

# The Rights Defence Movement, Rights Defence Lawyers and Prospects for Constitutional Democracy in China

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## Abstract

Contrary to the view that democratic aspiration has been utterly marginalised in China since the 1990s, the discourse of democracy continues to flourish via the Internet and other means of communication, and a budding “rights defence movement” (*weiquan yundong*) has emerged as a new focus of the Chinese democracy movement in China. The emergence of this rights defence movement foreshadows a new, more optimistic political scenario in which transition to a stable constitutional democracy through constructive interactions between state and society may occur. This paper explores the social and political context behind the rise of the rights defence movement in China, assesses the role played by rights defence lawyers (*weiquan lushi*) in shaping the rights defence movement and speculates on the implications of the rights defence movement for China’s transition to constitutional democracy.

Democratisation of communist China is a major international as well as domestic concern. With the Chinese democracy movement shattered in 1989 after the Tiananmen Square crackdown, and with the rapid marginalisation of the dissident democratic activist leaders, a pessimistic view developed among China scholars in the late 1990s predicting that due to its political stagnation and demographic and environmental challenges China was likely to collapse and be left in a state of prolonged domestic chaos and massive human exodus (Chang 2001). More recently, a new and equally pessimistic forecast of “resilient authoritarianism” has gained currency, which argues that China’s authoritarian system is not stagnant but constantly adjusting to new environments, and that the combination of a market economy and political institutionalisation has made the current authoritarian political system sustainable for the foreseeable future (Nathan 2003, Pei 2006). Yet both of these two camps underestimate the positive political impetus for democratisation among the Chinese population and within the Chinese Communist Party itself. Contrary to the view that democratic aspiration has been utterly marginalised in China since the 1990s (Xu 1999), the discourse of democracy continues to flourish via the Internet and other means of communication, and a budding “rights defence movement” (*weiquan yundong*) has emerged as a new focus of the Chinese democracy movement in China (Feng 2004, 2008).

The emergence of this rights defence movement in connection with the new development of the legal profession foreshadows a new, more optimistic political scenario in which transition to a stable constitutional democracy through constructive interactions between state and society may occur. Legal reforms in China have come a long way since the beginning of the “reform era” in 1978 when the legal profession did not exist and there were only two laws, namely *The Constitution* and *The Marriage Law*. Over the last three decades, the ideas of a legal system, the rule of law and human rights have eventually taken roots in Chinese society; China has enacted hundreds of laws and established a modern court system and hundreds of law schools; China has actively participated in the international human rights regime, signing more than 20 international human rights conventions; and the leadership has allowed space for the growth of the legal profession, with more than 150 thousand lawyers employed at 14 thousand law firms in China today. An essential point of this paper is the interdependency of the rule of law and transition to constitutional democracy in China, a relationship in which the rights defence movement is playing a vital role. The paper explores the social and political context behind the rise of the rights defence movement in China, assesses the role played by rights defence lawyers (*weiquan lushi*) in shaping the rights defence movement and speculates on the implications of the rights defence movement for China’s transition to constitutional democracy.

### **The Rise of the Rights Defence Movement in China**

The current rights defence movement is a comprehensive movement involving all social strata throughout the country and covering every aspect of human rights. Due to a strict ban on organised opposition, rather than taking the form of a coordinated nationwide movement, the rights defence movement has instead developed as a diverse and increasingly forceful wave of isolated cases reported daily in the media, as well as public protests (“mass incidents”, the term coined by the Chinese communist party-state to describe unapproved strikes, assemblies, demonstrations, petitions, blockages, collective sit-ins or physical conflicts involved 10 or more people). Those “mass incidents” numbered 60,000 in 2003, 74,000 in 2004 and 87,000 in 2005, an average of 200 protests a day, according to official figures. (Yu 2007; Hu 2008). Some of them may involve thousands of people and result in police and paramilitary intervention leading to loss of lives. The movement is not merely “rightful resistance” of the rural poor (O’Brien and Li 2006), but has also become an urban phenomenon facilitated by the growing strength of the middle class and the latest technologies such as the Internet and mobile phones.

### *Defence of economic and social rights*

Most cases of this rights defence movement aim to defend economic and social rights, including protests by peasants against excessive taxes, levies and forced seizures of farmland; strikes of workers against low pay, arrears of pay and poor working conditions; protests by laid-off urban workers against unfair dismissal by their employers; protests by home owners against forced eviction by government and developers; protests of residents against forced relocations; campaigns by citizens for unpaid social entitlements; campaigns for the rights of women and children; and protests of affected residents against environmental pollution.

Many serious protests involve peasants, the largest and most vulnerable “disadvantaged group” (*ruoshi qunti*) in China, accounting for more than 60% of the entire population. Detrimental factors such as lack of arable land, lack of capital, poor education, poor technology and poor accessibility make the life of Chinese peasantry difficult. Their hardship is exacerbated by the state discrimination, especially the “household registration system” which limits the mobility of peasants and deprives them of the state welfare and the opportunity of employment in the state sector. Although replacement of the “people’s commune” with “household responsibility system” and other policies in the reform era since the 1980s have increased autonomy and mobility of Chinese peasants, their life chance is still greatly limited by the subsistence agriculture relying on a very small piece of land allocated to each household. While this small piece of land generates very little income for peasant households, until very recently they had been very heavily taxed and levied to fund the salaries of local cadres and public projects. Worse still, land in the rural areas is run by local governments and does not belong to individual peasants. More often than not, local cadres collaborate with property developers to use the land for commercial purposes to bring in local financial income and personal gains, with little benefits for peasants. The peasants launched protests when they were desperate. One important development in last two years was that in some areas the peasants have raised bold demand for land ownership. In December 2008, when separate groups of peasant farmers in four provinces, Heilongjiang, Jiangsu and Shaanxi and Tianjin (one of the four provincial level municipalities) published very similar statements on the internet claiming to have seized their collectively owned land from the state and unilaterally privatised it (Shi 2008). The Chinese law stipulates that all rural land is owned by the state, which leases it to individuals to use on a 30-year contract basis but can take it back with relative impunity. The peasant rebellions and appeals by lawyers and liberal

intellectuals have put tremendous pressure on the state to revisit the policies on the landownership.

