23. CHING KWAN LEE, AGAINST THE LAW: LABOR PROTESTS IN CHINA’S RUSTBELT AND SUNBELT (2007).

24. ASSOCIATIONS AND THE CHINESE STATE: CONTESTED SPACES (Jonathan Unger ed., 2008); See *supra* note 19 and the accompanying text.

25. Eva Pils, *Asking the Tiger for His Skin: Rights Activism in China*, 30 FORDHAM INT’L L.J. 1209-87 (2007).

26. ZHONGGUO FALÜ FAZHAN BAOGAO: SHUJUKU HE ZHIBIAO TIXI [REPORT ON CHINESE LAW DEVELOPMENT: DATABASE AND INDICATORS] (Zhu Jingwen ed., 2007).

27. CHEN, *supra* note 5.

28. Ethan Michelson, *Lawyers, Political Embeddedness, and Institutional Continuity in China’s*

that some lawyers treasure their professional independence and have used the opportunity to be critical and challenging of state policies. Before this socialization of the legal profession, lawyers rarely brought cases concerning general public interest to court and rarely attempted to make social changes through litigation. The institutional change provided by the Lawyers' Law creates some preliminary conditions for an independent and civil-society based legal profession and a space in which lawyers can raise policy issues through litigation and challenge the Party/state through law. China's corporatist state is active, and dominant, in shaping and meeting the demand for the rule of law in civil society; and lawyers, either working under the state, with the state, or against the state, are also channeling social problems to law, hence changing the law and challenging the state in this process.²⁹

III. THE DEVELOPMENT OF PIL

The defining characteristic of PIL in China is the use of litigation by lawyers and other rights advocates as a strategy to protect a general interest that is larger than that of the individual case interest. There is an ulterior motive behind such cases on the part of the lawyers who seek policy changes through the legal process. Cases that are litigated thus reflect a general social concern which affects the interests of a wider group of people.³⁰

PIL in China is both, of its nature, focused on wider interests and is particularly, although not exclusively, concerned with the social and economic rights of a largely urban and consumer society, that is, the economic well-being of an emerging middle class. Through representative litigation, lawyers and other intermediaries in PIL focus on certain sets of social problems, aiming at remedies that are politically permissible within the authoritarian system and legally enforceable by China's weak judiciary. But public interest lawyering is moderate in its political stance and typically insists on working within the system.

This clear policy concern distinguishes PIL from legal aid in China which is concerned primarily with the *individual* suffering of the poor, the powerless and other vulnerable groups in society. PIL builds on the legal aid system but, with its ostensibly norm-setting and policy concerns, has elevated itself beyond legal aid. What distinguishes public interest lawyers from others are the willingness and ability of the former to stand out, speak

Transition from Socialism, 113(2) AM. J. SOC. 352-414 (2007).

29. Richard Croucher & Lilian Miles, *Chinese Migrant Worker Representation and Institutional Change: Social or Centralist Corporatism?*, 5(1) ASIAN J. COMP. L. 4 (2010).

30. For a more detailed discussion, see Fu Hualing & Richard Cullen, *The Development of Public Interest Litigation in China*, in PUBLIC INTEREST LITIGATION IN ASIA 9 (Po Jen Yap & Holning Lau eds., 2011).

out, and act out in addressing public policy issues through litigation.

On the other hand, however, the political moderation of public interest lawyers distinguishes them from their more critical and radical counterparts who often have a more public political objective of changing the political system and are ready to use more radical measures to achieve these objectives. Radical lawyers are willing to take on politically sensitive cases, which the government regards as off-limits, ready to mobilize media and NGOs, and are prepared to work with foreign entities. Radical lawyers are less confident in the system although they demand that the system live up to its rhetoric.

Five trends can be identified in the development of PIL in China in the past decades. The first development is from spontaneous action to institutionalization of PIL. PIL began as spontaneous acts of wayward citizens who individually challenged monopoly enterprises and public authorities in court for their abusive activities and negligence. Many of the first generation citizen activists, such as Wang Hai (王海)³¹ and Qiu Jiandong (邱建东),³² were themselves parties to a dispute in which they were treated unfairly by their adversaries. These activists learnt the law through their suffering and became experienced in using law and litigation to protect their own rights and the rights of others.

Lawyers entered into the field at the same time, but played a less active role at the outset. Noticeably, major players in China's PIL community made their debut in PIL around 1995 to 1996.³³ Based on their training, their stronger power of organization, and their specialist identity, lawyers have institutionalized PIL after the promulgation of the Lawyers' Law, and PIL in turn has become a convenient and useful tool which allows lawyers to

31. Dongbei Xinwen Wang [nen.com.cn], *A Dialogue with 'Rights Fighter' Wang Hai*, Wangyi [Neteast], <http://news.163.com/06/0312/07/2C0DUHOT0001124T.html>; *Information Related to Wang Hai's Fighting Against Fake Goods (1995-1997)*, WANGYI [NETEAST], <http://news.163.com/06/0314/15/2C6ELB970001126S.html>.

32. Lin Xinghua et al., *Is It Worthwhile to Initiate the 'One Dollar and Twenty Cents' lawsuit*, JINGJI RIBAO [ECONOMIC DAILY], Jan. 30, 1996, at 1.

