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Navigating the Boundaries of Political Tolerance:
Environmental Litigation in China

by

Rachel E. Stern

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Political Science

in the

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of the

University of California, Berkeley

Committee in charge:

Professor Kevin J. O'Brien, Chair

Professor Robert Kagan

Professor Katherine O'Neill

Fall 2009

Navigating the Boundaries of Political Tolerance:
Environmental Litigation in China

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by Rachel E. Stern

Abstract

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University of California, Berkeley

Professor Kevin J. O'Brien, Chair

This is a dissertation about lawyers, judges, international NGOs and legal action in an authoritarian state. The state is contemporary China. The type of legal action is civil environmental lawsuits, as when herdsman from Inner Mongolia sue a local paper factory over poisoned groundwater and dead livestock or a Shandong villager demands compensation from a nearby factory for the noise that allegedly killed 26 foxes on his farm. Empirically, this is a close-to-the-ground account of everyday justice and the factors that shape it. Drawing on fifteen months of field research in China, along with in-depth exploration of four cases, legal documents, government reports, newspaper articles and blog archives, this dissertation unpacks how law as litigation works: how judges make decisions, why lawyers take cases and how international influence matters.

Conceptually, civil environmental lawsuits illustrate one pathway between litigation and social change in China and, by implication, possibly other illiberal states. With the exception of the first chapter, each chapter introduces a new actor's perspective on the interaction between state signals and legal professionals' response. The key theme, which cuts across chapters on the state, judges, lawyers and international NGOs, is what I call political ambivalence: conflicting official (or quasi-official) signals regarding the desirability of certain types of citizen action. Simultaneous impulses to promote law but control courts, to protect the environment and yet pursue economic growth, generate a medley of statements, cases and regulations that do not necessarily concord. For legal professionals on the ground, these mixed messages translate into a degree of opportunity. Without official sanction or intent, conflicting signals crack open enough political space to allow limited judicial innovation (chapter 3), legal activism (chapter 4), sustained international encouragement (chapter 5) and policy promotion (chapter 6). Even on tough terrain, political ambivalence over law can provide a limited opportunity to probe new roles and, in so doing, gently push the limitations of political tolerance.

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List of Abbreviations

ACLA:	All China Lawyers Association
ACEF:	All China Environment Federation
ALL:	Administrative Litigation Law
BPCs:	Basic People's Courts
BLA:	Beijing Law Association
CASS:	Chinese Academy of Social Sciences
CLAPV:	Center for Legal Assistance to Pollution Victims
CPPCC:	Chinese People's Political Consultative Conference
EIA:	Environmental Impact Assessment
HRDF:	Human Rights and Democracy Fund
HPCs:	High People's Courts
IPCs:	Intermediate People's Courts
MEP:	Ministry of Environmental Protection
MoJ:	Ministry of Justice
NGO:	Non-Governmental Organization
NPC:	National People's Congress
OCI:	Open Constitution Initiative
OSI:	Open Society Institute
SEPA:	State Environmental Protection Agency

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Introduction

This is a dissertation about lawyers, judges, international NGOs, and legal action in an authoritarian state.¹ The state is contemporary China. The type of legal action is civil environmental lawsuits,² as when herdsmen from Inner Mongolia sue a local paper factory over poisoned groundwater and dead livestock or a Shandong villager demands compensation from a nearby power plant for the noise that allegedly killed 26 foxes on his farm. Empirically, this is a close-to-the-ground account of everyday justice and the factors that shape it. In a country known for tight political control and ineffectual courts, the pages that follow unpack how law as litigation works: how judges make decisions, why lawyers take cases and how international influence matters. Conceptually, civil environmental lawsuits illustrate how litigation can contribute to social change in China and, by implication, other illiberal states. Even in extraordinarily unlikely cases—places where we would not expect law to matter at all—litigation can provide a limited opportunity for judges, lawyers, academics and NGOs to probe new roles and, in so doing, gently push the limitations of political tolerance.

My focus is on environmental litigation for two reasons. First, the environment is an area with high, real world stakes. By 2005, when I started this research, the severity of China's environmental degradation was well known. Sources as diverse as marketing materials for Asian mutual funds and local radio talk show hosts concurred that China's pollution was a worldwide environmental concern as well as a challenge to internal stability. The importance of a solution was evident, both to global environmentalists and domestic officials concerned with the future of the Chinese Communist Party (CCP). Given extraordinary pollution and historically weak courts, this project offers one way to assess whether litigation does (or could) halt degradation or spur environmentalism.

As a student of politics, I find environmental lawsuits interesting for a second reason. One of the first insights of my fieldwork was that civil environmental lawsuits occupy a "safety belt" (*anquan dai*), as one lawyer put it, between cases that are unequivocally forbidden by the state (like defending Falun Gong) and cases that are relatively uncontroversial (like defending children's rights). Falling in the middle of this spectrum, pollution cases enjoy a sliver of political opening that renders them less risky than other rights-related cases while remaining "a little bit sensitive" (*you yidian minggan*), which is to say somewhat politically touchy, but not taboo. Sometimes environmental lawsuits proceed quietly, with no more impediments than any other private dispute. But at other times, disputes spark interest from political power

¹ I borrow Lisa Wedeen's definition of authoritarian states as places "where leaders are intolerant of people or groups perceived as threatening to the regime's monopoly over the institutions of the state" (1999, 26). I use the terms "authoritarian" and "illiberal" interchangeably.

² While I occasionally make reference to key administrative cases, my focus is on civil litigation. Overall, civil cases comprise the bulk of cases in Chinese courts (85%) and touch fewer political nerves than cases that entail direct confrontation with state agencies (Zhu 2007, 204). For more on administrative environmental litigation, see Zhang (2008).

holders who pressure litigants, lawyers and judges to meet their wishes or drop litigation altogether. Alternately undermined, ignored or encouraged, environmental cases sit near the boundary of the politically permissible.

This places environmental lawsuits on the outskirts of allowable legal action in an authoritarian state, an excellent location to observe both the potential and limits of law. My starting point is the observation that courts pose a dilemma to authoritarian states. Although law can enhance governance and boost legitimacy, all but the most orchestrated show trials can threaten government authority or interests. One strand of the growing literature on law in illiberal states³ explores this tension, particularly the reasons why regimes devolve power to courts and the ways in which they control them.⁴ But how does the authoritarian dilemma concerning courts—a high level desire to both control and capitalize on the law—affect daily routines among those whose jobs entail regular interaction with courts, litigants or legal concepts? Or, to ratchet up one level of abstraction, how do official attitudes towards law tamp down or, conversely, inspire grassroots social change?

This is where this dissertation comes in. To this point, most accounts of litigation and social change have focused on democracies, especially the United States.⁵ This is not surprising insofar as democracies tend to house the type of feisty, activist courts that deliberately dip into social and political issues. Yet it hardly seems likely that there is no relationship between law and social change outside the democratic world. Building on a resurgence of social science interest in Chinese law,⁶ the pages that follow track the interaction between state signals over environmental litigation and legal professionals' response. Here, environmental litigation offers a window onto what I call political ambivalence: conflicting official (or quasi-official) signals regarding the desirability of certain types of citizen action. Ambivalence, a word which means the simultaneous existence of opposing preferences, sums up the official attitude towards environmental litigation. It is not that individual bureaucrats or political leaders are conflicted (although this is certainly possible), but that citizens are collectively confronted with opposing information about state preferences. Simultaneous impulses to promote law but control courts, to protect the environment and yet pursue economic growth, generate a medley of statements, cases and regulations that do not necessarily concord. In contemporary China, this often translates into ground-level uncertainty. When information is conflicting, incomplete or only semi-reliable, it is difficult to gauge the government's "tolerance interval" (Epstein, Knight and Shvetsova 2001), let alone figure out how to act accordingly.

Writing about political ambivalence means taking seriously the realization that states are rarely unified monoliths, but rather "a heap of loosely connected parts" with

³ See Silverstein (2003); Hilbink (2007); Moustafa (2003); Moustafa (2007); Moustafa (2008); Moustafa and Ginsburg (2008); Massoud (2008), and Ghias (forthcoming). Earlier work on illiberal courts includes Toharia (1975); Hendley (1996), and Epstein, Knight and Shvetsova (2001).

⁴ Especially see Silverstein (2003); Moustafa (2007), and Moustafa and Ginsburg (2008).

⁵ See Hazard (1969); Muir (1973); Upham (1987); Rosenberg (1991); McCann (1992), and Roach Anleau and Mack (2007).

⁶ See O'Brien and Li (2004); Diamant, Lubman and O'Brien (2005); Gallagher (2006); Michelson (2006), and Michelson (2007).

divergent interests and agendas (Migdal 2001, 22).⁷ Rather than looking inside the state to see the fissures that produce ambivalence, however, I focus on how legal professionals experience and respond to conflicting information. Unlike work on bureaucratic politics (Allison 1969; Lieberthal and Lampton 1992) which offer an insider view of factional power struggles, this dissertation views the state from below: from the perspective of low-level bureaucrats and normal citizens who are attentive to political shifts without the insight of special access to officials' intentions. Of course, political ambivalence—sometimes consciously exploited and sometimes only dimly sensed—is a universal part of citizens' lived experience of politics. After all, conflicting official signals are common when multiple layers of government and bureaucracies get involved. For example, even cursory consideration of a well-established democracy like the United States highlights how much ambivalence is present in China. Although hard cases sometimes arise, American laws are reasonably clear about the boundary between permissible and prohibited action (letter writing and rallies vs. violence and vandalism) and the price of transgression is predictable. In China, in contrast, law plays no such role. Much like Justice Potter Stewart's 1964 definition of obscenity, officials often know unacceptable political behavior only when they see it. Consequences for similar acts vary widely and even after the fact, lack of transparency makes it difficult for all but the best-connected legal professionals to untangle why government found an incident palatable or deemed it radical. Sometimes, of course, shifting standards are the result of whim, favoritism or corruption. But in China, official caprice reflects not just private arbitrariness, but conflict in publicly expressed values and commitments—what I am calling political ambivalence.

It is perhaps unsurprising that ambivalence is such a prominent theme in a state visibly committed to three core contradictions. Most famously, China is a communist country pursuing capitalism, an irony rife with ideological tension. In politics, China is a one party state running long-term experiments in village elections, intra-party democracy and other types of citizen participation. And in law, China has spent thirty years of legal reforms working towards an efficient, predictable legal system despite certain knowledge that law can subvert the powerful as well as support them. Indeed, ambivalence is in the mainstream of Chinese politics. Even though unequivocal repression garners much outside attention, as during the 2008 Tibetan protests or the 2009 unrest in Xinjiang, conflicting signals from a divided state are equally (if not more) common. China is now several generations of leaders past the 1949 Communist Revolution and the intervening years have stretched the founding revolutionary ideology in unexpected and sometimes contradictory ways.

By diving into one area in which political ambivalence is particularly pronounced, this dissertation highlights the ways in which ambivalence can also serve as opportunity. In an inhospitable environment for both law and activism, conflicting signals crack open enough political space to allow limited judicial innovation (chapter 3), legal activism (chapter 4), sustained international encouragement (chapter 5) and

⁷ For other work that advocates disaggregating the state, see Perry (1994); O'Brien (2003), and O'Brien and Li (2006).

policy promotion (chapter 6). These are significant changes, especially considering that, as recently as 1995, the vast majority of lawyers were state employees and the Ford Foundation was one of very few international NGOs with an office in Beijing. Before major changes, like *glasnost* in Russia or velvet revolutions like those that swept the former Soviet republics in the mid-2000s, small-scale social shifts tell how the Chinese Communist Party's well-documented turn towards law is also changing China. After all, as legal scholar Martha Minow reminds us, "legal language, like a song, can be hummed by someone who did not write it and changed by those for whom it was not intended" (Minow 1990, quoted in McCann 1993, 733).

About the cases

Outside China, the most common reaction to my research is surprise that China has environmental cases. This reaction, I think, is two-fold. First, people are surprised that lawsuits are interesting enough to be worth studying in a place widely known for weak, closely monitored courts.⁸ Indeed, as discussed further in chapter 1, Chinese courts rely on the largess of local government for yearly budgets even as Party representatives vet key appointments and occasionally intervene in individual decisions (Zhu 2007, 179; Peerenboom 2002, 302-9). Yet despite this, Chinese judicial politics are increasingly vibrant. As in other authoritarian states, courts are not simply extensions of state power, but sites of "vigorous and meaningful legal struggles" that make visible daily conflicts over class, citizenship and power (Moustafa 2007, 3).⁹ At times, especially when broad-based mobilization proves difficult, lawsuits can also be a tool of social and political activism.¹⁰ Even when cases fail (as they frequently do), legal action and unimplemented court decisions can bring attention to an issue and serve as "an effective tool of political theater" (Moustafa 2007, 40).

The second surprise is that ordinary Chinese citizens are willing to stand up to polluters. But grassroots action does not necessarily indicate nascent environmental consciousness. Rather, most environmental cases are filed out of desperation and compelled by an immediate threat. So-called "typical cases" (*dianxing anli*), a prominent phrase in the Chinese legal lexicon, nearly always involve compensation for economic losses. In rural areas, lawsuits often arise when local residents blame pollution for dead fish, livestock or crops. Chinese villagers, as anthropologist Jun Jing observes, "can become instant political activists when their livelihood is threatened" (2000, 219). In urban areas, claims of economic loss are more frequently joined by quality of life complaints, perhaps over noise pollution or restaurant smoke. And in both places, lawsuits are often inspired by crisis events like an oil spill or chemical accident. Disruptions to everyday routines, or what Snow and Benford call "disruption of the quotidian," concentrate outrage far better than ongoing distress (1998; see also Stern 2003, 797).

⁸ See Lubman (1999); Peerenboom (2002); Cai (2004); Cai and Yang (2005), and Liebman (2007).

⁹ For more on how courts make conflicts visible see Lee (2007, 33) and Gu (2008, 260).

¹⁰ For more on legal activism, see Zhao (2003); China Labour Bulletin (2007); Lee (2007); Kellogg (2007); Pils (2007); Fu and Cullen (2008), and Lu (2008).

Of course, there are many ways to pursue disputes without recourse to courts. In focusing on litigation, my point is not that lawsuits are the most common way—or even the best way—to address environmental problems.¹¹ Clearly, the vast majority of environmental disputes are handled through government-brokered deals, private concessions or simply when plaintiffs give up and go away. In an unpublished estimate, one well-known Chinese environmental law professor and judge estimates that courts in Hubei province handled no more than 2,000 civil environmental cases between 1990 and 2003, or about 140 per year.¹² Multiplied across China’s 22 provinces—temporarily overlooking municipalities, autonomous regions, special districts and regional variation—this suggests a back of the envelope estimate of about 3,000 civil environmental lawsuits per year.¹³

Although this is not a huge number, environmental complaints are rising. There were 608,245 environmental complaints nationwide in 2004, a 60% increase over 2000.¹⁴ At the top of what legal sociologists call the “disputing pyramid,” interviews indicate that environmental litigation may be gaining ground too (2007-26; 2007-84; 2007-87).¹⁵ While no national numbers are publicly available,¹⁶ officials at the Supreme People’s Court (SPC), the highest court in China, estimate that pollution

¹¹ Most environmental disputes are not resolved through litigation. The All China Environment Federation, a government-backed non-governmental organization, estimates that no more than one percent of environmental disputes reach the courts (Li 2008). In 1999, the State Environmental Protection Agency (SEPA) came up with a similar ballpark estimate: no more than 5% (Sha 2003). More generally, forty nine percent of civil disputes were resolved through court decisions (rather than mediation or one of the parties simply dropping the case) between 1999 and 2004 (Zhu 2007, 223).

¹² Lu Zhongmei, document on file with the author. In another part of China, the head of the All China Lawyers Association in Guangxi estimated that the province sees as many as 200-300 civil and administrative environmental cases per year (2007-107).

¹³ As an extreme low-end estimate, my research assistant and I compiled a database of 201 environmental civil lawsuits filed between 2000 and 2007, roughly 25 cases per year. We culled cases from media reports, publicly available court decisions and books on environmental litigation, no doubt overlooking the vast, unnoticed majority. To start, we searched two major news databases, CKInet (*Zhongguo Zhiwang*) and Wisenews (*Huikexinwen Ziliaoku*), for articles that included either the term “pollution lawsuit” (*wuran susong*) or “environmental lawsuit” (*huanjing susong*). We then used the same two search terms to look for articles on the websites of the following national newspapers: *Fazhi Ribao*, *Beijing Qingnian Bao*, *Nanfang Baoye*, *Zhongguo Huanjing Bao*, *Renmin Fayuan Bao*, *Jiancha Ribao*, *Renmin Ribao*, *Xinhua*, *Zhongguo Jingying Bao*, *21 Shiji Jingji Baodao*. Newspaper articles are frequently cross-posted on Chinese websites, so we also searched the following websites, all of which serve as repositories of information on environmental law and courts: *Zhongguo Fayuan Wang*, *Zhengyi Wang*, *Huanjing Yanjiu Wang*, *Huanbao Faluwang*, *Beida Xinxiwang*, *Beida Fayiwang*. Finally, we added cases from Li (2003), Lan (2004), Wang (2005), Jiang (2006c), and Bie (2007). These kinds of case compilations have become quite common, both as academic textbooks and as a way to educate citizens about the law. The database includes 19 cases from 2000, 25 cases from 2001, 34 cases from 2002, 40 cases from 2003, 32 cases from 2004, 25 cases from 2005, 20 cases from 2006 and 6 cases from 2007. These numbers likely reflect trends in media coverage—or the tendency to report on a case only after a court decision—rather than trends in the frequency of litigation.

¹⁴ See China Environment Yearbook (2001 681) and China Environment Yearbook (2005, 734).

¹⁵ For more on the disputing pyramid see Diamant, Lubman and O’Brien (2005, 6-7).

¹⁶ The China Environment Yearbook (*Zhongguo Huanjing Nianjian*) contains annual data on the number of administrative environmental lawsuits, but no data on the number of civil environmental lawsuits.

cases are rising 25% per year (2007-84).¹⁷ In 2007, the Vice Minister of Justice told the All China Lawyers Association (ACLA) that “mass cases coming from conflicts over...environmental policies are growing by the day” (quoted in Human Rights Watch 2008, 28-29). Equally important, even low frequency events can illuminate social dynamics just as well as high frequency ones. In microcosm, the origins, dynamics and outcomes of environmental lawsuits offer one way to take stock of the shifting balance between political control and citizens’ rights.

Methods

Like many interesting topics in China, environmental lawsuits are hard to study. To start, there is no comprehensive, centralized repository of court decisions. This makes basic questions, like the number of civil environmental cases or patterns of regional variation, extraordinarily difficult to answer with any degree of certainty. In addition, courts are typically off limits to foreign researchers. While Chinese nationals can show an ID card to gain admittance (although they are sometimes denied access too), foreigners need both luck and connections to get inside. Finally, environmental lawsuits are relatively rare, which sometimes turned my research into a hunt for far-flung shards of information.

This dissertation, as a result, draws on an eclectic mix of sources. Above all, my perspective was shaped by months of conversations with lawyers, plaintiffs, judges, environmental protection bureau officials, journalists, legal experts and international NGO representatives in the United States, Hong Kong and eleven Chinese provinces.¹⁸ This added up to over 130 open-ended interviews, largely conducted during my longest stay in China, the fourteen months between November 2006 and January 2008.¹⁹ Twenty of these conversations were repeat interviews, when I sat down a second time with someone to get updated on a case, hear the latest gossip or see how their point of view had changed. In addition, I compiled more detailed information (including court decisions, media reports, legal briefs, email exchanges and blog archives) on four different disputes detailed in Appendix B: *Sun Youli et al. v. Qianan Diyi Zaozhichang et al.* (Hebei, 2002 and 2003);²⁰ *Xunhuan Yu (Chinese Surgeon) et al. v. Zhongguo Shiyou Tianranqi Jituan Gongsi* (Beijing/Heilongjiang, 2005), *Zhang Changjian et al. v. Rongping Huagong Youxian Gongsi* (Fujian 2005)

¹⁷ It is not clear whether this official had independent data or was recalling SPC Vice President Zhang Jun’s remarks at a 2002 United Nations Environment Program conference. Zhang told the audience that Chinese courts handled 21,015 environmental cases (civil, criminal and administrative) from 1998 through 2001 with an average annual growth rate of 25.35% (Zhang 2002).

¹⁸ Inside Mainland China, I conducted interviews in Beijing, Guangdong, Guangxi, Hebei, Hubei, Heilongjiang, Jilin, Shanghai, Jiangsu, Zhejiang and Yunnan. The coastal bias reflects the fact that most lawyers live and work along China’s more developed east coast.

¹⁹ I also took shorter research trips to China in 2005 and 2009. Conversations typically took place in Mandarin, unless I was talking to a native English speaker. Although a Chinese research assistant accompanied me on several occasions, I did most interviews alone. I often received permission to take notes, although this was sometimes infeasible in informal venues like restaurants. Meetings ranged in length from 30 minutes to several hours and, a few instances of exhaustion aside, I generally typed up more formal notes directly afterwards.

²⁰ The two years listed here are the date of decision in the initial case and in the appeal.

and a Shanghai dispute over the extension of a maglev train (2007-2008). These four cases, evenly divided between northern and southern China and between disputes resolved inside and outside of courts, helped me see some of the ways in which local politics, grievances and individuals shape both strategy and results. The following chapters, however, are not a case study-based explanation of success and failure in environmental lawsuits. Rather, details from my four cases are woven into a larger account of the everyday practice of law and the relationship between law and social change. In a place like China, where research is difficult and every piece of information hard won, one advantage of organizing the dissertation around themes rather than cases is the creative flexibility to build the arc of an argument on disparate fragments of insight. In addition to interviews and case studies, I opportunistically draw on other sources, including 42 decisions in pollution lawsuits, a Chinese language review of 62 Chinese language articles on environmental law and a small-n survey of 34 lawyers.

Finally, a significant part of what follows is based on personal observation and involvement. Day to day, I spent a significant amount of time in China not just arranging interviews and reading materials, but attending workshops on public interest law, environmental law, and environmental activism. These gatherings, which ranged in length from a morning to five days, attracted a group I came to think of as “the usual suspects:” the lawyers, NGO representatives and academics most interested in environmentalism and legal activism. Although the presentations were often stultifying, the conference circuit was a good way to meet people. I also learned a great deal about how people talk in unguarded moments, over coffee or in whispers in the back of the room. Inevitably, as I became more tightly integrated into this (largely Beijing-based) world, I started doing things like forwarding court decisions to lawyers working on similar cases, translating website updates into English, and alerting friends to American fellowships, grants and opportunities.²¹ The ties that eased my research, in other words, also made me into part of my own research on international exchange (chapter 5).

Roadmap

In keeping with the truism that where you sit affects what you see, this dissertation examines environmental litigation from multiple angles. With the exception of the first chapter, which traces the process of an environmental case from dispute to decision, each chapter introduces a new actor’s perspective on environmental lawsuits and, by extension, political ambivalence. Roughly speaking, each successive chapter also increases distance from the central state, moving from an exploration of official signals (chapter 2), to judges on the frontlines (chapter 3), to lawyers licensed by the state (chapter 4), to international NGOs (chapter 5). In addition to providing an organizing logic, working from inside to outside the state also offers a way to track the interaction between top-down signals and bottom-up

²¹ Although this core group of attendees typically lived in Beijing, many conference organizers worked hard to reach out to people outside Beijing. During conferences in Guizhou, Heilongjiang, Hubei, Shanghai and Zhejiang, I benefited greatly from talking to locals that were not part of the usual crew.

experimentation.²² The final chapter makes this connection explicit, weaving different actors' perspectives into a broader story about the relationship between political ambivalence, environmental litigation and social change.

As a writer, one challenging (and occasionally rewarding) aspect of this approach was writing with multiple audiences in mind. From a public law perspective, the pages that follow fit comfortably into two long-standing threads of socio-legal research, how legal institutions work and the relationship between law and social change. For those coming out of a comparative politics tradition, however, this dissertation is equally an account of the daily experience of working in and around a legal system promoted and then carefully watched by political elites.²³ Students of international relations will gravitate toward a new take on transnational exchange in a historically closed off state (chapter 5), while China watchers will want to carefully consider the claim that political ambivalence is central to contemporary politics. And anyone worried about China's tremendous environmental problems will want to know how litigation works (chapter 1) as well as how much impact it has (chapter 6).

Although this dissertation dips into many literatures and many topics, it is in no way comprehensive. As perhaps befits an early exploration, the chapters that follow are generally conceptual and universalizing rather than variation finding. And despite occasional forays into recent history, this account largely starts in 2000. That year that not only marked the turn of the century, but also the start of a major campaign to convert all remaining state-owned law firms into private partnerships. It is a good place to begin because pushing lawyers off the state payroll significantly changed the landscape of environmental litigation. Now responsible for making an independent living, lawyers suddenly had new incentives to pick cases, keep clients happy and even find new strategies to win in court.

In writing a dissertation directed at multiple audiences, my goal was to make an account of environmental litigation in contemporary China accessible and interesting to those who might otherwise only see the occasional headline in *The New York Times*. China's turn towards law, now spanning a generation, is one of the most important political stories of our time and one that deserves attention beyond a narrow band of specialists. For those coming to this dissertation steeped in the politics of other countries or parts of the world, China fits into a broader research agenda on both comparative law and authoritarian politics. While it may seem strange to use the word "comparative" about a dissertation that deals with just one country, my hope is that others will pick up where I have left off and help evaluate how well the concepts deployed here travel to other places and other times.

²² For more on the importance of an interactive approach to outcomes, see O'Brien and Li (2006, 112-114).

²³ For others interested in daily life under authoritarianism, see Wedeen (1999) and Kerkvliet (2005).

Chapter 1 From Dispute to Decision

Before turning to individual actors' perspectives on environmental litigation in the chapters that follow, some preliminary groundwork is called for. This chapter traces an environmental lawsuit from dispute to decision as a way of understanding the nuts and bolts of everyday justice. Chinese courts bear only a family resemblance to American ones and understanding how litigation unfolds is interesting in its own right as well as critical background for what follows.

As a starting point, consider this sketch of what *Legal Daily* and the All China Lawyers' Association (ACLA) would later name one of 2005's ten most influential lawsuits: In 1992, Pingnan village was located in one of Fujian province's poorest counties. It was a place where local sayings ("Pingnan, Pingnan is poor and hard") verged on lamentations and villagers were, at least at first, willing to welcome Rongping chemical plant as a source of tax revenue and over 300 new jobs. Over the next ten years, however, initial enthusiasm gave way to discontent as crops started dying and health problems spread. When complaint letters and media reports failed to solve the problem, 1,721 villagers filed a class action lawsuit against the factory in 2002. Three years and one appeal later, the Fujian Provincial High People's Court ordered Rongping to pay 684,178.2 RMB (US 100,614) in compensation and clean up industrial waste. This translates to roughly 397 RMB per plaintiff (US 58), an ambiguous victory for what many observers saw as a landmark environmental case.²⁴

One take away message of Pingnan is that civil environmental litigation in contemporary China is extraordinarily difficult. As lawyers and plaintiffs often recount, new challenges accompany each phase of litigation. Wringing concessions out of polluters requires remarkable persistence. As one of China's most prominent environmental lawyers explains, "it's incredibly hard to win environmental lawsuits. Even if you win, it's no use because the victims, most of whom are from the lowest levels of society, don't get any of the compensation. Litigation is hard; post-litigation enforcement is also hard" (Sha 2003). There is near consensus that, as one plaintiff put it, lawsuits should be "the last road" (*zuihou yitiao lu*), a final resort when government bureaus prove unresponsive or mediation fails (2007-56).²⁵

At the same time, the fact that many see litigation as a last resort suggests that environmental lawsuits, however imperfect, still tells us much about how China's most aggrieved and stubborn citizens experience the legal system. This chapter, then, is not only an account of how law works (e.g. process and institutions), but of how lawyers and litigants try to work the law (e.g. obstacles and strategies). The cases recounted below are not representative, but rather illustrative of problems encountered and solutions attempted. Above all, environmental cases show how the courts work when power is unequal. A few exceptions aside, cases with powerful plaintiffs or

²⁴ All exchange rates are calculated at 6.8 RMB to 1 US dollar throughout. Much has been written about the Pingnan case. In English, see Wang (2007) (especially 212-218) and Oster and Fong (2006). In Chinese, He (2004), Lai (2006), and Zhang (2006a) are a good starting place.

²⁵ See also 2005-15; 2007-32; 2007-49 and 2007-87.

weak polluters are rare. What, then, are the best legal (and extra legal) handholds when the odds are stacked against you?

Chinese Courts and Environmental Protection: A Basic Introduction

In China, as elsewhere, going to court is cumbersome and expensive enough that it usually makes sense to first try to resolve the problem in other ways. For most, the obvious first step is to notify the agency responsible for environmental protection: the local Environmental Protection Bureau (EPB). The catch, as many have documented, is that EPBs frequently lack the power, resources and incentive to enforce environmental regulations (Jahiel 1994, Ma and Ortolano 2000; Van Rooij 2006; Tilt 2007). Polluters are often big taxpayers, leaving local governments reluctant to jeopardize revenue by strictly enforcing environmental regulations. Both EPB leaders and on-the-ground inspectors have significant discretion to set penalties and, in so doing, they assess not only the extent of pollution, but also the polluter's attitude and ability to pay (Zhang 2008, 47). As Benjamin van Rooij has detailed in his study of regulatory enforcement in Yunnan, EPBs often aim for enforcement strict enough so that they won't be criticized, but not so strict as to upset powerful polluters or officials (Van Rooij 2006, 297).²⁶ After all, EPBs have no coercive power to force compliance. As a former EPB head in Hubei province explained, "if we issue a fine, but the violator does not hand it over, we cannot do anything, literally" (Zhang 2008, 36).²⁷

Could there be a role, then, for citizen-initiated lawsuits in China's larger efforts to limit pollution? In a country with both serious pollution and weak regulatory agencies, could private enforcement serve as a backstop for the more routine combination of fines, mediation and social suasion? Here, as the rest of the chapter shows, much depends on how litigation unfolds.

For anyone coming to Chinese law with any knowledge of judicial politics elsewhere, one good place to begin is by thinking of Chinese courts as "dispute resolution mechanisms" rather than "courts."²⁸ Cutting across cultural lines, courts resolve disputes in keeping with Martin Shapiro's logic of the triad: two parties turn to a third to adjudicate a conflict with the implicit understanding that will obey the resulting decision (1981). Yet the process of judging—how the decision is made and who makes it—can vary a great deal. Here, the word "courts," a seemingly neutral noun, is loaded with misleading cultural assumptions about how authorities can and should behave. Avoiding the word, even just as a brief thought exercise, opens up space to stop expecting Chinese courts to behave like courts elsewhere and take them on their own terms instead. For example, the highest court in China, the Supreme People's Court (SPC), is not an elite group responsible for constitutional

²⁶ Another problem is that EPBs, especially in poorer regions, sometimes rely on pollution levies for basic funding. Rather than solely depending on allocations from the local government, reliance on fines leaves EPBs reluctant to eradicate pollution entirely (Zhang 2008, 37).

²⁷ In contrast, the Industrial and Commercial Bureau can confiscate goods or materials until violators pay fines (Zhang 2008, 37).

²⁸ At Columbia University Law school, Professor Benjamin Liebman likes to start his class on Chinese legal institutions with this point and I'm indebted to him for the idea.

interpretation, but a bureaucracy of over 300 judges that acts as a wide-ranging court of final appeal. What is confusing (and what makes it hard to remember how differently the Chinese legal system works) are the widely publicized reforms designed to bring Chinese courts at least superficially in line with perceived international norms. In the early 2000s, for example, Chinese trial judges started donning a black gown and keeping order with a gavel.²⁹ And by the mid-2000s, when I was doing my fieldwork, Chinese courtrooms felt surprisingly familiar, from the state seal on the wall to the court recorder typing in the middle of the room.

The difference, of course, lies in the ways in which the Chinese legal system has been shaped not only by recent American-inspired experimentation, but also by a longer tradition of civil and socialist law. Contemporary Chinese law is rooted in a statute-oriented civil law tradition, which generally means that judges are closer to rule-interpreting bureaucrats than value-driven lawmakers. In contrast with the adversarial, lawyer-driven American legal system,³⁰ it also means that Chinese judges (like continental European judges) have historically been responsible for demanding production of relevant documents, identifying the relevant law and summarizing the evidence.³¹ In the 1950s, Chinese leaders also consciously modeled their legal institutions after the former Soviet Union. The Chinese procuratorate, to take one example, is directly analogous to the Soviet public procurator—a national bureaucracy responsible for criminal investigation and prosecution. As in the former Soviet Union, the Party also remains largely outside reach of the law. Cases involving CCP members are often not heard by the courts but dealt with as internal disciplinary matters (Lubman 1999, 10). The constitution stipulates that all legal work should be guided by adherence to the leadership of the Communist Party, yet the role of the Party in judicial proceedings is not clearly defined. Instead, Party influence is typically ad hoc, felt when a major case comes to the attention of the political-legal committee, the procuratorate or another government agency.³²

As shown in Figure 1, there are four levels of courts in China. As of 2004, there were 3,111 Basic People's Courts (BPCs), 404 Intermediate People's Courts (IPCs), 32 High People's Courts (HPCs) and 1 Supreme People's Court (SPC). Over eighty percent of judicial personnel work in BPCs, which are generally under the administrative jurisdiction of an urban district or rural county (Peerenboom 2002, 283). IPCs are located in municipalities and prefectures, while HPCs are generally in provincial capitals. The SPC, in addition to its work as a court of final appeal, also helps interpret laws, administer the judiciary and draft new legislation. With the exception of death penalty cases (which have additional appeal procedures) and SPC

²⁹ As Michelson (2005) discusses, there were interesting local attempts to indigenize these Western symbols. For example, Chinese embroidery on judges' robes shows socialist motives like a stalk of wheat and a gear wheel.

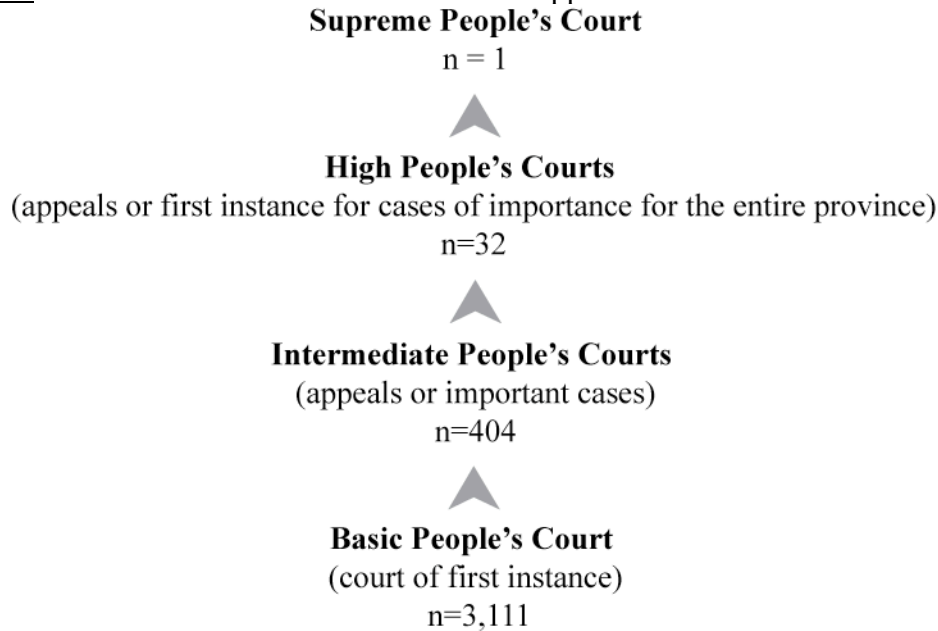
³⁰ For more on adversarial legalism in the United States, see Kagan (2001).

³¹ On the role played by judges in civil law systems, see Kagan (2001, 105).

³² The political-legal committee includes representatives from courts, the procuratorate, the public security bureau and the justice bureau. The committee routinely discusses major cases, especially criminal cases, and is typically chaired by head of the public security bureau.

decisions (which are always final), cases are allowed a single appeal to a court a single level higher than where the case was initially heard (Zhu 2007, 174).

Figure 1: Levels of Chinese Courts and Path of Appeals³³



Internally, courts are organized into divisions responsible for different tasks. A civil environmental lawsuit will be handled by at least three divisions. In the 1990s, Chinese courts started establishing case acceptance divisions (*li'an ting*) and, by October 2003, the first stop for litigants in 95% of courts was the case acceptance division (Zhu 2007, 188). The idea was to divide responsibility such that bribing judges would become more difficult, more expensive and, hopefully, less common. After judges in the acceptance division take a case, they assign it to a presiding judge in the civil division. One option at this point is court-brokered mediation. In 2004, 31% of civil cases were decided through mediation—a significant drop from the 70% mediation rate between 1978 and 1988 (Zhu 2007, 225).³⁴ If mediation either breaks down or doesn't take place, civil environmental cases are then heard by a three judge panel (*heyi ting*) and decided by majority vote.³⁵ In contrast to other countries where police enforce court judgments, Chinese courts are responsible for enforcing their own decisions. Post-decision, civil environmental cases are re-assigned to the enforcement division where judges attempt to ensure compliance with court orders. The main tools at their disposal are the ability to seize or freeze assets, impose fines and /or detain individuals for up to 15 days (Zhang 2008, 83). Still, enforcement of civil judgments is notoriously difficult, especially because seizing assets requires coordination with banks, bureaus and other institutions that sometimes prove less than cooperative.

³³ Adapted from Zhu (2007, 175).

³⁴ For more on mediation in administrative environmental cases, see Zhang (2008, 97-100).

³⁵ The exception is that relatively straightforward cases are sometimes heard under simplified procedures by only one judge.

Getting a Case Into Court

In environmental disputes, even getting a day in court is a hard won privilege. Under the Environmental Protection Law, would-be plaintiffs have three years from when they became aware of pollution-related losses to file a claim. Sometimes, as in the Pingnan case, the court counts time spent seeking administrative solutions against the statute of limitations—a real problem when bureaucracies move slowly or fail to act altogether (Wang 2007, 210). The right to sue, based on a legal concept known as “standing,” is also limited to those who have directly suffered harm. Only pollution victims (*wuran shouhaizhe*), not environmental activists or sympathetic lawyers, can bring a case.³⁶ Nor, in contrast to the United States, is China’s 2003 Environmental Impact Assessment (EIA) Law frequently used for litigation. Beyond the fact that many lawyers are unfamiliar with the law, one problem is that there is no judicial remedy for a biased assessment and bias is a significant problem. As one expert explained: “Our EIA system has one very big problem: there is no neutral organization to do the assessment. Under the current system, whoever does the work finds some experts to do the EIA. If they have contrary ideas, they’ll quickly be pushed out of the pool of evaluators” (quoted in Zhang 2005).

Not even law-abiding pollution victims are necessarily guaranteed a court hearing. Judges at the case acceptance division of the court routinely refuse cases and, although case refusal is supposed to be accompanied by a written rationale, judges often leave plaintiffs without the record of refusal necessary to formally appeal the decision. Judges explain that they turn away cases for a variety of reasons, perhaps due to lack of evidence, or because an administrative bureau is handling the dispute or because law is not an appropriate way to resolve the problem (2007-55). In practice, of course, subjective decisions about the “appropriateness” of law give judges latitude to avoid volatile disagreements that might affect social stability and, more importantly, annual court evaluations. Day to day, this means that judges at the case acceptance division often have the unenviable task of convincing very angry people to seek redress elsewhere. In so doing, judges sometimes exercise individual discretion and sometimes follow orders. Ad hoc confidential regulations (*neibu guiding*) occasionally instruct courts to refuse certain types of cases or to handle them in a certain way. A recurrent rumor during my fieldwork, for example, featured a memo from the Supreme People’s Court ordering lower courts to refuse major environmental cases (2006-13; 2006-19; 2007-19). While I was unable to confirm the existence of this document, politically inspired directions are certainly not uncommon.

The difficulty of maneuvering cases past the case acceptance division is no secret.³⁷ Even consultants to the government-backed All-China Environment Federation (ACEF) publicly admit “the overwhelming majority of cases [are] stopped

³⁶ Standing is also limited in American environmental law. In the landmark case *Sierra Club v. Morton* (1972), the Supreme Court held that NGOs must show a tangible link to an area before to be granted standing. Environmental NGOs usually do this by showing that their members have an economic, aesthetic or recreational interest in the area.

³⁷ See also O’Brien and Li (2004, 80-82). In practice, basic level courts also frequently turn away disputes that have previously been through mediation (*xingzheng tiaojie*) although there is no legal basis for this (Liu 2009, 75).

at the doors to the courts due to difficulties getting them accepted and obtaining sufficient evidence” (Li 2008). For many would-be plaintiffs, the primary emotion associated with law is frustration. In Hunan, one man spent five months in 2004 trying to get a pollution dispute into court. He kept a journal of his unsuccessful struggle, which included ten trips to the basic level court, three trips to the intermediate court and two trips to the high court. Here is a typical entry:

[October 18, 2004] Three days later, I went to the intermediate court to tell them about the situation and hand over my written documents...throwing the materials I had written aside, assistant division head Ding said: ‘Go to the basic level court! Don’t come back looking for us!’ Swallowing my anger, I picked up the documents from the floor and put them back on the counter. I wanted to go to the central court offices to find the court leaders, but the gatekeeper wouldn’t let me in.³⁸

The commonness of exclusion leaves some environmental lawyers ready to declare success as soon as a case is accepted (2007-91). After all, without a hearing, “there’s no place to even talk” (2007-14).

