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

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The Rise of the Rights Defence Movement in China

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 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.

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.

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” (quangui 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 2007). 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). 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 dual leadership role of the rights defence lawyers (weiquan lushi)

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). 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. 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. 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.

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.
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. 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 including detention and imprisonment simply for representing their clients in politically “sensitive” cases.

The clashes between rights lawyers and the party-state indicate profound contradictions in current legal and political systems in China. On the one hand, since 1978 when the legal profession did not exist and there were only two laws (the constitution and marriage law), remarkable legal reforms
have taken place in China, importing legal institutions from the West, establishing a modern court system, enacting hundreds of laws, establishing hundreds of law schools, and participating in the international human rights regime. (Zou 2006) On the other hand, the Chinese Communist Party seeks to maintain their monopoly on political power and the entire 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**

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. 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. 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 ordinary 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 are 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.

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