33. For example, the veteran PIL lawyer for women's rights Guo Jianmei (郭建梅) took up being a PIL lawyer after participating in the 1995 World Women's Conference hosted in Beijing; labor lawyer Zhou Litai (周立太) brought his first lawsuit in Longgang, Shenzhen in 1996; and PIL lawyer in labor rights and children's rights Tong Lihua (佟麗華) also started his PIL practice in Beijing in mid-1990s. See, e.g., Guo Jianmei, *The Colourful Life of Public Interest Litigation*, RENMIN ZHENGXIE BAO [NEWS OF THE PEOPLE'S POLITICAL CONSULTATIVE CONFERENCE], April 14 2009, available at FUNÜ GUANCHANG WANG [WOMEN'S WATCH-CHINA], <http://www.womenwatch-china.org/article.asp?id=4267>; Yang Liu, *Public Interest Lawyer Guo Jianmei, Helping the Weak to Move Forward*, ZHONGGUO WANG [CHINA.ORG.CN] (Mar. 3, 2009), available at RENMIN WANG [THE WEBSITE OF PEOPLE'S DAILY], <http://finance.people.com.cn/BIG5/70392/8985423.html>; Zhou Litai, *Zhou Litai who Finally Walking through from the Struggle*, LONGBO WANG [AWEB.COM.CN] (Nov. 24, 2007) <http://news.aweb.com.cn/2007/11/24/117200711241636340.html>; Luo Xiao, Tong Lihua: *The Greatest Happiness is to Feel the Existence of Justice*, 13 ZHIYE [OCCUPATION] 34 (2007); Sha Lei, *Tong Lihua: Defender of the Weak*, 10 ZHONGGUANCHUN MAGAZINE 118 (2008).

strategize and become more self-conscious of the efforts they are making and the consequences they wish to bring about.

The involvement of lawyers (including law students and law professors) has led to the professionalization of PIL. Replacing citizen activists, lawyers have become the spokespersons of public interest and dominate the discourse on rights and remedies, pushing towards a more legalistic protection of rights. While lawyers select essentially similar types of cases, with some exceptions, their approach is more refined, sophisticated and legal when compared to the activists. Since 2000, lawyers and law students have instituted a series of lawsuits against various kinds of discrimination.³⁴

Professionalization leads to institutionalization. The successful rights practice generates the necessary fame and socio-economic capital for the lawyers so that they can institutionalize their practice by setting up their own firms. The creation of such specialist law firms creates and reinforces a collective identity among public interest lawyers and provides a meeting place for similar-minded lawyers, a platform on which lawyers communicate with each other to exchange ideas, share experiences and provide mutual support. Institutionalized PIL has become more specialized with public interest lawyers providing specific legal services targeting particular groups in society.

The second trend is from passivity to aggressive defense. PIL in China has become more aggressive over the years. Substantively, there is little taboo for legal arguments. Lawyers are confident that if a matter can be converted into an issue of a legal right, then it is politically “do-able”. If a court accepts a case for litigation, then there is normally no longer any political concern. Lawyers are confident that many political arguments can be framed in legal terms. They do not hesitate in applying for judicial review against powerful government departments to protect legal rights, in spite of the increasing timidity on the part of the courts.

Procedurally, lawyers are asserting their independence in advancing legal arguments. The time when the government could dictate what lawyers could say in court has long gone. Going beyond a mere application of law in a concrete case, lawyers have challenged the illegality or unconstitutionality of local rules, administrative regulations and other subsidiary legislation. Moreover, lawyers mobilize constitutional rights to protect individual rights from government or private infringement. In criminal cases where lawyers are most constrained, lawyers routinely launch a not-guilty defense and argue aggressively for their clients even in the most politicized cases, including dissidents’ trials.

34. For the discussions of these cases, *see, e.g.*, ZHOU WEI, FAN QISHI FA YANJIU: LIFA, LILUN YU ANLI [STUDY ON ANTI-DISCRIMINATIVE LAW: LEGISLATION, THEORY AND CASES] (2008).

The third development is from litigation to social networking, creating a support structure for public interest lawyering. Lawyers typically possess good organizing abilities, and once a case is filed at court, people who share the same interest cluster around that case, creating a moment of collective action. Consequently, what otherwise are sporadic, disorganized and inconsistent voices of criticism become a well-coordinated alliance with well-defined common objectives.

There is a tacit alliance between the media and public interest lawyers.³⁵ Lawyers need reporters to publicize the case and their cause, seeking support in the court of public opinion and with the hope of channeling public support to influence judicial decision-making. Reporters, on the other hand, need to get inside stories and stories of recent developments to enhance their circulation/republication of their news. The reputation of reporters and the profitability of their organizations depend on, to a degree, access to news sources, and lawyers can often be reliable and interesting sources.

Public interest lawyers rely on information technology to maintain constant communications with one another. Many lawyers maintain a mailing list of reporters and have close relations with reporters from high-ranking newspapers or Xinhua News Agencies, especially those who have the privileges of writing internal references.³⁶ Public interest lawyers also maintain personal blogs for uploading information and maintaining contact with supporters and comrades-in-arms. To handle breaking news, lawyers use mobile phone messaging among themselves and their supporters.

The fourth trend is from using law as a shield to protect to a sword to attack. Lawyers conventionally react to government abuses,³⁷ and most of the public interest lawyers play largely a defensive role. They provide defense to people whose rights have been infringed upon, using the law as a shield.

