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Human Rights Lawyering in Chinese Courtrooms

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Abstract

Human rights lawyering in China can be categorized into three ideal types: moderate lawyering, critical lawyering and radical lawyering. Lawyers take corresponding political stance and use different strategies in their legal representation. This article uses three examples to illustrate the different types of lawyering and the degree to which the lawyers rely on law in the legal battles. In particular, this article examines the different type of interaction between lawyers and judges: 1) a moderate type in which lawyers rely on law to make a confined and technical legal argument strictly within the boundaries of law; 2) a critical type in which lawyers use law proactively and strategically to influence public opinions and the political process so as to shape judicial decisions to a particular direction; and 3) a radical type in which lawyers challenge law and use the case to advocate a larger legal or policy change. The three cases are the defence of Xia Junfeng in his murder trial; the defence of Falun Gong practitioners who are charged with various criminal offences; and the legal support for labour activists in China who are punished for organizing industrial action.

Keywords: *Human right lawyering; Weiquan lawyers; criminal trials*

Introduction

There is an ongoing debate on how lawyers should engage the legal system and whether lawyers should act as mere legal technicians arguing narrow legal issues in the courts or should take a wider political-legal view through legal mobilization. Some human rights lawyers act aggressively in the legal process. When the Jixi police of Helongjiang province detained Tang Jietan in October 2013, while acting for a Falun Gong practitioner allegedly in illegal detention, lawyers were mobilized to Tang's rescue. These lawyers publicized the story in the social media and overseas press, rallied in front of the government office

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to demand Tang's release, and threatened further publicity and escalation. Their mobilization was successful in forcing the local political-legal authority to the negotiation table, and in the end secured Tang's release after a five-day detention. In March 2014, a group of lawyers went to Jianshanjiang of Helongjiang province, acting on behalf of a Falun Gong practitioner, to investigate an extra-judicial detention facility. Upon arrival, lawyers were beaten and placed under police detention. The news quickly spread, and more than 20 lawyers and activists went to Jianshanjiang for their rescue. Again, they filed legal complaints, rallied in front government offices, and launched a media campaign. Two of the lawyers even went on a two-day hunger strike.[1] Legal mobilization, similar to the earlier event, has become a common strategy among human rights lawyers, who use these sensitive cases as rallying points for collective action, demand their legal rights as provided by law such as the right to meet their clients in custody and the right to examine and present evidence. For their resilience and bold action, they have been given the nickname of 'die-hard lawyers'.

However, on other occasions, human rights lawyers have acted moderately and approached their cases with caution. When the police detained Xu Zhiyong, Wang Gongquan, and, more recently, Pu Zhiqiang, their lawyers, including Chen Youxi and Zhang Sizi, took a low profile approach in trying to free their activist clients. Without forming a legal team, without organizing collective action, and without any publicity in the media, as they have done in other high profile cases, lawyers decided to limit themselves to only examining the technical legal issues in preparing their defence in court. How have lawyers in China approached these politically sensitive cases and why do they decide whether to act aggressively or moderately in making their claims in the courts and beyond?

Human rights lawyering in China can be categorized into three ideal types: moderate lawyering, critical lawyering, and radical lawyering, and lawyers take a corresponding political stance and use different strategies in their legal representation.[2] In this article, I will use three examples to illustrate the different types of lawyering and the degree to which lawyers rely on law in their legal battles. In particular, this article examines the different type of interaction between lawyers and judges: (1) a moderate type in which lawyers rely on the law to make a confined and technical legal argument strictly within the boundaries of law; (2) a critical type in which lawyers use law proactively and strategically to influence public opinions and the political process so as

[1] Human Rights in China, 'Post Reeducation-through-Labor "Abolition": Lawyers and Defenders Monitor Legal Reform Implementation—The Jiansanjiang Case' <http://www.hrichina.org/en/post-reeducation-through-labor-abolition-lawyers-and-defenders-monitor-legal-reform-implementation> accessed 1 August 2014.

[2] See Fu Hualing and Richard Cullen, 'Weiquan (Rights Protection) Lawyering in an Authoritarian State: Building a Culture of Public Interest Lawyering' (2008) 59 China Journal 111. See also Sida Liu and Terence C Halliday, 'Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers' (2011) 45 Law & Society Rev 831.

to shape judicial decisions in a particular direction; and (3) a radical type in which lawyers challenge law and use the case to advocate a larger legal or policy change. The three cases that are examined include the defence of Xia Junfeng in his murder trial; the defence of Falun Gong practitioners who were charged with various criminal offences; and the legal support for labour activists in China who were punished for organizing industrial action.[3]

The world of human rights lawyering

The Chinese State has used law and legal institutions to promote economic growth, improve governance capability, and enhance legitimacy. Human rights lawyers have seized the opportunities that China's continuous legal reform has offered in order to protect marginalized groups in society, to ensure fairness in the criminal process, and to limit the arbitrary exercise of State power.[4] There are, however, radically different views among human rights lawyers about to how to define their relationship with the courts and how to engage legal institutions in general. Harsh criticisms continue to be made against each other for their different political stance and legal strategies.

Moderate lawyers insist on making strictly legal submission to the court and win their cases relying on a careful analysis of facts and law. For these lawyers, the law has a degree of autonomy that, even in China, may allow judges to make fair decisions, according to legal rules and legal procedures, under the forceful persuasion of lawyers. These lawyers tend to refrain from any extra-legal mobilization and are confident that their approach has delivered victories in the past and will continue to do so in the future, in some cases only if they can craft effective legal arguments. Moderate lawyers are not naïve and do not believe that politics does not interfere with the legal process. While they acknowledge the strong political dimension of the Chinese legal process, they insist on arguing legal matters in court because of the futility and risk involved in engaging in political arguments and the potential results that moderate lawyering may achieve in delivering justice to destitute clients. In Patricia Ewick and Susan Silby's view, moderate lawyers work 'before the law' and defer to the authority of the law.[5] Moderate lawyers believe it is their professional duty and power to argue their cases in court, even though their legal argument may be of limited impact. Therefore, the fact that lawyers act moderately does not necessarily mean they are not aware of the inherent limitations of their approach or that they are hostile to legal mobilization. They have either accepted the identity of a moderate lawyer and happily leave political advocacy to

[3] This article relies on interviews with Chinese public interest lawyers between 2008 and 2014 and a review of the court documents.

