

Pro Bono, Legal Aid, and the Struggle for Justice in China

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Abstract

This chapter examines the role of lawyers in providing legal services to indigent persons and facilitating access to justice in China. The chapter explores the degree to which access to justice in China is different from other countries, and addresses whether those differences are related to China's political and legal system or China's status as a middle-income country with a low level in GDP per capita. Under current Chinese law, the provision of legal services to the poor is both a government responsibility and a duty of practising lawyers. The principal argument of this Chapter is that legal aid has reduced the scope of non-professional representation, and that increased legal aid funding has commercialised legal aid in China and hollowed out public interest among lawyers in general. However, as the legal profession grows, a public interest spirit has started to develop outside the official legal aid system, with some lawyers volunteering their services to assist those in legal need and promote public interest.

I. Introduction

China is a late comer in developing its legal profession. Concepts like pro bono, legal aid, and access to justice were only introduced in China in the past 20 years.¹ In a mature legal system with an independent and effective judiciary at its core, access to justice tends to be court-centric, and pro bono services and legal aid, operating in the shadows of the legal system, are in general geared to providing effective access to courts. Is China's development following this trend? This chapter examines the role of lawyers in providing legal services to indigent persons and facilitating access to justice in China, exploring the degree to which access to justice in China is different from other countries, and addressing whether those differences are related to China's political/legal system and China's status as a middle-income country with a low level in GDP per capita. The chapter analyses the development of legal aid in China in general, with some specific examples to legal aid from the city of Chongqing, a province-ranking city under direct central control. Information regarding Chongqing, unless otherwise specified, are obtained through the author's interviews with lawyers from that city in 2017.

Under current Chinese law, the provision of legal services to the poor is both a government responsibility and a duty of practising lawyers. As interpreted and practised in China though, the government is duty-bound to provide legal aid funding, while lawyers must

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¹ Fu Hualing & Richard Cullen, "The Development of Public Interest Litigation in China" in Po Jen Yap & Holning Lau, eds, *Public Interest Litigation in Asia* (London; New York: Routledge, 2011) 14 [*Public Interest Litigation in Asia*] at 28; Benjamin L. Liebman, "Legal Aid and Public Interest Law in China" (1994) 34 *Texas International Law Journal* 211 [*Legal Aid and Public Interest Law in China*] at 212; William P. Alford, "Lawyers, Legal Aid, and Legitimacy in China" in William P. Alford, ed, *Raising the Bar: The Emerging Legal Profession in East Asia* (Cambridge, Massachusetts: Harvard University Press, 2007) [*Lawyers, Legal Aid and Legitimacy in China*] at 311; Titi M. Liu, "Transmission of Public Interest Law: A Chinese Case Study" (2008) 13 *UCLA Journal of International Law and Foreign Affairs* 263 [*Transmission of Public Interest Law*] at 275.

undertake a certain number of paid legal aid cases as a condition for renewing their annual practising certificates. The argument of this Chapter regarding access to justice is two-fold: first, the increase in legal aid has reduced the scope of non-professional representation in Chinese courts and thus the level of social participation in the legal system, but it also reduced the involvement of police in individual disputes and social conflict, thus symbolising a baton-to-gavel transition in dispute resolution. Second, increased legal aid funding has commercialised legal aid in China and hollowed out public interest among lawyers in general, but as the legal profession grows, a public interest spirit has started to develop outside the official legal aid system, with some lawyers volunteering their services to assist those in legal need and promote public interest. However, public interest lawyering faces a unique political challenge under China's authoritarian political system.

II. Access to Justice Terminology in China

Although the English phrase access to justice is frequently referred to in the literature in China, the term does not have a concise Chinese translation. The translation, getting close to justice, is awkward. Users of the English term are aware of the lack of equivalence in Chinese, and when the term access to justice is used, both the English and its Chinese translation are displayed. Instead of access to justice, the term legal aid (*falv yuanzhu* or 法律援助), which refers to the system of government-organised and government-funded legal assistance to poor persons, is the official term used to describe the legal process of facilitating access to justice. More recently, the idea of providing justice to all, as exhorted by President Xi through legal aid to the poor and those in need, is strongly promoted by the government as a core component of socialist law and has gained popularity among the general public.

On the other hand, *pro bono*, defined as free legal services provided by lawyers for the poor and those in need, is not well known as an English phrase or as a general concept. China does not have an institutionalised *pro bono* practice. When used in China, the concept of *pro bono* is intertwined with the official legal aid system and is often regarded as an integral part of that system. Indeed, there is no equivalent Chinese phrase for *pro bono* as such.

In this chapter, the phrase legal aid will be used in the sense most often used in China: the government organised and funded process of facilitating access to justice for poor persons. In contrast, *pro bono* will refer to the idea that lawyers not funded by the government should provide free legal services to poor people.

III. Legality in Authoritarian States

China is an authoritarian state where the Chinese Communist Party (Party) monopolizes all political power. The 1982 Chinese Constitution (Constitution)² entrenched the Party's leadership role in China, which renders any challenge to its monopoly over political power unconstitutional and illegal. Article 1 of the Constitution openly asserts that China is "a socialist state under the people's democratic dictatorship". China's authoritarian state limits the autonomy of law, the independence of legal institutions, and the professionalism of legal actors.

Although politically authoritarian at the core, the Party has proven adaptable in reforming its political and legal institutions to meet external and internal challenges. Like many other authoritarian states,³ the Chinese Party-state has embraced and promoted the concept of a

² *Constitution of the People's Republic of China*, 1982, as amended on 14 March 2004.

³ Tom Ginsburg & Tamir Moustafa, eds, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008) at 4–10; Mark Tushnet, "Authoritarian Constitutionalism" (2015) 100 *Cornell Law Review* 391 at 423.

socialist rule of law, and has undertaken to respect human rights. The Party-state has reiterated its commitment to strengthen legal institutions around the margins and to rely on legal rules and institutions in dispute resolution. Significantly, Article 5 of the Constitution provides for the principles of the rule of law, equality before the law, and supremacy of Constitution and laws. Article 24 further states that “the state respects and protects human rights”. Beneath the periodical political repression that often sweeps through China’s legal landscape, China’s emerging legal system has been struggling for institutionalisation.⁴ Legal reforms aimed at enhancing judicial autonomy and power have even continued since 2015, during one of the worst crackdowns on human rights lawyers and civil society in recent history.⁵

Since the decisive shift in the late 1970s from revolution to modernisation, legal rules and legal institutions have been playing a more meaningful role in social and economic governance.⁶ In relative terms, there has been a gradual process of juridification in areas beyond the political core, whereby ordinary disputes are increasingly resolved through legal institutions including the courts, and facilitated by lawyers in accordance with legal rules. While political control over the legal process continues to take place and is even tightening in some spaces, legal rules are important and consequential in a vast majority of areas constituting the ordinary range of justice. Within this institutional design, China follows a global trend and faces the common challenges of capacity building in the courts and improving access to justice.

China’s type of authoritarian regime shapes access to justice in two different ways. Firstly, it directly affects the operation of legal institutions. Under China’s authoritarian system, legal professionals are more politically accountable to the Party-state than they are legally accountable to the law. Courts are also more receptive and responsive to political imperatives, giving priority to government policy changes. Depending on the prevailing political economy, for example, courts handling labor disputes can be friendly to labor, indifferent to labor, or hostile to labor,⁷ and judges can be accordingly lenient or harsh in sentencing in relative terms.⁸ The political identity of legal actors is in general stronger than their professional identity.

Secondly, authoritarianism ensures a weak legal system that lacks capacity and autonomy. A weak legal system allows the diversion of disputes away from courts and invites competition for jurisdiction from other political and administrative entities. Because of this diversion and competition, a significant proportion of disputes are settled without judicial involvement and resolved or otherwise managed through informal justice spaces such as mediation. Moreover, the police are empowered to intervene in disputes and conflict at an early stage through multiple means, including force. The political imperative to pre-empt disputes allows a high degree of informality and political control in dispute resolution.⁹

⁴ Fu Hualing, “Challenging Authoritarianism through Law: Potentials and Limit” (2011) 6 National Taiwan University Law Review 339 at 342.

⁵ Fu Hualing, “The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State” (2018) 112 Journal of Contemporary China 554 [*The July 9th Crackdown*] at 566.