While using law mainly in such a defensive stance to respond to the violation of rights by the government and public authorities, lawyers have also started to use law more proactively and tactically. They have started to exploit legal opportunities for legal action. *Potential* legal claims against the government and powerful groups abound. Lawyers could wait for plaintiffs passively as they traditionally do, or they can also plan ahead. Activist lawyers can actively spot legal opportunities, mostly a problematic

35. Benjamin L. Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 633-34 (2007).

36. Internal reference refers to internal reports on controversial issues prepared by journalists for senior government leaders.

37. Terence C. Halliday et al., *The Legal Complex and Struggles for Political Liberalism*, in FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 1 (2007).

government decision, and plan subsequent legal strategies, especially identifying a proper plaintiff, to enhance the possibility of winning and maximizing the impact of the case.

During this shield to sword transition, public interest lawyers are taking the initiative in the litigation process, “calling the shots” in determining strategies in matters such as who is to speak to the press; when and how; whether to settle with the defendant and how. In using law as a sword, lawyers are using law as a preemptive instrument to prevent violation of rights from taking place. This preemptive use of law is emerging in the field of labor rights where workers are developing collective bargaining; in the field of religious rights where religious groups (house churches for example) retain the in-house services of lawyers or recruit believers with a legal background; and in the area of environmental PIL in which lawyers resort to courts to prevent possible environmental disasters.

The final trend is the shift from case handling to advocating policy changes. Lawyers are faithful to the politics of rights and insist that court action can serve as a catalyst for policy change through education, mobilization and participation. PIL generally produces greater value in political symbolism than in delivering tangible results for litigants.³⁸ PIL, because of its moderate political objectives and official tolerance, is most effective in promoting policy and legal changes in advancing public interest.³⁹

In litigating individual cases, lawyers have in mind legislative and policy reforms where applicable. While lawyers working on rights of children, women, migrant workers, HBV carriers or environmental pollution are handling individual cases, they also attempt to lobby the legislature, the court and the government for legislative changes whenever an opportunity arises. Moderate public interest lawyers are more successful in promoting policy or law reform because they work on less sensitive policy areas and are regarded as part of the establishment.

IV. THE POLITICS OF POLITICAL LAWYERING

Public interest lawyers tend to be court-centric and use litigation as the primary strategy for policy advocacy, although they also realize the limit of court-based action and use the court as a spring board. *Prima facie*, it seems

38. BUILDING CONSTITUTIONALISM IN CHINA (Stéphanie Balme & Michael W. Dowdle eds.) (2009).

39. Andrew Mertha, *Society in the State: China's Nondemocratic Political Pluralization*, in CHINESE POLITICS: STATE, SOCIETY AND THE MARKET, *supra* note 19, at 69-84 (Gries and Rosen eds.); Samantha Keech-Marx, *Airing Dirty Laundry in Public: Anti-Domestic Violence Activism in Beijing*, in *supra* note 24, at 175-99 (Unger ed.).

surprising that lawyers and citizen activists have chosen the courts to pursue certain rights within China's authoritarian system, especially where courts are timid and compliant and the legal culture is said not to be receptive to litigation.

China's political and legal environment, in fact, makes litigation the most viable and effective tool in promoting legal changes, however. The popularity of PIL in China can be explained principally by the lack of alternative political institutions and processes where aggrieved citizens can claim their rights. In China's authoritarian system, political participation and competition for political power is prohibited or even criminalized and the representative mechanism, while emerging, is intrinsically weak. Dispute resolution through political deliberation and participation is often blocked or simply not available. Courts, in these circumstances, provide an institutional forum to bring social issue to public attention. Studies have shown that judicialization of politics within authoritarian regimes is a recognized phenomenon,⁴⁰ and authoritarian regimes are known to use courts to resolve disputes, maintain legitimacy and control local level bureaucrats. Matters that can be more properly resolved politically in democracies find their way into the courts in authoritarian regimes. As Ellmann pointed out, lawyering and litigation may not be the best vehicle to achieve political objectives, and politically-motivated lawyers may choose to engage in more direct political actions, where the circumstances permit.⁴¹ Public interest lawyers elsewhere including Hong Kong, Taiwan, South Korea, and South Africa abandon litigation strategy to engage in direct political competition and participation once a meaningful political channel is accessible.⁴²

There are opportunities for litigation. Access to courts is a right (in relative terms) and parties are entitled to bring a defendant to court to answer a complaint. The rhetoric of equality before the law is a powerful political legitimization tool, in authoritarian regimes in particular. The Chinese state itself had been instrumental in promoting the use of litigation to settle disputes throughout the 1980s and 1990s. With little exaggeration, resorting to the courts to settle disputes was regarded as the symbol of the rule of law in action and a defining characteristic of modern citizenship in modern China.

There are incentives for litigation. The judicial process is normally well structured and there is, in relative terms, a higher degree of predictability,

40. GINSBURG & MOUSTAFA, *supra* note 1.

41. Stephen Ellmann, *Cause Lawyering in the Third World*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 349 (Austin Sarat & Stuart Scheingold eds., 1998).