[4] Fu Hualing, 'Challenging Authoritarianism through Law: Potential and Limit' (2011) 6 National Taiwan U L Rev 339.

[5] Patricia Ewick and Susan S Silby, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998).

others or made a strategic decision to act moderately in the particular circumstances of the cases they handle.

On the opposite end of the spectrum of human rights lawyering are the radical lawyers who refuse to take legal rules and institutions for granted in certain circumstances. For radical lawyers, the current legal rules, in themselves or as they are applied, cannot offer adequate protection, if any, in the cases at hand. The law and legal institutions are often seen as part of the problem rather than as the solution, and, therefore, they need to be challenged and changed. Lawyers in this category see systematic injustice and abuse, and they examine the political root of the problem and design structural remedies accordingly. If moderate lawyers battle in courts and frame their submission within a proper legal framework that is politically acceptable, radical lawyers politicize legal issues, within the meaning of Chinese politics, and reach out for broader social and political support for their causes. These are the lawyers who work 'against the law'.[6] Radical lawyers in China have not abandoned law, however. As challenging as they have been, these lawyers are not totally defiant and have opted to act largely within the political framework and rely, with some reluctance, on the state courts for legal remedies.[7]

Most of the human rights lawyers tend to meet in the middle between the two extreme positions. These lawyers, unlike moderate lawyers, are not willing to take all of their cases to court. This category of lawyers advocates a more critical approach that goes beyond a reliance on legal rules. They question judges' professional standing and their political neutrality. These critical lawyers proactively make use of legal rules in a more dynamic and aggressive fashion. Because of the lack of judicial independence and other institutional problems facing the courts, judges cannot be trusted to give fair decisions. As a result, socio-legal mobilization is necessary to nudge the judges back towards the rule of law. Different from the radical counterparts who are 'against the law', these lawyers are reluctant to be expressly political and avoid being 'too close to the high-voltage' political lines. Critical lawyers may raise the political issues and then largely leave them to the political process. Unlike moderate lawyers who rely on law and work 'before the law', critical lawyers use law in a more dynamic way and tend to work 'with the law'.[8] In the following sections, I will use this framework to analyse lawyers' defence strategies in three different cases.

6 Ibid.

7 Similarly, resilient South African lawyers relied on law and fought apartheid in the courts. See Stephen Ellmann, 'Law and Legitimacy in South Africa' (1995) 20 Law & Social Inquiry 407; for the case of Taiwanese lawyers under authoritarian rules, see Jane Kaufman Winn and Tang-chi Yeh, 'Advocating Democracy: The Role of Lawyers in Taiwan's Political Transformation' (1995) 20 Law & Social Inquiry 561.

8 Ibid.

The case of Xia Junfeng

Xia and his wife ran a small business of selling cooked chicken on the streets without proper authorization. On 16 May 2009, while Xia was running his business as usual, he and his wife encountered the *chengguan*, officers from the infamous law enforcement authority in urban management, whose job it is to take action against unlicensed vendors on the street.[9] Under Chinese law, the *chengguan*, as an institution, has the power to seize the property of the vendors who violate urban management rules, but it does not have the power to deprive violators of their personal freedom. In this case, the officers, including three victims in the case, decided to seize a gas tank that Xia was using. A conflict ensued on the street, and push came to scuffle. In the process, Xia's wife went on her knees to beg for leniency. In the end, the officers confiscated the tank and took Xia with them to their office to take a statement. What happened after they arrived at the office is uncertain.

According to Xia, the officers started to assault Xia once they entered the office. They pushed Xia to the ground and started beating him. Xia tried to run away and, in the process, he took out a knife that was used to cut chicken meat in self-defence. He stabbed three officers in the office. Two of them later died, and one suffered serious injuries. According to the prosecution's evidence, there was some argument when the officers were taking Xia's statement, and Xia suddenly took out a knife and stabbed the three officers. Xia was charged with murder. He was found guilty after the trial and sentenced to death.[10] Teng Biao acted as the lawyer at his appeal.[11] After the Liaonin High People's Court dismissed the appeal, Chen Youxi acted as the lawyer for his death review by the Supreme People's Court (SPC).[12] The SPC endorsed the High Court's decision on 24 September 2013.

There are two possible defence strategies in Xia's case: a moderate defence, which pleads guilty but insists on a partial self-defence, and a radical defence, which pleads not guilty on the ground of self-defence. Chinese criminal law excuses a crime under the circumstances of self-defence. Article 21 of the Criminal Law of the People's Republic of China provides that:

> [a]n act that a person commits to stop an unlawful infringement in order to prevent the interests of the State and the public, or his own or other person's rights of the person, property or other rights from being infringed upon by the on-going infringement, thus

[9] For short introduction to the *chengguan*, see Flora Sapio, *Sovereign Power and the Law in China Zones of Exception in the Criminal Justice System* (Brill 2010).

[10] See the defence statement at the first instance trial, <http://blog.sina.com.cn/s/blog_dfd2e4580101naqs.html> accessed 1 August 2014, and the court decision of the first instance trial, <http://blog.sina.com.cn/s/blog.dfd2e4580101narb.html> accessed 1 August 2014.

[11] The defence statement at the second instance trial, <http://blog.sina.com.cn/s/blog_dfd2e4580101narb.html> accessed 1 August 2014.

[12] The review of the statement of defence at the Supreme People's Court, <http://blog.caijing.com.cn/expert.article-151578-59485.shtml> accessed 1 August 2014.

