

SETTLING FOR DISCRIMINATION: HIV/AIDS CARRIERS AND THE RESOLUTION OF LEGAL CLAIMS

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ABSTRACT

In the last decade, foundations and international non-governmental organisations (INGOs) have provided financial backing and transferred litigious techniques to Chinese NGOs operating in the HIV/AIDS area. A few NGOs have developed legal programs that provide legal services to HIV/AIDS carriers. HIV/AIDS carriers seek compensation for contracting their disease from transfusions of contaminated blood, illegal and incompetent blood collection as well as discrimination in employment, education and access to medical care. To date, China's courts have accepted few cases brought by HIV/AIDS carriers seeking claims. Many HIV/AIDS carriers have opted to pursue alternative dispute resolution (ADR) such as mediation and conciliation in order to reach a settlement. The settlements offered by ADR, however, institutionalise discriminatory practices. This paper argues that a combination of societal discrimination against HIV/AIDS carriers, government policies and the approach of courts to HIV/AIDS cases strongly discourages litigation and encourages ADR. By analysing court decisions and more importantly, court refusals to hear cases, the article claims that state policies toward HIV/AIDS carriers are driven by state interests more than protecting the rights and interests of HIV/AIDS carriers. The Four Free and One Care (simian yiguanhuai) policy is used by China to channel potential plaintiffs away from litigation. Rather than undermining discrimination, the courts' handling of HIV/AIDS cases helps sustain societal discrimination.

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Keywords: litigation, alternative dispute resolution, HIV/AIDS, discriminatory practices

INTRODUCTION

Lawyers at specialised legal aid centres have advised many HIV/AIDS carriers on how to protect their rights, but they have represented very few clients in court. Attorneys who advocate for HIV/AIDS carriers have tried just a handful of cases (if any), and until 2009, they had never litigated in the important area of discrimination. The paucity of legal cases is surprising in light of the large number of HIV/AIDS victims in China, government culpability during China's blood scandal in the 1990s and widespread discrimination in the areas of access to healthcare, education and employment.¹ Instead of litigation, legal aid lawyers have employed alternative dispute resolution (ADR), primarily negotiating out-of-court settlements. Legal aid stations seek to try impact litigation cases and to change popular attitudes toward HIV/AIDS carriers' legal rights, but the negotiated settlements that they reach are struck without formal legal judgment or society's knowledge. Usually, the settlements provide HIV/AIDS carriers with financial compensation in exchange for instituting discriminatory practices such as restricting an employee's right to work or right to education. To borrow Siri Gloppen's terms, settlement likely fails in the "material sense," which "improves the situation of the litigants...with regard to the health condition in question" and in the "social senses," which "make the health system more equitable and benefit members of society whose right to health is more at risk."²

Litigation and other legal means to pursue justice constitute a potentially important element of governing HIV/AIDS. The right to health is a core element of the U.N. Universal Declaration on Human Rights that has been elaborated to protect HIV/AIDS carriers. In 1996, the U.N. Commission on Human Rights "resolved that the term 'or other status' used in several human rights instruments 'should be interpreted to include health status, including

¹ Anderson, E. and Davis, S., *AIDS Blood Scandals: What China can Learn from the World's Mistakes* (New York: Asia Catalyst, 2007); Policy Research and Information Division of the National Center for AIDS/STD Control and Prevention, *HIV and AIDS Related Employment Discrimination in China*. ILO Country Office for China and Inner Mongolia: 2011. http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_150386.pdf; and STD and AIDS Prevention and Control Center of the Chinese Center for Disease Control and Prevention and the International Labor Organization, *Discrimination against People Living with HIV within Healthcare Centers in China*. International Labor Organization, 2011. http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/publication/wcms_155950.pdf

² Gloppen, S., "Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health," *Health and Human Rights* 10, no. 2(2008): 25.

HIV/AIDS' and that discrimination on the basis of actual or presumed HIV/AIDS is prohibited," providing a broad extension of human rights to HIV/AIDS carriers.³ China's government has made significant progress toward adopting international human rights concerns for HIV/AIDS carriers in its laws and policies, but its laws are vaguely defined and too often ignored by government officials. Litigation offers one avenue to hold the government accountable for its failure to secure health-related rights for citizens.⁴ Repeated litigation can increase pressure to secure healthcare rights for, and reduce discriminatory practices against, Chinese HIV/AIDS carriers. In addition, litigation encourages related social movements to press forward on their claims for rights to healthcare and against discrimination.⁵ In China, potential plaintiffs face many challenges, including difficulty having cases accepted by courts, loosely defined laws and regulations, poorly trained judges and weak enforcement of rulings.

Why would HIV/AIDS carriers opt to settle for discrimination rather than seek to litigate against discriminatory practices? There are many reasons for the small number of trial cases, ranging from the government's discouragement of cases to societal prejudice faced by HIV/AIDS carriers and their families. The following pages will explore the types of cases that HIV/AIDS carriers have sought to address through legal means, the reason that most cases have shifted to ADR and the decisions of two recent anti-discrimination cases brought by HIV/AIDS carriers.

China does not publish a record of all Chinese court cases, so a robust account of China's legal development is a challenge and necessitates documentary research combined with interviews. The present study draws from two rounds of interviews conducted in 2007–08 and 2010 and a survey of documents on China's legal system and HIV/AIDS published by China's government, U.N. agencies, the press and international and Chinese non-governmental organisations (NGOs). The author conducted interviews with 42 attorneys, representatives of NGOs, staff of U.N. agencies, Chinese officials and scholars who work on HIV/AIDS and legal development in China. For the interviewees' protection, the article does not identify their organisations or names.