In spite of the strict ban by the state, strikes by workers have become increasingly frequent in China, especially by the most vulnerable migrant workers from rural China, who are denied the right to collective bargaining or to form trade unions outside the official All China Federation of Trade Unions. Bureaucratic constraints often prevent them from obtaining legal redress for owed wages and other labour rights violations (Chan 1998). According to labour expert Han Dongfang, director of China Labour Bulletin, the Pearl River Delta in Guangdong Province, China's industrial powerhouse manufacturing one-third of Chinese exports, sees at least one major labour dispute involving at least 1000 people daily, not to mention those smaller strikes (Lee 2008). One new development is that China's Labor Contract Law, which came into effect in January 2008, has provided further encouragement for workers to assert their rights of better working condition and higher pay within the legal framework.

Massive protests in environmental protection represent a new area of social movement in China, which has witnessed a steady increase in environmental discontent and complaints induced by pollution incidents during the past few years. Apart from the growing claim of victimhood through official channels, protests led by environmental non-governmental organizations (ENGOS) and other antagonistic actions taken by the population are on a drastic rise. According to Pan Yue, deputy director of the State Environmental Protection Administration (SEPA), pollution-induced mass incidents grew by 29% every year, with more than 50,000 pollution disputes across the country in 2005 alone (Pan 2006).

#### *Defence of civil and political rights*

The cases of defending civil and political rights are also on the rise, including campaigns by lawyers, journalists and writers for the freedom of speech and press; campaigns by practitioners of the Christian house churches and Falun Gong practitioners for the freedom of religions, beliefs, assembly and association; campaigns against arbitrary detention, "reform through labour", torture and excessive death penalty; campaigns by victims of the party-state agents against injustice and abuses of public power, particularly by thousands of petitioners who flow to the national capital or provincial capitals from all over the country to seek redress from perceived injustice; Protests by migrant workers against the household

registration system and other discrimination; and protests by peasants against the irregularities and manipulation in village elections.

The fights by millions of Falun Gong followers and Christian family church members to assert their rights of beliefs and religions have attracted a great deal international attention. The Leninist party-state in China permits five official religions – Buddhism, Islam, Taoism, Catholicism and Protestantism – provided that they submitted to strict state supervision. When spiritual entrepreneurs try enticing followers on their own or anyone practicing religions without state sanction, they are banned. Falun Gong began in 1992 as a form of *qigong*, a general name describing physical and mental disciplines based loosely on traditional Chinese medical and spiritual practices. According to historian David Ownby, Falun Gong is a new version of Chinese traditional “redemptive societies.” They are organised around charismatic leaders who preach that salvation can be attained through cultivation of body and mind (Ownby 2008). On April 25, 1999, more than ten thousand Falun Gong practitioners gathered outside Zhongnanhai, the guarded compound where China's highest leaders live and work, in a day-long peaceful protest of police brutality against fellow practitioners in the neighboring city of Tianjin. Stunned and surprised, and with the fear of a potential threat to their legitimacy and control, China's paranoid leaders declared Falun Gong an “evil sect” (*Xiejiao*) and launched a campaign of brutal suppression against the group. Within a few months, the police had imprisoned tens of thousands of Falun Gong followers. The group claims that some 3,000 of its members were tortured to death in custody. Falun Gong has survived the suppression and transformed into a well-financed and well-coordinated international movement. While Falun Gong followers in exile have launched vigorous counter-charges in their own comprehensive media against the Chinese communist regime, those within China have turned into underground practitioners.

Chinese family churches (*jiating jiaohui*) are assemblies of unregistered Chinese Christians independent of the government-run Christian organisations. They are also known as the "Underground" Church or the "Unofficial" Church, although this is somewhat of a misnomer as they are collections of unrelated individual churches rather than a single unified church. They are called "family churches" because as they are not officially registered organisations and they cannot independently own property. Hence they meet in private houses, often in secret for fear of arrest or imprisonment. Family churches operate outside government regulations and restrictions, but they are not officially outlawed. Their leaders and members

are often harassed by the government officials mainly for the fear of popular mobilisation outside the government control. This persecution may take the form of arrest, a prison sentence, re-education through labour, confiscation and heavy fines. Family church members, numbering at least 50 million and accounting for 70% of total Christians in China, have rigorously fought back by organising demonstrations and defending themselves in lawsuits (Wei 2007).

In another development, illegal interception and arbitrary detention of petitioners bringing grievances to higher authorities in China have become more systematic and extensive, and hence a major concern. China's petitioning system has a long cultural and historical tradition dating back to imperial China and remains in place under the Communist rule. The legal basis for the current petitioning system, known as the Letters and Visits system, is provided by the Chinese Constitution which protect the rights to petition and the State Council Regulations on Letters and Visits, which provides a systematic and coherent framework for the practices of petitions. The Chinese government encourages petitions and has an extensive governmental bureaucracy to handle them, because the party-state needs the petitioning system as a window to understand the sources of social problems and unrest and as a release valve to maintain social stability, in the absence of other channels to raise grievances, politically-charged grievances in particular. However, officials at all levels of government have a vested interest in preventing petitioners from speaking up about the mistreatment and injustices they have suffered. Local authorities in particular have always been motivated to prevent information about rights abuses committed at the local level from reaching higher authorities. As petitioners bring complaints about lower levels of government to higher authorities, they face harassment and retaliation. After 2003, when the Custody and Repatriation System that controlled population movement by detention and forced return to their places of household registration was abolished, the Chinese government has developed a complex extra-legal system to intercept, confine, and punish petitioners in order to control and silence them, often employing brutal means such as assault, surveillance, harassment of family members, kidnapping, and incarceration in secret detention centres (known as 'black jails'), psychiatric institutions and Re-education through Labour Camps. The interception of petitioners violates a number of basic human rights, such as the rights to freedom of expression, to liberty and security of person, and to freedom from torture and other cruel, degrading or inhumane treatment. Petitioners, officially estimated to be 10 million, believe strongly that their rights

have been violated and persist to seek redress, but they are amongst those most vulnerable to human rights abuses in China today (CHRD 2008).