> harming the perpetrator, is justifiable defence, and he shall not bear criminal responsibility.[13]

Significantly, the Chinese Criminal Law allows a partial self-defence in self-defence. The second paragraph of Article 21 states: 'If a person's act of justifiable defence obviously exceeds the limits of necessity and causes serious damage, he shall bear criminal responsibility; however, he shall be given a mitigated punishment or be exempted from punishment.'

At the first instance trial, lawyers took a moderate approach. They submitted that the circumstances of this case necessitated self-defence, and there was sufficient evidence to substantiate Xia's self-defence. He was peaceful during the encounter on the street; he was taken to the office for a statement, after which the killing took place; he was outnumbered; he was 167 centimetres tall, and the two officers who were killed were both over 180 centimetres; and there were many other pieces of evidence that supported a high likelihood of self-defence. There were also procedural irregularities throughout the process, and the police, prosecutors, and judges appeared to have achieved a consensus on securing a death penalty regardless of what doubts the lawyers might be able to raise.

The lawyers at the first instance trial, while preparing themselves to make the concession that the self-defence might have been excessive, were of the view that Xia was not guilty of murder. They argued that the court should have taken into account the partial defence in considering liability and sentencing. For the lawyers, the proper charge should have been assault causing death as there was no intent, direct or indirect, to kill. The killing was not pre-mediated, and Xia carried the knife for the purpose of doing business. The lawyers also submitted that there was undue delay in the process of sending the victims to the hospital for treatment. In addition, the lawyers pointed out some traditional mitigating circumstances. Xiao had no prior criminal record, he surrendered himself to police, and he confessed his crime.

Teng Biao acted as the lawyer for Xia at the appeal. Teng's defence took a different path. While he also put forward a partial self-defence as an alternative, Teng argued forcefully for Xia's total innocence. For Teng, the circumstances of the case demonstrated that Xia made a natural response to a crime committed by both the *chengguan* officers and the institution—in Xia's own words, any one would have done the same as him in the circumstances. Stepping slightly away from the facts of the case, Teng argued that Xia was resisting a brutal and illegal exercise of State power. This gave him a moral justification, if not strictly legal, for the killing. To prove the justification, Teng moved beyond the traditional criminal law argument and took issues directly with the *chengguan* system. For him, the system had everything to do with Xia's defence, and it was necessary to place Xia's defence within the larger context of widespread abuse by the *chengguan*.

[13] Criminal Law of the People's Republic of China (1997).

The abuse by the *chengguan* was well known in China and widely reported in Chinese media, in the social media in particular. Teng then did something that defence lawyers in China rarely did; he Google-searched the term of '*chengguang* beating vendors to death' and was able to report more than 600,000 entries. He was also able to list nearly 20 cases in which the brutality of the *chengguan* had led to the death of vendors. There was abundant testimony on violence and brutality that had been inflicted by the *chengguan*. Indeed, brutality on the part of *chengguan* was so common that one of the *chengguan* whom Xiao had killed had brutalized a vendor not long before his own death.

There were 'thugs and hooligans' among the *chengguan* and this fact was well known. However, beyond violence on an individual level, the *chengguan* had institutionalized violence. As Teng pointed out:

> In this system of vague legal status and inadequate oversight, *Chengguan*'s violent habit becomes a necessity, and a part of the system. Extralegal violence, thus implied to compensate for inadequate regulation and an absence of authority and legal deterrence, is no longer individual behaviour. Such violence exists everywhere with the permission of the authorities. It is needed because of an overriding concern for 'city image' and 'urban management.' Finally, when extralegal violence is not monitored by the people and the media, and not punished by the law, it is only natural for *Chengguan* members to feel justified. Using violence with impunity enables the *Chengguan* to see violence psychologically as their 'privilege' a sign of status and pride. Since the legal and political status of *Chengguan* is unclear, it is only natural for its member to seek personal gain, vent their anger, and prey on citizens they were intended to protect. Once violence starts, it has its own momentum, and, with a specific system enabling it and Groupthink encouraging it, it eventually becomes a habit and an addiction.[14]

This was a powerful condemnation. However, the question was whether there was also a rational connection between the generalized brutality of the *chengguan* and the necessity of self-defence in Xia's particular case. This was a hard question, and Teng's answer was that, for street vendors, the brutality of the *chengguan* had become a taken-for-grant 'social fact' and could be treated as part of the cost of running a street business. Violence was so embedded in the *chengguan* culture and so institutionalized in the *chengguan*'s *modus operandi* that it formed part of the vendors' instinct and natural reflex. Street vendors knew what they were likely to face with the *chengguan,* and their survival instinct compelled a natural response. Xia had done nothing more than this.

Framing the defence in this political way, Teng put forward the following argument for self-defence: First, the killing was triggered by brutality on the part of the chengguan; the victims in the case first inflicted violence on Xia and as such they contributed significantly to the tragedy. Second, Xia reacted to the illegality and violence. The killing was justifiable under Chinese law. Instead of relying on self-defence on the traditional sense, Teng cited another

[14] Defense statement in the second instance trial, <http://blog.boxun.com/hero/201304/tengb/3_6.shtml> accessed 1 August 2014.

clause in the criminal law. The third paragraph of Article 20 of the Criminal Law provides:

> If a person acts in defence against an on-going assault, murder, robbery, rape, kidnap or any other crime of violence that seriously endangers his personal safety, thus causing injury or death to the perpetrator of the unlawful act, it is not undue defence, and he shall not bear criminal responsibility.

For Teng, the *chengguan* had endangered Xia's safety, and, therefore, Xia had reacted reasonably and proportionately in the circumstances. Third, the whole legal system in Xia's case conspired against Xia. The police had collected incriminating evidence only, and the prosecutors and judges in particular showed no interest in any possible defence that Xia might have given. The procedure was so demonstrably irregular and unfair that the guilty verdict could not stand.