The case acceptance division also has the discretion to break up collective lawsuits into individual cases. Worldwide, China is one of few countries that allows lawsuits on behalf of a large group of people with the same grievance. Under the 1991 Civil Procedure Law, citizens can bring collective lawsuits led by two to five representatives—a logical course of action when widespread pollution affects an entire neighborhood or village.³⁹ Often, however, judges in the case acceptance division divide up class actions in order to maximize per case court fees, boost statistics on the number of cases handled or disarm collective action (Wang 2007, 217-218; 2007-87).⁴⁰ But filing paperwork for hundreds (or even dozens) of identical cases is a burden (2007-87; 2007-96; 2007-98). Xeroxing documents and schlepping boxes is enough of a deterrent that lawyers say even convincing a court to treat each family as a unit instead of each individual constitutes a minor accomplishment (2007-98).

Many local observers interpret trouble getting on the docket as an outgrowth of local economic protectionism (*difang baohu*). Local protectionism, far and away the most frequently cited explanation for most litigant difficulties, refers to the widespread conception that the local government shelters large polluters who prop up the local economy.⁴¹ The Pingnan case is a particularly good example how focusing on economic growth can create a situation where, as one EPB employee put it, “if there wasn’t a factory, there wouldn’t be a government” (2007-68). By 2003, tax revenues from Rongping chemical plant comprised more than 25% of the county’s 20 million

³⁸ Document on file with the author.

³⁹ These representatives make most decisions for the group although the Civil Procedure Law includes a clause requiring group approval for to drop requests or initiate mediation. For more on the details of different kinds of group litigation, see Palmer and Xi (2009) and Liebman (1997-1998).

⁴⁰ Judges did the same thing in 1950s Czechoslovakia. Otto Ulc, a former judge, writes about how a quota system created incentives to break up cases as much as possible (1972, 43).

⁴¹ For more on local protectionism in environmental enforcement, see Van Rooij (2006, especially 191-209) and Zhang (2008, especially 51-53).

RMB (US 2,950,000) annual budget (News Probe 2003). “From the perspective of a villager,” one official told the media, “you could wish that we’d done a bit better of a job preserving the environment...[but] at the time when we built the Pingnan factory, the place was secluded. As for saying whether it was fair, I...can’t say why we did what we did” (News Probe 2003). While local protectionism is not always a factor, powerful political protectors can certainly sway courts dependent on local government for salaries, benefits, housing and facilities. Judges tend to listen when local officials make their preferences known if only because, as one judge put it, “everything the judge does, he must ask for help” (Lubman 1999, 265).

Lawyers’ fluency in the language of the law makes them a natural asset in the initial business of beating back local protectionism by drawing up legal briefs, submitting preliminary evidence and talking a case into the courts.⁴² The trouble for many complainants lies in finding a lawyer willing to take their case. Mainstream Chinese lawyers, like attorneys in many countries, typically screen out unprofitable cases, particularly those that involve challenging local power holders (Cai and Yang 2005; Michelson 2006). Yet contrary to the common view of poverty-stricken pollution victims, some would-be plaintiffs can find the money for a competitive attorney fee (2007-42). *Nongmin*, the Chinese administrative label for anyone involved in agricultural work, covers a range of incomes, including those more akin to farm bosses than farmhands. In 2007, I observed a 90 minute contract negotiation between a group of *nongmin* and two environmental lawyers which centered on the relative wealth of the villagers (as one lawyer said, “I’ve seen people much poorer than you!”). The two sides settled on a 60,000 RMB (US 8,823) fee paid in installments, a lot of money considering that successful mid-career Beijing lawyers net about 20,000 RMB per month⁴³ and that per capita rural income was 4,140 RMB per year in 2007 (Wen 2008). While the group may have had hidden sources of income (possibly remittances or past profits from bumper harvests?), it is equally likely that they simply decided that scrimping for a lawyer was worth it.

Still, even when clients scrape together a market-rate fee, many lawyers remain wary of environmental cases because of the potential political sensitivity and the amount of legwork involved. Collective lawsuits are particularly hassle-filled because plaintiffs must individually *opt in*, which means that the legal team must submit a copy of each litigant’s identity card (*shenfenzheng*) to the court.⁴⁴ And even those

⁴² Plaintiffs are allowed to represent themselves in a civil lawsuit and it is an open question how often lawsuits move forward without legal representation. In the group of 42 decisions analyzed in chapter three, either a lawyer or legal worker represented 73% of those requesting compensation and 9.5% represented themselves. (The remaining 9.5% of decisions were unclear about whether plaintiffs hired a legal representative). This sample, in combination with information gleaned from interviewees, suggests that legal representation is fairly widespread but not universal.

⁴³ This is an estimate based on the salaries of lawyers I spoke to during my fieldwork. Salaries range a great deal and, in particular, a foreign LLM degree and years of experience generally translate into more money. A 2006 survey of 183 lawyers found that a senior lawyer with a LLM degree and six to ten years of experience makes 346,000 RMB annually compared to just 119,000 RMB for a lawyer with one to two years of experience and a local degree (Liu 2009, 151).

⁴⁴ In China, litigants must individually opt in to a lawsuit. Providing a copy of an identity card (or for litigants under 18, the household registration card) is one way to indicate that the lawsuit has their

willing to track down dozens (or hundreds) of identity cards sometimes balk at situations in which the polluter enjoys strong local government support. These lawyers delicately inquire about the extent of local protectionism during preliminary interviews or simply refuse cases where the polluter is a major taxpayer (2006-16). Physical danger is also a real concern (2007-18; 2007-112). One Beijing lawyer, for example, was afraid that the mafia investors behind polluting enterprises would beat him up on investigatory trips to isolated factories (2007-81).⁴⁵

Coaxing a lawyer into taking a case is often easier with law firms registered outside the immediate area.⁴⁶ Neither polluters nor their local government supporters usually have the high level connections necessary to cause trouble for non-local (*waidi*) lawyers (2005-11; 2005-14; 2006-10; 2007-86; 2007-96; 2007-106). Lawyers' daily conduct and, more importantly, annual license renewal are overseen by the local Justice Bureau and it is not easy to orchestrate bureaucratic pressure from far away. As a criminal lawyer in Zhejiang explains it, "local lawyers won't accept the case, but go to lawyers in other places, maybe more famous, so they will not offend local leaders. I often go to other counties to handle cases" (quoted in Halliday and Liu 2008, 29). Bringing in famous lawyers, particularly from big cities like Beijing and Shanghai, disposes judges to take complaints more seriously too. In a well-known administrative lawsuit against the Beijing urban planning bureau, for example, plaintiffs credited their success to the national reputation of lead lawyer Wang Canfa (Liang 2006, 64). Sometimes, local and non-local lawyers also team up to unite outsiders' prestige and relative freedom with insiders' local connections and on the ground ability to collect evidence and file paperwork (2007-96).

But signing up plaintiffs and assembling a legal team is no guarantee that either side will see a case through. When harassment picks up, even committed lawyers reconsider their priorities. One Hebei lawyer, for example, dropped an environmental case after the suddenly overzealous local water bureau intensified inspections at his law firm (2008-2). Disappearing plaintiffs are also common. Several lawyers I interviewed spent significant time investigating cases and collecting evidence only to find complainants unwilling to sue (2007-34; 2007-71; 2007-106). The fact that collective lawsuits require representatives (*daibiao ren*) makes it particularly easy to identify, cajole and discourage leaders. In a 2002 case in Beijing, a construction company offered two representatives, Mr. Wan and Mr. Sheng, 50,000

support. In the United States, in contrast, civil actions cover an entire class of people (say, those who bought a certain brand of laptop between 2000 and 2002). While individuals in the class must be notified of pending litigation and can opt out, they do not need to opt in individually. If there is a monetary settlement, however, class members usually need to do something (like file a claim form) to get compensation.

⁴⁵ While these lawyers reported fears of violence on trips to rural areas, violence can just as easily occur in urban areas. In April 2009, Shanghai lawyer Yan Yiming was beaten up in the conference room of his office by thugs posing as potential clients (Lim 2009).

⁴⁶ See Fürst (2008, 90-91) for an example of a case that was turned down by local lawyers before plaintiffs found legal representation in Beijing. Of course, non-local lawyers can also face local suspicion. As one Chengdu lawyer explained, "how could a Guizhou XXX law firm do business in Beijing?...[and] in Guangdong or Shanghai, nobody would hire a Sichuan XXX law firm" (quoted in Liu 2009, 119).

RMB (US 7,352) to relocate and drop the lawsuit. Even though Mr. Sheng was only making 400 RMB per month, he refused, saying “fine, if you give everyone else 50,000 to move first, I’ll be the last to move” (quoted in Liang 2006, 27).⁴⁷ Plaintiffs in other cases report widespread intimidation, such as local officials entering homes, eating food and using the bathroom without invitation (Liang 2006, 46). In addition to bribes and threats, inertia also drains energy during a long lawsuit. Maintaining hope, especially in collective lawsuits, requires both persistence and talented leadership. The Pingnan case was successful, in large part, because the village unified around the head representative, a middle-aged man named Zhang Changjian who ran the local medical clinic. Zhang, a natural leader by virtue of age, occupation and gender, was well aware of the importance and delicacy of his position. Dubbed the lawsuit’s “emotional leader” (*jingshen lingxiu*) by the press, Zhang told a reporter in 2004 that “I can’t move. Right now, everyone is watching me. If I retreat, everyone will disband” (He 2004).

Front-loaded case acceptance fees (*anjian shouli fei*) also force even the angriest plaintiffs to calculate the monetary value of court-brokered justice. Although the State Council lowered litigation fees in 2007 to make it easier for average citizen to bring civil claims, acceptance fees are high enough to compel consideration (see Table 1).⁴⁸ Among Chinese legal academics, there is near consensus that complainants need more financial help. Several authors suggest fee-shifting provisions, like those in the Trademark and Copyright Law, that would force losing defendants to pay litigation and attorneys’ fees (Shi 2004; Xing 2004).

Table 1: Civil Case Acceptance Fees Under 2007 State Council Regulations

Amount of requested compensation		Case acceptance fee
In RMB	In US Dollars	
Less than 10,000	< 1,470	50 RMB (~US 6)
10,000-1 million	< 147,058	2.5% of requested compensation
1-2 million	< 294,117	2% of requested compensation
2-5 million	< 735,294	1.5% of requested compensation
5-10 million	< 1.47 million	1% of requested compensation
10-20 million	< 2.94 million	.9% of requested compensation
20-50 million	< 7.35 million	.8% of requested compensation
50-100 million	< 14.7 million	.7% of requested compensation
100-200 million	< 29.4 million	.6% of requested compensation
More than 200 million	> 29.4 million	.5% of requested compensation

⁴⁷ In my interviews, 2007-34 and 2007-106 also discussed attempts to buy off plaintiff leaders.

⁴⁸ Before the 2007 regulations took effect, the case acceptance fee ranged from .5% to 4% of requested compensation (Wang 2007, 211). There are reports that some courts have delayed implementation of the new regulations because of concerns about lost revenue (Peerenboom and He 2008, 22).

Under the current system, poor plaintiffs' best recourse is to obtain proof of poverty and petition the court to waive litigation fees or delay payment.⁴⁹ Often, these decisions rely on a judges' assessment as to whether applicants are troublemakers (*diaomin*) or the deserving poor. Poor courts reliant on litigation fees are also less likely to approve fee waivers than richer courts with diverse sources of income (2007-55).

At this point, litigants and lawyers still undeterred by the risk, expense and nuisance of litigation face a first strategic decision: where to sue. Important cases (*zhongda anjian*), defined in the Civil Procedure Law as cases "with a significant impact within the particular jurisdiction," bypass the basic court and go straight to the intermediate court or high court. In practice, the definition of an "important" environmental lawsuit varies by province, but also often involves a baseline level of requested compensation (2 million RMB in some provinces and 3 million RMB in others).

As O'Brien and Li (2004) note (and lawyers on the ground agree), higher level courts are better insulated from local pressure, staffed by better educated judges and more likely to return favorable decisions (85-6; see also 2006-3; 2006-15). Starting with the intermediate court and appealing to a higher court if necessary is commonly seen as one way to lessen the obligation that accompanies basic level courts' budgetary reliance on local government and, by extension, major taxpayers. Sometimes, this works. In a 2002 water pollution case in Tangshan, for instance, the high court admonished the intermediate court for a grave legal error (*yanzhong falü cuowu*). The case was sent back on remand and the intermediate court re-decided in favor of the plaintiffs.⁵⁰ Yet skipping levels is increasingly difficult, at least in the mass cases that inspire the most official unease. A 2005 Supreme People's Court notice effectively limited most environmental cases to the lower rungs of the court hierarchy by mandating that all collective lawsuits go through basic level courts (Wang 2007, 215). And on the rare occasions when non-mass cases involve sufficient losses to qualify as an "important" case, individual plaintiffs may have to lowball requested compensation to afford case acceptance fees.

Another choice is to work horizontally to find a court outside the polluter's immediate bailiwick. When pollution crosses borders, several different courts likely have jurisdiction and filing a case as far away from the polluter as possible usually makes sense (Fürst 2008, 97; 2007-99). In particular, some lawyers claim that China's fourteen maritime courts are particularly good places to bring water pollution lawsuits (2007-9; 2007-65). Like China's specialized intellectual property tribunals, maritime courts handle a high number of cases involving foreign companies. Judges, appointed

⁴⁹ Proof of poverty can come from the local party committee, the neighborhood committee, the civil affairs department of the local government or the local labor bureau and is accepted at the court's discretion.

⁵⁰ The intermediate court re-decided in favor of the plaintiffs. Hebei High Court (2004), *Liu Honggui et al. v. Tangshan Jiaohuachang Youxian Zeren Gongsi*, decision on file with the author.

by the central government, have a reputation for being professional and relatively well-educated—two advantages for environmental litigants.⁵¹

Sun Youli et al. v. Qianan Diyi Zaozhichang et al. (see also Appendix B) is one example of a prominent case that benefited from the parallel maritime court system. Sun Youli and the eighteen other plaintiffs, all fish farmers on the Bohai delta in Hebei province, brought a lawsuit after a sudden outpouring of pollution and accompanying fishkill in October 2000. The resulting 2002 Tianjin maritime court decision held the nine polluters liable regardless of whether their emissions met environmental standards. Although clause 41 of the Environmental Protection Law clearly states that liability is based on damages rather than regulations, judicial reaffirmation of this principle was a significant breakthrough. In the 1990s, government approval to exceed pollution standards was easily attained and, even when environmental enforcement tightened in the 2000s, courts still frequently imposed a litmus test in which compensation depended on proving illegal behavior. The plaintiffs' Beijing-based legal team ascribed success to their choice of court, later writing that using maritime courts can “remove the administrative interference that accompanies local protectionism, bring the advantage of specialized courts and expert judges into play, increase the efficiency of the case, and guarantee justice.”⁵² In 2008, one of the lawyers involved in the case (now one of China's most experienced environmental lawyers) told me that the Tianjin maritime court is the best place to bring environmental cases in the country.

Inside the Court

Once inside the court, litigants struggle to even demonstrate that pollution exists. Here, government reports are the gold standard, seen as “very authoritative” (*feichang quanwei*) (2007-20) and “comprehensive” (*quanmian*) (2007-91).⁵³ Some lawyers even find major cases easier to litigate because of the increased likelihood of government reports documenting pollution (2007-21). The most obvious source of information is the local EPB, an agency whose competence and objectivity varies. In some places, lawyers find that the EPB efficiently conducts tests on request without demanding fees (2007-57). Elsewhere, however, the EPB is less responsive. When Zhang Changjian started lodging complaints in Pingnan, for example, the local EPB didn't even have pollution-monitoring equipment. The closest EPB capable of inspections was three hours away, making impromptu inspections nearly impossible (News Probe 2003). In places with uncooperative EPBs, court users sometimes learn to work around the agency. One repeat plaintiff in Hebei, described by his Beijing lawyer as a “graduate of the system more professional than many lawyers,” now requests help from the relatively sympathetic local Agricultural Bureau (*nongye bu*) instead (2007-107).

⁵¹ For more on the maritime courts in English, see Hamilton (2002) and Dimitrov (2006).

⁵² Zhongzi Law Firm, document on file with the author.

⁵³ For more on the importance of government reports, see McMullin (2009).

When it exists, there is also no guarantee that pollution data will be accurate or accessible. In some places, long stretches of county-mandated “enterprise quiet days” (*qiye anjing ri*) prohibit environmental monitoring from interrupting production and leave EPBs very little time to collect fines, deliver documents and conduct inspections (Zhang 2008, 51).⁵⁴ Factories are also adept at hiding pollution even from assiduous inspectors. Tricks include polluting only at night, building secret underground discharge pipes and storing wastewater in pools that flood during rainstorms (McMullin 2009). And when government agencies do manage to document pollution, the resulting reports are often tightly guarded. In the Pingnan case, the plaintiffs’ lawyers could pry documents out of the EPB only when they knew enough to request them by name (2007-15). Yet despite the difficulty of tracking down government data, independent scientific analysis is relatively rare. Outside expertise is expensive and, litigants fear, too easily dismissed as biased (2006-15). In politically sensitive cases, it can also be hard to find labs willing to run tests. In Shanxi, lawyer Yan Yiming was unable to get water samples analyzed because environmental monitoring stations uniformly claimed that they lacked the necessary equipment (Xu 2009).

While courts can track the history of pollution through routine government reports, day-to-day environmental monitoring does not typically touch on the two trickiest legal questions surrounding civil environmental litigation: causation and damages. Across legal systems, pollution-related compensation claims hinge on causation—the tricky business of linking of pollution and losses. This is hard because damages, like a fish kill, could be caused by other factors besides pollution, like overfeeding or overcrowding. Although the burden of proof in China rests with the defendant to prove that pollution did *not* cause damages, local courts routinely rule against plaintiffs because of doubts about causation. Cases involving lots of small enterprises are especially challenging because individual responsibility is so difficult to untangle (2007-87). Small companies are also more likely to be unregistered, so tracking down an owner to sue can also be a challenge (2007-99). To bypass the morass of causation, lawyers occasionally turn to zoning law or contract law. In Beijing, for example, an owner in an upscale housing complex sued the developers for a contract violation because the marketing materials promised 41% green space and only delivered 16.3%. The owner saw green space as an environmental rights issue, but she structured the case as a contract dispute in the hopes that would make courts more likely to accept it (Chen 2006a). Another strategy is to rely on a clear-cut standard. A case in Tangshan, Hebei, for example, hinged on whether the factory violated a 1986 regulation requiring a 1,000 meter buffer zone between industry and a residential neighborhood (2007-21).

In the absence of clear-cut standards, judges typically rely heavily on outside appraisals, usually conducted by either a government bureau or a court-appointed appraisal agency. Judges often lack the time or skills to investigate environmental

⁵⁴ Enterprise quiet days are a national problem according to a 2007 interview with the head of the Ministry of Environmental Protection’s Environment Supervision Bureau (Zhang 2008, 51). In two of the counties Zhang studied in Hubei province, enterprise quiet days lasted from the 1st to the 25th of each month.

cases and, in theory, a scientifically informed assessment helps improve the quality and efficiency of decisions. In fact, cases often hinge on appraisals, as judicial decisions rarely deviate far from a report the court regards as unbiased. Yet even the most expert appraisals are more akin to a good guess than scientific proof. Many of the effects of pollution, like a tree's stunted growth, are difficult to quantify, especially when there is no consensus on the best way to calculate damages (Fürst 2008, 70). In the absence of a set standard, court decisions spend long paragraphs discussing, for example, whether dead fish should be valued at the wholesale or retail price.⁵⁵

During my fieldwork, observers agreed that appraisals were both essential to the success of a case and of greatly uneven quality (2007-85; 2007-91). The local justice bureau is responsible for licensing both appraisal organizations (*jianding jigou*) and individual appraisers, but the qualifications for the job are relatively flexible. For example, appraisers can get a license with just five years of relevant work experience and a related undergraduate major.⁵⁶ Clued-in judges know that an license does not necessarily indicate competence and deeper evaluation is necessary. After several phone calls, one judge passed up a prestigious Qinghua University-affiliated organization because employees lacked the necessary skills (2007-74). Often, cases move ahead with a less-than-capable organization responsible for the key piece of evidence. In an environmental hearing I observed in Hebei in 2008, the appraisal team did not include a single plant expert even though their primary task was evaluating damage to a fruit orchard. Or, in the Pingnan case, plaintiffs complained that the court-appointed appraiser spent less than a day in the village and only did an eyeball assessment of a small piece of forest located relatively far from the factory (Caijing 2006). Often, lawyers suspect that experts were be pressured or bought off rather than merely incompetent. In a case in Inner Mongolia, an appraisal was written and stamped the same day inspections took place and *before* test results were available (Fürst 2008, 53).

Litigants also sometimes commission their own appraisal, picking an organization based on personal ties, efficiency, technical competence and location (2007-91; 2007-111). Some lawyers say that picking a northern-based appraiser for a case in the south (and vice versa) enhances objectivity (2007-91). In a legal system with a history of judge-led investigations, the problem is that hired experts are often seen as biased. More immediately, they are also expensive. As well-known environmental lawyer Wang Canfa put it, "after the pollution, the economic situation just gets worse and worse. Who has the money to hire an organization to do an appraisal?" (Lin and Ding 2009). Although the cost of an appraisal depends on the amount of work involved and who is hired to do it, most appraisals fall in the 10,000 to 50,000 RMB (US 1,470-7,352) range, no small amount for plaintiffs typically already suffering economic losses. Nor is documentation necessarily a first impulse

⁵⁵ Guangdong Foshan Intermediate Court (2005), *Ping Zao v. Zhongnan Shiyouju*, Civil Division No. 3, decision on file with the author.

⁵⁶ Appraisers must have five years of relevant work experience and one of the following: 1) a high level technical title; 2) equivalent professional qualifications or 3) a related undergraduate or graduate major. See State Council (2005).

after pollution. Dead fish or rotting crops are often cleared away before would-be plaintiffs ever consider litigation (2007-27). The combination of inexperience and bureaucratic feet dragging can also significantly extend the lag time between pollution incidents and evaluation. The fruit orchard appraisal in Hebei took place three years after the alleged pollution, making it even more difficult to demonstrate causation.

During the hearing, one of lawyers' best opportunities to sway the bench is the closing statement, known in civil cases as the *dailyi*. Lawyers see this as an opportunity to lay out an argument that flawlessly demonstrates their legal logic and education (2007-91; 2007-97). The clearest sign of success is when court decisions echo lawyers' legal arguments, as they occasionally do (2007-91). For the more theatrically inclined, closing statements also provide a platform to dramatize the case and appeal to judges' empathy, ego and patriotism. Playing on the government's historical sympathy for claims related to economic distress, lawyers often cast their clients as members of a weak and disadvantaged group (*ruoshi qunti*).⁵⁷ Consider how this Beijing lawyer opened a 2003 closing statement:

My client is a middle-aged laid off worker who is the backbone of a family with two children in middle school and a grandmother over 80 years old...he borrowed 30,000 RMB [US 4,411] from the bank, friends and relatives and signed a contract to raise fish in Lake X...he took this much risk and bore the hopes of his entire family! Imagine, a person of this age without a high school education or specialized skills. As soon as fish farming fails, he not only has no opportunity to get back the money but may drag three generations into his difficulties....⁵⁸

When it arises, environmentalism is primarily couched as what O'Brien and Li (2006) call "rightful resistance" and framed "in reference to protections implied by ideologies or conferred by policymakers" (3). One lawyer sees environmental slogans as "points of support" (*zhichengdian*) to buttress statements like "how can a harmonious society exist when everything is polluted?" (2007-106). Others neatly interweave environmentalism and patriotism, as in this excerpt from the closing statement in the Pingnan case:

I am a Beijing lawyer and university professor. The reason I'm paying attention to an environmental case thousands of kilometers away is not because I'm going to get any benefit from the case. Rather, it is because I see piece after piece of my country's green mountains turned desolate and bare by corrupt profiteers and section after section of clear river turned into a dirty gutter devoid of fish and shrimp. As a Chinese person who has not lost his reason, I cannot help using the law to help protect environmental rights and to protect our weak and disadvantaged groups who rely on the homeland to live.

⁵⁷ For more on official tolerance for moral economy claims, see Perry (2001, 168).

⁵⁸ Document on file with the author.

After reminding the judges of his status (“I am a Beijing lawyer and university professor”), the lawyer evokes Chinese pride in support of environmental rights. Reasonable Chinese people, he implies, should protect the homeland from destruction.

In these final remarks, lawyers often urge judges to uphold justice and even make history. One lawyer defending an environmental protester told the court that “those who should be judged are neither the defendants whose human rights and property rights were violated nor those weak and disadvantaged groups living at the bottom rungs of society, but those at the chemical companies responsible for the major pollution accident!...They will stand accused by history.” Strategically overlooking the possibility of political pressure or flat out corruption, this aspirational view of the court calls on judges to live up to the best traditions of Chinese justice.

Outside the Court

Many plaintiffs understand that judicial decisions can depend as much on what happens outside the court as within it. In the search for sympathetic elite allies willing “to enter the implicit or explicit bargaining arena” on their behalf, they typically both exhaust their net of personal connections and petition strangers (Lipsky 1968, 1145; see also O’Brien and Li 2004, 86-89). Among a range of potential backers, however, litigants and lawyers often share a common impulse to turn first to the media. Those familiar with the Chinese legal system know that media exposure often catalyzes concessions (Liebman 1998, 112).⁵⁹ Local governments may not be afraid of lawsuits, but they are afraid of the spotlight.⁶⁰ As Yan Yiming, a self-termed public interest lawyer, explains: “In so far as possible, [I] draw in the media as a strategic participant...Among public interest lawyers, the cases I handle are relatively hard, but the result is pretty good every time. Why? I don’t handle them alone, but with a lot of media working hard with me” (Xu 2009). Or, as another lawyer put it, “if the media didn’t exist, public interest litigation wouldn’t be possible” (2007-14).

Above all, external scrutiny heightens accountability and, in so doing, brings a degree of power to those who lack it. In China, as elsewhere, complaints easily go unheard unless “perceived and projected” (Lipsky 1968, 1151). Media reports, often submitted as evidence or mentioned in lawyers’ closing statements, remind judges of a wider audience and broader social responsibility. Sympathetic coverage also lends litigants a measure of protection by informing opponents that they are being watched (2007-50). Sometimes, the identity of the observer matters less than simply bearing witness. An anonymous internet letter, written by a Beijing lawyer and printed out by local complainants, successfully pressured the government in one Shanxi town into taking a land dispute seriously. No one local had internet access, so officials knew that an online letter indicated outside support (2009-5).

Still, despite the influence of even anonymous observation, most litigants and lawyers believe some kinds of media attention are more effective than others. To start, the national media is more likely than the local media to provide in-depth

⁵⁹ On how media coverage also helps protesters win concessions, see Cai (2008, 168-172).

⁶⁰ For more on media coverage as a litigation strategy, also see Fürst (2008, 98-102).

coverage of environmental disputes. The local media, overseen by the local propaganda department, is often barred from covering stories regarding politically powerful polluters (2007-15; 2007-18; 2007-21; 2007-82; 2007-109; Human Rights Watch 2008, 84; Halliday and Liu 2008, 28). In contrast, the national media is generally free to report any story that does not implicate officials above the county level (2007-40; 2007-75). (At the provincial level and above, environmental reporters say it's best "not to touch a tiger").⁶¹ In the Pingnan case, plaintiffs found that "the central media were our best allies" (2007-39). The day after a particularly influential news segment aired on China Central Television's *News Probe* (*Xinwen Diaocha*), for example, the EPB sent an inspection team to Rongping chemical plant (2007-39).⁶² Yet even as litigants and lawyers court domestic coverage, most are more reluctant to talk to the international media. While foreign attention can intensify pressure and bring results, it can also give complaints an unwanted radical cast (2006-10; 2007-18; 2007-53; 2007-75). At the very least, caution is called for. One well-known lawyer advised complainants not to take money from international reporters or pass on government documents because those actions could later be interpreted as leaking state secrets (2007-100).

Ad hoc alliances between journalists and litigants reflect the broader rise of the green media and what Hassid (forthcoming) calls advocacy journalism. The late 1990s and early 2000s saw the emergence of self-identified environmental journalists at mainstream newspapers like *China Youth Daily* (*Zhongguo Qingnian Bao*) and *Legal Daily* (*Fazhi Ribao*).⁶³ Encouraged by an a monthly environmental journalists salon started by Green Earth Volunteers in 2001, some journalists began self-consciously using the press to shame local governments and polluters into cleaning up.⁶⁴ Their efforts fit into a larger tradition of Chinese advocacy journalism, characterized by frequent use of the first person and a distinct moral position. Even outside the op-ed page, these reports clearly take sides and usually side with the powerless. The influential 2003 *News Probe* segment on the Pingnan case, to take one example, interweaves advocacy journalism with investigative reporting, a common combination. The reporter, always dressed in glasses and a business suit, is cast as a big city intellectual fighting rural injustice. In standard Mandarin (roughly the class and educational equivalent of Oxford English), he contrasts the plant's emphatic denials of illegal pollution with shots of worn villagers and barren countryside. He even dons a pair of gloves at one point to collect wastewater for testing and, of course, heighten the drama.⁶⁵ This is good TV, complete with villains, underdogs and heroes.

⁶¹ 2007-75

⁶² Ironically, the villagers were unable to watch the segment because the electricity suddenly went out during the broadcast (Lai 2006, 30; Caijing 2006).

⁶³ For a Chinese perspective on this trend, see Wang (2005a).

⁶⁴ In 1986, the State Environmental Protection Administration (SEPA) founded a more official, government-sponsored forum for environmental journalists. This official, state-run organization had much less of an impact on environmental journalism, however, than the later salon.

⁶⁵ The *News Probe* segment also inspired other pieces of advocacy journalism. After seeing the broadcast, one reporter from the area wrote his own story with the closing line "in the distant north, I pray for my hometown" (Lin 2003).

As the Chinese media is now largely reliant on advertising rather than government subsidies, popular appeal is important to even hard-boiled managers (2007-38). For their part, green journalists are happy to help report stories which, as one lawyer put it, “helps fulfill their ideals” (2007-53). It helps too that polluters often lack public relations skills. Despite years of well-documented environmental fines, for example, one of the defendants in the Sun Youli case offered a local TV station this credulity-straining sound bite: “we are definitely one of Hebei’s pollution standard-abiding companies. We’ve gotten all kinds of honors...and think that we are already perfect [so] when this happened, we thought it was unbelievable” (Tianjin TV 2004).

Of course, soliciting media coverage is not easy. When litigants and journalists do not share a social circle, contacting the media is challenging. Letters and emails are likely to go unanswered and traveling to news bureaus in major cities is time-consuming and expensive (Fürst 2008, 101). Nor do even sympathetic journalists necessarily see the newsworthiness of yet another pollution case. Media savvy lawyers brainstorm fresh angles before calling press contacts (2007-82) or simply don’t bother pitching run-of-the-mill cases (2007-69). And recruiting a reporter is only a first step. Journalists can be bought off or stories killed by editors under pressure (2007-38; 2007-40). Subtler local evasion, like intransigence from polluters, can also limit the depth and impact of reports. In Hebei, one court held a hearing on Christmas and released the decision just before Spring Festival to deter media attention (2007-115). In addition, media backlash is a real danger. Irritation with headlines-chasing self-appointed heroes can undercut public support as well as engender it (Huang 2006, 157). Rather than face accusations of “making a big deal out of nothing” (*xinwen chaozuo*), some lawyers avoid the media altogether (2007-94). Others say “the internet is the best choice for poor people” because, unlike reporters, the web never demands money in exchange for coverage (2009-5). Bloggers can help now too. A list of media contacts distributed at a June 2007 conference for environmental complainants included influential bloggers under the heading “independent journalists” (*duli jizhe*) (2007-61).⁶⁶

Another part of mobilizing personal networks is taking advantage of connections inside the state. Political embeddedness, e.g. ongoing formal and informal ties to state bureaucrats, confers serious advantage to the well connected (Michelson 2007, 356).⁶⁷ Well-placed backers ease the work of case preparation and protect lawyers from harassment (Michelson 2007; see also Halliday and Liu 2008, 32-33). In so doing, contacts both help with specific favors (like access to environmental reports) and serve as character references. One Beijing lawyer, for example, asks friends in government to spread the word that he is a good guy when he is working on a sensitive case (2007-66). Lawyers also use personal ties to talk a case

⁶⁶ Some “independent journalists,” although perhaps not those on this specific media contact list, openly fees in exchange for coverage. Strictly speaking, all freelancers and bloggers are supposed to have a press card issued by the General Administration of Press and Publication in order to practice journalism. In practice, this restriction is routinely ignored (Jonathan Hassid, personal communication, June 9, 2009).

⁶⁷ The term “political embeddedness” is borrowed from Michelson (2007).

into the courts (2007-77; 2007-111) or convince judges of their point of view (2007-23; 2007-75; 2007-79). Cases can turn on the opportunities provided by personal access and those who know the right people—often because of social class or education—benefit. Yet clubby networking, although common, is not everything. Sympathetic insiders occasionally slip key evidence to lawyers or litigants simply because their conscience demands it (2007-32). As one official told a Kunming lawyer, “working for the government is temporary, but you are a person for your whole lifetime” (2007-102).

Even as litigants tally contacts and weigh strategies, most struggle with a far more basic problem: maintaining unity. In the months and years leading up to a mass lawsuit, plaintiffs often fracture over both their understanding of the problem and the best solution. Lora-Wainwright (2009), for example, shows how residents of one Sichuan village were paralyzed by competing explanations for high cancer rates including 1) farm chemicals; 2) hardship, anger and anxiety and 3) diet, smoking and drinking (63). Without a consensus about who to blame, resignation and apathy dominated anger and action. Commitment can also dissipate over the course of a lawsuit, rupturing once solid coalitions. The spatial dynamics of pollution, in particular, generate tensions between plaintiffs unequally affected by the problem. A compensation offer viewed as reasonable by villagers relatively far from a factory, for example, can be seen as entirely unreasonable by villagers closer by (Fürst 2008, 83).⁶⁸ In mixed income communities, class also affects plaintiffs’ ability to escape pollution. In an air pollution case in Hebei, richer residents moved, leaving their poorer neighbors to sue on their own (2007-21). For all of these reasons, it is sometimes easier for lawyers to work with stable associations than ad hoc collections of complainants. A fisherman’s association, say, or a homeowner’s association typically has leaders in place and existing relationships with government bureaus, both significant advantages in litigation (2007-73).

Staying unified is a problem not only for plaintiffs, but also for the broader legal team. Lawyers and clients, as elsewhere, are separated by a gulf of “knowledge, assurance and social standing” and the resulting relationship can be tense (Ellmann 1986-1987, 719). Lawyers complain that plaintiffs are uneducated, grasping and “blind” (*mangmu*) to the law (2007-18; 2007-21; 2007-34; 2007-91; 2007-102; 2007-109). Lack of legal knowledge, they say, leads to unrealistic demands and frustration if compensation is not quickly forthcoming (2007-18; 2007-78; 2007-109). The handholding litigants often demand can be especially irritating. As legal scholar Martha Minow observes, “the clients’ case is the most important one to them, but one of many for the attorney” and this alone generates tension (1990, 723). High maintenance clients call frequently to check on the status of their case, report new developments or, in one case, just to talk about family problems (2007-91; 2007-18; 2007-21). Sometimes, clients even show up at law offices uninvited. My conversation with a Zhejiang lawyer in November 2007, for example, was interrupted by the unexpected arrival of three villagers who traveled an hour and a half to follow up on the previous day’s phone call. The displeased lawyer (possibly also embarrassed

⁶⁸ 2007-8 and 2007-46 also discussed how proximity to pollution motivates activism.

in front of a guest) told them their behavior was “unbelievably irritating” (*fansile*) and to go away and stop wasting his time. “Sometimes,” he later confided, “I just can’t help getting angry” (2007-102). In this case, as in many others, language marked the class and power differential in the dialogue. The Zhejiang lawyer spoke Mandarin while the visiting villagers, like many lower-class plaintiffs, only spoke the local dialect. Mandarin implies expertise and education and, as one lawyer told me, “embodies professionalism” (2007-112).⁶⁹

This is all to say that deep power inequalities underlie lawyer-client relationships. Most commonly, clients quietly comply with lawyers’ instructions. As one plaintiff described his relationship with his lawyers, “they told me what to do and I did it” (2007-39; see also 2007-22; 2007-41). While some lawyers are tightly integrated into local communities, legal authority can also shade into neglect or casual condescension as differences in social standing sharpen. In March 2007, I observed a group of Beijing lawyers ask a villager who had traveled over 24 hours for legal advice to leave the room while they drew up a strategy for his case. Even more telling, we were several minutes into a post-meeting lunch before someone noticed that the client wasn’t there. “Maybe he got arrested on the way over here,” a lawyer joked as he left the restaurant to look for him.⁷⁰ Over the long course of a case, initial deference can also shift to resentment. Disagreements over strategy—or over fees—can form deeper antagonisms, especially once trust is lost. While lawyers expect that a minority of clients will renege on fees, refusal to pay can still be infuriating and hurtful. One lawyer’s story of being burnt by a client after a five-year lawsuit finished with the conclusion that lawyers and clients “don’t completely trust each other” (2007-91).

Certainly in major cases, the intense pressure of environmental lawsuits cannot help but exacerbate tension between lawyers and plaintiffs. Litigation takes tremendous money and emotional stamina and anxious plaintiffs often want results. Although lawyers usually warn potential clients of the difficulties ahead, many still worry about disappointing them. “I’m embarrassed,” one lawyer told me, “because their hopes are on me and I can’t get any money for them” (2007-54). Nor are successful clients necessarily grateful. “After hearing the verdict,” another lawyer said, “I was so happy that we had won. However, my clients were unhappy that they had not been awarded as much compensation as they had hoped for. Had I lost, they would have blamed it on corrupt court officials, but now that we had won, they blamed it on me” (quoted in van Rooij forthcoming).

Conclusion

One way to look at the journey from dispute to decision is as a wide-ranging quest for allies. Outside help features prominently in litigation stories and winning

⁶⁹ Speaking the local dialect and having close ties to the community can also help lawyers get business. Outside your hometown, one lawyer told me, “[potential clients] think you are a crook!” (2007-27).

⁷⁰ This was not an unrealistic possibility as the client’s traveling companion, another potential plaintiff, had been taken into custody the previous night. The client was not arrested, however, but had gotten disoriented between the law office and the restaurant.

compensation often seems to require assistance from someone like an articulate lawyer, a sympathetic EPB official or a crusading journalist. Listening to lawyers and litigants talk about past cases, the other common theme is the difficulty of environmental litigation. Many of my conversations turned into a litany of obstacles, some of which are endemic to environmental litigation (like proving causation, maintaining unity and managing lawyer-client tensions) and some of which are more China-specific (like getting a case into court and leveraging personal networks). Yet despite consensus that environmental cases are a long shot, what is interesting is that they are not a lost cause. Sometimes, the process creaks forward such that appraisals are conducted on time, allies solicited and compensation won. Moving forward, the next chapter explores why environmental cases fall between hopeless causes and assured redress and what that tells us, not just about law, but about politics. Although environmental claims are legally hard to win, lawyers and litigants also face challenges because the CCP is deeply ambivalent about this particular type of citizen complaint.

Chapter 2

Harnessing the Law: The State

A great many authoritarian regimes have relatively autonomous courts that are expected to follow the law in routine criminal prosecutions and civil disputes. A reliable legal system that enforces social order and buttresses commonly held social norms has many advantages. Predictable law can help attract foreign direct investment, formalize power sharing and divert blame for unpopular policies (Moustafa 2007, 33-37). For leaders, legal constraints on powerful local interests like police departments, municipal governments and major taxpayers can also be a useful way to ensure that national policies are consistently implemented. And insofar as dispute resolution is seen as efficient and fair, well-run courts can shore up citizen support and help legitimate government authority (Nonet and Selznick 1978; Shapiro 1981).

But political authorities also have interests and allies, fears and concerns, which can be threatened by truly independent courts. The hallmark of what Nonet and Selznick call repressive law, law “associated with and subordinate[ed] to the requirements of the government,” is political intervention in particular cases (2008 [1978], 39). This can be done on a blunt, ad hoc basis, as in what was known as “telephone justice” in the former Soviet Union (Hedley 1996), or systematically, as when regimes divert certain types of cases to special courts that are reliably subservient to leaders’ concerns (Toharia 1975). In many illiberal regimes, lawyers and judges are attentive to political leaders’ “zones of tolerance” for straying beyond them risks reversal, diminution of authority and individual punishment (Epstein, Knight and Shvetsova 2001, Silverstein 2003; Moustafa 2007). For their part, authoritarian leaders also watch lawyers and judges closely, especially because of the historical association between legal professionals and political challenge.⁷¹ From 18th century France to contemporary Pakistan, lawyers, judges and legal academics have often been at the forefront of calls for an independent judiciary, limits on executive power and basic civil rights (Halliday, Karpik and Feeley 2007).⁷²

This is the crux of the authoritarian dilemma over courts. While law can be extraordinarily useful to those in power, all but the most orchestrated show trials also carry the threat of subversion. Moving from this general insight to a specific case, this chapter explores how environmental litigation in China encapsulates this dilemma. Unlike the following chapters, which focus on different types of legal professionals, this chapter looks at environmental litigation from the state’s point of view. Seeing like a state brings into view the deep roots of ambivalence over environmental litigation. Above all, the central government is betting that lawsuits will rein in local

⁷¹ On how the legal professions have supported political liberalism, see Halliday and Karpik (1997) and Halliday, Karpik and Feeley (2007).

⁷² Note that this is different from calls for democracy. As Karpik (2007) points out, it is possible to have political liberalism without democracy, as in contemporary Hong Kong, and democracy without political liberalism, as in contemporary Egypt (469).

evasion of national directives and provide a peaceful way for citizens to vent frustration against the worst environmental abuses. At the same time, however, party officials are well aware of the danger that environmental rights claims could spiral into political activism. Coping with ambivalence—e.g. keeping claims limited and local without dramatically empowering courts or stripping them of authority—depends on the steady pressure of everyday control. As much as high profile arrests or violence, mundane regulation keeps would-be legal activists in line.