### **Factors contributing to the rise of the rights defence movement**

Qin Hui, one of the most important Chinese scholars concerned with rights issues, has argued that the secret of China's current economic advantage is its low human rights standards, a salient feature of “power elite capitalism” (*quanguo ziben zhuyi*). China has become an investor's paradise because the prices of the four prime factors of production (human capital, land, credits and non-renewable resources) have been kept at artificially low levels by reducing the bargaining power of providers through political suppression (Qin 2007a). There is no doubt that one essential factor behind China's economic success is the abuse of rights and the environment (Yu 2006; Yu 2007; Wu 2008). The Chinese authorities also admitted that the current waves of “mass incidents” stem from the wide spread of rights abuses, including land seizures, forced evictions, and environmental disasters (Li 2009).

Nevertheless, the theory and practice of social movements have demonstrated that even widespread abuses do not necessarily lead to social protests; other factors may be required, such as a split within the ruling bloc, and the evolving rights consciousness and political calculation of the population (Scott 1985; Foweraker 1995). The development of the Chinese democracy movement since the 1980s and the re-emergence of liberalism and social democracy since the 1990s have greatly enhanced rights consciousness among the Chinese population (Feng 2003; Goldman 2005).

Prior to the Beijing Olympics in August 2008, a group of Chinese lawyers and activists launched a petition bearing the names of more than 14,000 people calling for ratification of *The International Covenant on Civil and Political Rights*. Again on 9 December 2008, in commemoration of the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights, rights lawyers and other rights activists published on the Internet *Chapter 08*, known as the “Chinese human rights manifesto” and signed by more than 8,000 Chinese citizens since its publication, spelling out 19 steps for rights protection and political reform, including a new constitution, freedom of speech and assembly, an independent judiciary and democratic elections for all levels of government. Thus, the sharp increase in protests against rights abuses in China since the beginning of the new century may have more to do with the raised

level of rights consciousness among ordinary Chinese citizens rather than an escalation of rights abuses.

The Chinese government has always defended its human rights record against international criticism, sometimes defensively, arguing that feeding and clothing 1.3 billion people supersedes political rights in the short term, and sometimes more aggressively, arguing that no country has the justification to interfere in the internal affairs of another country, including criticizing its human rights record. However, despite this defensive rhetoric, efforts have been made even by the Chinese Party-State to come to terms with human rights. One could argue that until the 1990s, the law had been cynically exploited by the Party-State as a tool for shoring up its dictatorship. The international discourse on human rights was officially repudiated as “bourgeois liberalism” and as a “Western conspiracy of peaceful evolution” – in other words, an attempt to overthrow the Chinese regime by stealth. However, partly due to domestic and international pressure and partly as a response to the imperatives of a developing market economy and globalisation, the Party-State has begun to engage in a real dialogue on human rights and has adopted a cautiously positive approach towards international human rights norms since the 1990s.

In 1991, the Chinese government published its first *White Paper on Human Rights*, followed by similar reports almost annually after 1995. The China Society of Human Rights Studies was established under the State Council, and numerous research centres on human rights were set up throughout the country. The government signed *The International Covenant on Economic, Social and Cultural Rights* in 1997 (ratified by the National People’s Congress in 2001) and *The International Covenant on Civil and Political Rights* in 1998 (pending ratification). In accordance with its policy of “getting on track with international practice” (*yu guoji jiegui*) since accession to the WTO in 2001, China also revised the *PRC Constitution* in 2004 to add the words “the state respects and protects human rights,” enacted a *Property Law* in 2007 that guarantees the right to private ownership of property, and announced a *State Action Plan for Human Rights* in 2008. Likewise, the Communist Party has officially replaced the concept of “class struggle” with the ideal of “building a harmonious society” with increasing emphasis on the rule of law. Furthermore, a clear distinction has been made between the rule by law (law as a tool for the rulers) and rule of law (rulers subject to the law). Rights and rights defence have now become popular topics in the State media as well as in Chinese cyberspace, which enjoy much greater freedom than in the past to comment on

political issues. It is safe to claim that the Chinese government is becoming increasingly tolerant of rights assertion, in spite of the fact that it continues to selectively crack down on individual rights defence lawyers and human rights activists.

### **The dual leadership role of the rights defence lawyers**

It is generally agreed among Chinese political activists and scholars that the rights defence movement proper in China was kick started in 2003 by two major events: the Sun Zhigang case and the SARS epidemic (Wang 2003; Fan 2005a; Tang 2005; Liu 2006; Teng 2006). In March 2003, Sun Zhigang, a resident from Hubei Province looking for employment in Guangzhou, was detained for not having proper identity documents and was beaten to death in police custody. The incident triggered nationwide protests led by journalists, human rights activists, legal scholars and lawyers against institutional discrimination and inhumane treatment of migrant workers, resulting in the abolition of State regulations on detention of migrants and the entire custody and repatriation system targeting migrant workers. The other major triggering event in early 2003 was the government's attempted cover-up of the severity of the SARS epidemic in China, which stimulated the media to a wave of unprecedented openness and investigation into government dealings in order to uphold the people's "right to know" [*zhiqing quan*] (Zhao 2005:12–14). The year 2003 has been named as "the first year of rights (*quanli yuannian*)" in China (Qiu 2003; Hu 2003; Xian 2004).

This claim sounds odd as assertion of a variety of rights has been a theme for democracy movement and other civil movements in China since the late 1970s. For example, the Educated Youth Returning to Cities Movement during 1976-1979 was a large-scale movement for the rights of residence and employment by millions of former urban students who were sent-down to the countryside by the party-state during the Cultural Revolution. The Democracy Wall Movement during 1978-1979, coincided with the Unofficial Magazines Movement, which lasted until 1981, was a pro-democracy and human rights movement spearheaded by Chinese democracy activists who demanded and practised the political rights of free speech, free press and free association. The 1989 Pro-democracy Movement led by students and joined by millions of other citizens aimed not only to clean the government from corruption but also to establish a variety of political rights, especially the right of association.