³ UNAIDS and IPU [Inter-parliamentary Union], *Handbook for Legislators on HIV/AIDS, Law, and Human Rights* (Geneva, Switzerland: UNAIDS, 1999), 26.

⁴ Gloppen, "Litigation as a Strategy."

⁵ Pieterse, M., "Health, Social Movements, and Rights-based Litigation in South Africa," *Journal of Law and Society* 35, no. 3(September 2008): 364–388.

LEGAL AND REGULATORY CONTEXT OF HIV/AIDS CARRIERS' RIGHTS

HIV/AIDS is a relatively new disease and international norms on AIDS-related human rights have formed slowly over the last three decades. The U.N. General Assembly's *Declaration of Commitment on HIV/AIDS* provided a non-binding set of guideposts for international, domestic and civil society responsibilities for addressing HIV/AIDS.⁶ *The Handbook for Legislators on HIV/AIDS, Law and Human Rights*, produced by IPU and UNAIDS was an important step toward codifying best practices on HIV/AIDS law.⁷ Over the last two decades, Chinese laws and regulations have partially moved toward adopting international norms on HIV/AIDS carriers' rights, including anti-discrimination principles. For example, Article 21 of the *Provisions for the Monitoring and Control of AIDS* stipulates that units and individuals may not discriminate against AIDS carriers and their families, and that AIDS carriers and their families have the right to keep their status private.⁸ The *Chinese Law on Prevention of Infectious Diseases* states that "individuals and work units cannot discriminate against carriers, former carriers, and possible carriers of infectious disease."⁹ Article 3 of *AIDS Prevention Rules* offers similar protection against discrimination in the areas of education, employment, medical treatment and marriage for HIV/AIDS carriers and their families.¹⁰ The improvement in policies toward, and legal protections for, HIV/AIDS carriers has resulted from collaborative work of transnational advocacy networks linking Chinese NGOs with U.N. agencies, foreign foundations and INGOs. The networks diffuse knowledge of international legal norms and press Chinese officials to come into compliance with such standards.¹¹

During the period 2004–09, international and Chinese NGOs collaborated to establish legal aid centres focusing on HIV/AIDS cases in major cities such as Beijing, Kunming and Shanghai. In each legal aid centre, international NGOs and foundations have provided financial support and

⁶ United Nations General Assembly, *Declaration of Commitment on HIV/AIDS* (New York: United Nations, 2001), adopted 27 June 2001.

⁷ UNAIDS and IPU [Inter-parliamentary Union], *Handbook for Legislators*.

⁸ State Council, *Provisions for the Monitoring and Control of AIDS*, approved by the State Council on 26 December 1987, promulgated on 14 January 1988.

⁹ Standing Committee of the NPC, *Chinese Law on the Prevention of Infectious Diseases*, passed by the Standing Committee of the National People's Congress on 21 February 1989, revised 28 August 2004, article 16 (in Chinese, author's translation).

¹⁰ State Council, *AIDS Prevention Rules*, issued by State Council 29 January 2006 (Document No. 457), put into effect 1 March 2006 (in Chinese).

¹¹ Wilson, S., "Introduction: Chinese NGOs – International and Online Linkages," *Journal of Contemporary China* (forthcoming).

technical training on international approaches to HIV/AIDS carriers' human rights. In Beijing, Shanghai and other major cities, activist lawyers have received foreign training, often through prominent public interest law programs run at law schools in the U.S., Australia or Europe. The legal aid centres seek to bring impact litigation cases in the areas of tort, discrimination and access to information claims into the courts for adjudication. Such cases help to defend HIV/AIDS carriers' rights and to improve governance of HIV/AIDS.

STATE ATTEMPTS TO KEEP HIV/AIDS SOCIAL CONFLICT OUT OF THE COURTS

Previous works have claimed that, due to China's legal culture, citizens prefer non-litigious settlement of social conflict and that the state attempts to channel disputes toward administrative resolutions.¹² The private settlement of social conflict has similarly affected China's administrative response to grievances related to HIV/AIDS. In 2003, China's central government sought to address HIV/AIDS carriers' needs with its Four Free and One Care (*simian yiguanhuai*) policy, which guarantees access to medical treatment, including anti-retroviral therapy (ART) for rural citizens and those with low incomes. The state policy helps to resolve several of the immediate and pressing needs of HIV/AIDS carriers, but it does not address a number of potential claims, including the following: loss of wages and employment, punitive damages, psychological and physical suffering, and discrimination. State officials use the policy to stave off litigation, arguing that the state has addressed HIV/AIDS carriers' needs with the policy. Therefore, litigation is not necessary for HIV/AIDS carriers.¹³ One attorney and legal scholar recalled his experience in trying to file cases on behalf of HIV/AIDS carriers and hemophiliacs, "The courts can say there is already the Four Frees, One Care policy that gives you free medicine, so you don't really need anything and we won't take the case."¹⁴ Judges avoid openly using such an excuse for refusing to hear cases, but the policy and political pressure from health bureaus and local governments combine to discourage judges from accepting filings by HIV/AIDS carriers.

¹² Potter, P. B., *The Chinese Legal System: Globalization and Local Legal Culture* (New York: Routledge, 2001), 9 and 12–13; Lakritz, R. M., "Comment: Taming a 5000 Year-Old Dragon: Toward a Theory of Legal Development in Post-Mao China," *Emory International Law Review* 11(Spring 1997): 264–265; Xiaotong, F., *From the Soil*, trans. and intro. Hamilton, G. G. and Zhen, W. (Berkeley: University of California Press, 1992).

¹³ Director, Chinese HIV/AIDS NGO (2010-06), interview by author, Beijing (27 May 2010).