The Authoritarian Dilemma Over Courts: Environmental Litigation in China

Ambivalence is everywhere. As psychologists have long known, having mixed feelings or contradictory ideas about something or someone is part of the experience of being human.⁷³ Sociologists write about ambivalence too, particularly the tension between opposing values in certain professions and social relations (Merton and Barber 1976 [1963]). Yet ambivalence is not a word much used in accounts of politics, perhaps because as sociologist Neil Smelser writes, it is “such a powerful, persistent, unresolvable, volatile, generalizable, and anxiety-producing feature of the human condition, people defend against experiencing it in many ways” (1998, 6). At the very least, actions born of ambivalence often occur “beyond the range of consciousness and calculation,” making ambivalence hard to see and even harder to study (Smelser 1998, 6).

One way forward is to think about how ambivalence applies not to individuals or even groups, but to states. States, as Joel Migdal points out, are both “the powerful image of a clearly bounded, unified organization” and “a heap of loosely connected parts” (2001, 22). This paradox, between state as unified symbol and the real-life divisions within, simultaneously creates political ambivalence and disguises it. It is only too easy to infer a coherent master plan even when evidence suggests that far-flung collections of individuals, factions and bureaucracies disagree. Here, however, political ambivalence, defined as conflicting official (or quasi-official) signals regarding the desirability of certain types of citizen action, differs from familiar bargaining over policy outcomes. What is up for grabs—and hotly debated inside government—is not an issue or policy, but the boundaries of citizen participation in political life. Even in countries without elections, other kinds of political expression (like flag-waving, rallies, petitions and protest) can be encouraged, tolerated or forbidden. In particular, illiberal regimes are often deeply ambivalent about one particular type of citizen action: litigation through courts. Courts defuse conflict and build support for leaders, but can also siphon power and legitimize dissent. As explored below, the last thirty years of Chinese legal reforms is the story of one state’s attempt to realize the benefits and avoid the dangers of law, matched by attendant conflicting signals about the role citizens should play in the process.

Above all, China’s increasing emphasis on law reflects two of the main reasons even autocrats sometimes prefer a well-functioning legal system: the need to attract

⁷³ The psychologist Bleuler first introduced the term “ambivalence” in 1910. It was picked up by Sigmund Freud, among others, who used the idea to explain sado-masochism and oedipal relations (Smelser 1998, 6).

foreign direct investment (FDI) and control local government officials (Moustafa 2007, 4-5). As countries compete for investment, “it is difficult to find any government that is not engaged in some program of judicial reform designed to make legal institutions more effective, efficient and predictable” (Moustafa 2007, 24). Investors need reassurance that their assets are safe and, as a result, the Chinese government wants a legal system capable of inspiring commercial trust (Lee 2007, 176).⁷⁴ The China International Economic and Trade Arbitration Commission (CIETAC), one of the first places foreign firms turn to resolve disputes,⁷⁵ amended its rules six times between 1998 and 2008, an indication of serious attempts at improvement (Peerenboom and He 2008, 10).

Courts can also help solve one of China’s biggest problems, monitoring local officials (O’Brien and Li 1999; Edin 2003). In a large, decentralized country, it is difficult for Beijing to know about local problems, let alone solve them. Information is the most basic tool of environmental enforcement and, due to limited resources, local Environmental Protection Bureaus (EPBs) often lack it. The Shanghai EPB, for example, collects *no* environmental information about more than 70% of registered small-scale enterprises (Warwick and Ortolano 2007, 244). Except for citizen complaints and litigation, these enterprises go unmonitored. Environmental lawsuits, then, can serve as a “fire alarm” (McCubbins and Schwartz 1984, 250) to attract higher-level attention to the worst abuses and rein in local power holders (Gilboy and Read 2008, 155; 2007-116; Shapiro 1981).⁷⁶ As with the 1990 Administrative Litigation Law (ALL), “having citizens as watchdogs makes sense even to dyed-in-the-wool Leninists who...need on-the-ground sources of information if they are to uncover and stop misconduct” (O’Brien and Li 2005, 13). In this way, environmental lawsuits can find and discipline the worst polluters (Jiang 2006b) and, in so doing, help the Chinese government fulfill basic responsibilities towards its citizens (Xu 2005a, 27; 2006-11).

Of course, there are many ways to control local officials and stop pollution besides citizen-initiated environmental litigation. In 1960s Japan, for example, the central government responded to four major pollution lawsuits not by encouraging further litigation, but by strengthening the environmental protection bureaucracy and creating a state-run compensation system for environmental damage claims (Upham 1987). Or in 1980s Brazil, leaders empowered national government prosecutors to sue polluters and local environmental agencies (McAllister 2008). The politics of institutional choice—e.g. why one solution wins out over another—depend a great

⁷⁴ It is not clear how well the Chinese government has succeeded in building investor confidence through legalization. Peerenboom and He (2008) report that commercial cases are more effectively resolved than socio-economic cases (10), but others suggest that Chinese courts still do not effectively guarantee property rights (Liebman 2007, 637). Certainly, the China International Economic and Trade Arbitration Committee (CIETAC) has come under its share of foreign criticism. Many were concerned by the 2006 arrest of former CIETAC head Wang Shengchang, which may have been connected to Wang’s 2005 decision in favor of PepisCo Inc. (Jones and Batson 2008).

⁷⁵ CIETAC arbitrated 1,118 cases in 2007, 40% of which involved foreign parties (Jones and Batson 2008).

⁷⁶ Lorentzen (2006) sees protest as another type of type of fire alarm.

deal on how rulers perceive costs, especially of the costs of using courts. In contemporary China, where we know so little about how leaders weigh the tradeoffs of governance, observers can typically only deduce intent from outcomes. As decentralization and the decline of ideology increased local officials' discretion in the 1990s and 2000s, for example, the ALL was likely an attempt to rein in local agents and, in so doing, extend the legitimacy of the Chinese Communist Party (CCP) (Ginsburg 2008, 67-71). And, as discussed below, civil environmental litigation is not the sole CCP strategy for environmental improvement. Citizen lawsuits fit into an array of efforts to improve environmental protection or at least pay lip service to that goal.

More broadly, environmental lawsuits are both facilitated and constrained by the past three decades of Chinese legal reforms. As others have chronicled, post-Mao reformers wrote new laws, professionalized the judiciary and strengthened the courts (Lee 2007, 18). A generation after Deng Xiaoping began talking about the importance of law, the Hu Jintao-Wen Jiabao government routinely stresses the importance of rule of law for a harmonious society (Xinhua 2005). "Ruling the country by law" (*yifazhiguo*), the legal principle written into the constitution in 1999, connotes both good governance and modernity. As a 2008 State Council white paper on promoting the rule of law put it, "the rule of law signifies that a political civilization has developed to a certain historic stage. As the crystallation of human wisdom, it is desired and pursued by people of all countries."⁷⁷ Certainly, China is not the only illiberal state to draw a connection between law, modernity and legitimacy. China's "fetish with courts and the rule of law" (Shapiro 2008, 328) dovetails with a global trend towards increased judicial power even in authoritarian states (Klug 2000; Epstein et al. 2001; Ginsburg 2003; Moustafa 2003).

In both rhetoric and reality, China's turn towards law has opened new opportunities for citizens to protect their rights in court (Liebman 2007, 620). In 1985, the Standing Committee of the National People's Congress (NPC) approved a law dissemination campaign (*pufa yundong*) to "place the law in the hands of the masses...so that [they] will learn to use the law as a weapon against all acts committed in violation of the Constitution and the law" (quoted in Gallagher 2006, 793; see also State Council White Paper 2008, 17-18). Media coverage of legal information increased, accompanied by public billboards and slogans (Gallagher 2006, 794-6). More recently, litigation on behalf of "weak and disadvantaged groups" (*ruoshi qunti*) has become an officially sanctioned way to help those left behind in China's economic transition. In 2007, the State Council lowered litigation fees to make it easier for average citizens to bring civil claims.⁷⁸ In addition, government-sponsored legal

⁷⁷ This is a quote from the official English translation released by the Information Office of the State Council.

⁷⁸ Some courts have delayed implementation of the new regulations because of concerns about lost revenue (Peerenboom and He 2008, 22). One indication of CCP attempts to make courts accessible is the return of the term *sifa weimin*, or justice for the people. The SPC re-introduced the phrase in 2003, accompanied by encouragement to reach out to petitioners (see Liebman 2008, 20-22). For more on the term "weak and disadvantaged groups" (*ruoshi qunti*), also see Lee (2007, 28 and 200).

advice is common.⁷⁹ After the 2008 Sichuan earthquake, the Chengdu justice bureau even published a handbook instructing victims how to sue the government over slipshod construction (Fowler et al. 2008).⁸⁰ “Rights protection,” in the words of a Shanghai metro advertisement for a labor legal aid center, “is by your side.” The result of twenty years of outreach is relatively high trust in courts (Landry 2008, 212)⁸¹ and rights language rooted in popular consciousness. Citizens not only learn about their law from the government, but via their neighbors and through movies and TV shows about lawyers, judges and courts (Gallagher 2006; Landry 2008). From 1989 to 1998, for example, the *Beijing Evening News* ran a column called “Dear Lawyer Bao” which dispensed advice on everyday legal problems. As the column’s editor wrote in his preface to the first article, “as society advances toward a system of law, every citizen needs to ...raise his or her legal awareness, and know the law, understand the law, adhere to the law, and use the law...[This column should tell readers] how to use the weapon of the law to protect themselves” (quoted in Michelson 2008, 44).

The prevalence of legal rights talk is a sign, not of political liberalization, but of authoritarian responsiveness. The CCP is increasingly searching out public feedback in order to draft sound policies and encourage political loyalty (Cai 2004; Gilboy and Read 2008).⁸² The Ministry of Justice (MoJ), for example, solicited external comments on the 2007 amendments to the Law on Lawyers, a first for the agency.⁸³ Even rights lawyer Li Heping, a well-known government critic, acknowledged the request for outside opinions marked a significant improvement (2007). As public participation gains currency, lawsuits are one way to hear and solve citizen problems. Environmental complaints rose significantly in the 2000s and, from the CCP’s perspective, litigation is far preferable to protest (Gu 2008, 275). As top

⁷⁹ In the first six months of 2007, China’s 3,000+ legal aid centers handled 172,600 cases. According to the Ministry of Justice, this was a 40% increase over the same period in 2006 (Fowler et al. 2008)

⁸⁰ Chinese NGOs also frequently distribute legal handbooks designed to help citizens identify and protect their rights. In my research, I came across environmental rights handbooks published by the Center for Legal Assistance to Pollution Victims (2006), Pacific Environment (2007) and Civil Society Watch (2007).

⁸¹ In a 2002-2004 survey of business people in Shanghai and Nanjing almost 75% gave the courts a very high to average rating. Only 25% rated the system low or very low (Peerenboom and He 2008, 6).

⁸² For more on the move towards pluralism within one-party rule, see Mertha (2008) and Leonard (2008, 66-67). Along the same lines, Wang Shaoguang, a prominent professor at the Chinese University of Hong Kong, criticizes Western scholars for being unable to acknowledge political change: “The analytical framework of authoritarianism from the West is completely unable to capture these deep changes in Chinese politics. In the past several decades, this label has casually been put on China from the late Qing era to the early years of the Republic, the eras of warlords, Jiang Jieshi, Mao Zedong, Deng Xiaoping and Jiang Zemin. Chinese politics has made world-shaking changes during this period, but the label put on it made no change at all” (quoted in Leonard 2008, 76).

⁸³ Government experimentation with public participation is common. In Wuhan, the local EPB started an online instant message group for environmental complaints (called the *wenzheng QQ qun*) (2007-80). In Chongqing, the government is now holding public hearings on all significant government decisions. To date, they claim to have held six hundred public hearings, involving 100,000 citizens (Leonard 2008, 68-9).

leaders admit,⁸⁴ extreme environmental degradation is already affecting social stability: pollution-related mass incidents (the officially sanctioned term for protest) are rising 29% annually, with over 60,000 incidents in 2006 (Pan 2006; Plumer 2008). Lawsuits are not a panacea, but—in combination with complaint hotlines, public hearings, appeals and mediation—they can stimulate local responsiveness to citizen needs.

Harnessing the law to serve state goals is a risky strategy. Despite widespread domestic agreement that legalization can be combined with one-party rule, world events in the mid-2000s increased high-level skittishness about citizen power. In particular, the Chinese government watched the color revolutions in Eastern Europe with a careful eye on China's own NGOs, lawyers and other potential "rabble rousers."⁸⁵ According to multiple sources, President Hu Jintao asked officials at an internal party conference in May 2005 to guard against Chinese imitation (Spector and Krickovic 2007, 18; Wilson 2008, 3). In 2008, lower level court and police officials received a similar message from a state-sponsored documentary entitled "Lessons From the Color Revolutions" (Lam 2008, 3). As the CCP increases vigilance, litigation necessitates scrutiny because it is inherently adversarial and politicized. Chinese leaders do not want mass demonstrations over court decisions (standard fare in most legal systems) or, worse still, lawyer-led protests against state assaults on judicial independence, like those in Pakistan in 2007.

Day to day, the authoritarian dilemma over courts plays out not in major ideological struggles, but in private policy battles between bureaucracies, factions and interest groups jostling for power. Although most bargaining occurs in private, occasional public signals suggest the general contours of commitment surrounding environmental litigation. Recent draft revisions of both the Civil Procedure Law and the Water Pollution Prevention and Control Law included provisions (later cut) for public interest environmental litigation, an indication that the idea has some political traction. The biggest supporters are the Ministry of Environment Protection (MEP) and the Supreme People's Procuratorate because, in both cases, new public interest provisions would boost the agency's profile and counterbalance the powerful, economic growth-oriented National Development and Reform Commission and Transportation Bureau (2007-116; 2008-3). In a 2005 submission to the State Council, the Supreme People's Procuratorate wrote that rising pollution levels made "the establishment of a system for civil and administrative environmental lawsuits both necessary and feasible" (reprinted in Bie 2007, 457). The hope behind those words is that legal reforms would grant the agency the high-profile power to sue in the public interest. At the same time, reformers at the Ministry of Environmental Protection (MEP)—long considered a weak agency—like the idea of recruiting

⁸⁴ Pan Yue, the outspoken Deputy Director of the MEP, openly talks about how local government officials looking for "quick achievements" condone pollution, infringing on local rights and sparking instability (Liu 2007).

⁸⁵ The color revolutions include the Rose Revolution (Georgia, 2003); the Orange Revolution (Ukraine, 2004) and the Tulip Revolution (Kyrgyzstan, 2005). For more on the Chinese response to the color revolutions, see Spector and Krickovic (2007), Wilson (2008), and "Investigation: America's Fake Thinktanks" (2007).

citizen, NGO and journalist allies to help pressure polluters (2007-107). Finally, there are signs that the courts are starting to see beyond their initial fear that reforms would increase case load (2008-3). China's first environmental court opened in Guiyang in November 2007 with the agreement that the local water bureau can bring pollution lawsuits. In Beijing, SPC judges also express concern court authority might be undermined if the "final line of defense" refuses to accept cases (2007-85).

Still, this tentative association of interests is far from a solid coalition. Even MEP is not unequivocally in favor of change. Insiders report that the agency is divided between reformers (notably in the Legal Affairs Department) and warier divisions, like the Environmental Impact Assessment Department (2007-116). Would-be reformers also face serious opposition from officials concerned about loosening Party control over the legal system. Top court officials, including SPC president Wang Shengjun, echo former Politburo Standing Committee member Luo Gan's statement that "there is no question about where legal departments should stand. The correct political stand is where the party stands" (Kahn 2007; see also Tang 2007; Lam 2008, 2). Often, belief in a correct political stand is accompanied by deep-rooted worry about the negative influence of Western rule of law. Warnings against "infiltration and disruption activities by Western countries," as the president of the Jilin high court put it, suggest wariness about the very idea of public interest litigation (Lam 2008, 3).

Signaling Political Ambivalence

But this is only part of the story. While the authoritarian dilemma over courts and the attendant bureaucratic power struggles tell us much about the origins of ambivalence, neither touches on either how states signal ambivalence or how these signals are interpreted and understood. If pollution cases are less risky than other types of rights-related litigation,⁸⁶ as interviewees claim, how do lawyers and litigants know? What are the signs that environmental complaints either merit special protection or inspire unusual unease?

The clearest signal—visible to nearly everyone I spoke to during my research—is high-level attention to environmental protection, a shift which some scholars see as "the greening of the Chinese state" (Ho and Vermeer 2006).⁸⁷ At the 17th Party Congress in October 2007, President Hu Jintao emphasized ecological civilization (*shengtai wenming*), a catchphrase symbolizing sustainable development. Beyond rhetoric, the NPC elevated the former State Environmental Protection Administration (SEPA) to the Ministry of Environmental Protection (MEP) in March 2008. The highly visible upgrade in status, observers agreed, indicated renewed attention to environmental protection. The MEP now rejects 30% of projects that submit an Environmental Impact Assessment, quite a shift from 1995-2005 when the old SEPA turned down only two projects over ten years (Batson 2007). In addition, MEP's five-year legislative plan (2006-2010) lays out an ambitious agenda for

⁸⁶ See Huang (2006, 155); 2006-3; 2007-8; 2007-53; 2007-90; 2007-91; 2007-97 and 2007-104.

⁸⁷ Many interviewees talked about the greening of the state, especially 2006-7; 2007-11; 2007-17; 2007-53; 2007-59; 2007-62; 2007-68; 2007-75; 2007-86; 2007-103; 2007-108; 2007-116 and 2007-118.

revisions to nearly every major environmental law.⁸⁸ Some laws, like the Law on Prevention and Control of Water Pollution (2008), have already been revised to increase penalties for violations. There are also plans to write a new Environmental Compensation Law as well as new regulations on electromagnetic pollution, an escalating urban concern.

Top-level greening (or at least greenwashing) is a result of both international and domestic pressure. In this post-Olympic era, China is firmly engaged with the world and the CCP derives significant legitimacy from international recognition broadcast back home (Schatz 2006, 270). The need to be seen on the world stage means not only hosting foreign dignitaries, but taking international top agenda items like the environment seriously. Domestically, state environmentalism reflects a considered assessment of the potential for pollution to disrupt long-term growth and stability (2007-116). After major chemical spills along the Tuo and Songhua rivers in 2004 and 2005, over 30 NPC delegates wrote a joint brief pushing for public interest environmental litigation to address the “un-ignorable influence [of industrial accidents] on the construction of a harmonious society” (reprinted in Bie 2007, 449). These high-profile accidents also channeled new resources to cash-strapped EPBs. In Jilin, along the Songhua river, the provincial EPB received new equipment for on-the-spot water analysis to avoid the delay caused by sending samples back to the lab for testing. “It’s ironic,” one EPB official commented, that “we suddenly had status” after a major crisis (*diwei mashang shang lai le*) (2007-68).

High-level attention to the environment has also meant increased interest in environmental law. In 2005, political elites started publicly calling for environmental public interest litigation as one way to fix a situation in which “polluting enterprises are local heroes” (Liang 2005, quoted in Bie 2007, 455). Liang Congjie and Chen Xunru brought up the topic at the Chinese People's Political Consultative Conference (CPPCC), a political advisory body that meets annually at the same time as the NPC, in 2005 and 2006. In addition, a group led by Lü Zhongmei made similar proposals at the 2006 NPC (see Bie 2007, 449-56). Around the same time, academics and journalists also began writing about environmental public interest litigation, particularly the idea that a wider range of groups and individuals should be allowed to bring environmental lawsuits on behalf of the public interest. While legislation has not yet changed—it is still the case that only those directly affected by environmental degradation can bring lawsuits—this debate indicates growing support for the idea that China should “give law greater clout in [the] battle against pollution” (Jiang 2006b). Tentative support for environmental litigation is also visible in key central policy decisions. Most importantly, a 2001 SPC explanation (*jieshi*) shifted the burden of proof to the defendant in pollution cases. SPC “explanations,” which instruct lower courts how to deal with unclear areas of the law, are a clear indication of central judicial preferences and the shift toward favoring claimants was significant. The defendant’s burden of proof was then written into the 2004 solid waste law, an

⁸⁸ State Environmental Protection Agency, “11th Five Year Law Plan on National Environmental Protection Laws and Regulations.” Document on file with the author.

indication that the principle is becoming entrenched (2006-18). Another central policy document, the 2008-2012 five year plan for legal aid, lists environmental protection as a priority area because “places and work units (*danwei*) that harm the masses’ environmental rights” should be held responsible” (Ministry of Justice 2008). By the time I attended the opening of the Hebei environmental rights environmental protection center in June 2007, it had become a ribbon-cutting platitude to say that China “needs lawyers and the law” to protect weak groups and preserve stability.

But these slender signs of encouragement are matched by strong indications of unease. The difficulties discussed in the previous chapter, from getting cases accepted by courts to forcing defendants to pay up, shows the continued emphasis placed on economic growth over environmental protection. Local government cadres are primarily evaluated on economic criteria and, as a result, economic growth usually takes priority.⁸⁹ A major central-led effort to clean up the Chang Jiang (Yangtze River), for example, failed to reduce pollution when local factories began dumping wastewater into Lake Taizi instead (2007-82). As one official from a provincial EPB explained, “we’ll stand in the complainant’s corner if it’s a small company, but not if it’s a big one” (2007-80). Part of the story is a divergence between national and local political goals. Although a raft of new and revised national environmental laws have strengthened standards and increased penalties for violations since 2000 (Van Rooij 2006), they are often subverted by locals officials and communities concerned with making money or maybe just scraping by. Local evasion of central environmental directives merits its own Chinese term, local protectionism (*difang baohu*), frequently evoked as an explanation for China’s environmental problems. National policies, at least according to some local officials, ignore the imperative to maintain a tax base and keep up employment. As one Sichuan township vice mayor put it, “the upper level of government invites you to dinner, but the local government pays the bill” (Tilt 2007, 927).

In the local parlance, environmental litigation is also “a little bit sensitive” because concern over degradation has historically sometimes masked a political agenda. In the 1980s, green movements in Eastern Europe helped overthrow communist regimes in countries including Bulgaria, Poland, Hungary and Czechoslovakia (Jancar-Webster 1998, 73-76; Economy 2004, 249-252). A decade later, Dawson (1996) found that anti-nuclear protests in the former USSR gave local nationalists a way to demand regional self-determination. In China, environmental NGOs and lawyers rarely mention democracy in public because they are only too well aware of official fears that China will follow Eastern Europe.⁹⁰ Despite activists’ caution, environmental lawsuits still lie at the politically sensitive nexus of official

⁸⁹ In September 2008, the central government implemented a new accountability system for 154 leading state-owned enterprises that evaluates managers based on environmental goals as well as profitability. This program may be an initial experiment of cadre evaluation based on environmental criteria.

⁹⁰ There are, of course, exceptions. In an interview with Elizabeth Economy at the Council on Foreign Relations, one activist made an explicit link between democracy and environmental activism: “Environmental work may lead to greater democracy in China. In fact, environmentalism and democracy are related. Many NGO leaders are hesitant to say [this], but I believe that the NGO movements are creating democracy” (Economy 2004, 169).

policies and unofficial power arrangements. Even a seemingly straightforward monetary compensation case can touch on volatile issues like land use policy, urbanization, subsistence and citizen rights. Today, academics and governmental officials lump environmental complaints with other “irregular disputes” (*fei changguixing jiufen*) that reflect “relatively high danger to the society” and “directly or indirectly show confrontation with or revolts against the existing social order” (Gu 2008, 258). Indeed, local regulations governing environmental disputes, as in Shandong province (1994), often lay out a course of action that brings complainants to the courts only when administrative bureaus cannot resolve the problem.

One sign of concern about litigation is the increasing numbers of regulations designed to keep lawyers apolitical and disputes small-scale. In 2005, a SPC notice mandated that all collective lawsuits go through Basic People’s Courts (BPCs), regardless of the size of the claim. Among lawyers, this notice suggested strong political unease over collective action as well as a desire to keep complaint as local as possible. Just a year later, in 2006, the All China Lawyers Association (ACLA) passed new guidelines indicating further disquiet over mass litigation. The guidelines require lawyers in cases with more than ten plaintiffs to seek the local Justice Bureau’s “supervision and guidance;” new reporting requirements that some lawyers see as yet another opportunity for interference (2007-77).⁹¹ Other recent regulations ban contingency fees, effectively limiting legal representation to those who can afford upfront payment (National Development and Reform Commission 2006). And finally, the 2007 amendments to the Law on Lawyers (which some lawyers call the Law to Control Lawyers) bar lawyers from “inciting or abetting parties to engage in disturbing public order, threatening public security, and other illegal methods to resolve grievances.”⁹² In combination, these rules serve as effective boundary markers, warning the risk-adverse majority well away from fractious mass cases, especially those involving the down-and-out.

The early history of the All China Environment Federation’s legal aid department is one indication of how political ambivalence can play out. Shortly after its founding in 2006, the department changed its name from the Center for the Defense of Environmental Rights (*weihu huanjing quanli zhongxin*) to the less strident, less political Environmental Legal Services Bureau (*faliu yuanzhu bu*). Moreover, the political sensitivities surrounding litigation have led to glacial results (2006-10; 2006-12; 2007-75). Despite the paraphernalia of progress, like a legal aid hotline and a lawyer training program, the department won only three cases in its first two years.⁹³ Inertia is politically safe, a common retreat for risk-adverse bureaucrats everywhere. And as experienced newspaper readers know, encouraging headlines—like the 2008

⁹¹ The lawyers’ reports to Justice Bureaus that I’ve read straightforwardly summarize court decisions, media reports and progress in the case to date.

⁹² Carl Minzner trans. Available at <http://tinyurl.com/yge7ttc>

⁹³ This includes cases resolved through mediation as well as litigation. Part of the problem is the generational conflict between young staff members and older Party leadership. The staff, mostly under the age of 30, must procure approval for each significant step in a case and are often frustrated by the slow work pace.

creation of a 10 million RMB (US 1.4 million) Ecological Protection Legal Aid Fund—may or may not signal deep-rooted commitment (Wang 2008).

Reflecting Ambivalence: A Kaleidoscope of Frames

In addition to the catalogue of contradictory signals detailed in the preceding section, one of the clearest ways to see political ambivalence is by looking how citizens justify demands on the state. Savvy citizens everywhere are adept at framing claims in ways that they think will win government allies or at least lessen official resistance. Unpacking what claimants think officials want to hear not only illuminates the experience of everyday politics, but also tells us much about which state signals are received and how they are interpreted. Here, my best data comes from the 2007 dispute over extending the magnetic-levitation (maglev) train from Shanghai to Hangzhou (also see Appendix B).

Although Shanghai residents heard rumors about a new maglev train as early as 2006, they were not officially notified until just before Chinese New Year 2007. The initial ‘Notice of Demolition and Resettlement’ posted around the affected neighborhood was vague, but an investigation revealed that the Shanghai-Hangzhou line would pass within 22.5 meters of the community without any plans to demolish the building or compensate the residents (Qian 2007, 64-65). In March 2007, the communities closest to the proposed extension began complaining, first by petitioning the government and reaching out to the media, and then in a series of protests outside the district and municipal governments. From February to May 2007, a four-month period during which I made several trips to Shanghai, residents expressed an extraordinary range of complaints and justifications.

Most residents, at least to start, were primarily concerned about compensation and relocation (Qian 2007; Faehnders 2007; 2007-88). Many residents—as many as 95% in one community—owned their apartments, a major asset in post-real estate boom Shanghai (2007-44; 2007-45). In one community, homes appreciated from 3,000 RMB per square meter in 1999 to 10,000 RMB in 2007 (2007-45). Residents feared that the maglev train would depress property prices and that they wouldn’t be able to afford to move. In another community, I heard complaints that apartments worth 8,000 RMB per square meter before the maglev plan would now have trouble selling for 5,000 RMB (2007-44). One BBS post compared the news about the maglev to the stock market crashing overnight (2/26/07, 22.24). At the same time, however, residents were also sincerely worried about pollution and radiation. “What have we bought?” one letter to Premier Wen Jiabao asked rhetorically, “we’ve bought electronic radiation!!!...We’ve bought a future where women may not be able to have children. We’ve bought the danger of birth deformities and a life of severe pollution for our kids!!!” (Petition to the NPC 2007). Under the umbrella of “upholding the right to environmental protection” (*huanbao weiquan*), residents also talked about worsening pollution and the desire not “to leave the environment in such bad shape for the next generation” (Jinhong Xiaoqu 2007; 2007-88; 2007-46).

Above all, residents neither subscribed to a single understanding of the problem nor solution and different strands of understanding surfaced in different

places and times. Often, for example, materialist and environmental concerns mixed in a single document or even sentence. One letter to the NPC closes with the concern that “old people can’t peacefully enjoy their twilight years, children can’t grow up healthy and young people will carry debt on a small apartment for their whole life because of property devaluation caused by the maglev” (Shenchang Yuan Xiaoqu 2007). In a place where political slogans are part of the everyday fabric of life, catch phrases like “harmonious society” (*hexie shehui*) and “putting people first” (*yi ren wei ben*) cut across almost every forum. Regardless of their core complaint, residents were keen to cast their opposition as a form of what Kevin O’Brien and Lianjiang Li call “rightful resistance,” (2006), a “critique within the hegemony” seeking limited redress rather than deep political change (Scott 1990, 106).⁹⁴ “We are peaceful, law-abiding citizens,” residents explained, “we just want to live in peace and contentment” (Letter to Wen Jiabao 2007). At another point, activists considered printing “oppose the maglev” (*fandui cixuanfu*) t-shirts, a motto which they saw as a carefully calibrated expression of opposition to a construction project rather than the government itself (2007-88).

Cloaking themselves in loyalty, residents portrayed themselves not as privileged Shanghai homeowners demanding money, but as the Chinese salt of the earth “earnestly requesting” justice (Letter to Wen Jiabao 2007). One letter to Premier Wen asked plaintively, “who will take care of us common people?” (2007). One of the anti-maglev community organizers even named his blog “Puxi Peasant” (*Puxi Nongmin*), a strategic choice of class identity considering that he could afford to spend several thousand RMB of his own money on anti-maglev activism. As loyal, rational citizens, the Shanghai residents also did their best to bury government opposition under mounds of information. One community put together a Powerpoint slideshow which references eighteen government documents residents consulted in making their claims. “This is the internet age,” as one organizer told me, and much of the scientific data on the dangers of noise and electromagnetic radiation also came from online English language journals (2007-88). One letter to the NPC, for example, cited articles from *Nature* and an American publication on noise (*Meiguo Shengxuehui Zazhi*). Collecting materials and inviting expert opinions, one activist told me, was not only an effective strategy but the best way to handle similar future disputes (2007-88).

In their petitions, residents held government not only to domestic law and commitments, but to the unspoken promise that modern China can and should be held to the same standard as the rest of the world. Maglev trains elsewhere, residents pointed out, do not run through residential neighborhoods. In fact, Germany (the country with the most developed maglev technology) requires a 500m safety zone

⁹⁴ One of the most interesting aspects of my interviews was residents’ refusal to see similarities between their situation and other conflicts over land use, like the Chongqing nail house incident and the Hong Kong-Shenzhen highway dispute. In part, residents were uninterested anything other than their particular grievance. I suspect, however, that there was also a semi-conscious refusal to knit together anything that could be construed as a cross-territorial (or cross-class) protest. (On the dangers of cross-class and cross-territorial expressions of protest, see Perry 2001).

around train tracks (Qian 2007, 66). But international standards were not just a calculated source of leverage. Awareness of international experience also intensified feelings of bitterness and deprivation. In the end, Shanghai residents stood up to the state not only to protect their property, but in pursuit of international standards of safety, health and access to information. “We are citizens of the People’s Republic of China,” residents wrote, “raising both hands to build the nation...but this doesn’t mean we’ll support lack of transparency about technology or people’s lives” (Letter to Wen Jiabao). “Why is there a different international standard?” another resident asked, “Chinese people shouldn’t look down on themselves” (*xiaokan ziji*) (2007-45). Finally, a netizen made the comparison explicit: “this kind of high-tech wouldn’t be used lightly in Europe or America” (BBS 3/30/2007, 20.02).

It is difficult to organize thousands of people and perhaps not surprising that residents didn’t necessary agree either on the core problem (lack of transparency, inadequate compensation, environmental harm) or the solution. Still, the range of frames used to justify demands shows more than the routine difficulty of keeping participants on message. The kaleidoscope of justification reflects the experience of political ambivalence, especially the murkiness of government decision-making. Much like Sinologists, Chinese citizens can’t necessarily see inside the black box of the state. In the end, they deployed every argument in the book, including environmental rights, modernity and the duty of the state towards the masses, in the hopes that something would resonate inside an opaque government.

Coping With Ambivalence: Everyday Control

Looking at the state as reflected in society, as in the Shanghai maglev dispute, highlights the degree to which long-term political ambivalence is a sustained balancing act. Cagney resuscitation of conflicting promises (some long-forgotten or perhaps only vaguely implied) requires leaders to both solve the immediate dispute and remind potential challengers of Party primacy. In law, the potential political threat is particularly acute. While China aspires to predictable, efficient law, like Singapore or other illiberal states, there is always a danger that courts will support complaints against the regime. So how does China, or any authoritarian state, keep the legal system in line? How can Shanghai mayor Han Zheng tell anti-maglev protestors “we welcome citizens to voice complaints through legal channels” and, should they take him at his word, keep litigation from launching a broader political challenge? (Xinhua 2008)

Looking outside of China for comparative perspective, crisis tactics are one common solution to this dilemma. When courts threaten political power, leaders often intervene to reverse key decisions or reorganize the judiciary (Tate 1991, 319). After the 1980 *Ong Ah Chuan* decision released several dissidents from prison, for example, the Singapore government passed constitutional amendments limiting judicial review over similar cases in the future and abolishing almost all avenues of appeal for those arrested under the Internal Security Act (Silverstein 2003). Or when Supreme Court decisions started impinging on Zimbabwe President Robert Mugabe’s political

priorities in 2001, he replaced the chief justice and added another three judges (Widner and Scher 2008, 249-51). Another crisis option is special government orders to limit judicial review of certain rules or cases (Tate 1991, 318). Either way, there is usually little official attempt to cloak these heavy-handed tactics in the language of the law. The crisis is averted, but at the cost of credible commitment to legalization. This may be expedient, but it also makes the government look bad and can scare away foreign investment. As a result, confrontation coupled with direct interference is usually a last resort. Day to day, the “steady pressure” of subtler forms of everyday control keeps authoritarian legal systems in check (Scott 1985, 274).

Many accounts of everyday control focus on judges and courts, particularly the indoctrination and incentives designed to ensure that judicial decisions reflect state interests (Moustafa 2007, 46-50; Hilbink 2007). In China, this matters too. The vast majority of judges are CCP members and all judges are appointed and approved by the state (Landry 2008, 209). Once on the bench, SPC directives and policy statements help judges read key political priorities.⁹⁵ Poor decisions (*cuo an*), reversed on appeal and judged wrong by court administrators, can lead to fines, demotion and transfer (2007-74).⁹⁶ In addition, highly political cases are sometimes shunted into special tribunals and courts staffed by the reliably faithful. China, like Franco’s Spain, has separate military courts to hear treason and espionage cases (Toharia 1975; see also Moustafa 2007, 50-52; Tate 1991, 319).⁹⁷ A fragmented court system, as others have noted, shines the government’s image by preserving the appearance (if not the reality) of independent justice (Toharia 1975, 495).

In many places, everyday control over courts also means close government attention to lawyers. Often, violence and intimidation coerce lawyers to drop individual cases and abandon networks capable of “deliberate, strategic and repeated litigation campaigns” (Moustafa 2007, 54; see also Widner and Scher 2008, 235). Indeed, in mid-2000s China, well-known political lawyers like Gao Zhisheng and Chen Guangcheng were routinely harassed, interrogated and imprisoned (Human Rights Watch 2008, 32-51; Fu 2006). At the same time, however, most of China’s 153,000 lawyers never experience this kind of “hard-line social control” (Fernandez 2009, 8). As Chinese academics acknowledge (Gu 2008, 285), the triad of state coercion—administrative punishment, imprisonment and violence—runs the risk of radicalization. Even states with a strong police presence are capable of less obtrusive measures to discourage contention before it starts and, along these lines, regulation is one of the most important tools keeping Chinese lawyers in check. Starting in 2002, passing the national judicial exam became a pre-requisite for a lawyers’ license. The test is abysmally hard to pass (less than 10% of applicants succeed), not least because government monitors the pass rate to control the number of lawyers. From 1981 to 2004, lawyer rolls increased an average of just 13.1% per year, despite the growing financial appeal of the profession (Zhu 2007, 340). In addition to a license, renewed yearly by the Justice Bureau, lawyers must also join the local lawyers’ association and

⁹⁵ On the importance of policy directives in the former USSR, see Solomon 2008 (268).

⁹⁶ For more on “wrong cases,” see chapter 3.

⁹⁷ Military court cases are subject to SPC review.

retain employment at a registered law firm in order to practice. These three requirements, especially yearly license renewal, gives officials a great deal of leverage. “The first warning,” one Shanghai lawyer explained, “is that someone at the Judicial Bureau will give you a simple phone call to invite you to ‘have a chat’” (quoted in Human Rights Watch 2008, 87). The next step is “making trouble” (*zhao mafan*) for recalcitrant lawyers. As two Beijing lawyers I met during my fieldwork discovered, intransigence can lead to delayed license renewal (2007-97) and pressure on law firms to find a new employee (2007-51). In addition, lawyers, like all citizens, are also subject to broad state secrets laws that can be deployed against the truly recalcitrant (Peerenboom 2002, 351).

Overall, China’s legal controls seek a delicate balance between allowing litigation and controlling individuals. Lawsuits can serve official goals, as long as everyone in the courtroom behaves like a servant of the state. Loyal lawyers, as Chinese academics point out, can help clients see the government’s perspective and drop irrational demands (Gu 2008, 292). Even Hu Jintao says that “strengthening lawyers’ ranks” can combat corruption and facilitate law enforcement (Li 2004). Indeed, just as the desire to bend the legal system to official ends opens a crack of political space, belief in the utility of lawyers lends the profession a degree of freedom. Lawyers and observers agree that control is “ad hoc, reactive and not omnipresent” and lawyers are generally left alone (Fu 2006, 19). The 2006 ACLA guidelines on mass cases look restrictive, but at least some lawyers report paying little attention in practice (2007-14). At least in Beijing, one lawyer explained, the Justice Bureau simply “can’t keep track of all [11,565] of us” (2007-91).

Conclusion

Looking at environmental litigation from above, from the state’s point of view, highlights the instability inherent to ambivalence. Cross-cutting values are not glossed over, or mediated down the middle, but expressed in different and contradictory ways. The status quo is not the sluggish result of inertia, but of ever-shifting signals and misfires up and down the chain of command. Now turning firmly from state to society, the next three chapters chronicle how legal professionals cope with the ground-level ambiguity generated by political ambivalence. Without clear, unified signals, it is often hard to be certain where the boundaries of political tolerance lie. At the same time, however, the state’s multivocality on environmental litigation opens up a degree of autonomy to interpret state priorities and even make decisions based on personal values. Our story begins inside the state, with the judges on the frontlines responsible for making decisions in environmental lawsuits.

Chapter 3

On the Frontlines: The Judges

Up on the commanding heights, at the pinnacle of the state, China's top leaders agree that law should serve the Chinese Communist Party (CCP).⁹⁸ Down in the trenches, at the frontlines of decision-making, Chinese judges in civil environmental cases decipher this dictum and attempt to diffuse local discontent.⁹⁹ But why do judges make the decisions they do? This chapter looks at legal decisions (*panjueshu*) as a window onto how political ambivalence over courts shapes judges' political logic. Amid increasing official rhetoric about public participation (*gongzhong canyu*), lifting up the poor and abating pollution, it is an open question how judges interpret competing state signals. Which goals are implemented and which are quietly abandoned depends a great deal on judicial decision-making, particularly how closely judges hew to the law or exercise autonomy in making determinations.

This chapter draws on forty-two decisions in pollution compensation disputes (*huanjing wuran sunhai peichang jiufen*) from 2000-2007.¹⁰⁰ Chinese legal decisions are not necessarily public documents and this selection, downloaded from a Beijing-based legal database, is almost certainly not a random sample. In particular, conversations with database employees lead me to believe that this database has too many cases involving major losses, especially from rich areas of the country, and rather too few class actions. Still, even if not representative, the cases recounted below illustrate how judges think about pollution disputes and the kinds of solutions they deem appropriate. Both Western and Chinese socio-legal research on Chinese courts rarely looks carefully at decisions, probably because they are largely seen as uninformative, pro forma recitations of the facts (Zhang 2003, 88). Yet legal decisions are getting more interesting. In 2005, the Supreme People's Court (SPC) issued a notice telling lower level courts that written decisions should include legal reasoning (Liebman 2007, 626).¹⁰¹ In my sample, this is clearly starting to happen.

⁹⁸ For a typical example, see former Politburo Standing Committee member Luo Gan's 2006 speech: "There is no question about where legal departments should stand. The correct political stand is where the party stands" (quoted in Kahn 2007).

⁹⁹ The image of the commanding heights of leadership and the trenches of political decision-making comes from Migdal and his anthropology of the state (2001, 116-124). Environmental inspectors, of course, interact daily with polluters and are also on the frontlines of environmental protection in a different way.

¹⁰⁰ This sample of decisions comes from the database *Beida Fayi* (<http://www.lawyee.net>). In December 2007, my research assistant downloaded all cases from 2000-2007 containing the search terms "environment" (*huanjing*) or "pollution" (*wuran*). I discarded three decisions because they lacked basic information about the facts of the case, which left me with forty-two decisions. An independent company since 2003, *Beida Fayi* is one of several national legal databases aiming to become China's version of LexusNexis or Westlaw. Many of the cases on *Beida Fayi* are publicly available—either published on the internet or in case compendiums compiled by courts and publishers—although the database also obtains some decisions through "cooperative relationships" (*hezuo guanxi*) with individual courts. Courts sometimes publish decisions online or through a court publishing house because they have reference value (*cankao de zuoyong*) as correct applications of the law in typical (*dianxing*) cases.

