

ARTICLES

SOCIAL ORGANIZATION OF RIGHTS: FROM RHETORIC TO REALITY

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ABSTRACT

Public interest litigation (PIL) is a form of socio-legal activism. PIL originated in the United States, and spread, through the aggressive promotion of U.S.-centric rule of law, to China, where it has had a significant impact on socio-legal activism since the 1990s. This Article explores both the process through which human rights discourse is translated into practice by activist lawyers and human rights defenders, as well as the circumstances that cause socio-legal mobilization to fail or succeed. This Article examines the collective and sustained endeavour by human rights lawyers and other activists to advocate for the rights of specific communities through a *rights complex*, composed of activist lawyers, NGO leaders, and citizen journalists, as well as supporters within state institutions, Chinese society, and the international community. This Article looks at the institutionalized manner through which legal cases facilitate socio-legal mobilization to serve the broader objectives of educating citizens, enhancing the capacity of civil society, and making the government more accountable and responsive. The principal argument is that once citizens are endowed with legal rights and institutions are put in place for their implementation, the remaining issue is raising rights-awareness among rights-bearing citizens and generate demand for rights in society and channel those rights to institutions. Lawyers and other rights defenders play an indispensable bridging function in translating rhetoric to practice.

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INTRODUCTION

Public interest litigation (PIL) is a form of socio-legal activism. Broadly defined to include prelitigation preparation, incubation, and mobilization during the court process and promotion and education following the trial, PIL originated in the United States,¹ and spread, through the aggressive promotion of U.S.-centric rule of law, to China, where it has had a significant impact on socio-legal activism since the 1990s.² Recent scholarship in transnational human rights advocacy focuses on the political and social context in which rights are practiced and local actors embedded in both international and domestic communities in appropriating and localizing human rights norms. Seen from this bottom-up perspective, researchers have studied the process by which local actors interpret, interact with and internalize global norms through programmes,³ emphasizing the organizational power and limits of local actors in appropriating global human rights norms and translating them into localized practices in specific cultural, economic, and political conditions.⁴ In Merry's words, global norms need 'to be remade in the vernacular.'⁵

1. Comment, *The New Public Interest Lawyers*, 79 *YALE L.J.* 1069 (1970); Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 *DUKE L.J.* 891, 900 (2008).

2. For studies of the US influence on public interest law in China, see Titi M. Liu, *Transmission of Public Interest Law: A Chinese Case Study*, 13 *UCLA J. INT'L L. & FOREIGN AFF.* 263 (2008); Benjamin L. Liebman *Legal Aid and Public Interest Law in China*, 34 *T. INT'L. L.J.* 211, 274 (1999); Joan Kaufman, *The Global Women's Movement and Chinese Women's Rights*, 21 *J. CONTEMP. CHINA* 585 (2012); and Cecily E. Baskir, *Crossing Borders: Creating an American Law Clinic in China*, 19 *CLINICAL L. REV.* 163 (2012).

3. Harold H. Koh, *How Is International Human Rights Law Enforced?* 74 *IND. L.J.* 1397 (1999).

4. SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006); *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* (Mark Goodale & Sally Engle Merry eds., 2007). For a useful review of literature, see Stephen Hopgood, Jack Snyder, & Leslie Vinjamuri, *Introduction: Human Rights Past, Present, and Future*, in *HUMAN RIGHTS FUTURES* 1-23 (Stephen Hopgood, Jack Snyder, & Leslie Vinjamuri eds., 2017).

5. MERRY, *supra* note 4, at 1. For local actors' construction of foreign ideas, see also Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 58 *INT'L ORG.* 239 (2004).

Once citizens are endowed with legal rights and institutions are put in place for their implementation, the remaining issue is raising rights-awareness among rights-bearing citizens and generate demand for rights in society and channel those rights to institutions. Lawyers and other rights defenders play an indispensable bridging function in translating rhetoric to practice.

This Article examines PIL in China. It explores both the process through which human rights discourse is translated into practice by activist lawyers and human rights defenders, as well as the circumstances that cause socio-legal mobilization to fail or succeed. This Article examines the collective and sustained endeavour by human rights lawyers and other activists to advocate for the rights of specific communities through a *rights complex*, composed of activist lawyers, NGO leaders, and citizen journalists, as well as supporters within state institutions, Chinese society, and the international community.⁶ This Article does not focus on individual, high-profile human rights cases.⁷ Instead, it looks at the institutionalized manner through which legal cases facilitate socio-legal mobilization to serve the broader objectives of educating citizens, enhancing the capacity of civil society, and making the government more accountable and responsive.

This Article has five Parts. Part I examines the ideas of PIL as they have been appropriated and practiced in China. Part II focuses on the roles of leaders, including lawyers and activists in the NGOs, in expanding PIL and nurturing a rights complex. Part III analyzes different strategies that have been used in promoting rights through PIL, their relative advantages, and the internal debates within the rights complex. Part IV uses the case of employment discrimination as an example to showcase the rights complex in action and the difficulties lawyers and NGO leaders encounter in advancing rights through PIL.

I. IDEAS

To change a stagnant system, an external shock, often through a fresh or “subversive” idea, is necessary.⁸ Foreign ideas, as interpreted by domestic actors and adopted for local context, have driven the Chinese domestic reform that begun in the late Qing Dynasty, continued through

6. The concept is inspired by Halliday, Karpik, and Feeley’s articulation of “legal complex.” See, for example, *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* (Terence C. Halliday, Lucien Karpik, & Malcolm M. Feeley eds., 2007).

7. Hualing Fu, *The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State*, 27 *J. CONTEMP. CHINA* 554 (2018); Hualing Fu & Han Zhu, *After the July 9 (709) Crackdown: The Future of Human Rights Lawyering*, 41 *FORDHAM INT’L L.J.* 1135 (2018); and Eva Pils, *The Party’s Turn to Public Repression: An Analysis of the ‘709’ Crackdown on Human Rights Lawyers in China*, 3 *CHINA L. & SOC’Y R.* 1 (2018).

8. MERRY, *supra* note 4.

Republican China, and recommenced in the post-Mao era.⁹ Indeed, the success of the post-Mao reform depended on the implementation of the open-door policy and therefore China's ability to adapt to foreign norms. This increased global engagement inspired international human rights ideas and guided socio-legal movements in China. China is a latecomer in constructing its legal system to offer protection for legal rights. Similar to other latecomers, importation and appropriation of foreign ideas are crucial for the seeding, incubation and growth of rights discourse and practice.

Since legal activism is guided by a moral vision of positive social change, ideas that are appropriated are often regarded as progressive, with liberating and emancipating impacts. As such, these ideas tend to be liberal-oriented and offer a fresh alternative to the traditional focus on community, state, and responsibilities.¹⁰ Therefore, these appropriated, liberal ideas serve multiple functions: they raise awareness, educate the public, allow for alternative world views, and provide new tools to solve longstanding problems.

For example, consider the imported notion of sexual harassment and domestic violence. Appropriated understanding of these issues has taught Chinese women to reexamine their status in society and their family and to combat verbal and physical abuse through socio-legal action. Another example is discrimination in the workplace. One job seeker understood employment discrimination, not only did they become aware of blatant discriminatory practices, but they also were newly empowered, morally and legally, to challenge them. Legal rights, which give citizens a right to legal action, coupled with facilitative tools such as legal aid and NGO support, are instrumental in empowering and energizing a population once subjected to arbitrary exercises of power. In addition, ideas empower people to better frame their grievances and claims, thereby enabling them to articulate and assert their positions in more effective and forceful ways.¹¹

An important question, however, remains. At a micro level, how was the rights discourse accepted in China and then turned into effective rights practice? After a continuous legal reform over four decades, human rights discourses now abound in China, but few of them prove to trigger sustained legal activism. What are the circumstances in which human right discourses have become mainstreamed, endorsed officially, and embraced popularly? What is the process through which a human right discourse is effectively put into practice and becomes operational?

9. MARINA SVENSSON, *DEBATING HUMAN RIGHTS IN CHINA: A CONCEPTUAL AND POLITICAL HISTORY* (2002); ANDREW J. NATHAN, *CHINESE DEMOCRACY* (1986); JEDIDIAH J. KRONCKE, *THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW* (2016).

10. MERRY, *supra* note 4, at 4.

11. COMM'N ON LEGAL EMPOWERMENT OF THE POOR, *MAKING THE LAW WORK FOR EVERYONE* (2008).

Regime type determines the acceptability of the kind of rights. China's authoritarian system strictly limits political participation and associated civil and political rights. For the Party-state, political rights and collective actions pose a challenge to the Party's monopoly of political power, and therefore are tightly controlled.¹² Indeed, even mentioning rights may become problematic and offensive, as illustrated by the recent imposition by the Party of the Seven Prohibitions.¹³ While the Party-state has firmly rejected or limited a wide range of political rights, it cannot absolutely prohibit them with equal effectiveness. The degree of religious freedom, for example, varies greatly depending on the type of faith, the perceived risk and level of tolerance; religious practices in Xinjiang and Tibet are subject to the tightest, quasi-military controls, followed by "evil cults," and then underground Christian churches.¹⁴ Repression of freedom of speech through political dissent principally targets known dissidents and their organized activities.¹⁵ Freedom of association is generally restricted although unregistered societies and informal workers' groups are occasionally tolerated.¹⁶

Because state economic interests matter in China's developmental state, social and economic rights that directly impact peoples' livelihoods are often quickly accepted, repeatedly claimed, and mainstreamed. The concept of consumer rights, for example, arrived in China earlier than other rights and have been routinely practiced and well-institutionalized. In relation to consumer protection, a synergy has developed between the state, business, and society to enhance the protection of consumers' rights and interests, in particular on matters relating to food medicine

12. The prosecution of Liu Xiaobo illustrates the Party's hostility toward critical political speech. Liu was sentenced to eleven years imprisonment for his harsh criticism of the Party and for advocating the end of the one-party rule through election. See JEAN PHILIPPE BEJA, HUALING FU, & EVA PILS, *LIU XIAOBO, CHARTER 08, AND THE LIMITS OF CHINA'S POLITICAL REFORM* (2012).

13. Benjamin Carlson, *7 Things You Can't Talk About in China*, PUBLIC RADIO INTERNATIONAL:GLOBALPOST (Jun. 3, 2013), <https://www.pri.org/stories/2013-06-03/7-things-you-cant-talk-about-china> [<https://perma.cc/7FBM-6U6S>].

14. For an analysis of the graded control of religion, see Fenggang Yang, *The Red, Black, and Gray Markets of Religion in China*, 47 *SOCIOLOGICAL Q.* 93, 100–102 (2005); Carl Hollan, *A Broken System: Failures of the Religious Regulatory System in the People's Republic of China*, 2014 *BYU L. REV.* 733 (2014); and Shucheng Wang, *Tripartite Freedom of Religion in China: An Illiberal Perspective*, 39 *HUM. RTS. Q.* 783 (2017).

15. Hualing Fu, *Sedition and Political Dissidence: Towards Legitimate Dissent in China?*, 26 *H.K. L.J.* 210 (1996); Fu, *supra* note 7; Hualing Fu & Michael Dowdle, *The Concept of Authoritarian Law: The Chinese Case*, in *AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION* (Weitseng Chen & Hualing Fu eds., forthcoming 2019).