⁶ Randall Peerenboom, *China’s Long March toward Rule of Law* (Cambridge and New York: Cambridge University Press, 2002) [*China’s Long March toward Rule of Law*] at 55; Albert Chen, *An Introduction to the Legal System of the People’s Republic of China*, 4th ed (Hong Kong: LexisNexis, 2011) [*Introduction to PRC Legal System*] at 41-45.

⁷ Mary E. Gallagher, *Authoritarian Legality in China: Law Workers, and the State* (Cambridge: Cambridge University Press, 2017) [*Authoritarian Legality in China*] at 213.

⁸ Susan Trevaskes, *Policing Serious Crime in China: from strike hard to kill fewer* (Oxon; New York: Routledge, 2010) at 170-171.

⁹ Richard L. Abel, *The Politics of Informal Justice (Vol. 2): Comparative Studies* (New York: Academic Press, 1982) at 5; Fu Hualing, “Mediation and the Rule of Law: The Chinese Landscape” in Joachim Zekoll, Moritz Balz & Iwo Amelung, eds, *Formalization and Flexibilisation in Dispute Resolution* (Leiden: Brill/Nijhoff, 2015) at 114.

A country's economic environment significantly impacts on the implementation of its rule of law.¹⁰ Justice is economically costly as well as politically risky. China has become well-known for its economic growth over the past 40 years, having achieved a status of being the second largest economy in terms of total GDP within a relatively short time span. The irony is that while China's economic resources allow it to invest more in legal institutions and expand legal aid spending, its 2016 GDP per capita was slightly over US\$8,000, a figure far below the average level of an advanced economy,¹¹ even though that constitutes a significant increase since the beginning of economic reform. The availability of increased legal aid funding has proved essential to incentivising lawyers, and it has allowed the government to openly state that legal aid is a public good to be paid for by the state. Ultimately however, financial capacity is limited when faced with the scale of the demand for justice from the society. Indeed, the legal aid services available in different Chinese provinces and cities largely depend on the amount of legal aid funding from the respective local governments. Wealthy areas by and large do better in providing legal aid, soliciting support from the wider society to those in need, and compensating lawyers who provide legal aid services.¹²

IV. From Legal Pluralism to Access to the Courts

Currently, China has a pluralist legal services structure. There is first and foremost a distinction in the delivery of legal services between rural and urban areas. China operates a dual legal profession, with lawyers serving cities, and another less standardised class of legal workers (法律工作者), who provide more limited services in rural areas. In rural areas, access to lawyers has remained limited. In response to unmet legal need in rural communities, the government created the quasi-legal profession of legal workers. Unlike their professional peers, the minimum educational requirement for legal workers is a sub-University qualification, and they are qualified through provincially-based examinations as opposed to national examinations. Legal workers are barred from practicing criminal law, and their practices are limited to rural counties where they are registered. Totalling around 120,000, legal workers principally serve the legal needs of farmers. Concentrated in county seats, legal workers compete directly with lawyers at the county and sub-county levels. While lawyers have tried to eliminate or otherwise restrict the practice of their less qualified peers, the latter have proven resilient. In 2016, in Chongqing, a mega city of over 28 million residents that combined urban districts and rural counties, there are approximately 7,900 lawyers, 110 salaried legal aid lawyers, and 1,500 legal workers. The existence of legal workers has always been a contentious issue and their partial practice is a compromise between the legal profession that demands abolition and the government that wants to preserve the dual system to meet legal needs in vast rural areas. The wider political and legal circumstances are hostile to their continuation,¹³ but

¹⁰ Randall Peerenboom & Tom Ginsburg, eds, *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (Cambridge: Cambridge University Press, 2014) at 7.

¹¹ "GDP per capita (current US\$)", *The World Bank Group*, online: <<https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?contextual=max&end=2016&locations=CN&star=t=1960>>.

¹² China, Department of Legal Aid Work, Ministry of Justice, *健全法律援助制度调研报告汇* [*Collection of Research Reports for Legal Aid System Improvement*], (Beijing: Beijing University Press, 2014) [*Reports for Legal Aid System Improvement*] at 372-375 (Zhengzhou), 398-402 (Guangzhou) and 430-432 (Yinchuan).

¹³ William P. Alford, "Second Lawyers', First Principles: Lawyers, Rice-roots Legal Workers, and the Battle over Legal Professionalism in China" in William P. Alford, Kenneth Winston & William C. Kirby, eds, *Prospects for Professionalism in China: Essays on Civic Vocations* (London: Routledge, 2013) at 52; Fu Hualing, "Away from Grass-roots? The Irony of the Chinese Rural Legal Service" (2015) 60 *Diogene* 116 at 126.

given the lack or absence of qualified lawyers in rural areas, legal workers are likely to survive in the foreseeable future.

The Lawyers Law governs the regular legal profession.¹⁴ Prior to the enactment of this law, lawyers were defined as state legal workers, who were part of the state legal establishment and directly accountable to the government.¹⁵ In the initial stage of China's market economic reforms in early 1990s, the rule of law and an independent legal profession were regarded as indispensable pillars to support the growing edifice of market transactions. Under the able leadership of Xiao Yang, the Ministry of Justice privatised an essential public service against strong political opposition. A landmark piece of legislation, the Lawyers Law, was enacted in 1996 to delink the legal profession from the government in order to facilitate an emerging socialist market economy.

Since 1996, lawyers have also become a socialised profession, and they are, in the legal aid colloquialism, often referred to as social lawyers. This phrase refers to private lawyers who take legal aid cases paid for by the government, as distinguished from salaried legal aid lawyers, government employees who provide legal aid services. There are currently nearly 330,000 lawyers in China,¹⁶ and as of 2012, about 1% are salaried legal aid lawyers,¹⁷ mostly practising law in big cities. Nearly 96% of lawyers were social lawyers, and the other 6% were government lawyers, corporate in-house counsels, legal aid lawyers, and military lawyers.¹⁸

The number of lawyers had hovered around 100,000 before the late 2000s. A relaxation of the pass rate for the Bar exam in China, which rose about 20% (of approximately 3000,000 candidates per year) for four consecutive years between 2007 and 2010,¹⁹ pushed the number of lawyers to nearly 200,000.²⁰ For decades, the Chinese legal system operated with more judges than lawyers, but with the recent increase, the number of lawyers has finally surpassed that of judges.

With recent social and economic developments, the Chinese legal profession has made progress in its degree of professionalism and the level of institutionalisation. The number of lawyers has steadily increased, and their quality, as defined by level of education, has also improved. There is now a rigorous national judicial examination for judges, prosecutors, and lawyers, and the eligibility requirement to take the examination has changed in turn from a sub-degree, to a general University degree,²¹ to the current requirement of a full law degree.

Secondly, there is a division between lawyers and notary publics. The latter is a government department that offers document verification and certification services, work that

¹⁴ 律师法 [Lawyers Law], China 2007, c 76, with effect from 28 October 2007, online: <http://www.gov.cn/flfg/2007-10/28/content_788495.htm> .

¹⁵ *Introduction to PRC Legal System*, *supra* note x, at 217.

¹⁶ “司法部首次举行新闻发布会 关注律师执业权利保障 [The Ministry of Justice holding its first press conference, responding to the questions relating to the protection of lawyers' rights and lawyers' classification by expertise]”, *CCTV* (26 April 2017), online: <<http://news.cctv.com/2017/04/26/ARTI6mINRg3akY534QjWo884170426.shtml>> .

¹⁷ One percent estimation is based on provincial statistics gathered in *Reports for Legal Aid System Improvement*, *supra* note x, at 6, 13, 19, 31, 39, 51, 60, 71, 85, 96, 107, 115, 125, 136, 147, 156, 166, 176, 192, 204, 220, 232, 245, 257, 272, 280, 285, 289, 300, 310, 329, 340, 359, 368, 373, 390, 405, 413, 421 and 425; China, State Council Information Office, 《中国的司法改革》白皮书 [White Paper: Judicial Reform in China], (9 October 2012), online: <http://www.scio.gov.cn/zfbps/ndhf/2012/Document/1226620/1226620_5.htm> [White Paper: Judicial Reform in China].