¹⁰¹ On how legal decisions are getting longer and better, also see Peerenboom (2002, 287).

Three pages, the average length of the decisions I examined, is long enough to at least hint at the court's concerns and rationale. While these opinions do not offer groundbreaking legal insight (judges sit on an average of forty two cases per year and primarily focus on clarity and brevity),¹⁰² they reflect, to borrow Martin Shapiro's phrase, "the popular element" in judging (1981, 56). Even courts in single party states are often compelled to offer public justification, however glancing, for their actions.

My starting point in analyzing these decisions is a typology based on two key elements of judicial decision-making in one party states: 1) the degree of *legal formality* (how closely judges adhere to the letter of the law) and 2) *individual autonomy* (judges' power to make decisions based on their personal view of the law or sense of justice). Thinking along these two dimensions highlights variation in judicial strategy. While Chinese judges typically comply with clear political instructions regardless of the legal merits, a combination of shifting incentives, uneven application of the law and political ambivalence produce a degree of de facto discretion, especially in low profile, run of the mill cases. Most of the cases in my sample deal with exactly this kind of everyday justice. While researchers tend to focus on high courts¹⁰³ and landmark cases¹⁰⁴ rather than the trudge of low level judicial work (Kapiszweski and Taylor 2008, 755), judges are the "assembly line workers" responsible for negotiating competing state goals and fashioning locally acceptable bargains (Zhao 2008). As others have found (Kapiszweski and Taylor 2008, 745; Liebman 2007, 637), rulings in mundane cases can also display real legal creativity. Everyday pollution disputes show innovation at the margins as courts occasionally offer new legal interpretations or validate new types of claims. Day to day, Chinese judges arbitrate between citizen grievances and state goals and slowly re-shape the practice of environmental law.

Two Dimensions of Judicial Decision-Making in One Party States

Looking at Chinese judges as strategic actors provides entry into a broader conversation about judicial politics in illiberal states (Toharia 1975; Silverstein 2003; Popova 2006; Hilbink 2007; Moustafa 2007; Ginsburg and Moustafa 2008). In America, there is an active debate about when and whether judges strictly follow the law, vote their convictions or strategically nudge along policy change (Baum 2006, 5-6). In strong single party states, however, less attention has been paid to judges'

¹⁰² Some courts are much busier. A *Southern Weekend* profile of one of China's busiest courts reported a case load of 7,540 cases split among 13 judges (Zhao 2008). Under these circumstances, one judge explained, if a decision "explains the case clearly, you can write it succinctly and that's fine" (Zhao 2008). American judges face similar pressure to get decisions out fast. Patricia Wald, a judge for the District of Columbia Court of Appeals, writes that "thinking great thoughts is...out...final opinions will usually be committee products with all the obstacles to virtuoso performance that entails" (1992, 178).

¹⁰³ Constitutional courts have attracted an especially great deal of attention (e.g. Klug 2000; Jacobsohn 2003; Ginsberg 2003; Hirschl 2008).

¹⁰⁴ For in-depth examinations of groundbreaking Chinese cases, see Shen (2003), Hand (2006), and Kellogg (2007).

choices.¹⁰⁵ Researchers often assume that, as in Pinochet's Chile, judges uphold the status quo because institutional incentives effectively bind their interests to the Party's (Hilbink 2007). This conventional wisdom, although often correct in broad outline, overlooks variation in the dynamics of decision-making. Even when law serves the state, the degree of extra-legal interference and judicial attention to legal texts depends on regime, court and type of case.

Two aspects of judicial decision-making are particularly helpful in understanding this variation. The first dimension is judges' degree of *individual autonomy*. In short, who decides cases: individual judges or political elites?¹⁰⁶ While a bench of three judges typically hears civil cases in Chinese courts, there is no guarantee that the judges who try the case will decide it.¹⁰⁷ Important cases are often decided by the court adjudication committee (*shenpan weiyuanhui*), comprised of top court officials appointed by the local people's congress and approved by the CCP (Zhu 2007, 177). Courts are also officially under the supervision of the political-legal committee of the local branch of CCP and particular cases can elicit a meeting and instructions. But the demands of scale dictate that this kind of "telephone justice" is reserved for the most high profile, politically sensitive cases. Chinese courts handle hundreds of thousands of civil cases each year (4.7 million in 2004) and only a small percentage is important enough to warrant external attention (Zhu 2007, 205). Observers suggest that criminal cases are most likely to trigger intervention from political-legal committee, especially when government bureaus disagree (Yu 2009, 63). Judges, at least in most everyday civil cases, are quietly left to the day-to-day work of hearing cases and making decisions.

The second dimension is adherence to the law, or what law scholars call legal formality. At one extreme, judges apply the letter of the law without consideration for consequences or extenuating circumstances. At the other extreme, laws and regulations give way to wide ranging judicial discretion. Lower court judges are particularly likely to engage in this kind of informal problem solving to maintain local harmony (Coates 1968; Nader 1990). Keeping both sides happy, even if it means bending the law, makes intuitive sense to local judges concerned with avoiding further conflict and maintaining judicial prestige. As one Australian chief magistrate explained, "it's 80 percent dealing with people [and] twenty percent law" (Roach Anleu and Mack 2007, 191).

Conceptually, both dimensions are a continuum with room for intermediate positions between the two poles. In particular, political elites are capable of influencing individual cases through signaling that stops far short of an official meeting or phone call. When law is officially subordinated to the state, Party values permeate courts and judges tend to think like apparatchiks. Directions are usually

¹⁰⁵ For exceptions, see Ai (2008) and He (2009).

¹⁰⁶ Talking about "political elites" rather than "the Party" leaves room for the very real possibility of intra-Party disagreement. The CCP is not a monolithic united front, but a collection of bureaucracies, factions and individuals.

¹⁰⁷ Minor cases are heard by one judge.

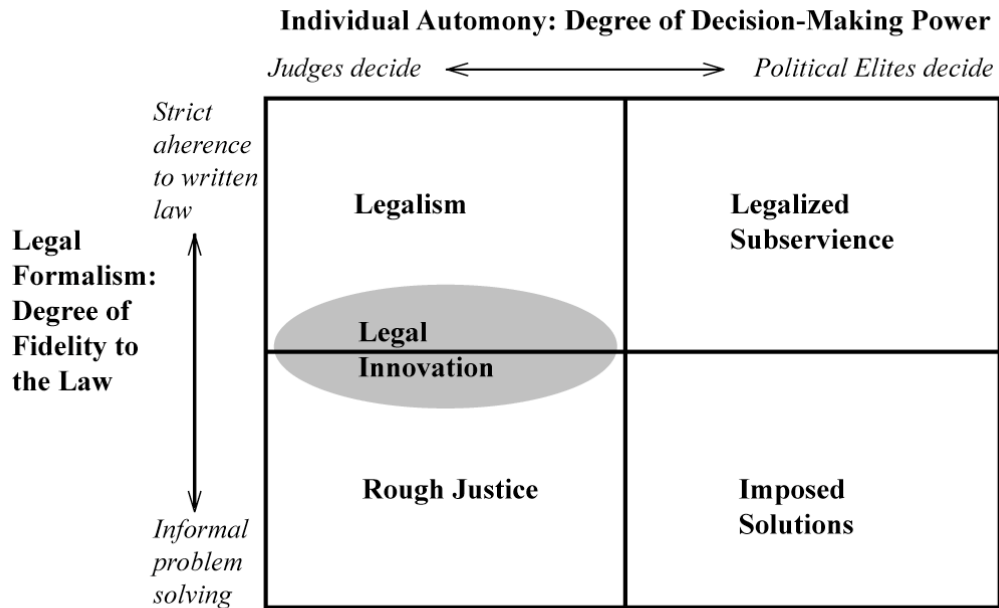
unnecessary when the vast majority of judges are CCP members¹⁰⁸ and all judges are well-steeped in Party priorities. This is true in many large organizations: even absent specific instructions, general announcements, rumors and common sense give workers a good idea of what bosses want. In investigating the 1986 Challenger explosion, for example, U.S. physicist Richard Feynman concluded that President Ronald Regan had not rushed the space shuttle launch to coincide with his annual State of the Union address. Rather, as Feynman writes, “the people in a big system like NASA *know* what has to be done—*without* being told” (1988, 217).¹⁰⁹

Plotting these two dimensions against each other yields a useful typology of judicial decision-making in one party states:

¹⁰⁸ While I have never seen official numbers on the percent of judges that are Party members, small-n surveys by Chinese researchers suggest that at least 80% of judges belong to the CCP. In a 1997 article, Jerry Cohen also estimates based on personal interviews that more than 90% of judges are CCP members (797).

¹⁰⁹ Otto Ulc makes a similar observation about courts in 1950s Czechoslovakia: “In about ninety percent of the court agenda, there was not the slightest sign of interference in our decision-making...But the sorry experience with the remaining ten percent and the awareness that someone might at any time inflict his ‘suggestion’ upon us, conditioned *all* our adjudication” (1972, 61).

Figure 1: Judicial Decision-Making in One Party States



Legalism, in the upper left corner, is what Nonet and Selznick call “autonomous law” (1971). This is a “model of rules” that values procedure, regularity and fairness where judges are constrained by statutes and precedents (Nonet and Selznick 1971, 53). In illiberal states, the combination of scrupulous attention to the law and judicial autonomy produces a system like apartheid South Africa (Chaskalson 2003) or Pinochet’s Chile (Hilbink 2007). Taboos against political behavior, as Hilbink observed in Chile (2007, 37), or a culture of legal positivism compel adherence to the law, moderated by a small amount of discretion that is both legally permissible and politically tolerated. Laws leave judges some room for personal judgment, perhaps in their interpretation of the law or the penalties associated with breaking it. Apartheid-era judges, for example, sentenced Nelson Mandela to life in prison rather than death, a flash of clemency that changed the course of South African history (Chaskalson 2003).

In the upper right corner, which I call legalized subservience, political goals are written into highly specific laws that leave judges little room to maneuver. In East Germany, for example, “innumerable instructions, analyses, inspections and consultations” helped judges “find the politically correct solutions to social ills whose diagnosis and remedy usually had already been prescribed by the Party” (Markovits 1996, 2293). This kind of legal specificity is an especially common way to deal with political dissent, through Nuremberg-like laws that identify, target and punish enemies of the regime. Even the most illiberal regimes are image conscious and legalized subservience obscures repression with flawlessly legal language. Sometimes, one

party states also shunt highly political cases into subservient tribunals while allowing judicial autonomy in ordinary cases. Franco's Spain, as Toharia (1975) points out, preserved the appearance (if not the reality) of independent justice through separate military courts targeted at subversion.

When judges diverge from the law, in the bottom half of the typology, decisions are likely to either protect the influential or feature a compromise. In the lower left box, termed rough justice, relatively independent judges forge informal solutions. Sometimes, outright corruption or social pressure (*guanxi*) induce judges to take a side. Absent a personal interest in the outcome, however, Shapiro's logic of the triad mediates towards compromise (1981). The need to convince losers that both the outcome and the process were fair points many judges toward the Zapotec Indian conclusion that "a bad compromise is better than a good fight" (quoted in Nader 1990, 1).

Still, whenever top cadres make their interests known, the reality of a Party-subordinate legal system pushes most judges toward the safety of the lower right box and an imposed solution. As one judge recalled an instance of strategic retreat, "the president addressed me at the very beginning of this lawsuit, saying 'the Environmental Protection Bureau (EPB) acted groundlessly; you have to pay close attention in handling this case'" (Zhang 2008, 146). Imposed solutions means that everyone from old school chums to state-owned enterprises can negotiate special legal treatment, provided, of course, leaders prove willing to extend themselves.

The zone of legal innovation, in which judges push and expand the boundaries of the law, lies halfway between rough justice and legalism and overlaps both. In well-established, independent legal systems, legal creativity often corresponds to what Nonet and Selznick call responsive law. Judges base decisions not just on a legalistic reading of rules, but on substantive concerns about justice. Law is flexible, political and potentially unstable because judicial interpretation offers a way to change the very substance of the law itself (1978, 78). Yet legal creativity is deeper and harder than responsive law. A close reading of Chinese civil environmental cases shows a dollop of innovation where we would least expect to see it: in a one party state inculcated in a civil law tradition of judges as "expert clerk[s]" (Merryman 1985, 36). Even in relatively inhospitable environments, there can be room for new inferences and interpretations.

Beyond my particular case, these four ideal types of judicial logic highlight the shifting pressures on judges in illiberal states. Legal systems may not fit neatly into one box because justice varies not only between countries but also within them. Particularly in large decentralized court systems, judges' individual autonomy and the degree of formalism differ locally. Just as environmental enforcement depends on local circumstances, so too does judicial logic and outcomes. In addition, judges' strategy may shift with the type of case. Certainly parallel courts for political sensitive cases—what Moustafa and Ginsburg call a "fragmented court system" (2008, 17)—show a different approach to judicial decisions than their mainstream counterparts.

More immediately, these two dimensions offer a precise way to discuss the dynamics of decision-making in civil environmental cases. As discussed below, my

sample of forty-two cases feature low legal formality and fluctuating autonomy from external pressure. Most of the cases fall under the rubric of rough justice, although imposed solutions are also possible when political elites make a clear preference known.

Fluctuating Autonomy

Judicial choice is hard to see (and even harder to study) because it is frequently concealed. Judges disguise discretion in authoritative decisions “written to look like a standard drill in legal reasoning” (Amsterdam and Butler 2000, 202). The goal is not to debate the law, but to dispel doubt and dissuade appeal. Yet, contrary to the conventional image of Chinese judges as bureaucratic automatons, pollution lawsuits suggest that judges exercise a fluctuating degree of autonomy. In addition to practical issues (e.g. the fact that political elites cannot possibly weigh in on every decision), discretion stems from uneven application of the law, legal silences and the ambivalence of underlying political goals. Uncertainty about both legal principles and state priorities, in short, lends judges the political and legal cover to plausibly defend whatever decision they see fit.

Legally, civil environmental cases hinge on two points: First, the Environmental Protection Law, a 1991 EPB circular and State Council regulations agree that polluters must pay pollution victims even if discharge meets government standards (Wang 2005, 195). Second, the 2008 Water Pollution Law, the 2004 Solid Waste law and a 2001 SPC explanation (*jieshi*) shift the burden of proof such that *defendants* are responsible for proving that pollution did *not* cause losses. This latter point is particularly important for pollution victims looking for compensation. Environmental cases turn on causation and it is notoriously difficult to prove (or deny) a connection between pollution and harm.

In practice, my set of decisions—almost certainly publicly released because court leaders thought the law was correctly applied and the case merits reference¹¹⁰—show widespread confusion on both counts. Several courts imposed a litmus test whereby the illegality of emissions is a pre-requisite for court-mandated compensation¹¹¹ and many more did not reverse the burden of proof.¹¹² Judges, perhaps unaccustomed to pollution cases and unfamiliar with environmental laws, tend to default to the General Principles of the Civil Law. The General Principles, which should be trumped by more specific environmental regulations, limit liability to polluters who do not comply with environmental standards and operate according to

¹¹⁰ Releasing legal decisions to national databases almost certainly requires the approval of court leaders unwilling to harm the court’s reputation by publishing decisions that they know to be wrong.

¹¹¹ As the Shanxi high court wrote in 2000, “pollution within government standards does not give rise to civil responsibility” (*Qinghianren Village Committee v. Shanxi Luchang*, Civil Division No. 6). See also *Zhang Wenjian v. Deng Guoqiang*, Beijing Second Intermediate Court, No. 9040 (2004). All decisions on file with the author.

¹¹² Again, this is striking because I would expect this sample to reflect national best practices. For examples of decisions that *do* reference the 2002 SPC explanation, see *Liaohai Youtian Liaohai Jituan Youxian Gongsì v. Xu Kean*, Liaoning Liaohai Youtian Intermediate Court, No. 2 (2003); *Yuan Wei Shipin Gongsì v. Lu Kaiwen*, Anhui Bangbu City Intermediate Court, No. 285 (2005).

the logic of “whoever claims it, proves it.” This gap between national laws and local implementation is not surprising, but the key point is that irregular application of the law gives judges a degree of freedom to diverge from it. Absent a uniform understanding of basic legal principles, ignorance becomes a credible (and quasi-acceptable) defense for questioned decisions.

The deeper source of discretion, however, is the silence of the law surrounding evidence. Evidence is scarce, both because state of the art environmental testing is rare and because collecting the data that does exist is hard.¹¹³ Judges are responsible for investigating the unclear aspects of a case, but many lack the time or desire to do a good job (2007-55; 2007-103). One significant problem is that soliciting evidence frequently requires wheedling reports out of bureaucrats with little incentive to cooperate. One conscientious Tianjin judge made three trips to the EPB to obtain pollution data, succeeding only after he went drinking with local officials (2007-74). Other judges see gathering more evidence as a liability because simple facts and short decisions are easier to defend on appeal (Upham 2005, 1696).

In addition, judges lack guidelines about how to use the evidence they have. In one typical case, Ye Hanjia and his family sued a Guangdong chemical company for 950,000 RMB (US 139,700) for medical expenses, after he lost work time and suffered emotional distress from poisoning caused by a chemical spill.¹¹⁴ Ye and his family presented medical records (from both directly after the accident and about nine months later) as well as photos of the scene as evidence. The defendant supplemented this with: 1) a copy of their operation permit; 2) a public health bureau report stating there were no illegal emissions three months after the accident; 3) a pollution control center statement that Ye’s family no longer exhibited symptoms of poisoning several months post-accident; and 4) a copy of the initial compensation agreement with Ye. There were no epidemiology reports, competing opinions from groundwater experts or even pollution data from the day of the accident. The Dongwan judges, in other words, lacked information about the two most important facts of the case: the severity of the spill and the cause of the Ye family’s original illness. Much like 19th century magistrates, they simply had to decide whose evidence to believe and what was fair.

Finally, the diversity of CCP political goals offers judges flexibility in resolving cases. Sometimes, of course, powerful polluters—maybe major taxpayers or historic state-owned enterprises—leverage political connections to fix decisions. When dealing with the less powerful, however, the political logic is complicated. Economic growth is always a top CCP priority, but, as discussed in chapter 2, there is increasing recognition that environmental protection matters too. Above all, leaders are concerned about unrest inspired by pollution. In 2006, pollution-related mass incidents (the officially sanctioned term for protest) were rising 29% annually (Pan 2006). For judges, pollution disputes mean navigating varied and conflicting state objectives including economic growth, social stability and the protection of vulnerable groups. As anthropologist Anna Lora-Wainwright observed in a Sichuan village, “the

¹¹³ Nor is testimony from witnesses especially common. See Liu (2009, 205) on reluctance to testify in court.

¹¹⁴ *Ye Hanjia v. Ruidefeng Gongsi*, Guangdong Dongwan Intermediate Court, No. 219 (2001).

clashing targets put forward by the central state itself pose a challenge to local cadres' ability to implement central directives" (2009, 62). The government's interest is genuinely complex, sometimes allowing judges room for their own interpretation.

On the ground, it is not always easy for judges to read the political winds. The local government's "tolerance interval," to borrow Epstein, Knight and Shvetsova's term, is hazy, especially when cases touch on multiple goals (2001). As a result, judges afraid of getting it wrong routinely solicit ideas from other judges in the same division (2007-55) senior judges (2006-6), Party committees (Zhu 2007, 183) or higher level courts (Liu 2006, 93-4) on how to handle tough cases. Even SPC judges in Beijing receive occasional requests for advice from judges nervous about environmental cases (2007-84; 2007-85). Often, the advice is as much political as legal. Top court officials are political appointees (vetted by the Party committee of the local government and approved by the local people's congress) who are trusted to transmit Party priorities.¹¹⁵ As some environmental decisions openly note,¹¹⁶ the most important cases are not decided by the judges present at the hearing, but by an adjudication committee of senior judges and court officials.¹¹⁷

From a systemic perspective, however, giving advice is a time-consuming burden for higher level courts already struggling to manage their own case load. In the mid-2000s, SPC documents and public statements began signaling that judges should only ask for advice in influential cases or cases where there is a dispute about the law (Zhu 2007, 183). Requiring decisions to be made locally, of course, lends local judges de facto power to weigh conflicting government priorities. In response, judges sometimes choose to prioritize moral imperatives over economic ones. Judges talk about feeling responsible for the down-and-out masses (*laobaixing*), occasionally showing visible sympathy for the vulnerable (2007-74; 2007-57; see also Gu 2008, 273). At times, the new national emphasis on environmental protection also surfaces in lower court decisions. As one Guangdong court wrote:

environmental protection is a basic national policy (*jiben guoce*) because behavior that infringes on environmental rights not only endangers our health and living environment, it also causes incalculable harm to the environment of future generations.¹¹⁸

¹¹⁵ The court president (*yuan zhang*) is elected and dismissed by the relevant people's congress. The vice-president, division heads (*ting zhang*) and assistant division heads (*fu ting zhang*) are appointed and dismissed by the standing committee of the people's congress (Zhu 2007, 177). The Party committee of the local government must approve all names before they are submitted to the people's congress for approval (Zhu 2007, 179). For more on the importance of court officials, see Peerenboom (2002, 281 and 284-5), Liu (2006, 93) and Liebman (2007, 627).

¹¹⁶ *62 families from Damengwu Village v. Lianhe Xian Yuantong Liuhuangchang*, Yunnan Lianhe County Court, Civil Division, No. 51 (2005).

¹¹⁷ For more on adjudication committees, see Upham (2005, 1682). While no official statistics are available, the committee reportedly hears less than one percent of all cases.

¹¹⁸ Guangzhou Basic Level Court, quoted in *Guangzhou Poya Dengshi Zhizao Youxian Gongsi v. Xie Zantian*, Guangdong Guangzhou Intermediate Court, Civil Division No. 1770 (2005).

In a far-flung, deeply political court system, this limited degree of judicial autonomy varies. Disputes between citizens, such as noise complaints, rarely trigger the same kind of external pressure as high-profile, politicized cases. While it's difficult to discern the exact tipping point when cases become politically sensitive, judges clearly spend most of their time handling the commonplace. Here, as He (2009) notes in his work on divorce disputes, judicial discretion depends on the court (see also Liebman 2007, 632). Just as resources and legal knowledge accumulate in some courts more than in others (He 2007), some judges have more autonomy than others. In research on three Sichuan courts, for example, Lan (2008) found a wide range of judicial decision-making power in criminal cases. Depending on the court, judges (rather than higher court officials or the court adjudication committee) made decisions 89%, 68% or 0% of the time.

In large part, the degree of discretion depends on the local specifics of judicial evaluation. Courts issue yearly indicators of decision-making quality (*shenpan zhiliang pinggu zhibiao*), which include the number of appeals, complaints and retrials (Ai 2008, 106; He 2009, 12). These numbers are used in judges' annual evaluations. Doing a good job leads to raises, better housing and access to court cars. Doing a bad job might mean fines for "wrong decisions" (*cuo an*) or, in extreme cases, demotion or transfer to a different court or government bureau. Overall, penalties for "wrong decisions" are meant to tackle two of the largest problems facing the Chinese judiciary: corruption and the uneven application of the law. Judicial consistency is an ongoing problem and, in 2008, the SPC announced an improved tracking system designed to penalize regional judges with a record of misjudgments (Lam 2008, 4). Despite attempts to improve central control, however, rewards and punishments vary a great deal locally (Yu 2009). In some places, for example, the criteria for a "wrong case" includes incorrect legal reasoning or mere reversal while in other places it is limited to instances of corruption and decisions with no basis in law (Yu 2009, 20).¹¹⁹ Wrong decisions can, as in Gansu, result in a 2-4 point loss on evaluations linked to annual bonuses (Yu 2009, 57), or, as in Shanghai, warrant only a minor 100 RMB fine (2007-55). Variation in local incentives, as Yu (2009) points out, gives some judges more motivation than others to puzzle out political tolerance intervals and position themselves accordingly.

In short, judges in environmental cases can be powerless or powerful. When it exists, judicial discretion influences the tenor of proceedings as well as the outcome. In a Hebei environmental hearing I attended in January 2008, judges allowed a representative from the Beijing-based Center for Legal Assistance to Pollution Victims (CLAPV) to both sit with the plaintiff's counsel and give a speech even though the NGO had no official role in the courtroom. The representative used the speech to frame the dispute ("this is a typical water pollution case") and lend prestige to the plaintiff's cause. The head of CLAPV, the representative namedropped, is busy helping the National People's Congress revise the Water Pollution Law, but his

¹¹⁹ The supervisory division of individual courts and the local procuratorate determine "wrong cases" through an investigation of cases that were changed on appeal (*gai shen*), re-heard (*zai shen*) or generate complaints.

organization “is here today to help the plaintiff use the law to protect his rights” (2008-2). The court president sat in the front row during the hearing and the unusual presence of external observers (including me) likely encouraged him and other court officials to carefully consider the plaintiff’s case.

Most of the time, however, uncertainty about actors’ tolerance guides judges toward conservative, by-the-book decision-making. Risk-adverse decisions are common sense when, as in one Zhejiang Basic People’s Court, annual bonuses equivalent to four months of salary require the court president’s signature (2006-6). And in the instances when elites signal the limitations of tolerance, possibly through a carefully worded expression of concern, an ad hoc retreat to an imposed solution is the norm. In the end, as Ran Hirschl writes about judges elsewhere, courts “hand down decisions that favor the powerless primarily when doing so is consistent with elite values and interests” (2008, 109).

Rough Justice

Writ large, legal systems provide “an echo chamber for conversations about credit and blame” (Tilly 2008, 35). But in individual struggles, like the Henan farmer blaming a paper factory for his dead fish or the Beijing insomniac living next to a noisy bus depot, what does this conversation look like? Here, legal decisions are one way to infer how Chinese judges think about responsibility and fairness.¹²⁰ In terms of the typology discussed above, this set of cases cluster around “rough justice.” Decisions aim to defuse grievances by balancing a near overwhelming state imperative for economic growth with concerns about vulnerable groups, pollution and social stability.

Most immediately, judges hope to leave both parties satisfied. The “biggest headache,” one Chinese judge explained, is when decisions trigger complaints to supervisors in the judiciary (2007-55; also He 2009, 14). Judges work hard to ensure influential parties retain a positive impression of the court. When Beijing lawyers showed up in small town Zhejiang to handle a pro bono environmental case, for example, the court sent a car to pick them up and judges took them out to dinner after the hearing (2007-51; 2007-97). Balancing interests and keeping both sides happy frequently translates into pragmatism. At least in environmental cases, Chinese judges often follow U.S. judge Patricia Wald’s advice to employ “pragmatism that decides cases on the merits...[and] takes all the circumstances, including precedent, real-world significance and institutional relationships...into consideration, tempered on occasion by compassion” (1992-1993, 181). Few judges, in China or elsewhere, have a “visionary or crusading bent” and environmental decisions tend to divide responsibility and split the difference in a way that dents but upholds the status quo (Posner 1993, 3).

Balancing and pragmatism are most visible in the way that judges handle compensation. Depending on the number of plaintiffs and the extent of the losses,

¹²⁰ Looking at decisions is one way to infer judicial goals and motives from judicial behavior. Another worthwhile tack would be to ask judges directly how they make decisions.

pollution disputes cases can involve significant damages. The average case in my sample involves a claim of 1.02 million RMB (US 150,000), although there are some big money outliers like a 2000 case in Shanxi in which a village sued for 18 million RMB in damages (US 2.6 million).¹²¹ While these numbers are not representative, each case highlights the difficulty of translating legal credit and blame into real cash payouts.

This is often the moment in which judges diverge from the law. Citing “discretion” (*zhuoqing*), judges find a variety of reasons to lower compensation. In a case in Fujian, for example, the court slashed requested compensation by 30% on the grounds that the defendant should not bear full responsibility when noise pollution is the inevitable result of flaws (*quexian*) in national development policies.¹²² Courts assess damages, as one decision explained, “from the perspective of justice and reasonableness” (*cong gongping heli de jiaodu*).¹²³ As in a 2003 dispute in Anhui over air pollution from a neighborhood bathhouse, judicial perception of a reasonable standard often encompasses non-legal factors, like the proprietor’s ability to pay (*jingying zhuangkuang*).¹²⁴ Even plaintiffs sometimes take their opponent’s financial situation into account. One group of Hebei villagers dropped 45,000 RMB (US 6,617) of peach tree damages in light of “the defendant’s financial difficulties.”¹²⁵

In addition to extra-legal rationalization, judges also come up with legal reasons to adjust compensation. In the absence of official guidelines detailing how to allocate blame, one common strategy is to divide legal responsibility. Fish farmer Wang Shouxiang’s failure to mitigate the effects of pollution, a Zhejiang court found, entitles him to only 56% of his requested compensation.¹²⁶ Or, as a Shandong panel argued, plaintiffs should have sought out government bureaus to help combat pollution.¹²⁷ Lack of due diligence, at least in this interpretation of the law, has financial consequences. Another strategy, as in cases in Shandong and Anhui, is to dismiss

¹²¹ *Qinghianren Village Committee v. Shanxi Luchang* (2000). As one would expect, there was a difference between the amount of compensation requested in mass cases (cases with more than five plaintiffs) and non-mass cases. The average request for compensation in mass cases was 2.7 million RMB (US 396,164) and the average request for compensation in non-mass cases was 776,518 RMB (US 114,193). I have full data on the amount of compensation requested and the amount of compensation received for 39 of 42 cases, including 8 mass cases and 31 non-mass cases. I coded one case where the village committee served as a plaintiff as a mass case because compensation claims were made on behalf of the entire village (e.g. more than five people). Under these circumstances, the political logic of the case should be more similar to a mass case than an individual lawsuit.

¹²² *Yang Hanqiu v. Disan Hangwu Gongchengju Diliu Gongcheng Gongsi*, Fujian Xiamen Intermediate Court (2002).

¹²³ *Guangzhou Poya Dengshi Zhizao Youxian Gongsi v. Xie Zantian* (2005).

¹²⁴ *Chen Renxia v. Yin Hongxia*, Anhui Chuzhou Intermediate Court, Civil Division No. 120 (2004).

¹²⁵ *Lu Baoyin et al. v. Hebei Bada Jituan Mancheng Shuini Youxian Gongsi*, Hebei Mancheng Basic Court, No. 453 (2000).

¹²⁶ *Ningbo Beilunqu Baifengshang Yangdianhua Yichang et al. v. Wang Shouxiang*, Zhejiang Ningbo Intermediate Court, Civil Division, No. 440 (2002).

¹²⁷ *Zhang Pengguo and Li Yuping v. Shengli Youtian Gongyi Xinjishu Shiyou Kaifa Youxian Zeren Gongsi*, Shandong Dongyang Intermediate Court, Civil Division No. 27 (2004).

compensation requests unaccompanied by a stamped, official receipt of expenditures.¹²⁸

Regardless of judges' rationale, this group of environmental cases shows how frequently judges compromise by granting part, but not all, of a plaintiffs' requested compensation. Across all cases, plaintiffs were awarded an average of 29% of their claimed losses.¹²⁹ Judges were slightly less favorably inclined towards mass cases (defined as those with more than five plaintiffs), granting plaintiffs 24% of claimed compensation. In non-mass cases, plaintiffs managed to get orders awarding an average of 42% of requested damages. These numbers fit lawyers' perception that judges mandate compensation based, not primarily on the law, but on their (not always accurate) impression of what polluters can afford (2007-23; 2007-27).

Judges' tendency to split the difference, to a large extent, shows a pragmatic impulse to locate a compromise acceptable to both sides. The Sun Youli case (Appendix B) is a particularly good example of this kind of "split it down the middle" approach. The first decision in that case held nine defendants jointly liable for 13.6 million RMB (US 2 million) in damages to fish farms owned by the eighteen plaintiffs. On appeal, however, the Hebei High Court reduced compensation by 47%, based on two public justifications. First, the decision re-calculated losses based on wholesale value rather than retail value. Second, the judges recognized the defendants' long history in the area and penalized the fish farmers for failing to consider the risk before starting business. Those involved in the case, however, recognized that the bench primarily wanted to lessen the burden on struggling industry, a goal that even the plaintiffs' lawyer found fair (*gongping*). As he later wrote, "for now, most enterprises face a number of difficulties reliably meeting [environmental] standards...lightening industry's civil liability can contribute to their enthusiasm for environmental protection."¹³⁰

In addition to striking an ad hoc balance between economic growth and environmental protection, judges also sometimes reduce compensation because they believe pollution victims are exaggerating losses. Judges, according to one Beijing lawyer, frequently ask questions like "how can farmers make so much money?" (2009-5) Here, judicial wariness reflects the real presence of fraud. One Guangdong court caught a farmer cheating when back-of-the-envelope calculations revealed that the number of dead fish he claimed could not be conceivably packed into a pond the size of his fish farm.¹³¹ Or in Yunnan, farmers planted trees difficult to cultivate under

¹²⁸ Without more information about these cases, it is hard to know how to interpret judges' instance on an official receipt. This could be a way to show favoritism to defendants or an attempt to ensure plaintiffs are not inflating claims. For example, see *Zhang Pengguo and Li Yuping v. Shengli Youtian Gongyi Xinjishu Shiyou Kaifa Youxian Zeren Gongsi* (2004) and *Yuan Wei Shipin Gongsi v. Lu Kaiwen* (2005).

¹²⁹ Courts often have trouble enforcing their decisions and I am not making any claims about how much money plaintiffs actually received. Rather, this is the amount ordered by the court. This 29% figure includes cases in which plaintiffs lost and were awarded no damages.

¹³⁰ Document on file with the author.

¹³¹ *Ping Zao v. Zhongnan Shiyouju*, Guangdong Foshan Intermediate Court, Civil Division No. 3 (2005).

the best environmental conditions and then demanded pollution-related compensation when the trees failed to grow (van Rooij 2006, 153).

Faced with uncertainty about the facts, the law and overlapping political priorities, judges in environmental cases often take refuge in common sense. In a rare moment of transparency, a Guangdong court wrote out a checklist for environmental cases in a 2005 decision: 1) whether there is pollution; 2) whether there is harm and; 3) whether there is causation between pollution and harm.¹³² When these determinations prove difficult, as they frequently do, judges and lawyers often refer to their assumptions about how an average person would see the case. A Shanghai court, for example, sided with a plaintiff in a 2004 light pollution case because the brightness “exceeded what a normal person can stand.”¹³³ Or, in a 2001 case in Hebei, the defense argued that noise and vibrations from a railroad couldn’t possibly cause cracks in neighboring house. According to the defense, the plaintiff’s claim wasn’t even worth discussing because “there’s no need to prove common sense.”¹³⁴

Common sense, as invoked in these cases, is an extension of local knowledge. Judges are enmeshed in local communities and, as a result, frequently come to the case with a pre-existing understanding of the situation.¹³⁵ Industrial pollution, at least for one Henan court, does not need proof because “everyone knows about [it].”¹³⁶ In another case in Inner Mongolia, industrial discharge into the Yellow River reduced Baotou City’s water supply to a single back-up reservoir (Zhuang 2006). Baotou judges, like all city residents, were angry about the water crisis and favorably disposed to a large settlement (2007-99). At other times, of course, local ties sway judges toward the polluters’ perspective. Social suasion from friends and relatives, in addition to pressure from officials, lawyers, plaintiffs and defendants, is part of most judges’ job (Peerenboom 2002, 315-16). Isolated objectivity is rarely worth the cost of loneliness and even local ridicule (He 1999, 234).

Judges’ deep local roots also help them identify and handle cases with a high probability of trouble (*keneng naoshi de anzi*). Pollution lawsuits can shade into protest, especially when the financially desperate are certain they have been wronged. This on-the-streets anger occasionally surfaces in written decisions, an implicit judicial acknowledgement of the permeable boundary between law and justice by other means. Judges noted that Mr. Ye, the Guangdong man whose family was diagnosed with pesticide poisoning, originally received compensation only after he was arrested for digging up the road leading to the chemical factory.¹³⁷ Or, in a 2005 case in Yunnan, a village halted factory production for almost a year by blocking delivery of raw materials.¹³⁸ Volatile cases, one judge explained, “are urgent and its

¹³² *Guangzhou Poya Dengshi Zhizao Youxian Gongsi v. Xie Zantian* (2005).

¹³³ *Lu Yaodong v. Shanghai Yongda Zhongbao Qiche Xiaoshou Fuwu Youxian Gongsi*, Shanghai Pudong Basic Court (2004).

¹³⁴ *Yin Bingquan et al. v. Beijing Tieluju*, Beijing Railway Court, No. 23 (2001).

¹³⁵ For more on how basic level courts are rooted in local communities, see Upham (2005).

¹³⁶ *Zhumadianshi Suyahu Shuiku Guanliju v. Zhumadianshi Yicheng Hongyuan Waleng Banzhichang*, Henan Runan Basic Court, Civil Division No. 30 (2003).

¹³⁷ *Ye Hanjia v. Ruidefeng Gongsi* (2001).

¹³⁸ *62 families from Damengwu Village v. Lianhe Xian Yuantong Liuhuangchang* (2005).

important to get a decision out quickly” (Zhao 2008). When emotions are running high or when there are a lot of plaintiffs involved, courts frequently refuse to hear cases altogether (2007-38). Local connections help risk-averse judges manage the critical extra-legal work of avoiding intractable cases and fashioning acceptable bargains.

Innovation at the margins

One advantage of reading forty-two legal decisions is that the cases collectively offer a sense of the limits of the law, or the legal frontier. As environmental lawyers know, Chinese courts are much more comfortable with some kinds of grievance than others. In general, judges are inclined to treat pollution cases as private economic disputes, solvable via negotiated monetary settlement. Non-monetary claims and rulings, like a request for an apology,¹³⁹ moving a factory¹⁴⁰ or recognizing herdsman’s land rights,¹⁴¹ are usually ignored. Lawyers were still struggling draw a legal connection between illness and pollution during my fieldwork in 2006-2007, a tough sell because courts fear a landslide of similar cases (2007-103). As one prominent environmental lawyer told *The New York Times* in 2007, “no previous [mass] lawsuit has proved the link between pollution and cancer, but I am optimistic that we can be successful” (Mackey 2007).

Yet despite strong incentives to avoid controversy, Chinese judges occasionally innovate. By and large, such environmental decisions bypass the sweeping rhetoric of landmark decisions in favor of understated innovation at the margins. Decisions quietly validate new types of cases, like China’s first “bright light” pollution case in Shanghai in 2004,¹⁴² and new types of claims. Compensating cancer villages may fall beyond the current legal frontier, but some court decisions recognize that pollution affects health¹⁴³ and award compensation for emotional distress caused by noise.¹⁴⁴ In egregious cases, like the 2004 case that left the city of Baotou without clean drinking water for five days, courts can also shift litigation cost onto defendants and order payouts large enough to compel national media attention.¹⁴⁵

These moments of divergence from the mainstream are significant because they show judges pushing the boundaries of the law. By echoing environmental rhetoric, as when a Beijing court wrote that “the environment is a basic condition of human

¹³⁹ *Lu Yaodong v. Shanghai Yongda Zhongbao Qiche Xiaoshou Fuwu Youxian Gongsi* (2004)

¹⁴⁰ *62 families from Damengwu Village v. Lianhe Xian Yuantong Liuhuanchang* (2005)

¹⁴¹ *Damu Linzhabu et al. v. Dongwu Zhumu Qinqi Dianhua Jiangbanchang et al.* Inner Mongolia High Court, Civil Division No. 6 (2004).

¹⁴² *Lu Yaodong v. Shanghai Yongda Zhongbao Qiche Xiaoshou Fuwu Youxian Gongsi* (2004).

¹⁴³ *Wan Hongxiang et al. v. Lianshui Xianchanglin Bingbangchang*, Jiangsu Lianshui Basic Court, No. 1117 (2000); see also *Lu Yaodong v. Shanghai Yongda Zhongbao Qiche Xiaoshou Fuwu Youxian Gongsi* (2004).

¹⁴⁴ *Wan Hongxiang et al. v. Lianshui Xianchanglin Bingbangchang* (2000); *Yang Hanqiu v. Disan Hangwu Gongchengju Diliu Gongcheng Gongsi*, Fujian High Court (2002); *Shi Meizhu v. Nanjing Aihua Zhuangshi Youxian Zeqian Gongsi*, Nanjing Gulou Basic Court, No. 208 (2002).

¹⁴⁵ In the Baotou case, the court ordered 2.8 million RMB in compensation (US 411,764). For more on the case, see Fürst (2008, 47-50).

existence and development,” courts also validate it.¹⁴⁶ As one judge wrote, “rights that are not written in the text of the law, but are hidden between the lines, can be discovered” (quoted in Kellogg 2007, 180). In a Shanxi village, for example, judges found that pollution infringed on “residents’ right to health, leisure and property.”¹⁴⁷ Other judges connected pollution disputes to the “right to use your house normally”¹⁴⁸ and “the right to live peacefully and right to health.”¹⁴⁹ The appearance of rights talk in lower court decisions shows how deeply it has penetrated the Chinese state.¹⁵⁰ Certain circumscribed rights, at least, are edging toward entitlements by dint of official repetition.

Taken individually, each foray beyond the legal frontier—the appearance of rights language in a decision or support for a new claim—is not of great significance, especially because the Chinese legal system has neither judicial review nor binding precedent. Taken together, however, they indicate systemic tolerance for modest innovation, especially in cases that do not touch powerful local interests (Liebman 2007, 632). Room for innovation has also expanded along with the number of smaller polluters. An increase in the number of enterprises from 165,080 in 1998 to 323,793 in 2007 means that environmental lawsuits can increasingly target less-protected polluters rather than major state-owned enterprises (Van Rooij and Lo forthcoming).