While Teng condemned the violence and brutality perpetrated by the victims in this case, he never celebrated the killing. He expressed his profound condolence for the families of the dead and, indeed, treated them as the victims of the evil *chengguan* system. Teng, however, did celebrate the act of self-defence when facing violence. This point was short but significant. For Teng, self-defence was both a 'virtue' and an 'instinct'. Facing violence from an individual or an institution, citizens should have the moral courage to stand up and defend their legitimate rights and interest, even if it means using extreme violence. While Teng did not herald the killing directly, he provided a justification for using violence against any State-inflicted violence on the ground of natural responses and instinct. This line of reasoning would have broader implications beyond Xia's killing of the *chengguan*, and the argument may apply to the case of Yang Jia who killed six police officers in Shanghai and other violent acts that have been inflicted against representatives of the State. Teng warned that the imposition of the death sentence on Xia would serve to perpetuate State violence in the *chengguan* institution, harm the moral and ethical foundation in society, and undermine the dignity and authority of the law. The death sentencing, Teng insisted, amounted to judicial murder, and those responsible for the decision should be punished accordingly.

Falun Gong and their defenders

The persecution of Falun Gong practitioners in China since 1999 has been both brutal and systematic.[15] Ironically, the quasi-religious movement has lived on and has become the most powerful enemy of the Chinese party State despite (or, more concisely, because) of this persecution.[16] Domestically, the practitioners have sustained their practice in spite of the continuous persecution, and, against all odds, they continue to operate as a loosely knit community of

[15] James W Tong, *Revenge of the Forbidden City: The Suppression of the Falungong in China, 1999-2005* (Oxford University Press 2009).

[16] Stephen Noakes, 'Falun Gong, Ten Years On' (2010) 83 Pacific Rev 349.

mutual support. They continue to adhere to their beliefs; to manufacture and distribute compact discs, books, and other materials to promote the teaching of Falun Gong; to practise their belief; and to provide mutual support when facing prosecution. The Falun Gong proves to be a highly resistant, and it offers a story of durable authoritarianism and resilient resistance.

Falun Gong practitioners have been charged with various criminal offences, in particular the offence of sabotaging the implementation of law. Article 300 of the Criminal Law punishes any act that uses cult or superstition to sabotage the implementation of laws and regulations—an offence that is punishable by a term of imprisonment between three and seven years or more than seven years if the circumstances are especially serious. The SPC and the Supreme People's Procuracy, in an interpretation of Article 300, have provided further details for these offences. According to this interpretation, it is an offence if a person makes or transmits cult materials numbering more than 300 copies of pamphlets, pictures, slogans, or newspapers or more than 100 copies of books, compact discs, or video or audio cassettes.[17]

There is nothing new about the legal representation in Falun Gong cases since the Chinese Communist Party (CCP) started its crackdown in 1999. For reasons discussed later in this section, the political sensitivity of defending Falun Gong practitioners has increased over the years and, as a result, fewer lawyers are willing to take on these cases. Yet, there is a continuous supply of lawyers who are willing to come to the Falun Gong's defence when they are prosecuted. Since the socialization of the legal profession in 1996, which was due largely to the enactment of the Lawyers Law of the People's Republic of China, lawyers have become a quasi-autonomous profession and can choose to represent any defendant, as the law provides.[18] The government has slowly lost its tight grip over the profession and has to tolerate a degree of freedom on the part of the lawyers in criminal defence.[19] While indirect interference behind the scenes is still possible and prevalent from time to time, the direct obstruction of legal representation, even for the worst enemy of the CCP, is no longer legally feasible. As long as the regime insists on putting the Falun Gong on trial, lawyers are able to enter the process. The nature of a legal proceeding creates opportunities and incentives for resistance.

Most of the lawyers stay firmly away from any Falun Gong cases. Even well-known human rights lawyers, who otherwise are active in sensitive political cases, strategically decline these cases, fearing that defending Falun Gong cases in an aggressive manner will lead to severe punishment from the State. There are clear precedents, as demonstrated by the imprisonment of Gao

[17] Supreme People's Court and Supreme People's Procuratorate, *Interpretation of Several Questions in Relation to the Concrete Implementation of Law in Handling Criminal Cases of Organizing or Using Cults,* No 2 (10 May 2001).

[18] Lawyers Law of the People's Republic of China (1996).

[19] Fu Hualing, 'When Lawyers Are Prosecuted: The Struggle of a Profession in Transition' (2007) 2 J Comp L 95.

Zhisheng,[20] the disbarment of Liu Wei and Tang Jitian for their aggressive defence of Falun Gong practitioners,[21] and the detention of lawyers in the cases of Jixi and Jianshanjiang, as mentioned earlier in this article.

For those who actually come to the defence of the Falun Gong, there are two types of lawyering. One is a narrow defence on legal technicality, centring on a fine analysis of the criminal provisions involved and a painstaking examination of the prosecution's evidence. Lawyers make their argument within the four walls of the Criminal Law as they are understood in China. Principally, the defence would not challenge criminal liability (定性) as such and largely limits itself to the defence of mitigation, such as when a defendant has confessed his or her crime and has demonstrated remorse. When these lawyers challenge criminal liability and plead not guilty, the argument is based exclusively on the elements of the crime involved. A typical example for the offence of circulating Falun Gong-related materials is to argue that a mistake has occurred in calculating the numbers. Instead of 100 copies, the accurate number should be less because some copies were not properly collected and presented as evidence.[22]

A more critical defence is to challenge the legality of the prosecution and to point out the fundamental fraud in the system in dealing with Falun Gong cases. Gao demonstrated this approach and is still paying the price.[23] For lawyers who have followed in Gao's footsteps, the prosecution of the Falun Gong is wrong because it lacks any clear legal basis and is politically motivated. While legal rules in China criminalize cults, they do not criminalize the Falun Gong directly. Indeed, Chinese criminal law never mentions the Falun Gong. Therefore, the prosecution has to prove that the Falun Gong is first of all a cult and that it is a reasonable argument to make that the anti-cult rule in Article 300 of the Criminal Law should not apply to the Falun Gong.