¹⁴ Other NGO leaders and attorneys made similar claims. Attorneys and legal aid workers (2008-26), interview by author, Shanghai (15 April 2008); Leader of Chinese HIV/AIDS NGO (2008-27), interview by author, Beijing (5 May 2008); Interview 2010-06.

In some provinces, courts have accepted cases brought by HIV/AIDS carriers and even found in their favour. For example, a Heilongjiang court found in favour of nineteen HIV/AIDS carriers who were infected by contaminated blood transfusions, and courts in Inner Mongolia, Shanghai, Hebei and Hubei awarded damages to others infected in China's blood scandal.¹⁵ These cases, however, arose in the early 2000s and in provinces with relatively few HIV/AIDS cases caused by the blood scandal. The provinces with the highest rates of HIV/AIDS infection are also some of China's poorer ones, and some of the provinces such as Henan and Anhui were sites of the illicit blood collection stations.¹⁶ In those provinces very few court cases have been allowed, and since 2006, courts throughout China have tried very few HIV/AIDS cases. In Henan, the courts have been particularly loath to accept cases filed by HIV/AIDS carriers. Chinese courts are not required to accept all filings by citizens, but the *Civil Procedure Law* requires courts to produce a document stating reasons for rejecting a case, which a citizen may appeal.¹⁷ Lawyers at legal aid stations charge that Chinese judges, however, have rejected HIV/AIDS carriers' complaints without producing such a document, leaving the would-be plaintiff with no legal recourse.¹⁸ Attorneys and journalists allege that Henan authorities issued a secret order to China's courts not to accept HIV/AIDS filings,¹⁹ and that the courts should not accept filings related to HIV/AIDS infection transmitted by contaminated blood.²⁰

Li Xige's attempt to file a case against the hospital where she received an HIV/AIDS-contaminated blood transfusion during childbirth in Henan Province is indicative of the challenges that HIV/AIDS carriers face in the courts. After Li Xige contracted HIV from her blood transfusion during a caesarian delivery of her first child, she unwittingly infected her two daughters through mother-to-child transmission. Li sought compensation and justice against the hospital that illegally collected blood for her surgery without

¹⁵ Anderson and Davis, *AIDS Blood Scandals*, 18.

¹⁶ According to 2009 data, Henan Province has the third highest number of HIV/AIDS carriers of China's provinces. The six provinces with the most HIV/AIDS carriers in China account for 61.8% of China's total number of infected persons. Ministry of Health, *China 2010 UNGASS Country Progress Report (2008–2009)*. Beijing: Ministry of Health, 23. http://data.unaids.org/pub/Report/2010/china_2010_country_progress_report_en.pdf

¹⁷ National People's Congress, *Civil Procedure Law of the People's Republic of China*, promulgated by the President on 9 April 1991, article 85.

¹⁸ Interview 2008-26.

¹⁹ Interview 2008-27; Interview 2010-06; Wu, Z. and Huiru, L., "An Analysis by Attorneys Representing a Group Who Contracted HIV/AIDS from Blood Donations," *Asia Catalyst* (no date). www.asiacatalyst.org/Blood_transfusion_AIDS_cases.doc

²⁰ Heywood, M. and Hassim, A., "Observations and Assessment Arising from a Visit to Beijing and Chengdu, China to Look at Human Rights, Civil Society, and the Government's Response to HIV/AIDS," unpublished report (2009), 16, citing Attorney Liu Wei.

screening the donor. The courts refused to accept her torts claim case, so Li petitioned provincial and central Ministry of Health officials for help. With each round of petitioning, Li received official letters of support, calling on local officials to address her claims, but local authorities shrugged off the instructions. Eventually, Li received a modest stipend from local authorities, but not before she was detained during one of her petitioning efforts and placed under house arrest. Meanwhile, no civil or criminal cases have been brought against the responsible parties. At several points in her ordeal, local authorities informed Li that the courts would not accept her case because the authorities were working on an administrative response to her and others' cases of contracting HIV/AIDS through the blood supply.²¹ Administrative responses to HIV/AIDS carriers have been very uneven across China's provinces because of great disparities of wealth and resources available to local governments.²² The administrative handling of cases seeks to avoid public scrutiny of officials and their culpability in the blood scandal. Two officials, Li Changchun and Li Keqiang, leading provincial officials in Henan during the blood scandal, have reached very high levels of power in China's central government and would not want their careers ruined by negative publicity from litigation.

DISCRIMINATION AND IMPEDIMENTS TO GOING TO TRIAL

In China, popular prejudice against HIV/AIDS carriers runs deep and is concretely expressed in the form of denial of employment to applicants or firing of existing workers, refusal to provide medical treatment, being cast out from schools with non-infected students and general stigmatisation. A survey conducted in Beijing, Kunming, Shanghai, Shenzhen, Wuhan and Zhengzhou by the CHAMP found that 47.8% of respondents would be unwilling to eat a meal with an HIV/AIDS carrier, 41.3% would be unwilling to work in the same place as an HIV/AIDS carrier and 30% did not believe that infected students should attend the same school as uninfected students.²³ Chinese HIV/AIDS carriers are looked down upon for their perceived sexual promiscuity, same-sex relations or drug use, despite the fact that nearly one-fourth of Chinese HIV carriers directly contracted HIV from blood donations or transfusions. Even Chinese who contracted HIV from tainted blood face

²¹ Li, X., "Li Xige Gives National Secretary Hu Jintao an Open Letter," *Xinboshe* (12 August 2007) (in Chinese, author's translation) <http://www.minzhuzhongguo.org/Article/ShowArticle.asp?ArticleID=2268>

²² Anderson and Davis, *AIDS Blood Scandals*, 18.