42. Waikung Tam, *Political Transition and the Rise of Cause Lawyering: The Case of Hong Kong*, 35 L. & SOC. INQ. 663 (2010); Patricia Goedde, *From Dissidents to Institution-Builders: The Transformation of Public Interest Lawyers in South Korea*, 4 E. ASIA L. REV. 63 (2009).

transparency, and publicity in the judicial process than the political and executive processes. Compared with political (e.g. petition) and administrative (e.g. agency review) processes, the judicial process is better structured and appears to be more neutral and accountable. Parties in the process know they are all bound by rules of procedure from which normally the parties cannot depart without proper justification. Judges in particular are more inclined to follow those rules to maintain legitimacy and credibility. As Hershkoff nicely puts it, "The very act of litigation affords a juridical space in which those who lack formal access to power become visible and find expression."⁴³ There is a higher expectation of fair play in the judicial process.

Litigation is a cost-effective way to advance public interest and affect policy changes.⁴⁴ The cost to bring a claim to court is not prohibitive in relative terms. Similarly, Hershkoff argues that, in the US context, "for marginalized groups, litigation sometimes offers the only, or least expensive, entry into political life at a given time."⁴⁵ Where litigation costs often deter the poor from bringing their cases to courts, many lawyers and others are willing to be plaintiffs. With a valid claim, a plaintiff could bring the offending policy or practice to court, often without incurring excessive cost. As a result, courts become the meeting place to debate social injustice.

Without the opportunities to participate in political movement in China, lawyers are virtually forced to use courts as the *only* platform to achieve their objectives. However, legal mobilization in an authoritarian state is intrinsically limited. The court may be relatively effective in delivering justice in ordinary cases and upholding the rule of law in certain areas. As mentioned above, the judicial process has been used as a meaningful platform for consumer protection or anti-discrimination lawsuits, for instance. Courts are, however, fundamentally limited in cases that are ostensibly political, with strong policy implications or otherwise regarded as "sensitive". The long-held wishful thinking on the part of many public interest lawyers is to build the rule of law and constitutionalism in China without touching, or without touching directly, the core of the political system.

Rights promotion is also sequential. The initial rights-action took place at the margin of the political power and was congruent to the agenda of the government. On issues of certain social and economic interests, the state was

43. Helen Hershkoff, *Public Interest Litigation: Selected Issues and Examples*, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf> (last visited Oct. 11 2010), at 9.

44. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

45. Hershkoff, *supra* note 43, at 14.

more pluralistic and its response was more mixed. By and large, right claimants of a moderate nature could, through courts or other institutions, achieve some legal and political victories, at the early stage of PIL, without questioning and challenging the Party/state.

However, legal activism without politics can only carry public interest lawyers so far, and politically compliant lawyers can merely scratch at the surface in a wide range of cases. Law may be more effective in providing protection of rights situated at the margin of authoritarian politics, playing an ameliorative role in an otherwise harsh system. But given law's close relations with politics (as the Party/state defines it), it would only be artificial to make a legal argument without touching upon the political power in those cases.

Dedicated political lawyers, regardless of the types of rights that they try to protect, would, sooner or later, confront a common barrier that appears to be insurmountable. They would not be able to advocate effectively without displaying an express transformative agenda of political change. Most lawyers can refrain themselves from making a politically challenging argument, but there are always a few wayward lawyers who are determined to move up the ladder and have become more challenging. They inch in slowly but visibly, moving closer to the political core. The consensual lawyering which challenged abuses at the periphery starts to decline and to be replaced by confrontational and radical lawyering.⁴⁶

Lawyers become political, thus challenging, in different ways. Political lawyers have used courts instrumentally as a forum of free speech. For some lawyers, this is a calculated and strategic decision. Discussion of a sensitive topic, such as the Falun Gong (法輪功), is off-limit in Chinese media because of the tight political censorship; but court procedure provides a rare opportunity for lawyers and their clients to speak out legally and politically. If courts are instruments of dictatorship of the CCP, as the orthodox theory has described it, lawyers are excising their free speech right in the heart of the Party/state.

Defending Falun Gong has become the hard core of radical lawyering in China. Lawyers not only rigorously defended the constitutional rights of Falun Gong practitioners to practice their religion on the ground of the constitutional protection of freedom of conscience, speech and religious belief; they moved one step further by praising Falun Gong in open courts in front of the prosecutors and security personnel attending the trials. As these lawyers recalled, they put to the courts firmly that Falun Gong not only strengthened human bodies and improved health, but also nurtured the soul

46. Fu Hualing & Richard Cullen, *Climbing the Weiquan Ladder: A Radicalizing Process for Weiquan Lawyers*, 205 CHINA Q. 40 (2011).

and enhanced the nation's moral standard.⁴⁷ When Falun Gong lawyers fought hard and left no room for compromise with the system, they truly turned the trial of dissidents into a trial of the system.

Most lawyers are intimidated into silence, but there are a few who are defiant. Those who remain in the business of defending the Falun Gong and dissidents would have developed a thick skin and would be immune from low-tech harassment from the government. Those lawyers shouted back, banged the table and reported judges to the authorities and complained of any irregularity they spotted in the process. They walk out the courtroom from an on-going trial in protest against court irregularities. The best weapon for lawyers is the ability to spot errors in the legal process, magnify them and report the people who made the errors to the competent authorities. In a way, lawyers are copying the strategy of their clients to protect their own right of legal representation through petition — a process with which judges are highly concerned and are eager to avoid, if possible.

