

STRATEGIC LITIGATION AS A TRIGGER TO
ENFORCE HUMAN RIGHTS IN CHINA:
From the Perspective of Rights of the Disabled

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Abstract

This thesis mainly deals with the use of strategic litigation to enforce human rights with a perspective of rights of the disabled. The first chapter provides the literature review of strategic litigation and disability rights, discussing the basic concepts mentioned in this thesis.

The second chapter discusses the function of litigation to enforce rights, as well as the use of strategic litigation. Discussion on the function of litigation will contribute to the power of strategic litigation to enforce rights.

Chapter 3 talks about the achievements and challenges of strategic litigation in Central and Eastern Europe and lessons learnt from them. The experiences learnt from this chapter will guide the discussion of the next one.

Finally, the last chapter discusses the use of strategic litigation in the context of China and if strategic litigation suits the special political and judicial regimes in China. The conclusion is drawn from all the discussions above.

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Table of Contents

Abstract.....	i
Acknowledgement	ii
Introduction.....	1
Chapter 1 Literature Review	3
1.1 Strategic Litigation.....	3
1.2 CRPD and Disability Rights	8
Chapter 2 The Use of Strategic Litigation to Enforce Disability Rights	11
2.1 The Functions of Litigation	11
2.2 Alternative Means to Enforce Disability Rights.....	16
2.3 A Case Study in Canada	18
Chapter 3 Achievements and Challenges of Strategic Litigation Approach to Enforce Rights.....	23
3.1 Shtukaturov v. Russia	23
3.2 D.H. and Others v. the Czech Republic	28
Chapter 4 Strategic Litigation to Enforce Rights of the Disabled in the Context of China.....	35
4.1 The Situation of Persons with Disabilities in China	35
4.2 Strategic Cases for Persons with Disabilities.....	36
4.2.1 Administrative Cases	36
4.2.2 Civil Cases	42
4.3 Achievements and Challenges of the Strategic Litigation Approach in China	44
4.3.1 Achievements.....	44
4.3.2 Challenges.....	47
Conclusion	49
Bibliography	51

Introduction

Strategic litigation as a tool has its power to enforce human rights and bring social change in both court-independent country and countries with a relatively weak judiciary system. The use of strategic litigation in western countries has a long history and has been proved to be effective in terms of rights enforcement, while recently there is also a trend in China to enforce human rights through strategic litigation, such as women's rights, issues regarding the environment and rights of the disabled. In central and eastern Europe, strategic litigation has a relatively short history and it has contributed significantly to the rule of law in this region.¹ Compared with western countries, the regimes and environment for strategic litigation in Central and Eastern Europe are closer to that in China, so lessons learnt from this region may be help to develop strategic litigation in China.

The birth of Convention on Rights of Persons with Disabilities has fostered a new wave to enforce rights of the disabled. China has just ratified CRPD in 2008 and modified its domestic law, which provides both foundation and opportunity to enforce rights of the disabled. However, rights of the disabled in China are still very limited and some of them are just something on paper. In order to transfer the words in CRPD into practice, and to examine how to make social change through strategic litigation in

¹ James A. Goldston, "Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges", *Human Rights Quarterly*, Vol. 28, No. 2 (May 2006).

China, this thesis will discuss the use of strategic litigation to enforce rights with a specific focus on rights of the disabled in a comparative perspective.

Chapter 1 Literature Review

1.1 Strategic Litigation

Strategic litigation, also called impact litigation, test case litigation or public interest litigation, is a method used by public interest organizations and lawyers through test cases in the judicial system, to create “lasting effects beyond individual case”² and thus further the enforcement of human rights and make social change eventually.³

Peter Reading described four characters of strategic litigation: strategic, part of a whole strategy where strategic litigation is linked to other methods pursuing the same goal of human rights enforcement and social change, maximum impact and effective use of resources.⁴

Compared with ordinary litigation, strategic litigation is more motivated. In ordinary litigation, lawyers are usually pushed by victims and play a secondary role to serve the interests of their clients. However, in strategic litigation, public interest organizations or law firms usually determine in the first place a certain sphere of

² See International Gay and Lesbian Human Rights Commission, “Public Litigation Strategies” and also Interights, “International Dimensions of Strategic Litigation”, available at <http://www.internationaldisabilityalliance.org/wp-content/uploads/2010/01/Disability-Seminar-strategic-litigation-PowerPoint.ppt>, visited on Nov.23, 2010.

³ See International Gay and Lesbian Human Rights Commission, “Public Litigation Strategies”; Sabine Benzing-Balzer, “Strategic Litigation: An Introduction”, Public Affairs Foundation; Public Law Interest Law Initiative, Columbia University Budapest Law Center, Public Policy Advocacy: Strategic Litigation and International Advocacy.

⁴ Peter Reading, “The Importance of Strategic Litigation: the Experience in Britain”, Equality and Human Rights Commission, 2010.

human rights violations in which they would like use litigation as a tool to enforce human rights, and then try to find victims of such violations in order to file a lawsuit. Sometimes they even take themselves as potential victims⁵ to launch strategic litigation aimed at human rights enforcement and social change. Therefore, strategic litigation pursues broad social justice, rather than individual justice.⁶

Sometimes, strategic litigation is also called “public interest litigation”.⁷ Both of them serve public good. But public interest litigation is a broader term. It also refers to legal aid lawsuits bringing access to justice to the underrepresented.⁸ But considering the overlapping between these terms, and different use of terms in different countries,

⁵ In the jurisdiction of ECHR, many public interest organizations launched strategic litigation in which they themselves act as “potential victims”. See, for example, *Association for European Integration and Human Rights and Ekimdzhev v. Bulgaria*, Application no. 62540/00, ECHR, 2008; *Iordachi and Others v. Moldova*, Application no. 25198/02, ECHR, 2009; *Liberty and Others v. the United Kingdom*, Application no. 58243/00, ECHR, 2008.

⁶ See Sabine Benzing-Balzer, “Strategic Litigation: An Introduction”, Public Affairs Foundation, p.12, available at <http://www.pacindia.org/projects/right-to-information-empowerment-programme-right-to-information-training-for-ngos-from-india/S%20Benzing-Balzer%20-%20Strategic%20litigation%20-%20Bangalore.ppt>; Public Law Interest Law Initiative, Columbia University Budapest Law Center, Public Policy Advocacy: Strategic Litigation and International Advocacy, available at http://www.essex.ac.uk/armedcon/story_id/000698.pdf; Peter Reading, “The Importance of Strategic Litigation: the Experience in Britain”, Equality and Human Rights Commission, 2010, available at http://www.equineteurope.org/the_importance_of_strategic_litigation_010710final_1.ppt.

⁷ Edwin Rekosh, Kyra A. Buchko and Vessela Terzieva (eds), “Persuing The Public Interest: a Handbook for Legal Professionals and Activists”, Public Interest Law Initiative, 2001, p.82.

⁸ Ibid.

strategic litigation in one country may refer to the general public interest litigation in another country.⁹

Though controversial, public interest litigation is very powerful in India where a lawsuit can be brought to the court without a particular victim.¹⁰ Therefore, it is even considered as “the improved version of public interest litigation of U.S.A.”¹¹

However, in the international level, it is still difficult for a third party to file a case for public interest before the court. In the context of this thesis, strategic litigation mentioned here does not include the type of public interest litigation launched by a third party.

In the United States, there is a long history of the disadvantaged groups “utilizing the courts as an opportunity to challenge existing governance structures and exclusionary policies”.¹² In the early civil rights movements, strategic litigation was widely used in different human rights spheres ranging from school segregation, labor rights, and

⁹ For example, in China, lawyers, scholars and journalists tend to use the term of “impact litigation” or “public interest litigation” in their works.

¹⁰ See, Varun Gauri, “Public Interest Litigation in India: Overreaching or Underachieving?” The World Bank, 2009, pp.3-4, available at www.indiaenvironmentportal.org.in/files/WPS5109.pdf, visited on Nov.24, 2010; Jasper Vikas George, “Social Change and Public Interest Litigation in India”, 2005, available at <http://india.indymedia.org/en/2005/03/210205.shtml>, visited on Nov.24, 2010.

¹¹ Jasper Vikas George, “Social Change and Public Interest Litigation in India”, 2005.