Isolated instances of innovation may also ripple through other courts, slowly shifting the mainstream interpretation of environmental law. Liebman and Wu (2007) document a trend toward soft precedent in which lower courts look at other decisions for guidance handling difficult cases (also 2007-55; 2007-74; Kellogg 2007, 171).¹⁵¹ In my sample, a 2002 Guangxi high court decision discusses the legal implications of a similar case¹⁵² while the Zhejiang high court looks even further afield toward “principles commonly used by every country in the world in handling environmental pollution rights infringement cases.”¹⁵³ The groundbreaking 2004 Shanghai light pollution case was also written up in the SPC Gazette (*Zui Gao Renmin Fayuan Gongbao*), a clear indication that higher-ups thought the case merited widespread attention and reference. Sometimes, lawyers even observe movement in the legal frontier as a set of local judges becomes accustomed to new types of claims. Zhou Litai, one of China’s best-known labor lawyers, recalls a four year progression from losing almost every labor case to winning 40-50% of the time (Zhou 2005, 201).

Sometimes, a single successful lawsuit can also spark inspire imitators. After the Sun Youli case discussed in Appendix B made national headlines, for example, one of

¹⁴⁶ *Xiong Wansheng v. Beijingshi Zonghe Touzi Gongsì et al.* Beijing Second Intermediate Court, Civil Division No. 5696 (2000). See also *Gong Changjiu et al. v. Shen Xiang*, Chongqing Basic Court, Civil Division, No. 1045 (2006).

¹⁴⁷ *Qinghianren Village Committee v. Shanxi Luchang* (2000).

¹⁴⁸ *Chen Renxia v. Yin Hongxia*, Anhui Chuzhou Intermediate Court (2004).

¹⁴⁹ *Yang Hanqiu v. Disan Hangwu Gongchengju Diliu Gongcheng Gongsì* (2002).

¹⁵⁰ For more on the importance of rights-based claims, see O’Brien and Li (2006).

¹⁵¹ Competition between legal databases over the next several years should put more cases online and, by extension, make it much easier for judges to research cases.

¹⁵² *Liu Fangyu v. Qinzhou Guoxing Youqi Youxian Gongsì et al.* Guangxi High Court No. 21 (2002).

¹⁵³ *Zhejiang Jianchayuan v. Jiaxingshi Buyun Ranhuachang*, Zhejiang High Court No. 17 (2000).

the lawyers involved started receiving inquiries from would-be plaintiffs as far away as Guangxi. On a trip to Hebei, I also observed one of the Sun Youli plaintiffs quietly pull aside a lawyer to solicit advice on a new set of pollution-related losses. Having once won compensation through litigation, he was ready to sue again.¹⁵⁴ Local word of mouth can inspire copycat litigation too. A Beijing property lawyer's 2003 decision to sue a real estate developer over toxic levels of ammonium, for example, convinced many of his neighbors to follow suit. And, of course, winning a novel lawsuit can legitimate similar claims and pave the way for successors. Lawyers in Sun Youli lawsuit thought that the Tianjin maritime court decision "created an example" (*chuangzao le dianfan*), as they later wrote, because it was one of the first high-profile cases to correctly shift the burden of proof to the defendant.¹⁵⁵ Or the lawyer in the Beijing ammonium lawsuit (somewhat self-servingly) told the press, "this is not a small victory for owners...it's the first case of its kind in Beijing and has a lot of significance."

Incursions beyond the legal frontier occur, in large part, because judges have some incentives to innovate. Local government is a common testing ground for economic and legal reforms in post-Mao China and the most successful innovations are adopted nationally.¹⁵⁶ This is career-making stuff and there is no shortage of ambitious judges angling for attention from higher ups. Officials from the innovative administrative division of the Pingdingshan Intermediate Court, for example, have been invited to national-level SPC conferences—public recognition that is both immediately gratifying and holds the promise of possible future promotions (Yu 2009, 57). Some judges also subscribe to the "no action, no authority" (*yiwei zhengwei*) approach to judicial decision-making and believe that courts need to take bold action to increase their influence vis-à-vis other government bureaus (Yu 2009, 39). Other innovative decisions are obliquely aimed not at government officials, but at a peer group of judges and academics. Taking a stand for social justice and pushing the boundaries of the law wins accolades among reform-oriented legal elites (Yu 2009, 50-52). Nudging forward social change can be personally satisfying too. As one Guangdong judge told the newspaper *Southern Weekend*, "ever since I found out that [labor] decisions can change a few things, I've felt that this work is really meaningful" (Zhao 2008). Moreover, the risks of modest innovation are typically low. Local experiments can quietly lapse into inactivity, judges can recant and the tiny minority of unforgiven mutineers can find a new job.¹⁵⁷ In recent years, publicly chastised judges have left courts to study law in top graduate programs or increased their salary by joining the bar (Yu 2009, 73).

Conclusion

¹⁵⁴ I later heard from the lawyer that he did bring another lawsuit.

¹⁵⁵ Zhongzi Law Firm, document on file with the author.

¹⁵⁶ For more on the importance of decentralized experimentation, see Heilmann (2008) and O'Brien (2009, 134).

¹⁵⁷ On how local experiments quietly fade away, see Heilmann (2008, 27).

When law exists to serve the Party, or any powerful clique, what can we learn from how judges choose between politically circumscribed solutions?

First, taking judicial choice seriously compels an “anthropology of the state” that charts the gap between central intention and local interpretation instead of skimming over it (Migdal 2001). While regimes may aspire to a single standard of justice, decisions often depend on the political signals surrounding either a type of case or a specific lawsuit. Nor are these signals necessarily clear cut. In China, judges sometimes find themselves responsible for interpreting ambivalence and even occasionally edge forward a new understanding of the law. Indeed, as the next chapter explores in regard to lawyers, political ambivalence often leads to unintended consequences. Grassroots attempts to remember the past, interpret the present and scry the future can suggest actions quite different than what a coordinated, central five-year plan might have envisioned.

Second, litigation can make visible one of the hidden transcripts of politics.¹⁵⁸ the competing values and commitments that divide the state against itself. Controversial lawsuits bring the fault lines of politics into high relief, as Supreme Court decisions over abortion in America or dismantling settlements in Israel. In places where disagreement is frequently swept under a façade of unity, like China, judicial decision-making can offer much-needed insight onto the underlying political spectrum. Mapping cases onto the four profiles of judicial logic sketched here promises a better understanding of where official priorities lie and when they conflict. Indeed, scrutinizing the political pressure that judges face—and how it varies by issue and court—can provide leverage over questions of not only how law works, but of where the boundary between law and politics lies and why it shifts.

¹⁵⁸ The phrase “hidden transcripts” is from Scott (1990). While Scott’s hidden transcripts refer to “a critique of power spoken behind the back of the dominant,” however, I’ve borrowed the term to evoke a different kind of hidden political conflict.

Chapter 4

Heroes or Troublemakers? The Lawyers

I spent much of my fieldwork talking with Chinese environmental lawyers, defined, rather basically, as anyone with experience handling a pollution case.¹⁵⁹ In twelve provinces over fourteen months, I tracked down a diverse group driven by both the prosaic need to make a living and a desire to do good.¹⁶⁰ Some in this latter group were recognizable as what Austin Sarat and Stuart Scheingold would call cause lawyers: activist lawyers motivated by a cause rather than cash. In the early and mid 2000s, terms like rights defense lawyer (*weiquan lüshi*), public interest lawyer (*gongyi lüshi*) and impact litigation (*yingxiangxing susong*) broke into the media and into the public consciousness. By the time of my fieldwork in 2006-2007, there was an active discussion both in print and in person about what these labels mean and whether public interest law was a good thing. As a June 2009 headline in the newspaper *Southern Weekend* bluntly asked: “Public Interest Lawyers: Heroes (*Yingxiong*) or Troublemakers (*Diaomin*)?” (Meng 2009).

The very existence of Chinese activist lawyers¹⁶¹ requires explanation if only because the conventional wisdom so often links cause lawyers with democracy (Scheingold 2001, 384). At least at first glance, values-driven litigation exemplifies a peculiarly democratic “diffusion of power” (Zemans 1983, 692) that stands in stark contrast to how one-party systems tightly control legal confrontations. As Markovits (1996) writes about East German lawyers, “socialism did not like individual challenges to state authority. It liked even less for such challenges to be articulated and sharpened by professional squabblers” (2297). But “cause lawyers in an authoritarian state” is not a contradiction in terms. Despite the well-documented affinity between cause lawyers and political liberalism,¹⁶² litigation neither necessarily requires nor masks stirrings of liberalization. Socially committed lawyers can diminish the worst excesses of inequality and decrease dissatisfaction in government regardless of who is in power. And when illiberal governments invest in even the trappings of law, activist-minded lawyers find ways to bend the system to their ends. The law may not be “resilient,” as Chinese academic Jiang Ping puts it, but Chinese “lawyers [can] rely on the law’s small openings (*kongxi*) and contradictions as well as its authority” (Jiang 2005, 28). As in the West Bank and Gaza Strip, even litigation in courts perceived as rigged can be worthwhile (Bisharat 1998).

¹⁵⁹ My focus here is primarily on licensed lawyers who have passed the state bar exam, but they are only one type of legal service provider. Other kinds of legal advocates and representatives include basic level-legal workers (*jicheng falü gongzuozhe*) and legal advisory agencies (*falü zixun jigou*). In addition, there are unauthorized black lawyers (*hei lüshi*) and barefoot lawyers (*chijiao lüshi*). For an excellent overview of how these different groups relate to each other, see Liu (2009).

¹⁶⁰ Practically, this was not an easy task. Most Chinese lawyers have never handled an environmental case and even those with experience do not necessarily know each other. Snowball sampling (e.g. getting one contact to put you in touch with other contacts) was not effective, so I started tracking down the names of environmental lawyers quoted in newspaper articles and calling them. Thanks to online lawyer directories, the lawyers were relatively easy to find and surprisingly responsive to out of the blue inquiries.

¹⁶¹ I use the term activist lawyer and cause lawyer interchangeably here.

¹⁶² See Halliday and Karpik (1997) and Halliday, Karpik and Feeley (2007).

Re-emphasizing the theme of political ambivalence, this chapter first explores how China's recent turn towards law—especially the privatization of the bar—lent lawyers a degree of freedom to find “something to believe in” and pick cases accordingly (Scheingold and Sarat 2004, 2). In so doing, Chinese lawyers drew on conflicting visions of lawyers as socialist crusaders and as international professionals.¹⁶³ Recognizing the importance of the socialist law tradition (as well as contemporary ambivalence over it) underscores the degree to which moral commitment can serve authoritarianism as well as subvert it. Some idealistic lawyers provide pro bono help for “weak and disadvantaged groups” (*ruoshi qunti*) not to nudge forward democracy, but in the hopes of building a better, more egalitarian China under the Chinese Communist Party (CCP). As Terence Halliday and Lucien Karpik note, lawyers are neither necessarily “liberal actors-in-waiting” nor the “perpetual creators of rule of law regimes” (Halliday and Karpik 1997, 60).

Moving from macro trends to micro decisions, the second part of the chapter unpacks how high-level ambivalence over litigation, courts and the role of the bar affects environmental lawyers' everyday choices. Given the difficulty of winning an environmental case (let alone making money and staying out of political trouble), why do lawyers ever take them? Moreover, once a case is underway, how do lawyers interpret conflicting signals about the boundaries of tolerance? In response to widespread uncertainty, lawyers often decide that sticking to well-trodden areas makes sense. In particular, stories about repression, which I call “control parables,” harden limits on activism by assigning meaning to seemingly random repercussions. The rules for daily behavior, in short, are not handed down from the pinnacle of the state, but jointly written (and re-written) by Chinese lawyers and their government overseers.

The Emergence of Activist Lawyers

Observers of Chinese politics are just starting to write about the activist lawyers who “take law and the legal process seriously while realizing the ‘outer limits’ of law in an authoritarian state” (Fu and Cullen 2008, 112; see also Hand 2006; Pils 2007; Kahn 2007a; Lü 2007). So far, research has focused on the most politicized lawyers: those not only committed to “protecting the rights of the weak in society,” but to “protecting those rights *against the Party-State*” (Pils 2007, 1225; emphasis mine). This first generation of research traces the emergence of legal activism to the state's reliance on law, the privatization of the bar and new ways—from NGOs to the internet—for lawyers to find and publicize grievances (Fu and Cullen 2008, 123-125).

This account, as discussed below, is largely accurate. Yet the spectrum of Chinese cause lawyers extends far beyond a narrow swath of politically inclined critics.¹⁶⁴ Sometimes drawing on a native socialist populism and sometimes inspired by international example, lawyers leverage the law not to constrain government authority but in the service of other social goals. Building on a scant literature on

¹⁶³ I am indebted to Liu Sida for crystallizing this distinction in my mind. See Liu (2009, 110).

¹⁶⁴ See O'Brien and Stern (2008, 22) on the need to unpack “rights protection” to better understand how lawyers with different agendas operate.

cause lawyers in illiberal states,¹⁶⁵ this section traces the origins of legal activism to understand how activist lawyers came to exist (and are sometimes even comfortable) in the architecture of an authoritarian legal system.

Legal reforms

Beyond China, socio-legal research on Vietnam (Sidel 2008) and the Occupied Territories (Bisharat 1998) suggests that would-be cause lawyers can benefit from the authoritarian dilemma over courts. When even one-party states turn to law as a tool of governance, new regulations and rhetoric about the importance of law create new handholds for “rightful resistance” meant to hold the powerful accountable for their promises (O’Brien and Li 2006). Equally importantly, laws and rhetoric signal the boundaries of official tolerance. Shortly after the Chinese constitution incorporated new language about protecting human rights in 2004, for example, one self-identified human rights lawyer proclaimed that:

Time is progressing. It is not like before when people were punished for speaking out... clauses on human rights are written into the constitution and the concept of human rights is already deep in people’s hearts... Why would lawyers need to be concerned if we only act within the framework of the law, make our activities public and act with justice in mind? (Guo 2005, 105)

For lawyers like this one, constitutional cover lent official validation to human rights-related claims. It became possible to cast oneself, not as a conscientious dissenter, but as a patriot with “justice in mind.”

In China, activist lawyers only started emerging in force after the privatization of the bar gave lawyers the professional freedom to pursue personal passion.¹⁶⁶ After the Cultural Revolution, lawyers worked as civil servants in legal advisory offices (*falü guwen chu*) modeled after Soviet law offices. Lawyers were part of the state bureaucracy and simultaneously expected to serve socialism and the masses. This changed in 1996 when the Lawyers Law transformed lawyers into “professionals providing legal services to society” (Michelson 2003, 59). From the state’s perspective, turning government employees into private professionals offered a way to expand lawyers’ ranks without paying for it. A series of similar cost-cutting *cum* privatization initiatives in the 1980s and 1990s culminated in a State Council mandated drive to convert all remaining state-owned law firms to partnerships in 2000 (Michelson 2003, 59-65). The campaign was largely successful. By 2004, only 14% of law firms were state-owned, down from 98% in 1990 (Zhu 2007, 332).

By 2006, when I started my fieldwork, most of China’s lawyers were self-employed (*geti hu*) within partnership law firms.¹⁶⁷ Outside elite law firms in China’s

¹⁶⁵ For other work on cause lawyers in illiberal states, see Michalowski (1998), Bisharat (1998), and Sidel (2008). On activist lawyers in China, see Pils (2007), Liu and Halliday (2008), and Fu and Cullen (2008).

¹⁶⁶ For a more complete history of lawyers in post-Cultural Revolution China, see Michelson (2003, 59-83); Peerenboom (2002, 345-350), and Liu (2008).

¹⁶⁷ As Michelson (2006, 12) points out, lawyers have the same tax status as individual enterprises (*geti hu*). During my fieldwork, I also frequently heard lawyers refer to themselves as *geti hu*. By 2007, however, *geti*

big cities, most Chinese lawyers work on a per-case commission basis instead of drawing a salary (Michelson 2006, 11). Lawyers then turn over a fixed percent of billed income (typically around 30%-50%) to the firm in exchange for office space and a staff position. Retaining employment at a registered law firm is a licensing requirement and sole proprietorships, now permitted under the 2007 amendments to the Law on Lawyers, are not yet common.¹⁶⁸ This set-up, as Michelson (2006) points out, generates intense economic pressure in an already competitive market. Many law firms have minimum annual billing quotas, forcing lawyers to hustle commissions to stay employed (Michelson 2006, 13).¹⁶⁹ In addition, lawyers are responsible for taxes, annual fees to the All China Lawyers Association (ACLA) and the day-to-day expense of cultivating good connections in the bureaucracy. Mainstream lawyers undoubtedly worry about personal solvency far more than social change.

Still, in the short time since lawyers became private professionals, many have also joined the upwardly mobile middle class. While there are no national statistics on lawyer salaries, a recent survey of 1,300 lawyers in eight provinces found an average income of 100,000 RMB per year (US 14,700) (Peerenboom 2009, 14).¹⁷⁰ In China, even among urban professionals, this is a good living. Zhu (2007), drawing on data from 2004 and 2005, estimates that lawyers make at least twice as those employed in other white collar jobs including finance, real estate and information technology (362-3). As one Jilin lawyer put it, “we’ve solved the problem of getting enough to eat. This is a prosperous society now!” (2007-70) Prosperity, in turn, imparts financial freedom for occasional pro bono work.¹⁷¹ “Once you are dressed and fed,” one lawyer told me, “you can do environmental work” (2007-27; see also 2007-27; 2007-53; 2007-63; 2007-70; 2007-97; 2007-102; 2007-106). With the exception of a few lower class lawyers exceptionally driven by ideological fervor, Chinese cause lawyers are middle class recruits.¹⁷²

It is less than twenty years since Chinese lawyers unhooked from the state and, to a large extent, legal activism simply reflects professional diversification. The jump from 48,000 lawyers in 1997 to 143,967 lawyers in 2007 brought a wider range of concerns and motivations into the bar (Fowler et al. 2008; China Law Yearbook 2008). Just as growing numbers of Jewish, Catholic and black lawyers introduced civil rights litigation to post-World War I America (Epp 1998, 55), pockets of an increasingly heterogeneous Chinese bar are now debating the public interest and who lawyers should serve. Some see civic commitment as a way to resuscitate the

hu seemed to be a relatively neutral description rather than the self-deprecating reference to a marginalized social group that Michelson heard in 2000 (see Michelson 2003, 81)

¹⁶⁸ This may change in the near future. A 2007 amendment to the Lawyers Law allows lawyers who have been practicing for five years to establish individual law firms, provided they haven’t had their license suspended over the previous three years.

¹⁶⁹ Minimum annual billing quotas are meant to prevent lawyers from billing their clients directly and underreporting their gross income to the firm. This, of course, only partly solves the problem because lawyers can still underreport income after meeting the quota (Michelson 2006, 13).

¹⁷⁰ Zhu (2007) estimates average annual income at a roughly comparable 80,000 RMB (362).

¹⁷¹ On “de facto pro bono” work, see Michelson (2006, 21).

¹⁷² Some are upper class too. In 2009, self-identified public interest lawyer Yan Yiming told *Southern Weekend* that his salary consistently placed him among China’s 100 top-earning lawyers (Meng 2009).

reputation of a denigrated profession (2006-14). Lawyers, as one saying puts it, “just take money and don’t do anything” (2005-9; also see Michelson 2003, 20-24). If people admire lawyers, one op-ed in *Legal Daily* complained, “it is because they make a lot of money, not because they uphold law and justice” (Zhang 2006b). In this environment, some are understandably drawn to an alternative identity where lawyers are intellectuals and social activists who use their expertise on behalf of society.

In combination, privatization, diversification and new affluence has given a number of Chinese lawyers the political space and financial freedom to pursue a cause. As terms like public interest lawyer (*gongyi lüshi*) and rights protection lawyer (*weiquan lüshi*) entered the Chinese lexicon in the 2000s, lawyers also started to take refuge in the advantages of an idealistic professional identity. In particular, some found that pro bono cases allowed some relief from the sometimes unpleasant, expensive extra-legal work of buying meals and cajoling judges (2007-96).¹⁷³ Forgoing financial reward brought judicial respect, as one lawyer said, “not only for our morality but for our professionalism” (2007-96). Others found winning a case without relying on connections—just “because of your skill and because of the law”—to be a fantastic high (2007-102). By the mid-2000s, a few public interest law firms and NGOs had opened in Beijing, including The Open Constitution Initiative (*Gongmeng*) and Dongfang Public Interest and Legal Aid Law Firm in 2003 and Impact (*Yipai*) Law Firm in 2006.¹⁷⁴ Often cast as “heroes who pursue justice,” China’s post-1996 activist lawyers are now regular features in both the domestic and international press (He 2005, 1). These lawyers pursue causes from consumer rights to religious rights, sometimes acting as plaintiffs and sometimes drawing clients from a society increasingly concerned with protecting legal rights.¹⁷⁵ At least a few Chinese lawyers, like their American counterparts, see “litigation in much the same way athletes see the Olympics—a vivid showcase for their talents and proof of both their social importance and their selfless endeavors” (Schuck 2000, 36). In so doing, this nascent community of legal activists drew inspiration from two very different historical traditions, one home grown and the other international.

Two Visions of Law

When Qiu Jiandong filed the case later dubbed China’s first public interest lawsuit, he wasn’t even aware of the term public interest litigation. In 1996, Qiu sued a Fujian branch of the Post and Telecommunications office over a 1.20 RMB overcharge on his bill due to a failure to account for nighttime and holiday phone discounts (China Labour Bulletin 2007, 4). The “one dollar and twenty cents case,” as it was called in the media, opened a series of consumer rights lawsuits over unfair or

¹⁷³ On how lawyers dislike using connections (*la guanxi*), see Lo and Snape (2005, 450) and Wu (2008, 198). 2007-112 also mentioned this point.

¹⁷⁴ The Open Constitution Initiative was first registered as *Yangguang Xianzheng* in 2003 before a name change to *Gongmeng* in 2005.

¹⁷⁵ For more on the social changes behind the emergence of Chinese cause lawyers, see Fu and Cullen (2008, 124-125).

hidden fees. In fact, as public interest litigation gained currency in the early and mid 2000s, consumer rights cases (often considered the least sensitive type of public interest litigation) became a mainstream way for lawyers-turned-plaintiffs to protest unfairness (Huang 2006, 155). Yet back in 1996, Qiu Jiandong filed his first case before he had a label for his actions or even knew of like-minded comrades. As he says, “this is a case of theory lagging behind practice.”

The story of Qiu’s first case reminds us that relatively isolated lawyers also take up the law for a cause. Without the spur of external networking, encouragement and exchange, local lawyers often draw on closer-to-home traditions to find and justify pro bono work. In particular, many draw on a socialist and revolutionary tradition of virtuous lawyers helping the poor. Cause lawyers can have socialist as well as democratic aspirations, especially because there is nothing inherently democratic about “a struggle on behalf of egalitarian values and redistributive policies” (Scheingold 2001, 383). On the contrary, egalitarianism places Chinese cause lawyers squarely in the socialist mainstream. Just as Cuban lawyers committed to the Revolution voluntarily formed state law collectives to give the poor access to justice, fighting for the rights of China’s disadvantaged can help the state meet its vision (Michalowski 1998).

In particular, many occasional cause lawyers fit comfortably within a tradition of state-sponsored legal aid. As government employees, lawyers had an official obligation to represent the poor and many have always reduced fees in poor and rural areas (Liebman 1999, 238). When lawyers unhooked from the state in 1996, the Ministry of Justice set up a separate, national legal aid system. The budget and scope of the program reflect growing official emphasis on access to justice. In 1999, the legal aid system handled 132,097 cases on a budget of 27.5 million RMB (Zhu 2007, 404). Just eight years later, in 2007, the numbers were up to 420,104 cases and a budget of 525 million RMB (China Law Yearbook 2008, 1124). In addition to government-run legal aid centers and legal aid offices inside government bureaus, China is also one of few countries in which the local Justice Bureau allocates legal aid cases to lawyers (Liebman 1999, 214). While lawyers report variation in how many cases they handle, mandatory legal aid work helps plant the idea that lawyers should help deserving clients on behalf of society. Cause lawyers, at least in their egalitarian, socialist incarnation, can follow the lodestone of social transformation without veering toward democratic considerations.

Activist lawyers also feed on and echo iconic images of revolutionary lawyers that pre-date the current legal aid system. While lawyer-bashing has a long history in China, popular depictions of virtuous lawyers also surface amid jokes and complaints. The 1947 Shanghai movie *Bright Day*, for example, features a heroic lawyer who “acts for causes and perhaps only for causes” (Conner 2007, 210). Lawyer Yin is a pro bono defender of old ladies and rickshaw pullers as well as a self-aware crusader against class exploitation. In the character’s own didactic summation:

It’s shameful that good people are oppressed again and again but don’t feel their oppression. No, that’s not right, it’s good people like us who don’t rise

up to fight evil, to struggle to death with those bastards. That's the disgrace!" (Conner 2007, 206)¹⁷⁶

For lawyers, as for many others, this kind of revolutionary zeal outlasted the actual Communist Revolution of 1949. Discussion on the ACLA website in the mid-2000s still showed lawyers invoking revolutionary rhetoric and casting themselves as heroic defenders of the masses (Halliday and Liu 2007). As one lawyer wrote, "I have adopted the practice that the more unjust the case, the more it is the kind of case where common people are eager to receive legal aid, the more willing I am to undertake the case" (Halliday and Liu 2007, 99).

Tracing sympathy for the poor and oppressed through 20th century Chinese socialist and revolutionary history helps explain the appearance of 21st century activist lawyers in an ostensibly hostile setting. Local historical exemplars, both recent and not so recent, simultaneously inspire action and help still accusations of undue foreign influence. In fact, one insider at an American foundation told me that these "indigenous cause lawyers get more bang for their buck" because they have no need for staff, schmoozing or overhead (2007-67).

Just as Chinese judges use a Western gavel imbued with Socialist symbolism, a gloss of historical continuity can help make rights litigation look like a natural extension of post-Mao Communism (Michelson 2005, 37-42). Xu (2005), to take one example, claims that environmental litigation can ameliorate the wealth inequality and corruption that accompanies capitalism and usher in "an equal and just society" (25). Environmental lawsuits are not a scary manifestation of rights consciousness and human rights, but exemplify moments when the "national and societal good aligns with citizen interests" (Song 2006; also see Pan 2004). Sometimes invoked strategically and sometimes sincerely, historically resonant language casts activist lawyers as state allies in a glorious tradition.

At the same time, however, many of China's most vocal promoters of leveraging the law for social change are drawn to and inspired by international example. For these lawyers and academics, the 1997 Lawyers Law re-oriented the Chinese bar toward international standards of professionalism and sparked new comparisons.¹⁷⁷ He Weifang, one of very few superstar law professors capable of packing a room both on and off campus, writes that "lawyers are a new type of profession influenced by foreign culture" (2005, 1). In particular, discussions of public interest law often touch on the concept's international origins. Public interest law, in most versions of the retelling, first arose in ancient Rome and took off in the West in the 1960s and 70s (Chen 2006, 125; Lü and Wu 2007, 20). This abbreviated history overlays an implicit teleology that public interest law is an inevitable part of how legal systems develop. Inspired by a 1989 trip to Hong Kong, Xiao Yang (Minister of Justice from 1993 to 1998 and later President of the Supreme People's

¹⁷⁶ For more on the film, see Conner (2007). Conner suggests that *Bright Day* is a typical 1940s "left-wing" film concerned about class and poverty. These films were both socialist and realist without necessarily being connected to the Chinese Communist Party (Conner 2007, 196).

¹⁷⁷ For one example, see Wu 2006.

Court) became a supporter of legal aid, which he later explicitly equated with legal development (Liebman 1999, 222-23).

In the internet era, even those with a passing curiosity can ferret out information about lawyers elsewhere. Yet focusing exclusively on the web overlooks one of the most important entry points for new ideas: academic exchange. In Chinese law schools where comparative research accelerates publication and brings accolades, academics act as a portal. Books and articles like *Research on Handling Environmental Disputes: Chinese, Japanese and Korean Scholars Discuss* or “Citizen Lawsuits in the United States and Their Inspiration for China” translate and interpret global experience (Zhang 2007; Jiang 2006). By bringing international concepts to a domestic audience, Chinese legal academics are active participants in the global diffusion of ideas.

Inside law schools, clinics and courses also bring international experience into students’ consciousness. At Beijing University, arguably China’s top law school, more than 200 students took a course called “Public Interest Law and Lawyering: The American Tradition and its Possible Relevance to China” between spring 2006 and spring 2009.¹⁷⁸ The course, taught by a visiting American lawyer, looks the past, present and future of American public interest law and its applicability to China. Under the heading “*Sheng Ci* (New Words),” the syllabus explicitly takes on the issue of translation:

In the globalizing world, people in public life (lawyers, officials, managers) increasingly use the same words (for example, rule of law, NGOs, governance), but the words may mean different things in different places. An important purpose of the course is to help students and professor learn the ways in which basic words and concepts used in American law (for example, “class action,” “reasonable man,” “discovery,” “precedent”) “translate” into Chinese concepts, and vice versa. Students will be expected to keep a list of American law terms and concepts that they find interesting and possibly useful.¹⁷⁹

While students are expected to be thoughtful about difference (“words may mean different things in different places”), the core assumption here is that at least some American concepts are “interesting and possibly useful.” Although the syllabus lends itself to a nuanced discussion of different strands of the American experience, it steers students away from the possibility that public interest law is a foreign import entirely ill-suited to Chinese reality. Translation—and the accompanying haggling over terms—helps mete out a local understanding of public interest law. Course graduates join a legal elite well-versed in indigenization, specifically the use of local language to gain legitimacy for ideas that originate elsewhere.¹⁸⁰

Concretely, international actors have also directly financed many of China’s legal advocacy organizations. Just as private money made civil rights litigation

¹⁷⁸ Personal communication, March 2009.

¹⁷⁹ Syllabus provided by the instructor.

¹⁸⁰ On indigenization, see Stern 2005 (422).

possible in 20th century America, international organizations provided critical early funding for China's first legal aid centers and public interest law firms. The Ford Foundation, perhaps due to its history of supporting rights litigation in the United States, was one of the first to support China's emerging legal community.¹⁸¹ After starting work in China in 1979, Ford's first law-related programs involved exchange between Chinese and American legal academics. By 1992, however, program officers were fiscally and strategically ready to directly fund China's first legal aid center: the Wuhan University Center for the Protection of the Rights of Disadvantaged Citizens (Liebman 1999, 233). Following Ford's lead, other international organizations, including the Asia Foundation, the Canadian International Development Agency and UNDP, started funding legal services in the late 1990s and early 2000s. While there is no tally of total international funding for litigation, an examination of Ford's annual reports shows that it gave US 2.9 million to Chinese legal aid organizations between 2000 and 2008.¹⁸² This is not a huge amount in absolute terms, but 2.8 million dollars goes a long way in China and the landscape of legal advocacy would clearly look quite different without international support. As a 2006 Ford Foundation internal report acknowledged, "the primary funding for public interest litigation comes from foreign foundations and organizations" (Rho 2006, 9).

As others have noted (Liebman 2008, Liu 2009), Chinese legal reformers are divided between those who want to bring law in line with international practice and adherents to a local socialist legal tradition. What is interesting is that both camps can find something to like about Chinese cause lawyers. Legal activism can be interpreted as grassroots populist enthusiasm for socialist values or as a new form of international professionalism. For every Pu Zhiqiang, a lawyer who broke out freedom of speech arguments in Chinese courts after reading the 1964 *New York Times Co. v. Sullivan* decision (Pan 2008, 278), there is a lawyer inspired by China's socialist and revolutionary past. This means that adroit lawyers can also switch rhetoric as the situation demands, winning support (or at least grudging acceptance) from both Western-oriented reformers and socialist conservatives.

Unpacking Motivation: Environmental Lawyers

¹⁸¹ As Epp (1998, 58) recounts: "The Ford Foundation gave \$7.4 million to the National Legal Aid and Defender Association from 1953 to 1972; \$15 million to create the pro-civil liberties fund for the American Republic in 1953-1972; \$8.6 million to the Southern Regional Council from 1953 to 1977; \$3.3 million to the NAACP-LDF from 1967 to 1976; and \$13 million for the development of public interest law centers from 1970 to 1977."

¹⁸² Calculations by the author. The Ford Foundation website (<http://www.fordfound.org/>) includes a grant database for the years 2005-2008 and annual reports for 2000-2004. I searched both the grant database and annual reports for the keyword "China" and used discretion to sort out grants that: 1) directly supported legal aid organizations; 2) supported networking between public interest lawyers and 3) supported the development of clinical legal education in China. Other legal aid organizations that have received significant financial support from Ford include the Research Center on Juvenile Legal Aid, the Beijing University Center for Women's Law Studies and Legal Research and the Yunnan Xishuangbanna Prefecture Women and Children Psychological and Legal Consultation Service Center. All dollar totals are approximate because single grants could cover multiple types of activities.

The fact that legal activism resonates with both socialist and international conceptions of law tells us much about how cause lawyers came to exist in an authoritarian state, but little about lawyers' individual motivation for handling environmental cases. Put colloquially, environmental cases are losers: difficult to win, usually unprofitable and potentially politically touchy. So why do lawyers ever take them? Unraveling strands of motivation offers one way to start to understand lawyers' everyday choices, including the daily reality of what it means to be a Chinese cause lawyer.

To start, however, many civil environmental cases are handled not by legal activists, but by lawyers simply concerned with making a living. Although lawyers complain that they can't make money on environmental cases, local generalists will occasionally take on environmental disputes to round out their caseload.¹⁸³ As one Zhejiang lawyer put it, "it's like being a doctor in an isolated place where you see all kinds of illnesses; I'll handle whatever case comes my way" (2007-57). Or, as a lawyer in isolated Qinghai explained¹⁸⁴

In developed cities like Shanghai or Beijing, lawyers are highly specialized. Here, lawyers must be generalists and take all kinds of cases. For example, if a lawyer only wanted to specialize, he would starve. There simply aren't enough cases (quoted in Wu 2008, 195).

Prior to 2006 regulations that banned contingency fees (National Development and Reform Commission), lawyers would also sometimes gamble on a 20-30% payout in compensation cases. Water pollution cases were especially appealing because of large, definable losses and the relative ease of demonstrating causation (Ma 2003; Caijing 2006; 2006-15). The biggest advantage of environmental cases, however, is that they can help lawyers to attract clients. Because ACLA regulations limit lawyer advertisements to a dry recitation of qualifications and basic biographical facts, lawyers most frequently find new work through referrals from friends, classmates, relatives, former clients and former co-workers (Qiu 2006, 15).¹⁸⁴ Those less well-connected, maybe young lawyers or lawyers from a less privileged background, are always looking for ways to expand their personal network (2007-78). Big environmental cases with lots of plaintiffs, as one lawyer explained, "bring more opportunities" by expanding social ties (2007-111). Environmental cases also often generate good publicity that can help attract new clients (2006-12).

¹⁸³ For example, 2007-48; 2007-57; 2007-78; 2007-111.

¹⁸⁴ Article 127 of the All China Lawyers Association's 2004 "Behavior Criteria for the Practice of Lawyers" states that "the contents of the personal advertisement of a lawyer shall be limited to the name, portrait, age, sex, place of birth, educational background, degree, registration date for the practice of a lawyer, name of the law firm where he/she practices, time for working at the said law firm, charging standards, ways of contact, and the scope of legal service business that can be provided to the society according to law." These kinds of ads, one imagines, would have a hard time attracting anyone the lawyer didn't already know.

Maritime lawyers also fairly routinely handle one particular type of environmental litigation: oil spill cases involving boats.¹⁸⁵ These cases are much more lucrative and attractive than run-of-the-mill pollution cases because oil spill damages are relatively easy to prove and because all legally registered boats have insurance to cover compensation (2007-49). As one maritime lawyer explained, “you know from the start that there’s going to be compensation, it’s just a question of how much” (2007-49). Maritime lawyers are also a small and specialized minority. A large case with multiple defendants and plaintiffs will involve most well-established lawyers in the field and professional pride dictates that, regardless of fee, no one wants to sit a major case out (2007-41).

Although lawyers accrue some direct and indirect financial benefits from the occasional environmental case, most lump pollution disputes with other types of unprofitable cases and avoid them.¹⁸⁶ Personal entreaties, like helping out a friend (2007-87) or representing your hometown (2007-108), are often necessary to persuade lawyers to get involved. Sometimes, simple sympathy also trumps profit-loss calculations. Lawyers are frequently drawn into what Kritzer calls “de facto pro bono” out of compassion and a sense of shared humanity (2002, 1945).¹⁸⁷ As one lawyer put it, “Chinese people have it really tough, so I’m willing to make a bit less money or take the case for free” (2007-79). Many environmental cases are handled by well-meaning lawyers who are not vocally committed to “ends and ideals that transcend client service” (Scheingold and Sarat 2004, 3). These lawyers talk about following their conscience (2007-3), doing the right thing (2006-12), and pursuing something meaningful (2007-14). They frequently mention a strong sense of responsibility to society and a desire to make a contribution.¹⁸⁸ Conceptually, these do-gooders do not fit the typical mold of cause lawyers as self-aware moral crusaders (Scheingold and Sarat 2004). Yet in the shadow of a socialist legacy, lifting up the disadvantaged blurs the boundary between charity and activism. Even carefully parsing the language of the most self-reflective lawyers, it is difficult to tease apart the quotidian pull of human sympathy from a deeper egalitarian commitment to more just society.¹⁸⁹

Beyond intermittent altruism, a significant minority of environmental lawyers are recognizable cause lawyers. These are the lawyers dedicated enough to scan the news looking for pollution victims to represent in court (2007-53; 2007-71, 2007-

¹⁸⁵ 2007-41, 2007-49 and 2007-65 all handled these kinds of cases.

¹⁸⁶ On how lawyers screen cases, see Michelson (2006).

¹⁸⁷ For interviews that discussed human sympathy, see 2007-15; 2007-28; 2007-54; 2007-77; 2007-79; 2007-97; 2007-103 and 2007-108. For more on this kind of de facto pro bono work in Qinghai province, see Wu (2008, 196).

¹⁸⁸ Chinese-speaking readers may be interested in the exact phrases lawyers use to make this point. Lawyers talk about a desire to contribute to society (*dui shehui you gongxian*) (2007-27); serving society (*wei shehui funu*) (2007-60); a sense of responsibility to society (*dui shehui you zeren gan*,) (2007-70); societal responsibility (*shehui zeren*) (2007-78), and doing something good for society (*dui shehui huozhe dazhong zuo yixie haoshi*) (2007-87).

¹⁸⁹ As Shamir and Chinski point out, causes are not objective facts, but constructed and articulated by lawyers themselves (1998, 231). So far, China’s most articulate legal activists have converged around rights protection without an accompanying eloquent defense of egalitarianism.

108), spend 10,000 RMB (US 1,470) of their own money on a case (2007-51) or set up local hotline for pollution victims (2007-34). While a few describe themselves as environmentalists (*huanbao zhuyizhe*) (2007-70; 2007-108), most skip over the label in favor of a tamer appreciation of nature (2007-34; 2007-106) or recognition of the severity of China's environmental problems (2007-27; 2007-94). Some of those most concerned about environmental degradation, unsurprisingly, are former Environmental Protection Bureau employees (2007-27; 2007-54). At the same time, the relative safety and wide scope of environmental cases attracts lawyers who care little about pollution. Environment is a particularly flexible cause, broad enough to encompass concerns about inequality and overbearing government as well as pollution and degradation, and cases attract a collection of lawyers driven by disparate beliefs. These lawyers see environmental cases as one way to push forward a number of causes including owners' rights (2007-72), fishermen's rights (2007-79), rule of law (2007-53) and checking state strength (2007-97). As one of China's best known environmental lawyers put it, "I firmly believe that every lawsuit I conduct helps rebuild people's confidence in the system...every environmental case, even if the lawsuit itself is unsuccessful, is an advancement of the rule of law in China" (quoted in Mackey 2007).

Across causes, the Chinese environmental lawyers I met believe in both the necessity and the promise of incremental change. Like other moderate rights protection lawyers, they see individual cases as a way to slowly change society (2007-51).¹⁹⁰ These cases, in the words of one lawyer, are "not just a way to get compensation, but to change the legal system and slowly expand the space for action" (2007-91). Environmental lawyers' overriding orientation is towards nudging an agenda forward one uncontroversial step at a time. Although they admire the courage of lawyers more inclined to political criticism, like dissident lawyer Gao Zhisheng, they worry about backlash from doing too much too fast (2007-18). Even the most political environmental lawyers—the ones who talk about environmental cases as a "break through point" (*tupoukou*) for democracy (2007-104)—are not advocates for regime change or even deep liberalization. Rather, they are talking about "small d" democratization; a gradual expansion of public participation to increase state responsiveness to citizen needs.

To some extent, this scaled-down political agenda reflects the influence of Tiananmen and the other protests of 1989. For at least one cohort of activist lawyers, now in their early 40s, youthful participation in the democracy movement marked a biographical moment, a point in time that divides lives into 'before' and 'after' terms (McAdam 1989, 758). After the government crackdown, some turned to law to make a living and, later, as a lower profile way to push forward political change (2007-66).¹⁹¹ As one lawyer writes:

In 1980, China opened up to the world again. Western philosophy, politics and legal theory all started flooding in. These completely new, strange ideas

¹⁹⁰ See Fu and Cullen (2008, 116-118) on moderate *weiquan* lawyers.

¹⁹¹ Pu Zhiqiang is one example of a lawyer willing to talk publicly about his experiences at Tiananmen (see Pan 2008, 274-77).

strongly affected Chinese citizens, hastening the 1989 student democracy movement that so transfixed the world. As a sophomore in college, I went to Tiananmen Square and saw my classmates block the tanks with their flesh and blood...at that moment, knew I was destined to spend my life in the struggle for liberty. The flame of that conviction never went out, even when the aftermath of Tiananmen forced my ideals to the bottom of my heart. I became an environmental lawyer, committed to the fight for rights.¹⁹²

In the post-Tiananmen era, rights litigation became a way to mount a “critique within the hegemony” significant enough to satiate at least some demands for political change (Scott 1990, 106). And as de facto restrictions on internal migration relaxed in the 2000s, like-minded lawyers started converging on China’s big cities, particularly Beijing, to both find clients and channel the advantages of relative anonymity into legal activism.