16. MARY E. GALLAGHER, *AUTHORITARIAN LEGALITY IN CHINA: LAW, WORKERS, AND THE STATE* (Cambridge University Press, 2017); Ivan Franceschini, *Labour NGOs in China: A Real Force for Political Change?*, 218 *CHINA Q.* 474 (2014); JENNIFER Y. J. HSU, *STATE OF EXCHANGE: MIGRANT NGOS AND THE CHINESE GOVERNMENT* (2017).

due to the potentially massive social impact.¹⁷ Rights with limited political implications have been, in general, introduced and practiced with a degree of success as seen in labor rights, criminal justice rights, and equality rights more generally.

Socio-legal activism for social and economic rights is subject to similar political constraints as political rights described above, which are all subordinated to the state's economic interest. The state promotes social and economic rights but restricts the ways in which those rights can be asserted. A defining characteristic of authoritarian legality in China is the individualization of claims and the isolation of victims. Rights are bestowed on citizens as individuals and cannot be fought for and enjoyed collectively. This "anti-solidarity impact," that is the disaggregation of groups and communities through the provision of individual rights and remedies, restricts collective action and can explain the crackdown on organized advocacy for rights.¹⁸

In addition to the political ramifications of social and economic rights, advocacy for rights is subject to economic considerations. In labor law, collective bargaining is highly restricted and when it happens in practice, the rights are contested between informal workers' groups and willing employers. The Party state often intervenes to disrupt informal bargaining through which workers organize to safeguard social stability and the interests of capital.¹⁹ Enforcement of environmental rights is particularly difficult in China because local governments are incentivized to maximize GDP growth and develop policies that protect local industries. Environmental PIL has been in place for decades, and there has been a multiplicity of reform measures to enhance enforcement. However, in comparison with state-driven economic development, environment protection remains a marginal consideration.²⁰

In addition, cultural acceptance of rights is significant. A discourse can be effectively translated into activism only when it descends the altar

17. Chang Zhipeng (常志鹏) & Cui Qingxin (崔清新), *20 Nian 20 Jianshi-Xiaofeizhe Quanyi Baohu Fa Shishi Yilai Weiquan Dashiji* (20年20件事——消费者权益保护法实施以来维权大事记) [20 Events in 20 Years—Chronicle of Events of Rights Protection since the Implementation of the Law on Protection of the Rights and Interests of Consumers], XINHUA WANG (新华网) [Xinhua Net], April 23, 2013, http://www.npc.gov.cn/npc/cwhhy/12jcw/2013-04/23/content_1792854.htm [https://perma.cc/5DSD-BFHD].

18. Ching Kwan Lee & Yuan Shen, *The Anti-Solidarity Machine? Labor Non-governmental Organizations in China*, in FROM IRON RICE BOWL TO INFORMALIZATION: MARKETS, WORKERS, AND THE STATE IN A CHANGING CHINA 173 (Sarosh Kuruvilla, Ching Kwan Lee, & Mary E. Gallagher eds., 2017); Gallagher, *supra* note 16; Hualing Fu, *Bringing Politics Back In: Access to Justice and Labour Dispute Resolution in China*, in JUSTICE: THE CHINA EXPERIENCE (Flora Sapio, Susan Trevaskes, Sarah Biddulph, & Elisa Nesossi eds., 2017).

19. GALLAGHER, *supra* note 16.

20. Benjamin van Rooij, Qiaoqiao Zhu, Li Na, & Wang Qiliang, *Centralizing Trends and Pollution Law Enforcement in China*, 231 CHINA Q. 583 (2017).

of philosophy to become part of common sense and sensibilities.²¹ An idea becomes effective only when mass ownership of the idea renders it of practical use in daily life. Advocacy for gender equality, in particular activism against gender-based discrimination, sexual harassment, and domestic violence, illustrates the importance of cultural acceptance. Although political authoritarianism is a major factor restricting organized and coordinated activism to promote equality rights, it is a cultural bias towards a conservative, patriarchic order that often makes the realization of gender equality hard in practice.²²

While gender equality is a legitimate, government-promoted discourse in China and practical efforts have been made for its implementation, the idea of gender equality has encountered formidable resistance from China's patriarchic society. In the pre-reform China, "women hold up half the sky" was one of the best known revolutionary slogans that had sent a powerful message for enhancing the status of women in society and in government, continuing a revolutionary legacy of promoting equality rights initiated at the dawn of twentieth century.²³ Since the 1980s, however, market reforms have worked to undermine the idea of gender equality by reducing the legitimacy and capacity of government regulation in social and economic activities, removing some of the protective measures designed for the promotion of gender equality, and tolerating and reinforcing discriminatory practices and the gender gap in both the public and the private sectors.²⁴ The crackdown on NGOs, including feminist ones, further entrenches and reinforces gender bias by removing organized protest and resistance.²⁵ Men are in control of political, economic, and social life, and their entrenched antiequality bias ensures that rights-friendly legislation meets insensitivity, ignorance, and, at times, outright hostility. Campaigns against sexual harassment persisted and feminists, lawyers, academics and other activists continue to fight to promulgate and enforce legal protection against sexual harassment in the work place and public spaces. However, such ideas, while aggressively promoted by certain communities, face formidable obstacles to becoming operative in a divided society.²⁶

In spite of political, economic and cultural restrictions on rights, the social and economic changes that the Party state has initiated also generate a tremendous demand for rights and indeed places rights at the heart of the reform process. The degree of acceptance of rights practice of

21. MERRY, *supra* note 4.

22. See for example, MARGERY WOLF, *REVOLUTION POSTPONED: WOMEN IN CONTEMPORARY CHINA* (1985).

23. CHRISTINA KELLEY GILMARTIN, *ENGENDERING THE CHINESE REVOLUTION: RADICAL WOMEN, COMMUNIST POLITICS, AND MASS MOVEMENTS* (1995).

24. ASIAN DEV. BANK & INT'L LABOUR ORG., *GENDER EQUALITY AND THE LABOR MARKET: WOMEN, WORK, AND MIGRATION IN THE PEOPLE'S REPUBLIC OF CHINA* (2017).

25. Hualing Fu & Han Zhu, *Transparency as Offence*, 12 J. COMP. L. 417 (2018).

26. HUMAN RIGHTS WATCH, *ONLY MEN NEED APPLY: GENDER DISCRIMINATION IN JOB ADVERTISEMENT IN CHINA* (2018).

course depends on a combination of factors, including structural change in Chinese society and new government policy initiatives responding to domestic demand and international influences within the economy. The fostering of a consumer society since the 1980s created consumer rights and made protection an unavoidable issue;²⁷ and the arrival of migrant workers in cities since the early 1990s necessitates the creation of labor rights administered through the legal system.²⁸ The spread of AIDS in China and international assistance in its prevention has energized civil society and catalyzed existing socio-legal activism for rights. Similarly, the 1995 World Women's Conference sowed the seeds for China's independent movement for gender equality.²⁹ The state has to respond to structural changes, domestic demand, and international influences in accepting rights concepts, creating a legal framework for rights, and facilitating rights practices. Even during harsh crackdowns on rights ideas and practices, lawyers and NGO leaders are still adept at identifying and exploring the ways to continue their rights-protection work in alternative locations and areas of practices.³⁰

II. LEADERS

Successful mobilization requires organization, which in turn necessitates effective leaders. Legal activism, like other activism, is a top-down process in which elite members of a community (both community leaders and lawyers), those with the requisite vision, resources and leadership skills, can translate a rights discourse into practice and catalyze a rights movement. China boasts many of these aggressive human rights lawyers who have contributed to China's rights' practice in their unique *xiaoke* (侠客) or "lone swordsman" style.³¹ However, China's rights practice is so enduring because it is embedded activism that focuses on alliance-making, consensus building in the rights complex, capacity building in NGOs, and the development of a critical citizenship among stakeholders and constituents.

Thus, China's right movement since the mid-1990s is associated with a small group of individuals who often single handedly triggered and then lead a rights movement in their respective fields. Legally trained or not, these individuals have developed a deep and sophisticated

27. Liang Huixing (梁慧星), *Zhongguo de Xiaofeizhe Zhengce he Xiaofeizhe Lifa* (中国的消费者政策和消费者立法) [*China's Policy and Legislation on Consumers*], 5 FAXUE (法学) [LAW SCI.] 20-26 (2000), <http://www.iolaw.org.cn/%5Carticle%5C2009%5C7%5C27%5C59F99F6A1ACDD327DA5AC4B41D80CA77.pdf>.

28. Gallagher, *supra* note 16.

29. Yaxue Cao, *Guo Jianmei, Zhongze, and the Empowerment of Women in China*, CHINA CHANGE (Feb. 14, 2016), <https://chinachange.org/2016/02/14/guo-jianmei-zhongze-and-the-empowerment-of-women-in-china> [<https://perma.cc/L86K-TANT>].

30. Fu & Zhu, *supra* note 7.

31. See, e.g., Wu Lei et al., *Get to Know Wang Quanzhang at Time of Peace and Prosperity*, RIGHTS DEFENSE NETWORK, (July 13, 2017), http://wqw2010.blogspot.com/2017/07/blog-post_13.html [<https://perma.cc/36EB-LVMZ>].

understanding of Chinese law, legal practices, and socio-legal activism. In addition, they led a series of rights-centric socio-legal mobilization that combines litigation, online mobilization, and street action. Those are individuals from different sectors, who at a right moment are able to appropriate ideas and put them into practices. Those practices then become mainstreamed and routinized. Wan Exiang is a leader who built the Centre for the Protection of the Rights and Interest of the Weak in the Wuhan University School of Law. He was impressed by legal aid centers in the United States when he was a visiting scholar at the Yale Law School, and with the support of Ford Foundation, brought the idea back to China in 1992. Subsequently, legal aid centers and clinics became a well-established practice, and Wuhan University remains a leader in law school legal clinic education.³² Guo Jianmei is another crucial leader in Chinese PIL. Inspired by the 1995 World Women's Conference and with the endorsement of the government, Guo, a young journalist working for a newspaper on women's affairs, again with the support of Ford Foundation, created the Women's Legal Research and Services Centre, an NGO affiliated with the Law School of Beijing University. Guo's new center became a rallying point for feminist lawyers and activists and catalyzed a bottom-up movement advocating gender equality. Guo renamed the center Beijing Zhongze Women's Legal Counseling and Service Center in 2010 after the Beijing University Law School delinked itself from center under political pressure. Zhongze was shut down by the government in 2016.³³ Lu Jun is a leader who was inspired by activism in the area of equality rights, such as advocacy for HIV carriers and AIDS patients. Lu created an organization called Yirenping, launching a decade long campaign for legal protection of the rights of Hepatitis B virus carriers contributing to the repealing of discriminatory rules and policies and in the process nurturing a generation of young lawyers and activists who have remained active in the public interest law field.³⁴ Xu Zhiyong is another leader who made his debut following the Sun Zhigang case. Xu, with his classmate Teng Biao, created the Constitutionalism Network, through which they carried out investigation and advocacy on a number of high profile issues ranging from the rights of petitioners to education rights for the children of migrant workers. Some of the advocacies were regarded as politically challenging and resulted in the deregistration of Xu's organization and his own lengthy detention. He and his team continued aggressive advocacy and organized the largest protest movement since the Falun Gong crackdown in 1999, the New Citizens Movement,

32. Wang Exiang et. al., *Wang Exiang: The Youngest Jurist of People's Republic of China*, WUHAN UNIVERSITY, (Dec. 29, 2011), <http://news.whu.edu.cn/info/1008/26520.htm> [<https://perma.cc/JUN5-J2WM>]

33. Yaxue Cao, *Guo Jianmei, Zhongze and the Empowerment of Women in China*, CHINA CHANGE, (Feb. 14, 2016), <https://chinachange.org/2016/02/14/guo-jianmei-zhongze-and-the-empowerment-of-women-in-china> [<https://perma.cc/BM3Q-DZEH>]

34. Fu Hualing, *Embedded Socio-Legal Activism in China: The Case of Yirenping*, 42 HONG KONG L.J., 245, 274 (2012).

focusing on street mobilization on cutting-edge issues such as the freedom of the press and the mandatory disclosure of personal assets of Party and State officials. This movement was harshly suppressed and Xu received a 4 years' prison term for disrupting public order.³⁵

There are many other well-known civil society leaders working on rights-centered activism. In the traditional gender equality field, well-known examples include Li Ying,³⁶ Feng Yuan,³⁷ Huang Yizhi,³⁸ the Feminist Five,³⁹ and more recently young activists behind the Chinese #MeToo movement,⁴⁰ covering a wide range of issues from sexual harassment, domestic violence and gender-based employment discrimination. Following in the footsteps of Wan Erxiang, Lin Lihong, Xiang Yan and Zhang Wanhong and his team continued their legal empowerment projects based in the Wuhan University Law School,⁴¹ Wang Canfa, Ma Jun and a few others on legal protection of environmental protection;⁴² Wang Yanhai, Li Dan and others who raised HIV/AIDS onto the

35. Eva Pils, *From Independent Lawyer Groups to Civic Opposition: The Case of China's New Citizen Movement*, 19 *ASIAN-PAC. L. & POL'Y J.* 110, 151 (2017); Michael Caster, *The contentious politics of China's New Citizens Movement*, DISQUS, (June 6, 2014), <https://www.opendemocracy.net/civilresistance/michael-caster/contentious-politics-of-china%E2%80%99s-new-citizens-movement> [<https://perma.cc/C246-B2NS>].