¹² Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, Cambridge, 2007, p.8.

women's rights to animal rights.¹³ For example, the landmark case *Brown v. Board of Education*¹⁴ where separation of the black people in the education system was ended by the court is seen by many scholars and activists as the origin of public interest litigation.¹⁵ This case is also a famous and early example of strategic litigation, in which a clear strategy formed before the litigation, with a strong will of making changes in the educational system instead of seeking individual justice. After the success of *Brown*, the strategic approach used in this case was followed by other public interest organizations and lawyers seeking to end racial distinctions through strategic litigation beyond the sphere of public school, expanding to issues concerning employment, housing and right to vote.¹⁶ The *Brown* decision had also inspired human rights defenders who sought to enforce rights of other minorities using similar litigation strategies learned from the *Brown case*.¹⁷ Gradually, strategic litigation in the *Brown case* achieved its goal----elimination of separation of education, and

¹³ Ibid.

¹⁴ *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁵ See Helen Hershkoff, "Public Interest Litigation: Selected issues and examples", p.3, available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf>, visited on Nov.23, 2010; Steven H. Wilson, "*Brown* over 'Other White': Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits", 21 *Law & Hist. Rev.* 145 (2003), p.145; Christoph Scwarte, "Public Interest Litigation", International Institute for Environment and Development, p.2, available at [http://www.environmental-mainstreaming.org/documents/EM%20Profile%20No%203%20-%20PublicInterest%20Litigation%20\(6%20Oct%2009\).pdf](http://www.environmental-mainstreaming.org/documents/EM%20Profile%20No%203%20-%20PublicInterest%20Litigation%20(6%20Oct%2009).pdf), visited on Nov.23, 2010; Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89 (1976), pp.1282-86.

¹⁶ Steven H. Wilson, "*Brown* over 'Other White': Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits", 21 *Law & Hist. Rev.* 145 (2003), p.145.

¹⁷ Ibid. and also Helen Hershkoff, "Public Interest Litigation: Selected issues and examples", p.3.

brought “slow but steady”¹⁸ social change----elimination of separation of the black people.

Compared with the large-scaled litigation movements in the US, strategic litigation in Europe has “a considerably shorter history”.¹⁹ Many legal systems in European countries do not accept group litigation until present.²⁰ And similarly, the influence of activities concerning women’s rights and environment before the courts was also minimal until now.²¹ Though a considerable number of strategic litigation before the European Court of Human Rights is successful, such as litigation against separation of education of Roma children²² and against wiretapping,²³ it is far from the large-scaled movements as they are in the United States.

¹⁸ Ibid.

¹⁹ Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, Cambridge, 2007, p.8.

²⁰ Ibid.

²¹ Ibid.

²² See *D.H. and Others v The Czech Republic*, Application No. 57325/00, 2006; *Sampanis and Others v Greece*, Application No. 32526/05, 2008; *Oršuš and Others v Croatia*, Application No.15766/03, 2010.

²³ See for example, *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, Application no. 62540/00, ECHR, 2008; *Liberty and Others v. the United Kingdom*, Application no. 58243/00, ECHR, 2008; *Iordachi and Others v. Moldova*, Application no. 25198/02, ECHR, 2009.

1.2 CRPD and Disability Rights

Convention on Rights of Persons with Disabilities (hereafter referred to as CRPD) was adopted at the end of 2006 and came into force in 2008. It is the first international convention protecting rights of the disabled. Besides the highlights of the convention itself, such as combination of civil political rights and economic social and culture rights, rights-based mode, detailed description of obligations of the government, and the brand new understanding of disability, it also brings life of the disabled into people's horizon and incurs new actions to enforce CRPD and better the life of persons with disabilities.

The birth of CRPD has brought great mass fervor to rights of persons with disabilities, including the sphere of judicial system, and CRPD has been cited frequently in both complaints and judgments.²⁴ In the case *Alajos Kiss v. Hungary*,²⁵ which is an example of strategic litigation launched by Mental Disability Advocacy Center (hereafter referred as MDAC), the applicant was deprived of right to vote because he is under partial guardianship due to his mental disease. Since Hungary is a member of CRPD, the lawyer from MDAC and the third party used provisions of CRPD as a strong tool to organize their arguments and address right to vote for persons with disabilities.²⁶ After the success of this litigation, a lasting effect has been created to promote the implementation of the favorable judgment, including conferences,

²⁴ See for example, *Alajos Kiss v. Hungary*, *Application no. 38832/06*, 2010 and *Jasinskis v. Latvia*, *Application no. 45744/08*, 2010.

²⁵ *Alajos Kiss v. Hungary*, *Application no. 38832/06*, 2010.

²⁶ *Ibid*, para.31-35.

discussions and further actions regarding the right to vote for mental disabled people,²⁷ which further incurs more effective activities and possibilities to implement the judgment in the whole country.

In the context of China, since China has actively joined CRPD and modified its domestic law²⁸ accordingly, it may be a good chance to enforce disability rights through different ways, including strategic litigation. In other words, in order to comply with the obligations under CRPD, the government of China has to ensure not only its domestic laws in accordance with CRPD, but also their implementation.

Though these laws and regulations in the domestic level are imperfect and there is still a huge gap between CRPD and domestic law, they are helpful to change the situation of disabled people if applied into practice. However, the up-to-down approach of application of laws is always insufficient and the government can not “make the law work for everyone”,²⁹ which entails a strong need of use of a down-to-up approach. Therefore, when the guarantee in the law is not reflected in the real life of disabled people, strategic litigation plays a role of bridging provisions in the law and practice, which is of great significance in terms of the circumstances in China.

²⁷ For example, the conference “Legal Provisions on Guardianship and the Right to Vote in Hungary: Conference and Roundtable Discussion on Guardianship and the Right to Vote in Hungary in Light of Hungarian and International Regulations” was held by MDAC shortly after the case *Alajos Kiss v. Hungary*.

²⁸ Law on the Protection of Disabled Persons (2008).

²⁹ UNDP, *Making the Law Work for Everyone: Report of the Commission on Legal Empowerment of the Poor*, vol. I, 2008.

In other countries, strategic litigation could be used to bring laws and regulations in line with the Constitution, whereas in China, where the Constitution can not be directly used in the judicial system,³⁰ strategic litigation may play an important role of bringing CRPD and modified disability law into the real life of disabled people. In the case *Luan Qiping and Others v. Ministry of Railways*,³¹ the plaintiffs have problems with their legs and complained that when they travelled by train where there were no facilities for disabled people, they had to sit on the ground. Because there were too many people in the train at that time, when passengers moved through the corridor, they had to cross plaintiffs' bodies, which made them suffer both physically and mentally.³² This case was prompted by Sichuan University Human Rights Centre as a test case to call attention to the right to barrier-free traffic for persons with disabilities. Though at last the plaintiffs withdrew the lawsuit, this case has already known to the public through the media and brought the real life of disabled people into society. Therefore, as long as there is continued strategic litigation aimed at addressing the barriers faced by persons with disabilities, disability rights promised in the laws will become meaningful in the real life.

³⁰ Actually in 2003, there is a case where the Constitution was cited by the court to protect the petition's right to education and this citation was confirmed by the judicial interpretation of the Supreme People's Court. (see *Qi Yuling v. Chen Xiaoqi and Others*, Shandong Higher People's Court, 2001) However, this interpretation was invalidated by the Supreme People's Court in 2008. See Supreme People's Court, Decision on Abolishment of Judicial Interpretation before 2007.

³¹ *Luan Qiping and Others v. Ministry of Railways*, Beijing No.1 Medium People's Court, 2009.

³² *Ibid.*

Chapter 2 The Use of Strategic Litigation to Enforce Disability Rights

2.1 The Functions of Litigation

Generally, there are various approaches to enforce human rights and achieve social change. Human rights defenders may lobby decision makers³³, including legislators, officials and government agencies, inform the press³⁴ and mobilize the public through activities such as demonstrations, meetings with the communities and petition drives.³⁵ However, compared with legislative and executive powers, as long as a particular claim meets the criteria of admissibility of the court, judicial system is always open to human rights defenders and civil society. Especially in some circumstances, the effect of a lawsuit may extend beyond the general outcomes in the judicial system.³⁶ Therefore, Litigation as a way of dispute settlement, though imperfect, has its power to enforce human rights and bring social change.³⁷

³³ Edwin Rekosh, Kyra A. Buchko and Vessela Terzieva (eds), "Pursuing The Public Interest: a Handbook for Legal Professionals and Activists", Public Interest Law Initiative, 2001, pp.115-116, available

at http://www.pili.org/index.php?option=com_content&view=article&id=352:pursuing-the-public-interest&catid=29:books&Itemid=53, visited on Nov.20, 2010.

³⁴ Ibid, 2001, p.83.