The current rights defence movement is new in two senses. First, the current rights defence movement rights are grounded in legal framework and legal process. The new features of the

Sun Zhigang case lay in the fact that it was not only a human rights case fought by ordinary citizens against the abuses by the state, but also a case that led to the positive response of institutional reform by the state to redress human rights abuses. Second, leadership is provided by the legal profession, rights defence lawyers in particular. It has been a classical story known to all that the petition sent to the National People's Congress by three young graduates holding PhD degrees in law from Beijing University, Jiang Yu, Teng Biao and Xu Zhiyong who later became rights lawyers, played a key role in bringing about a rare review on constitution violation and subsequent abolition of the notorious *Regulations on Detention and Repatriation of Beggars and Floating Population* (Kingdom Law Firm, 2008). With their professional knowledge and extraordinary courage, rights defence lawyers have fought in the frontline and provided leadership to the emerging rights defence movement (Carnes 2006; Li 2007). Some have been hailed as “heroes of our times” or “men of the hour”, and have enjoyed an increasingly high profile in the Chinese and international media. (Ji & Wang 2005; Hu 2006; Tao 2006; Ya 2006).

Actually, there is a hot debate among rights lawyers about the strategy of rights defence movement. (Teng 2006; Kahn 2007; Guo 2008) For those who take a harder line, it is futile and harmful to seek compromise with the ruling Communist Party, as even the “enlighten leader” Hu Jintao, in spite of his talks of expanding constitutional rights and strengthening the legal system, tightened the Party's control over the courts and continued to persecute rights lawyers; it is impossible to win the political cases for defendants as courts are strictly controlled by the Party; the main purpose of lawsuits is to expose the evils of Chinese legal system and the crimes of the Communist government. They also support Internet campaigns and mass demonstrations, including demonstrations involving violence. There is a tendency for mass demonstrations to become violent when the legal system proves unable to redress widespread social injustice. In June 2008, based on the rumour that a school girl was raped and killed by a son of a local official, thousands of people at Weng'an County, Guizhou Province joined together to burn down 160 offices and 42 vehicles belonging to local government and police. In July 2008, due to the disputes about ownership of rubber trees, hundreds of peasants at Menglian Village, Yunnan Province clashed with police, resulting in the death of two villagers and injury of 19 villagers and 41 policemen. Again in November 2008, due to resentment against forced eviction, about 30 evicted households and thousands of other people surrounded the city government of Longnan, Gansu Province, burning 110 offices and 22 vehicles.

For those who take a much softer line, communist bureaucracy is not monolithic and the current top communist leaders, committed to attracting foreign investment and making the country a respected world power, are running the country “according to law”; the basic duty of rights lawyers is to help citizens exercise the rights granted to them within current legal framework; through individual litigations against rights violation, rights lawyers are effecting positive policy and institutional changes and raising the awareness of the concept of human rights. Some notable victories have been won by this approach. The “stubborn as a nail household” (*dingzihu*), a family who refused to vacate their home to make way for real estate development in Chongqing, Sichuan Province, attracted international attention throughout the world in March 2007, and led to a negotiated settlement with the developers the following month. This was seen as a test case on the government’s enforcement of the new *Property Law*. Likewise, the protests by residents of the coastal city of Xiamen in the second half of 2007 forced a giant petrochemical plant (investment of US\$1.41 billion) with strong political connections and government support to be relocated elsewhere, probably the first direct concession made by the Chinese government to public demands through demonstrations. Again in January 2008, similar protests by Shanghai residents forced the Shanghai government to reconsider its Maglev Train project to connect the Hongqiao International Airport to the Pudong International Airport. In November 2008, starting from Chongqing, one of China's four provincial-level municipalities, and extending later to Jingzhou, Lanzhou, Sanya, Dali, Shantou and other cities, thousands of taxi drivers went on strikes over high operating costs, high traffic fines, shortages of natural gas and the government's lack of efforts in reining in unlicensed taxi operators who were stealing fares away. Local governments in these cities negotiated with strikers and took emergency measures to address their demands. These examples are significant because the Chinese government, with its tradition of top-down decision making, secretive deliberations and little tolerance for dissent, previously had almost no practice of engaging in real popular consultation.

Rights lawyers have not only rigorously defended various victims of rights abuses, but also played an important role as opinion leaders to link rights defence cases with political aspirations for the rule of law and constitutional democracy. In their role as professional lawyers, they not only represented clients in ordinary cases, but also took up politically sensitive cases involving victims of state power, defending political and civil rights with a focus on cases of wider social and political significance, and provided legal aid for

individual and collective rights defence action kept within the realm of law. As legal activists and opinion leaders, they publish regularly on “sensitive topics” via the Internet and other media outlets, organise or participate in political petitions, and consciously use lawsuits as social mobilisation for legal and political reform (Ji & Wang 2005).

Precisely because of this dual role, rights lawyers have been constantly harassed by the party-state: blacklisted, suspended, monitored, confined, detained or even jailed (Fu 2006; Liu 2006). Lawyers, and particularly rights defence lawyers, are vulnerable due primarily to continuing flaws in the Chinese legal system, which still does not recognise a fully independent judiciary and privileges the Party-State over any of its “enemies”, real or imagined. As late as 1996, when the *PRC Lawyers Law* was enacted, the State owned every law firm and lawyers were treated as civil servants (“State legal workers”), expected to uphold the interests of the State as their central priority. While most law firms have now been privatised (Michelson 2006), lawyers are still tightly controlled by the State’s regulatory body, the Ministry of Justice, and its provincial counterparts, the Bureaus of Justice. These Bureaus monopolise the most important powers for management of lawyers, including granting, suspending and revoking their practicing licenses, which are reviewed on an annual basis. Many rights defence lawyers have lost their licences or faced other State-sanctioned harassment simply for attempting to represent their clients in politically “sensitive” cases.