36. Bai Yunzhi (白韵之) & Gao Boning (高铂宁), *Li Ying: Dui Jiating Baoli, Xingsaorao, Xing Qin Hai Shuo Bu* (李莹：对家庭暴力、性骚扰、性侵害说不) [*Li Ying: Say No to Domestic Violence, Sexual Harassment and Sexual Assault*], CHINA GATE, (Feb. 6, 2018), http://cn.chinagate.cn/photonews/2018-02/06/content_50304156.htm [<https://perma.cc/2Y6G-GSSJ>]

37. XiaoWuet.al., *Feng Yuan: Anti-Gender Violence is a Lifelong Cause*, CHINA FILE, (May 26, 2018), <https://chinadigitaltimes.net/chinese/2018/05/%E5%B0%8F%E4%BA%94%E8%AE%BF%E8%B0%88-%E5%86%AF%E5%AA%9B%EF%B-C%9A%E5%8F%8D%E5%AF%B9%E6%80%A7%E5%88%AB%E6%9A%B4%E5%8A%9B%E6%98%AF%E4%B8%80%E8%BE%88%E5%AD%90%E7%9A%84%E4%BA%8B%E6%83%85> [<https://perma.cc/3NWF-95BV>]

38. Lai Yang et. al., *Fighting for Rights Through Weibo: A Young Public Interest Lawyer's Self-Cultivation*, CHINA YOUTH ONLINE, (Jan. 17, 2013), http://zqb.cyol.com/html/2013-01/17/nw.D110000zgqnb_20130117_2-12.htm.

39. Josh Rudolph, *People of the Week: The Feminist Five*, CHINA DIGITAL TIMES, (Feb. 8, 2018 6:03 PM), <https://chinadigitaltimes.net/2018/02/people-week-feminist-five> [<https://perma.cc/MQ3S-MKPP>]

40. Javier C. Hernández & Zoe Mou, *'Me Too,' Chinese Women Say. Not So Fast, Say the Censors*, N.Y. TIMES, (Jan. 13, 2018), https://www.nytimes.com/2018/01/23/world/asia/china-women-me-too-censorship.html?_ga=2.5413875.1131981438.1529416635-1872759255.1522225049 [<https://perma.cc/5WTK-CDAM>].

41. *Zhongxin Jianjie* (中心简介) [*Introduction*], WUHAN DAXUE GONGYI YU FAZHAN FALÜ YANJIU ZHONGXIN (武汉大学公益与发展法律研究中心) [WUHAN UNIVERSITY PUBLIC INTEREST AND DEVELOPMENT LAW INSTITUTE], <http://pidli.org/gwym/zxjj/2014-03-23/1.html> [<https://perma.cc/M4WH-ALXN>].

42. CENTER FOR LEGAL ASSISTANCE TO POLLUTION VICTIMS, http://www.clapv.org/english_lvshi/index.asp [<https://perma.cc/9VCY-K9D7>].

national agenda;⁴³ Huang Xuetao on the rights of mental patients;⁴⁴ Duan Yi, Tong Lihua, Huang Leping on labor rights;⁴⁵ Xie Yan from One Plus One⁴⁶ and Lü Fei from Able Development Institute on disability rights;⁴⁷ and a new generation of young leaders working on LGBT related rights.⁴⁸ Old generations of leaders may fade away, and new leaders may emerge, but effective leadership is indispensable. Without appropriate leadership, there would be no rights movement.

Leaders in China's rights movement share many core characteristics: they are charismatic, resourceful, courageous, and possess excellent organization skills. They vary in their willingness and ability to delegate work to subordinates and to nurture future leaders. Nonetheless they all, importantly, have immense credibility among the constituents they represent. Thus, their embeddedness has two dimensions.⁴⁹ First, leaders are embedded in the respective international rights communities, maintaining a close tie with foreign donors and supporters. They

43. Edward Wong, *AIDS Activist Leaves China for U.S., Citing Pressure*, NEW YORK TIMES, (May 10, 2010), <https://www.nytimes.com/2010/05/11/world/asia/11beijing.html> [<https://perma.cc/D5NE-KLE7>]; Jehangir S. Pocha, *Transcript of Interview with Li Dan*, THE BOSTON GLOBE, (March 27, 2006), http://archive.boston.com/news/world/asia/articles/2006/03_28/transcript_of_interview_with_li_dan/?page=full [<https://perma.cc/8326-YWKN>].

44. Aharon Lafraniere, *Life in Shadows for Mentally Ill in China*, N.Y. TIMES, (Nov. 10, 2010), https://www.nytimes.com/2010/11/11/world/asia/11psych.html?_r=4&ref=global-home [<https://perma.cc/FS3U-KMNJ>].

45. John Ruwitch, *Labor Movement 'Concertmaster' Tests Beijing's Boundaries*, REUTERS, (Dec. 6, 2014 6:49 PM), <https://www.reuters.com/article/us-china-labour-lawyer-insight/labor-movement-concertmaster-tests-beijings-boundaries-idUSKBN0JL00T20141207> [<https://perma.cc/U9XH-WFST>]; Jia Hepeng, *Tong's Sword of Justice*, CHINA DAILY, (Mar. 22, 2007), http://www.chinadaily.com.cn/cndy/2007-03/22/content_833508.htm [<https://perma.cc/9SEB-HTWP>]; *Beijing Yilian Labor Law Aid and Research Center*, CHINA DEVELOPMENT BRIEF (2018), <http://www.china-developmentbrief.cn/directory/beijing-legal-aid-and-research-center-of-labor> [<https://perma.cc/N5TJ-QMWS>].

46. Partners, ONE PLUS ONE, (2016), <http://www.yijiayi.org/en/index.php?catid=27> [<https://perma.cc/MW78-DP6A>].

47. ABLE DEV'T INSTITUTE, <http://www.enablecn.org> (last visited Aug. 20, 2018).

48. *ChinaFile Presents: Feminist and LGBT Activism in China*, ASIA SOCIETY, (July 28, 2016), <https://asiasociety.org/new-york/events/chinafile-presents-feminist-and-lgbt-activism-china> [<https://perma.cc/X46W-LBAQ>]; Cindy, *Activists Go to Court to Fight for LGBT Rights*, CHINA DIGITAL TIMES, (Sept. 20, 2016 8:13 PM), <https://chinadigitaltimes.net/2016/09/activists-go-court-fight-lgbt-rights-china> [<https://perma.cc/DG88-UDAJ>].

49. Similarly, Merry discusses what she refers to as "double consciousness" of local actors who "appropriate, translate, and remake transnational discourses into the vernacular" and at same time "take local stories and frame them in national and international human rights language." MERRY, *supra* note 4, at 3. For an exploration of the embedded nature of rights advocacy in China, see also CHINA'S EMBEDDED ACTIVISM: OPPORTUNITIES AND CONSTRAINTS OF A SOCIAL MOVEMENT (Peter Ho & Richard Louis Edmonds eds., 2008); Sida Liu & Terence C. Halliday, CRIMINAL DEFENSE IN CHINA: THE POLITICS OF LAWYERS AT WORK (2016); Ethan Michelson, *Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism* 113 AM. J. OF SOCIOLOGY 352 (2007).

are credible in source countries and their international reputation gives them access to foreign funding, political support of foreign governments and international organizations, and publicity in the international media. This international credibility in turn ensures a continuous flow of funding to support domestic projects. It also reduces the level of harassment and prosecution at home and further enhances their legitimacy among domestic supporters. Human rights are a global struggle, and in the aforementioned ways, the leaders of this movement achieve the necessary integration in a global network of their respective field.

Second, the leaders are also embedded in the communities they work with and with whom they have a common interest. This shared goal is a defining characteristic of public interest lawyers in China that sets them apart from other human rights lawyers in China, which are well known for their antagonistic legal relationship with the government. Human rights lawyers, however, are mostly the swordsmen-type lawyers, rushing to the rescue in places where injustice occurs and fighting heroically on behalf of the underdogs. However, they have little patience in doing the painstaking work of rights awareness-raising among the general public or capacity building in communities. While the periodical crackdown on rights lawyers may have forced them to step down the “weiquan ladders” and pick the lower-hanging fruits, this type of lawyers’ spirit to do battle with the government remains as strong as ever.⁵⁰ As one such lawyer put it vividly in reference to promoting gender equality through legal aid in domestic violence cases: “human rights lawyers prefer to battle with the single autocrat in government rather than those mini-autocrats in millions of households.”⁵¹

While ideas are usually external, which may have greater moral and political purchase in China, the underlying organization of the ideas must be indigenous; for activism to be resilient and effective, it must be bottom-up and inside-out. Thus, successful lawyer-leaders are invariably insiders. What is crucial, in the end, is a common identity to achieve a common cause, developed through frequent interpersonal connections, that binds leaders and their constituents. Connections of a personal touch are particularly powerful in China. Further, leaders who are embedded can package human rights ideas in “local cultural terms,” which make the ideas more relevant, persuasive, and effective.⁵² A shared identity between lawyers/leaders and their clients/constituents generates a strong sense of internal solidarity which, in turn, energizes members in their collective endeavors.

Shared identities may be constructed in numerous ways. First, a gender identity makes the mainstreaming and practicing of gender-based

50. For the escalation of weiquan (rights protection) lawyers and their responses to political crackdowns, see Fu Hualing & Richard Cullen, *Climbing the Weiquan Ladder: A Radicalizing Process for Rights-Protection Lawyers*, 205 CHINA Q. 40 (2011).

51. Interview with a human rights lawyer, Hong Kong, 2016.

52. Meity, HUMAN RIGHTS & GENDER VIOLENCE, *supra* note 4.

rights possible. For instance, NGO leaders and lawyers who fight for a feminist cause, either against sexual harassment, domestic violence, or gender-based discrimination, are, with rare exceptions, female. Women's rights are largely regarded as women's battle against male dominance. Since this repression is gender-based, so is resistance to it. It is a women's movement in which feminist NGOs working with female lawyers fight on behalf of female victims. Men, by and large, are mostly targets to fight against, and this entrenched sense of gender identity is hard to dilute. While there is a growing awareness as to the importance of involving males in promoting gender equality,⁵³ the gender equality field remains one organized by women, for women, and of women.