¹⁸ *Reports for Legal Aid System Improvement*, *supra* note x, at 11, 16, 26, 37, 46, 57, 68, 82, 92, 122, 133, 145, 152, 162, 186, 202, 215, 227, 242, 254, 264, 306, 322, 336, 366, 386, 399, 411 and 418; *White Paper: Judicial Reform in China*.

¹⁹ Rachel E. Stern, “Political Reliability and the Chinese Bar Exam” (2016) 43 *Journal of Law and Society* 506 at 512.

²⁰ *White Paper: Judicial Reform in China*, *supra* note x.

²¹ *Introduction to PRC Legal System*, *supra* note x, at 217.

would be done by lawyers in common law jurisdictions. The government has made these important services available to poor persons via legal aid. Earlier attempts in the early 2000s to socialise notary publics failed and there has been no further discussion to delink it from the government. Notary publics remain a state controlled public service organisation with its services compulsory in certain transactions, such as real estate transfers. The notary public business in cities is well-known for its huge profitability, and the fees it generates is commonly shared between the State, the Department of Notary Publics, and individual notary publics.

Finally, there is a division in civil cases between trained legal personnel and non-lawyer citizen representatives (公民代理 or *litigants ad litem*). With the approval of the court, citizens had been allowed to act as legal representatives in administrative, civil and criminal litigation. Chinese law has been historically liberal in legal representation; in addition to lawyers and legal workers, family members and relatives, individuals recommended by the residential community and work places, or perhaps most importantly any citizen can be a legal representative in civil litigation.²² This layperson backstop compensated for the shortage of lawyers and at the same time reduced the dependence on professionals, making their shortage less of a concern for ordinary people. This approach to representation, while allowing legal assistance from untrained persons, was justified because of the shortage of lawyers. The approach was deemed feasible because of the central judicial role in fact-finding as well as previously limited concerns with procedures and evidential niceties. It was also politically correct because it enabled citizens' public participation in the judicial process. Since the early 1990s, another effect of this open door policy was that it created tremendous opportunities at law school legal clinics and public interest-oriented NGOs to provide free legal aid services to vulnerable groups in society. Foreign donors such as the Ford Foundation and the American Bar Association played a crucial role in supporting, facilitating and shaping the growth of legal clinics and advocacy NGOs in China.²³

This approach to representation changed when civil procedure was reformed in 2013.²⁴ At present, although family members and direct relatives can still serve as litigation representatives, open-ended citizen representation has been placed under stricter control. Under the new rules, citizen representation is not allowed until the workplace or the residential committee of a party to a litigation so recommends. It appears that citizen representation among family members has continued in practice, but representation provided by NGOs, activist citizens, and law school clinics has diminished significantly, if not vanished completely.

V. The General Profile of Legal Aid in China

Legal aid in China was formally created in 1996, immediately after the enactment of the Lawyers Law.²⁵ Legal aid was not available before 1996 except in a limited number of criminal cases, such as those involving juvenile offenders where assistance from lawyers was mandatory.

²² Zhao Junsheng, Li Jijun & Song Jiangtao, “浅谈新民事诉讼法实施后公民代理的规范 [The Regulation of Citizen Representation after the Implementation of New Civil Procedures]”, *Zhengzhou Intermediate People's Court* (8 June 2015), online: <<http://zzfy.hncourt.gov.cn/public/detail.php?id=22393>> .

²³ Fu Hualing & Richard Cullen, “Climbing the Weiquan Ladder: A Radicalizing Process for Rights-Protection Lawyers” (2011) 205 *The China Quarterly* 40 at 55; *Legal Aid and Public Interest Law in China*, supra note x, at 268; *Transmission of Public Interest Law*, supra note x, at 282.

²⁴ A revision of *The Civil Procedure Law of the People's Republic of China* was adopted on 31 August 2012 and came into effect on 1 January 2013.

²⁵ *Legal Aid and Public Interest Law in China*, supra note x, at 220; *Lawyers, Legal Aid and Legitimacy in China*, supra note x, at 311; Zhang Geng & Gong Xiaobing, eds, *中国法律援助制度诞生的前前后后 [The Creation of the Chinese Legal Aid System]* (China: China Fangzheng Press, 1998) at 21.

The governing law is the Legal Aid Regulations which were enacted by the State Council in 2003.²⁶ Each province has also enacted its own rules to implement the national regulations.

The government has been the principal source of legal aid funding and the key driver for its development. The total legal aid funding in China in 2013, for example, was over RMB1.6 billion (US\$225.9 million),²⁷ of which nearly 99% was sourced from government budgets, in particular local county and district governments, which have contributed the lion's share of over RMB1 billion (US\$141.2 million).²⁸ Legal aid is mostly a local government responsibility. At slightly over RMB1 (US\$0.14) per person, the legal aid spending per capita in China is tiny, but its mere existence represents a significant change in the Chinese legal system.²⁹ Before and during the early stages of China's social and economic development, dispute resolution relied heavily on community-based mediation, in which justice was administered with minimal contribution from lawyers or even judges. China's closely-knit, communitarian society was perceived to have the capacity to resolve its own disputes without resorting to external assistance.³⁰ Legal aid and access to courts became relevant and gained importance as the capacity of traditional communities in dispute resolution diminished,³¹ and the evolution of social and economic disputes gradually demanded more formal legal intervention.³²

The central government initiated the delivery of legal aid through the creation of Legal Aid Centres (LAC), which function at four levels. The national level coordinates legal assistance across the country, while LACs in provinces and autonomous regions supervise the actual legal aid work in their jurisdictions. LACs in cities and counties are also responsible for providing legal aid. LACs are staffed by salaried lawyers paid by the government, who provide full-time legal aid services within jurisdictional limits. The institutionalisation of LACs created a stable team of professional lawyers in each jurisdiction, able to exercise hands-on quality control in the delivery of legal aid services.

A significant proportion of legal aid funding is used to pay for government-run LACs, mostly to cover the costs of the salaried legal aid lawyers. In 2014, there were 14,548 legal aid personnel, including lawyers, working in LACs, with most of them (11,755) working for county or district level LACs. Chongqing's funding and performance were better than the national average. The total legal aid funding in the city in 2016 was close to RMB80 million (US\$11.3 million), including RMB36 million (US\$5.1 million) as legal aid fees for lawyers, RMB20 million (US\$2.8 million) to pay for the salary of 110 legal aid lawyers, and RMB18 million (US\$2.5 million) to cover LAC administrative costs. In addition to salaried legal aid

²⁶ 法律援助条例 [*Legal Aid Regulations*], China 2003, with effect from 1 September 2003, online: <http://www.law-lib.com/law/law_view.asp?id=78770> [*Legal Aid Regulations*].

²⁷ XE Currency Converter <<https://www.xe.com/currencytables/?from=CNY&date=2018-07-26>> accessed 6 June 2020. All subsequent references to US\$ denominations in this article have been derived from www.xe.com.

²⁸ See *Reports for Legal Aid System Improvement*, *supra* note at x, at 5, 12, 17, 28, and 38. See also China, Legal Aid Centre, Ministry of Justice, *中国法律援助年鉴 2013* [*Yearbook of Legal Aid in China: 2013*] (China: China Democracy and Legal System Publishing House, 2015) [*Yearbook of Legal Aid in China: 2013*] at 204.

²⁹ Fu Hualing, "Access to Justice and Constitutionalism in China" in Stephanie Balme & Michael W. Dowdle, eds, *Building Constitutionalism in China* (New York: Palgrave Macmillan, 2009) [*Access to Justice and Constitutionalism in China*] at 168.

³⁰ Victor Li, *Law Without Lawyers: A Comparative View Of Law In The United States and China* (Boulder: Westview Press, 1978) at 59; Stanley B. Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford, California: Stanford University Press, 2000) at 218-219.

³¹ *Access to Justice and Constitutionalism in China*, *supra* note x, at 172; Fu Hualing, "Understanding People's Mediation in Post Mao China" (1992) 6(2) *Journal of Chinese Law* 211 at 216-218.

³² Donald Clarke, Peter Murrell & Susan Whiting, "The Role of Law in China's Economic Development" in Loren Brandt & Thomas G. Rawski, eds, *China's Great Economic Transformation* (Cambridge; New York: Cambridge University Press, 2008) at 405.

lawyers, the government relies extensively on providers in private practice, both social lawyers and legal workers, to deliver legal aid services.