Even lawyers who are handling cases in policy areas that are tolerated by the government are no longer scratching at the surface. They have started to approach the deeper structure. After bombarding enterprises and government with lawsuits for a decade on discrimination, lawyers and activists have started to plan lawsuits against the core state organs such as the police and the military for discrimination. There is also the possibility to launch ethnicity and religion-based anti-discrimination actions. Labor law is also advancing. In addition to the bread and butter labor law cases on behalf of the poor, some lawyers and activists are moving beyond defending rights of individual workers and are starting to litigate for a more fundamental policy such as collective bargaining,⁴⁸ which indirectly would demand the authority to tolerate more meaningful and independent labor unions at the grassroots level and recognize the legal rights to take industrial actions, including strikes.

Ultimately, challengers have the opportunities to face the Party/state directly and lawyers bring politics into the juridical space. Lawyers and others want to uphold the supremacy of the Constitution with the clear agenda to tame the Party through law, and the constitutionalism argument that was advanced in courts led to a simple conclusion that the CCP in court should not be supreme. Radical lawyers, through the legal process and a court trial, express their free political speech; humiliate the compliant courts;

47. Interviews with *weiquan* lawyers, Hong Kong, Sept. 2009 (on file with the author).

48. See, e.g., Wei Chang et al., *Over 20,000 Labor Disputes were Solved Last Year; Shenzhen Trade Confederation Puts Great Effort in Defending Labor Rights*, NANFANG RIBAO [SOUTHERN DAILY], Jan. 9, 2008, CHINA LABOUR BULLETIN, <http://www.china-labour.org.hk/chi/node/1300188/print>; Huang Biao, *Bus Crew Stopped Hundreds of Buses, Labor Rights Lawyers are Going to be Involved in Collective Bargaining*, GUANGDONG LAOWEI LAW FIRM, Oct. 21, 2008, <http://www.gdlaowei.com/jiti/jtpractice/200810/594.html>.

and attack Party policies in a public forum, sending alarm to the CCP that its own lawyers have turned against them.

What then is the role of lawyers in the eyes of the CCP? There could be two conceptually different roles for lawyers. The traditional argument is that lawyers, through PIL, channel disputes to a legal institution through legal processes, so that sensitive and potentially politically explosive issues are legalized and isolated into individual cases. The rule of law is in essence a conservative project which serves to de-politicize disputes. Within this conceptual framework, lawyers and litigation deflect political contention, strengthen legal institutions and help stabilize the existing political order. This is an appealing argument that has been accepted by the government and also the reason why the CCP has tolerated and supported PIL. After all, lawyers are mostly embedded in the existing political system and support the system.

The circumstances in the society have changed in the eyes of the CCP in the past decade. Citizens are now airing their grievances in a more aggressive manner to realize their interests as the law promises. They organize unofficial associations; they take part in informal rallies and demonstrations; and they take industrial actions including strikes. These forms of resistance represent an emerging movement of civil disobedience and civil unrest. Citizens are demanding the CCP and government to live up to their promises. If the promise falls too short for too long, aggrieved and frustrated citizens may start radicalizing and taking the law into their own hands. The government is well aware of this risk. The government knows that serious politically-motivated action can lead to politically-motivated violence, including riots, property destruction and killings. Fundamentally, people are more energized and they are taking their grievances to the streets and to the court of public opinion, forcing the government to take the law more seriously.

Civil society organizations have grown and expanded, and are active outside the government control. Women groups, AIDS groups, homosexuality groups, anti-discrimination groups and labor groups are organizing their constituents to promote their causes, with legal rights and lawyers playing a pivotal and instrumental role in the process. For the loosely organized associations, they use information technology to coordinate their activities, mobilize support and advance their causes and work closely with overseas donor agencies, including "hostile" ones.

Alarmed by the social activism in different confronts, the Party re-treated to its comfortable conservative zone. After 2003, the rights discourse started to diminish and stability discourse comes to the fore and the rights talk which was popular in the 1990s was replaced by harmony talk. The broad concept of the rule of law remains valid but is increasingly

interpreted in the framework of socialist legal ideals. The defining characteristic of the current stage is the almost heightened alert to any sign of unrest and instability. While the CCP has prioritized stability in the past 30 year, stability has a new meaning: it becomes an end in itself.

At the same time, the CCP becomes confident in its legitimacy and capacity to rule because of the economic success it has achieved so far. It increasingly becomes impatient with a democratic process which is regarded as chaotic and the rule of law which is associated with inefficiency. Governance reform continues and anti-corruption efforts may have been enhanced, but the Party is clearly in charge of, and hands-on in managing, these changes, crowding out the constitutional process and legal institutions. The CCP has clearly pressed the reverse button and is rolling back the legal reform of the past decade. In this context, there is the clear danger that harmony clashes into conformity and uniformity while repression and brutality are equated to effectiveness and efficiency.

The concern of the CCP is that lawyers and other activists are organizing aggrieved citizens to challenge the Party. Through *weiquan* lawyering and rights promotion, the otherwise isolated victims are organized to pursue a common objective. Lawyers draw social forces together and channel them to a confrontation with the CCP. In the particular case of Falun Gong, the perception is that lawyers may have willingly abandoned their professional identity and served as the cult's spokespersons politically through legal representation.