As a group, then, environmental lawyers are moved by a diverse set of aspirations and desires. Mixed ideological and financial motivation is common, even among self-aware lawyers for a cause. Environmental litigation, at least for some, offers a way to direct personal environmental leanings into a marketable expertise (2007-9; 2007-54; 2007-89; 2007-99; 2007-115). Climate change and pollution are headline news and future-looking lawyers sense business opportunities in clean development mechanism projects and corporate advice on environmental standards (2007-28; 2007-80). The more intellectually inclined also enjoy learning about a new area of law (2007-87; 2007-102) even if a short-term financial payoff is unlikely. While many of these lawyers are loosely affiliated with either CLAPV or the ACLA environmental law committee, these networks are not particularly tight knit. It is hard to forge solidarity between individuals with different motivations and, as of my fieldwork in 2006-2007, China’s environmental lawyers were still calling on each other to team up (*duiwu qi lai*) and stand together.

One reason that environmental lawyers are not more unified is disagreement over goals and tactics, sometimes exacerbated by garden variety jealousy and competition. Sometimes naming names and sometimes keeping silent, nearly everyone in China’s environmental law community can think of someone out for publicity rather than a cause¹⁹³ and grumbling about “fishing for fame and compliments” (*guming diaoyu*) is widespread. “If a lawyer wants to be famous,” one lawyer commented at a conference, “it’s just too easy” (2007-33). Yet, as those few willing to own up to it admit, the rewards of reputation are real (2007-99; 2007-102). Lawyers rely on “cheerleaders” (*lala dui*), including the media, to build a reputation and bring in clients (Qiu 2006, 15-16; see also Liebman 1999, 238).¹⁹⁴ At times,

¹⁹² Document on file with the author.

¹⁹³ See, for example, 2006-3; 2006-12; 2007-11; 2007-29; 2007-99; 2007-100 and 2007-110 as well as dozens of other comments in more informal exchanges.

¹⁹⁴ For well-known lawyers, on the other hand, controversial cases can be more risky than rewarding. Self-termed public interest lawyer Yan Yiming, for example, told *Southern Weekend* in 2009 that he has lost foreign clients over his public interest work (Meng 2009).

caustic remarks about publicity seekers also indicate strategic disagreement. Some lawyers pursue a self-consciously “low profile” (*didiao*) strategy where they “just do stuff, but don’t talk about it” (2007-66; see also 2007-51 and 2007-73). From their perspective, lawyers in the headlines only attract unwanted state attention. Others, as discussed in chapter 1, see the media as a critical ally in the vital extra-legal business of capturing public opinion and pressuring judges. Coverage from state-run media, in particular, stamps lawsuits with an official imprimatur that increases the likelihood of a sympathetic hearing.

Across these fissures, however, the pleasure of moral action moves many environmental lawyers.¹⁹⁵ Acting on conviction marks the preferences and allegiances of personality and deepens self-respect. Law, like protest, offers a satisfying opportunity to “plumb our moral sensibilities and convictions and to articulate and elaborate them” (Jasper 1997, 5). Better yet, heightened societal respect frequently accompanies the self-contained pleasure of taking a stance. Idealism begets status, visible in newspaper coverage, awards and the admiration that permeates everyday social encounters. All but the humblest lawyers would enjoy being introduced to a conference as “our rights-upholding hero,” as I once observed (2007-33), or, like academic and lawyer Wang Canfa, being selected as an international “hero of the environment” by *Time* magazine (Ramzy 2007). As one lawyer explained, “there’s so much to do in China, it’s easy to be a hero” (2007-73). Or, at least, it is easy to be a hero to someone. Heroic sensations of power, righteousness and gratitude can arise from even one pro bono case. Grateful clients, the kind who thank lawyers with a commemorative banner or perhaps mark the end of a lawsuit with a group photo, can be deeply fulfilling. As one environmental lawyer recalled his final client meeting, “although we faced opposition from the local government, [at that moment] we felt like it was worth it” (2007-97).

Serving justice and right can also be fun. As one Zhejiang lawyer told me, suing the government “fits my personality because I like being a tiger” (2007-102). Some lawyers even appreciate the long odds of environmental cases. As one lawyer put it, “a case has to be challenging before it’s interesting” (*you weidao*) (2007-82). For the performative, the public spectacle element of litigation is especially enjoyable. At an environmental hearing I attended in December 2008, the legal team (which included the plaintiff) seized every opportunity for drama. Here is a typical exchange:

Plaintiff: Did you visit the neighboring fruit farms to assess damages there?
What were they like?

Representative from the appraisal team: [long pause] I believe we went several times.

Plaintiff: Hah! You went! [snort] No way! You saw them across the way!
[snort]

Regardless of the outcome, this was first-rate legal theater. As one of the lawyers said later, it was like watching a play or starring in a private, Chinese version of Hollywood movies like *A Civil Action* or *Erin Brockovich*.

¹⁹⁵ For an example of the pleasure of moral action, see Pan (2008, 271).

Experiencing Ambivalence: Blurry Boundaries and Self-Censorship

For lawyers, a large part of the experience of political ambivalence is the genuine difficulty of distinguishing a safe case from one that merits unwelcome attention from authorities. Amid shifting boundaries of tolerance, signals from the state are easily misinterpreted or simply missed altogether. Even signs of encouragement, like recent efforts to double the size of the ACLA environmental law committee,¹⁹⁶ are open to interpretation. One public interest-minded Shanghai lawyer, for example, became interested in environmental litigation after the announcement of the 2008 Regulations on Open Government Information convinced him that collecting evidence and winning cases was going to get much easier (2007-53). While his logic makes sense, no other lawyer I met mentioned the new regulations.¹⁹⁷

One issue is that the blurry boundaries of tolerance often become clearest when violated. Sometimes, standard monetary compensation cases are headlines-grabbingly successful, as when the Baotou water company won a RMB 2.3 million (US 338,000) settlement against two paper mills in a 2006 case heralded as a major step forward for civil environmental law (Jiang 2006a). Or one of Center for Legal Assistance to Pollution Victims (CLAPV)'s most successful cases, the Pingnan case discussed in Appendix B, was named one of the most influential lawsuits of 2005. On the other hand, however, innovation and related publicity frequently trigger government pressure. In 2006, for example, Chen Yueqin's Beijing law firm threatened to sue the State Environmental Protection Agency unless it publicly released the environmental impact assessment (EIA) for proposed dams along the Nu River in Yunnan. The case was unusual because Chen, working in collaboration with Yunnan environmental activists, had an explicit policy agenda: preventing the dams. In addition, the lawsuit was innovative. China's 2003 Environmental Impact Assessment Law is rarely used for litigation, despite lawyers' complaints about secret assessments and low fines (a maximum of RMB 200,000 or US 29,411) for skipping an EIA altogether.¹⁹⁸ In the end, the case disappeared amid government disapproval—either dropped by Chen or refused by the courts (2007-11; 2007-33). Another boundary-pushing lawsuit, the Songhua River case discussed in chapter 5, was also rejected by Heilongjiang courts uninterested in expanding the right to sue. Sometimes conventional compensation cases fall outside the zone of tolerance too. Even as environmental lawyers won a landmark water pollution lawsuit in Inner Mongolia, a government document prohibited lawyers from taking similar cases along the Tuojiang River in Sichuan (Fu 2006, 13).

¹⁹⁶ In 2007, the environmental law committee had about 30 members and a goal of doubling to 60 members by 2008 (2007-60, 2007-73).

¹⁹⁷ It is not yet clear if the new regulations on access to information will have a significant impact on environmental lawsuits. The Trial Regulations on Release of Environmental Information, a separate set of regulations promulgated through the Ministry of Environmental Protection, suggests that the government should provide environmental information to the public without requiring it.

¹⁹⁸ The penalty for construction without submitting an EIA is also quite low: the construction company must stop construction and submit a late EIA. Often, only the executive summary is released to the public.

Trouble determining whether any given case will be “prescribed, tolerated or forbidden” indicates that environmental litigation “sits near the fuzzy boundary between official, prescribed politics and politics by other means” (O’Brien 2003, 53, 52). Depending on which official makes the call, the same lawsuit can be interpreted as an irritant to stability or an opportunity to reinforce justice. In places where outright dissent leads to quick retribution, this kind of “boundary-spanning contention” gives activists and claimants critical room to maneuver (O’Brien 2003). Environmental lawsuits may be hard to win, but lawyers at least sometimes report that “there wasn’t anyone who didn’t support us” (2007-102).

At the same time, however, the widespread uncertainty that accompanies political ambivalence exacerbates self-censorship. Would-be activists must contend with “attitudes, fears and uncertainties” that counsel against boundary-pushing litigation (Fernandez 2008, 34) and toward quietly dropping a case or letting a claim slide. Here, there are strong parallels between lawyers and journalists. As Hassid (2008) points out, Chinese journalists also “self-censor to a critical degree” because the Central Propaganda Department “demarcates the boundaries of the acceptable in such a deliberately fuzzy way” (415). While official punishment affects less than .002% of both professions, seemingly arbitrary repercussions breed widespread caution because no one knows when or why the government will crack down (Hassid 2008, 420-421 for journalists; Fu 2006, 8 for lawyers).

But how exactly does uncertainty and political ambivalence ultimately change behavior? One key link is stories about state repression and its consequences, which I call control parables.¹⁹⁹ Control parables, told during conference breaks and over meals, are grassroots stories about repression which draw larger meaning from isolated incidents. Rather than uncritically accepting the state’s official explanation (when there is one), listeners and storytellers interpret facts and develop “shared understandings of how to manage the risks of uncertainty, anomaly and unpredictability” (Ganz 2001, 2). Gossip about run-ins with the state ultimately influences behavior by making some “courses of action seem reasonable, fitting, even possible and others seem ineffectual, ill-considered, or impossible” (Polletta 2006, 4). Control parables, in other words, are the understudied flip side of stirring resistance stories.²⁰⁰ Instead of inspiring action, they dissipate possibilities.

The best example of a control parable I encountered involved a controversial public interest lawyer training program I attended in March 2007. Over the next six months, I heard (and overheard) at least a half-dozen conversations about political blowback from this meeting.²⁰¹ The consistent kernel of the story was that local officials reported the conference (*huibao*) up the Party chain of command to President

¹⁹⁹ I call them parables because they are less detailed than a story (often there is no true beginning, middle or end), but more open-ended than an adage (which summarizes a moral in a pithy proverb).

²⁰⁰ See Ganz (2001), Polletta (2006) and Khalili (2007) on resistance stories. Interestingly, I did not hear many resistance stories during my fieldwork. The few heroic references, discussed in chapter 5, were to international heroes rather than domestic ones.

²⁰¹ I was an active participant in some of these conversations and, obviously, my presence affected the story-telling. Overhearing several similar conversations, however, convinced me I did not change the basic script.

Hu Jintao on the grounds that some participants vilified (*chouhua*) the government. Regardless of truth, this rumor was the *on dit* for a time among the community of Beijing lawyers, academics and international NGO representatives involved in public interest law. Aside from the sheer fun of passing on insider information, these conversations marked an attempt to decipher how the March conference differed from dozens of similar meetings and, in particular, what the organizer did wrong. Storytellers, as Polletta observes, “rarely say explicitly to their audience, ‘and the moral of the story is...’” (2006, 10). Instead, each conversation organically unearthed lessons about how to avoid political fallout. Theories about why the conference ran into trouble included: 1) the location (a small town where it was hard to avoid notice); 2) the attitude of the local government (too conservative); 3) the source of financing (the politically sensitive Open Society Institute) and 4) the sponsors (no “protective umbrella” (*baohu san*) of university involvement). These are all plausible explanations, but the more interesting point is how locals interpret ambiguous state signals. Rather than blaming the government, on-the-ground activists frequently struggle to draw meaning from seemingly random sanctions. Finding fault with an inexperienced conference organizer helps moderate the anxiety of uncertainty, especially when even the well-connected find government actions inscrutable. The call-and-response of control parables, like all stories, fills a human impulse to “tame time, map space, and understand character and motive” (Khalili 2007, 226). Across retellings, storytellers and listeners refine a set of imagined rules designed to prevent future clashes with authority. Without state involvement or even knowledge, these parables weave uncertainty into prescriptions and then shibboleths that mark the limits of tolerance.

Clearly, drawing meaning out of seeming randomness is not unique to Chinese lawyers. We tell ourselves stories to explain uncertainty all the time, coming up with theories about when highway police are most likely to be ticketing or why some Ph.D. students get better jobs than others. Control parables are a subset of these larger attempts to interpret and manage uncertainty. The difference is that control parables deal exclusively with one particular type of uncertainty: ambiguity about which actions authorities consider off limits.²⁰² Confusion over the boundaries of tolerance, in turn, leaves citizens unsure whether any given action will be encouraged, forbidden or ignored. Yet, even narrowly defined, control parables are not an exclusively authoritarian phenomenon. Democracies, too, are capable of unpredictable crackdowns, at times harassing some groups that challenge the prevailing political orthodoxy and not others and no doubt driving grassroots attempts to make sense of state response.²⁰³ Still, democratic leaders are usually limited in ways that authoritarian leaders are not. Pressure to maintain the appearance of clear laws and consequences constrains discretion and, by extension, uncertainty. The availability of information matters too. In places where media reports range from incomplete to

²⁰² Note that this is different from ambiguity surrounding whether citizens will be punished. Drivers frequently get away with speeding, for example, but everyone is clear that it is illegal.

²⁰³ For examples of surveillance and harassment in the United States, see Davenport (2005) and Starr et al. (2008).

disingenuous, citizens often rely on rumors to know what is going on. Rumors, however, vary in reliability and require conversations to transmit and interpret them. And when these conversations turn to repression, participants can be heard subtly encoding parables with the limits of political possibility.

One of the most notable political consequences of control parables in contemporary China is the degree to which they shift blame away from the political system. Instead of criticizing top leaders or the CCP, control parables usually attribute repression to obstructionist local cadres or hold participants responsible for the consequence of their own actions.²⁰⁴ Tim Hildebrant's dissertation on Chinese NGOs, for example, shows how those who have never run into problems with authorities tend to see clashes as activists' fault, perhaps prompted by their excessive radicalism or ignorance of the rules. As Hildebrant writes, "leaders are quick to point to the 'poor choices' of others, while drawing attention to their own 'smart decisions' (2009)." In deflecting blame from the politically powerful, control parables serve elite interests. Listening to what is *not* said underscores the extent to which the powerful have "successfully inserted themselves and their interests into the processes by which the weak understand themselves, their goals, their possibilities and their constraints" (Stokes 1991, 270). In so far as lawyers or other activists share a common understanding of the limits of the permissible, it is an understanding partly created by their own actions and interpretation.

Conclusion

To be clear, China is not being overrun by public interest lawyers, let alone public interest environmental lawyers. Most Chinese lawyers are simply struggling for survival in a competitive market and environmental lawyers, as one complained, are undoubtedly "too weak and too few" (2007-91). Without career fairs or summer scholarships, those interested in environmental public interest litigation are unsure how to break into the field (2006-3; 2006-4; 2006-16) and the few experienced lawyers are an "unstable professional type" that shifts with the political winds and economic possibilities (Shamir and Chinksi 1998, 232). Experience particularly tends to fade ideals, especially the day-to-day grind of being underpaid and underappreciated. It is wearing to make as much money as your former assistant (2007-18) and get stiffed by clients on litigation fees (2007-91), particularly when success is rare. It is discouraging to sink time into a first environmental case, perhaps making multiple trips to far-off pollution sites, only to find plaintiffs suddenly unwilling to sue or the court unwilling to accept the case. Disillusionment and burn out are as common as recruitment and radicalization, especially among those just starting out (2007-34; 2007-71; 2007-89).

Still, the existence of anyone who could plausibly be called a Chinese cause lawyer—a noteworthy shift from the early 2000s when lawyers were only seen as "producers, peddlers and consumers of connections" (Michelson 2003, 6)—shows

²⁰⁴ Li (2004) discusses Chinese citizens' "bifurcated" view of the state and how blame accrues to local mismanagement without denting the integrity of the central government.

how conflicting political cues open up possibilities for activism. For many, even the whiff of political sensitivity encoded in water cooler gossip is enough to counsel a sensible retreat to less controversial work. At the same time, however, paralyzing uncertainty can be interpreted as inspired opportunity, especially when lawyers have a larger cause in mind.²⁰⁵ Yet legal activism in China is a transnational story as much as a domestic one. As I realized traveling around China meeting environmental lawyers, international exchange, study abroad programs and even movies like *A Civil Action* have brought some form of international awareness into most lawyers' lives. Turning from inside China to outside of it, the next chapter looks how, if at all, these transnational ties shape environmental lawyers' decisions and commitments.

²⁰⁵ On how activists tend to be overly optimistic, see O'Brien and Li (2006, 47).

Chapter 5: Soft Support: The International NGOs

Over tea in industrial northeastern China, a group of Chinese lawyers discuss O.J. Simpson as a symbol of America's commitment to human rights. For them, O.J.'s 1995 murder trial does not showcase racism or the perils of celebrity justice, but a well-functioning legal system operating at its best. Sixteen hundred miles to the south, in Shenzhen, a group of lawyers hires a foreign tutor to convene weekly two-hour classes on American law. In their free time, they want to both practice English and learn about the US justice system. And in Washington D.C, a Chinese environmental lawyer on a foreign-sponsored study tour calls me to talk about his internship. Energized by new possibilities, he shares his plan to establish a Chinese environmental foundation when he returns home.

In a moment which, to borrow Pico Iyer's phrase, "almost every culture could access every other," it was impossible to observe China's legal landscape without noticing this kind of transnational influence (quoted in Mishra 2008). The global reach of the internet, CNN and Hollywood has increasingly brought the American experience, however dimly perceived, into everyday Chinese lives. For those with an international bent, especially in big cities, it has become difficult *not* to know something about law elsewhere. Some, like the environmental lawyer turned D.C. intern, are even more deeply integrated into a steady current of transnational activity. These lawyers are active participants in international networks: they attend Ford Foundation-funded workshops, organize conferences with international NGOs and take advantage of US-sponsored opportunities to go abroad.²⁰⁶

Environmental litigation is not a purely domestic story and, turning our attention abroad, this chapter examines the influence of one, final new actor: international NGOs. In particular, how (if at all) do programs designed to support environmental litigation affect legal professionals' day-to-day practice and core commitments? Empirically, this is an important question because there hasn't been a public evaluation of the hundreds of thousands of dollars spent on programs designed to help lawyers leverage the law for social change.²⁰⁷ China-based "rule of law programs" are a growth industry and NGOs, ever looking to the next project, should be interested in a reflective look at how their money matters (2007-64; 2007-67). Scholars of Chinese politics have also only recently awakened to the importance of international influence on local activism. Here, this chapter fits into a new generation of work on how foreign money (Bentley 2003; Spires 2007) and networks (Shelley 2005; Wu 2005; Morton 2008) affect domestic non-governmental organizations

²⁰⁶ By network, I mean the collection of overlapping, voluntary, personal and professional connections that knit together individuals and organizations.

²⁰⁷ For a theoretical critique of U.S.-sponsored rule of law programs, see Stephenson (2006). Alford also discusses the ethics of promoting democracy and rule of law in China (2000, 1707-1708) and Mendelson and Glenn (2002) evaluate democracy promotion in Eastern Europe.

(NGOs).²⁰⁸ Instead of focusing on NGOs, however, I look at another potential sphere of activism: litigation.

Theoretically, links between international organizations and Chinese lawyers brings into focus a particular strain of transnational activism, which—extending Charles Epp’s concept of a litigation support structure (1998)—I call soft support. Rather than lobbying for policy change or directly funding litigation, international organizers of soft support programs invest in human capital by enhancing activists’ legal skills, knowledge and experience. The hallmark of soft support, training programs backed by foreign expertise and money, surfaces far afield from China and even from law. My work explores this broader concept by zeroing in on American-funded efforts to support Chinese environmental lawyers.²⁰⁹

This chapter traces soft support from conception to implementation and from the United States to China. The payoff is a new perspective on one, specific way in which regions can be “linked and bounded” (Cooper 2001, 213). As researchers have noted, there are “different types of foreign connectedness” as well as “multiple Chinas, connected to the outside world in many ways” (Stark et al. 2006, 326; O’Brien and Stern 2008, 23). Soft support gives us another angle on globalization, particularly how middlemen translate lofty goals into practical programs and the reasons why both Americans and Chinese seek out connections across borders.

Overall, American-funded soft support for environmental lawyers has met with mixed results. To date, soft support does not seem to have recruited a substantial new corps of activist lawyers or improved the success of litigation. Instead, soft support is most effective in the ideational realm, in inculcating hope and encouraging new identities. While this kind of intangible outcome may leave hard-nosed grantmakers queasy, soft support programs offer a welcome reminder that environmental lawyers’ efforts are appreciated abroad if not at home. At the same time, the American legal system—often distorted in the retelling—serves as a local aspirational ideal for China’s future.

The Turn Towards Soft Support

Many of the classic accounts of transnational activism revolve around the state (Keck and Sikkink 1998; True and Minstrom 2001; Khagram 2004; Tarrow 2005). Building on the insight that transnational ties affect political outcomes, researchers have chronicled how coalitions “bound by a common agenda” influence government policy (Price 1998, 620). Activists promoting, say, a different definition of development (Khagram 2004) or an anti-land mine ban (Price 1998) lobby decision-makers to accept their definition of a problem and its solution. Activist groups knock on the doors of power, leveraging moral suasion and social pressure to change minds

²⁰⁸ On lack of attention to international influences, see O’Brien and Stern (2008, 22-23) and Morton (2008, 195).

²⁰⁹ This is not to say that America is the only game in town. European, Japanese and Korean organizations run similar soft support programs in China that target lawyers, plaintiffs, activists, students, judges and government officials. While future research could examine variation, a first look suggests a striking similarity of values, curriculum and approach across of the nationality of the organizers and the groups involved.

(Price 1998, 616). Sometimes, the state also invites outsiders in, to pick their brains for a new “cheap means” to solve a problem (Dolowitz and Marsh 2000, 14; see also Kelemen and Sibbitt 2004; Weyland 2005). Uncertainty and complexity stimulate openness to outside ideas and policymakers frequently turn to knowledgeable experts, or epistemic communities, to deal with tough issues (Haas 1992).²¹⁰

Both transnational advocacy networks and epistemic communities are alive and well in China. Government technocrats scour the world for solutions to China’s social problems even as international networks lobby top leaders on issues from trade to Tibet. Indeed, international NGOs frequently collaborate with government-backed organizations to cultivate allies inside government. In a strong, illiberal state, officials are impossible to ignore. But in a world “crisscrossed by an increasingly dense web of networks,” not all activism is state-focused (Slaughter 2004, 6).²¹¹ As Paul Wapner reminds us, NGOs often bypass the state by, for example, directly pressuring polluters or staging events to shock an apathetic public into action (1996; also see Wu 2005, 66).²¹² Reaching around the state can be an effective strategy, particularly in nondemocracies when lobbying offers uncertain results (Khagram 2004, 20-25).

One way of reaching out to “critical communities” is “train[ing] Chinese lawyers in the practice of environmental law and advocacy” to “see to what extent the legal system can offer...support” for environmental claims (Chabot and Duyvendak 2002, 706; 2007-92; 2007-65). Steeped in the conviction that litigation can bring social change, American financiers have taken seriously Charles Epp’s charge that “proponents of expanded judicial protection for rights should...provide support to rights-advocacy lawyers and organizations” (Epp 1998, 6; also 2007-76). This support can take many forms. In Epp’s work, a “support structure” of organizations and lawyers backed by private and public money brought enough litigation to spark the 1960s American rights revolution (1998, 19). In contemporary China, in contrast, American organizational, legal and financial resources seldom directly support lawsuits.²¹³ Although Chinese lawyers would gladly accept cash to pay salaries and litigation fees (2007-51), organizations generally opt for soft support: ex-ante

²¹⁰ “An epistemic community is a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area” (Haas 1992, 3).

²¹¹ Sociologists and anthropologists are not nearly as state-focused. Much of the literature on diffusion looks at transnational ties outside the state. On the diffusion of social problems, see Best (2001). On the diffusion of ideas, see McAdam and Rucht (1993) and Dezalay and Garth (1996). On the diffusion of protest repertoires, see Soule and Tarrow (1991), Chabot (2000), and Chabot and Duyvendak (2002).

²¹² In China, there are also other examples of activism that reaches around the state. In 2004, *The Epoch Times* (a newspaper with close links to the banned sect Falun Gong) orchestrated a mass resignation from the Chinese Communist Party (Thornton 2008, 179).

²¹³ In terms of environmental litigation, the notable exception is the Ford Foundation. Between 2000 and 2008, the Ford Foundation gave US 660,000 for the Center for Legal Assistance to Pollution Victims, China’s leading environmental legal aid center, some of which was used to bring lawsuits (calculation by the author, data culled from Ford Foundation annual reports). These China Labour Bulletin, a Hong Kong-based NGO, also started a Labor Rights Litigation project in 2003 that directly pays Chinese lawyers to take labor lawsuits. As of June 2008, China Labour Bulletin had taken on 274 cases and provided US 87,000 in lawyer fees (Han 2008, 4-5).

investment in skills to make future litigation and advocacy possible. This investment in human capital leaves a visible wake of flyers and emails announcing training workshops, conferences and study trips.²¹⁴ Often, international money translates into an international perspective on environmental law. Foreign-financed opportunities to reflect and learn almost always include some discussion of what China can learn from abroad.

This is not the first time China has encountered foreign money, ideas or experts. Between the end of the Qing Dynasty in 1911 and the Chinese Communist Revolution in 1949, China was deeply internationalized (Kirby 1997). Bertrand Russell visited China in 1920 and 1921, Margaret Sanger visited in 1922, and John Dewey lived in Beijing in 1919 and 1920 (Spence 1990, 317). More permanent international residents translated international law textbooks (Svarverud 2007, 91-106), founded law schools (Conner 2003), financed railways (Kirby 1997, 447) and pursued “god’s work” (Kirby 1997, 453). In 1947, the Rockefeller Foundation alone invested US 45 million in Chinese medical programs (Wu 2005, 7). In part, contemporary soft support reflects a resurgence of international involvement after the isolation of the Mao era.

On the American side, there are also strong historical parallels to the 1960s law and development movement. Clinton and Bush administration support for rule of law programs in China, including environmental law, evoke memories of earlier efforts to bring U.S. legal assistance to Latin America, Africa and parts of Southeast Asia (Alford 2000; Stephenson 2006). The mid-1960s saw a zenith of belief in the transformative potential of law; experts spent the better part of a decade teaching the American experience in the hopes of inspiring imitation.²¹⁵ Legal scholars involved in this period of international outreach recall that law meant more than efficient, impartial justice; it was a “rational and effective method to protect individual freedom, expand citizen participation in decision making [and] enhance social equity” (Trubek and Galanter 1974, 1063).

More than forty years later, the associate director of the American Bar Association’s (ABA) environmental law initiative in China made the same connection between values and soft support. In his words, “the environment is the wedge issue, the Trojan Horse, by which the ABA is working with the legal reform community in China to advance cutting edge concepts of rule of law, governance and transparency” (Rohan 2003). As always, advancing concepts is a value-laden and inherently political enterprise. Now, as before, the transmission of expertise is accompanied by the “indirect transfer of underlying legal models, concepts, values and ideas” (Gardener 1980, 14). But whose morals anchor environmental law programs and are they effectively transmitted? Following the money from the United States to China shows the degree to which values and aspirations shift between rhetoric and practice.

The U.S. Side: High-Flying Rhetoric and Uncertain Missionaries

²¹⁴ For more on investing in human capital, see Mendelson and Glenn (2002, 9).

²¹⁵ For more on the 1960s law and development movement, see Trubek and Galanter (1974), Gardener (1980), and Widner (2001, 200-205).

Fed by American curiosity about the repressive export powerhouse turned Olympic host, China was all over the American media in the early 2000s (sample headline from *Atlantic Monthly*: “China Makes, the World Takes”).²¹⁶ While China had been in the headlines for years, this time China mania extended into foundations, NGOs and government offices increasingly interested in international programs. As a staff member at a U.S. environmental NGO explained, “the single biggest issue right now is China and what China is going to do...China holds the fate of the planet in its hands, so whatever we can do is worth it” (2008-4). Even Chinese lawyers across the Pacific noticed that “China is unignorable” and, by 2007, it was clear to employees at the Environmental Protection Agency that “people [in Washington] are realizing that China is a major player” (2007-90; 2007-91).

In terms of foreign aid, China fever meant more money for outreach. Four top U.S. funders (the Ford Foundation, the National Endowment for Democracy, the Asia Foundation and the U.S. Department of State) collectively made US 32.6 million in China-targeted grants in 2005, a 62% increase over 2002 funding levels (Spires 2007, 11). Within this budget, soft support for environmental lawyers is typically placed inside larger programs to promote the rule of law. In a country where any discussion of democracy is sensitive, the hope is that legal reform will spur proto-democratic values like transparency, accountability and public participation (also see Stephenson 2006).²¹⁷ Legal assistance, as a result, was particularly high on the Bush administration’s “freedom agenda.”²¹⁸ The U.S. State Department’s Human Rights and Democracy Fund (HRDF) money earmarked for democracy promotion overseas increased 500% between 2002 and 2008. In fiscal year 2005-2006, the last year for which detailed data is available, 34.8% of the HRDF budget went to China-based programs, including US 10.4 million dollars for rule of law (see Table 1).

Table 1: Human Rights and Democracy Fund Support for China

	FY 2002-2003	FY 2003-2004	FY 2004-2005	FY 2005-2006	FY 2006-2007	FY 2007-2008
Total budget	13,000,000	26,750,000	32,960,000	34,260,000	69,845,000	69,845,000
\$ for China	4,752,000	8,641,500	13,050,300	11,835,000	--	--
China as % of total budget	36.5%	32.3%	40%	34.8%	--	--
\$ for China/law ²¹⁹	3,644,000	5,617,500	9,942,300	10,455,000	--	--
China/law as a % of total budget	28%	21%	30.4%	30.7%	--	--

²¹⁶ Fallows (2007).

²¹⁷ There is also a domestic calculus behind these programs. Rule of law offers a way for U.S. China policy to please both business and human rights interests (Alford 2000, 1696).

²¹⁸ On American efforts to promote democracy, see Carothers (1999) and Amiri (2007).

²¹⁹ I counted a project as law-related if it had the words “law” or “legal” in the project description. I’ve included money given to the National Endowment for Democracy, a major part of each year’s China budget, because part of their mandate is to promote rule of law.

Sources: Data from the U.S. Department of State, Bureau of Democracy, Human Rights and Labor, <http://www.state.gov/g/drl/p/> and <http://www.state.gov/g/drl/p/c12440.htm> (accessed May 13, 2008). Information on specific programs not available for FY 2006-2007 and 2007-2008.

Although there's no comprehensive list of environmental law programs, the American Bar Association, the Rockefeller Brothers Fund, the Global Greengrants Fund, Natural Resource Defense Council, the Ford Foundation, Ecolinx and the Environmental Defense Fund ran programs between 2001 and 2008 on environmental information, legal aid and public participation in environmental decision making in China. Compared to the Human Rights and Democracy Fund's US 69 million annual budget, most of these programs are small-scale, ranging from several thousand dollars to several hundred thousand dollars. Small budgets make it easier to operate unnoticed because, as one NGO representative remarked, "it's harder for the government to keep tabs on all of us" (2007-64). More recently, however, there have also been some larger, high-profile projects. In 2006, for example, Vermont Law School and Zhongshan University won a three-year US 1.8 million grant from US AID to focus on environmental law, a sign that China, law and the environment are top priorities for the U.S. government.

The Americans running environmental law programs are clear that democratic values are central (2007-67).²²⁰ Political change is an open, acknowledged part of the agenda, at least when they describe their work in front of American policymakers. In 2003, a representative from the American Bar Association plainly told the Congressional-Executive Commission on China that:

using environmental law as a means to promote broader rule of law... is the right approach at the right time...the reform community with whom we are working sees this project as a well-timed, viable approach to political reform (Rohan 2003).

To some extent, couching programs in terms of democracy and human rights is simply what it takes to get money. Tackling big problems, like oppression and injustice, makes an appealing grant application, especially after President Bush made "ending tyranny" and "the growth of democratic movements and institutions in every nation and culture" key parts of his second inaugural address and U.S. foreign policy (Bush 2005). Luckily, NGOs focused on the law find it "relatively easy to make the argument that any one of our programs contributes to democracy and human rights" because litigation "forces the government to respond and that's very democratic" (2007-76). Even the seemingly innocuous training and exchange of soft support are

²²⁰ This chapter lumps together private and public money because goals and programming are so similar. The boundaries between the two worlds are also quite blurry. The National Endowment for Democracy and the Asia Foundation, to take two prominent examples of private foundations, receive a significant percentage of their budget from the U.S. government. Further research might want to consider how the source of funding affects pressures on expatriate program organizers. Sometimes, moderation may not play well back at headquarters. One State Department-supported organization told me they have to work hard to persuade China critics on Capital Hill that a good relationship to the CCP does not obviate an individual's "integrity as [an] advocate" (2007-76).

said to contribute to political change. One academic involved with rule of law programs argued that training Chinese lawyers in critical thinking is “the most subversive things we can get to happen. That starts to create subterranean fissures by changing the way people think, understand and process issues. That’s ultimately more effective than standing in Tiananmen Square” (Stephenson 2006, 201).

Would-be philanthropists looking to fund work in China quickly find themselves in need of local contacts and expertise. Predictably, they first look to China’s most internationalized enclaves for local partners: a handful of charismatic, English-speaking Chinese activists or Beijing-based, expatriate-run NGOs (2008-4). There are not many well-established Chinese NGOs and, as aid has grown, grantmakers increasingly find themselves in competition to work with the same “four and a half [Chinese] people” (2007-87; see also 2007-2). Out of both necessity and convenience, many opt instead to funnel money through Western consulting firms and NGOs with local roots instead. These foreign middlemen play a pivotal role in spinning sensitive, overseas money into workable, on-the-ground projects. These are the people on “the outposts of intercultural collision,” responsible for promoting democratic values in a state committed to one-party rule (Cohen 1974, 214).

This is no easy task in a difficult, high-pressure environment.²²¹ One problem is that many international NGOs are unregistered and, as a result, operate in a legal gray zone.²²² Lack of official status raises practical problems, like not having an organizational bank account. One program head can only secure enough local currency for daily operations by recruiting visiting Americans to change dollars into *renminbi*. It’s “totally unprofessional” to drag visitors to the bank, but there’s no other way to do business when each individual can only convert US 50,000 a year (2007-64). Being unregistered also intensifies awareness that continued operation depends on the state’s forbearance. American program officers worry continually about being shut down and the safety of their Chinese staff. These concerns are very real. Just in the last four years, *New York Times* researchers have been arrested²²³ and well-established NGOs closed.²²⁴ At his most stressful moments, one Beijing-based expert involved in environmental law-related soft support said “I felt like I was on the bottom of Niagara Falls” (2007-83).

Practical difficulties and the toll of state surveillance (both real and imagined) explain much of the turn toward soft support for environmental lawyers. Local training and skill building is a common component of aid work everywhere—indeed, capacity building is an industry buzzword. In my research, however, soft support became central because international activists were wary of other approaches. Beijing-based

²²¹ On how China is a difficult environment for activism, also see Matsuzawa (2007, 14).

²²² Some international NGOs and foundations are officially registered with a Chinese sponsoring agency, including the Clinton Foundation, the Gates Foundation and the Ford Foundation.

²²³ *New York Times* researcher Zhao Yan was detained in 2004 on charges of revealing state secrets. He was released in 2007 after serving a three year prison sentence.

²²⁴ In July 2007, the authorities shut down China Development Brief, a newsletter on Chinese civil society. The closure sent ripples through the international NGO community as organizations wondered if they could be next. The government also shut down the Beijing office of the German Friedrich Naumann Foundation in 1996 (Matsuzawa 2007, 77).

representatives of American NGOs and foundations agree that bankrolling a court case in another county is risky (2007-52; 2007-64; 2007-67; 2007-76; 2007-92). Their goal is to support local reformers, not to get expelled from China or draw attention to themselves. The desire to stay engaged, in other words, moderates possible courses of action. One foundation representative avoids “radical, radical reformers” because support for them would lead us to be “shut down quickly” (2007-92).

In addition, moderation reflects the doubting pragmatism of some China-based expatriate program officers. Over the course of my research, I came to think of key individuals in this group as “uncertain missionaries.” Although their job, like missionaries, consists of proselytizing values, most are not zealots called to a cause.²²⁵ Instead, they privately express doubts about the assumptions and effectiveness of their work. “One isn’t sure that one is proceeding in the right direction,” especially when “you have no idea if these things take” (2007-92; 2007-83; see also 2007-67 and 2007-76). Qualms that the American way of doing things is “certainly not something that’s going to be transported into a place like China” generate fears that “we are [just] creating English-speaking foundation hustlers” (2007-92; 2007-83). At the very least, “this work is so long-term [that] it’s not often you see concrete change” (2007-76).

Although some program heads, like their 1960s counterparts, embody “a rather awkward mixture of goodwill, optimism, self-interest, arrogance, ethnocentricity and simple lack of understanding,” a growing group is self-reflective and unsure (Gardner 1980, 8; 4). These graduates of top U.S. universities and law schools are well aware that legal aid runs the danger of being labeled neo-imperialism and America is not the only model for the world.²²⁶ At least on the surface, the hubris of the law and development movement has dissipated. Americans running programs in China frequently say things like “you have to be careful because we don’t have a monopoly on wisdom” or “we are not importing a U.S. vision...we want to try and learn what has worked and what hasn’t” (2007-90; 2006-16). At a time when moral relativism—or at least cross-cultural understanding—is in vogue, American NGOs are also keen to follow local activists’ lead. “If it’s not homegrown,” one China-based representative of an American NGO told me, “it’s not going to happen” (2007-64).

There is an inescapable tension, however, between cultural sensitivity and spending American dollars to promote proto-democratic values. Program heads, especially the most thoughtful, struggle with the cognitive dissonance between historically-induced humility and an arrogance inherent to foreign aid. They intersperse modest disclaimers, like “I have thirty years of ignorance [about China] to cure,” with assumptions about how China should change (“I know that in America and in most of the world [environmental] problems get run through the legal system”) (2007-24). Despite doubts, they often end up “providing U.S. experience because

²²⁵ This is not to say that all missionaries are the same. Different religions, sects and secular organizations espouse different approaches and change tactics over time (see Etherington 2005, 15). My point is that, despite internal diversity, missionaries share a commitment to spreading their vision of the good life.

²²⁶ See Elbourne on how it’s important to think about missionaries in terms of the social position they occupy at home (2003, 20).

that's what we have access to" (2007-64). As insiders, there are also limits on self-criticism. A near-constant conversation about how to improve current programs rarely touches on the validity of the enterprise. The job, in the end, is to spend money in China, not worry about whether it should have been spent elsewhere.

In combination, practical difficulties and private doubts mute ambitious, idealistic goals. The American expatriates behind soft support programs define success, not in terms of democratization or human rights, but in small steps. One American NGO representative feels successful if "first, [we] identify a topic that has practical use for [our] Chinese partners. Second, that real dialogue takes place at the event and people make connections that didn't exist before. Third, that there's potential for ongoing work, ideally with concrete next steps" (2007-76). Grant proposals may carefully employ the right key words, but they often "aren't very ambitious" (2007-92). Uncertain missionaries know that soft support is "three giant steps back" from the objectives policymakers and foundations espouse and that political change might take years (2007-92).

Like soft support, uncertain missionaries exist in other parts of the world and in other kinds of international outreach. Introspection interlaced with doubt comes with the territory for many contemporary aid workers, especially those working in difficult environments. In a moment of public soul-searching in the Stanford University alumni magazine, development expert Robert Strauss wondered:

why I stay in the game...Perhaps it's the ego gratification of being welcomed by ambassadors, cabinet ministers and other top officials I could never meet at home. Perhaps it's the seductive sense of self-importance that comes with free upgrades to business and first class. After more than 20 years, my motivations have become hopelessly muddled.

Strauss's searing self-reflection highlights not only self-doubt but why uncertain missionaries stay in the game: the work can be a lot of fun. Contemporary China is a dynamic place and most program organizers enjoy standing between two cultures. It's satisfying as well as "aesthetically interesting" to forge Sino-American partnerships and watch the results unfold (2007-83; see also 2007-64).

The Chinese Side: Homegrown Hunger and Domestic Backlash

Any kind of conversion, the transformation of "understandings, commitments, and affiliations," is a give-and-take process of persuasion (McCann 1994, 230). Seeding conviction is a "long conversation" that, over time, alters both the individuals and ideology involved (Comaroff and Comaroff 1991, 17-18). However, as many have pointed out, this is seldom a conversation between equals (Thayer 2004; Bob 2005). American NGOs' deep pockets and first-world cachet introduces power inequalities that underlie even the most collaborative programs. Regardless of organizers' intentions, deference to power makes it impossible for international sponsors to blend in "as just another participant" (Roelofs 2007, 479). Still, Chinese lawyers have choices. Lawyers volunteer to attend conferences, workshops and

training programs when they could be handling cases and making money. Indeed, soft support programs are only possible because international initiatives have a domestic constituency.

In large part, Chinese participation reflects a homegrown hunger to hear about law elsewhere. Transmission of the American experience with environmental law occurs not only because American organizations publicize the U.S. experience but because Chinese audiences genuinely want to hear what they have to say.²²⁷ As in Meiji Japan or turn of the century China, slogans like “learn from abroad” (*jiejian guowai*) and “link up with the international track” (*yu guoji jiegui*) permeate everyday life and, often, foreign implies better. As one Chinese observer noted:

The most popular cliché in China today is ‘link up with the international track.’ No matter what is at issue, as long as it ‘links up with the international track,’ it would seem indisputable. All judgments are made on the basis of foreign judgments, and all fashions are based on foreign fashions (quoted in Wang 2007a, 7).