In total, over 1.24 million legal aid cases including mediation were approved in 2014; there were over 997,000 civil cases, 240,000 criminal cases, and over 5,800 administrative law cases.³³ The three categories of legal aid providers, salaried lawyers, social lawyers and legal workers, each handle approximately one third of the national legal aid caseload. The percentage of cases handled by legal workers has been fairly stable and ranges from around 36% to 38% of the total number of legal aid cases. Cases handled by social lawyers have been on the increase, reaching 38% in 2013, partially due to an overall increase in legal aid funding. In contrast, the volume of cases handled by salaried lawyers has been declining, from over 29% in 2009 to about 20% in 2013. There are significant regional variations in these percentages, with legal workers handling half of the legal aid cases in the Western provinces with larger rural populations.³⁴ Legal aid services offered by other social groups, including NGOs or University-based legal aid centres, can have a considerable social impact but are negligible in number, with the exception of Beijing.³⁵

The scope of civil cases that are eligible for legal aid is limited. Under the Legal Aid Regulations, legal aid is available only for a listed category of cases relating to state compensation, social insurance payment, support for family members, relief payment, labour remuneration, or traffic accidents, medical malpractice or industrial injuries.³⁶ The types of legal aid recipients, as categorised by the official statistics, are also telling. In 2014, over 1.38 million recipients were recorded. They included approximately 476,000 migrant-workers, 471,000 farmers, 351,000 females, 65,000 persons with disabilities, 154,000 juveniles and 112,000 senior citizens.³⁷ The classification reflects how the Party prioritises legal aid services, much of which is directed to migrant labourers whose grievances have attracted significant political attention.

Legal aid in China is a rare public good that is in short supply, even with a restricted application, and the government exercises further control over the legal aid threshold by means and merits tests. The means test is straight-forward. It is standard practice for LACs to use the poverty line in China, i.e. those who receive a welfare payment calculated for the poorest persons (*dibao* or 低保), as a cut-off line. While the *dibao* varies from one jurisdiction to another, it is generally so low³⁸ that it limits legal aid to extremely poor persons. There is also a merits test, which the government uses to screen out contentious cases and which ensures a virtual certainty of winning. While there has been criticism that the merits test lacks consistency, its enforcement is rigorous enough that the majority of legal aid cases win. The courts found against legal aid recipients in only 5% of legal aid cases in 2011 and 2012.³⁹

³³ China, Legal Aid Centre, Ministry of Justice, *中国法律援助年鉴：2014* [*Yearbook of Legal Aid in China: 2014*], (China: China Democracy and Legal System Publishing House, 2015) at 208.

³⁴ Huang Dongdong, “法律援助案件质量：问题、制约及其应对——以C市的调研为基础” [*Quality of Legal Aid Cases: Problem, Regulations and Reaction – A Search focused on C City*]” (2015) 4 *Research on Law and Commerce* 54 at 59.

³⁵ The Beijing government has been providing funding to a few NGOs to provide legal aid services, including the well-known Zhicheng Legal Aid and Research Centre for Migrant Workers and the Yilian Labor Law Legal Aid and Research Centre. See *Reports for Legal Aid System Improvement*, *supra* note x, at 6–8.

³⁶ *Legal Aid Regulations*, *supra* note x, s 10.

³⁷ China, Legal Aid Centre, Ministry of Justice, *中国法律援助年鉴：2013* [*Yearbook of Legal Aid in China: 2013*], (China: China Democracy and Legal System Publishing House, 2015) at 208-209.

³⁸ In Chongqing for example, the poverty line was drawn in 2016 at RMB460 per month (US\$64.96) for urban residents and RMB300 (US\$42.36) per month for rural residents.

³⁹ In 2012, legal aid lawyers won in 58.4% of the cases and lost in 4.9% of the case. 30.3% of the cases were mediated and 5.8% of the cases were withdrawn. See *Reports for Legal Aid System Improvement*, *supra* note x, at 152.

As the Chinese economy improved and more people were lifted out of poverty, a diminishing number of people became eligible for legal aid. In response, nearly every province has raised the threshold to reflect China's changing economic reality and to increase access to justice. In Chongqing, the poverty line was drawn in 2016 at RMB460 (US\$64.95) per month for urban residents and RMB300 (US\$42.36) per month for rural residents, but the legal aid cut-off line is twice the poverty line. There are close to one million residents of Chongqing who live under the poverty line, but between two to three million residents are eligible for legal aid, about 10% of the population in the city.

A significant characteristic of access to justice in China is that the government no longer regards legal aid merely as a tool to meet the legal needs of the poorest of the population. It uses legal aid as a policy tool for legal intervention in matters of high profile social concern. The plight of Chinese workers migrating to the cities for work has in particular attracted wide political attention,⁴⁰ and as a result legal aid is now extended to legal disputes between these migrant workers and their employers, without having to satisfy a means test. Facing collective disputes such as those involving labour and the environment, the authoritarian government is sending legal aid lawyers, instead of police as it used to do, to manage delicate and potentially explosive issues.⁴¹ Other cases that are regarded as sensitive or significant, such as those involving the spouses of soldiers, good Samaritans in legal need, victims of domestic violence, or collective disputes involving low-income groups particularly in the areas of consumer rights and environmental pollution, have also been brought into the fold of legal aid cases.⁴²

Because of its politicisation, China's legal aid case load shows some features that may be uniquely Chinese. Civil legal aid funding elsewhere may be spent mostly on family law matters, including divorce or custody of children.⁴³ For clear policy reasons, a wide range of labour law issues relating to migrant workers have now become the largest type of case to receive legal aid funding. Ordinarily, a legal aid case must pass a means test to qualify, but the means test is waived for migrant workers for claims based on labour law rights. Migrant workers were brought within legal aid coverage without a means test in part because of the prevalence of violation of their rights and in part because migrants had acted collectively, extra-legally and occasionally violently in their advocacy.⁴⁴ In China, law in general and legal aid in particular are used to disaggregate collective conflict among migrants to bring them from the streets back into the courts.⁴⁵

Legal aid priority is also given to criminal cases. There is a general legal right to counsel for all criminal suspects after the first interrogation by the police,⁴⁶ and legal aid is available

⁴⁰ *Authoritarian Legality in China*, *supra* note x, at 2; Aaron Halegua, "Getting Paid: Processing the Labor Disputes of China's Migrant Workers" (2008) 26 *Berkeley Journal of International Law* 254 [*Getting Paid*] at 256.

⁴¹ *Access to Justice and Constitutionalism in China*, *supra* note x, at 170.

⁴² China, The General Office of the Central Committee of the CPC and the General Office of the State Council, *关于完善法律援助制度的意见* [*Opinions on Perfecting the Legal Aid System*], (29 June 2015), online: <http://www.gov.cn/gongbao/content/2015/content_2897153.htm> ; China, Ministry of Justice, *军人军属法律援助工作实施办法* [*Measures for the Implementation of the Work of Legal Aid for Servicemen and Their Family Members*], (29 September 2016), online: <http://www.gov.cn/gongbao/content/2017/content_5197025.htm> ; *Legal Aid Regulations*, *supra* note x, s 10.

⁴³ Richard L. Abel, "Law without Politics: Legal Aid under Advanced Capitalism" (1985) 32 *UCLA Law Review* 474 [*Law without Politics*] at 608.

⁴⁴ *Getting Paid*, *supra* note x, at 281, 283-286.

⁴⁵ Yang Su & He Xin, "Street as Courtroom: State Accommodation of Labor Protest in South China" (2010) 44 *Law & Society Review* 157 at 164.

⁴⁶ *中华人民共和国刑事诉讼法* [*Criminal Procedure Law of the People's Republic of China*], 1979, as amended on 14 March 2012, s 33. Under s 37, access to lawyers can be restricted in cases concerning national security, terrorism and major corruption.

for all indigent suspects if they wish to have a lawyer.⁴⁷ The circumstances in which access to a lawyer is mandatory for suspects and defendants under the Criminal Procedural Law⁴⁸ have been widening. They now include death penalty cases, juvenile offenders, and offenders who are senior or with certain disabilities. In detaining criminal suspects, police generally advise the detainees of their right to be represented by a lawyer. As a pilot project, the government has set up legal aid offices in detention centres and courts in which duty lawyers, private lawyers paid for by the legal aid fund, provide legal advice or defence when needed.