³⁵ Ibid, 2001, p.116.

³⁶ See Wolfgang Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008", 30 Mich. J. Int'l L. 927, p.976 and also International Gay and Lesbian Human Rights Commission, "Public Litigation Strategies", available at http://www.ggp.up.ac.za/sexual_minority_rights/coursematerial/iglhrc.ppt, visited on Nov.20, 2010.

³⁷ Litigation as a trigger to bring social change has been frequently discussed by scholars and human rights activists. See, for example, Edwin Rekosh, Kyra A. Buchko and Vessela Terzieva (eds), "Pursuing The Public Interest: a Handbook for Legal Professionals and Activists", Public Interest Law Initiative, 2001, pp. 83-86; Scott L. Cummings & Deborah L. Rhode, "Public Interest Litigation: Insights From Theory and Practice", 36 Fordham Urb. L. J. 603, p. 606; Wolfgang Kaleck, "From

Generally, litigation has three functions. The direct effect of a successful litigation is the interpretation and application of laws related to the case.³⁸ Sometimes, many strategic cases launched by public interest organizations “simply to enforce existing laws that are being ignored or inadequately enforced”.³⁹ During the process of an ongoing litigation, the relative laws are used by both the plaintiff and the defendant as basis of their arguments, and are also cited by the court as source of the final judgment. Therefore, in this way, relevant provisions in the laws might be given a new interpretation that is beneficial to the vulnerable group in countries where the judges have broad discretion. Even in countries where the court has a relatively weak power, the more the laws are applied, the more they are known to the public and the more they are effective in practice. Gradually, litigation will contribute to the goal of rule of law.⁴⁰

Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008”, 30 Mich. J. Int’l L. 927, p.976; International Gay and Lesbian Human Rights Commission, “Public Litigation Strategies”, available at http://www.ggp.up.ac.za/sexual_minority_rights/coursematerial/iglhrc.ppt, visited on Nov.20, 2010; Jonathan Michael Berger, “Litigation Strategies to Gain Access to Treatment for HIV/AIDS: the Case of South Africa’s Treatment Action Campaign”, 20 Wis. Int’l L.J. 595, p.598.

³⁸ Edwin Rekosh, Kyra A. Buchko and Vessela Terzieva (eds), “Pursuing The Public Interest: a Handbook for Legal Professionals and Activists”, Public Interest Law Initiative, 2001, p. 81.

³⁹ Ibid, p.116.

⁴⁰ See Sabine Benzing-Balzer, “Strategic Litigation: An Introduction”, Public Affairs Foundation, p.12, available at <http://www.pacindia.org/projects/right-to-information-empowerment-programme-right-to-information-training-for-ngos-from-india/S%20%20Benzing-Balzer%20-%20%20Strategic%20litigation%20-%20Bangalore.ppt>; Edwin Rekosh, Kyra A. Buchko and Vessela Terzieva (eds), “Pursuing The Public Interest: a Handbook for Legal Professionals and Activists”, Public Interest Law Initiative, 2001, p. 83; Public Law Interest Law Initiative & Columbia University Budapest Law Center, Public Policy Advocacy: Strategic Litigation and International Advocacy, available at http://www.essex.ac.uk/armedcon/story_id/000698.pdf, visited on Nov.20, 2010.

The second function of litigation is its influence on political mobilization.⁴¹ In order to enforce the judgment of the court, governments and other responsible entities may need to take positive measures to make the judgments of the court or provisions of the laws meaningful. In this way, executive agencies are involved to enforce human rights, which might promote political discussion and governmental obligation.⁴² Meanwhile, litigation can also stop an ongoing but problematic project conducted by the government.⁴³ Sometimes, especially in the United States, courts may issue decisions to ensure “the compliance of public officials and institutions with the judicial decisions”⁴⁴ by bringing changes to prisons, schools and hospitals.⁴⁵ Gradually in this way, litigation may change civil services and lead to policy reform.⁴⁶

⁴¹ Scott L. Cummings & Deborah L. Rhode, “Public Interest Litigation: Insights From Theory and Practice”, 36 *Fordham Urb. L. J.* 603, p. 606.

⁴² Sabine Benzing-Balzer, “Strategic Litigation: An Introduction”, Public Affairs Foundation, p.6, available at <http://www.pacindia.org/projects/right-to-information-empowerment-programme-right-to-information-training-for-ngos-from-india/S%20Benzing-Balzer%20-%20Strategic%20litigation%20-%20Bangalore.ppt>, visited on Nov.14, 2010.

⁴³ Edwin Rekosh, Kyra A. Buchko and Vessela Terzieva (eds), “Pursuing The Public Interest: a Handbook for Legal Professionals and Activists”, Public Interest Law Initiative, 2001, p. 84.

⁴⁴ *Ibid*, p.108.

⁴⁵ *Ibid*.

⁴⁶ Sabine Benzing-Balzer, “Strategic Litigation: An Introduction”, Public Affairs Foundation, p.6, available at <http://www.pacindia.org/projects/right-to-information-empowerment-programme-right-to-information-training-for-ngos-from-india/S%20Benzing-Balzer%20-%20Strategic%20litigation%20-%20Bangalore.ppt>.

Litigation can also raise awareness of the public⁴⁷ and empower the venerable groups.

⁴⁸ Litigation gives a lesson to the public on what rights are protected in the laws and how to make these rights realized. This educational function of litigation⁴⁹ may potentially change the opinion of the public and devote to “a more just society”⁵⁰ eventually. Meanwhile, this court-centered social change may also occur by bringing access to justice to the subordinated groups.⁵¹ Through the judiciary system and enforcement mechanism of judgments, the rights of the venerable are admitted both by the court and government. Therefore, the power of these groups was enlarged and the disadvantaged people are thus empowered.

The role of litigation as a trigger to make social change is based on the assumption that law is autonomous from politics.⁵² Judges should be faithful to the law and not susceptible to political policy and decisions. However, litigation can not successfully and effectively achieve its goal and lead to social change merely with the help of the

⁴⁷ Edwin Rekosh, Kyra A. Buchko and Vessela Terzieva (eds), “Pursuing The Public Interest: a Handbook for Legal Professionals and Activists”, Public Interest Law Initiative, 2001, p. 84.

⁴⁸ See Scott L. Cummings & Deborah L. Rhode, “Public Interest Litigation: Insights From Theory and Practice”, 36 Fordham Urb. L. J. 603, p. 606 and also International Gay and Lesbian Human Rights Commission, “Public Litigation Strategies”, available at http://www.ggp.up.ac.za/sexual_minority_rights/coursematerial/iglhrc.ppt.

⁴⁹ International Gay and Lesbian Human Rights Commission, “Public Litigation Strategies”, available at http://www.ggp.up.ac.za/sexual_minority_rights/coursematerial/iglhrc.ppt.

⁵⁰ Edwin Rekosh, Kyra A. Buchko and Vessela Terzieva (eds), “Pursuing The Public Interest: a Handbook for Legal Professionals and Activists”, Public Interest Law Initiative, 2001, p. 84.

⁵¹ International Gay and Lesbian Human Rights Commission, “Public Litigation Strategies”, available at http://www.ggp.up.ac.za/sexual_minority_rights/coursematerial/iglhrc.ppt.

⁵² Scott L. Cummings & Deborah L. Rhode, “Public Interest Litigation: Insights From Theory and Practice”, 36 Fordham Urb. L. J. 603, p. 606.

court. Professor Cummings and Rhode argued that there should be structural factors that encourage litigation:

*“A judiciary receptive to civil rights claims; centralized administrative agencies susceptible to reform through impact lawsuits; and a system of welfare entitlements open to enforcement and expansion”.*⁵³

This means when considering using the method of litigation to bring social change, other factors should also be taken into account, such as political circumstances and efficiency of enforcement of a favorable judgment.

Similarly, concerns on the effect of litigation to enforce human rights are also around the disadvantages of litigation, and relevant factors outside the judicial system. The first critique of litigation from scholars contends that litigation alone can not bring social change and it is thus inefficient.⁵⁴ It relies on the discretion of the executive to reform field-level practice⁵⁵ and to make the positive outcome of the judgments come

⁵³ Scott L. Cummings & Deborah L. Rhode, “Public Interest Litigation: Insights From Theory and Practice”, 36 Fordham Urb. L. J. 603, pp. 606-607.

⁵⁴ Scott L. Cummings & Deborah L. Rhode, “Public Interest Litigation: Insights From Theory and Practice”, 36 Fordham Urb. L. J. 603, pp. 607-608.