Similarly, leaders who represent the disability communities are often themselves physically challenged in one way or another. Indeed, in the rights protection communities for the disabled, a lawyer without a physical disability would find it difficult to have meaningful engagement with the disability community. While the degree to which the disability rights community is open to the outside world in building partnership varies according to the personal view of the leaders, a defining feature of disability rights practice is suspicion towards outside individuals or groups and the strongly felt view that people without disabilities cannot understand nor have the will or skill needed to represent people living with disabilities.⁵⁴

Leaders of rights-based labor activism are mostly former migrant workers who have been ritually baptized in a bloodbath of dispute and protest, learning the law and legal skills in the process. For Gallagher, it was the "informed disenchantment": a social psychological process in which migrant workers were traumatized by their experiences in the workplace and that frustration with their encounters with the legal process transformed aggrieved workers into rights defenders.⁵⁵ Factory despotism and "semi-proletarianization" created a common identity.⁵⁶ With that "collective critical consciousness" as the backdrop, NGO leaders for migrant workers like Zhu Xiaomei, Meng Han and others associated with Panyu's Workers' Service Center led by Zeng Feiyang received national attention.⁵⁷ The cultural gap between lawyers and

53. Interviews with Chinese feminist lawyers and NGO leaders in gender equality workshops that were hosted at the University of Hong Kong, 2016, 2017 and 2018.

54. Communications activists in disability NGOs and lawyers who work with such NGOs, Hong Kong, 2016.

55. GALLAGHER, *supra* note 16.

56. Chris King-Chi Chan & Pun Ngai, *The Making of a New Working Class? A Study of Collective Actions of Migrant Workers in South China*, 198 CHINA Q. 287 (2009); Pun Nagi & Lu Huilin, *Unfinished Proletarianization: Self, Anger, and Class Action among the Second Generation of Peasant-Workers in Present-Day China*, 36(5) MOD. CHINA 493 (2010); Pun Nagi & Chris King-Chi Chan, *The Subsumption of Class Discourse in China*, 35 BOUNDARY 75 (2008).

57. *China: Persecution of Labor Activists Escalates*, HUMAN RIGHTS WATCH, (Jan. 13, 2016 9:43 PM), <https://www.hrw.org/news/2016/01/13/china-persecution-labor-activists-escalates> [https://perma.cc/Z53Z-SM4C].

migrant workers is so wide that ordinarily NGO leaders are needed to bridge the two parties and assist in their communications. Labor lawyers mostly work for and with workers through NGOs and workers' groups.

Rural identity also plays a significant role in choosing leaders and representatives in rural protests over land rights, illicit fee levies and other issues pertinent to the rights of peasants.⁵⁸ As protests in Wukan and elsewhere have shown, migrants who return to their original villages from cities play an instrumental role in educating fellow peasants, designing protest strategies, and leading rural protest. Due to China's *hukou* restrictions and the rural land regime, China has a high level of "circular and return migration" through which migrant workers in cities maintain close ties to their native villages. As Lu, Zheng and Wang point out, having experienced or witnessed social-legal activism in cities, migrants from rural areas bring rights discourses and practices back to their villages. The returnees are natural leaders in rural social-legal activism due to their rural identity, their vested interest in the villages, and their enhanced capacity.⁵⁹

Who can best represent a given community has been a contentious issue human rights lawyering in China? LGBT communities are eager to have lawyers who come from within their communities, just like Yiren-ping creating its own in-house barefoot lawyers in fighting for the rights of Hepatitis B virus carriers, and would prefer lawyers sharing a similar sexual identity if possible. Some Christian lawyers, notably Zhang Kai, have strongly insisted that only lawyers with a Christian faith can represent the repressed underground churches in China; outsiders would not have the necessary theological background, but perhaps more importantly, it is said that outsiders would not have the commitment to religious freedom as believers.⁶⁰ Others strongly disagree and point out that the Falun Gong does not have any lawyers from their community and has been robustly represented by human rights lawyers, though most of these lawyers are themselves Christians. The theological difference between Christian lawyers and their Falun Gong clients does not prevent the lawyers from identifying with their clients' interest and objectives in fighting for religious freedom in general.⁶¹ However, the resistance among lawyers who otherwise fight for rights and freedom fiercely to understand and defend another faith on its unique terms and form an alliance at a higher level is hard to conquer, to say nothing of the near impossibility to mobilize Christian lawyers in China to defend the LGBT communities.

While it is possible for outside lawyers to play a leading role in a social movement, lawyers have to work with grassroots NGOs with close ties to be credible. For instance, Duan Yi, a leading labor lawyer

58. Yao Lu, et. al., *Migration and Popular Resistance in Rural China: Wukan and Beyond*, 229 CHINA Q. 2 (2017).

59. *Id.*

60. Interviews with Christian lawyers, Hong Kong, 2016.

61. *Id.*

in China in the field of promoting collective bargaining and the right to strike, made a conscientious effort to resemble migrant workers in his routine activities, including the way he dresses and eats.⁶² That approximation undoubtedly reduces the cultural distance between Duan and the workers he seeks to represent and enhances his credibility among the stakeholders. To represent petitioners in Beijing, Xu Zhiyong lived with them in shoddy tents for months, eating and sleeping together with the petitioners. According to Xu, it was this sharing that drove him in his tireless efforts to speak and act for them.⁶³ Other rights defenders go even further. To understand sex workers and better articulate their rights, a feminist activist Ye Haiyan⁶⁴ worked as a prostitute for a month. In 2008, Ye openly stated in social media that she served multiple clients and made RMB 1,500 in order to make a statement that sexual work is indeed work. In 2012 she worked in so called “ten yuan shops,” where sex workers served the urban poor and live-tweeted her encounters.

III. STRATEGIES

There are different strategies based on a diversity of leaders' positions and the demands of their constituents. There are significant fault-lines, which divide rights movements in different subfields.

The first fault line is between “elitists” and “grassrooters.” While the former aims at policy change and political impact in their advocacy, grassroots campaigners are principally concerned with more localized welfare issues. One well-known example is between Xu Zhiyong and others in relation to the promotion of education rights for migrant children. Children of migrant workers have limited access to education and frequently have no choice but to return to their place of birth to take university entrance exams (高考, *gaokao*). Should the campaign against discrimination of migrant children focus on University entrance exam as in the case of Xu's campaign⁶⁵ or should it take aim at access to elementary schools

62. Yi Zhe (易哲) & Zhou Zhi (周执), “*Pingmin Lüshi*” *Duan Yi* (“平民律师” 段毅) [*Civilian Lawyer Duan Yi*], NANFANG DUSHI BAO (南方都市报) [SOUTHERN METROPOLIS DAILY] (Mar. 11, 2013), http://epaper.oeeee.com/epaper/A/html/2013-03/11/content_2509874.htm?div=-1.

63. Xu Zhiyong (许志永), *Shangfangcun de Yici Yandaohui* (上访村的一次研讨会).

[*A Seminar in a Petitioners' Village*], ZHONGGUO GONGMIN YUNDONG (中国公民运动) [CHINA CITIZEN'S MOVEMENT], <https://cmcn.org/archives/29649> [<https://perma.cc/JZL6-F6H5>]; Xu Zhiyong (许志永), *Women Zaiyiqi-Zoujing Shangfangcun* (我们在一起——走进上访村) [*We Are Together—Entering a Petitioners' Village*], XU ZHIYONG WENJI (许志永文集) [XU ZHIYONG'S COLLECTION], http://xuzhiyong2012.blogspot.hk/2012/11/blog-post_3147.html [<https://perma.cc/HM6F-XQ3L>].

64. Ye Haiyan (叶海燕), BAIDU BAIKE (百度百科) <http://baike.baidu.com/subview/1692389/10851090.htm?fromtitle=%E6%B5%81%E6%B0%93%E7%87%95&fromid=4797653&type=syn> [<https://perma.cc/48DG-JYQY>] (last visited Oct. 17, 2018).

65. Xu provided a useful summary for his advocacy for the right to education in his closing statement to the court that sentenced him to four years' imprisonment. See Xu Zhiyong, *Freedom, Justice, and Love*, CHINAFILE, (Jan. 26, 2014), <http://www>.

as others have emphasized? Focusing on the former, the priority would be shifted to the more educated and well-off migrants and, given the nature of *gaokao*, their advocacy would aim for high level policy changes targeting the Ministry of Education. Focusing on the latter, the campaigns would be geared toward persuading local government for more spending on the education of migrant children, inclusion of more migrant students in regular schools and tolerance of special schools for migrants. Differing priorities determine the advocacy strategies deployed and in particular the attitude towards local governments: to protest with banners and posters in front of education authorities or engage with the government through persuasion and dialogue.⁶⁶

Similar divides also appear in LGBT communities with lesbian issues in particular: should the focus be on expanding legal rights in relation to the right to have a child without incurring a penalty, the right of cohabitation and related property rights, or the right to be free from government interference? Different agendas and priorities call for different strategies. Normalizing LGBT individuals demands the acceptance and tolerance of mainstream society and must be achieved by persuasion, cooperation, and resistance.⁶⁷

There is also a similar division within the broader community for gender equality. On the one side is are the mainstream NGOs and their lawyers, patiently pursuing individual complaints and offering advice through telephone hotlines; moderate in their strategies in resolving individual cases and painstakingly lobbying for legal and policy change, they work within the perimeters set by the government and partner with official institutions. On the other side are the action-oriented feminists, who are more geared to exposing abuses and scandals and demanding immediate action through naming and shaming via online publicity and flash-mob demonstrations. For them, poking the eyes of the government by publicizing scandals and demanding accountability is the best way to provoke action in the Chinese society where abuse is prevalent and action is largely limited to lip service. For their provocative actions, they are often watched by the security forces and placed under a degree of surveillance and control.⁶⁸

Those two communities work toward a common goal and both realize the value of each in maximizing gender equality in China. However, the moderate groups find it necessary to distance themselves from their more aggressive sisters for the fear that government may withdraw from

chinafile.com/freedom-justice-and-love [https://perma.cc/URT5-JQG4].

66. Mujun Zhou, *Fissures Between Human Rights Advocates and NGO Practitioners in China's Civil Society: A Case Study of the Equal Education Campaign, 2009–2013*, CHINA Q., 486, 487 (2018).

67. Interviews with a LGBT NGO leader, Hong Kong, 2018 and a lawyer who regularly gives advices to LGBT communities in China, 2015, Beijing; 2016, Hong Kong.

68. Interviews with feminist lawyers and NGO leaders in China, Hong Kong, 2017 and 2018.

their partnerships. Reliance on government funding and the possibility of participating in and influencing decisionmaking are powerful incentives for reconsidering their relations with what the government perceives to be radicals. Initially it may have been a simple disagreement as to the best strategy to adopt, it then becomes an inconvenience when government partners indicate their displeasure and reluctance to link up with “radicals”; but once the police become directly involved working with action groups it transforms into a security risk that must be managed. As one lawyer/leader explained her reluctance to invite activist feminists to workshops or other events: “police follow them wherever they go and we don’t want to see police officers around and in our workshops.”⁶⁹ Gradually the gap between the two groups widens, communications become difficult and the level of trust drops significantly.