A prevailing view is that there are inequality and injustice and people who have suffered are entitled to legal remedies. But a legal mobilization, as rights lawyers have envisaged and are practicing, is too interruptive to political stability that is essential for the survival of the Party/state. Injustice, as prevalent as it is, can only be brought to solution at a pace and according to a method with which the CCP is comfortable. Lawyers cannot be the representative of the interest of the people. Only the Party can.

Watching the social forces charging forward, the political system stands firm and then pushes back. It first targeted rights lawyers in Beijing where rights lawyers cluster,⁴⁹ and in doing so, the government creates a repressive environment. As with rights promotion, suppression of rights is also sequential and contagious. Suppression of rights claims at a higher level

49. In June 2009, for example, almost 20 rights lawyers in China were reported as failed by the justice bureaus in the annual review for lawyers — a compulsory review that a lawyer must pass in order to have he/her lawyer's practice licence renewed. Among these lawyers, majority of them were based in Beijing, and two Beijing lawyers, namely Tang Jitian (唐吉田) and Liu Wei (劉巍), even had their practice licences revoked by the Beijing Justice Bureau in this process. For the details of this incident, see, e.g., Chinese Rights Defense Lawyers Under All-Out Attack by the Authorities, HUMAN RIGHTS IN CHINA, June 4, 2009, <http://www.hrichina.org/public/contents/press?revision%5fid=169861&item%5fid=169791>.

narrows the political space for all rights claims because judges and others pick up the cues quickly and respond spontaneously. When Beijing tightens its control over rights lawyers, copy-cats at local level followed the lead and produced some add-ons of their own. Legal mobilization is a two-way street: while a successful mobilization in one case makes the next one easier, one instance of legal suppression makes the next one more straightforward as well. Within a repressive context, it is easy to make a repressive decision.

V. CONCLUSION

Legal activism has evolved over the past decade and has become more institutionalized, professionalized and established in China. The practice is taking root. Lawyers are actively pursuing PIL and the government encourages or tolerates its existence when the issues do not confront and challenge the legitimacy of the One Party State. Lawyers continue to search for interesting cases. From handling fake and defective consumer goods, equality rights and non-discrimination, to religious freedom and the right to criticize the government, lawyers have traveled a long way on a tortuous road. PIL has the potential to grow and develop further in China, especially in areas that are less politically challenging.

At the very beginning of China's legal development, there were many common grounds between the CCP and the social forces, with the CCP taking the lead in opening up the political system and initiating the constitutional changes. Lawyers and others took moderate steps in correcting market and government failures in politically marginal areas, with the encouragement (or at least tolerance) of the CCP.

At the beginning, rights that were permitted to grow were narrowly defined civil law rights, initially consumer rights followed by the rights of children, women, disabled persons and migrant workers. The government has been pushing for more legal rights and more effective legal protection of rights.

The government soon started to become suspicious and to suppress some of the rights advocacy that it used to support. That was when a legal case became rallying point for otherwise isolated plaintiffs, law became a meeting point of aggrieved people, and lawyers became organizers of social movements. Once that happens, the government withdraws its support and moves to limit law's autonomy and restrict lawyers' space. When the initial restriction fails to achieve its objective, the CCP becomes repressive.

The current pace of political and institutional reform and improvement in China does not match the expectation and the demand from the civil society. The pace of social and economic change has been so brutal and drastic, and the social and economic conflicts are so acute and fundamental

that they are beyond the grasp of the existing legal norms and institutional capacities of the legal institutions. Both the people on the supply and demand sides are giving up on law and resort to something else outside the established legal process and institutions altogether.

Public interest lawyers are who they are mostly because of their passion and their dedication for progressive social and political changes in China. When public interest lawyers move forward from the periphery to the core of the system, they risk backlashes. Facing an institutionalized and aggressive public interest lawyering fraternity and their potential organizing and mobilizing capacity, the government perceives certain political risks that PIL may bring about. As a result, it has become more hostile and repressive, seeing lawyers as organizers of an emerging social force that aims at transformative politics. The fact that PIL is largely foreign-funded gives an easy excuse for government to link PIL in China to hostile forces outside China, and to second-guess ulterior motives of a color revolution in China. In an authoritarian state, the line between the permitted and the prohibited is blurred and unpredictable even at “normal” times. The line may vanish and legality may lose its hold on governance when the regime perceives an existential threat.

At this particular juncture, the Party/state panicked at the emerging rights movement and social and legal mobilization and the current system is not able to contain and internalize the societal demand. There is much less room for consensus building and for agreement between conflicting imperatives. This is how the Party sees PIL and political lawyering. While the regime may not have regarded any particular lawyer and a group of them as the vanguard of a (new) revolutionary force subverting the Party/state, they are clearly seen as a part of a larger color revolution backed by hostile international forces, with the potential of organizing broad social and political mobilization against the regime, hence the current repressive episode.