At a policy level, criminal justice reform and better access to lawyers for suspects in custody has been a major focus since the 1990s. The lack of access to effective legal advice has been a perennially sensitive international concern, with China receiving consistent criticism for lack of criminal representation.⁴⁹ Because the right to defence in criminal cases is widely regarded as a core human right, the central government is strongly incentivised to improve access to lawyers in criminal cases as soon as the police finish their first round of interrogation. In another pilot project in eight provinces, the Ministry of Justice and the Supreme People's Court have provided comprehensive legal aid coverage for all criminal cases at trial, appeal and for post-conviction reviews, where the defendant has no legal representative. The court is invested with the duty to inform a competent legal aid centre of a defendant's need for legal aid, and where a failure to notify this leads to the deprivation of the defendant's right to lawyer, the appellant court "shall" automatically quash the conviction and remand the case for a retrial.⁵⁰ China has sufficient lawyers to handle the current legal aid caseload, but whether the local legal aid budget is adequate remains uncertain.

Overall legal aid capacity is limited in any given jurisdiction, and choices among priorities are made. It is more likely than not that criminal cases are given priority in funding allocation. Criminal cases generally count for less than 10% of the total cases that courts adjudicate per year, but more than 20% of total legal aid funding. In places where duty lawyer schemes in detention centres were implemented, a much larger percentage of the legal aid budget, as limited as it is, has to be diverted to subsidize lawyers for advising suspects during their lengthy pre-trial detention.⁵¹

Other unique features of access to justice in China include the cooperation and coordination in case-handling between legal aid centres and government-controlled women's confederations, associations for disabled persons, and trade unions. Those groups are often the first port of call for their respective constituents when disputes arise, and they can effectively channel those disputes to legal aid services.⁵² Another feature of legal aid is the extensive use of legal advice from lawyers via government-run telephone hotlines. Each year, the National Legal Aid Centre reports over a million instances of the provision of such legal advice. There were over six million cases of legal advice given via hotline each year in 2013 and in 2014.⁵³

⁴⁷ *Legal Aid Regulations*, *supra* note x, s 13.

⁴⁸ *Criminal Procedure Law*, *supra* note x, s 34, 267.

⁴⁹ Zuo Weimin & Ma Jinghua, "The role of criminal defence lawyers in China: an empirical study of D County, S Province" in Mike McConville & Eva Pils, eds, *Comparative Perspectives on Criminal Justice in China* (Cheltenham, UK, and Northampton, MA: Edward Elgar, 2013) at 234; for a broad review of the issues, see Sida Liu & Terence G. Halliday, *Criminal Defense in China: The Politics of Lawyers at Work* (Cambridge: Cambridge University Press, 2017) [*Criminal Defense in China*].

⁵⁰ The Ministry of Justice and the Supreme People's Court, "最高法院司法部联合出台办法 开展刑事案件律师辩护全覆盖试点 [The Ministry of Justice and the Supreme People's Court Jointly Issuing Measures to Offer Blanket Coverage of Legal Aid by Lawyers for Criminal Cases]", *Xin Hua* (12 October 2017), online: <http://news.xinhuanet.com/politics/2017-10/12/c_129719121.htm> .

⁵¹ Proceedings from the Conference on Human Rights Protection Mechanism for Criminal Detainees, 14-15 September 2013, Wuhan, China (Copy on file with author).

⁵² *Access to Justice and Constitutionalism in China*, *supra* note x, at 173.

⁵³ *Yearbook of Legal Aid in China: 2013*, *supra* note x, at 206.

The 12348 hotline is now well-established and has become an important starting point for people with legal needs. Settlement through mediation by legal aid lawyers is another feature of legal aid in China. Lawyers are generally encouraged to settle cases through mediation, although the rate of mediation varies significantly in any given period of time, according to whether judicial policies are pro-mediation or anti-mediation. In both 2011 and 2012, for example, the mediation rate for applicable cases was approximately 30%.

VI. Lawyers and Mandatory Legal Services

Chinese lawyers have a mandatory statutory duty to provide legal aid services, which means that they are required to take a certain number of legal aid cases per year as determined by the jurisdiction – for which they will be paid. According to Article 42 of the Lawyers Law,⁵⁴ lawyers should provide legal services according to state regulations and should do so diligently and dutifully. A 2007 amendment of that Article expanded the duty to law firms.⁵⁵ The Legal Aid Regulations also reiterate the duty for mandatory legal aid services on the part of lawyers.⁵⁶

While the particular requirements of the obligation have varied historically, and currently differ from one jurisdiction to another, the requirement is normally within the range of between one to three legal aid cases per lawyer per year. Failure to provide the mandatory legal aid services may lead to disciplinary sanctions. Indeed, all lawyers are required to have their practicing certificates renewed by their respective provincial government each year, and completion of legal aid cases is one of the conditions for licence renewal. Government regulators often state expressly in their official websites that lawyers may be subjected to a wide range of disciplinary actions including disbarment for failing to provide this mandatory legal aid service. In practice, however, lawyers and their law firms are always able to meet the mandatory legal aid requirement. Law firms may organise legal aid duties by designating one junior associate to handle multiple legal aid cases on behalf of the lawyers in the firm, or lawyers may help each other out by registering a legal aid case under the name of a lawyer who falls short of the mandatory requirement. As long as the total number of legal aid cases is higher than the number of lawyers in a jurisdiction, it is assumed that lawyers are doing their duty and the legal aid performance of individual lawyers is not questioned.⁵⁷

There is little articulation or conceptualisation of the basis of the legal duty to provide mandatory legal aid services. Is it the socialist ambition to create an egalitarian and equal society through legal intervention, a moral responsibility of lawyers due to their status and privilege, or simply an authoritarian tradition that allows the government to impose whatever duties on lawyers it sees fit?

A typical argument put forth to justify pro bono legal aid in liberal democracies, compulsory or not, is an appeal to the sense of professionalism of lawyers,⁵⁸ as defined by the particular institutional settings in which lawyers work.⁵⁹ This argument asserts that lawyering is a noble profession that facilitates the supply of justice, and that if the poor cannot afford it, lawyers should provide it for free. There is indeed a moral and professional duty on lawyers to do so, because lawyers have a monopoly over the supply of legal services. Since only qualified

⁵⁴ 中华人民共和国律师法 [*Lawyers Law of the People's Republic of China*], as amended on 29 December 2001, s 42.

⁵⁵ 中华人民共和国律师法 [*Lawyers Law of the People's Republic of China*], as amended on 28 October 2007, s 42.

⁵⁶ *Legal Aid Regulations*, *supra* note x, s 6.

⁵⁷ Interviews with two Chinese lawyers, 2017, Chongqing, China.

⁵⁸ Deborah L. Rhode, *Access to Justice* (New York: Oxford University Press, 2004) at 77-78.

⁵⁹ Robert Granfield, "The Meaning of Pro Bono: Institutional Variations in Professional Obligations among Lawyers" (2007) 41 *Law & Society Review* 113 [*The Meaning of Pro Bono*] at 114-115.

lawyers can satisfy legal demand, lawyers have a duty to satisfy unmet legal needs though pro bono services. The monopoly nature of legal services and the related privileges that lawyers enjoy underlies this pro bono duty. Related to this main argument, there are more pragmatic arguments for lawyers to participate in pro bono, such as young lawyers gaining practical experience, all lawyers developing potential clients, and improving the public image of the legal profession by serving the poor.⁶⁰

The conceptualisation of pro bono in Western democracies is less relevant to understanding access to justice, and in particular mandatory legal services, in China. As new concepts, legal aid, access to justice, and pro bono became relevant in China only after it decided to embark on market reforms, including delinking of the legal profession from the state. The prevailing view was that a market economy required an independent legal system to facilitate economic transactions,⁶¹ and it was at this historical juncture that mandatory legal service provision duties were imposed on lawyers, who otherwise had no indigenous pro bono tradition.