The second fault line is between those who focus on individual cases and those who prioritize institutional and structural changes. The very idea of PIL is to cause policy and structural changes in society through impact litigation, using the legal process as an entry point for broader social and political mobilization.⁷⁰ The PIL concept is particularly fitting in China because the authoritarian political system restricts political participation and prohibits political mobilization, leaving the legal process as the only available channel to articulate and assert rights and interests. The expectation, among all human rights lawyers, has been a process of incremental reform, from individual cases to systemic change, through legal action and social-legal activism. PIL is not only legally possible, but also politically permissible in rights advocacy in China because PIL transforms a political question into a legal one and offers a technical solution where an impossible political impasse would otherwise have been reached.⁷¹

While lawyers have high expectations of PIL, it has also encountered two challenges. The first is similar to that made in the debate between elite lawyers and grassroots campaigners discussed above. Case advocacy for remedial justice and action for structural and transformative remedies are seen as alternative legal strategies independent of one another and between which lawyers and NGO leaders need to prioritize. This is a particularly acute problem for labor disputes involving work-related injuries and compensation. Resources are scarce and injured workers are placed in a precarious position. In the case of pneumoconiosis, for

69. Interviews with feminist lawyers and NGO leaders in China, Hong Kong, 2017 and 2018.

70. Within the PIL community, there is also a debate on lawyer/client relationship: should lawyers principally serve the interest of the clients, or “use” the case to promote what the lawyers regard as the public interest? For a number of reasons, including the lack of a clear ethics requirement in regulating lawyers/client relations in China, that debate has not gained any prominence.

71. Fu & Zhu, *supra* note 25; Fu Hualing & Richard Cullen, *The Development of Public Interest Litigation in China* in PUBLIC INTEREST LITIGATION IN ASIA, 9, 18, (Po Jen and Holning Lau eds., 1st ed. 2010).

example, should lawyers and rights defenders concentrate on lobbying the local government where a patient resides for assistance on behalf of the patients and their dependents (which is more feasible and directly addresses some immediate concerns), or should one raise more structural issues in labor relations that produce and continue to reproduce pneumoconiosis patients? Defenders who act in a way similar to social workers in relation to individual cases are often criticized for focusing too much on the trees at the expense of ignoring the forest. Those who insist on struggling for structural changes, such as collective action in courts as well as on the street to force the government to offer a systematic resolution to the issue, are often accused of politicizing industrial compensation cases and putting politics before the livelihood of individual workers. Activists who assist dying “dust lung” patients face those tough questions on a regular basis. They question what the meaning of justice is: remedial justice for individuals in isolated cases or a systematic resolution and structural transformation? It is in this context that we appreciate what is regarded as a rhetorical question: should one live on their knees or die standing up and fighting? In a country with six million victims of pneumoconiosis, it is sobering to consider the importance of government handouts and the fundamental limits of such an approach. Individual lawsuits offer limited help; but collective action such as demonstration is hard to organize and easy to alienate the government and put it to the other side.⁷²

This dilemma exists across a wide spectrum of PIL. Should one address the fundamental issue of religious freedom and authoritarian politics in defending Falun Gong members legally and politically, as Gao Zhisheng did before his conviction or Liu Wei and Tang Jitian did before their disbarment? Or should lawyers merely accept this “political reality” as such, plead guilty as required by the authorities and ask for leniency in the sentencing of individual cases?⁷³ Should labor lawyers focus on individual legal cases correcting individual wrongs in the workplace or alternatively attempt to effect structural change by enhancing workers’ bargaining position as a collective and even as a class? Should those who suffer from pneumoconiosis beg or should they gather to protest? Should the LGBT communities concentrate on routine legal difficulties and lobbying behind the scenes or should they raise their profiles, for example by organizing public protests in Beijing during the sensitive political period when the National People’s Congress and the China Political Consultative Conference meet in March and protest for the sake of it.⁷⁴ Should the activists behind the Chinese #MeToo publicize scandals and demand transparency and accountability or rely on institutions

72. Communications with two activists in 2018.

73. Fu Hualing, *Human Rights Lawyering in Chinese Courtrooms*, 2 CHINESE J. OF COMP. L., 270, 274 (2014).

74. Interview with a LGBT NGO leader, Hong Kong, 2018.

to sort things out in their own ways and according to their own pace?⁷⁵ The list of dilemmas goes on.

The second challenge is more fundamental and political. The sequential relationship between case advocacy and structural change may be illusionary. Repeated PIL may have led to legal victories and litigation may have served as a rallying point to catalyze socio-legal mobilization, but those successes are effectively quarantined to prevent the virus spreading throughout the system. Legal victories continue but the regime remains resilient and the rule of law declines. For lawyers, observing the rule of law in individual cases has not clearly demonstrated a strong logical relationship to fostering wider structural changes to the system. On the contrary, instead of challenging the system PIL may even enhance its credibility and the capacity of legal institutions.⁷⁶ In the aftermath of the crackdown on human rights lawyers in 2015, frustrated lawyers cast serious doubt on the impact of “impact litigation.” But there is no shortage of PIL in China, so the debate continues.

The third fault line between those who allegedly work for and with the system and those who challenge the system. Traditionally, human rights lawyers working on sensitive political cases are suspicious of legal institutions and treat courts as adversaries rather than partners to work with and rely on. That is so in part because the state in general treats challenging human rights lawyers as the enemy rather than advocates of rights. In sensitive cases, judges often bend legal rules and make decisions according to political expedience. Instead of a neutral and independent tribunal, the court represents the state in its confrontation with lawyers. Rather than a liberal-leaning complex in fighting for a limited state and a larger realm of freedom, the court is used by the Party-state to limit freedoms and as such has to be resisted and fought against.⁷⁷ Not surprisingly, when Chinese lawyers suffer, they suffer at the hands of their fellow professionals, who were trained through the same system of legal education. For human rights lawyers, their fellow members are punished or disbarred because of their aggressive defence in court and their defiance of unfair treatment and outright illegality.⁷⁸

There are others, especially those working in public interest, who insist on relying on the system to achieve concrete and limited policy

75. Interviews with feminist NGO leaders, Hong Kong, 2018.

76. Fu and Zhu, *supra* note 25.

77. Zhou Ze et al. (周泽等), *Guanyu Shandongsheng Jinanshi Sifaju Ni Dui Li Jinxing Lüshi Chufa Yishi de Lüshi Lianhe Shengming* (关于山东省济南市司法局拟对李金星律师处罚一事的律师联合声明) [Lawyers' Joint Statement Regarding the Punishment Against Lawyer Li Jinxing Made by the Jinan Bureau of Justice of Shandong Province], *ZHONGGUO GONGMIN YUNDONG* (中国公民运动) [CHINA CITIZEN'S MOVEMENT] (Dec. 3, 2016), <https://cmcn.org/archives/28068> [<https://perma.cc/CY29-X9PE>].

78. Shi Ping et al., *Five Lawyers Write to Minister of Justice: Cease the Campaign-style Political Crackdown Against China's Lawyers*, *CHINA CHANGE* (Feb. 28, 2018), <https://chinachange.org/2018/03/02/five-lawyers-write-to-minister-of-justice-cease-the-campaign-style-political-crackdown-against-chinas-lawyers> [<https://perma.cc/CDG6-FU43>].

objectives. Grassroots campaigners for the children of migrant workers rely on the goodwill of the local education system and generosity of local governments to fund extra schools. Dying pneumoconiosis patients desperately need their local government to offer a helping hand, and women's groups working on domestic violence are nudging the police and courts to be more interventionist and forceful in encountering domestic abuses. Government is seen as the key in solving difficult social and economic problems and in protecting rights in general. Radical actions against the state risk alienating the mainstream rights supporters, as the debate on the effective approach to the right to education between Xu Zhiyong and his supporters show.⁷⁹

In any event, the "system" does not have a single interest or voice and what is meant by the Party state can and must be unpacked. Positive forces within the system therefore can be clearly identified. After all, in China's authoritarian system, mere resistance may be futile and meaningful changes have to happen from the inside out. Civil society forces should work with positive forces within the system to achieve the goal of changing the system from within. Instead of challenging or bypassing the court, for example, there is now a more critical engagement between judges and lawyers in the court room and in the court of public opinion. A common understanding is that the court is now an important site of contention which lawyers cannot afford to give up on.⁸⁰ Judicial reform with the aim of promoting judicial autonomy, professionalism and effectiveness has been an ongoing process.⁸¹ While crackdowns on human rights lawyers take place periodically, the Party-state has also made genuine efforts to expand judicial space and to accommodate legal advocacy.⁸² Lawyers increasingly find court battles can be meaningful and effective in achieving certain clearly defined goals.⁸³ The court also serves as a sig-

79. MERRY, *supra* note 4, at 5.

80. Chen Youxi (陈有西), *Xiaohe Panjue—Duo Kandao Tizhi Nei De Jiankang Liliang* (小河判决,多看到体制内的健康力量) [*Xiaohe Case—Please Pay More Attention to the Positive Forces Within the System*] (Aug. 28, 2012), CHEN YOUXI BOKE (陈有西博客) [CHEN YOUXI'S BLOG], <http://chenyouxivip.blog.sohu.com/235088127.html> [<https://perma.cc/JV2X-L647>].

81. QUANGUO RENMIN DAIBIAO DAHUI (全国人民代表大会) [NATIONAL PEOPLE'S CONGRESS], ZUIGAO RENMIN FAYUAN GUANYU RENMIN FAYUAN QUANMIAN SHENHUA SIFA GAIGE QINGKUANG DE BAOGAO (最高人民法院关于人民法院全面深化司法改革情况的报告) [REPORT ON PEOPLE'S COURTS' COMPREHENSIVELY DEEPENING JUDICIAL REFORM], (2017) http://www.npc.gov.cn/npc/xinwen/2017-11/01/content_2030821.htm [<https://perma.cc/JVG5-XCBA>].

82. *Zuigaofa Sifabu Lianhe Fawen Goujian Faguan Yu Lüshi Liangxing Hudong Guanxi* (最高法司法部联合发文构建法官与律师良性互动关系) [*The Supreme People's Court and the Ministry of Justice Jointly Issued Rules on Building Good Relationship between Judges and Lawyers*], CHINA NEWS (Apr. 24, 2018), <http://www.chinanews.com/gn/2018/04-24/8498846.shtml> [<https://perma.cc/G9YF-BLFX>].

83. Chen Guangwu (陈光武), *Qiwang Beihai—Yetan Tizhi Nei De Jiankang Liliang* (祈望北海—也谈体制内的健康力量) [*Wishes for Beihai Case—About the Positive Forces Within the System*] (Sept. 13, 2012), http://blog.sina.com.cn/s/blog_6592426a0102e25m.html [<https://perma.cc/VNJ2-3T4D>].

nificant—and often the only—entry point into a system whereby those located outside of the system can speak directly to power.