High profile cases where rights defence lawyers have been harassed include Zheng Enchong’s imprisonment for three years for representing some evicted Shanghai residents in a lawsuit against a real estate developer and the local government; Zhu Jiuhu’s detention for representing oil-field operators in Shaanxi whose contractual right to operate oil wells was unilaterally and arbitrarily taken away by the local government without proper compensation; Li Baiguang’s detention for representing peasants in Fujian Province fighting for their land rights; Guo Feixiong’s detention for representing villagers in Guangdong in an action to recall their village leaders; the suspension of Gao Zhisheng’s practicing license and the closure of his law firm for defending Falun Gong members; and the suspension of Guo Guoting’s practicing license for defending dissident journalists and Falun Gong practitioners (Wang 2006; Fu 2006; Human Rights Watch 2008).

### **State persecution of lawyers: examples**

Name	Charge and Punishment	Time	Location
Zheng Enchong	3 years in prison for “leaking state secrets”	2003	Shanghai
Li Baiguang	detention for “swindling”	2004	Fujian
Guo Guoting	suspension and exile for “inciting subversion”	2005	Shanghai
Zhu Jiuhu	detention for “disturbing social order”	2005	Shaanxi
Guo Feixiong	5 years in prison for “illegal operation”	2006	Guangdong
Gao Zhisheng	3 years in prison with 5 years of probation for “inciting subversion”; indefinite suspension	2006	Beijing
Chen Guangcheng	4 years in prison for “disturbing social order”	2007	Shandong
Li Heping	Being beaten for representing “sensitive cases”	2007	Beijing
Teng Biao	Kidnap for representing dissidents	2008	Beijing
Teng Biao and Jiang Tianyong	Suspension for offering defence to arrested Tibetans	2008	Beijing

Lawyers are no enemies of the state, and the current regime in China is eagerly promoting the use of law and lawyers to foster social stability and political legitimacy. In rights issues that do not pose a direct challenge to the legitimacy of the CCP and political stability, such as consumer rights, rights of minority shareholders, or women’s rights, lawyers’ contributions to the process have become indispensable. There is even a new trend that “legal profession” personnel [*zhengfa xi*], including lawyers, judges, legal scholars and People’s Congress deputies, are fast ascending to replace technocrats in leadership positions within the party-state (Fan 2005b; Lao 2005; Wang 2006).

The clashes between rights lawyers and the party-state indicate profound contradictions in current legal and political systems in China. On the one hand, mainly through importing legal institutions from the West, a modern legal system has been established since the late 1970s (Zou 2006). On the other hand, the Chinese Communist Party still seeks to maintain their monopoly on political power and the power structure of Leninist party-state, creating intrinsic contradictions between the rule of law and the supremacy of the Party. The constitution is granted the “highest legal authority”; courts are granted power to handle law cases; and legal norms and procedures are put in place to protect citizens against abuses. However, according to the concept of “socialist rule of law”, the principle of the “Party leadership” must be upheld and the Party power should not be undermined by law. As a consequence, rights lawyers were punished when they crossed the line drew by the Party, although the authorities have refrained from suppressing the legal activism of rights lawyers

entirely, at least partly because it operates carefully within the law and uses China's judicial system to advance its aims.

### **Implications for China's transition to constitutional democracy**

Several empirical studies have been carried out on the practices of Chinese lawyers and legal aid workers (Michelson 2006; 2007; Gallagher 2006; S.Liu 2006; Cai 2007). However, these studies do not focus on rights defence lawyers, and they conclude that the vast majority of Chinese lawyers have no interest in upholding the rights of ordinary citizens against State-supported defendants. The reasons for this reluctance are that such cases are both politically risky and often have little or no economic pay-off (Michelson, 2006). It is true that only a small minority of lawyers are actively engaged in rights defence cases, but we argue that the social and political impact of these lawyers is much broader than their numbers might suggest. It is extremely important to study this impact, and to demonstrate the link between the work of these lawyers and broader political and social reforms in China.

The rights defence movement is a tremendous boost to the initial development of civil society in China, transforming the peoples' consciousness from that of obedient subjects to autonomous citizens; transforming the orientation of many quasi-governmental organisations from the Party-State to their true constituencies among the people; and encouraging citizens to further organise themselves for civil rights purposes. As tens of thousands of NGOs and professional associations play increasingly important roles in economic, social and political change in China and the term "civil society" (*gongmin shehui*) has long become part of Chinese political vocabulary, there is a debate among China's scholars whether the concept of "civil society" can be applied in analysing this new development (Brook and Frolic 1997). Our position is that civil society should be understood as the intermediate associational realm situated between the state on the one end and the private realm (including individuals, families and firms) on the other. Contrary to the experience in the West, where civil society grew naturally from the society, the emerging civil society in China today comes from the reversing direction and is dependent on the withdrawal of, and subject to the negotiation with, the Leninist party-state, which had taken up the space of associational life and continues to deny the right of citizens to free association (Feng 2006). However, the popularising of the term "rights defence" and its daily practice have a synergistic impact in enhancing rights consciousness. There are indications that many social organisations and professional associations in China, including the official Trade Unions, the Women's Federation,

Federation of Industry and Commerce, and Lawyers Associations are all beginning to play a far more active role in rights defence within the boundaries sanctioned by the party-state. The Internet, and increasingly the state-controlled media, are also contributing to the emergence of a genuine public sphere and serious debates on social and political issues. Migrant workers, numbering more than 100 million, have started to establish their own unions, and the call for the establishment of peasant associations receives increasing support from enlightened government officials as well as the public.

The rights defence movement also contributes to the progress of the rule of law and democratic transition in China. Convinced that there is an interdependence between economic and political development, China scholars seem to have reached a consensus that China will democratise in the long run, either through an evolution entailed by sustained economic growth, openness to the outside world and the accompanying social change, or through a violent eruption when an unexpected economic breakdown challenges the remaining legitimacy of the current regime, based as it is primarily on economic performance (Brzezinski, et al 1998). However, opinions are divisive about the timing of democratisation in China, and scholars have found it hard to identify the kinds of actors who will actually bring about democracy there. There is a huge body of literature on the decline or crisis of Communist rule, the emergence of democratic ideas, and the development of the democratic movement against the Chinese Communist dictatorship (Davis 1995; Weatherley 1999; Angle 2002). However, research that focuses on the democratic movement in opposition to the Party-State has not been able to provide satisfactory answers to the questions of timing and actors, because the exiled leaders of this opposition movement have been effectively marginalised by the CCP.