When mandatory legal services were imposed on Chinese lawyers in 1996, lawyers' social status was relatively low. Lawyers also faced fierce competition from legal workers and citizen representation in a limited legal market. Lawyers were a newly socialised profession, recently delinked from a powerful government, and yet to establish wealth, reputation, or status. Although lawyering might have been a profession with potential to prosper in future, it was hardly a privileged one in the American sense that called for a corresponding responsibility.

A more viable explanation for the growth of mandatory legal services in China is that it provided lawyers with better economic prospects. At the beginning of market reforms, lawyers were largely content with the socialisation of their profession and the corresponding improvement in financial prospects. It was taken for granted by all stakeholders in the larger legal community that once freed from government control, lawyers would be financially independent, and certainly better off than judges, prosecutors, and legal advisers in government positions. Mandatory legal services were most likely imposed not because of lawyers' prestige in a political or social sense, but rather their potential financial profitability. Mandatory legal services imposed an additional tax on a potentially wealthy but politically weak profession. Historically, judges and prosecutors have treated lawyers poorly, in part because of a common perception that the lawyers could make a lot of money by doing very little in a case.⁶²

The requirement to provide mandatory legal services, however, was not well enforced. Without the government reimbursing at least the cost of transportation for rendering legal services, lawyers simply refused to assist and there was little the government could do. Several factors may be relevant in explaining this lack of enforcement. Demand for lawyers in 1996, when the obligation was introduced by the Lawyers Law, remained limited. At the beginning of lawyers' socialisation, use of professional legal representation by parties was low in both civil and criminal cases, and in the vast majority of the cases the parties did not have any professional legal representation. China's proactive, inquisitorial judges needed little assistance from lawyers in their fact-finding and legal analysis, effectively rendering the lawyers' role marginal.

Another reason for non-enforcement of mandatory duties was the state of law firm structures and bar associations. The experience of mature legal systems suggests that compliance with a pro bono requirement requires support and oversight from law firms and bar associations. In the American experience, voluntary pro bono works when the law firms

⁶⁰ *The Meaning of Pro Bono*, *supra* note x, at 114-5.

⁶¹ Albert Chen, "Rational Law, Economic Development and the Case of China" (1999) 8 *Social and Legal Studies* 97 at 111.

⁶² Fu Hualing, "When Lawyers are prosecuted...The Struggle of a Profession in Transition" (2007) 2 *Journal of Comparative Law* 95 at 112; *Criminal Defense in China*, *supra* note x, at 136-137.

employing lawyers, especially larger firms, encourage or insist on this requirement. Pro bono tends to be most sustainable when it is embedded within its institutional settings, for example when law firms count pro bono work toward billable hours. Mandatory pro bono, where it exists, works because of the existence of a well-organised and resourceful bar, which can coordinate, monitor, and enforce compulsory pro bono. Compulsory pro bono would not exist without a well-organised bar or other organisation with resources to organise and power to discipline.⁶³

These enforcement mechanisms from law firms and bar associations are not available in China. Before the enactment of the 1996 Lawyers Law, Chinese lawyers were state legal workers, and law firms were state owned or attached to government departments and other public entities such as universities. Law firms were small in size, and lawyers' associations were largely irrelevant in the regulation of the legal profession, itself a marginal institution.⁶⁴

While the Lawyers' Law has freed lawyers and law firms from direct government control, the road to building genuine partnerships within law firms has been a torturous one. It is well documented that Chinese law firms, until recently, were composed of individual partners and associates, who worked largely in isolation as solo practitioners. The influence of a firm on its lawyers is limited, and firms lack the effective tools to motivate lawyers to join public interest work that international firms typically have.⁶⁵

Similarly, lawyers' associations in China do not have organising abilities or disciplinary powers over law firms or lawyers. The authoritarian political system does not permit the creation of a free and powerful bar to represent lawyers independent of government control. Economic imperatives may require the state to create a free legal profession to serve the market economy, but the political concerns of an authoritarian state do not allow for the creation of an autonomous and vibrant civil society association.⁶⁶ Thus, the creation of a socialised legal profession did not witness the parallel institution of a powerful representative body. The bar is intentionally weak for political reasons, and is therefore not well placed to serve, monitor, or discipline its members. A weak bar association has neither the will nor the capacity to enforce mandatory legal aid. While the government may intervene in matters that it perceives to be significant, such as political challenges raised by human rights lawyers, it typically leaves lawyers alone in relation to minor matters such as legal aid or pro bono. Indeed, whenever the lawyers' association or government regulators did discipline lawyers, they took this action primarily on political grounds and for the purpose of exerting political control, i.e. "to safeguard the Communist Party's rule by keeping lawyers in bounds".⁶⁷

The position of bar associations may change. As the profession develops, lawyers have amassed wealth and gained a certain political clout and social status, which could be used to advance the professional interest of the legal profession.⁶⁸ For example, lawyers have lobbied

⁶³ Rebecca L. Sandefur, "Lawyers' Pro Bono Service and American-Style Civil Legal Assistance" (2007) 41 *Law & Society Review* 79 at 91-92; *The Meaning of Pro Bono*, *supra* note x, at 138.

⁶⁴ *Introduction to PRC Legal System*, *supra* note x, at 226; *China's Long March toward Rule of Law*, *supra* note x, at 348-349.

⁶⁵ Ethan Michelson, "The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work" (2006) 40 *Law & Society Review* 1 at 10; for official criticisms for the lack of supervision and monitoring, see Meng Jianzhu, "律师事务所要加强日常监管不能养痍遗患 [Law firms must solidify routine supervision and not leave wrongdoers unchecked]" *The Procuratorate Daily* (16 September 2015), online: <<http://www.chinanews.com/gn/2015/09-16/7526556.shtml>> .

⁶⁶ Anthony J. Spires, "Contingent Symbiosis and Civil Society in an Authoritarian State: Understanding the Survival of China's Grassroots NGOs" (2011) 117 *American Journal of Sociology* 1 at 8.

⁶⁷ Judith A. McMorrow, Sida Liu & Benjamin Van Rooij, "Lawyer Discipline in an Authoritarian Regime: Empirical Insights from Zhejiang Province, China" (2017) 30 *The Georgetown Journal of Legal Ethics* 267 at 267.

⁶⁸ *Criminal Defense in China*, *supra* note x, at 150.

the government to limit competition from others in the legal services market, with varying degrees of success. They had some success pushing legal workers out of cities and back to their rural counties. They were also successful in prohibiting bare-foot lawyers, law students and other activist citizens from representing civil cases in court. In relation to the mandatory legal service provision duty, they succeeded in persuading the government to expand legal aid spending and to offer better compensation for their legal aid services.

Indeed, the increase in legal aid funding in general, and funding to subsidise legal aid cases by social lawyers who take legal cases for a fee, reflects the increased power of lawyers. The total legal aid budget in 2003, for example, was RMB155 million (US\$21.9 million), the vast majority of which was ear-marked for salaried lawyers and their operating costs. A mere 17% was spent on legal aid cases by social lawyers in that year, with a national average of slightly over RMB400 (US\$56.48) per case, which reflected an increase of RMB100 (US\$14.12) from that its 2002 level. By 2014, China's legal aid spending rose to over RMB1.7 billion (US\$240.1 million).

While the national average case subsidy remains low, the situation has started to change in wealthy cities, where increased spending has made legal aid cases an attractive source of income for young lawyers struggling to find work. With increased spending on case subsidies, there is a distinct change in lawyers' attitude toward legal aid: the mandatory legal aid quota imposed on lawyers, which was regarded as a burden to be avoided if possible, is becoming a source of income to be fought for. The case fee has been increasing steadily in Chongqing and elsewhere in China.⁶⁹ In 2013, the legal aid fee per civil case in Chongqing was approximately RMB800 (US\$112.97), increasing to RMB1,800 (US\$254.17) in 2017.

Legal aid cases have become attractive not only because the pay has increased, but also because they are a stable source of income. The way the legal aid fee is calculated and offered is modelled on market fee arrangements. For civil cases, the government offers a lump-sum to the social lawyers selected for cases. For criminal cases, the fee is calculated in phases, with lawyers paid different amounts for their participation in different stages of the criminal process.⁷⁰ While it is difficult to estimate the gap between legal aid fees and market prices for a comparable case, an educated guess is that the legal aid fee is a third to a half of the market fee that a lawyer would charge in Chongqing for a simple civil case.