The Chinese Human Rights Bar is a polarized world with allegations constantly made between those who are perceived as working for the system and those who work against it. The former is often accused of colluding with the system to personally benefit; the latter are dubbed radicals whose high rhetoric often achieves little for the people they seek to represent. Lawyer He Huixing is a believer of compromise and has worked through what he refers to as positive forces within the system. He was the lawyer who successfully represented Chen Pingfu, whose subversion charge was dropped in a rare and significant appeal decision. While public opinion and criticisms from human rights lawyers and legal academics of the prosecution may have had some impact on the decisionmaking, the unexpected withdrawal of the prosecution's case was due largely to the impact of “positive forces” within the system.⁸⁴ That view has been widely shared by many public interest-oriented lawyers, with lawyer Chen Youxi as a core member of that group. To engage the positive forces within state institutions, it is argued that lawyers have to tone down their rhetoric and become less confrontational in their approaches. Lawyers should be competent in arguing their legal case and be forceful in exploring legal gaps where they exist while being ready to make political compromises, such as tolerating certain procedural irregularities that are arguably inevitable and refraining from “naming and shaming” their legal adversaries in government in public.⁸⁵

IV. SOCIAL ORGANIZATION OF RIGHTS

The renowned rights defender Lu Jun, who was named a key leader in China's civil society, argues persistently and forcefully that organization is the key factor in social-legal activism. By organization, Lu means a coordinated and sustained socio-legal mobilization that is case-focused and rights-based with the active participation of lawyers, NGOs, and media, aiming simultaneously at influencing the immediate legal decision, shaping public opinion and lobbying institutions for certain legal and policy changes.⁸⁶ Yirenping under Lu Jun's leadership excelled in public

84. He Huixin (何辉新), *Zhege Shijie, Qing Ni Ting Wo Shuo* (这个世界·请你听我说) [*Please Listen to Me, the World*], BOXUN (博讯) (Sept. 30, 2012), <https://www.boxun.com/news/gb/china/2012/09/201209301754.shtml> [<https://perma.cc/9V-DU-TS93>]; Song Shijing (宋识径), *Shiye Jiaoshi Chen Pingfu Fatie Beikong Dianfu Guojia Zhengquan, Yi Chehui Qisu* (失业教师陈平福发帖被控颠覆国家政权 已撤回起诉) [*Chinese Authorities Drop Inciting Subversion Case Against Laid-off Teacher Chen Pingfu*], BEIJING NEWS (新京报) (Dec. 18, 2012), <http://www.cnchu.com/view-news-114574.html> [<https://perma.cc/G7JF-GGNY>].

85. Chen Youxi (陈有西), “Sike” Zhahui Ba Zhongguo Lüshiye Daijin Gouli (“死磕”只会把中国律师业带进沟里) [*“Sike” Will Only Tarnish the Image of Chinese Lawyers*], GUANCHAZHEWANG 观察者网, July 28, 2017, http://www.guancha.cn/FaZhi/2017_07_28_420401.shtml [<https://perma.cc/7BZ5-6F4R>].

86. Fu, *supra* note 34.

interest law prior to the tightening of space around legal mobilization and, indeed, Lu himself become a victim of the ensuing systematic crack-down.⁸⁷ But is this style of public interesting lawyering sustainable in a new and visibly more hostile political environment?

While the world's attention is directed to the persecution of 709, there remains a resilient socio-legal mobilization complex with a sharp focus on rights equality. It is true that there is much less political space for activism and street action—the flash-mob type of street action has been largely stopped in such a hostile environment. But court-centric mobilization is still feasible and ongoing. Thus, there is a familiar story repeating itself in which human rights lawyers work closely with respective NGOs and use litigation as an entry point to shape and influence public opinion with the ultimate goal of achieving certain legal or policy changes. The following parts of the Article use a number of court cases concerning employment discrimination to illustrate the operation of a rights complex in China in promoting gender equality.⁸⁸

To find a plaintiff to commence litigation is a crucial but difficult first step to take in a socio-legal mobilization. Among well-known public interest litigation, it is often the case that public interest-minded lawyers or activist citizens themselves become the plaintiff/applicant who bring their individual grievance to the attention of the court.⁸⁹ It is often also

87. Josh Chin & Meet Lu Jun, *Meet Lu Jun, One of China's Most Wanted Social Activists*, WALL STREET J., (September 6, 2015), <https://www.wsj.com/articles/meet-lu-jun-one-of-chinas-most-wanted-social-activists-1441521914> [<https://perma.cc/S6ST-YE54>].

88. See, e.g. Cao Ju (Huaming) Su Beijing Shi Haidian Qu Xin Juren Peixun Xuexiao (曹菊 (化名) 诉北京市海淀区新巨人培训学校) [Cao Ju (Pseudonym) v. Beijing Haidian District New Giants Training Sch.] (2012); Huang Rong (Huaming) Su Xindongfang Pengren Xuexiao (黄蓉 (化名) 诉新东方烹饪学校) [Huang Rong (Pseudonym) v. New East Cooking Sch.] (2014); Ma Hu (Huaming) Su Beijing Shi Youzheng Sudi Wuliu Youxian Gongsi (马户 (化名) 诉北京市邮政速递物流有限公司) [Ma Hu (Pseudonym) v. Beijing Post Speedy Mail and Logistics Co. Ltd.] (2015); Gao Xiao (Huaming) Su Guangzhou Huishijia Jingji Fazhan Youxian Gongsi (高晓 (化名) 诉广州惠士佳经济发展有限公司) [Gao Xiao (Pseudonym) v. Guangzhou Huishijia Econ. Dev. Co. Ltd.] (2016) (court decisions are on file with author). For a detailed analysis of the cases relating to employment discrimination, see Huang Yizhi (黄溢智), *Tuokuan Xingbie Jiuye Qishi Anjian De Sifa Jiuji—Cong Guangzhou Huishijia Xingbie Jiuye Qishi An Tanqi* (拓宽性别就业歧视案件的司法救济—从广州惠食佳性别就业歧视案谈起) [*Improving Judicial Remedies for Gender-based Employment Discrimination Cases—Gao Xiao v. Guangzhou Huishijia Company*], 4 FANQUISHIFA PINGLUN (反歧视评论) [ANTI-DISCRIMINATION L. REV.] 138 (2017). For a broader empirical survey, see Huang Zhouzheng, *Zhichang Xingbie Qishi An de Shizheng Fenxi* (职场性别歧视的实证分析) [*An Empirical Analysis of Gender-based Discrimination at Workplace*] 4 FANQUISHIFA PINGLUN (反歧视评论) [ANTI-DISCRIMINATION L. REV.] 157 (2017). For an excellent study of the LGBT-focused litigation in China, see Siodhbhra Parkin, *LGBT Rights-Focused Legal Advocacy in China: The Promise, and Limits, of Litigation*, 41 FORDHAM INT'L L.J. 1243 (2018).

89. See, e.g., Li Fangping *Qisu Zhongguo Wangtong, Minjian Fanlongduan Di-yi'an Li'an* (李方平起诉中国网通 民间反垄断第一案立案) [*Li Fangping Sued Beijing Netcom, the National First Case Against Monopolistic Services Accepted*], BEIJING

the case that public law professors and public interest lawyers and activists file for applications for open government information, followed by agency review and litigation.⁹⁰ Professor Zhou Wei, a pioneering antidiscrimination lawyer based in Sichuan University, was well-known for his legal representation of equality rights cases, but it was less known that the plaintiffs in his cases were often either his students or people the students referred to him.⁹¹ Beyond the elite groups in public interest law, ordinary citizens are not well known for their public assertion of rights. NGOs and public interest law firms have tried, in various ways, to bring victims into the legal spotlight but without much success.⁹² Suffering and grievances abound, but victims who are willing to step to confront their perpetrators are rare. In the absence of plaintiffs, it is not surprising to find that activist lawyers, legal academics and other rights defenders find it necessary to initiate suits in their personal capacity.

Why do so few people come forward to sue? A direct answer is that litigation does not pay. While it costs little, monetarily or otherwise, to pollute, to make or sell fake goods, to discriminate, or to sexually harass, the costs of legal action are often prohibitive. Not only is the procedure itself difficult, sometimes amounting to revictimization, but even a winning result falls far short with regards to compensation for the loss and suffering of the parties involved (as is discussed below). If litigation

WANBAO (北京晚报) [BEIJING EVENING NEWS] (Sept. 21, 2008), <http://finance.sina.com.cn/g/20080921/16205326321.shtml> [<https://perma.cc/V4QM-6R2D>]; *Buman Shiming-zhi Goumai Qichepiao, Lüshi Gao Keyun Gongsi An Kaiting* (不满实名制购买汽车票 律师告客运公司案开庭) [Lawyer Sued the Bus Company Against the Real-name Registration for Long-Distance Bus Tickets], DA JIYUAN (大纪元) [THE EPOCH TIMES] (Aug. 5, 2017), <http://www.epochtimes.com/gb/17/8/4/n9496619.htm> [<https://perma.cc/2HC6-MR8W>].

90. See, e.g., *Shenzhen Lüshi Gao Tiedaobu, Shenqing Gongkai 5100 Kuangquanshui Fafang Yiju* (深圳律师告铁道部 申请公开5100矿泉水发放依据) [*Shenzhen Lawyer Sued the Ministry of Railways, Demanding Disclosure of the Legal Basis of Distributing 5100 Spring Water*], NANFANG RIBAO (南方日报) [NANFANG DAILY] (February 5, 2013), <http://news.sohu.com/20130205/n365583026.shtml> [<https://perma.cc/X5R4-KBQZ>]; *Canzhang Renshi Zhuiwen Quanguo Canbaojin Quxiang, Caizhengbu Shouda Gongkai Shouzhi Xinxi* (残障人士追问全国残保金去向 财政部首度公开收支信息) [*Person with Disability Asked About the Whereabouts of the National Disabled Employment Security Fund, and the Ministry of Finance Disclosed the Income and Expenditure Details for the First Time*], NANFANG DUSHI BAO (南方都市报) [SOUTHERN URBAN DAILY] (January 13, 2014), <http://www.cqn.com.cn/news/xfpd/szcz/dflb/830777.html> [<https://perma.cc/ALV2-FJWL>].

91. See, e.g., *Jiang Tao Su Zhongguo Renming Yinhang Chengdu Fenheng* (蒋韬诉中国人民银行成都分行) [*Jiang Tao v. Chengdu Branch, People's Bank of China*] (2002), <http://cc.scu.edu.cn/G2S/Template/View.aspx?courseId=1464&topMenuId=132263&action=view&type=1&name=&menuType=1&curfolid=143880> [<https://perma.cc/J9YU-ERQW>]; *Qiu Zi Su Shanghai Ang Li Jiaoyu Touzi Guanli Zixun Youxian Gongsi* (秋子诉上海昂立教育投资管理咨询有限公司) [*Qiu Zi v. Shanghai Angli Educational Investment and Management. Consultation Corporation*] (2007), <http://news.163.com/07/0208/07/36PT5016000120GU.html> [<https://perma.cc/TTY9-SN4S>].

92. Interviews with public interest lawyers, Hong Kong, 2017 and 2018.

boiled down simply to a rational economic decision on the part of individual plaintiff, there would be no PIL in China at all.