⁵⁵ Joel F. Handler, Social Movements and the Legal System: A Theory of Law Reform and Social Change, Academic Press Inc, 1979, pp.18-22, in Scott L. Cummings & Deborah L. Rhode, “Public Interest Litigation: Insights From Theory and Practice”, 36 Fordham Urb. L. J. 603, p.607.

true.⁵⁶ Without the cooperation of an effective political mechanism, it is difficult to entirely enforce human rights and make social changes merely through litigation.

Another negative effect of litigation is that if public interest litigation fails to favor the venerable groups, the problematic law practice may be reaffirmed.⁵⁷ This might happen especially in common law system, where case law plays an important role and the subsequent cases are supposed to follow the precedent unless there is obvious and serious error in it.

2.2 Alternative Means to Enforce Disability Rights

Litigation is definitely not the only way to enforce human rights. There are also non-judicial mechanisms pursuing the same goal. CRPD emphasizes the importance of civil participation in the process of implementation of the convention, such as public participation in legislative and policy planning and implementation,⁵⁸ and involvement in the monitoring process.⁵⁹ In a bottom to up campaign, civil society can lobby the government by providing information, research report to the parliament and relevant departments; they can cooperate with the media to cause more attention

⁵⁶ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* University of Chicago Press, 1991, p.338, in Scott L. Cummings & Deborah L. Rhode, “Public Interest Litigation: Insights From Theory and Practice”, 36 *Fordham Urb. L. J.* 603, pp. 607-608.

⁵⁷ Sabine Benzing-Balzer, “Strategic Litigation: An Introduction”, Public Affairs Foundation, p.12, available

at <http://www.pacindia.org/projects/right-to-information-empowerment-programme-right-to-information-training-for-ngos-from-india/S%20%20Benzing-Balzer%20-%20Strategic%20litigation%20-%20Bangalore.ppt>, visited on Nov.14, 2010.

⁵⁸ Article 4 (3) of CRPD.

⁵⁹ See, eg. Article 16(3), 33(2) and 33(3).

of the human rights issues; they can also mobilize the public and gain more support to promote the implementation process.⁶⁰

The use of media could be most effective when human rights issues are severe and of public's concern. When a serious violation is disclosed by the media and widely circulated among civil society, the government has to face the huge pressure from the public, and take measures as soon as possible. However, not all forms of discrimination and violations can cause resonance at a large scale and influence the majority in the society. Sometimes a measure in question may touch only a certain group, or several people, whose lives and human rights issues are always hidden in the society. In this case, the disclosure by the media of their life may cause sympathy from the public, while a successful strategic litigation may change their life.

Compared with the media approach, litigation is more accessible; more personalized in terms of rights enforcement, and can impose compulsive and immediate obligations on the government, rather than simply moral or long-term obligations. In practice, media and litigation are often used together by public interest organizations or lawyers to enforce human rights and make changes in a society.

⁶⁰ Edwin Rekosh, Kyra A. Buchko and Vessela Terzieva (eds), "Persuing The Public Interest: a Handbook for Legal Professionals and Activists", Public Interest Law Initiative, 2001, pp.124-pp.134, available at http://www.pili.org/index.php?option=com_content&view=article&id=352:pursuing-the-public-interest&catid=29:books&Itemid=53, visited on Nov.19th, 2011.

In the context of China, a direct way to enforce human rights is to write a proposal disclosing human rights violations and ask the government to take measures accordingly. It is also citizens' right to supervise the government, as guaranteed in the constitution.⁶¹ However, if the proposal itself does not cause public concerns, this direct approach is still not effective. There are only few possibilities that the government would take the suggestion and make changes as required.

Awareness raising of the public in China is a very important technique in terms of rights enforcement in the long run. Especially in China, where citizens have no sense of rights and no laws are rights based, it is crucial to promote human rights education, not only just to gain support for a human rights campaign, but also to empower them and make them stand up and fight for their own rights. However, awareness raising could not be effective in a short time and even if it is effective, this approach itself could not get rights enforced. Further actions need to be taken to make the well-known rights meaningful. At this point, as discussed above, a proposal to the government claiming violations and human rights requirements, disclosure through the media and litigation could be considered.

2.3 A Case Study in Canada

⁶¹ Article 41 of Constitution of the People's Republic of China.

Inspired by the civil rights movement in the United States and the women's rights movement in Canada,⁶² campaign for the rights of persons with disabilities in Canada has contributed to the disability field both at home and abroad. Though disability rights movement in Canada has a not short history,⁶³ the year 1982 was a breakthrough for the disabled in Canada, when the government of Canada was pushed by NGOs to become one of the first countries to write disability rights into constitution.⁶⁴ After that, disability rights movement pursued the goal of equality within the meaning of the constitutional protection, which also contributed to the understanding of equality for the handicapped in the international community.⁶⁵

However, constitutional recognition of disability rights was just “the first step of affirming the equality rights of people with disabilities”.⁶⁶ There were still problems remained to be solve. For example, how to understand disability rights in the Constitution? What is the meaning of equality in terms of disability rights? How to

⁶² Yvonne Peters, “Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference?” Council of Canadians with Disabilities, 2004, available at <http://www.ccdonline.ca/en/humanrights/promoting/20years>, visited on Nov.27, 2010.

⁶³ In the 1970s, disability rights movement in Canada, together with that in the United States, had been active. See Douglas Todd, “Disability Movement Has Changed World, With Controversy”, 2010, available at <http://communities.canada.com/VANCOUVERSUN/blogs/theseearch/archive/2010/03/13/disability-movement-has-changed-canada-with-controversy.aspx>, visited on Nov.27, 2010.

⁶⁴ Yvonne Peters, “Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference?” Council of Canadians with Disabilities, 2004.

⁶⁵ See Henry Enns & Aldred H. Neufeldt, *In Pursuit of Equal Participation: Canada and Disability at Home and Abroad*, Captus Press, 2003, p.1 and also Yvonne Peters, “Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference?” Council of Canadians with Disabilities, 2004.

⁶⁶ Yvonne Peters, “Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference?” Council of Canadians with Disabilities, 2004.

apply and develop the new-born constitutional protection of disability equal rights? The guarantee of equal rights of persons with disabilities in the legislation had been achieved to some degree, leaving the space to enforce the rights for the judicial system. Accordingly, in response to these questions followed by the constitutional recognition, disability NGOs decided to use the tool of strategic litigation to achieve the goal of equality for the disabled provided in the Constitution.⁶⁷

Equal disability rights were provided in the Constitution as:

*“Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age, or mental or physical disability.”*⁶⁸

However, this equality guarantee clause in the Constitution did not itself explain what the meaning of equality for the handicapped was. In the early days, only intentional discrimination against the disabled was seen as conflict with this clause.⁶⁹ While measures with direct discrimination against the handicapped were prohibited, people with disabilities faced indirect discrimination most of the time. Therefore, NGOs

⁶⁷ Ibid.

⁶⁸ Article 15(1) of Constitution Act, 1982.

⁶⁹ Yvonne Peters, “Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference?” Council of Canadians with Disabilities, 2004.

pushed the court to admit the harm of indirect discrimination faced by the disabled through strategic litigation, and achieved favorable decisions holding that both intentional and unintentional discrimination was prohibited by the Constitution.⁷⁰ Indirect discrimination was thus recognized in Canada in 1985, three years after the constitutional recognition of disability rights.

However, the fight of anti-discrimination never stops. Though there were significant victories of disability rights protection in these cases, where the concept of discrimination was extended to include indirect discrimination as well, there were still problems concerning the “duty to accommodate”.⁷¹ In the *Bhinder case*,⁷² the court held that “any refusal, exclusion, suspension, limitation, specification or preference based on a bona fide occupational requirement in relation to any employment”⁷³ did not constitute discriminatory practice.⁷⁴ That means as long as employers claim that the action in question is based in good faith and constitutes “a bona fide occupational requirement”, they could be exempt from the duty to accommodate. Therefore, NGOs and lawyers began a new campaign for accommodation through litigation and finally the court overruled its previous decision and held that even where indirect

⁷⁰ See *Bhinder v. Canadian National Railway Company*, [1985] 2 S.C.R. 561 and *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536.

⁷¹ Yvonne Peters, “Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference?” Council of Canadians with Disabilities, 2004.

⁷² *Bhinder v. Canadian National Railway Company*, [1985] 2 S.C.R. 561.

⁷³ *Ibid*, para.41.