²³ CHAMP [China HIV/AIDS Media Partnership] et al., *AIDS-Related Knowledge, Attitudes, Behavior, and Practices: A Survey of 6 Chinese Cities*. Beijing, 2008. <http://www.un.org.cn/public/resource/ea0b7baa18b18c711db095673895aeba.pdf>

hostility from members of their community and even their own family.²⁴ Parents of non-infected children have been known to pressure school principals to force children who contracted HIV through no fault of their own to leave school or dormitories.²⁵ Many doctors and hospitals effectively have refused to treat AIDS carriers.²⁶ Employment-based prejudice is particularly troublesome for HIV/AIDS carriers and bosses and co-workers who discover a person has HIV/AIDS may fail to respect the person's right to privacy and push to remove the employee from the worksite. While popular prejudice is hard to change, in China prejudice has led to infringement on citizens' rights to access healthcare, education and employment, all of which are protected by law.

A significant stumbling block to the pursuit of potential anti-discrimination cases brought by HIV/AIDS carriers is the underdeveloped nature of Chinese law. China lacks an anti-discrimination law, and the general legal expressions banning discrimination against HIV/AIDS carriers lack implementing instructions.²⁷ Chinese courts are not bound to follow judgments in analogous cases, but courts tend to follow precedents. Without model verdicts in HIV/AIDS discrimination cases to emulate or clear implementation guidelines, the courts are reluctant to hear cases involving HIV/AIDS carriers' claims. A Chinese attorney trained in AIDS law and who has worked on anti-discrimination cases complained about the anti-discrimination clause in China's AIDS Prevention Law,

Discrimination is not defined. It says that people should not discriminate against each other in three ways [employment, access to healthcare, and access to education]. It is written beautifully, but it does not stipulate what you are to do if someone discriminates against an HIV or AIDS carrier. ... With regard to what should be done about discrimination, it just says, "hospitals should not discriminate." ... We think that it is great that the anti-discrimination clause is there, but we would like to have something that clarified assuming responsibility by persons.²⁸

²⁴ Li Xiaoshu, "The Public Face of AIDS in China," *Global Times* (3 February 2010). http://special.globaltimes.cn/2010-02/503379_3.html

²⁵ Yanhai, W., Ran, H., Ran, G. and Arnade, L., "Discrimination against People with HIV/AIDS in China," *The Equal Rights Review* 4 (2009), 15–25.

²⁶ Associate director, Chinese HIV/AIDS NGO (2010-02), interview by author, Beijing (21 May 2010).

²⁷ Gloppen, "Litigation as a Strategy," notes that health-related and specifically HIV/AIDS-related laws and norms are poorly defined.

²⁸ Officer of HIV/AIDS INGO (2008-12), interview by author, Beijing (17 January 2008).

The vagueness of China's laws and the contradictory statements in laws and regulations impede judges from converting general anti-discrimination principles into awards for HIV/AIDS carriers who encounter discrimination.²⁹ Moreover, Chinese courts are still heavily influenced by political considerations, so judges are reluctant to render verdicts that they fear will be overturned or that will have repercussions for their pay or their careers.³⁰ Local officials can exercise sway over lower courts because they (rather than Ministry of Justice) evaluate and pay the salaries of judges.

The discriminatory practices—denial of access to medical treatment, employment and education—all violate the spirit, if not the letter, of Chinese laws and regulations governing HIV/AIDS. Thus, they are ripe for legal challenge, but HIV/AIDS carriers have been reluctant to face prejudice that making their HIV-positive status known would generate. An attorney noted that a plaintiff who pursues litigation could request a closed hearing, but the plaintiff must enter a true name (rather than a pseudonym) in court documents, and court documents would include the true name of the plaintiff. When such documents are put into circulation, they effectively reveal the identity of the HIV/AIDS carrier-plaintiff,³¹ a problem that the courts have begun to resolve in three recent cases involving alleged discrimination described below. Although Chinese courts have developed procedures to protect the privacy of HIV/AIDS carriers in court proceedings, some infected people have had their cases revealed to the public, which has brought further discrimination.

Rather than risk the exposure that a trial might bring, HIV/AIDS carriers who face discrimination typically turn to alternative dispute resolution (ADR) to seek settlement of their grievances. Additionally, the numerous obstacles to litigating HIV/AIDS-related cases encourage most would-be plaintiffs toward ADR, which has a greater chance of gaining compensation for HIV/AIDS carriers than litigation. A Shanghai lawyer who advocates for HIV/AIDS carriers and the gay community argued that ADR was more useful than litigation in handling employment discrimination for the following reason: "If we don't go to courts and use non-litigious means, using ADR or petitions, then the government or work unit can make plans, or a hospital or unit can arrange, with an individual to resolve the problem. Because our country's laws lack detail, I can only go through human sentiment [and not legal rules] to

²⁹ Balzano, J. and Ping, J. "Coming Out of Denial: An Analysis of AIDS Law and Policy in China," *Loyola University Chicago International Law Review* 3(Spring 2006): 187–212.

³⁰ Stern, R. E. "On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits," *Law & Policy* 32, no. 1(January 2010): 87–88, makes a similar point with regard to the courts and environmental litigation.