REFERENCES

- Balme, S., & Dowdle, M. W. (2009). *Building Constitutionalism in China*. New York, NY: Palgrave Macmillan.
- Baum, R., & Mao, B. (1994). *Chinese politics in the age of Deng Xiaoping*. Princeton, NJ: Princeton University Press.
- Biddulph, S. (2002). China's accession to the WTO: Legal system transparency and administrative reform, In S. Ostry, A. S. Alexandroff, & R. Gomez (eds.). *China and the Long March to Global Trade: The Accession of China to the World Trade Organization* (pp. 154-191). London, UK: Routledge.
- Brandt, L. & Rawski, T. G. (Eds.). (2008). *China's great economic transformation*. Cambridge, NY: Cambridge University Press.
- Carothers, T. (2007). The "sequencing" fallacy. *Journal of Democracy*, 18(1), 12-27.
- Chang, W., Cheng, L. T., & Huang, Y. (2008, January 9). Over 20,000 labor disputes were solved last year, Shenzhen Trade Confederation puts great effort in defending labor rights. *Nanfang Ribao* [Southern Daily]. Retrieved from China Labour Bulletin: <http://www.china-labour.org.hk/chi/node/1300188/print>
- Chen, A. (1999). Toward a legal enlightenment: Discussions in contemporary China on the rule of law. *UCLA Pacific Basin Law Journal*, 17, 125-165.
- Chen, A. (2004). *An introduction to the legal system of the People's Republic of China*. Hong Kong, China: Lexis Nexis.
- Clarke, D. (2003). Economic development and the rights hypothesis: The China problem. *American Journal of Comparative Law*, 51, 89-111.
- Clarke, D. (2007). China: Creating a legal system for a market economy (Research Paper No. 396) Retrieved from SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1097587
- Clarke, D., Murrell, P., & Whiting, S. (2008). The role of law in China's economic development. In L. Brandt & T. G. Rawski (eds.). *China's great economic transformation* (pp. 375-428). Cambridge, NY: Cambridge University Press.
- Croucher, R., & Miles, L. (2010). Chinese migrant worker representation and institutional change: Social or centralist corporatism? *Asian Journal of Comparative Law*, 5(1), Article 4. doi: 10.2202/1932-0205.1245
- Dongbei Xinwen Wang (2006, March 12). A dialogue with 'rights fighter'

- Wang Hai. Retrieved from Net Ease <http://news.163.com/06/0312/07/2C0DUHOT0001124T.html>
- Ellmann, S. (1998). Cause lawyering in the third world. In A. Sarat & S. Scheingold (eds.). *Cause Lawyering: Political Commitments and Professional Responsibilities* (pp. 349-430). New York, NY: Oxford University Press.
- Fu, H., & Cullen, R. (2011). Climbing the *Weiquan* ladder: A radicalizing process for rights-protection lawyers. *The China Quarterly*, 205, 40-59.
- Fu, H., & Cullen, R. (2011). The development of public interest litigation in China. In P. J. Yap & H. Lau (Eds.). *Public Interest Litigation in Asia* (pp. 9-34). New York, NY: Routledge.
- Gallagher, M. (2006). Mobilizing the law in China: 'Informed Disenchantment' and the development of legal consciousness. *Law & Society Review*, 40(4), 783-816.
- Ge, Z. (2010). Toward regulatory neutrality in a party-state? A review of administrative law reforms in China. In J. Gillespie & A. H.Y. Chen (Eds.). *Legal Reforms in China and Vietnam: A comparison of Asian communist regimes* (pp. 109-133). New York, NY: Routledge.
- Ginsburg, T., & Moustafa, T. (2008). *Rule by law: The politics of courts in authoritarian regimes*. New York, NY: Cambridge University Press.
- Goedde, P. (2009). From dissidents to institution-builders: The transformation of public interest lawyers in South Korea. *East Asia Law Review*, 4, 63-89.
- Gries, P. H., & Rosen, S. (Eds.). (2010). *Chinese Politics: State, Society and the Market*. New York, NY: Routledge.
- Halliday, T. C., Karpik, L., & Feeley, M. M. (2007). The legal complex and struggles for political liberalism. In T. C. Halliday, L. Karpik, & M. M. Feeley (eds.). *Fighting for political freedom: Comparative studies of the legal complex and political liberalism* (pp. 1-42). Portland, OR: Hart.
- Hand, K. J. (2006). Using law for a righteous purpose: The Sun Zhigang incident and evolving forms of citizen action in the People's Republic of China. *Columbia Journal of Transnational Law*, 45, 114-195.
- Harding, H. (1987). *China's Second Revolution: Reform after Mao*. Washington, DC: Brookings Institution Press.
- Hershkoff, H. (2010, October 11) Public interest litigation: Selected issued and examples. Retrieved from <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf>
- Huang, B. (2008, October 21). Bus crew stopped hundreds of buses, labor