⁷⁴ See also *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202.

discrimination fulfilled the bona fide occupational requirement, employers still had the duty to accommodate where there was no undue hardship.⁷⁵

From the approach of pursuing equality for persons with disabilities in the disability movement in Canada, we can learn that strategic litigation, together with other means of campaign, plays an important role in shaping the concept of equality from wording to practice. A guarantee in the legislation is only the first step; follow-ups should be done to make the rights meaningful outside the legislative system. In the judicial mechanism, strategic litigation is one of the most effective ways to enforce human rights and bring social change.

⁷⁵ See *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R.489.

Chapter 3 Achievements and Challenges of Strategic Litigation Approach to Enforce Rights

The history of strategic litigation in Russia and central and eastern Europe is not as long as that in western countries. Public interest litigation in China is also arising. So lessons learnt from the experiences in Russia and central and eastern Europe may be a guide for the use of strategic litigation in China. Apart from that, the transitional regimes and process of these former communist countries may be closer than western countries to China in terms of political, social and economic context, human rights and civil society. Therefore, this chapter will examine the achievements as well as limitations of strategic litigation to enforce disability rights in these countries first, and then to see how does it work in China.

3.1 Shtukurov v. Russia⁷⁶

Persons with mental disabilities are often deprived of legal capacity to control their own life upon court decision. They are always placed under the guardianship of another person, and human rights abuses are thus institutionally hidden behind. In order to challenge this legal mechanism and address the autonomy of people with mental disabilities, strategic litigations are conducted in both Russia and Central and Eastern Europe.⁷⁷

⁷⁶ Shtukurov v. Russia, Application No. 44009/05, 2008.

⁷⁷ For more information, please see the introduction to legal capacity by Mental Disability Advocacy Center, available at <http://mdac.info/legal-capacity>, visited on Nov. 22nd, 2011.

Mr. Shtukurov, a Russian young boy who did not know his legal capacity had been deprived upon the request of his mother until one year later. The court decision was made in only ten minutes without his knowledge. As a result, he was legally deprived of right to privacy and living independently, which influenced almost all aspects of his life: capacity to trade, to work, to vote, to travel, to marry, etc. Shortly after he asked a lawyer from Mental Disability Advocacy Center (hereafter referred to as MDAC) to represent him, he was detained in a psychiatric hospital simply upon the request of his mother. He was refused access to his lawyer on the basis that he was under guardianship and should have no right to appoint an attorney. His right to a fair trial was also denied on the same basis. When he was released from the hospital, with the help of the lawyer from MDAC, he complained to the European Court of Human Rights (hereafter referred to as ECtHR) and got favorable judgments eventually.⁷⁸

In the judgment of ECtHR, the court found several violations:

- A mental disease could not be the only reason to deprive one's legal capacity, as full incapacitation constitutes a "very serious" interference with one's personal

⁷⁸ Shtukurov v. Russia, Application No. 44009/05, 2008. See also the MDAC: Europe's highest human rights court holds that Russia violated rights of man with mental health disabilities, available at <http://mdac.info/content/europes-highest-human-rights-court-holds-russia-violated-rights-man-mental-health-disability>, visited on Nov. 22nd, 2011.

life.⁷⁹ The Russian court's decision was disproportionate to incapacitate the applicant from living independent.⁸⁰

- Even if deprivation of legal capacity is lawful, it could not be the ground to deprive one's liberty.⁸¹
- The procedure of reviewing one's legal capacity in Russia is flawed.
- The applicant's right to a fair trial had also been violated.

These conclusions of the court are very inspiring. The problems of the guardianship system and the treatments of mental disabled people in Russia have been addressed through Shtukaturov's personal experience. If this judgment is enforced completely, it will be a huge progress or even a revolution in terms of changes in the life of mental disabled people, changes in the laws, guardianship system, and psychiatric hospitals, as well as changes of people's attitudes towards people with mental disabilities.

However, what makes people exciting may just be something on paper. It still remains to be seen how the judgment is going to be implemented. After the judgment made by ECtHR in 2008, the constitutional court of Russia found unconstitutional several provisions in Code of Civil Procedure and Psychiatric Care Act regarding the guardianship decision-making procedures, prevention of right to appeal against the

⁷⁹ Shtukaturov v. Russia, Application No. 44009/05, 2008, para.90.

⁸⁰ Ibid.

⁸¹ Ibid.

guardianship and the possibility to detain a person in a psychiatric hospital without the review by a court.⁸² The local court also restored his legal capacity.⁸³

From the perspective of two types of justice, restoring the legal capacity of the applicant is within individual justice, while the decision of the constitutional court, if fully implemented, can bring changes to a larger scale of people with mental illness and thus achieve social justice somehow. This is the direct achievement after the ECtHR judgment of 2008.

However, the decision of the constitutional court did not reflect all the problems mentioned in the ECtHR judgment. What it had touched are almost all obvious procedural flaws. It did not say that deprivation of legal capacity simply because of mental illness is unconstitutional; nor did it mention that deprivation of liberty on the ground of deprivation of legal capacity is unconstitutional as well. A person could still be denied of legal capacity as long as he or she is present when the court makes the decision. And similarly, a person whose legal capacity has been deprived could easily lose his or her liberty after the court's symbolic review.

⁸² SHTUKATUROV v. RUSSIA (Just Satisfaction), Application no. 44009/05, 2010, para.8.

⁸³ Ibid. para.16.

Since the applicant's individual injuries had not been fully compensated, in the Just Satisfaction judgment in 2010, the court required the government to pay EUR 25,000 for non-pecuniary damage.⁸⁴ However, though the European court mentioned the measures the Russian government had taken after the 2008 judgment, namely the decision of the constitutional court and local court, it did not give any comment on if the domestic court's decisions had reached the level of ECtHR as observed in its previous judgment in 2008. As a result, though the applicant's individual justice and social justice in some degree has been achieved, further actions still need to be taken to reform the substantive issues in the laws.

Therefore, apart from the tool of Strategic litigation, MDAC also uses the international human rights mechanisms to push the Russian government to reform its legal capacity law. On the one hand, MDAC submitted a shadow report to the Human Rights Committee, which had then asked Russia to reform its legal capacity laws in accordance with its obligations under ICCPR.⁸⁵ On the other hand, since Russia has signed CRPD but not yet ratified, MDAC and its partner organizations also lobby the government to ratify CRPD as soon as possible, resulting in setting up a working

⁸⁴ Ibid, para,18.

⁸⁵ It is said that HRC concluding observations on Russia are "most comprehensive analysis" in HRC's observations history, in that it specified why legal capacity is important under ICCPR. See MDAC: *UN: Russia Must Reform Legal Capacity Laws*, available at <http://mdac.info/un-russia-must-reform-legal-capacity-laws>, visited on Nov. 24th, 2011.

group on this issue. It is expected that Russian will ratify CRPD and reform its legal capacity laws in line with Article 12 of CRPD.⁸⁶

From this case we can see that strategic litigation opens a door to Russian's legal capacity laws reform, and has achieved some changes, while further actions will help to make rights fully enforced and reach the final goal.

3.2 D.H. and Others v. the Czech Republic⁸⁷

The Roma people are the largest minority group in Central and Eastern Europe. They have been suffering from a high degree of social exclusion in almost all aspects of life for long.⁸⁸ Further, according to Mensur Haliti, “a combination of economic, social, geographical, cultural, and ethnic factors have contributed to this exclusion from society at large”.⁸⁹ However, these factors and facts are always ignored by the society, and even the government. They continue blaming Roma on laziness at work and school, high rate of crimes and keeping on taking without giving anything. As a result, a circle forms because of discrimination and exclusion against Roma: the stronger discrimination and social exclusion are, the more “improper” Roma behave in social

⁸⁶ It is learned that the President of Russian Federation has showed the opinion that Russia will ratify CRPD. See MDAC: <http://mdac.info/russia-progress-reforming-legal-capacity-system>, visited on Nov. 24th, 2011.

⁸⁷ D.H. and others v. the Czech Republic, Application No. 57325/00, 2007.

⁸⁸ Mensur Haliti, Blindspot: Kosova Roma and the Decade, 2011, p.11, available at <http://www.romadecade.org/files/downloads/General%20Resources/Blindspot-final.pdf>, visited on June 28th, 2011

⁸⁹ Ibid.

life; in turn, the more “improper” Roma act in the workplace, schools, residence area, etc., the more excluded and discriminated they feel from the society.