³¹ Interview 2008-26.

negotiate."³² Another attorney who specialised on HIV/AIDS made a similar point: "When we have had cases, the mediators and judges have often sympathized with the worker. In some cases, the defendant also sympathizes with the plaintiff. You could say that sentiment (*qingli*) is involved in such settlements."³³ The lawyer concluded, however, that "ADR is good at winning a claim for an individual, but it does not help the rest of society. It does not demonstrate the case for others to see."³⁴

THE RIGHT TO HEALTHCARE AND CHINA'S FIRST HIV/AIDS ANTI-DISCRIMINATION INSURANCE CASE

One of the core human rights is access to health, and U.N. agencies have articulated the right to health for HIV/AIDS carriers as access to antiretroviral treatment at reasonable costs and medicine to fight opportunistic infections.³⁵ Chinese legislation and regulations have extended these rights, but they are not fully observed. Interviewees complained about denial of access to medical care for HIV/AIDS carriers, and recent reports have substantiated such claims.³⁶ A survey conducted in 2005 found that 50% of doctors and nurses believed it was permissible to deny medical services to HIV/AIDS carriers.³⁷ Even doctors in Beijing hospitals have turned away patients known to have HIV/AIDS, despite medical ethics and hospital rules to the contrary.³⁸ Despite these problems, to date, Chinese courts have heard no cases related to discrimination based on denial of access to medical care.

A recent related area of legal focus has been on discrimination in health insurance coverage. As part of its economic and administrative reforms, China has privatised health insurance and made healthcare providers responsible for profits and losses.³⁹ HIV/AIDS carriers need access to insurance because the state's Four Free and One Care policy does not cover medical expenses that are unrelated to HIV/AIDS and some Chinese are either ineligible, or (in order to guard their privacy) choose not to register, for the policy's benefits.

³² *Ibid.*

³³ Lawyer for Chinese HIV/AIDS NGO and legal aid center (2008-34), interview by author, Beijing (8 May 2008).

³⁴ *Ibid.*

³⁵ United Nations General Assembly, *Declaration on HIV/AIDS*, Article 55.

³⁶ Director, Chinese HIV/AIDS NGO (2010-01), interview by author, Beijing (21 May 2010); Interview 2010-02; STD and AIDS Prevention and Control Center, *Discrimination against People*.

³⁷ STD and AIDS Prevention and Control Center, *Discrimination against People*, 7.

³⁸ "China Hospital Refused to Treat Woman with HIV: Co-Worker," *Agence France Presse* (16 July 2010). <http://health.asiaone.com/Health/News/Story/A1Story20100716-227326.html>.

³⁹ Cai, J. "Turning Away from Dependence on the Economic System: Looking Forward and Back on the Reform of China's Health Care System," in *Economic Transitions with Chinese Characteristics*, eds. Sweetman, A. and Zhang, J. (Montreal and Kingston: McGill-Queen's University Press, 2009), 139–140.

Unfortunately, some Chinese insurance policies have excluded HIV/AIDS carriers from coverage. In 2008, Li Wei, a citizen of Kunming, Yunnan Province, tested anti-discrimination principles for HIV/AIDS carriers by challenging his health insurance company's policies. In this first legal challenge to discrimination against HIV/AIDS carriers, Li alleged that the Ping'an Health Insurance Company, which provided his insurance policy, discriminated by excluding HIV/AIDS carriers from medical benefits. The policy lumped HIV/AIDS in with health damages caused by warfare, actions of soldiers, bombs, rioting or the actions of criminals.⁴⁰ Li claimed that such an exclusion against HIV/AIDS, which stood out as a medical condition in a list of violent acts, discriminated against a category of more than 700,000 persons.

On June 25, 2009, a Kunming municipal court heard the complaint but ultimately rejected it. In the trial, the plaintiff raised two main arguments. First, Li's attorney alleged that the insurance coverage did not comply with relevant regulations. Ping'an Insurance claimed that the insurance policy containing the article in question had been written in 1998 and approved by the state's insurance review board (*baojianhui*) in 1999. The attorney representing Li contended that although the policy had been approved in 1999, it violated China's *AIDS Law* passed in 2003, which included an anti-discrimination clause protecting HIV/AIDS carriers and their families. The insurance company failed to have an attorney ensure that its policies were updated to comply with relevant state law and regulations. The plaintiff also argued that the policy did not include required calculations on insurance coverage costs in its brochures. Ping'an Insurance claimed that it was impossible for it to make calculations about the likelihood and medical costs of a person who contracts HIV/AIDS. Therefore, it could not afford to insure against such medical claims. The plaintiff's counsel countered that insurance companies in other countries and even those in Hong Kong, a Chinese territory, have been able to make such calculations. The attorney challenged the insurance company representative to offer calculations that would show it would be prohibitive for the company to insure medical costs related to HIV/AIDS.⁴¹ Second, the plaintiff's counsel alleged that the policy discriminated against HIV/AIDS carriers by failing to cover medical claims related to an HIV/AIDS carrier who

⁴⁰ Xinhua, "Court Rejects AIDS Carrier's Claim in a Discrimination Case against an Insurance Company," *Xinhua* (10 July 2009). http://news.xinhuanet.com/legal/2009-07/10/content_11685603.htm (original in Chinese, author's translation).

⁴¹ Since 2005, China had an insurance policy for HIV/AIDS set up by a small private company in Hubei Province, which had calculated insurance payments and expected pay-outs, as well as a government-run group insurance policy for select occupations. Zhang, Y. ed., *Chinese AIDS Legal and Human Rights Report*. Beijing, Aizhixing Research Unit, 2009 (original in Chinese, author's translation).

was involved in an accident such as being hit by a car. A judge asked the insurance company representative to imagine two people are hit by a car, one infected by HIV/AIDS and the other not. The judge asked the insurance company if it would cover the person not infected by HIV/AIDS but refuse coverage to the HIV/AIDS carrier. The Ping'an Insurance representative stated that the company would deny coverage to the HIV/AIDS carrier.⁴² The court found that the article of the insurance policy in question was very convoluted. Ignoring the defendant's testimony in the case, the court could not determine if the written policy would exclude coverage for a HIV/AIDS carrier who had an ordinary accident such as being struck by a car. The court determined that the exclusion, on the face of it, did not inherently constitute discrimination, despite the non-discrimination article in China's *AIDS Law* and *AIDS Prevention Rules*.