For the lawyers of the Falun Gong, the Falun Gong cannot be regarded as a cult when the matter is examined in the context of the constitutional right of religious freedom and the nature and practices of the Falun Gong. Article 36 of the Constitution protects freedom of religion, which necessarily includes the right to belief and the right to practice. A prohibition or prosecution is not permissible under the Constitution unless the belief and practice violate social order, harm citizens' health, and disturb the education system of the State.[24] Falun Gong lawyers insist, in their court submissions, that the Falun Gong actually preach harmony and tolerance in society, and, as such, it strengthens the moral foundation of the society and enhances the moral standard of the individual citizens. It is well known among Falun Gong practitioners that the

[20] Eva Pils, 'Asking the Tiger for His Skin: Rights Activism in China' (2007) 30 Fordham Intl LJ 1209.

[21] Edward Wong, 'Two Chinese Lawyers Are Facing Disbarment for Defending Falun Gong' *New York Times* (21 April 2010) <http://www.nytimes.com/2010/04/22/world/asia/22beijing.html?r=0> accessed 1 August 2014.

[22] Interviews with human rights lawyers, 2009, 2011, and 2012.

[23] Pils (n 20).

[24] Constitution of People's Republic of China (1982) art 36.

practice improves health, and, indeed, most of the practitioners have turned to Falun Gong precisely because of its ability to heal disease and strengthen bodies. In doing so, the lawyers speak the truth to power of the Falun Gong, as their clients expect.[25]

Lawyers not only defend individual practitioners who are prosecuted for particular criminal offences but also use the courts as a platform to expose the abuse beyond the individual cases. In defending the Wang family, in which all three members of the family were charged with a cult offence, lawyers broadened the defence by pointing out the systematic persecution of Falun Gong practitioners. In doing so, the lawyers placed the case in the larger political context and directed the judges' attention towards the widespread abuse of people who have gone to prison for nothing but the possession of Falun Gong materials or who have uttered statements supportive of the Falun Gong.[26] In doing so, these lawyers have used the courtroom to publicize the brutality of the system and have turned the trial of the Falun Gong practitioners into a trial of the regime itself.

The submissions of these radical lawyers do not stop when the trial is over. They move on to the court of public opinions by posting their defence statements online, contacting the media, including overseas media, and generating critical discussions. An aggressive defence and the subsequent legal mobilization also reinforce the solidarity within the Falun Gong community. As commonly practised, a local Falun Gong community is mobilized when a fellow member is put on trial. On the day of trial, while their lawyers are putting up a rigorous defence and insisting on innocence inside the court, other Falun Gong members are performing their religious rituals outside the court to give support to their prosecuted comrades.[27]

Defending labour activists at risk

As radical as they are, Falun Gong lawyers rarely venture outside the law in advocating for the Falun Gong. The defence of the Falun Gong is mainly anchored within legal and institutional settings. Precisely because of its political sensitivity, lawyers for Falun Gong members and political dissidents are particularly sensitive to the law in framing their arguments to challenge the prosecution. It is often in the less sensitive field of social and economic rights where one sees more aggressive lawyering in which lawyers truly act against the law. In protecting labour rights, labour lawyers often move beyond the law in advocating for direct and explicit legal and policy changes.

[25] Interviews with human rights lawyers, 2012 and 2013.

[26] Li Heping and Teng Biao, 'The Supremacy of the Constitution and the Freedom of Belief: Joint Statement of Defence for the Case of Wang Bo, Wang Xinzhong and Liu Shuqing' <http://blog.boxun.com/hero/2007/tengb/39_1.shtml> accessed 1 August 2014.

[27] Interviews with human rights lawyers, 2009 and 2010.

In handling labour disputes, China has decisively followed a private model in enforcing labour rights, which relies on workers to initiate private legal action for remedies. In this model, legal action is reactive and arises only after an alleged violation and damage has taken place, and the workers who are willing and able to sue are expected to bring their grievances to the attention of the legal institutions. Violation of labour rights may abound, but this model shifts the regulatory burden of policing labour standards from the government to the individual workers themselves.[28]

Litigation becomes the mainstream mechanism to absorb and dispose of the majority of labour disputes. To make this model credible, Chinese law has become relatively clear and labour friendly, and there have been a continuous supply of new legal rights. There is also a well-established procedure. Armed with labour-friendly legal provisions and assisted by legal aid that is provided by the government, lawyers provide much-needed legal assistance in individual cases ranging from compensation for industrial injuries, overtime pay, social security, or unlawful dismissal. There are abundant 'low-hanging fruits' in labour law practices for public interest-minded lawyers.[29]

The mainstream labour legal practice is moderate. First, these cases involve well-defined legal issues relating to individual workers. Given that the regime intends to offer legal protection for the social and economic rights of workers, claims of labour rights, narrowly defined, do not pose a challenge to the political system, in the same way that Falun Gong cases may do. Second, workers bring their case to court as isolated individuals rather than as a collective. There is no class action in practice, and workers' collective grievances are broken down into individual cases when they are accepted by the courts. The legal action permits and encourages an individual-rights consciousness at the expense of a collective-class consciousness. Third, the individual claimants seek specific legal remedies without political mobilization. It is a typical court-centric approach in which a court applies legal rules to a concrete case. As large as the number of labour cases may be in parts of China, these legal cases, because of the strategies lawyers adopt, do not pose any political challenges.

Throughout the 1990s, litigation was a commonly used strategy for migrant workers to solve their disputes with their employers, and this was especially true in South China where migrant workers clustered. Almost by definition, migrant workers lacked the necessary social capital and capacity and were forced to rely on the law and seek legal remedies. It was no surprise that Zou Litai arrived in Shenzhen in the mid-1990s and made a reputation for himself as a tough labour lawyer. There were abundant cases, particularly concerning

[28] Fu Hualing, 'Bringing Politics Back in: Access to Justice and Labor Dispute Resolution in China' paper presented at the Workshop on China: The Justice Experience, 10–11 July 2014, Gold Coast, Brisbane, Australia.