In the education system, Roma children are often put into special schools because of assumed learning disability. In Czech Republic, though they take up only 2% of the population, Roma children constitute at least 50% of the children in special schools.⁹⁰

There are two requirements for sending a child into a special school: failing to pass a psychological test and consent of the parents. On the one hand, few Roma children are prepared for testing compared to their non-Roma peers; on the other, they also have problems with the language.⁹¹ Meanwhile, it is also very easy to get parents’ consent.

These parents are not aware of the importance of inclusive education and are easy to be persuaded by school officers to send their children for “special care”. As in the D.H. case, all the parents of the applicants have consented to the placement of their children in these special schools.⁹² As a result, the governments supporting segregation often contend that it is Roma parents’ desire to send their own children into these special schools.

⁹⁰ Jennifer Devroye, *The Case of D.H. and Others v. the Czech Republic*, *Northwestern Journal of International Human Rights*, vol.7, 2009.

⁹¹ *Ibid.*

⁹² Morag Goodwin, “D.H. and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe”, available at <http://www.minorityrights.org/download.php?id=232>, visited on Nov. 27th, 2011.

In the D.H. case, 18 Roma children from the Ostrava region were sent into special schools for children with learning difficulties and received inferior education as a result.⁹³ Furthermore, Roma children could not go to secondary schools for further education after graduation from special schools. With the help of European Roma Rights Centre (hereafter referred to as ERRC), the applicants filed the case before ECtHR.

The D.H case is a landmark case not only in the sense of acknowledging a large scale segregation of education in Central and Eastern Europe, but also in terms of understanding of discrimination in the case law system of ECtHR. On the one hand, the court has found not just specific discriminated acts segregating education for Roma children, but also “a nationwide pattern of discrimination”.⁹⁴ This step goes beyond the Shtukurov case,⁹⁵ as the court mentioned the discrimination and suffering of a group as a whole, not just the applicants. This finding may be due to the research report and statistics of the general situation of Roma segregation of education

⁹³ D.H. and others v. the Czech Republic, Application No. 57325/00, 2007, para.19-22.

⁹⁴ See ERRC, “D.H. and Others v the Czech Republic”, available at <http://www.errc.org/cikk.php?cikk=3559>, visited on Nov.27th, 2011. See also Jennifer Devroye, The Case of D.H. and Others v. the Czech Republic, *Northwestern Journal of International Human Rights*, vol.7, 2009.

⁹⁵ Shtukurov v. Russia, Application No. 44009/05, 2008.

in Czech Republic, provided by ERRC and third party organizations⁹⁶ together with the complaint.⁹⁷

On the other hand, indirect discrimination has been found for the first time in the jurisprudence of ECtHR,⁹⁸ which may potentially influence certain number of people. The court contended that even when a policy was neutral, it might have discriminated effect as well.⁹⁹ The element of intent is not necessary when considering indirect discrimination.¹⁰⁰ Therefore, it is the burden of the government to prove the differences are not discriminatory in terms of indirect discrimination.¹⁰¹

The case is successful in terms of the result of the court decision. Since segregation of Roma people is very serious in Central and Eastern Europe, this case has drawn attentions of various organizations¹⁰² which have also provided useful information for the court to consider. From this case we can learn that research work regarding

⁹⁶ These organizations include European Union Agency for Fundamental Rights (former European Monitoring Centre for Racism and Xenophobia) and International Step by Step Association. See *D.H. and others v. the Czech Republic*, Application No. 57325/00, 2007, para. 18.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, para.195.

⁹⁹ *Ibid.*, para. 185-195.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² These organizations are International Step by Step Association, Roma Education Fund, European Early Childhood Research Association, Interights, Human Rights Watch, Minority Rights Group International, European Network Against Racism, European Roma Information Office and Fédération internationale des ligues des droits de l'Homme (International Federation for Human Rights). See *ibid.*, para.9.

statistics and the situation of a certain group before the litigation is very important. It may help to expose the real life of a certain group to the court's horizon and convince the court to support the disadvantaged group. Meanwhile, in judicial systems where third party could be involved, seeking for support of third party could also contribute to a desired result of the litigation.

However, as the similar situation happens in other strategic litigation, a favorable judgment is just the first step; further efforts need to be put in terms of its implementation. In the D.H. case, during the process of strategic litigation, changes regarding segregation of education are as follows:

First, barrier of entering secondary schools from elementary special schools has been removed. Before 2000, students who had completed their elementary education at special schools were unable to continue their education in secondary schools, while in 2000, this barrier was removed. However, it is still difficult for Roma children to go to secondary schools because they could not pass the entrance exam after the inferior education in special schools.

Second, the government has amended School Act in 2005 and special schools are now called "practical schools". However, according to the analysis of ERRC and Open

Society Justice Initiative (hereafter referred to as OSJI), the amendments still failed to prevent segregation of education for Roma children.¹⁰³

Further, in 2010, the Czech government was pushed to adopt a National Action Plan on Inclusive Education, whose goal was in consistent with standards of the ECtHR judgment. But it is still lack of concrete implementation measures and a clear timeline.¹⁰⁴

Later, the Strategy for the Fight against Social Exclusion 2011-2015 was adopted by the Czech government with a goal of inclusive education for all.¹⁰⁵ Again, this Strategy is still in doubt as the nature of it is not binding and there is no specific budget for its implementation.¹⁰⁶ The campaign of desegregation of Czech schools is still on-going.

This case clearly shows that strategic litigation could be sometimes time-consuming.

In the D.H. case the 18 applicants brought the case to the constitutional court in 1999

¹⁰³ OSJI and ERRC: Continuing Segregation of Romani Schoolchildren in Czech Republic: Submission to the Committee of Ministers, 7-9 June 2011, available at <http://www.errc.org/cikk.php?cikk=3559>, visited on Nov.27th, 2011.

¹⁰⁴ Ibid.

¹⁰⁵ OSJI and ERRC: D.H. and Others v Czech Republic: Consideration by the Committee of Ministers, Nov.2011, available at <http://www.errc.org/cikk.php?cikk=3559>, visited on Nov.27th, 2011.

¹⁰⁶ Ibid.

and finally got a favorable judgment in 2007, when some of the applicants have already passed their school ages.¹⁰⁷ Apart from the time spent on litigation, Roma children have also waited for its implementation and social change to occur. It is said that till now there is still no decrease in number of Roma children in special schools due to the ineffective measures that have been taken by the government.¹⁰⁸

On the other hand, this case also tells that strategic litigation alone can not successfully and effectively achieve its goal. Other issues such as political circumstances and efficiency of enforcement of a favorable judgment also matter. Without the effective political mechanism, it is difficult to entirely enforce human rights and make social changes merely through strategic litigation. Therefore, in the most cases strategic litigation is just a part of a broader campaign, in which other means of the campaign are used together to achieve social change.

¹⁰⁷ They were born between 1985 and 1999. See *D.H. and others v. the Czech Republic*, Application No. 57325/00, 2007, Annex.

¹⁰⁸ See OSJI and ERRC: *Continuing Segregation of Romani Schoolchildren in Czech Republic: Submission to the Committee of Ministers, 7-9 June 2011* and OSJI and ERRC: *D.H. and Others v Czech Republic: Consideration by the Committee of Ministers, Nov.2011*.

Chapter 4 Strategic Litigation to Enforce Rights of the Disabled in the Context of China

4.1 The Situation of Persons with Disabilities in China

Generally speaking, the government of China is relatively positive towards protection of disabled people's rights. The governmental organization—China Disabled Persons' Federation (hereafter referred to as CDPF) was set up by the government in 1988 to specifically benefit and serve for 83 million persons with various disabilities.

Headquartered in Beijing, CDPF has “a nationwide umbrella network reaching every part of China with about 80 thousand full-time workers”.¹⁰⁹ There are just two this type of organizations serving a certain group of people, Women's Federation for women and CDPF for the disabled. Apart from the existence of a nationwide governmental organization, China is also among the first batch to become a party of CRPD and modified its domestic law accordingly. It is also worth mentioning that China is the second country in this world to submit national report to the CRPD Committee.

However, though the above-mentioned facts do benefit the disabled in China, rights of persons with disabilities are still ignored or hidden under the regimes lack of rights-based approaches. Disabled people are seen as the object of protection, rather than subject of rights. As a result, all the protections and measures taken are from the

¹⁰⁹ See the introduction of CDPF at its website: <http://www.cdpf.org.cn/english/aboutus/aboutus.htm>, visited on Nov.28.

perspective of the legislator or the government, instead of the needs of the disabled. Meanwhile, there is strong discrimination against disabled people, especially in the spheres of education and employment. It is very hard for a person to go to an ordinary kindergarten, a high school, or a university because of his or her visible disability and there is no inclusive education provided as well. Similarly, it is also very difficult for the disabled to be employed, even when there are laws and regulations forcing the companies to do so. The image of persons with disabilities is not considered acceptable in some occupations such as lawyers, teachers, comperes, etc. Therefore, the hidden and ignored rights of the disabled should be addressed not only to the government, but among the society. Accepting and respecting persons with disabilities is a lesson for the whole society to learn.