- rights lawyers are going to be involved in collective bargaining. Retrieved from <http://www.gdlaowei.com/jiti/jtpractice/200810/594.html> (last visited Nov. 10, 2009).
- Jianmei, G. (2009, April 14). The colorful life of public interest litigation. *Renmin Zhengxie Bao* [News of the People's Political Consultative Conference]. Retrieved from Funü Guancha Wang [Women's Watch-China].
- Keech-Marx, S. (2008). Airing dirty laundry in public: Anti-domestic violence activism in Beijing. In J. Unger (Ed.). *Associations and the Chinese State: Contested Spaces* (pp. 175-199). Armonk, NY: M.E. Sharpe.
- Lee, B., & Lardy, N. R. (2008). China's embrace of globalization. In L. Brandt & T. G. Rawski (Eds.). *China's Great Economic Transformation* (pp. 633-682). Cambridge, NY: Cambridge University Press.
- Lee, C.-C. (1994). *China's Media, Media's China*. Boulder, CO: Westview Press.
- Lee, C. K. (2007). *Against the law: Labor protests in China's rustbelt and sunbelt*. Berkeley, CA: University of California Press.
- Liebman, B. L. (2007). China's courts: Restricted reform. *The China Quarterly*, 191, 620-638.
- Litai, Z. (2007, November 24). *Zhou Litai who finally walking through from the struggle*. Longbo Wang. Retrieved from <http://news.aweb.com.cn/2007/11/24/117200711241636340.html>
- Liu, Y. (2009, March 17). Public interest lawyer Guo Jianmei helping the weak to move forward. Retrieved from Renmin Wang [The website of People's Daily] <http://finance.people.com.cn/BIG5/70392/8985423.html>
- Lin, X. et al. (1996, Jan. 30). Is it worthwhile to initiate the 'One Dollar and Twenty Cents' lawsuit'. *Jingji Ribao* [Economic Daily], p. 1.
- MacLaren, M. (2009, October). 'Sequentialism' or 'Gradualism'? On the transition to democracy and the rule of law (*Working Paper No. 38*). Retrieved from <http://www.nccr-democracy.uzh.ch/publications/workingpaper/pdf/wp38.pdf>
- Mertha, A. (2010). Society in the state: China's nondemocratic political pluralization. In Gries & Rosen (Eds.). *Chinese Politics: State, Society and the Market* (Lawyers, political embeddedness, and institutional continuity in China's transition from socialism. pp. 69-84). New York, NY: Routledge.
- Michelson, E. (2007). Lawyers, political embeddedness, and institutional

- continuity in China's transition from socialism. *American Journal of Sociology*, 113(2), 352-414.
- Nathan, A. J. (1985). *Chinese democracy*. New York, NY: Knopf.
- Naughton, B. (2008). A political economy of China's economic transition. In L. Brandt & T. G. Rawski (Eds.). *China's great economic transformation* (pp. 91-135). Cambridge, NY: Cambridge University Press.
- Net Ease. (2006, March 14). Information related to Wang Hai's fighting against fake goods (1995-1997). Retrieved from Wangyi [Netease] <http://news.163.com/06/0314/15/2C6ELB970001126S.html>
- O'Brien, K., & Li, L. (2001). Accommodating 'democracy' in a one-party state: Introducing village elections in China, *The China Quarterly*, 162, 465-489.
- O'Brien, K., & Li, L. (2006). *Rightful resistance in rural China*. Cambridge, NY: Cambridge University Press.
- Peerenboom, R. (2002). *China's long march toward rule of law*. Cambridge, NY: Cambridge University Press.
- Peerenboom, R. (2009, August 10). Rule of law, democracy and the sequencing debate: Lessons from China and Vietnam. Retrieved from SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1447051
- Pils, E. (2007). Asking the tiger for his skin: Rights activism in China. *Fordham International Law Journal*, 30, 1209-1287.
- Saich, T. (Ed.). (1990). *The Chinese people's movement: Perspectives on spring 1989*. Armonk, NY: M.E. Sharpe.
- Sha, L. (2008). Tong Lihua: Defender of the weak. *Zhongguanchun Magazine*, 10, 118-120.
- Shih, M. (2010). Legal geographies – Governing through law: Rights based conflicts and property development in Shanghai. *Urban Geography*, 31(7), 973-987.
- Tam, W. (2010). Political transition and the rise of cause lawyering: The case of Hong Kong. *Law & Social Inquiry*, 35, 663-687.
- Teiwes, F. C. (1984). *Leadership, legitimacy and conflict in China: From a charismatic Mao to the politics of succession*. London, UK: Macmillan.
- Unger, J. (Ed.). (2008). *Associations and the Chinese state: Contested spaces*. Armonk, NY: M.E.
- Wei, Z. (2008). *Fan Qishi Fa Yanjiu: Lifa, Lilun yu Anli* [Study on anti-discriminative law: Legislation, Theory and cases]. Beijing, China: Law Press.

- Xiao, L. (2007). Tong Lihua: The greatest happiness is to feel the existence of justice. *Zhiye* [Occupation], 13, 34-35.
- Yan, Y. (2009). The Good Samaritan's new trouble: A study of the changing moral landscape in contemporary China. *Social Anthropology*, 17(1), 9-24.
- Yang, G. (2009). *The Power of the Internet in China: Citizen Activism Online*. New York, NY: Columbia University Press.
- Yap, P. J., & Lau, H. (Eds.). (2011). *Public interest litigation in Asia*. New York, NY: Routledge.
- Zhu, J. (Ed.). (2007). *Zhongguo Falü Fazhan Baogao: Shujuku he Zhibiao Tixi* [Report on Chinese Law Development: Database and Indicators]. Beijing, China: Press of Renmin University of China.

透過法律挑戰專制 ——潛力與限制

傅 華 伶

摘 要

在專制國家進行法律改革的潛力和限制是一項有趣的議題。學者和實務界爭論司法改革是否能軟化專制體系的界線，並最終解放之，抑或反而確立專制統治。本文企圖透過審視中國人權律師在保障並促進人權方面的努力，以及他們的司法積極性對中國政治和法治發展的影響，來討論此一議題。中國共產黨既然容許律師的自主性，如今他們必須面對這些律師的挑戰。

關鍵詞：公益訴訟、司法積極主義、接近司法、人權律師、公民社會