Changes start to precipitate once an element of public interest law and organized activism are factored into the equation. Infringement of rights takes place on a regular basis but whether an individual whose right is infringed can make a claim depends on the community that individual came from. The internal capacity of a community is clearly significant. The hepatitis B virus is common health issue that has affected the Chinese population, ranging across social and economic hierarchies including elites and ordinary persons, with systematic discrimination against carriers beginning in the 1980s. It is a community with political and economic resources that, when mobilized, can exert important influences on courts and in the public spheres more broadly.⁹³ Similarly, people who are affected by the one child policy and punitive measures associated with it—such as extra-birth fees and difficulties in enrolment in public schools of such children—can and frequently do step forward to challenge both policies and practices.⁹⁴ The community of pneumoconiosis sufferers, composed principally of migrant workers who have returned to their home villages due to their disease, are disorganized, poor and fatally ill. Therefore, this community is unable to assert the rights of its members in the same way as other communities.⁹⁵

The autonomy of a community and its relative distance from government control also affect the ability of members in that community to assert their rights. The hepatitis B virus became an issue in the 1980s. There has been no state organization to control and manage the issue in the way that gender issues are controlled and managed through women's associations or disability issues through disability associations. The absence of a direct government presence in the field creates a gap which NGOs are able to fill and thus exert influence and leadership independent of government. Yirenping, under the able leadership of Lu Jun, took the opportunity and mobilized the community in an example of successful socio-legal activism against discriminatory rules and practices in China. On the contrary, the government controls the disabled community tightly through a well-structured network with associations for the disabled at the center. As a consequence, lawyers and NGOs encounter indifference and hostility in organizing members to assert their legal rights. On issues of gender equality and labor rights, lawyers and NGOs compete directly with official representative organizations for women and workers, respectively, with lawyers and others outside the system trying to bring grievances to public attention to facilitate legal resolution

93. Fu, *supra* note 34.

94. Interview with an NGO leader specializing on the right of reproduction in China, Hong Kong, 2018.

95. Li Dai (李岱), *Bei Yiwang de Chenfei Bingren* (被遗忘的尘肺病人) [*The Forgotten Pneumoconiosis Patients*], N.Y. TIMES CHINA (Jul. 26, 2013), <https://cn.nytimes.com/china/20130726/cc26patients> [<https://perma.cc/G6ZL-DJAU>]

on one hand and official organizations wishing to internalize them so that they disappear from public scrutiny on the other.⁹⁶

The possibility of avoidance and existence of choice makes a difference in deciding whether to step out to make a claim or not. Airing a grievance is one thing, but taking legal action against an adversary is another. The latter takes courage and requires sacrifice and support. Lawsuits are often the last resort of the desperate. In the case of discrimination against Hepatitis B virus carriers, the impact is fatal because those who test positive stand to lose their opportunity to work and receive education, leaving them with no choice but to fight back in whatever way they can. Those who are discriminated against in employment on a gender basis, for example, face a different dilemma. Young women, often well-educated, may be frustrated with male-only job advertisements, but prefer to find another job opportunity where the female gender is not excluded to better use limited resources to fight a social problem.⁹⁷

In spite of all the structural barriers and variations, education clearly changes behaviors. Seminars, workshops and training on public interest law and a variety of corresponding volunteer schemes have served an enlightenment function in raising awareness and in developing a public interest identity among some of the participants. It is often those among that group of committed individuals who later become plaintiffs in public interest litigation. In other words, plaintiffs in public interest law cases come from the rights-complex, with a degree of nurturing and strategic planning. The litigation process in turn reinforces their commitment to public interest law.

Institutional support is of equal importance. Participation in public interest activities immerses one in a tightly-knitted group with a common identity. Encouragement, advice, and support from a large group are often indispensable for plaintiffs to step forward to make a legal claim. Group solidarity reduces fear and conquers isolation. Chinese law is authoritarian because it isolates individuals as legal subjects and prohibits the formation of public interest groups. As such, plaintiffs individually face mighty adversaries: workers taking on enterprises, citizens facing off against government authority, or abused women confronting their batterers. Organized support is thus indispensable in compensating for the individualizing impact of the PRC legal system. Socio-legal activism creates a group identity, a strong sense of belonging and provides a mutual support network to the effect that an individual plaintiff is no longer perceived as a lone fighter for her own rights. The plaintiff is a representative of a group and fights against a common abuse on behalf

96. Fu, *supra* note 34.

97. See, e.g., Wuda Fan Xingsaorao Jizhi Jianyi Faqiren: "Wo Shi Wenhe De Jijin Nvquan Zhuyi Zhe" (武大反性骚扰机制建议发起人: "我是温和的激进女权主义者") [*The Initiator of the Anti-Sexual Harassment Campaign at Wuhan University: "I Am a Mild and Aggressive Feminist"*], NÜQUAN ZHI SHENG (女权之声) [FEMINIST VOICES BLOG] (Apr. 24, 2018), http://blog.sina.com.cn/s/blog_67c528700102xfcx.html [<https://perma.cc/QVJ8-TEBJ>].

of the larger community. That community stands firmly behind the individual and stands ready to provide material and psychological support. Organizers, as well as the plaintiff, have a clear vision of moving from successful resolution of individual cases to empowering and energizing a larger community through collective action, and finally to certain structural changes.

Once a plaintiff is identified and prepared, a campaign can be designed and implemented. A suitable team of public interest lawyers is retained, law professors in the respective field are consulted and journalists are notified. Preexisting networks are important in energizing social support through mini-flash-mob demonstrations, sit-ins and open letter petitions. Effective socio-legal activism relies on broad networking and diverse support beyond activist lawyers and rights defenders. In initiating legal action against the one-child policy and associated measures, such as the levy of extra-birth fees, NGOs relied on the active support of population economists in government and academic institutions, who provided unwavering support in drafting news briefings, preparing legal and policy recommendations, and referring legal cases.⁹⁸ It is well known that lawyers actively approach hospitals for support in relation to the verification of pneumoconiosis and testing of Hepatitis B virus, questioning the lawfulness of involuntary commitment for psychiatric treatment and consulting economists with relation to financial feasibility studies for incorporating migrants into cities.⁹⁹

Once a case reaches court, the event is widely publicized and circulated through media, including official media (the involvement of official media may have been reduced but has not been prohibited). All the parties in the rights complex have a clear objective for the case to be educational for the general public and act as a deterrent for offending parties. Media remains a significant battle ground for public interest cases. Indeed, a significant initial battle is to have the news reported officially and in the more important part of social affairs in a newspaper instead of just as entertainment.¹⁰⁰

As the case proceeds through the legal process, experts and academics are approached and asked to provide expert evidence, such as for battered women's syndromes and the jurisprudence of equality rights,¹⁰¹

98. Interviews with NGO leaders specializing in women's rights, Hong Kong, 2018.

99. Interviews with public interest lawyers, Hong Kong, 2017 and 2018.

100. Fu, *supra* note 34; Lü Pin (吕频), *Zhengqu Zhuliu Yu Baochi Linglei-Fanguan Nüquan Xingdong Chuanbo Celüe* (争取主流与保持另类——反观女权行动传播策略) [*Seeking for Mainstream Media as Well as Alternative Media—A Review of Media Strategy of the Feminist Movement*], DOUBAN (豆瓣) (May 15, 2014), <https://www.douban.com/note/351247876> [<https://perma.cc/5PQJ-E9FT>].

101. See, e.g., Bowen, *Duihua 'Xingdongzhe' Xiao C* (对话“行动者”小C) [*Communication with 'Activist' Little C*], BEIJING TONGZHI ZHONGXIN (北京同志中心) [BEIJING LGBT CENTER] (Jan. 6, 2017), <https://site.douban.com/bjlgbtcenter/widget/notes/18221245/note/600855723> [<https://perma.cc/8QWF-5ECN>].

similar cases decided elsewhere in China would be shown to presiding judges for reference;¹⁰² a related government department, if any, may be added as an additional defendant to make the case more weighty,¹⁰³ and interviews with media are arranged, with standard lines prepared well in advance, all planned to maximize the social impact of the case.¹⁰⁴ The mobilization of the rights complex that has a proven track record in promoting rights in the past has, with some restrictions, continued in a different political environment.

A final component in the rights complex is formal institutions, the courts in particular, in expanding the sphere of freedom and in constraining the arbitrary exercise of public power in areas that are not politically sensitive. A neglected aspect in the discussion of China's rights discourse and practices is the positive contributions that legal institutions can make in improving routine justice in ordinary cases, as high-profile reversals of wrongful conviction cases in the past years have amply demonstrated. Without support or at least tolerance from state institutions, human rights discourse faces a significant, if not insurmountable, challenge in order to be translated into socio-legal activism. The court is an indispensable focal point where arguments are submitted by parties and decisions are made that affect the party and the community behind the party. Beyond the immediate case, the court is also a rallying point that may catalyze socio-legal activism and has a radiating impact on the larger society.

The resilience of PIL in an otherwise hostile political environment requires some explanation. The regime under Xi has sent two conflictingly ambivalent if equally strong messages: one is hostile and the other is tolerant. Extra-legal mobilization and associated street activism in the struggle for rights and freedoms can, in certain circumstances, be regarded as subversive and is punished harshly.¹⁰⁵ In that exceptional zone carved out for political expedience, law is largely marginal if not entirely silent. But outside this special zone, enforcement of rules that protect social and economic rights and freedoms has also become more rigorous and consequential. Even human rights lawyers who do battle in both extraordinary and ordinary cases agree that while political cases are becoming more lawless, ordinary cases are more rule-bound. The difference between the two spheres has become sharper and more defined than before.

102. Huang, *supra* note 88.

103. See, e.g., *Rensheju Shouyin Jiuye Xingbie Qishi Tousu cheng 'Beigao'* (人社局首因就业性别歧视投诉成“被告”) [*Bureau of Labor Was Sued for the First Time for Employment Discrimination on Grounds of Gender*], *DI YI CAIJING RIBAO* (第一财经日报) [YICAI] (May 10, 2013), <https://www.yicai.com/news/2691557.html> [<https://perma.cc/5PKC-A2M2>].

104. Fu, *supra* note 34.

105. See, e.g., Chris Buckley, 'Vulgar Butcher' Activist in China Is Sentenced to 8 Years for Shaming Officials, *N.Y. TIMES* (Dec. 25, 2017), <https://www.nytimes.com/2017/12/25/world/asia/china-wu-gan-sentence.html> [<https://perma.cc/EF89-CELD>]; Chris Buckley, 2 Chinese Activists Sentenced to Over 10 Years on Subversion Charges, *N.Y. TIMES* (Jun. 17, 2016), <https://www.nytimes.com/2016/06/18/world/asia/china-lu-gengsong-chen-shuqing.html> [<https://perma.cc/W78G-6PRZ>].

There continues to be a space for public interest lawyering and this space is intentionally maintained and expanded so that legal argument within the system offers an alternative to socio-legal activism including street action. With that possibility as the backdrop, human rights lawyers returned to the courtrooms immediately after the 709 crackdown to continue legal battles. Thanks to the continuous legal reform, cases that may be barred from entering the gates of justice in the past are allowed, with fewer hurdles, to enter into the system,¹⁰⁶ and once inside the system, the autonomous force of law starts to operate. Legal rights in less sensitive areas, once created, cannot be easily denied, and the remaining issue is how those battles will be fought and how legal remedies are to be crafted.

When Ma Hu sued the Beijing Post for its refusal to hire a female to deliver speedy mails, the court found against the defendant. However, the remedies were disappointing—she was awarded RMB 2,000 in damages only and there was no public apology as requested by the plaintiff. With that victory, as small as it is, lawyers moved to Guangzhou and instituted the case of Gao Xiao. Gao Xiao, an active feminist, had always wanted to be a chef in a restaurant and to that end she studied cooking and duly received a certificate. However, she realized that in practice, it was a male-only profession that she and her supporters wanted to challenge in court. An advertisement for hiring chefs came to her attention and that of the NGO she is associated with. The advertisement stated clearly that the job was for “male only.” Gao applied for the position, recorded the conversation with the company indicating discriminatory practices, and filed the case in court. With the Beijing Post case and other similar cases in the background, Gao won. However, the court also followed the Beijing court in limiting the damages to RMB 2,000 without a public apology. Gao appealed and judges at the appeal court were finally persuaded to order the defendant restaurant to make a public apology.¹⁰⁷

With those victories spreading widely among NGOs and the public interest lawyers communities in China, more plaintiffs were encouraged to come forward with their complaints and claims, and more cases were lodged. Significantly, NGOs in certain terrains are energized to scan their respective landscapes in China to identify potential legal contentions and to take respective legal actions. Activists and lawyers are alerted to possible abuses of rights and are prepared for a good fight in courts. The level of vigilance, preparedness and the fighting spirit among lawyers has manifested in political cases like Xie Yang,¹⁰⁸

106. Huang, *supra* note 88.

107. *Id.*

108. Catherine Lai, *Over 100 Chinese Lawyers Call for Release of Colleague Who Reported Torture Claims by Rights Lawyer Xie Yang*, HONG KONG FREE PRESS (May 5, 2017), <https://www.hongkongfp.com/2017/05/05/100-chinese-lawyers-call-release-colleague-reported-torture-claims-rights-lawyer-xie-yang> [<https://perma.cc/AC2Z-FRV5>]; Chen Jiangang, *How Xie Yang's Transcripts of Torture Came to Light: Lawyer Chen Jiangang Rebuts China's Smear Campaign*, CHINA CHANGE (Mar. 3, 2017), <https://>

Li Chunfu,¹⁰⁹ and Jiang Tianyong¹¹⁰ on the one hand moderate cases like Lei Yang,¹¹¹ Zhao Chunhua,¹¹² and a range of equality cases, as mentioned above. The ongoing #MeToo movement in China¹¹³ and a rare but meaningful success against censorship imposed by Sino Weibo to bar homosexual content¹¹⁴ testify to the resilience of socio-legal activism in China on the part of new generations of activist lawyers and civil society leaders.