Answers should be sought elsewhere. The processes of the transformation in other former communist countries have shown that most important actors were “inside the system” rather than “outside the system” (Feng 2008). Rights defence lawyers have helped to frame the demands of protesters within the broader language of defending basic human rights, and have thereby shamed the Chinese Party-State into upholding its own laws and stated ideals. As a new development, Rights lawyers played an essential role in drafting up *Chapter 08*, known by some as the “Chinese human rights manifesto”, signed by more than 8,000 Chinese citizens since its publication on the Internet on 9 December 2008, clearly articulating constitutional democracy as an alternative to one-party dictatorship in China and spelling out

19 steps for political reforms, including a new constitution, freedom of speech and assembly, an independent judiciary and democratic elections for all levels of government.

There are those who argue that progress in rule of law is irrelevant to the political transition to democracy. It is our belief that the quest for rule of law is vital for China's transition to constitutional democracy, which we would define as a political system where the legitimacy of the government is ensured by fair elections and government powers are limited by a constitution that guarantees fundamental rights through a democratic legislature, an accountable executive and an impartial judiciary. Law, even if it is the same, functions differently in different political systems. There is a fundamental difference between the "rule by law", in which the law is an instrument for rulers, and the "rule of law", in which the law is an instrument used by everyone for justice and the rulers are also subject to the law. (Maravall & Przeworski 2003). The rule of law is intrinsic to constitutional democracy but impossible in a dictatorship or autocracy, simply because dictators and autocrats are not subject to law. Some scholars have argued that China will continue reforming its legal system while maintaining the current authoritarian political regime for the foreseeable future, a so-called "thin" rule of law system (Peerenboom 2002, 2006). Yet this view underestimates the catalytic power of reforms to the legal system, particularly in the current international environment, when the Chinese government must be seen to embrace universal human rights norms in order to retain its international credibility and continue to attract foreign investment. As the government ratifies human rights and other international treaties, it faces increasing pressure both domestically and internationally to uphold the basic legal rights of its citizens, as set out in its national laws and constitution. Rights defence lawyers clearly understand this dynamic, and in seeking to assist citizens to uphold their legal rights, many of these lawyers have a much more ambitious agenda in mind. In their various writings, these rights defence lawyers clearly relate their legal work to a broader political and social reform agenda. (Teng 2007; Mo 2008; Xu 2008). They making the Chinese government more accountable to its citizens, and this will require much deeper reforms to the legal structure – such as introducing a truly independent judiciary and removing the influence of the Communist Party over the appointment and discharge of judges and lawyers. (Wang 2005) In other words, they demand a "thick" rule of law system, which can only function normally in the power structure of constitutional democracy.

## **Conclusion**

By definition, the current rights defence movement in China is a social movement asserting the constitutional rights by Chinese citizens through lawful means within the legal framework of the country. With their professional knowledge and extraordinary courage, rights defence lawyers have fought in the frontline and provided leadership to this emerging movement (Carnes 2006; Li 2007). Led by this group of rights lawyers, some citizens in China have been able to file and even win their cases at courts, achieving concessions and negotiated outcomes from the state. However, it is inevitable that rights defenders are forced to at least implicitly confront and challenge the political structure of one-party dictatorship. The system of Leninist party-state is set up in such a way so as to virtually ensure that corruption and abuse of power become endemic, since there is no access to an independent media, no independent judiciary court system, no political opposition and no accountability guaranteed by regular elections. The battles of the rights defence movement at the legal front may provide an important step for political reform toward constitutional democracy.

The impacts of rights defence cases in contemporary China have extended far beyond the judiciary domain. The most recent wave of rights defence protests has shown the determination of Chinese citizens to assert their right to be consulted in decisions that directly affect their lives, a clear sign of their awakening sense of real citizenship. For those rights lawyers, well educated and idealistic, the ultimate aim of the right defence movement is to effect a political transition from one-party dictatorship to constitutional democracy. Using the laws and courts the party-state has put in place, they are putting into effect the state rhetoric on rights and translating constitutional rights into reality. The end result can be a robust civil society with legal protection of human rights, predominance of the rule of law, and a political structure of constitutional democracy in which the government is formed through periodic elections and subject to the law.

## References

- Angle, Stephen C. 2002, *Human Rights and Chinese Thought: A Cross-cultural Inquiry*, Cambridge University Press.
- Brook, Timothy and B. Michael Frolic, eds.1997, *Civil Society in China*, M. E. Sharpe, New York.
- Brzezinski, Zbigniew, et al. 1998, 'Will China Democratize?' *Journal of Democracy*, vol. 9, no. 1, pp. 3-64.
- Cai, Yongchun 2007, 'Civil resistance and rule of law in China: the defense of homeowners' rights,' in Elizabeth J. Perry and Merle Goldman, eds., *Grassroots political reform in contemporary China*, Harvard University Press.
- Carnes, Tony 2006, 'China's new legal eagles: Evangelical lawyers spur civil rights movement forward', *Christianity Today*, September, pp.106-110.