4.2 Strategic Cases for Persons with Disabilities

4.2.1 Administrative Cases

a. Ding Shengqi v. the Planning Bureau of Chongqing

In China, few cases are direct strategic litigation as planned of it in other countries. Few disabled people would like to stand up and fight for their own rights. They are either lack of awareness of their rights, or have concerns about their rights and dare not to fight for them openly. Therefore, it takes time to find a proper applicant who would like to file a case for persons with disabilities.

Sichuan University Centre for Human Right Law is a non-profit academic institution which provides legal aid services to the disadvantaged. They have used strategic litigation as a tool to address and enforce rights of the disadvantaged in China. When it comes to the sphere of anti-discrimination, it takes more than five years for them to find the first test case regarding this issue,¹¹⁰ namely the case Ding Shengqi v. the Planning Bureau of Chongqing.¹¹¹

Mr. Ding is a lower limb disabled person who uses the wheel chair to travel. When he went to the Chongqing Longxi sub-branch of Industrial and Commercial Bank of China to open a bankcard, he could not enter the bank because there were no accessibility facilities for the disabled. The site of the bank was built by a company with the planning grant of the Planning Bureau.¹¹² Therefore, Prof. Zhou Wei from Sichuan University Centre for Human Right Law decided to sue the Planning Bureau as the defendant, and the bank and the company as third parties.¹¹³

¹¹⁰ Min Jie & Bai Hao, Chongqing: Industrial and Commercial Bank of China Becomes the Defendant Because of Lack of Accessibility Facilities, China Youth Daily, Sep.9th, 2009, available at <http://finance.sina.com.cn/consume/puguangtai/20090909/06496724731.shtml>, visited on Nov.29th, 2011.

¹¹¹ Ding Shengqi v. the Planning Bureau of Chongqing, Chongqing First Intermediate People's Court, 2010.

¹¹² Min Jie & Bai Hao, Chongqing: Industrial and Commercial Bank of China Becomes the Defendant Because of Lack of Accessibility Facilities, China Youth Daily, Sep.9th, 2009.

¹¹³ Ding Shengqi v. the Planning Bureau of Chongqing, Chongqing First Intermediate People's Court, 2010.

This case is very strategic at several points:

First, it is an administrative litigation, rather than ordinary civil litigation, though the direct party intervening the applicant's right to travel is the bank. The reason for Prof. Zhou Wei to choose the Planning Bureau as the defendant is that administrative litigation has the potential to create a lasting effect among the society and cause more attention of the public.

Second, the applicant did not ask for any economic compensation.¹¹⁴ Prof. Zhou just wants to show that the main reason for this litigation is not just to remedy the applicant, but to make the whole country pay attention to right to travel for the disabled.¹¹⁵

Third, the applicant did not drop the case when the staff of the bank promised to apologize to the applicant and conduct the barrier-free transformation in the near future,¹¹⁶ and when the court promised to issue a judicial recommendation to relevant departments.¹¹⁷ After deliberate consideration, Prof. Zhou still decided to continue with all of the court sessions to draw attention of the public. Another representative of

¹¹⁴ Ibid.

¹¹⁵ Min Jie & Bai Hao, Chongqing: Industrial and Commercial Bank of China Becomes the Defendant Because of Lack of Accessibility Facilities, China Youth Daily, Sep.9th, 2009.

¹¹⁶ Ibid.

¹¹⁷ Interview with Zhou XiuLong, representative of the applicant, conducted by Huang Zhong from Public Interest and Development Law Institute.

the applicant from Sichuan University Centre for Human Right Law said that simply removal of the barrier of one bank was not enough; the government and other companies should take this issue seriously as well.¹¹⁸ And also, the case was also aimed to draw the attention of the public to right to travel for persons with disabilities.¹¹⁹

However, the case failed eventually from the perspective of the result of the judgment. Both of the Basic People's Court and Intermediate Court contended that according to the Urban Roads and Buildings Barrier-Free Design Standard, there may have to be accessibility facilities in commercial buildings, but it is not compulsory.¹²⁰ So there is no problem for the Planning Bureau to grant the design of commercial buildings with no disabled facilities.¹²¹ What may be even worse is that the failure of this case may in turn reinforce the bad existing practice. Since the applicant refused to drop the case and thus refused the offers made by the bank and the court, the bank did not build disabled facilities as promised before and the court did not issue the judicial recommendation as well.¹²²

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ding Shengqi v. the Planning Bureau of Chongqing, Chongqing First Intermediate People's Court, 2010.

¹²¹ Ibid.

¹²² Interview with Zhou XiuLong, representative of the plaintiff in the Ding Shengqi case, conducted by Huang Zhong from Public Interest and Development Law Institute, between October and November of 2010.

But viewed from the perspective of mobilization of civil society and legal empowerment of the plaintiff, it also has bright side. Though the case failed at last, the plaintiff said that he knew more about disability rights than before, and he is willing to fight for rights of the disabled in future.¹²³ Meanwhile, this case as a clear test case has been taken to many lectures and conferences and was known to a larger audience including the academy, interested students, civil society organizations and relevant government officers.¹²⁴ It also opens a door to disabled people of similar situation, who want to address their own issues through strategic litigation as well.¹²⁵

b. Luan Qiping and Others v. Ministry of Railways of Republic of China¹²⁶

Inspired by the Ding Shengqi case, Luan Qiping, another person of similar situation also asked Sichuan University Centre for Human Right Law to represent him in another litigation for rights of the disabled.

Luan Qiping and Xie Wenqiang, took a train to Zibo, Shandong with no seat tickets on Oct.16th, 2009. Since there are no special seats for disabled people, the plaintiffs

¹²³ Ibid.

¹²⁴ Public Interest and Development Law Institute (PIDLI): “Public Interest Litigation: A New Strategy to Protect the Rights of Persons with Disabilities in China”, to be published in 2012.

¹²⁵ For example, the next case to be discussed was inspired by this case. See *ibid.*

¹²⁶ *Luan Qiping and Others v. Ministry of Railways*, Beijing No.1 Medium People's Court, 2009.

have to sit on the passageway between the seats.¹²⁷ According to the plaintiffs, they suffered the whole night when other passengers passed by them over their heads and shoulders.¹²⁸ As a result, they filed a case to the court.

However, this case was not successful as well, as the plaintiffs dropped the case at last because of the pressure.¹²⁹ But after the case, the Minister of Railways sent a notification internally requiring that special treatments should be provided to special passengers.¹³⁰ As a result, hundreds of disabled people have benefitted from the special treatments at the time of the interview.¹³¹ Empowered during the case process, Luan Qiping has started to fight for disabled people like him. On Aug.10th of 2011, one day before the National Day for Physical Disabled People, a recommendation initiated by Luan Qiping and another four disabled people with 353 signatures has been sent to the Minister of Railways suggesting the Minister to provide special seats, barrier-free facilities and discount on ticket for persons with disabilities.¹³²

¹²⁷ Chengdu Business Daily: Disabled People Sue Minister of Railways Because of Lack of Seats for the Disabled, Nov.2nd, 2009, available at <http://gongyi.sohu.com/20091102/n267889988.shtml>, visited on Nov.29th, 2011.

¹²⁸ Ibid.

¹²⁹ Interview with Luan Qiping, one of the plaintiffs in the case Luan Qiping & Xie Wenqiang v. the Ministry of Railways, conducted by Huang Zhong from Public Interest and Development Law Institute, between October and November of 2010.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Wan Jing, Disabled People jointly Suggest Minister of Railways to Provide Conveniences with Persons with Disabilities, Legal Network, Aug.10th, 2011, available at http://www.tetew.com/category/100001/2011/08/10/2011-08-10_1043514_100001.shtml, visited on Nov.29th, 2011.

From both cases conducted with the help of Sichuan University Centre for Human Right Law, it seems that when the defendant is the government, it is less likely to win or even continue with a case. But even under such circumstances, positive results still emerge from these cases.