Li Wei's case tested new legal principles regarding discrimination, so judges were unable to consult prior verdicts in analogous suits for guidance. The case of Li Wei v. Ping'an, though, points to the court's even deeper level of unfamiliarity with the central issues in the case. During the course of the hearing, the plaintiff's attorney provided the judges with a set of materials, including China's *AIDS Law* (the most basic law related to HIV/AIDS in China), *Yunnan's AIDS Prevention Rules* and an edited volume on legal principles related to HIV/AIDS. The judge in the case found the materials very useful, so much so that he requested a second set of materials to share with his colleagues on the bench who wanted to learn more about the laws related to HIV/AIDS.⁴³ Given the novelty of the issues raised in the courts, it is likely that many judges with no prior experience in AIDS cases will render verdicts.

Although the courts did not find that Ping'an Insurance Company had infringed upon Li Wei's right to medical coverage, the Insurance Association of China issued a paper requiring all insurance companies not to exclude HIV/AIDS carriers from health coverage, effective 1 October 2009. The guidelines could remedy the situation that Li Wei encountered with Ping'an Insurance Company, but Li's backers have expressed a cautious approach. Wang Xiaoguang from Daytop Drug Abuse Treatment Center in Kunming, Yunnan, who assisted with Li's case, noted that the paper is not binding and does not have the force as a law.⁴⁴

EMPLOYMENT DISCRIMINATION AND LITIGATION

⁴² Attorney with expertise on AIDS law (2010-12), interview by author, Kunming (2 June 2010).

⁴³ *Ibid.*

⁴⁴ Quoted in "Insurance Fix a Win for HIV Patients," *China Daily* (15 July 2009). http://en.kunming.cn/index/content/2009-07/15/content_1920690.htm

A 2007 study found that 48.8% of the population and 65% of business managers surveyed believed that HIV/AIDS carriers should not have equal employment rights.⁴⁵ Managers face pressure to discriminate against HIV/AIDS carriers and their families from co-workers who fear working alongside people with the virus. In order to try to keep work units operating, managers try to appease their workers, and it is easier to marginalise one HIV/AIDS carrier who works at a unit, even if it means infringing on his/her rights, than it is to hire all new staff. In some extreme cases, HIV/AIDS carriers, once their medical status was discovered, were fired.⁴⁶ Instead of firing a worker, some business managers either put an employee with HIV/AIDS in a job where the employee works alone, or more commonly ask the person not to show up for work while continuing to pay the person's base salary. Some attorneys negotiate for such a settlement on behalf of HIV/AIDS carriers through alternative dispute resolution.⁴⁷ In Yunnan Province, a middle-level manager who contracted HIV/AIDS was asked not to report to work, and his salary was reduced from 100,000 *yuan* to 10,000 *yuan*, his base pay.⁴⁸ In addition to reducing a worker's pay based on health status, such arrangements are discriminatory in three senses: (i) without opportunities to work at their post, HIV/AIDS carriers cannot earn bonuses or commissions, (ii) without work performance evaluations, HIV/AIDS carriers lose opportunities for promotion or salary increases, and (iii) by treating HIV/AIDS carriers as unwanted employees in the workplace, managers reproduce societal discrimination against HIV/AIDS carriers, refracted through co-workers' prejudices.⁴⁹ Rather than challenging prejudices against HIV/AIDS carriers and their ability to work, the arrangements positively enforce opposition to working alongside HIV/AIDS carriers. Pay-not-to-work arrangements tacitly legitimate co-workers' prejudices, reduce immediate compensation rates, and decrease long-term earning potential. One attorney who has helped to broker such arrangements described them as "low level discrimination."⁵⁰

Courts have been reluctant to accept employment discrimination cases brought by HIV/AIDS carriers, leading many infected persons to pursue

⁴⁵ Policy Research and Information Division of the National Center for AIDS/STD Control and Prevention, *AIDS Related Employment Discrimination*, 6.

⁴⁶ *Ibid.*, 8; Xia, G., *HIV/AIDS in China* (Beijing: Foreign Languages Press, 2004), 82.

⁴⁷ Head and legal officer of Chinese HIV/AIDS NGO with legal aid center (2008-07), interview by author, Beijing (15 January 2008); Professor of public health and expert on HIV/AIDS (2008-22), interview by author, Shanghai (18 April 2008).

⁴⁸ Xia, *HIV/AIDS*, 152.

⁴⁹ Interview 2008-22.