- Chan, Anita 1998, 'Labour standards and Human Rights: The case of Chinese workers under market Socialism', *Human Rights Quarterly*, vol. 20, pp. 886-904.
- Chang, Gordon G. 2001, *The Coming Collapse of China*, Random House, New York.
- Chinese Human Rights Defenders 2008, *Silencing Complaints: Human Rights Abuses Against Petitioners in China*, [http://crdnet.org/Article/Class9/Class11/200803/20080314221750\\_8056.html](http://crdnet.org/Article/Class9/Class11/200803/20080314221750_8056.html)
- Dang, Zhiguo 2008, 'Dier ci geming de zhongda tupo: nongmin xuangao shouhui tudi suoyouquan' (A breakthrough of the second revolution: peasants announce that they will take back ownership of land), <http://www.newcenturynews.com/article/gd/200801/20080107022732.html>.
- Davis, Michael C., ed. 1995, *Human Rights and Chinese Values: Legal, Philosophical and Political Perspectives*, Oxford University Press, Hong Kong.
- Fan, Yafeng 2005a, 'Weiquan zhengzhi lun' (The politics of rights defence), <http://www.blogchina.com/new/display/87613.html>.
- Fan, Yafeng 2005b, 'Zhengfa xi he zhongguo de xianzheng zhi lu' (The legal profession camp and China's road to constitutional democracy), <http://www.sachina.edu.cn/htmldata/article/2005/10/466.html>.
- Feng, Chongyi 2001, 'Reluctant Withdrawal of Government and Restrained Development of Society: an assessment of the "small government, big society" model in Hainan', *China Perspectives*, no.35, p25-37.
- Feng, Chongyi 2003, 'The Return of Liberalism and Social Democracy in Contemporary China', *Issues and Studies*, vol. 39:no. 3 (September), pp.1-31.
- Feng, Chongyi 2004, *Xianzheng yu zhongguo* (China and Constitutional Democracy), Hong Kong Press for Social Sciences.
- Feng, Chongyi 2006, 'Marketization, Globalization and Democratization: Prospects for Civil Society in Hainan', in James Goodman, ed., *Regionalization, Marketization & Political Change in the Pacific Rim*, University of Guadalajara Press, Guadalajara.
- Feng, Chongyi 2008, 'Democrats within the Chinese Communist Party since 1989', *Journal of Contemporary China*, vol. 17, no. 57, November, p.673-688.
- Foweraker, Joe 1995, *Theorizing Social Movements*, Pluto Press, Boulder Co..
- Fu, Hualing 2006, 'When lawyers are prosecuted: the struggle for a profession in transition', *Working Paper Series*, University of Hong Kong – Faculty of Law.
- Gallagher, Mary 2006, 'Mobilizing the Law in China: "Informed Disenchantment" and the Development of Legal Consciousness,' *Law & Society Review*, vol. 40, no. 4, pp. 783-817.
- Garnau, John 2008, 'The year of the peasants' revolt', *Washington Post*, January 5.
- Goldman, Merle 2005, *From Comrade to Citizen: The Struggle for Political Rights in China*, Harvard University Press, Cambridge, Mass.
- Guo, Guoding 2008, 'Lun zhengzhi an bianhu' (On defence of political cases), [http://www.boxun.com/hero/200805/wqgc/26\\_1.shtml](http://www.boxun.com/hero/200805/wqgc/26_1.shtml)
- Hu, Ping 2003, 'Huigu 2003 nian gongmin weiquan yundong' (Reflections on rights defence movement in 2003), <http://www.bjzc.org/bjs/bc/129/03.txt>.
- Hu, Ping 2006, 'Weiquan lüshi: women shidai de yingqiong' (Rights defence lawyers: heroes of our times), [http://www.crd-et.org/article/20060212115002\\_47.html](http://www.crd-et.org/article/20060212115002_47.html).
- Human Rights in China 2006, Weiquan online. *China rights forum* 3, [http://hrichina.org/public/PDFs/CRF.3.2006/CRF-2006-3\\_Weiquan.pdf](http://hrichina.org/public/PDFs/CRF.3.2006/CRF-2006-3_Weiquan.pdf).
- Human Rights Watch 2008, "Walking on Thin Ice": *Control, Intimidation and Harassment of Lawyers in China*, Human Rights Watch, New York.
- Ji, Shuoming & Wang, Jianmin 2005, 'Zhongguo weiquan lüshi: fazhi xianfeng (Rights defence lawyers in China: the vanguard of the rule of law), *Yazhou Zhoukan* (Asia Weekly), cover story, 19:52, 25/12/2005.
- Kahn, Joseph 2007, 'Rivals on a Legal Tightrope Seek to Widen Freedoms in China', [http://topics.nytimes.com/top/reference/timestopics/people/k/joseph\\_kahn/index.html](http://topics.nytimes.com/top/reference/timestopics/people/k/joseph_kahn/index.html)
- Kingdom Law Firm 2008, 'Beida san boshi jingdian shangshu' (A classical petition by the PhD graduates from Beijing University), [www.kingdomlawfirm.com/jdwc/2008/0510/article\\_20.html](http://www.kingdomlawfirm.com/jdwc/2008/0510/article_20.html)
- Lao, Ma 2005, 'Zhengfa xi: yu gongmin shehui yiqi chengzhang' (The legal profession camp: growing together with civil society), <http://www.folkchina.org/user1/42/archives/2005/714.html>