4.2.2 Civil Cases

Compared with administrative cases, it seems that civil cases go easier through the strategic litigation approach. Luan Qiping, the same person of the Minister of Railways case, sued Shenzhen Metro Corporation for refusing to give him discount when he took the metro as required by the Guangdong Province.¹³³ The Shenzhen Metro Corporation contented that they give free service to disabled people from Shenzhen only. Since the two plaintiffs are from Liaoning and Beijing, they could not benefit from this policy. However, the Guangdong Province requires that public transportation should be free to disabled people or at least provide discount to them, regardless of their household register. According to the lawyer who represents the plaintiffs in the case, this litigation will be successful, as the request of the plaintiffs has already been implemented before the court sessions.¹³⁴ The Shenzhen government is planning to make a new policy in which all the persons with disabilities will receive

¹³³ Luan Qiping & Li Jun v. Shenzhen Metro Corporation, Shenzhen Futian District People's Court, August, 2011.

¹³⁴ Interview with Pang Kun, representative of the plaintiffs in the case Luan Qiping & Li Jun v. Shenzhen Metro Corporation, conducted by Huang Zhong from Public Interest and Development Law Institute, between October and November of 2010.

free public transportation with Shenzhen, regardless of the household register.¹³⁵

Similarly, Zhu Mingjian, another person with disabilities in Guangzhou, filed two cases¹³⁶ making public transportation in Guangzhou free to disabled people.¹³⁷

All of the three cases are examples of the power of strategic litigation to change current bad practices and policies. It is worth mentioning that the media has played an important role in these cases. According to Pang Kun, the lawyer of Luan Qiping, a journalist from a local television station videoed the arguments between the plaintiffs and the staff of Shenzhen Metro Company, which was unable to be played on TV but was used as first-hand evidence to support the plaintiffs.¹³⁸ In Zhu Mingjian's cases the media also supported him by spreading his concerns among the public, making the public stand by the side of persons with disabilities.¹³⁹

¹³⁵ Beijing News, Beijing Disabled Person Sue Shenzhen Metro Corporation for Denial of Free Travel with the Metro, Oct.13th, 2010, available

at <http://www.shenyangbus.com/sybus/bbs/viewthread.php?tid=100740>, visited on Nov.29th, 2011.

¹³⁶ Zhu Mingjian v. Guangzhou Metro Corporation, Guangzhou Yuexiu District People's Court and Zhu Mingjian v. Guangzhou Zhenbao Bus LTD, Guangzhou Luogang District People's Court.

¹³⁷ Ibid.

¹³⁸ Public Interest and Development Law Institute (PIDLI): "Public Interest Litigation: A New Strategy to Protect the Rights of Persons with Disabilities in China", to be published in 2012.

¹³⁹ See Zhou Ruilin, Zhu Mingjian: Hero of Persons with Disabilities, available at <http://www.chnqxw.com/2011/1116/14500.html>, visited on Nov.29th, 2011.

4.3 Achievements and Challenges of the Strategic Litigation Approach in China

4.3.1 Achievements

The achievements and strength of strategic litigation differ in different regimes. In countries where the judiciary is more independent, it is likely to create more space for political changes. However, even in regimes where the government is very powerful and the courts are very weak, there are still achievements brought by strategic litigation.

a. Rule of law

A main element of rule of law is the belief in law.¹⁴⁰ In the human rights perspective, law can be effective only when people believe that law can bring justice and enforce rights. However, unlike western countries where there is a tradition of rule of law and belief in law, the role of law is not put the same weight as the role of politics in China.

The common sense among citizens is that the law is weak to solve disputes and remedy the loss, so they are reluctant to file lawsuits when their rights are violated.

However, when strategic litigation concerning interests of a large group of people occurs, the power of lawsuit is brought back to the vision of the public. During this

¹⁴⁰ Berman has a very famous statement contending that “law has to be believed in, or will not work”. See Harold Joseph Berman, *The interaction of law and religion*, Abingdon Press, 1974.

process, not only the real life of the vulnerable group is disclosed to the public, the laws providing the rights of them, as the basis of the litigation, are also known to people. The more the laws are used in litigations, the more familiar people feel with the laws. Meantime, there are always discussions concerning the cases themselves and relevant provisions among scholars and citizens through media and internet, which reinforce the understanding of rule of law. Gradually in this way, rule of law might be rooted in people's mind step by step.

In all of the above-mentioned cases, successful or not, Law on Protection of Disabled Persons has been mentioned frequently as a powerful evidence of the existence of long-term hidden rights of the disabled. Besides that, the news of litigation has been spread among the civil society and people of same situation are more aware of their own rights. They begin to believe that laws could benefit the disadvantaged as well. Some of them even put their thoughts into action and to further make the laws enforced through strategic litigation.¹⁴¹

b. Social justice achieved through individual justice

Since the aim of strategic litigation is to make social change through an individual case, it also works in the context of China. In the case of Luan Qiping v. Minister of

¹⁴¹ For example, Luan Qiping sued the Minister of Railways after he knew the Ding Shengqi case regarding accessibility facilities. And then, after further empowered, he brought another case seeking for free travel by metro for disabled people in a different region. Zhu Mingjian brought a second case regarding free travel by bus after the first successful case regarding free travel by metro. For details, see the above-discussed cases.

Railways, though the case was dropped by the plaintiff eventually, the Minister provided better services to the disabled people after the case, which has benefitted a larger group beyond the plaintiff himself. In Guangzhou, it is free now for a disabled person to travel by public transportation and the disabled group knows that it results from two strategic cases initiated by Zhu Mingjian.

It could be said that strategic litigation can always make social change in the long run, provided that it is used strategically and constantly and do not give up when there is failure at a certain stage.

c. Awareness raising of the public

Used smartly, strategic litigation could be one of the best forms of human rights education for the public. First, the human rights issues of a certain group in a case could be disclosed through the media, unfolding the public what has been hidden before about the life of the disadvantaged.

Second, the legal and rights issues in the test case will be discussed, through which the same situated group will know the laws and rights that have been guaranteed in it.

For example, Ding Shengqi was informed of right to travel for disabled people after the case *Ding Shengqi v. the Planning Bureau of Chongqing* and Luan Qiping has learnt the existence of CRPD and has spread the spirit of CRPD to a larger group in his future campaigns.

Third, the awakened people may stand up to fight for disabled people. Both Luan Qiping and Zhu Mingjian filed another test case for the disabled people after the first one, and they also conducted other kinds of campaigns as well.¹⁴²

4.3.2 Challenges

Though there are progresses and changes achieved through strategic litigation in China, the challenges facing those who want to use strategic litigation are also very obvious.

First, strategic litigation can only work when there are clear laws or regulations addressing rights of them. When there is blank on certain types of human rights issues, it may be more effective to lobby the government to act in accordance with international human rights law.

Second, lack of political will to enforce human rights is another big issue blocking the way for strategic litigation. From the above-mentioned cases in this chapter we can see that when the defendant is the government, the test case is very likely to be unsuccessful in terms of the result of the judgments.

¹⁴² For example, Luan Qiping has submitted a recommendation with 353 signatures to the Minister asking for a barrier-free environment on the train; Zhu Mingjian fight for not just the disabled people, but also other kinds of disadvantaged group, such as the poor, women, etc.

Third, the inherent drawback of the judiciary—lack of independence—creates doubts about the effectiveness of strategic litigation. In the cases where the defendant is the government, the plaintiffs are always persuaded or forced to drop the case.

Conclusion

Strategic litigation, as other means of rights enforcement, is never perfect. Strategic litigation alone can not successfully and effectively achieve its goal. It relies on “a judiciary receptive to civil rights claims; centralized administrative agencies susceptible to reform through impact lawsuits; and a system of welfare entitlements open to enforcement and expansion”.¹⁴³

It is therefore necessary to make strategic use of different means of right enforcement, including the media, suggestion letters to the government, and international advocacy to make the government accountable for human rights enforcement in accordance with its obligations under international human rights law. When strategic litigation occurs, other means of advocacy are also involved to achieve the final goal. In a human rights campaign, strategic litigation is a good starting point to trigger public mobilization and the judgment of a successful is very powerful to lobby the government to make changes.

In the context of China, though difficult, it is very important to promote the strategic litigation approach for both rights of the disadvantaged groups and reforms of the

¹⁴³ Scott L. Cummings & Deborah L. Rhode, “Public Interest Litigation: Insights From Theory and Practice”, 36 *Fordham Urb. L. J.* 603, pp. 606-607.

regimes. It also helps to build a rights-based environment for both the government and the civil society.

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