⁵⁰ Interview 2008-26.

settlements. But on 26 August 2010, the Yingjiang District court in Anqing City, Anhui Province accepted a case filed by Xiao Wu (a pseudonym), China's first accepted employment anti-discrimination case brought by an HIV/AIDS carrier. Xiao Wu was a student in Anhui Province who upon graduation applied for a teaching position at the Municipal Education Bureau and the Personnel Office of Anqing City. In May 2010, Xiao Wu passed a written exam for the position, and in June, his interview qualified him for the job.⁵¹ During a required physical examination as part of the application process, authorities discovered that he was HIV positive. Based upon that discovery, the school found him unfit for employment.⁵² After a period of angry reflection and consultation with lawyers, Xiao Wu filed a case in court in Anqing City, Anhui Province.⁵³

Xiao Wu and his lawyer, Yu Fangqiang, from Yirenping, a public interest law firm in Beijing, claimed discrimination based on legal principles found in *China's Constitution*, *Labor Law*, *Employment Promotion Law*, *China's Infectious Diseases Prevention Law*, and *AIDS Prevention Rules*. *China's Constitution* states, "All citizens have the same right to employment, and any employer or individual may not infringe upon a citizen's equal right to employment."⁵⁴ China's *Labor Law* includes similar protections. The third article of *AIDS Prevention Rules* says, "No work unit or individual shall discriminate against HIV/AIDS carriers. HIV/AIDS carriers and their relatives shall enjoy protection of their rights to marry, work, receive medical treatment, and receive an education."⁵⁵ The rules on civil service employment, however, ran against these general statements against discrimination in employment. *The Standards Used for Civil Servant Physical Examinations (Trial Implementation)* flatly states, "HIV/AIDS, inappropriate," and *The Handbook on Physical Examinations Used for Civil Servants* notes that "physical examinations cannot be completed once it is discovered that an applicant is discovered to have HIV."⁵⁶

Yu Fangqiang, Xiao Wu's attorney, alleged that the defendants—the Anqing Municipal Education Bureau and the Personnel and Social Protection Bureau—had discriminated against Xiao Wu in violation of the above

⁵¹ Li, G., "An Anhui University Student Sues over His Job Request Being Rejected Based on His HIV Positive Test Result," *Legal Daily (Fazhi Ribao)* (26 August 2010) (original in Chinese, author's translation). http://www.legaldaily.com.cn/society/content/2010-08/26/content_2261462.htm?node=20771

⁵² *Ibid.*

⁵³ "Litigant in 'First AIDS Employment Discrimination Case': Discrimination is a Wall," *Jinghua Shijian* (25 October 2010) (original in Chinese). <http://icma.org/en/international/regions/Country/1001/China>

⁵⁴ Quoted in *Ibid.*

⁵⁵ State Council, *AIDS Prevention Rules*.

⁵⁶ Quoted in Guangming Li, "Record of a Cover Up."

employment rights of HIV/AIDS carriers. In addition to claiming violation of the legal right to employment, Xiao Wu believed that teachers should not be subject to special rules on civil servants.⁵⁷ In an interview, Xiao Wu said, "AIDS only can be transmitted by three means: mother to child, through blood plasma and sexual intercourse. Have you met a teacher who must give birth to a child, exchange blood plasma or have sex in order to transmit knowledge? No."⁵⁸ Moreover, Xiao Wu is HIV positive but not an AIDS carrier, so his physical ability is not compromised by his infected status. The defendants argued that they acted within the legal guidelines of the relevant regulations, so the case should be dismissed. The court decided with the defendants in their lawful use of regulations to deny Xiao Wu employment. One commentator lamented that the various laws related to discrimination and employment lacked a common "equal standard" (*pingdeng yuanze*) and detailed definitions by which to judge discrimination claims.⁵⁹ Implicitly, the courts, by failing to act on such cases, have indicated that they do not take it upon themselves to help settle such discrepancies in terminology in legal expressions, instead waiting for implementing guidelines or instructions from legislative bodies.

Xiao Wu's case is extraordinary in several respects. First and against the basic argument of this paper, Xiao Wu overcame his fear of public exposure to use litigation (rather than alternative dispute resolution) to address his grievance. Second, the courts have been reluctant to hear cases related to discrimination, but they accepted this case. Third, the case alleges discrimination by a state-run unit, which may suggest a change in the courts' willingness to hear more cases related to discrimination, even against state agents.

At first blush, Xiao Wu's case challenges this article's claim that HIV/AIDS carriers prefer to settle their cases out of court due to reluctance of judges to hear such cases, resulting in an acceptance of discrimination against themselves. It is difficult to draw conclusions from a single verdict (especially one that is under appeal), but the court's rejection of the plaintiff's allegations of discrimination may discourage future potential plaintiffs from filing suits and encourage settlement out of courts. Xiao Wu's case supports some of the arguments advanced here, namely, that the prejudice that HIV/AIDS carriers face compels them to remain secretive about their status. Xiao Wu brought his case pseudonymously—he has not even informed his parent of his HIV

⁵⁷ *Ibid.*

⁵⁸ "Litigant in 'First AIDS Case.'"

⁵⁹ Lu, S., "Anti-Discrimination Requires Blocking 'the Cattle Gate Closing in the Cat,'" *Legal Observer (Fazhi GuanCha)* (15 November 2010) (in Chinese, author's translation). http://www.legaldaily.com.cn/commentary/content/2010-11/15/content_2350415.htm

positive status—out of fear of further discrimination.⁶⁰ Significantly, China's courts, at the request of their attorneys, have protected the confidentiality of Xiao Wu and Li Wei, both HIV carriers who have successfully brought their cases claiming discrimination to the courts. In 2011, a court in Sichuan Province accepted, but not yet tried, a second employment discrimination case involving an HIV/AIDS carrier, which may evince growing pressure on the courts to address this important issue.⁶¹ Yet, the courts' rulings against HIV/AIDS carriers' claims contrast to a 2009 verdict in favor of a person infected with Hepatitis B who alleged employment discrimination.⁶² The court's approach to discrimination against HIV/AIDS carriers appears particular even within the parameters of health law.

CONCLUSION: SETTLING FOR DISCRIMINATION?