Why have legal aid fees been increased and how are they justified? Moreover, how does the government justify the practice of paying lawyers to fulfil their duty to assist the poor? Firstly, as the 2003 Legal Aid Regulations⁷¹ clearly state, legal aid is a government responsibility, and governments at the county level and above are required to take active measures to promote legal aid work and provide financial support for legal aid within their respective jurisdictions.⁷² Local legislation on legal aid confirms the statutory duty of the local government to provide adequate financing to satisfy local legal needs. Legal aid is now a regular budgetary item in government budgets and revenue for legal aid is relatively stable. There is a genuine commitment from both the central and local governments to expand legal aid funding to improve access to justice. Significant policy leadership is also provided by the Party, and the Party has repeatedly undertaken different kinds of legal reforms. Starting in 2014, the Party adopted a number of policy responses emphasising the significance of legal aid, and together with the expansion of legal aid, these measures indicate a strong political desire to replace the police and other coercive apparatuses of the state with legal procedures as the

⁶⁹ *Reports for Legal Aid System Improvement*, *supra* note x, at 230.

⁷⁰ For detailed description of pay-scale for legal aid cases in different provinces, see *Reports for Legal Aid System Improvement*, *supra* note x, at 402 (Guangzhou).

⁷¹ *Legal Aid Regulations*, *supra* note x.

⁷² *Legal Aid Regulations*, *supra* note x, s 3.

predominant method for dispute resolution.⁷³ For example, in 2015, the Party's General Office and that of the State Council, two key policy-making bodies in China's political structure, jointly issued a document entitled Opinions on Improving the Legal Aid System. The Opinions demanded that concrete measures be taken to channel disputes and conflicts into the legal process via the expansion of legal aid for disputes involving labour, family, food and medicine, education and medical care. The Opinions also required the creation of a duty lawyer scheme in courts and detention centres. For those who promote legal aid in China, the Party has offered a target list of commitments.⁷⁴ Beyond the broader rule of law promotion, the Party is also increasing public spending on public services to improve the livelihood of the poor, and specifically referencing the constitutional right of equality for all.⁷⁵ Legal aid is regarded as part of the wider provision of public services in state planning. The 13th Five Year Plan, in particular, refers to the improvement of public legal services through improving legal aid.⁷⁶

Secondly, China has developed the financial capacity to provide more legal aid funding. China's GDP per capita has increased steadily over the past four decades, particularly in the wealthy provinces and cities in the past 15 years. This enhanced financial capacity, coupled with a political commitment to legal aid spending, means a larger and a more stable budget for legal aid in general and increased subsidies for lawyers handling individual cases throughout the country.⁷⁷

Thirdly, there seems to be a consensus that lawyers' work, like any work, should be adequately compensated. While legal aid is both a government responsibility and a duty of lawyers, Chinese discourse has decisively shifted from lawyers' duty to government responsibility. The argument that lawyers are a special profession that provides a crucial public service remains relevant, and the notion that serving the people defines socialist lawyers is not entirely evaporated, but lawyers' voluntary and free contributions no longer dominate public discourse or government decision-making. The government has the money and lawyers have the expertise. The only remaining challenges are for lawyers to bargain for higher fees from the legal aid authority, and for the national legal aid authority and local governments to bargain about the balance of funding. Adequate compensation for legal aid is mostly taken for granted due to a combination of reasons, including acknowledged increases in inflation and related cost of living allowances, and recognition that lawyers need time to prepare a case. The clear intention of the Party is to increase spending to purchase quality legal services from lawyers to cover a wide range of social issues.⁷⁸

Expanded legal aid funding and the corresponding increase in legal aid fees per case, however, have arguably led to the commercialisation of legal services for the poor. While commercialisation may have motivated some lawyers to contribute to legal aid, it creates its own difficulty. Before the increase in legal aid funding, the difficulty was one of motivation, in other words how to incentivise lawyers to provide services largely for free. For the reasons stated above, neither the socialist ideology of serving the people nor a professional commitment based on a newly found lawyer identity were strong enough to nurture a pro bono culture. Lawyers who participated in legal aid work bargained for higher pay, and with the availability

⁷³ *Access to Justice and Constitutionalism in China*, *supra* note x, at 170.

⁷⁴ China, Ministry of Justice and Ministry of Finance, *关于完善法律援助制度的意见* [*Opinions on the Provision of Legal Aid by Lawyers*], (29 June 2015), online: <<http://www.chinalawedu.com/falvfagui/21752/wa1507079100.shtml>> .

⁷⁵ “司法部就《关于完善法律援助制度的意见》答记者问 [The press conference of the Ministry of Justice on the Opinions on Improving Legal Aid System]”, *Xin Hua* (30 June 2015), online: <http://news.xinhuanet.com/politics/2015-06/30/c_127966971.htm> .

⁷⁶ China, *The 13th Five-Year Plan for Economic and Social Development of the People's Republic of China* (17 March 2016) at chapter 75, section 4.

⁷⁷ *Reports for Legal Aid System Improvement*, *supra* note x, at 166 (Hubei).

⁷⁸ *Legal Aid Regulations*, *supra* note x, s 3.

of more resources, the government met market demand. With steady increases in funding and acceptance of legal aid as a government responsibility, it became possible and necessary to offer enhanced financial compensation for lawyers for legal services to the poor. Indeed, a new difficulty has emerged with the increase of legal aid budget, namely how to distribute legal aid funding among lawyers demanding legal aid cases in an equitable and efficient manner.

The availability of legal aid funding has solved, in part at least, the incentive difficulty. With more lawyers providing legal aid services, the major difficulty becomes one of monitoring. The dominant discussion in policy and academic circles now is how to increase the legal aid budget and how to put the increased legal aid funding to better use, including how to monitor lawyers effectively to ensure compliance and to maintain quality control. The clear agenda is for the government to purchase legal services from the private sector and put them into effective use in solving disputes and improving governance. However, for junior lawyers and small law firms, the increased budget means little more than a steady source of income. Regardless of how the quality issue will be resolved, the embryonic spirit of pro bono has diminished in the official system. By commercialising pro bono, the state has ended it.

VII. Legal Aid as a Site of Contention

Legal aid serves a political function. It is political in the classic Abelian sense⁷⁹ in that legal aid reproduces labour relations, disciplines capital and bureaucrats, and mitigates social and economic repression of the poor. Structurally, legal aid legitimises the underlying political system and maintains the *status quo*. The endowment of rights on individual legal subjects is fundamental to the operation of China's emerging market economy, yet at the same time the law and the legal rights it endows atomise society and individualise disputes. The enshrinement of rights in law, under contract and through the legal process, creates an impression of neutrality and a sense of justice, which in turn render the legal regime legitimate in the eyes of its users, even though the legal system operates in a passive, reactive fashion, with courts responding to particular allegations of infringements and demands for remedies. Private rights rely on private dispute resolution, and litigants are presumed to have the capacity to enforce their individual rights. Access to justice in this context is narrowly construed and indeed dependent on the willingness and ability of parties to take legal action.⁸⁰ Legal aid, while empowering those who are weak and cannot initiate a legal action,⁸¹ can hollow out the political substance of social conflict and reduce collective conflict to matters of mere legal technicality. Through the legal process, collective or class conflict is turned into isolated legal disputes between individuals. While legal aid reduces real harm, as Abel acknowledges,⁸² it also serves an anti-solidarity function that prevents the poor and the vulnerable from organising themselves and projecting a collective voice.

Although the state commercialises legal aid and uses it to depoliticise conflict, progressive forces can potentially use similar legal tools to re-create a collective identity, class awareness, and a sense of shared community. Rights-based NGOs and University-based legal clinics can recruit lawyers and organise their own pro bono work independent of the official legal aid system. Coordinated and supported by overseas and domestic NGOs of various kinds, lawyers have offered a variety of legal intervention on a wide range of legal issues touching on gender equality, disability rights, environmental protection, labour rights, and criminal defence

⁷⁹ *Law without Politics*, *supra* note x, at 586.

⁸⁰ Fu Hualing, "Bringing Politics Back: Access to Justice and Labour Disputes" in Flora Sapio et al, eds, *Justice: The China Experiences* (Cambridge: Cambridge University Press, 2017) at 357.