CONCLUSION

At the end of the day, how much of a victory is winning those cases, highlighting the global human rights ideas they reflect? From one

chinachange.org/2017/03/03/how-xie-yangs-transcripts-of-torture-came-to-light-lawyer-chen-jiangang-rebuts-chinas-smear-campaign [https://perma.cc/2VRS-XB7G].

109. Simon Denyer, *A Broken Lawyer and a Hawkish Judge Cast Deep Pall Over China's Legal System*, WASH. POST (Jan. 21, 2017), https://www.washingtonpost.com/world/a-tortured-broken-lawyer-and-a-hawkish-judge-cast-deep-pall-over-chinas-legal-system/2017/01/20/1daf0ff6-dd62-11e6-b2cf-b67fe3285cbc_story.html [https://perma.cc/EVE5-FZVW].

110. Chen Jinxue & Qin Chenshou, *Statement by Lawyers Representing Jiang Tianyong Regarding the Global Times Interview*, CHINA CHANGE (Mar. 1, 2017), https://chinachange.org/2017/03/02/statement-by-lawyers-representing-jiang-tianyong-regarding-the-global-times-interview [https://perma.cc/L27G-DBVU]; Chen Jinxue (陈进学) & Qin Chenshou (覃臣寿), *Qin Chenshou Lüshi, Chen Jinxue Lüshi Guanyu Jiang Tianyong An de Lüshi Shengming* (覃臣寿律师、陈进学律师关于江天勇案的律师声明) [Statement by Lawyers Qin Chenshou and Chen Jinxue Regarding Jiang Tianyong's Case], WEIQUAN WANG (维权网) [RIGHTS DEFENSE NETWORK], http://wqw2010.blogspot.com/2016/12/blog-post_17.html [https://perma.cc/NK33-TUKM].

111. Chen Youxi (陈有西), *Chen Youxi Lüshi: Guanyu Lei Yang An Bu Qisu Hou de Jidian Shuoming* (陈有西律师：关于雷洋案不起诉后的几点说明) [Lawyer Chen Youxi: Explanations on a Few Points Regarding Decision to Not Prosecute in Lei Yang Case], WEIQUAN WANG (维权网) [RIGHTS DEFENSE NETWORK] (Dec. 26, 2106), https://wqw2010.blogspot.com/2016/12/blog-post_47.html [https://perma.cc/2KUN-42G7]; *Zhongguo Renmin Daxue 88 Ji Bufen Xiaoyou Jiu Lei Yang Tongxue Yiwai Shenwang de Shengming* (中国人民大学88级部分校友就雷洋同学意外身亡的声明) [Statement of Some Renmin University of China Class 88 Alumni Concerning Accidental Death of Classmate Lei Yang], ZHONGGUO SHUZI SHIDAI (中国数字时代) [CHINA DIGITAL TIMES] (May 16, 2011), https://chinadigitaltimes.net/chinese/2016/05/%E4%B8%AD%E5%9B%BD%E4%BA%BA%E6%B0%91%E5%A4%A7%E5%AD%A688%E7%BA%A7%E9%83%A8%E5%88%86%E6%A0%A1%E5%8F%8B%E5%B0%B1%E9%9B%B7%E6%B4%8B%E5%90%8C%E5%AD%A6%E6%84%8F%E5%A4%96%E8%BA%AB%E4%BA%A1%E7%9A%84%E5%A3%B0 [https://perma.cc/SNH6-ANMY].

112. Cao Yin & Peng Yining, *Shooting Allery Owner Wins Appeal Over Gun Sentence*, CHINA DAILY (Jan. 27, 2017), http://www.chinadaily.com.cn/china/2017-01/27/content_28064741.htm [https://perma.cc/V68L-2U7J].

113. Mimi Lau, *After #Metoo Success, Chinese Rights Activists Urge Lawmakers to Join the Fight Against Sexual Harassment*, SOUTH CHINA MORNING POST (Mar. 8, 2018), http://www.scmp.com/news/china/policies-politics/article/2136199/after-metoo-success-chinese-rights-activists-urge [https://perma.cc/KP2S-27NZ].

114. Gwyneth Ho, *China's Sina Weibo Backtracks From Gay Content Ban After Outrage*, BBC (Apr. 16, 2018), https://www.bbc.com/news/world-asia-china-43779650 [https://perma.cc/447G-YJG3].

perspective, individual cases cannot change the system due to their limited legal impact—case law does little beyond the immediate case in China's civil law legal system, and the legal system itself is subsidiary, if not marginal, in China's authoritarian political system. Significant legal change depends on and demands structural changes, which by definition is a political process requiring political mobilization—a type of collective action that authoritarian leaders will not tolerate in China. Without a meaningful political process, legal mobilization, that is case-focused and court-centric mobilization, is bound to be petty: soft in the approaches taken, incremental in objectives achieved, and negligible in terms of the challenges posed. Through the courts, lawyers have challenged discriminatory rules and practices on behalf of Hepatitis B virus carriers and others. Now, ten years later, the same lawyers have started from scratch advocating gender equality litigation, this time with less political space and experiencing a similar degree of ignorance, insensitivity, and hostility. Furthermore, the damages that a court is willing to order in successful cases is only a small fraction of the actual costs incurred. In other words, the damages are too little to encourage other victims to step forward to assert their rights or to deter would be offenders. Politically, these victories have done little to moderate power or hold government, corporate bodies and individuals accountable.

Moderate lawyers who have embedded themselves in the communities they serve offer two responses to these challenges: one answer is weak and the other answer is stronger. The weak response relies on remedial justice. That is, while well-aware of the structural constraints placed on socio-legal activism, lawyers, and NGO leaders can still choose to do whatever is possible to make a contribution. As long as there is some space to act, no matter how limited, and as long as there are cases, no matter how petty, lawyers will continue to advocate on behalf of their clients. Limited space does exist in a suffocating circumstance and lawyers can use it tactically and intelligently.

A stronger response, underpinned with a dogged fighting spirit, naturally follows. The fact that PIL has survived brutal political repression testifies to the resilience and strength of the rebellious strand of the legal profession and the civil society it aims to protect. PIL is not merely, and indeed not mainly, about winning cases in courts but about engaging and persuading powerholders to educate and empower the public. Persuasion and empowerment is necessarily a slow-paced, incremental, and long-term process. In addition, cases and battles serve to galvanize all stakeholders in the rights complex and, case-by-case, strengthens the resolve of civil society, catalyzes new movements and enhances the capacity of civil society in its ongoing contention with the Party state. Human rights advocacy is not merely a shield to fence off abuses, it is also a sword and has potential constitutive power in empowering victims and in triggering progressive change that is much larger than an individual case.

More specifically and pointedly, individual cases do trigger systematic or structural changes. There are many examples of case-driven changes engendered through PIL in the past. The abolition of China's vagrancy law was closely related to the death of Sun Zhigang,¹¹⁵ the abolition of reeducation through labor was possible because of legal mobilization in a number of high profile cases including Tang Hui and Ren Jianyu that attracted wide public attention,¹¹⁶ legal measures adopted to control forced confession and torture could not have been possible without a series of shocking scandals involving wrongful convictions in the 2000s,¹¹⁷ and Yirenping's public interest litigation, case-by-case, cumulatively made a significant contribution in reducing discrimination against Hepatitis B virus carriers and in developing a culture of equal rights and a strategy for socio-legal activism.¹¹⁸ More recently, aggressive lawyering by Xu Xin and Si Weijiang fostered a new legal interpretation to limit the abuse of gun control.¹¹⁹ Legal changes in China, for a significant part, have been scandal-triggered and case-driven. Lawyers and others, including the most radical, work largely within the political and legal perimeters to seek remedial and transformative changes. Lawyers like Gao Zhisheng, Teng Biao, Xu Zhiyong, Wang Yu and others who suffered in the 709 crackdown, as radical as they were, never entirely abandoned the traditional legal process in their fights for political freedom and have increasingly realized the importance of network-building and the need to be embedded.¹²⁰ Changing a system by working within it is a long and torturous process and PIL is a limited tool in causing structural change everywhere, as the US examples show.¹²¹ While one can argue that legal advocacy in

115. Keith 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).

116. Pu Zhiqiang (浦志强), *WO BIANHU: PU ZHIQIANG LÜSHI BIAN CÍ JI (我辩护: 浦志强律师辩护词集)* [I DEFEND: DEFENSE STATEMENT OF LAWYER PU ZHIQIANG] 324 (2015).

117. Chen Ruihua (陈瑞华), *Zhengju Guiding Yiyu Zhongjie Xingxun Bigong Yu Yuanjia Cuo'an (证据规定意欲终结刑逼供与冤假错案)* [*The Evidence Regulations to End Forced Confession and Wrongful Convictions*], NANFANG ZHOUMI TEYUE (南方周末特约) [SOUTHERN WEEKLY] (Jun. 3, 2010), <http://www.infzm.com/content/45906> [<https://perma.cc/6NNU-GLX9>].

118. Fu, *supra* note 34.

119. Yujing Liu, *China Eases Air Gun Laws After Public Outcry Over Harsh Court Rulings*, SOUTH CHINA MORNING POST (Mar. 30, 2018), <http://www.scmp.com/news/china/society/article/2139573/china-eases-air-gun-laws-after-public-outcry-over-harsh-court> [<https://perma.cc/9FPT-D92P>].

120. Chinese Human Rights Lawyers Group, *Statement Upon the Third Anniversary of the Chinese Human Rights Lawyers Group*, CHINA CHANGE (Sep. 13, 2016), <https://chinachange.org/2016/09/13/statement-upon-the-third-anniversary-of-the-chinese-human-rights-lawyers-group> [<https://perma.cc/EZQ3-G6TD>].

121. See, e.g., David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209 (2003); Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360 (2018). For a critical examination

authoritarian states cannot lead to transformative political change, and as some human rights lawyers insist, legal battles with the court rooms do not have a democratization potential, one can also argue with equal force that as long as the regime embraces a degree of legality and promulgates laws to protect a range of legal rights, rights-friendly laws can be more or less effectively enforced and rights can be more or less rigorously protected. The legal and political opportunities, as limited as they are, still exist, and demand is set to grow; the outcome depends on how lawyers, civic leaders, and society at large seize these opportunities to empower the greater society and nurture critical citizenship through social-legal activism.

of the limited role of PIL in engendering social change, see also GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2nd ed. 2008).