The pattern of using ADR to negotiate for cash settlements that leave discriminatory practices intact may prove cold comfort for HIV/AIDS carriers. Due to the anxiety of exposing themselves, their families and friends to the stigma associated with HIV/AIDS-positive status and due to the courts' reluctance to hear their cases, HIV/AIDS carriers have sought to keep their claims out of the courts. Financial settlements impose a small financial penalty on those accused of discrimination against HIV/AIDS carriers or those people whose negligence caused the spread of HIV/AIDS, but they limit the progress of HIV/AIDS carriers to define and protect their legal rights.

Out-of-court settlements of social conflicts such as the ones described above are not announced. In fact, ADR settlements may stipulate that the details of the settlement cannot be discussed, and they typically do not determine fault. Thus, settlements limit the "demonstration effect" that court cases, which receive media publicity and enjoy the attention of other courts, can have on the legal system and society. Chinese courts are not bound to follow the precedents of earlier rulings, but decisions in publicised impact litigation cases demonstrate the bench's legal reasoning in such cases, which other courts are likely to weigh and even emulate. Equally important, settlements typically provide economic compensation but do not address the alleged underlying discriminatory practices. The persistence of such

⁶⁰ "Litigant in 'First AIDS Case.'"

⁶¹ Huang, Z., "HIV-positive Man Fights in Court for Job," *China Daily* (17 February 2011). http://www.chinadaily.com.cn/china/2011-02/17/content_12029053.htm

⁶² China Labour Bulletin, "China's First Successfully Litigated Hepatitis B Employment Discrimination Case," (no date). <http://www.china-labour.org.hk/en/node/100542>.

discriminatory practices does little to change the popular conceptions of HIV/AIDS carriers and allows prejudicial views to stand.

In many countries, HIV/AIDS carriers face prejudice, and fear of stigmatisation dampens their interest in pursuing litigation to defend their rights. Settling out of court, then, may appear a common or natural course of action. Yet, broad comparisons to other legal systems suggest that China's legal system and its practices pose particular challenges to HIV/AIDS carriers' pursuit of justice. Other countries have encountered blood scandals, including the U.S., Japan, France and Canada. In those countries, the courts heard cases, established precedents and awarded damages to HIV/AIDS carriers. Interestingly, Japan's legal system, which shares with China a tendency to rely upon administrative measures to keep litigation out of the courts, was more open to hearing AIDS cases than the U.S. courts.⁶³ In South Africa, a country with a fairly low standard of rule of law, the courts have heard HIV/AIDS cases and established important precedents for other countries to follow, such as the right to antiretroviral therapy.⁶⁴ In most countries, early test cases establish a precedent for a new area of litigation, and subsequent would-be plaintiffs seek settlements to avoid legal fees and to speed the process of redress. Defendants are motivated to avoid allegations of negligence or discrimination that would damage their reputation. The courts serve as a backstop for plaintiffs who encounter recalcitrant defendants. The Chinese courts, however, by refusing to hear cases on HIV/AIDS have shifted the balance in favour of would-be defendants. Potential defendants have little reason to comply with anti-discrimination principles or to eliminate negligence. In the context of discrimination in access to medical treatment, one doctor said, "Every hospital knows that according to the law they cannot reject HIV patients. ... Without concrete punishment, hospitals do not consider the law as a restriction on their behavior."⁶⁵

Increasingly, scholars and international organisations recognise the importance of litigation to securing the rights of HIV/AIDS carriers.⁶⁶ Settling

⁶³ Feldman, E. A., "Blood Justice: Courts, Conflict, and Compensation in Japan, France, and the United States," *Law and Society Review* 34, no. 3(2000), 651–701.

⁶⁴ Heywood and Hassim, "Observations and Assessment."

⁶⁵ Quoted in STD and AIDS Prevention and Control Center, *Discrimination against People*, 14–15.

⁶⁶ Meier, B. M. and Yamin, A. E., "Right to Health Litigation and HIV/AIDS Policy," *Journal of Law, Medicine & Ethics*, supp(Spring 2011), 81–84; Maluwa, M., Aggleton, P. and Parker, R., "HIV- and AIDS-Related Stigma, Discrimination and Human Rights: A Critical Overview," *Health and Human Rights* 6, no. 1(2002), 12–13; Gloppen, "Litigation as a Strategy," 3; Heywood and Hassim, "Observations and Assessment," 6; UNAIDS, UNDP, and IDLO, *Toolkit: Scaling Up HIV-Related Legal Services*. Rome: International Development Law Organization, 2009, 10; RTI International, *Assessment of the HIV Legal Environment: Yunnan, China October 13–20, 2008*. USAID and Health Policy Initiative, 2009, 2.

for discrimination limits the capacity for a "rights revolution," to borrow Charles Epp's term.⁶⁷ Although some of the organisational conditions—non-governmental organisations with resources and legal aid centers—are present to help HIV/AIDS carriers in their pursuit of justice, the courts' reluctance to hear such cases and HIV/AIDS carriers' reticence to bring their claims into the courts impede such a rights revolution. In turn, the paucity of litigation constrains the use of legal means to govern AIDS in a way that secures the rights and interests of HIV/AIDS carriers.

Xiao Wu's and Li Wei's cases may evince a new trend by the courts to allow discrimination cases against HIV/AIDS carriers to be heard. Even though both cases resulted in the courts' denial of damages, at least one case has resulted in a non-binding policy change among insurance companies, which would not only address the material concerns of Li Wei but also apply to other potential claimants in society. Rights revolutions are littered with lost legal cases until plaintiffs begin to gain the courts' favor. The fact that Xiao Wu's and Li Wei's cases received hearings, which China's press widely reported, may encourage others to come forward to test try their cases in the courts. The litigation will likely have a positive feedback function on social movements, in this case the pursuit of rights by HIV/AIDS carriers.

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⁶⁷ Epp, C. R., *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

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