The end of Chinese isolation also meant the beginning of government-sponsored study tours to garner insights overseas for everyone from legal scholars at the Chinese Academy of Social Sciences (CASS) to Shanghai judges (2006-3; 2007-55). There is a widespread belief that “contemporary environmental law comes from the West” and best practices from abroad should guide legal development at home (2007-98). Starting in the late 1990s, the National People’s Congress Environmental Protection and Natural Resource Conservation committee even started inviting foreign experts’ feedback on changes to domestic environmental law (Ferris and Zhang 2002, 601-2).²²⁸

Lawyers’ excitement about learning from abroad mirrors official concern about catching up with the West and many are caught up in the national rush towards an “advanced” legal system.²²⁹ As one lawyer put it, America is a modern day Lei Feng (an iconic 1960s model worker) and China should learn from the American example (2007-87; see also 2007-60; 2007-71). International exchange is helpful in “mastering new thinking” (*zhangwo xin sixiang*) and will help determine where China should be heading (2007-9; 2007-15). On a personal level, learning about international experience broadens one’s outlook and improves one’s “legal reasoning” (*falü luoji*) (2007-18).

Some Chinese lawyers, especially the more intellectually inclined, are simply curious about environmental law elsewhere and frequently read academic articles. Others turn up for soft support programs because international exchange offers them a

²²⁷ Elsewhere, other legal communities have been similarly interested in international ties. Tanzanian judges actively sought out opportunities for international exchange (Widner 2001), and, even in the 1960s law and development movement, there were “relatively few unsolicited requests for American legal assistance” (Gardner 1980, 242).

²²⁸ Foreign experts gave feedback, for example, on the Noise Pollution Control Law and amendments to the Land Administration Law (Ferris and Zhang 2002, 601).

²²⁹ The word “advanced” (*xianjin*) frequently came up in interviews with lawyers (see 2007-54; 2007-94; 2007-104; 2007-106; 2007-108; 2007-113).

competitive edge. In a tough market, lawyers continually review how to enhance their symbolic capital, “the social class, education, career, and expertise that is contained within a person” (Dezalay and Garth 1996, 18). A significant number of Chinese lawyers are self-taught and, without official degrees to connote authority, symbolic capital is particularly important. As one lawyer explained, “you have to develop yourself” to attract business and an international gloss helps project urbane professionalism (2007-112). At times, it might even help win coveted international clients. In the 1920s, graduates of Suzhou’s Comparative Law School became “big lawyers” in the foreign concessions because of “their excellent English and their special legal training” (Conner 2003, 240). These days, the foreign niche is dominated by lawyers with LL.Ms or J.D.s from top international law schools. Professional enrichment (via soft support) is sometimes seen as a way for locally trained lawyers to attract lucrative, international clients. One lawyer, for example, was willing to give up three months of salary to go on a U.S. exchange program because he thought he could improve his English enough to work with foreigners when he returned (2007-63).²³⁰

Unpacking motivation is always difficult. Just as converts to Christianity were attracted by “dreams of adventure, social advancement, influence and the promise of salvation,” Chinese conference attendees are moved by a blend of curiosity and self-interest (Barker 2005, 95). Sometimes, in a kind of reverse Orientalism, the appeal of the exotic is enough to pique interest. The Chinese organizer of a December 2007 roundtable for Chinese environmental lawyers in Harbin, for example, insisted on including an American speaker because foreign participation would spur local attendance. As one American expert complained, “you are put on stage as a trained dog...the vapidity of the substance doesn’t matter” (2007-83).

Some Chinese lawyers, of course, are not interested in international exchange or learning from abroad. In fact, an undercurrent of dissatisfaction is often present during discussions of the American experience, occasionally audible in back-of-the-room exclamations like, in one case, “this isn’t America, this is China!” (see also 2007-42; 2007-102). Backbench displays indicate not only a few bored participants, but a broader backlash against foreign involvement. For every admirer of the American legal system, there is someone concerned about the negative influence of Western rule of law. Many, like Beijing University Dean Zhu Suli, think that China should rely on “native resources” to solve its legal problems (Upham 2005). Lawyers also worry about excessive Westernization. As one lawyer wrote online, “if we blindly magnify the importance of law, thus using rights consciousness to blindly expand, this is an expansion of selfishness and not taking responsibility.”²³¹

Strategically, even lawyers committed to radical rights defense work (*weiquan lishi*) are wary of foreign funds. Some lawyers won’t take money from organizations

²³⁰ Symbolic capital is an idea borrowed from Pierre Bourdieu. In Bourdieu’s work, symbolic capital can be leveraged to make money (monetary capital). One of the interesting things here is that the link between symbolic capital and monetary capital is stronger in lawyers’ minds than in reality. Given the surfeit of foreign-trained Chinese lawyers, it’s hard to see how participants in soft support programs could cash in on the experience. It seems unlikely that, as the lawyer discussed in this paragraph suggests, someone’s English could improve enough in three months to take on clients in that language.

²³¹ Lawyer Tiankun (2006), *Han Hai Sha BBS*, document on file with the author.

with open political goals, like the National Endowment for Democracy or the Open Society Institute (2007-8) and others refuse foreign money altogether (2007-32; 2007-53). Foreign money is often sensitive in tightly controlled, illiberal states and some Chinese lawyers would certainly agree with Iranian democracy activist Fariba Davoudi Mohajer that “besides ourselves, our independence from foreign funding is our only strength” (Azimi 2007, 55). Staying impoverished and independent makes sense given the government scrutiny that accompanies international ties. In 2005, after the Eastern European color revolutions, the Chinese government audited all NGOs receiving foreign funding in an attempt to ensure that none were clandestinely promoting revolution (Wilson 2008, 5). During my fieldwork in 2006-2008, American NGOs found it hard to find Chinese partners to co-sponsor domestic workshops and conferences on public interest law. One NGO representative routinely heard: “we think you are a good partner, but we don’t want to put your name on the [conference] banner” (2007-76). Even with the advantages of money and local interest, pulling together international conferences and workshops is still a daily struggle .

Impact, Part One: Limited Conversion

Global philanthropy involves huge sums—likely fifty-five trillion dollars in the U.S. alone over the next forty years (Edwards 2008, 9)—and even impeccable intentions are no guarantee of good results (Bell 2007, 2). There is a need to unravel some of the intended and unintended consequences of NGO choices, even if assessing the impact of soft support is notoriously difficult. As one program organizer explained, when you are “dealing with values” and “an incremental influence,” it’s “as impressionistic as any aid can be” (2007-92).

As a starting point, one obvious gold standard of success is conversion. Are soft support programs recruiting a new corps of active, environmental lawyers? Or do green-washed graduates continue with business as usual? Program heads are understandably wary of external attempts to assess their work and these are not easy questions for them to answer internally. Reports to funders are generally due three to six months after a program ends which is too soon to make claims about long-term influence. Often, these self-evaluations take refuge in numbers, indicating impact through the number of trainings held or the number of participants. Time is short and there are also good reasons to move on quickly. By the time evaluation deadlines roll around, even the most introspective organizers are caught up in the next project or writing the next grant. There’s a strong incentive to claim success and ask for more money.

From an outside perspective, I decided to examine potential conversion through the case where conversion seemed most likely: China’s largest, longest-running environmental litigation soft support program, the Beijing-based Center for Legal Assistance to Pollution Victims’ (CLAPV) annual training for environmental lawyers and judges.²³² Since its inception in 2001, this one week workshop has been funded by a number of foreign sponsors, including the Ford Foundation, Natural

²³² In 2007, some Environmental Protection Bureau officials also attended.

Resource Defense Council, the American Bar Association and the Canadian, Dutch and Norwegian governments. The training, which I attended in 2007, features a week of lectures on Chinese and international environmental law, interspersed with case studies and small group discussion. CLAPV covers participant expenses, including transportation, lodging and food. In exchange, lawyers are expected to accept at least one pro bono environmental case when they return home.

In addition to its annual training program, CLAPV runs an environmental law clinic that handles about fifteen cases per year. The cases, mostly referrals from CLAPV's legal assistance hotline, come from all over the country.²³³ The center often recruits a local lawyer who has completed the training program to handle the day-to-day work of filing documents, collecting evidence and managing clients. Indeed, annual training has been quite successful in helping a small organization with no full-time staff develop a national network of volunteer lawyers. From 2001 to 2006, CLAPV cooperated on cases with 36 of the 289 lawyers they trained (see Table 2).

Table 2: Center for Legal Assistance to Pollution Victims (CLAPV) Annual Training (2001-2006)

	No. of lawyers present	No. of lawyers who cooperated with CLAPV on later cases
2001	100 ²³⁴	15
2002	50	4
2003	41	5
2004	40	9
2005	38	4
2006	20	2
TOTAL	289	36

Source: CLAPV staff, 2007

This is an impressive amount of outreach for a small legal aid center, but 87% of participants do not work with CLAPV after the training ends. What happened to the remaining 253 lawyers? Did commitment fade or, as CLAPV staff and international sponsors would hope, are they quietly taking environmental cases at home? To address this question, my research assistants and I contacted 34 lawyers from CLAPV's class of 2004 in November 2007.²³⁵ We asked them to compare the

²³³ For more on CLAPV, in English, see Xu and Wang (2006).

²³⁴ 50 lawyers paid their own fees.

²³⁵ Like all research in China, this methodology strongly conditioned by what was possible. A random sample across the six years of the training program was not feasible because we only had complete contact information for the class of 2004. CLAPV staff later told me that the class of 2004 was fairly typical—neither especially inspired nor uninterested. Like other classes, they came from around the country, although Beijing was somewhat overrepresented (10 of 40). The data in Table 3 come from phone conversations with 33 of the 40 lawyers present in 2004. We were unable to contact six of the remaining lawyers, one lawyer opted not to talk to us, and we discarded one lawyer as an outlier. The advantage of talking to lawyers three years after the training program is that it offers some insight onto the longer-term effects of soft support. It was possible to ask them about numbers of cases because

number of times they 1) gave advice in environmental disputes and 2) handled environmental lawsuits before and after the CLAPV training (see Tables 3 and 4).

Table 3: CLAPV Class of 2004, Requests for Advice (paired samples)

No. requests for advice before training	No. requests for advice after training	Mean difference	95% confidence interval
133.5	168.5	1.06	1.06 ± 2.22

Table 4: CLAPV Class of 2004, Lawsuits (paired samples)

No. lawsuits before training	No. lawsuits after training	Mean difference	95% confidence interval
28	26.5	.045	.45 ± .42h

While the pre-training period includes significantly more time than the post-training period (most lawyers practiced law for more than three years before 2004), the data show one trend clearly: the 2004 training program did not lead to a spike in environmental litigation. Between 2004 and 2007, lawyers' behavior showed no significant change from the longer preceding period. At a 95% confidence level, CLAPV's class of 2004 took between .03 and .87 more lawsuits after the training than before the training. Requests for legal advice held relatively steady or declined slightly (between 1.16 and -3.28 additional requests), despite the fact that environmental disputes increased between 2001 and 2005.²³⁶ In addition, the class of 2004 had five converts: lawyers who took their first environmental case after training. Five newly motivated environmental lawyers sounds like an achievement, except that six other lawyers with pre-training litigation experience failed to take another case after 2004. Beyond the numbers, phone conversations with the class of 2004 confirmed that a future jump in case load is unlikely. For most, attention is focused on new ventures as the training program recedes to distant memory.

Clearly, the next step in a broader assessment would be a larger-scale survey across different issue areas and target groups and hopefully future researchers will take up this challenge. It is possible that some groups respond better to soft support or new habits more easily take root outside environmental law. As a starting point, however, this survey strongly suggests that soft support has a marginal effect on most lawyers' daily practice. Conversion, at least judging by the class of 2004, is more wishful thinking than on-the-ground reality.

Few conference organizers will be surprised to hear that environmental law training programs rarely forge newly committed lawyer-activists. The long process of conversion takes time and all but the most compelling experiences stimulate new awareness more than they change routines. In a week, or even several weeks, new information flows by as fast as, in the words of one study tour participant, "glimpsing flowers from horseback" (*zou ma kan hua*) (2007-80). In addition to time limitations, it is also difficult to effectively transfer skills and knowledge in what is typically a

environmental disputes are fairly rare and lawyers can generally remember how many they've handled without recourse to records.

²³⁶ Data from the China Environment Yearbook (*Huanjing Nianjian*) (2001, 682) and (2005, 735).

bilingual and bicultural setting. Visiting experts are a frequent feature of soft support and it is a constant struggle to make American expertise relevant. As one lawyer complained, “it’s always the same people...we come, talk about America and go home” (2007-108).

At times, international exchange fails because visiting experts are tone deaf to the local situation. During a one-day training program on Alternative Dispute Resolution, for example, the group spent several hours discussing a toxic spill by the fictitious Acme Chemical Company. The case study, written by Americans and translated into Chinese, made a number of assumptions, including: 1) a quick and effective response by a concerned government; 2) effective representation of community concerns by an ad hoc group (“the Chinese Society for the Protection of People from Toxic Clouds”), and 3) polluters willing to negotiate. In China, it’s difficult to imagine any of these things happening, let alone all three of them. Missteps like this are routine, even when local organizers carefully cue visiting experts. One international exchange veteran recalled launching into a discussion of river water quality in Bahrain before a local participant reminded him that there aren’t any rivers in Bahrain (2007-90). The problem is that irrelevant comments and asides irritate listeners into checking out of the conversation.

Even when experts get the basics about China right, it’s hard to find the right level of detail about international experiences. At one extreme, lecturers “talk as if the students are going to wake up screaming in the middle of the night because they can’t remember what section 103.c is” (2007-83). At the other extreme, complicated history is reduced to simplistic parables. This is especially common when experts, relying on a translator, want to make sure a Chinese audience is following them. In explaining a landmark toxic waste case, an American lawyer told one group that “the judge agreed because he was a brave and wise judge and told the government to do the clean up” (2007-105). If a brave and wise judge sounds like a character in a children’s story, so do other protagonists from soft support-sponsored retellings of American legal history, including “this chemical company, it is very bad, it makes the children sick” (2007-114) and a tiny fish that stopped work on a big dam (2007-42). Pared down to archetypes, these stories are distilled Americana: tales about “the little guy against the big system, the right to a day in court, principle’s triumph over expediency, the taming of corporate power, the disciplining of rogue or heartless bureaucracies, and the possibility of fundamental and structural social change” (Schuck 2000, 35). These themes make for effective movies (such as *A Civil Action*), but frustrate Chinese lawyers who have read a great deal about the American system. Behind the scenes, they complain that these introductory, law-for-the-layman lectures are “superficial” (*qianbo*). “If [American law] is that simple,” one lawyer sarcastically commented, “why haven’t you solved all your societal problems?” (2007-60).

The temptation is to improve presentations by finding experts who are knowledgeable about China and can find a useful middle ground for exchange. Program organizers know that you “can’t take a lawyer, drop him into a country and expect him to speak the same language as local lawyers” even if “funders think that it’s a good idea” (2007-92). In fact, one NGO stopped inviting foreigners altogether

because “you could see the Chinese eyes glaze over” (2007-92). But before fine-tuning existing practices (or giving up entirely), it is important to look beyond quantifiable results to see the overlooked, quieter influence of soft support: cultivated hope.

Impact, Part Two: Cultivated Hope

Talking about hope brings us to a terrain more familiar to preachers and politicians than social scientists. Despite calls for more attention to emotions (Finnemore and Sikkink 1998, 916; Aminzade and McAdam 2001), academic accounts of activism usually steer clear of feelings. Yet emotions, especially hope, can enable and even compel action. Hope, as St. Thomas Aquinas put it, “aims at a future good that is arduous and difficult but nevertheless possible to obtain” (quoted in Abrams and Keren 2006, 8). The key point here is possibility: unlike dreaming, hope is based on concrete, achievable goals (Abrams and Keren 2006, 9). Sometimes, hope grows out of optimism and a belief that almost anything is possible. At other times, especially in difficult circumstances, hope can be a decision—one with political consequences (Wallis 2005, 346).

When hope does not organically well up from within, it can sometimes be induced. Cultivated hope, “an active external effort to cultivate emotions in others,” helps people envision new possibilities and brainstorm strategies (Abrams and Keren 2006, 6). Despite the fact it is seldom discussed, constructing hope is a critical element of soft support. Explicitly (or more often implicitly), program organizers encourage lawyers to take on new identities and imagine a better future. The *sub rosa* goal, in the words of one NGO representative, is to instill “the courage to take action” (2007-2; see also 2007-4).

The first challenge in building new identities is that Chinese lawyers are socialized into a profession that tends to measure success in terms of salary.²³⁷ Social pressure is very real, especially when many others are speculating on the stock market and hustling to get ahead. The few lawyers who prioritize a cause over money often feel like “outcasts” (*hen linglei*) because their work “isn’t popular at home” (2007-91). In an increasingly acquisitive culture, soft support helps plant the idea of the public interest. Lawyers are left with the message that it is both possible and admirable to “work on behalf of the public interest to help other people” (2007-94). “Public interest lawyer” (*gongyi lishi*) is now a familiar Chinese term, thanks, in part, to local efforts to popularize it by Chinese former visiting scholars and study tour graduates (see Xu 2005; Wu 2006). As Wu (2006) writes, “Chinese lawyers need to vigorously develop their profession...[and] win societal respect. It’s not only a question of salary, or the size of law offices, but of taking social responsibility.”

Re-ordering priorities is easier when foreign recognition serves as tangible indications of encouragement (*guli de zuoyong*). In a profession focused on money, trips abroad, trophies, and even invitations to conferences offer alternative signs of status. One activist told me he would have dropped out of the environmental

²³⁷ On professions as inculcators of norms, see Finnemore and Sikkink (1998, 905).

movement except for international support. His wife used to nag him about his low salary, but his home life improved after he started traveling abroad. He did not make more money, but his wife could at least tell friends and neighbors “look how many times [my husband] has been out of the country!” (2007-11). Other plaintiffs and lawyers proudly display prizes and awards from both national and international NGOs (2007-14; 2007-39), reminders that their efforts are appreciated elsewhere if not at home. As the chairman of the Pesticide Eco-Alternative Center (PEAC) explained, “with the support of international NGOs we feel that our work here at PEAC is very valuable” (quoted in Morton 2008, 210). External validation generates prestige or, in Bourdieu’s term, symbolic capital that is both personally satisfying and locally legible. At the very least, as one lawyer told me, “no one is going to laugh at you” (2007-106).

International support bolsters, not only Chinese lawyers, but anyone working in an unfriendly or indifferent place. Just before he was executed by the Nigerian government in 1995, activist Ken Saro-Wiwa wrote that “the exhilarating thing is near total support of the Ogoni people & the support I find in the national and international community. It makes my suffering worthwhile” (quoted in Wiwa 2001, 114). Even simple gestures matter. Tanzanian judges recall being “amazed and delighted” by former Irish president Mary Robinson’s visit to the Court of Appeal. The event, as Widner writes, “helped forge solidarity, an important resource in times of stress and change” (2001, 213). In uncertain times, international recognition can also catalyze hope about the future. China’s premier environmental lawyer might one day win the Nobel Peace Prize, one lawyer speculated. After all, “why not think that way?” (2007-91) Even as they worked to overthrow Slobodan Milosevic, Serbian activists were similarly aware that they “would like to be in the encyclopedia of nonviolent resistance with Gandhi and Martin Luther King [and] have a right to dream about that.” (Cohen 2000, 148).

These hopes cast local activists as members of an international heroic pantheon. Flattering comparisons to imported heroes often resonate, especially when stories about smart, successful local resistance are scarce. For Chinese environmental lawyers, the most common reference point during my fieldwork was the 2000 movie *Erin Brockovich* (*Yong Bu Tuoxie*) starring Julia Roberts as a legal assistant who wins US 333 million in damages for California residents exposed to toxic chromium.²³⁸ For many Chinese lawyers, Brockovich is a source of inspiration. When one lawyer posed as a journalist to obtain information from reluctant employees at an Environmental Protection Bureau (EPB), for example, she was reminded of Brockovich’s subterfuge and bravery when collecting evidence (2007-12). Another lawyer thinks about Brockovich’s courage when he feels disappointed and this helps him “conquer that feeling” (2007-106). Even plaintiffs are inspired by Brockovich’s story. One asked rhetorically, “have you seen the movie *Erin Brockovich*?...One small lawyer won over a million dollars in corporate compensation: our victory can’t be far away” (He 2004).

²³⁸ Unprompted, the following lawyers brought up the movie: 2007-34; 2007-39; 2007-51; 2007-77; 2007-87; 2007-94; 2007-106; 2007-111; 2007-112. While chitchat about an American movie is undoubtedly a way to make polite conversation with an American academic, the frequency and specificity of references convinced me that the movie was locally important too.

In part, Erin Brockovich's ubiquity in the late 2000s reflects the power of Hollywood. *Erin Brockovich* (the movie) shows the potential power of environmental law and individual action and Chinese lawyers, tapping into the magic of film, sometimes show the film to motivate each other. A Beijing academic, for example, screened the film at a meeting of the environment committee of the All China Lawyers Association (2007-32). Others report recommending *Erin Brockovich* to clients to encourage them (2007-34; 2007-51). Brockovich's popularity also indicates that lawyers are reaching out for role models. As they reconsider priorities, lawyers find solace in a larger-than-life exemplar of moral conviction.

Mixing social values and the law is a big step for most Chinese lawyers. It requires, if not a wholesale identity shift, a "reordering of the priorities that guide individual action," sometimes called a transvaluation of values (Wickham 2005, 240). In so far as soft support offers status, imported heroes, and encouragement, international ties can nudge along this process of personal change. But there is nothing magic about the international part of the equation. External validation can, and often does, come from domestic visitors. Big city journalists and NGO representatives, for example, can encourage claims and boost status just by appearing in isolated villages (2007-61; 2007-62). One NGO employee felt obligated to maintain communication even after he returned to Beijing because "without good support and hope, what can [the plaintiff] do?" (2007-50). When work is risky and poorly paid, an appreciative audience helps. In January 2008, I accompanied a Beijing lawyer to an environmental hearing in Hebei province. At lunch afterwards, the local lawyer told us that having outside observers made him "feel like a big man" (2008-3).

Of course, values only change when personal commitment accompanies external prodding. Most soft support participants eat free food and go home to the same daily grind. But soft support can be important at the margins, among those lawyers for whom international exposure accelerates transformation (2007-77). Some come back from the United States with a heightened sense of responsibility and commitment (2007-107). "If it wasn't for that trip to America," one commented, "I wouldn't be doing public interest work full-time" (2007-91). For these select few, soft support is a bridge to an alternative path.

New paths, however, are only appealing insofar as they lead to a desired destination. In addition to promoting the idea of the socially committed lawyer, soft support also cultivates hope by offering a vision of the future. In trainings and workshops, America often comes across as a city on a hill where citizens have well-respected legal rights and polluters are held to task. In part, U.S. presenters feel pressure to talk up America even when, as one put it, "it's weird to be talking about the American model because we complain about [our system] all the time" (2007-98). Of course, visiting experts are not just unreflective skills. Many, especially in question and answer sessions, offer a nuanced critique of U.S. environmentalism. And lawyers, especially in big cities like Beijing and Shanghai, often know about America's environmental problems. They know that Europe devotes more resources to environmental protection and that the United States consumes one-third of the world's oil (2007-63).

Still, an understanding of American shortcomings does not obviate the appeal of the American legal system. The taken-for-granted reality of an independent, respected judiciary deeply impresses many Chinese listeners. At a public interest lawyer training sponsored by the Open Society Institute, for example, a Beijing academic recently returned from United States talked about how amazing it is that American courts respond in writing to each case filed. American environmental lawyers may face challenges, but, as one lawyer put it, at least “the results are very good” (2007-60). Sometimes, caveats about the American experience also go unheard. A lawyer I know told a workshop that “Situ Lei [my Chinese name] says that American environmental lawyers are well-respected [I did say that] and they make a lot of money [I said the opposite!].”

Persistent belief in the American experience, even given an awareness of the setbacks that accompany real life struggles, shows the importance of an ideal. Chinese lawyers want to believe, not in a far-off utopia, but in a real life model. It helps that the broad brush story of American environmental law prominently features heroic lawyers, an appealing self-image for a sometimes denigrated profession. The city on the hill, even with its blemishes, offers an attractive alternative future where lawyers are activists working on behalf of society (2006-14). If anything, the American ideal is even stronger in small and mid-sized cities where relatively isolated lawyers are often more sanguine about the U.S. than their internationalized, somewhat more cynical big city counterparts. American lawyers have it easy, one such lawyer from a small town in Fujian explained to me, if they want to sue someone, they just go ahead and sue (2007-15). Another lawyer in a mid-sized city in Jiangsu told me he’d read an article online about an American environmental lawyer who got rich thanks to a million dollar contingency fee (2007-27). American law, even dimly perceived, can also suggest new possibilities for domestic action. As one Chinese activist put it, “we’ve seen a lot of Hollywood movies—they feature weddings, funerals and going to court. So now we think it’s only natural to go to court a few times in your life” (quoted in Nye 2002, 72).

Sometimes, misrepresentations of American law can help envelope-pushing activism look less radical. In the wake of a major benzene spill along the Songhua River in 2005, six Beijing University professors and graduate students brought a lawsuit on behalf of the Chinese sturgeon, the Songhua River and Taiyang Island. Some members of the group were working on a translation of American environmental law decisions at the time and their the lyrical brief draws on U.S. precedent. In keeping with Justice Douglas’s minority view in *Sierra Club v. Morton* (1972), the brief argues that “woodpeckers who eat wood, coyotes and bears, lemmings and river salmon should all have their day in court.”²³⁹ Furthermore, “countries with an advanced conception of environmental protection have already started to put this new legal idea into practice...In America, for example, it is firmly established that endangered species and environmental NGOs can team up to bring litigation.”

²³⁹ Document on file with the author.

These two statements (both of which reoccur, in various forms, throughout the brief) jumble a complicated issue in American environmental law: standing, or the legal right to initiate a lawsuit. While the 1973 Endangered Species Act allows NGOs and citizens to bring lawsuits on behalf of designated species, run-of-the-mill bears, lemmings and river salmon enjoy no such protection. Furthermore, standing in civil cases involving damages (like the Songhua River lawsuit) is limited to people who have suffered economic, physical, psychological or aesthetic harm. The Songhua brief glosses over these issues and leaves the mistaken impression that, in America, even a river can be a plaintiff. In reality, such a case would be quickly thrown out of American court.

It is not clear whether the authors of the brief misunderstood American environmental law or took their inspiration from a minority view that “the voice of the inanimate object... should not be stilled” (Justice Douglas quoted in Percival et al. 2006, 981). In either case, the legitimacy of international precedent—even fudged around the edges—simultaneously justified and de-radicalized their argument. Misconstruing American law helped the plaintiffs argue that “what we are advocating does not clash seriously with existing law [and] there’s no need for the court to feel uneasy about this” (Songhua Brief 2005).

To some extent, the existence of misunderstanding needs no explanation. Urban legends are proof enough that good stories are repeated and shades of gray easily lost. It is worth noting, however, that academics act as a portal for misinformation as well as new ideas. The rise of comparative legal research has generated a pile of new books about foreign law and, while some are scrupulously accurate, small mistakes are common. Zhang (2006), to take one example, writes that environmental rights first entered legislation in the U.S. 1969 National Environmental Policy Act (NEPA), an odd claim considering that the word “rights” never appears in NEPA (63).²⁴⁰ This kind of slip is easy to understand considering how heavily comparative research in China draws on sources in a second language.²⁴¹ Once made, mistakes are often repeated because academics with weaker language skills work from Chinese secondary sources or books translated into Chinese.²⁴²

For those interested in how ideas change as they move across borders, there’s a theoretical payoff here: misunderstanding and misrepresentation matter. Like the children’s game “telephone,” stories mutate during transmission and both intentional and inadvertent alterations have consequences for activism. At times, as in the Songhua River lawsuit, misrepresentation helps activists cast themselves as reasonable moderates rather than dangerous radicals. And across languages and retellings, the

²⁴⁰ Zhang is almost certainly thinking about the section of NEPA that reads: “The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment” (available at <http://tinyurl.com/yb9wx52>). However, NEPA stops short of recognizing environmental rights in law.

²⁴¹ Getting and using English sources is not necessarily easy for Chinese scholars. While most academics now have access to Westlaw, I was often asked to recommend or provide good law review articles.

²⁴² For a scholar researching environmental law, this might include Boyle and Bernie (2007) or Wang (2006).

complicated history of American environmental law is smoothed into a myth capable of cultivating hope by invoking an alluring, feasible future.

Conclusion

Although this chapter started with a new actor on the legal landscape, international NGOs, it ended by considering outcomes. For most of us, the emergence of new programs and players begs an accompanying exploration of how much (or in what ways) their activities matter. Here, soft support leaves an ambiguous legacy. At its best, soft support can feed a “heady feeling of belonging—to one another and to some promise, however dim, of changing the world” (Cohen 2000, 144). But even hope, a positive, uplifting word, is not unequivocally good. Unrealistic hopes can lead to disappointment and burnout, especially if people feel let down by a group or organization (Abrams and Keren 2006, 33). Moving away from the focus on individual actors that sustained the last four chapters, the final chapter now turns squarely to results. Without central intent (or even necessarily awareness), environmental litigation shows one way in which political ambivalence can breed grassroots experimentation and contribute to slow moving social change.

Chapter 6

Thinking About Outcomes

Having spent the last four chapters examining environmental litigation from different perspectives, this final chapter turns to outcomes of legal action. Politics is about consequences and, for most people, the significance of environmental litigation depends on its effects. Can this kind of litigation reduce pollution and change long-term practices? And theoretically, what can environmental lawsuits tell us about the relationship between law and social change not in vibrant democracies, but in illiberal, one-party states?

More than a bit of normative concern lurks behind questions like these. People ask me why environmental litigation matters not only to hear me justify my research, but because of their own underlying values. Environmentalists want to know if lawsuits can help solve China's environmental problems while those more concerned with liberalization hope that courts can slowly expand citizens' rights. Both groups are likely to be disappointed. As discussed below, environmental lawsuits are unlikely to dramatically improve environmental quality, let alone spark a rights revolution in China.

Yet there is a danger in letting an ethical agenda dictate the kinds of outcomes we look for. However merited or well-intentioned, concern about political reform and environmental improvement diverts attention from quieter shifts more indicative of how law can matter on tough terrain. Before turning to a broader discussion of outcomes, this chapter examines looks at one such slow-moving social change: the emergence of an elite conversation over public interest law. Some of the lawyers, academics, officials and international NGOs encountered in the last three chapters have become vocal advocates for the idea of public interest litigation and, in a place where the marketplace of ideas is closely monitored (if not absolutely controlled), public promotion of new legislation and labels marks a noteworthy shift. In combination with the bottom up experimentation detailed in chapters 2-5, this suggests a pathway between law and social change in an extraordinarily unlikely place: in a Party controlled legal system in a resilient, illiberal state. Without official intent or even awareness, political ambivalence can crack open space for significant, albeit subtle, changes in ideas and identities.

Judicial Activism and Environmental Protection

Before turning to a broader narrative about law and social change, however, it is worth pausing to consider why environmental litigation is neither a harbinger of a rights revolution nor a panacea for China's all-too-immediate environmental problems. Effective judicial protection of rights, as Martin Shapiro points out, requires a core of charismatic, risk-taking judges who are politically savvy enough to win allies and avoid retribution (2008, 332). Right now, few (if any) Chinese judges fit this description. Incentives for evaluation and promotion, as discussed in chapter three, leave most judges reluctant to test the limits of their authority. In addition, a

few crackdowns on innovative judges in the 2000s increased caution among the risk-adverse majority. Two judges were fired in Luoyang, Henan in 2003, to take one example that made national news, over a decision that invalidated a provincial regulation because it contradicted national law.²⁴³ The case signaled that expanding court authority through judicial review remains unwelcome, even if judges faithfully reinforce central policy.

Nor are today's Chinese lawyers unified or politicized enough for collective action. In part, as chapter four makes clear, there are simply not very many lawyers determined to infuse their work with social and political commitment. More importantly, however, China's most political lawyers lack national organization. Elsewhere, national bar associations have eased the work of coordination when leading lawyers agree on the need for action.²⁴⁴ In 2007, for example, the Pakistani bar association decided that lawyers would no longer appear in court as a form of protest against the Musharraf regime. Although this was a significant burden for those whose income was tied to litigation, a combination of social pressure and the threat of losing licenses issued by provincial bar councils compelled widespread compliance (Ghias forthcoming). By virtue of national profile and social standing, bar associations can also broadcast and validate politically iconoclastic ideas. The journal of the Egyptian Lawyers' Syndicate, *al-Mohammah*, was an important forum for calls for political reform in the 1980s before infighting between liberals and Islamists split the organization (Moustafa 2007, 197). Even in illiberal or failed states, bar associations can also retain a critical gloss of moral authority. As a retired Supreme Court judge in Sudan explained, "the bar association has real weight...if any statement of all these lawyers that [Sudan's] laws [or government actions] go against the Constitution, the statement would make all the difference" (quoted in Massoud 2008, 138).

The All China Lawyers Association (ACLA), in contrast, enjoys little credibility among either activist lawyers or its rank-and-file members. Membership in national and local lawyers associations is compulsory and when mainstream lawyers mention ACLA at all, it is usually to grouse about membership fees.²⁴⁵ Among more political lawyers, bar association leaders are typically dismissed as wealthy conservatives appointed and cued by Justice Bureau overseers. Indeed, many of the most notable legal crackdowns of the 2000s were designed to disband or discourage networks that might become capable of sustained, national mobilization. In July 2009, for example, the authorities closed the Beijing-based Open Constitution Initiative (OCI) for alleged tax evasion and arrested its director. OCI, founded in 2003, had taken a number of controversial rights cases and observers—without knowing what triggered retribution—agreed that the organization must have eclipsed the limits of

²⁴³ For more on the case, see Yu (2009).

²⁴⁴ For more on how lawyers are most politically effective when the profession is ideologically cohesive, see Moustafa (2007, 213).

²⁴⁵ These membership fees vary, but range from a few hundred *yuan* to a few thousand *yuan* per year. Some provinces charge a fixed amount and some charge in proportion to annual billings (Liu 2009, 107). Membership fees can be a significant financial burden in poorer provinces or for less wealthy lawyers.

tolerance. Some of OCI's volunteer lawyers were also involved in a 2008 public petition for direct elections in the Beijing Lawyers Association (BLA) aimed at reducing annual fees and securing new leaders. The BLA declared such "rabble rousing" illegal, a response that left no doubt of the association's opposition to reform. Later, several of the lawyers involved also lost their license to practice law.²⁴⁶

Considering the regular repression of legal activists, it hardly seems likely that lawyers, judges, legal academics and their supporters will usher in dramatic political change anytime soon. China's lawyers have yet to network themselves, let alone develop alliances with judges (like Pakistan in 2007) or prosecutors (like Franco's Spain) (Hilbink 2007). And in contrast to the halcyon years of U.S. rights litigation in the 1950s and 1960s, there is no Chinese Justice Earl Warren willing to stretch the law to encompass concerns about justice or even lawyer Thurgood Marshall backed by the financial support of the NAACP. Perhaps even more importantly, Chinese courts lack two of the lynchpins of judicial influence: judicial review and binding precedent. It is no wonder that Chinese domestic environmental NGOs widely report that "the time isn't yet ripe" to use the law for environmental protection and NGOs "shouldn't push too hard for things you can't do" (2008-1; 2007-42; see also 2007-13; 2007-61).

As for environmental protection, law clearly trails bureaucratic target setting as the primary means of abating pollution (Guttman 2008).²⁴⁷ Still, as others have documented, administrative environmental lawsuits can sometimes re-enforce environmental protection efforts by changing Environmental Protection Bureau (EPB) practices and boosting agency status. Being sued—at least for EPB heads willing to admit to a mistake—reinforces commitment to scrupulously follow the law (Jahiel 1994, 386; Zhang 2008, 116-117). EPB officials also find that lawsuits offer a justification for pressuring polluters. EPB officials can say that, as one explained, "we have to do our job [collecting fines]. Otherwise, we will be sued and even lose in court like XX lawsuit" (Zhang 2008, 157). In addition, courts can legitimate tough enforcement of regulations. EPBs can request court help collecting outstanding pollution levies and, unsurprisingly, polluters are more likely to pay up when the court detains top managers (legally permissible for up to 15 days) or confiscates company cars. Repeat cases involving the same polluter are also rare (Zhang 2008, 193-95). As one Hubei district judge said, "our enforcement has been tremendously helpful to the EPB. Before the court became involved, no one took the EPB seriously. Through court enforcement, the EPB's status has been enhanced a lot" (Zhang 2008, 171). Of course, EPBs are also capable of ignoring court opinions or averting courts altogether. Much depends on the relationship between courts and regulatory agencies, which can be symbiotic, indifferent or suspicious (McAllister 2008; Zhang 2008).

In civil lawsuits, the connection between litigation and environmental protection is more tenuous. In Brazil, another developing country with tightening environmental standards and largely ineffectual regulatory agencies, active public

²⁴⁶ For more on the attempt to establish direct elections in the BLA, as well as an English translation of both the initial petition and the BLA response, see Clarke (2009).

²⁴⁷ Strengthening environmental criteria on cadre evaluations would likely have more effect than even a landmark lawsuit. For more on the importance of bureaucratic evaluation, see Van Rooij (2006, 310).

prosecutors used litigation to enforce environmental law and make it matter (McAllister 2008). But for now, despite occasional experiments with public interest litigation, it is difficult to imagine Chinese public prosecutors playing a similar role. Nor, as discussed above, do judges look poised to step in. Unlike activist courts in developing countries like India, Chinese judicial decisions are far more likely to tinker with perceived precedent than suddenly hold government accountable for policy implementation or expound on sustainable development principles (Narain and Bell 2005; Preston 2006, 47-48). Fundamentally, it is hard to expand environmental rights—or even scare polluters straight—when courts struggle to force compliance at all. Respect for court decisions is not a well-embedded norm and, even after a case is over, bargaining over compensation frequently continues. Plaintiffs routinely settle for less than court-mandated compensation, sometimes because polluters legitimately go bankrupt and sometimes because they successfully feign poverty by stashing cash in bank accounts in another province or under a family member’s name (2006-6; 2007-74).²⁴⁸ In addition, near exclusive reliance on post-hoc monetary compensation, rather than preventing harm or restoring the natural environment, indicate that civil lawsuits remain a better fire alarm for extreme abuses than the potential centerpiece of a serious bid to improve environmental quality.

An Emerging Conversation: Policy Entrepreneurs and Public Interest Law

Given the scale and importance of China’s environmental problems, it is inescapably disappointing that litigation remains a relatively weak tool for environmental protection. Yet the simplicity of pessimism overlooks a quieter, more contingent story of slow-moving social change. Indeed, there is more than a hint of narcissism about the hunt for signs that litigation might be as central to China in the 2000s as it was to America in the 1960s. Instead of searching for landmark cases, or a groundswell of environmental activism, it makes sense to remain attentive to “the seemingly small changes in state-society relations” that indicate how law is slowly re-making China (O’Brien and Li 2006, 114). This is a difficult task, not least because social scientists are more accustomed to explaining short-term results than what political scientist Paul Pierson calls a “moving picture of important social processes” (2004, 2). But of course long-term processes—like rising literacy, suburbanization or, in this case, sustained political ambivalence over courts—also matter. Zooming out from the focus on individual actors that sustained the last four chapters, this section considers national experimentation with new policy proposals, labels and institutions as one key marker of social change.

As a starting point, consider that a source inside the Supreme People’s Court told *Legal Daily* in March 2009 that “establishing a system for public interest environmental litigation is just a matter of time. It’s a matter of vital urgency for some of China’s developed areas” (Yuan 2009). At first glance, this is an odd remark. Why would a Chinese government insider publicly insist on the inevitability of an approach so strongly associated with citizen activism? After all, there are many ways to

²⁴⁸ Compliance in maritime cases is a bit easier because the court can impound a boat pending payment of compensation (2007-74).

strengthen environmental protection without allowing private parties like citizens and NGOs to sue on behalf of the public interest. In 1970s West Germany, for example, courts and legislatures considered and rejected the idea of environmental litigation based on other grounds besides violation of private rights (Greve 1989).²⁴⁹

In contemporary China, however, this comment fits easily into an emerging civic conversation over public interest litigation. In the 2000s, the term “public interest litigation” (*gongyi susong*)—almost certainly translated from English—entered elite parlance as legal academics and journalists began writing about the possibility of allowing a wider range of groups and individuals to sue. By 2007, researchers at the Zhongnan University of Economics and Law could claim a “consensus among scholars” that some combination of the procuratorate (*jianchayuan*), environmental bureaus (*huanbao jigou*), NGOs and citizens should be allowed to initiate public interest environmental litigation. Although legislation has not yet changed, this discussion indicates growing support for the idea that China should “give law greater clout in [the] battle against pollution” (Jiang 2006a).

In a country hardly known for pluralism or political debate, elite advocacy for public interest litigation is noteworthy. By publishing articles and speaking up at conferences, promoters of public interest litigation cast themselves as visible policy entrepreneurs or “advocates for...the prominence of an idea” (Kingdon 1995, quoted in Mertha 2008, 6).²⁵⁰ At least in public, the debate revolves around how fast and how much to expand standing rather than whether to expand it at all. It is a rather one-sided dialogue, as those opposed to the public interest enterprise rarely publish or speak publicly. While articles with titles like “How Public Interest Litigation Can Act As a Shield for Malicious Accusations” exist, neither the mainstream media nor legal journals typically publish anything so vitriolic. In fact, it is telling that the “malicious accusations” article was self-published online under the pen name “Dr. Water” (*shui bo*). Nor does even the anonymous Dr. Water jettison the idea of public interest litigation entirely. Instead, he concludes that environmental public interest litigation should replace peasant petitioning (*shangfang*) because “this kind of public rights and public participation absolutely cannot be monopolized by extreme environmental activists and international anti-China forces.”²⁵¹

Of course, the absence of robust, public opposition does not mean that public interest litigation is uncontroversial. On the contrary, it is likely that the Party hardliners wariest of “extreme environmentalists” and “international anti-China forces” are either unaware of public interest advocates or insufficiently threatened to attack reformers outside closed-door meetings. Not surprisingly, there are only a few officials active in the public debate and they tend to support a more cautious, government-led approach. One well-known champion of public interest litigation

²⁴⁹ This still left room for quite a bit of litigation. Most large-scale construction projects, for example, end up in court because they infringe on someone’s private rights (Greve 1989, 202).