[29] Chen Feng, 'Legal Mobilization by Trade Unions: The Case of Shanghai,' (2004) 52 China Journal 27; 'Individual Rights and Collective Rights: Labor's Predicament in China' (2007) 40 Communist & Post-Communist Studies 59.

industrial injuries, for which the only remedy for the labourers was to resort to litigation. In this sense, migrant workers acted differently from those individuals in the northeast where aggrieved workers in State-owned enterprises (SOEs) tended to mobilize politically to solve their problems through extra-legal mobilization. Ching Kwan Lee's research captures the intrinsic difference between SOE workers in the north and the migrant workers in the private sector in the south in both resource mobilization and the way in which they settled their disputes with employers.[30]

Different from the defence of the Falun Gong, where radical defence appears at the inception of the persecution, radicalism in labour evolved slowly. This was due partly because the legal process had a degree of credibility and the moderate legal action was able to absorb the grievances and contain disputes. The individualized style of lawyering was able to attract substantial support from foreign donors and the Chinese government because it could alleviate hardship in certain cases.

Gradually, those who experienced the system lost their confidence in the system's ability to deliver.[31] For workers who had resorted to legal action, the existing legal mechanism, even in full operation, was fundamentally biased against labour and the substantive rights were compromised by the institutional design. It is well known that the legal process of labour dispute resolution is a prolonged one and cannot be afforded by ordinary migrant workers. The compulsory arbitration and subsequent litigation can easily take many months before a decision can be made. And, often, additional procedures are needed to further prolong the process in the cases of industrial injuries. The defendant company, which is more resourceful and experienced in handling labour cases, could easily stall the procedure through appeal and other means so as to force the labourer to compromise. It is well documented that the prolonged legal process can impose a severe burden on migrant workers and thus is not affordable.

After decades of frustration with the legal process, workers are realizing that they are facing common difficulties that require a collective resolution. Their experiences with the law and legal institutions are transforming them from individual workers to citizens. In the process, workers are discovering their class identity and starting to recognize a common interest behind this identity.[32] Their dispute strategy has changed accordingly in two significant aspects. First, workers are moving away from narrowly defined legal rights

[30] Ching Kwan Lee, *Against the Law: Labor Protest in China's Rustbelt and Sunbelt* (University of California Press 2007).

[31] Mary E Gallagher and Dong Baoha, 'Legislating Harmony: Labor Law Reform in Contemporary China' in Mary E Gallagher, Sarosh Kuruvilla and Ching Kwan Lee (eds), *From Iron-Rice Bowl to Informalization: Markets, State and Workers in a Changing China* (Cornell University Press 2011).

[32] Ngai Pun and Lu Huilin, 'Unfinished Proletarianization: Self, Anger, and Class Action among the Second Generation of Peasant-Workers in Present-Day China' (2010) 36(5) Modern China 493; Pun Ngai and Chris King-Chi Chan, 'The Subsumption of Class Discourse in China' (2008) 35 Boundary 75; Pak Nang Leung and Pun Ngai, 'The Radicalisation of the New

towards a broader interest-based articulation. Take minimum wage, for example. Workers are no longer satisfied with a minimum wage but are struggling with a pay that is higher than the government-regulated minimum wage can offer. Once the matter moves from legal rights-based action to interest-based advocacy, the relevance and importance of the legal process will decline and diminish.[33]

Second, regardless of the rights or interest, workers are taking collective action in making their demands and bypassing the existing legal procedures and institutions. On matters that are not regarded as justiciable or in areas where alternative mechanisms exist to provide a more effective remedy, workers—those in Guangdong, in particular—have started to seek self-help and take the law into their own hands. They have formed their own organizations, designed their own strategies, and, in the process, have developed their own collective identity without resorting to lawyers, journalists, or government-controlled unions. It shocked the world, including the government, when workers successfully organized a large-scale strike in the Guangdong-based Honda car-making factories. This success triggered a wave of wildcat strikes, which are still ongoing in China. As a result, a generation of dedicated young workers have taken up a leadership role in grassroots and bottom-up industrial action.

Lawyers have taken notice of these changes and have taken part in the emerging movement in shaping the direction. These lawyers have designed legal services in response to the changing profiles of the new working class, their new strategies, and their legal needs. One of the best examples is the new legal practice of Duan Yi and his Lao Wei law firm in advising and supporting collective bargaining and action. Duan and his law firm regularly offer training on collective bargaining; build platforms for academic and policy discussion on collective action; host seminars among academics and policy makers on the necessity and feasibility of industrial action; represent workers in collective bargaining; and advise workers in industrial action. Strongly believing in the power of collective action among workers in protecting workers' rights and interests, Duan and his lawyers identify with the cause of the workers they educate and advise and are a significant part of a newly emerging labour movement in China.[34]

For Duan and his fellow lawyers, the rights of labour are respected and protected only when labour is well organized and placed in a position to bargain effectively. Instead of litigating on individual cases, Duan shifts his priority decisively from litigating on individual cases to advising and training labour for labour organizing and collective bargaining. Duan and his fellow lawyers define their role as giving legal advice and support to an emerging workers' movement, without participating in the industrial action directly. In designing and advocating collective action, Duan has never abandoned the law and the

Chinese Working Class: A Case Study of Collective Action in the Gemstone Industry' (2009) 30 Third World Q 551.

[33] Interviews with public interest lawyers, 2012.