- Lee, Kin-kwan 2008, 'Guangdong Detains 14 as Strikers Protest Reported Death', [http://www.rfa.org/english/news/china\\_strikes-20080313.html](http://www.rfa.org/english/news/china_strikes-20080313.html).
- Li, Dun, 'quntixing shijian bushi hongshui mengshou' (Mass incidents are not fierce floods and savage beasts), <http://www.newscenturynews.com/article/20090210132549.html>
- Li, Zhiying 2007, 'Dui falü weiquan de jidian renshi' (Some thoughts on rights defence by legal means), <http://www.bjsjs.org/news/news.id=3361>.
- Linz, Juan J. and Alfred Stepan 1996, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*, Johns Hopkins University Press, Baltimore.
- Liu, Lu 2006a, *Weiquan lüshi, yige weixian de zhiye* (Rights defence lawyers: a risky profession), Shenzhong shuju, Hong Kong.
- Liu, Lu 2006b, 'Guanyu weiquan yundong de jidian sikao', (Several thoughts on the rights defence movement). [http://www.chinaeweekly.com/viewarticle\\_gb.asp=4643](http://www.chinaeweekly.com/viewarticle_gb.asp=4643).
- Liu, Sida 2006, 'Client Influence and the Contingency of Professionalism: The Work of Elite Corporate Lawyers in China.' *Law & Society Review*, vol. 40, no. 4, pp.751-782.
- Michelson, Ethan 2006, 'The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work,' *Law & Society Review*, vol. 40, no. 1, pp. 1-38.
- Michelson, Ethan 2007, 'Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism,' *The American Journal of Sociology*, vol. 113, no. 2, pp. 352-414.
- Mo, Shaoping 2008, 'Chishou xindi minzhu,fazhi,xianzheng guandian er fengyu qianxing' (Experience difficulties and meet challenges while keeping the values of democracy, the rule of law and constitutional government at heart), <http://www.rq2007.cc/17/09/2008>
- Nathan, Andrew 2003, 'Authoritarian Resilience', *Journal of Democracy*, vol. 14, no. 1, pp. 6-17.
- O'Brien, Kevin J. and Lianjiang Li 2006, *Rightful Resistance in Rural China*, Cambridge University Press.
- Ownby, David 2008, *Falun Gong and the Future of China*, Oxford University Press.
- Pan, Yue 2006, 'Hexie shehui mubiao xia de huanjing youhao xing shehui' (Environmentally friendly society is congruous with the goal of building a harmonious society), July, <http://www.eedu.org.cn/Article/epedu/florilegiums/panyue/200607/9018.html>
- Peerenboom, Randall 2002, *China's Long March toward Rule of Law*, Cambridge University Press.
- Peerenboom, Randall 2006, 'Law and Development of Constitutional Democracy: Is China a Problem Case?', *Annals of the American Academy of Political and Social Science*, vol. 603, p.192.
- Pei, Minxin 2006, *China's Trapped Transition: The Limits of Developmental Autocracy*, Harvard University Press, Cambridge, Mass.
- Qin, Hui 2007a, 'Zhongguo jingji fazhan de di renquan youshi' (The advantage of poor human rights in China's economic development), <http://www.cicus.org/info/artshow.asp=46041>.
- Qin, Hui 2007b, 'Nongmin diquan liu lun' (Six commentaries on peasants' land rights), <http://bbs.tecn.cn/archiver/tid-209368.html>
- Qiu, Feng 2003, 'Xin minquan xingdong nian' (The year of new rights movement), *News Weekly*, no.161, pp.52-53.
- Scott, James C. 1985, *Weapons of the Weak: Everyday Forms of Peasant Resistance*, Yale University Press.
- Shi, Ying 2008, 'Nongmin xuangao tudi siyou, dierci tudi geming baofa,' (Claim of private land ownership and the second agrarian revolution), <http://minzhuzhongguo.org/article/8/01/2008>.
- Tang, Boqiao 2005, 'Gongmin weiquan yundong de huigu yu zhanwang' (Retrospect and prospects of the rights defence movement), <http://www.ncn.org/asp/swginfo/da-kay.asp=1/13/2005>.
- Teng, Biao 2006, 'Zhongguo weiquan yundong xiang hechu qu?' (Whither the rights defence movement in China), <http://www.peacehall.com/news/gb/pubvp/200610172340.shtml>
- Teng, Biao 2007, 'Weiquan lushi yu zhongguo cifa bu duli wenti' (Rights defence lawyers and the problem of the lack of judiciary independence), [http://www.tmd-news.blogspot.com/2007/06/blog-post\\_12.html](http://www.tmd-news.blogspot.com/2007/06/blog-post_12.html).
- Tao, Ye 2006, 'The need for a united front on rights defence', *China Rights Forum*, no.3, pp.27-31.
- Wang, Xinyou 2005, 'Yingxiang xing susong: yi ge'an tuidong minzhu fazhi' (Influential litigations: promotion of democracy and the rule of law through individual cases of lawsuits), [http://www.njrd.gov.cn/jcdt-mb\\_a200511221055.htm](http://www.njrd.gov.cn/jcdt-mb_a200511221055.htm).

- Wang, Yi 2003, '2003: "Xin minquan yundong" de faren he caolian (2003: The origins and practices of the "new civil rights movement")', *Guangcha* (Observation), 19 December.
- Wang, Yi 2006) 'Human rights lawyers and the rule-of-law camp,' *China Rights Forum*, no.3, pp.21-26.
- Weatherley, Robert 1999, *The Discourse of Human Rights in China: Historical and Ideological Perspectives*, Macmillan, Basingstoke.
- Wei, Wei 2007, 'Beijing jidujiao jiating jiaohui huodong renshi huoyi' (Release of Christian family church activists in Beijing), <http://www.voanews.com/chinese/archive/w2007-07-26-voa58.cfm>.
- Wu, Jinglian 2008, 'Zhongguo jingji zhuanxing de kunnan yu chulu' (Economic transformation in China: Problems and solutions), <http://www.newcenturynews.com/article/gd/2008020205180502.html>
- Xian, Jianglin 2004, "Quanli yuannian yu zhidu weiquan' (The first year of rights and institutional rights defence), [http://www.article1.chinalawinfo.com/article\\_detail.asp](http://www.article1.chinalawinfo.com/article_detail.asp)
- Xu, Ben 1999, *Disenchanted Democracy: Chinese Cultural Criticism after 1989*, University of Michigan Press.
- Ya, Wei 2006, 'Zhongguo weiquan renshi chengwei fengyun renwu' (Rights defence personages men of the hour), <http://www.voanews.com/chinese/archive/2006-01/w2006-01-01-voa32.cfm>
- Yu, Jianrong 2006, *Zhongguo gongren jieji zhuangkuang: Anyuan shilu* (The plight of China's working class: a true record of Anyuan), Mirror Books, New York.
- Yu, Jianrong 2007, *Dangdai nongmin de weiquan douzheng: Hunan Hengyang kaocha* (Rights defence struggles of contemporary peasants: an investigation into Hunan's Hengyang), Zhongguo wenhua chubanshe, Beijing.
- Zhang, Xingshui 2008, 'Chongshang lixing, zhunxun fazhi de weiquan zhilu' (The road of rights defence in accordance with rationalism and the rule of law), [http://www.chinesepen.org/article\\_200803180318034213.shtml](http://www.chinesepen.org/article_200803180318034213.shtml).
- Zou, Keyuan 2006, *China's Legal Reform towards the Rule of Law*, Martinus Nijhoff Publishers, Boston.