⁸¹ *Access to Justice and Constitutionalism in China*, *supra* note x, at 168.

⁸² *Law without Politics*, *supra* note x, at 554.

in general. The NGO-facilitated pro bono cases may be small in number, however they are significant in the social impact they create.⁸³

While NGO-coordinated pro bono cases share some common characteristics with government-run legal aid services, there is a significant divergence in both the case selection process and its objectives. Legal aid aims to serve individual legal needs of the poor, and lawyers generally accept cases according to a means and merit test without considering the political implication or social impact of the case. The clear objective is to offer immediate remedies to the particular legal predicament that a client faces. Public interest lawyers on the other hand strategically choose cases for the purpose of generating a larger social impact, either to raise awareness among the general public, to highlight some systematic abuses, or to lobby for certain legal or policy changes.⁸⁴ The immediate grievance of a particular individual is of less a concern than the larger public interest behind it. These kinds of lawyers are concerned with structural issues and aim to obtain transformative remedies. The particular case is used as an entry point into the legal system, and pro bono here serves a larger political agenda for social transformation.

The provision of legal services for the majority of poor persons is better left to the extensive official legal aid programmes that the government runs or sponsors. NGOs and public interests groups can better serve their objectives by moving beyond individual grievances and concentrating their limited resources on structural issues with larger social and legal impact. Some NGOs and law school-based clinics have a long-standing strategy of shifting from providing legal aid for individual cases to proactively selecting cases for legal or policy changes. If the political agenda of legal aid is to individualise conflict and maintain the *status quo*, public interest law promotes a collective identity, aggravates isolated grievances and disputes and seeks social changes through law. However, it is this organisation and collective action, with the political objective of social transformation, that invites suspicion and hostility from the government. For China's authoritarian system, legal advocacy of the public interest independent of the Party-state poses a potential risk to social and political stability. It challenges the Party's governance and legitimacy, and it must be restricted and suppressed because of its potential to nurture independent social forces.⁸⁵

The rise and fall Wuhan University Law School's Centre for the Protection of Rights of Disadvantaged Citizens is illustrative of this dynamic process. The Centre was created in 1992 with the support of Ford Foundation. It was modelled on American public interest law firms, and it was the first legal aid centre that was created by a law school in China.⁸⁶ Like other clinical programs that became popular in subsequent years, law students in Wuhan University provided free legal advice under faculty supervision and assisted in case preparation for those requesting their services. There was an open door policy and clients were invited to walk in for legal assistance. As the Centre developed, its management started to reconsider the direction of the Centre's development. As a result of that reflection, the Centre shifted its priority from providing legal aid for vulnerable groups to promoting policy challenges through impact litigation. As it turned out, the Centre was successful in instituting a number of high profile judicial review cases challenging a variety of practices, including the police power to randomly

⁸³ *Public Interest Litigation in Asia*, *supra* note x, at 20; *Legal Aid and Public Interest Law in China*, *supra* note x, at 248-250; *Transmission of Public Interest Law*, *supra* note x, at 279.

⁸⁴ *Public Interest Litigation in Asia*, *supra* note x, at 24; Wang Zhenyu & Chen Shengqiang, "Public Interest Litigation and Social Media – Commenting on the Case of Cui Yingjie Murdering a Urban Management Officer" in Yan Xiang, ed, *公益诉讼的理念与实践* [*Public Interest: Philosophy Through Litigation*] (Wuhan University Press, 2010) at 95.

⁸⁵ *The July 9th Crackdown*, *supra* note x, at 567; Eva Pils, *China's Human Rights Lawyers: Advocacy and Resistance* (Abingdon: Routledge, 2014) at 274.

⁸⁶ *Public Interest Litigation in Asia*, *supra* note x, at 14; *Legal Aid and Public Interest Law in China*, *supra* note x, at 233.

check ID cards, age discrimination in civil service recruitment, and governmental refusal to publicize information in response to open government information applications.⁸⁷ The Centre's success soon attracted wide public attention and hostility from a range of authorities, including the security forces. When the government launched a new round of crackdowns on civil society and public interest activism in 2014, the Centre had to abandon its public interest law practice. Its director was forced to resign, and the Centre was coerced into having its name changed to a Legal Aid Centre to symbolise a retreat from impact litigation for social change to legal aid to assist the poor. A similar shift from providing legal aid services to creating legal impact through public interest law has also taken place in other University-based legal aid centres or legal aid NGOs.⁸⁸

Public interest litigation, initiated by civil society actors including lawyers, can become politically sensitive, inviting pushback and even repression, as human rights lawyers have experienced since 2015.⁸⁹ The political risk marks a fundamental difference in legal aid and access to justice between democracies and authoritarian states. However, grass-roots public interest promotion in China has proven resilient. While the on-going crackdown has had a chilling impact on public interest law, it has not put all NGO-facilitated social-legal activism on hold. NGOs in different parts of China have continued to organise lawyers to participate in pro bono work in relation to the promotion of rights equality. The narrowing of space for civil society activism in general is making public interest litigation much harder, but it has not prevented lawyers from offering pro bono legal aid services in cases relating to domestic violence, and gender and sexual orientation-based discrimination.⁹⁰

VIII. Conclusion

Before the 1996 landmark legal changes, lawyers were part of the state, hired by and accountable to the state. There was no pro bono tradition or public interest spirit in what was a government-controlled legal profession. The 1996 reforms delinked the profession from the government, and at the same time China's authoritarian government imposed a duty of mandatory legal aid on lawyers. However, the government did not secure lawyers' compliance. The mandatory legal aid duty was imposed at a moment when the legal profession had just been freed from direct government control, and after the practice of law became a socialised profession the government had little leverage over lawyers to enforce its mandatory rule.

To manage China's post-revolutionary transition, lawyers became indispensable in channelling rising social conflict into legal institutions for effective resolution. Unmet legal demands attracted official attention because of their potential to trigger social and political instability. Lawyers gained wealth and status after socialisation, and to motivate lawyers to work for poor or vulnerable persons, the government first created a legal aid system and then increased legal aid spending following demands from lawyers. With both carrots and sticks in

⁸⁷ Details of the cases are provided in Shen Xiaoping, "Public Interest Litigation and the Making of Government under Sunshine" in Yan Xiang, ed, *公益诉讼的理念与实践* [*Public Interest: Philosophy Through Litigation*] (Wuhan University Press, 2010) at 7; Shen Xiaoping & Xiong Yongxian, "Police ID Check Challenged by Public Interest Litigation" in Yan Xiang, ed, *公益诉讼的理念与实践* [*Public Interest: Philosophy Through Litigation*] (Wuhan University Press, 2010) at 35; Chen Shengqiang & Liu Jiahai, "Do Eligibility Requirements for Civil Service Exams Constitute Discrimination?" in Yan Xiang, ed, *公益诉讼的理念与实践* [*Public Interest: Philosophy Through Litigation*] (Wuhan University Press, 2010) at 66.

⁸⁸ Interviews with five existing and former lawyers from legal aid centres in Wuhan and Beijing in 2016 and 2017.

⁸⁹ *The July 9th Crackdown*, *supra* note x, at 560.

⁹⁰ Fu Hualing, "What Future is there for Human Rights Lawyering in China?" (2017) 2 *Made in China: A Quarterly on Chinese Labour, Civil Society, and Rights* 11 at 15; *The July 9th Crackdown*, *supra* note x, at 561.

hand, the government proved successful in bringing lawyers back to meet the legal needs of the poor and other vulnerable groups. However, although the commercialisation of legal aid may have motivated lawyers to provide legal aid for the poor, it also diminished and for many lawyers perhaps even killed an embryonic pro bono spirit.

A pro bono, or perhaps more accurately in China, a public interest spirit, managed to survive in the legal profession, outside of the official legal aid system. As the legal profession in China developed and matured, lawyers started to volunteer their services to promote public interest law, with the coordination of public interest NGOs. Gradually, a pro bono or public interest ethos started to take root and grow. Lawyers, of their own volition and with some support from the international community, are advocating for equality rights in the court of law as well as in the broader court of public opinion. The main challenge to this ethos lies in China's authoritarian political system, which has definitively acted to prohibit activity perceived to conflict with sensitive areas, and it is this tension which will test access to justice in the coming years.