[34] Interviews with Duan Yi, 2012 and 2013.

legal framework in which he operates. However, unlike other lawyers, Duan challenges the narrow definition of legal rights and is aggressive in expanding the boundaries, even though he anchors his practice and advocacy in a broader legal framework. Therefore, Duan maintains his identity as a lawyer and advocates legal changes. What he challenges is only what he regards as the narrowness of legal rights as the Chinese law currently allows. Ultimately, he advocates a new legal right to collective bargaining; a special legal status of workers who participate in collective action; and implicitly the restoration of the right to strike.[35]

Duan advocates legal and policy changes through lobbying the official unions and the government through platforms, such as the collective bargaining forum, that he has built. More directly, he advocates legal change through impact litigation that goes far beyond what the moderate labour practice permits. He offers legal intervention for labour leaders at risk—young labour leaders, who are punished by their employers or the police for participating in organizing industrial action. On these difficult occasions, Duan has designed a proactive legal strategy to carry the movement forward.

For those who are punished for participating in industrial action, Duan has launched a bold defence by asking the court to create an exemption from criminal or civil liabilities for workers participating in industrial action. The Chinese law recognizes and offers certain protection for 'official' labour leaders who organize and participate in collective bargaining and labour action,[36] but those officially recognized representatives do not represent the workers' interest, and they largely lack the necessary legitimacy. Often, workers who are punished for organizing and taking part in industrial action are charged with disturbing the public order or are dismissed for violating labour contracts. The official position is that the government maintains a neutral position between labour and management in these disputes, but it generally intends to protect the validity of the labour contract and to enforce public order law.

The defence that Duan tries to advance is that the demonstrations, sit-ins, or absence from work should be properly regarded as an integral and subsidiary part of an otherwise legitimate industrial action. Workers are in a process of bargaining with the employers, and industrial action is part of the bargaining process. The action may cause a degree of disturbance in production and public order, but, given the context in which the disturbance takes place, the court should create immunity for what the workers may have done during the bargaining process. Duan and other lawyers advance a series of legal

[35] Ibid.

[36] Official representatives of workers include union leaders (Trade Union Law of the People's Republic of China (1992)), workers' representatives in certain State-owned enterprises (Company Law of the People's Republic of China (1993)) and other representatives (Labour Contract Law of the People's Republic of China (2007)). Local legislation offers more effective protection for worker's representatives. See eg Zhejiang Province Measures to Implement the Trade Union Law of the People's Republic of China, Zhejian Province Regulations on Democratic Management in Enterprises; and Zhejiang Province Collective Contract Regulations [on file with the author].

challenges against the punishment of labour leaders. As a general legal principle, the Chinese Constitution and law do not prohibit strikes and other industrial action. Indeed, legislation, such as trade unions, indirectly recognize the legality of a strike, even though the law uses alternatives terms such as 'work stoppage' and 'work slowdown'. More significantly, China has not made a reservation on Article 8.1.3 in relation to the right to strike when it ratified the International Covenant on Economic, Social and Cultural Rights in 2001, indicating the commitment of the Chinese state to recognize this right.[37]

Indeed, Duan has found sufficient constitutional support for the right to strike. It was argued that a strike is an exercise of the freedom of speech, which is a constitutional right that must be taken into consideration when judges endorse disciplinary and punitive measures against workers on strike. Equally importantly, the Constitution provides that China is a workers' state in which workers are the master of their society and enjoy the constitutional rights to work (Article 42) and to rest (Article 4). To exercise this constitutional right, workers must be allowed to use industrial action as an effective tool to fulfil their rights and they must have the freedom not to be punished for participating in necessary and reasonable industrial action. More concretely, the Trade Union Law of the People's Republic of China offers a degree of justification for an exemption if judges are willing to look into the matter proactively.[38] The Trade Union Law, for example, requires the union to initiate negotiation between workers on industrial action, including strikes and slowdowns, so as to satisfy the 'reasonable request' of the workers.[39] Implicitly, while the unions are conducting negotiations, workers in industrial actions should not be subject to any punishment.

The limit of moderation and the danger of radicalism

Lawyers engage with the court in different ways depending on the nature of the cases, the particular political and legal circumstances in which the cases occur, and the political stance of the lawyers involved. The radical and moderate divide has always been an issue facing Chinese lawyers since the inception of public interest law, and it is unlikely for this debate to fade in the near future. For many public interest-minded lawyers, moderate lawyering provides the best strategy for incremental reform. Moderate lawyering legalizes political questions and solves potentially sensitive issues by making technical legal arguments. Once an issue is framed as a legal issue and presented to, and accepted by, the court as such, political sensitivity drastically diminishes. When this happens, lawyers can properly argue a case within the boundaries of legal rules, and judges may be persuaded to rule accordingly.

[37] International Covenant on Economic, Social and Cultural Rights 993 UNTS 3.
[38] Trade Union Law (n 36).
[39] Ibid art 17.

There are certainly many types of cases, including a proportion of labour cases, where moderate legal intervention has advanced, or has the potential to advance, the rights of the parties involved. Legal aid offered by public interest lawyers in the government legal aid centres and by specialist law firms has provided meaningful links between the world in which disputes occur and the world in which the disputes are resolved. Moderate legal services undoubtedly alleviate the hardship that migrant workers experience, and, in these cases, lawyers are able to work with the law and secure legal remedies in courts.

Moderate lawyering that focuses on technicality may engage judges and bring a judge into a dialogue. Because of this possibility, supporters of moderate lawyering have pointed out that lawyers should tone down their rhetoric and rely on improved legal skills rather than on political passion in legal advocacy in order to persuade the court. They caution that radical lawyering with an express political argument only invites hostility from the court and the political institutions behind the courts. In Xia's case, it has been commonly said that had Xia not insisted on his innocence and pleaded guilty of using excessive force in his self-defence, Xia's life might have been spared. Critics point out that a moderate defence that limits the submission to specific facts in the case, without challenging the institution behind the case, may be considered more easily by the court. Likewise, moderate labour lawyers insist that it is the shortage of solid legal argument, in part at least, that drives workers to a more radical path. In other words, better lawyering in courts could give more credibility to the legal process and prevent the radical labour movement that China is witnessing.[40]

Lawyers who provide aggressive and radical defences are therefore criticized for advancing their own political agenda and objectives at the cost of their clients. In Xia's case, it was his life that was at risk, the criticism goes, but his lawyers did not focus enough on the case itself. Instead, the defence was shifted to attacking the evil *chengguan* system and the justification for the killing. This may be powerful political rhetoric, but it carries little legal value. The rhetoric may attract political attention so as to allow lawyers to advocate their political views or even build their reputation, but it does not save lives.

Similarly, according to the critics, the aggressive defence in the Falun Gong trials has never saved any Falun Gong practitioners from criminal punishment. On the contrary, the open confrontation in court may have put judges in an impossible position because of the political imperatives in these cases. Aggressive defence has put judges on the spotlight, hardening the position of the judges, creating hostility towards lawyers, and making it impossible for judges to consider mitigating factors and imposing a lenient sentence. In the end, the aggressive lawyering has achieved very little except for putting lawyers themselves into jeopardy. Duan Yi is also under attack for the same reason. It is said that when the political atmosphere is not ready, training

[40] Interview with a public interest lawyer specializing in labor disputes, 2014.

collective action and organizing industrial action may only put workers at risk and create hope that cannot materialize. Once workers are on the street and police move in, it is the work leaders who will suffer. Legal aid for rescue workers in custody for participating in strikes often comes too late and amounts to very little.

However, increasingly, lawyers recognize the limits of moderate lawyering and are acting collectively and aggressively in defending their rights. Interestingly, in spite of the hostile political environment, more and more lawyers are joining the community of 'die hard' lawyers. Due to the politicization of the court, moderate lawyering is no longer possible in a growing number of cases that are regarded as sensitive. In these cases, the judges' attention has been effectively directed towards political correctness and the social impact of the decisions and away from the substantive and procedural legal requirements. Lawyers may craft forceful legal arguments based on legal rules and technicalities, but they have little impact on judges who see the cases through a political lens and make decisions according to political criteria. When judges remain fundamentally political, it is merely wishful thinking among some of the lawyers to remain legalistic.

In labour cases, while legal aid may alleviate hardships, the court-based approach can only keep the working class at a subsistence level and is far from being cost-effective. It is out of the frustration with the existing mechanism, including the cost, delay, and limited remedy that has forced some of the workers to organize themselves into a collective action. Progressive lawyers have seized this opportunity and have provided legal and technical support to workers' own mobilization so as to make it disciplined, legal, and sustainable.

The criticisms of lawyers' strategies are largely misplaced, and it is unrealistic that lawyers' defence strategies in Xia's case would have made a difference, given the political context. As Teng Biao, the lawyer for Xiao at his appeal, stated, the case went through three legal process—that is, trial, appeal, and review—and the lawyers adopted drastically different strategies, but the decision was the same. If the defence failed, as many have alleged, it failed because there was not enough extra-legal mobilization and politicization of the case. There was not enough pressure from public opinion to force the court, or whatever forces existed behind the court in this case, to refrain from imposing the death penalty. The statement of Chief Justice Zhou Qiang makes it clear that, in the eyes of the State, Xia must be executed given the nature of the case or 'the world would be reduced to chaos', as he lamented.[41]

In representing Xia in his death penalty review at the SPC, Chen Youxi and his team prepared a detailed statement that identified concisely the gaps and missing links in the murder charge and raised serious doubts about the credibility of the decisions of the trial and appellant courts. Chen seems to have believed in the possibility that the SPC would take seriously a well-crafted and substantive legal argument. As it happened, Chen's argument did not change

[41] 'Zhou Qiang on the Case of Xia Junfeng' <http://news.qq.com/a/20140312/001914.htm> accessed 1 August 2014.

Xia's fate, and Chen is now criticized for leaving the decision to the court alone to decide and for his reluctance to resort to a forceful mobilization strategy.

In cases with greater political sensitivity, such as those mentioned in this study, moderate lawyering may not be feasible because the constituents of human rights lawyers have changed. Increasingly, Falun Gong defendants on trial insist on speaking the truth at any cost—that is, the legitimacy of their religious belief—and they give clear instructions to lawyers to make explicit political arguments. The Falun Gong's principal concern is not a not-guilty verdict since they know how hostile the system has been. Rather, the purpose is to use the trial as a forum to promote their values and beliefs and to demonstrate their defiance against such persecution. In this sense, lawyers representing the Falun Gong do not necessarily have a political agenda in politicizing their defence, and they provide a radical defence because of the authorization or even the demands of their clients. Similarly, a new generation of workers with better education who have experienced systematic abuse and violation, such as salaries in arrears or a shortage of social security payments, are taking industrial action and demanding unionization with or without the involvement of lawyers. Labour lawyers may be simply reacting to these new and often desperate demands.

Conclusion

Lawyers have tried different strategies in their court battles. In these sensitive public interest cases, there has been a subtle but visible shift from a moderate style of lawyering towards a more radical style. Learning from the clients whom they represent, lawyers are taking a more forceful stance in making submissions, in pointing out abuses in the legal process, and in demanding their rights in general. Few lawyers would take the law and courts for granted, and fewer still would admit that lawyering 'before the law', in Ewick and Silby's terms, is a real possibility. They have developed more agency in working 'with the law' and, when needed, 'against the law'. Realizing that a moderate approach can often reduce lawyering into irrelevance in the legal process in cases that they handle, lawyers are getting together and, when united, are becoming a more vocal and more influential political force, which the court, and the political forces behind the court, can no longer simply ignore.[42]

[42] Fu Hualing, 'Can Lawyers Build a Legal Complex for the Rule of Law in China?' *China Rights Forum* (July 2014) <http://www.hrichina.org/en/china-rights-forum/can-lawyers-build-legal-complex-rule-law-china> accessed 1 August 2014.