²⁵⁰ For more on policy entrepreneurs in China, see Mertha (2008, especially p. 6-12).

²⁵¹ Dr. Water (*Shui Bo*), “How Public Interest Litigation Can Act As a Shield for Malicious Accusations” (*Gongyi Susong Qineng Dangzuo Eyi Wugao de Hushenfu*), available at <http://tinyurl.com/yjyh3>

within the Ministry of Environmental Protection, for example, believes that standing should be limited to government-approved NGOs (Bie 2007). Of course, there are fissures among government reformers too. While parts of the procuratorate like the additional responsibility that might accompany a newfound right to sue in the public interest,²⁵² other bureaucrats are wary of expanding their authority. Court officials say that the procuratorate is supposed to supervise the judicial system, a role that conflicts with initiating public interest litigation. As one judge put it, “it [would be] like playing ball and umpiring at the same time” (2007-85).

Across these divides, however, this group of policy entrepreneurs shares a willingness to look abroad, particularly to America, for concepts like public interest litigation that might be useful at home. As explored in chapter 5, this international orientation resonates deeply with the Chinese zeitgeist and academics are a critical “channel through which new ideas circulate” (Haas 1992, 27). In contemporary Chinese law schools, comparative research (*bijiao yanjiu*) facilitates publication and brings accolades. The CASS law institute, a government-affiliated thinktank, tells website visitors that “a comparative method of legal research is always emphasized...not to mention research co-operations with foreign universities and research institutes” (2003).²⁵³ Academics are well aware that they act as a portal for new ideas. As one academic explained (in English), China “needs to learn something from U.S. law...I want to write something to tell [the] Chinese people what is the American [way]” (2007-26).²⁵⁴

At the same time, international philanthropists expend significant resources on efforts to strengthen the culture of public interest law. Local lawyers report that foreign donors “want to donate into this field” and are particularly keen on weaving lawyer networks and building law school clinics (2006-3). Between 2000 and 2008, the Ford Foundation spent US 1.3 million on networking and US 2.9 million supporting clinical education.²⁵⁵ By the mid-2000s, many of China’s best-known law schools had opened legal clinics to offer applied education, serve the disadvantaged and burnish the school’s reputation (2006-3).²⁵⁶ However, many university law clinics—so critical to the development of a case body of U.S. environmental law—do not litigate. When I talked to professors at the Zhongshan University environmental law clinic in 2006, for example, students were helping clients cast complaints in legal terms instead of bringing cases.

²⁵² In a 2005 submission to the State Council, the National Procuratorate (*Zui Gao Renmin Jianchayuan*) wrote that rising pollution levels has made “the establishment of a system for civil and administrative environmental lawsuits both necessary and feasible” (reprinted in Bie 2007, 457).

²⁵³ The privileged place accorded comparative research surfaces in many ways. On an August 2007 trip to Jilin law school, I noticed that the hallways were decorated with cartoon cutouts of famous legal thinkers. The few Chinese scholars (Confucius, Han Feizi) were far outnumbered by Western luminaries, including Aristotle, Oscar Wendell Holmes and Roscoe Pound.

²⁵⁴ Legal academics also often look abroad for practical reasons. The State Environmental Protection Agency (SEPA) is in the midst revising China’s environmental laws and top foreign experts are often invited to assist with drafting. Policy-oriented research, in this context, makes imminent sense as academics are called on to consider China’s options.

²⁵⁵ Calculations by the author.

²⁵⁶ For more on the development of Chinese clinical education, see Phan (2005).

A review of sixty-two articles on environmental law conducted in December 2007 helps explain the rise of a group of policy entrepreneurs committed to an idea that is so clearly a foreign import.²⁵⁷ Importing ideas is a large part of mainstream legal scholarship, as evidenced by the fact that sixty two percent of the articles explicitly discuss foreign approaches to environmental law. As table 1 shows, most authors draw on multiple countries' experiences, picking and choosing solutions they think will work best in China. America is the clear favorite for authors who only reference one country, a reflection of both U.S. importance and the fact that Chinese researchers have better access to sources because many speak English. Soft support programs also focus attention to the American experience, especially when long-term collaboration culminates (as one program did) in edited volumes like *Environmental Public Interest Litigation: A China-US Comparison* (Lü and Wang 2009). As one staff member of an international NGO explained, "these big meetings are useful because they pull people in [and] validate fields like public interest law that have no validation" (2009-5).

Table 1: Looking Abroad for Inspiration: 62 Chinese Law Journal Articles on Environmental Law

Countries mentioned explicitly	U.S.	Japan	France	Germany	Multiple countries	Number of international references	Total
Number of articles	12	1	2	1	22	24	62

Among practitioners, however, tensions over emerging labels like "rights protection lawyer" (*weiquan lüshi*) and "public interest lawyer" (*gongyi lüshi*) indicate real disagreement over how to translate the concept of public interest law into practice. In particular, the common enterprise of promoting public interest law conceals friction between advocates for an inclusive, umbrella concept and those who insist that some work is more meaningful than others. For some, an expansive conception of public interest law is a practical necessity in a place with little tradition of high-profile litigation. Many lawyers point out that litigation is only one aspect of legal activism and, as a result, spend much of their time petitioning, challenging the legality of law and regulations, influencing legislation, educating decision-makers and promoting

²⁵⁷ In total, my research assistants and I collected 62 articles on legal reforms that would facilitate environmental litigation, particularly public interest environmental lawsuits. Fifty seven of these articles were downloaded from the China Knowledge Infrastructure (CKNI) database, accessible through Qinghua University. In December 2007, we searched CKNI's twenty one legal core journals (*hexin qikan*) for articles published between 2000 and 2007 with the key words environmental lawsuit (*huanjing susong*); pollution lawsuit (*wuran susong*) and environmental public interest lawsuit (*huanjing gongyi susong*). Off-topic articles were discarded and, in the interest of time, we did not review articles written by graduate students. In addition, we added relevant articles from volumes 1-6 (2000-2006) of China's only environmental law journal, *Huanjing Fa Luncong*, published annually, and Tao Bie's 2007 edited volume *Environmental Public Interest Litigation (Huanjing Gongyi Susong)*.

legal awareness (Rho 2006, 6-7; Lü 2008, 21-22).²⁵⁸ Indeed, frustration with the current system, particularly strict limits on standing, steers even many practitioners toward outreach and legislative reforms. Famous lawyers and academics (the sort who might be invited to comment on draft regulations or join the local Chinese People's Political Consultative Conference) are particularly likely to convert status into behind-the-scenes lobbying opportunities. As one lawyer involved in local government said, “different levels of people have to solve different levels of problems” (2007-71).

At the same time, promoters of public interest law are also sometimes in the business of exclusion. Limiting membership, as in any social movement, is one way to protect the advantages of association; benefits like contacts, recognition or even the subtle thrall of feeling special. One particular divide separates lawyers who represent real-life clients and those who act as plaintiffs themselves. In one self-proclaimed “successful environmental public interest lawsuit” in 2004, for example, Beijing lawyer and home owner Chen Yueqin contested the lack of green space in her Haidian district apartment complex, *Huaqingjiayuan*. Although the prospectus promised owners 41% green space (*lüdi*), the final built complex delivered only 16.3%.²⁵⁹ Chen sued the developer for breach of contract as well as various city bureaus for failing to enforce local regulations that mandate 30% green space (Chen 2006a). Despite Chen’s claim of success—the city promised to start inspections to make sure developments meet green space standards—the case was controversial. Representing yourself significantly lessens the political sensitivity of a case (2007-100), but lawyers disagree over whether this constitutes an opportunity for activism or turns public interest law into an elite activity that ignores real injustice (2007-33).

More tensions, occasionally audible in heated conference exchanges or backstabbing asides, emerge when assembled audiences try to pin down what public interest actually means. In practice, most lawyers and academics tend to conflate public interest and pro bono (2007-14; 2006-16; 2007-18; 2007-51; Wu 2006, 7; Bie 2007, 10). In this way of thinking, public interest lawyers cannot pursue profit or personal interest, a stance that sidesteps the quagmire of defining the public interest while neatly seizing the moral high ground. This definition, however, limits public interest law to a select few who can afford it. Charging market rate contingency fees (20-30%)²⁶⁰ and suing clients for unpaid bills, like labor lawyer Zhou Litai, courts controversy. But some lawyers get angry over the impossibility of building a self-sustaining practice on pro bono work. As Zhou explains it, “as an organization specializing in protecting other people’s rights, my own rights were severely infringed...I have to live!” (2005, 203).

Among this group of policy entrepreneurs, a few advocates have become so associated with public interest litigation that they seem to have staked their careers on the adoption of the idea. What is less clear is whether they will be successful. Policy

²⁵⁸ Cause lawyers in other developing countries also often deemphasize litigation in favor of other types of activism (Ellmann 1998, 359).

²⁵⁹ The definition of “green space” (*lüdi*) is not clear to me. Having visited the *Huaqingjiayuan* complex (and many similar complexes), most of the “green space” is occupied by playgrounds and concrete walkways.

²⁶⁰ In contrast, CLAPV charges about 5% in contingency fees (2006-15).

entrepreneurs spend years pushing change and, in these early days, it is imaginable that public interest litigation could founder and yet also plausible that some portion of these ideas could be influential. After all, intellectual influence is often slow moving and indirect. The roots of the 1960s American rights revolution, to take one example, wind back to an earlier generation of “legal realist” scholars whose work justified re-shaping law to reflect social values (Kagan 2008 [2001], xx).

Even in the meantime, however, there are moments when public interest litigation seems to be gaining ground. After six Beijing University professors and graduate students brought a lawsuit on behalf of the Songhua river in 2005 (see Appendix B), this question appeared on the 2006 national judicial examination:²⁶¹

Four teachers and students from a certain university jointly sued Company A over pollution along a certain river. They asked the court to mandate that Company A pay compensation to take care of the pollution. In addition to the four teachers and students, the plaintiffs included a famous island in the river. The court refused to take the case. Which of the following explain the relevant points of law?

One of the correct answers (there were several) was the civil procedure law does not allow public interest litigation. Although the test clearly endorsed the court’s decision to turn down the case, it is notable that public interest litigation turned up on the exam at all. For policy entrepreneurs struggling on behalf of an idea, bringing public interest litigation into the consciousness of over 200,000 test takers certainly constitutes a degree of validation.²⁶² Considering that the case never even made it to adjudication, this kind of national ripple effect almost certainly reflects the prestige of the Beijing University professors and law students who brought the case. Clearly, a veneer of legal scholarship can lend respectability to potentially radical experiments, especially when prestigious institutions or well-known individuals lend social capital to a cause.²⁶³

Another good example of how elite legal discourse can provide political and intellectual cover for innovation is the recent proliferation of specialized environmental courts. In the mid to late 2000s, a number of city and district courts opened environmental divisions or designated judges to serve as a specialized environmental panel. Innovators included: Dalian (2004), Shijiazhuang (2004), Nanjing (2004), Guiyang (2007), Changzhou (2008), Kunming (2009), Yuxi (2009) and Wuxi (2009).²⁶⁴ While China’s first environmental court dates back to the late

²⁶¹ Both lawyers and judges are required to pass the test. Copy of the question on file with the author.

²⁶² Between 200,000 and 260,000 people per year take the national judicial exam (Peerenboom 2009, 1).

²⁶³ For more on how legal scholars can serve as potentially allies for lawyers and civil society, see Halliday, Karpik and Feeley (2007, 9).

²⁶⁴ While more research on the politics behind these initiatives is needed, preliminary indications suggest that these are locally initiated projects designed to burnish reputations and ameliorate pressure to do something about pollution. Several of the environmental courts were established after crisis events, like record pollution in Lake Tai (near the Wuxi environmental court) and Lake Dianchi (near the Kunming environmental court) and in Lakes Hongfeng and Baihua (the source of drinking water for several million Guiyang city residents). In interviews with the press, court officials also talk about how

1980s,²⁶⁵ this rapid burst of nearly identical experimentation suggests that elite promotion of public interest litigation may be trickling down into bureaucratic consciousness. Even more significantly, local courts have also began experimenting with expanding standing in environmental cases to include the procuratorate²⁶⁶ and the All China Environment Federation (ACEF), a government-backed NGO.²⁶⁷ Of course, the direction of change is not inevitable. Environmental courts can always quietly lapse into inactivity, especially when tolerance for innovation starts to falter. Still, this modest experimentation indicates one way that academic ideas can work their way into local practice.

Political Ambivalence, Litigation and Social Change

Too often, law in China is portrayed as an exercise in political authority, a veneer of external validation for decisions made by and for political elites. Yet this shorthand understanding—correct in broad strokes and certainly easy to grasp—overlooks both the depth and implications of political ambivalence over law. During the period from 2006 to 2008, when I was doing my fieldwork, the unintended consequences of sustained political ambivalence were just starting to come into view. The flip side of ambivalence turned out to be bottom up experimentation, as different groups began to talk and act differently about both the scope of law and their role in it. Without official sanction or intent, there were activist lawyers, policy entrepreneurs talking about public interest litigation, and judges willing to stand behind limited, local innovation. My fieldwork, in short, coincided with a slow “enlargement of the scope of legal inquiry” surrounding the idea that law should serve the public as well as the Party (Nonet and Selznick 1978, 97).

Concretely, political ambivalence and social change are linked in two ways. First, political ambivalence lent lawyers and judges political cover and even incentives to experiment with new roles, provided they did not overstep the hazy boundaries of official tolerance. Despite the traditional image of Chinese judges as rubber-stamping bureaucrats, pragmatic creativity is a logical, ad hoc response to conflicting Party priorities. Among ambitious judges, handling “complex and difficult cases”—or maybe experimenting with institutional innovation—is also one way to build a reputation and get promoted (Yu 2009, 73). Ambitious lawyers have incentives to handle high-profile litigation too. Sympathetic media coverage of pro bono lawyers has a real monetary payoff, especially in a profession usually reliant on personal networks to find clients and make money. Among a morally motivated minority, the

environmental courts signal to polluters and environmental protection officials that they need to take pollution seriously. In addition, officials note that environmental courts help pool judicial expertise and manage pollution that crosses district lines (see Shu 2008 and Qie 2008).

²⁶⁵ China’s first environmental court was established in Wuhan in 1989, followed by similar experiments in Shenyang in 1996 and Harbin in 1999. One publicly stated rationale for these early environmental courts was that environmental complaints were rising and Environmental Protection Bureaus were unable to effectively resolve disputes.

²⁶⁶ In 2008 and 2009, for example, the Guangdong procuratorate brought two different pollution cases to the Guangzhou maritime court (Deng 2009).

²⁶⁷ To date, ACEF has filed environmental cases in the environmental courts in Guiyang and Wuxi.

combination of political ambivalence and liberation from the state payroll also now allows a degree of legal activism, as long as causes are cloaked in loyalty to country and Party.

Second, political ambivalence has provided an opening for new actors to wedge themselves into the legal system. In contrast to Mao's China, and perhaps even Deng's China, it is impossible to study environmental litigation in the late 2000s and fail to notice the international NGOs and policy entrepreneurs working to both support lawsuits and change the law. In particular, the growing popularity of "public interest" talk is significant. In China, as elsewhere, labels are hotly contested, powerful markers which "help us change our minds, see new vistas and rearrange our feelings about others" (Jasper 1997, 11).

As always with social science research, even a tentative causal link between political ambivalence and grassroots social change is hard to prove. Absent a laboratory-like ability to manipulate political ambivalence and observe the results, one helpful thought experiment is to consider counterfactuals. In other words, how would how unequivocal signals change the landscape of activism? At one end of the spectrum, none of the experimentation or advocacy detailed in this dissertation would be possible if officials were as determined to stamp out environmental litigation as, say, they were willing to stamp out Falun Gong. On the other end of the spectrum, however, unambiguous state support would allow cases to move forward much more smoothly, possibly supported by a corps of government lawyers empowered to bring civil actions like the *Ministério Público* in Brazil (McAllister 2008). These alternatives are hard to imagine, if only because they diverge so dramatically from the contemporary reality of neglect punctuated by reactive crackdowns and intermittent praise. At least when officials are looking in another direction, official incoherence seems to lend legal professionals limited freedom to act on values and commitments that might be Party inspired, but are not Party dictated.

At the same time, however, I do not want to oversell either the extent of grassroots social change or the importance of causal argument. Political ambivalence is not a synonym for liberalization and conflicting signals can encourage self-censorship as easily as experimentation.²⁶⁸ Indeed, labels like "public interest lawyer" and "rights protection lawyer" are complicated concepts that repel as well as appeal. In public, lawyers frequently back off full-fledged dedication to the public interest with statements like "I'm not a public interest lawyer, I'm just someone interested in public interest law" (2007-33) or "I am a just a little bit of a public interest lawyer" (2007-106). One lawyer whose entire practice revolves around serving the disadvantaged insists "I am absolutely not a public interest lawyer. The government should be in charge of looking after the public interest [and] if you need people to sacrifice themselves, there are real problems in society" (2007-102). Self-chosen labels do not necessarily compel action either. Lawyers frequently complain about "so-called public interest lawyers" who excel at self-congratulatory grandstanding and little else. At the same time, this dissertation covers far more ground than the connection between political ambivalence and grassroots innovation detailed in this

²⁶⁸ For more on the importance of self-censorship, see Stern and Hassid (2009).

final chapter. In these pages, my core commitment is to close-to-the-ground work that weaves real people's lived experiences into concepts like political ambivalence, soft support and control parables that help make sense of politics in a complicated, conflicted authoritarian state. In China, as elsewhere, a fine-grained focus on individual incentives, emotions and ideas reveals much about both how politics works and the potential for change.

Moving forward, my hope is that drawing attention to the implications of sustained political ambivalence in just one area—environmental litigation—will open up a new agenda for research in China. Rather than hunting for signs of political liberalization, or despairing when flare-ups of repression occur, we can instead expect ambivalence and re-focus attention on how conflicting signals are transmitted and understood. In these pages, I've defined political ambivalence relatively narrowly, as conflicting official or quasi-official signals regarding the desirability of certain types of citizen action. But even a quick glance through the newspaper (or through recent issues of *China Quarterly* or *China Journal*) shows ambivalence about far more than the boundaries of citizen participation. From the Internet to free trade, the CCP is ambivalent about the realizing the benefits of new institutions, ideas and technologies if it means ceding political control. Conflicting signals, accompanied by ground level uncertainty, is mainstream. Future researchers will certainly want to examine how groups like foreign law firms,²⁶⁹ environmental NGOs,²⁷⁰ or documentary filmmakers²⁷¹ cope with constantly changing rules. There is much to be gained from viewing the state from below and carefully parsing when individuals, groups and institutions receive clear signals and, more often, how they respond to mixed messages.

Whenever possible, future researchers will also want to take on a task I've largely left untouched here: piecing together the behind-the-scenes politics that explain seemingly random outcomes. To some extent, this kind of work turns on the kind of candid access to top officials that few enjoy. If more data become available, however, it will also become possible to learn more about the state not by talking to people within it, but by looking at the signals that come out of it. Information on which environmental cases were accepted or turned down by courts in a particular jurisdiction, for example, would be one way to systematically unpack why some cases are more politically sensitive than others. While the common sense view is that sensitivity depends on the political clout of the polluter (taxes paid, strength of party connections) and the number of litigants,²⁷² those inclined towards hypothesis testing

²⁶⁹ For more on how the Ministry of Justice's attitude towards foreign law firms is ambivalent, see Liu (2009, 158).

²⁷⁰ Liang Congjie, the founder of Friends of Nature, summed up political ambivalence in this way: "It is hard to generalize what the government thinks about us. The government is not a monolithic bloc in this regard. SEPA [the State Environmental Protection Agency] supports us and has called us their "natural ally." The MOWR [Ministry of Water Resources] probably likes us much less and the provincial government in Yunnan undoubtedly hates us" (quoted in Mertha 2008, 27).

²⁷¹ Independent documentary filmmakers work in a "measured free space, the limits of which are constantly being tested by filmmakers and festivals alike" (Nornes 2009, 52).

²⁷² Large groups are generally seen as threatening to social stability.

will certainly want to probe and fine-tune this understanding. Likewise, patterns of regional variation²⁷³ or success and failure will prove rich ground for future research that builds on and complicates the account presented here.²⁷⁴

Beyond China, this dissertation fits into an emerging research agenda on how law matters in unlikely places. Efficient, well-functioning courts are increasingly seen as part of what makes a modern state, even in one party regimes like China where we might expect law to be irrelevant. This dissertation marks an early attempt to trace the unintended consequences of deep-rooted political ambivalence over courts, but much more remains to be done. It is an open question whether this story of bottom-up experimentation might hold true in other places and in other times and, if so, to detail how creeping cultural and political change unfolds over the long term. This calls for a textured, nuanced view of legalization that shies away from grand pronouncements and disassembles “rule of law” into more manageable constituent pieces. Especially when regimes are conflicted about law, procedures and outcomes are likely to vary with local pressures and issue area. Future researchers will want to stack environmental litigation up against other types of cases to see when authoritarian justice is a mishmash of conflicting priorities as well as the moments when those priorities become lucidly clear. It may also be interesting to add other kinds of dispute resolution, like mediation or petitioning, to a comparison. After all, litigation is only one way to resolve disputes and the interaction between state signals and societal response may be quite different outside courts than within them.

For now then, the best way to think about environmental litigation is as a topic on the “cutting edge of society’s understanding of itself as it changes” (Jasper 1997, 13). This dissertation primarily reflects China in the mid-late 2000s, a moment in the midst of a massive experiment over how to exploit law and maintain political control in which outcomes were far from certain. From our vantage point mid-experiment, then, multiple futures are possible. As occurred in Egypt or Singapore, it is easy to imagine repression of courts, judges or lawyers that start to act like political challengers. Indeed, instances of violence, intimidation and retribution already frequent the news. In the first six months of 2009, for example, authorities suspended or shut down two prominent legal advocacy organizations, Yitong Law Firm and the Open Constitution Initiative (OCI).²⁷⁵ Yet despite these high-profile crackdowns, it is also possible to imagine an extension of the status quo: a period of sustained ambivalence long enough to see how much new actors prove able to accomplish and

²⁷³ The frequency of environmental lawsuits clearly varies by region. As more detailed data becomes available, it will be interesting to explore how the number of lawsuits relates to the number of lawyers, the severity of pollution, the level of economic development and other factors. There are also interesting anomalies that are worth explanation. For example: Why, as interviewees indicate, would Shanghai have fewer lawsuits than equally rich areas like Beijing, Zhejiang and Jiangsu (2007-31, 2007-89)?

²⁷⁴ One extension of chapter 5, for example, would be to explore whether soft support has a deeper impact in other areas other than environmental law. Women and children’s rights lawyers, for example, seem to have better absorbed fundraising and networking strategies from abroad (2007-76; 2007-96).

²⁷⁵ For more on this, see Clarke (2009).

how much role conceptions continue to shift.²⁷⁶ Although China watchers typically default to cynicism (it is far safer to be hard-boiled than to risk being called Pollyannaish), the decision about whether to be optimistic or pessimistic about environmental litigation reflects nothing as much as prior expectations. Those expecting an inflexible Communist court system bent on bending the law to protect polluters will be pleasantly surprised and those searching for stirrings of 1960s-style American judicial activism will be disappointed.

The main implication is simply that we need to keep watching. Considering that the majority of lawyers were state employees as recently as 1995, it is still early for an evaluation of long-term outcomes. In both politics and society, trends can take years to unfold, especially if it takes a distant tipping point to trigger a cascade of results.²⁷⁷ But rather than hunting for signs of major transitions, like revolution, liberalization or democratization, we need to attune ourselves to changes that leave the top leadership largely untouched. Without official intent or even awareness, the steady pressure of litigation can re-work the legal system from within, especially when laws are also changing fast. For example, the 2008 Open Environment Regulations may ease environmental litigation by improving access to information. As one Chinese observer (rather breathlessly) wrote in 2009: “this regulation promises to be the proverbial hammer that will smash the wall between polluting enterprises and the public, turning China from a bureaucracy-oriented country to a science-and-democracy-oriented one” (Hu 2009).²⁷⁸ Change, now subtle and slow, may also rapidly accelerate. In Pakistan, a Supreme Court handpicked by the president and unwaveringly loyal through 2005 developed distinct anti-regime sympathies in just two years (Ghias forthcoming). As China’s leaders know, law requires vigilance precisely because change can be so unexpected.

²⁷⁶ One potential change worth watching for is a shift from a top-down strategy calling for legislative change to bottom up strategy designed to push the limits of the current system. Just as Richard Cloward and Frances Fox Piven called a welfare enrollment drive in the 1960s to force a bureaucratic crisis and compel reform, Chinese policy entrepreneurs *cum* activists could push legal reforms by overwhelming courts with cases.

²⁷⁷ Paul Pierson calls these cumulative causes (where change is slow-moving and gradual) and threshold effects (when major change happens at a critical level) (2004, 82-83).

²⁷⁸ Joan Hu, “Greenlaw and the First Anniversary of China’s Open Information Regulations,” available in English at <http://tinyurl.com/q6opjs>.

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Appendix A: Personal Communication Cited

2006

- 2006-1 American academic, New York City, September 11
- 2006-2 Chinese lawyer (Beijing), Chinese lawyer (Beijing), New York City, September 20
- 2006-3 Chinese lawyer, New York City, September 28
- 2006-4 Chinese LLM student, New York City, October 4
- 2006-5 Chinese LLM student, New York City, October 18
- 2006-6 Former Chinese judge (Zhejiang province), New York City, October 26
- 2006-7 Environmental Protection Bureau employee (Shanxi province), New York City, November 4
- 2006-8 Chinese academic, New Haven, November 6
- 2006-9 Chinese lawyer, phone interview, November 16
- 2006-10 Chinese lawyer, Beijing, November 30
- 2006-11 Chinese academic, Beijing, December 5
- 2006-12 Chinese academic, December 6
- 2006-13 Staff members from an American NGO, Beijing, December 7
- 2006-14 Chinese lawyer, Beijing, December 14
- 2006-15 Chinese environmental NGO staff member, Beijing, December 15
- 2006-16 Meeting between a Beijing and American university to discuss potential collaboration, Beijing, December 11
- 2006-17 Chinese lawyer, Beijing, December 20
- 2006-18 Meeting between an American university and a Chinese NGO to discuss potential collaboration, December 11
- 2006-19 State Environmental Protection Agency employee, Beijing, December 21

2007

- 2007-1 Chinese academic, Guangzhou, January 5
- 2007-2 Staff members of an American NGO, Hong Kong, January 12
- 2007-3 Chinese environmental NGO staff member (Yunnan), Beijing, January 19
- 2007-4 Japanese academic, Beijing, January 21
- 2007-5 Chinese environmental NGO staff member, Beijing, January 21
- 2007-6 Chinese lawyer, Beijing, January 22
- 2007-7 Chinese plaintiff in an environmental lawsuit, Beijing, January 24
- 2007-8 Chinese lawyer, Beijing, January 25
- 2007-9 Chinese lawyer, Chinese lawyer, Beijing, January 26
- 2007-10 Environmental reporter, Beijing, January 30
- 2007-11 Environmental reporter, Beijing, February 1
- 2007-12 Chinese environmental NGO staff member, Beijing, February 5

2007-13 Chinese environmental NGO staff member, Fujian province, February 6

2007-14 Chinese lawyer, Fujian province, February 7

2007-15 Chinese lawyer, Fujian province, February 10-11

2007-16 American NGO representative, Beijing, February 12

2007-17 Meeting between an American environmental NGO and the State Environmental Protection Agency, March 1

2007-18 Chinese lawyer, Beijing, March 2

2007-19 American NGO representative, Beijing, March 4

2007-20 Chinese plaintiff in an environmental lawsuit, Beijing, March 5

2007-21 Chinese lawyer, Hebei province, March 6

2007-22 Chinese lawyers, plaintiff in an environmental lawsuit, Beijing, March 8

2007-23 Chinese lawyer, Beijing, March 14

2007-24 Meeting between Beijing and American universities to discuss the potential for collaboration, Beijing, March 14

2007-25 Plaintiff in an environmental lawsuit, Beijing, March 15

2007-26 Chinese academic, Shanghai, March 19

2007-27 Chinese lawyer, Jiangsu province, March 20

2007-28 Chinese lawyer, Shanghai, March 21

2007-29 American government officials, Shanghai, March 21

2007-30 Chinese academic, Shanghai, March 22

2007-31 Lawyer working for a Chinese environmental NGO, Shanghai, March 23

2007-32 Chinese plaintiffs in an environmental lawsuit, Hebei, March 28

2007-33 Training program for public interest lawyers, March 31-April 4

2007-34 Chinese lawyer, Zhejiang, April 5

2007-35 Chinese plaintiff in an environmental lawsuit, Beijing, April 10

2007-36 Chinese lawyers, Beijing, April 12

2007-37 International roundtable on environmental law, April 16

2007-38 Chinese environmental journalist, Beijing, April 19

2007-39 Chinese plaintiff in an environmental lawsuit (Fujian), Beijing, April 21

2007-40 Chinese environmental journalist, Beijing, April 21

2007-41 Chinese lawyer, Beijing, April 23

2007-42 NGO conference on using the law for environmental protection, Beijing, April 25-27

2007-43 Complainants in an environmental dispute, Beijing, April 27

2007-44 Complainants in an environmental dispute, Shanghai, May 2

2007-45 Complainants in an environmental dispute, Shanghai, May 3

2007-46 Complainants in an environmental dispute, Shanghai, May 4

2007-47 Complainants in an environmental dispute, Beijing, May 7

2007-48 Chinese lawyer, Guangdong, May 10

2007-49 Chinese lawyers, Guangdong, May 12

2007-50 Chinese environmental NGO representative, Beijing, May 12
 2007-51 Chinese lawyer, Beijing, May 12
 2007-52 American foundation representative, Beijing, May 22
 2007-53 Chinese lawyer, Shanghai, May 24
 2007-54 Chinese lawyer, Shanghai, May 24
 2007-55 Chinese judge, Shanghai, May 25
 2007-56 Chinese environmental activist and plaintiff, Zhejiang, May 28
 2007-57 Chinese lawyer, Zhejiang, May 29
 2007-58 Chinese lawyer, Hebei, June 1-June 4
 2007-59 Chinese environmental NGO representatives, Beijing, July 5
 2007-60 Chinese lawyer, Beijing, July 6
 2007-61 Chinese environmental NGO representative, Beijing, July 10
 2007-62 Chinese environmental journalist, July 11
 2007-63 Chinese lawyer, Beijing, July 11
 2007-64 American NGO representative, Beijing, July 15
 2007-65 Chinese lawyer, Beijing, July 17
 2007-66 Chinese lawyer, Beijing, July 20
 2007-67 American foundation representative, Berlin, July 25
 2007-68 EPB official, Jilin, August 16
 2007-69 Chinese judge, Jilin, August 16
 2007-70 Chinese lawyer, Jilin, August 17
 2007-71 Chinese lawyer, Beijing, August 21
 2007-72 Chinese lawyer, Beijing, August 23
 2007-73 Chinese lawyers, Beijing, August 28
 2007-74 Chinese judge, Hebei, August 28
 2007-75 Chinese environmental journalist, Beijing, August 30
 2007-76 American NGO representative, Beijing, September 2
 2007-77 Chinese lawyer, Hubei, September 4-5
 2007-78 Chinese lawyer, Hubei, September 5
 2007-79 Chinese lawyer, Hubei, September 6
 2007-80 EPB official, Hubei, September 7
 2007-81 International workshop, Hubei, September 10
 2007-82 Meeting between Chinese lawyers and plaintiffs, Hubei, September 11
 2007-83 American expert, Beijing, September 16
 2007-84 Chinese judge, Beijing, September 18
 2007-85 Chinese judge, Beijing, September 20
 2007-86 EPB official, Shanghai, September 24
 2007-87 Chinese lawyer, Shanghai, September 25
 2007-88 Complainant in an environmental dispute, Shanghai, September 27
 2007-89 Lawyer roundtable on environmental law, Shanghai, September 27
 2007-90 American expert, phone interview, October 12
 2007-91 Chinese lawyer, Beijing, October 13
 2007-92 American NGO representative, Hong Kong, October 18
 2007-93 American NGO representative, Hong Kong, October 19

2007-94 Chinese lawyer, Guangdong, October 22
 2007-95 American expert, phone interview, October 24
 2007-96 Chinese lawyers, Beijing, October 25
 2007-97 Chinese lawyer, Beijing, October 25
 2007-98 Environmental law training program, Beijing, October 26-November 1
 2007-99 Environmental lawyer, Beijing (Inner Mongolia), October 29
 2007-100 Environmental law workshop, Beijing, November 1
 2007-101 Chinese lawyer, Beijing, November 3
 2007-102 Chinese lawyer, Zhejiang, November 5
 2007-103 Chinese lawyer, Jiangsu, November 7
 2007-104 Chinese lawyer, Beijing, November 11
 2007-105 Roundtable on environmental law, Beijing, November 12
 2007-106 Chinese lawyer, Beijing, November 15
 2007-107 Environmental lawyer meeting, Guangxi, November 17
 2007-108 Chinese lawyers, Guangxi, November 18
 2007-109 Chinese lawyer, Yunnan, November 27
 2007-110 Chinese lawyer, Yunnan, November 27
 2007-111 Chinese lawyer, Yunnan, November 28
 2007-112 Chinese lawyer, Yunnan, November 28
 2007-113 Chinese lawyer/academic, Yunnan, November 29
 2007-114 Lawyer roundtable, Beijing, December 2
 2007-115 Lawyer roundtable, Heilongjiang, December 7
 2007-116 Chinese academic, Beijing, December 18
 2007-117 Foundation representative, Beijing, December 21
 2007-118 Chinese lawyer, Shanghai, December 27

2008

2008-1 Chinese environmental NGO representative, Yunnan, January 4
 2008-2 Chinese lawyers, Hubei, January 10
 2008-3 SEPA officials, Beijing, January 13
 2008-4 American NGO representative, phone interview, May 14

2009

2009-1 Staff at a Beijing-based legal database, Beijing, January 9
 2009-2 Chinese academic, Beijing, January 12
 2009-3 Staff at a Beijing-based legal database, Beijing, January 13
 2009-4 American NGO representative, Beijing, January 13
 2009-5 Chinese lawyer, Beijing, January 20

Appendix B: The Stories

For readers who crave more detail (or those who simply like a good story), this appendix presents four environmental disputes. The first two cases went to court, while the second two disputes never made it there.

Sun Youli et al. v. Qianan Diyi Zaozhichang et al. (Hebei 2002 and 2003)

Few consumers think much about fish farming beyond the occasional moment at the fish counter spent weighing the benefits and costs of farm-raised versus wild caught. But in China, fish farming is big business: more than 4.5 million Chinese fish farmers produce about 70 percent of world's farmed fish (Barboza 2007). Fish farms inhabit thousands of lakes, ponds, rivers and reservoirs and stories of industrial discharge causing large fish kills are common. In fact, the combination of industrial pollution and documentable economic losses make fish farmers one of the groups most likely to bring (and win) civil environmental lawsuits.

Sun Youli and 17 other fishermen received local government permission to start farming fish on Hebei province's Bohai delta in 1997 and, in so doing, joined what had become a local economic trend. Fish farming was a popular enterprise on the Bohai delta in the late 1990s and farmers were successful enough that national newspapers cited the area's "golden beaches" (Workers' Daily 2002). To a large extent, the popularity of fish farming reflected the appeal of starting a rural business that didn't require too much education or capital. As a fish farmer in Fujian province explained, "this doesn't take a lot of technology...you just learn it as you go along" (Barboza 2007).

In October 2000, what the Hebei high court would later call a "major pollution accident" disrupted what would have been the fall fish harvest. One of the laborers hired to work the harvest first noticed thousands of fish and shellfish floating dead in black and red water. Sun and the other fish farmers immediately reported the incident to county officials who, in turn, quickly closed down two sluices channeling water from the nearby Luan river to the Bohai sea. Shutting the sluices reflected widespread local suspicion that factories along the Luan river were the most likely source of an industrial pollution accident. In fact, the eventual defendants—nine paper and chemical factories—were located in Qian An city, more than 1,000 kilometers upstream from the sluices.

At first, the Bohai fish farmers were reluctant to bring a lawsuit. Even when I talked to them seven years later, one of the plaintiffs still felt that "if we could have gone through a government bureau, that would have been better" (2007-32). Instead, their first impulse was to take photos of the damage and petition the government for compensation. Only after a frustrating and fruitless month did they start looking for lawyers willing to represent them in exchange for a future cut of compensation should they win in court. The fish farmers found a law firm located a two and a half hour drive away, Zhongzi law firm in Beijing. Back in 1999, a time when few lawyers were thinking about environmental issues, Zhongzi had set up an environmental law department. There was some thought that environmental law might develop into a lucrative business, as well as a more immediate imperative to take cases that were both

morally satisfying and would garner good press. Zhongzi had worked with members of the nearby Tangshan fishermen's association on earlier pollution disputes and, when the Bohai fish farmers starting asking around for lawyer recommendations, Zhongzi's name came up.

As discussed in chapter 1, the plaintiffs' legal defense team took the lawsuit to the Tianjin maritime court in an attempt to escape the influence of powerful local polluters. The Tianjin maritime court was not accustomed to handling pollution cases and, before taking the case in May 2001, judges double-checked with the SPC to confirm the court had jurisdiction. Although one of the Zhongzi lawyers would later tell me that "the hardest thing in this case was the lack of evidence," the plaintiffs' legal team maneuvered a significant amount of environmental monitoring data into court (2007-23). It helped that one of the Zhongzi lawyers was a former EPB employee, a real "insider" (*zaihang*), who knew what kinds of data should exist and who to ask for it. Convincing judges to request reports from the Tangshan EPB, for example, exposed an unflattering record of law breaking, fines and dumping. In addition, the fish farmers raised money for independent monitors to collect water samples from 14 spots near Qian An city for analysis (Workers' Daily 2002).

As always, proving a link between pollution and damages was more challenging. One key piece of evidence was a January 2001 inspection by the Hebei and Leting Water Products Bureaus that pinned the pollution on paper and chemical factories in Qian An (Workers' Daily 2002). Then, the Tianjin maritime court asked the Bohai Area Monitoring Station (under the Ministry of Agriculture's Fishery Environmental Monitoring Center) to appraise damages. The monitoring station came back with an estimate of 13.6 million RMB (US 2 million), almost three quarters of a million RMB (US 111,000) per plaintiff.

The Tianjin maritime court saw this appraisal as "objective" (*keguanxing*) and "reliable" (*kekao*) and relied on it heavily in its April 2002 decision. The decision held the nine defendants jointly liable for the entire 13.6 million on the grounds that, in keeping with the 2002 SPC explanation which reverses the burden of proof, the defendants failed to disprove a link between pollution and losses. 13.6 million RMB is a large amount and the decision attracted national media attention as well as a degree of external support. Just afterwards, a Beijing-based SEPA official told *Legal Daily* that he supported the fish farmers' attempts to protect their lawful rights (Qie 2002).

The defendants appealed to the Tianjin High Court and, especially as the lawsuit dragged on, many of the fish farmers took out loans to pay for basic necessities. In the spring of 2002, Sun Youli couldn't even fish off his boat because he had no money to pay workers. As one reporter wrote during this time, "now [Sun's] only hope is that this lawsuit will conclude so that he can get some money to pay his debts" (Workers' Daily).

In March 2003, the High Court upheld the Maritime Court decision, but reduced compensation by 47% to 6.5 million RMB (US 963,000). First, the decision re-calculated losses based on wholesale value rather than retail value. Second, the Tianjin High Court judges recognized the defendants' long history in the area and

penalized Sun Youli et al. for failing to consider the risk before establishing a fish farm. Those involved in the case, however, recognized that the bench primarily wanted to lessen the burden on struggling industry, a goal that even one of the Zhongzi lawyers found “fair” (*gongping*). As he later wrote, “for now, most enterprises face a number of difficulties reliably meeting [environmental] standards...lightening industry’s civil liability can contribute to their enthusiasm for environmental protection.”²⁷⁹

It took a long time, however, for the struggling fish farmers to get any money at all. After much delay and only under significant judicial pressure, the plaintiffs finally received 3.5 million RMB (US 514, 705) in September 2004. While this was only 45% of what the court had mandated, the plaintiffs were not unduly disappointed. As they recalled in 2007 (after time smoothed the most unpleasant memories), “the most important thing is that we won.”

Zhang Changjian et al. v. Rongpin Huagong Youxian Gongsi (Fujian 2005)

In Pingnan village, Rongping chemical plant was initially welcomed in 1994 as a source of tax revenue and over 300 new jobs. Back then, Pingnan was one of the eight poorest counties in Fujian province; a place where local sayings (“Pingnan, Pingnan is poor and hard”) verged on lamentations. The local government even subsidized 30% of the cost of building the plant in the hopes of spurring the local economy (Caijing 2006). As a local cadre later explained, “from the perspective of a villager, you could wish that we’d done a bit better of a job preserving the environment...[but] at the time when we build the Pingnan factory, the place was secluded” (News Probe 2003). Indeed, Rongping quickly became an integral part of the local economy and, by 2002, was providing 25% of the local county budget.

Over the next ten years, however, local enthusiasm gave way to discontent as crops started dying and health problems spread. In 1999, Zhang Changjian, the village doctor who later led the environmental lawsuit against Rongping, started writing complaint letters. After Zhang acquired a computer in 2001, his writing pace increased. He wrote as many as forty letters and emails a day to would-be allies from the tip of the Party hierarchy down through local EPB inspectors. In January 2002, a reply from then-Premier Zhu Rongji (or, more likely, his office) boosted Zhang’s confidence (Yang 2002; Lai 2006). He started contacting the media and, in March 2002, a sympathetic reporter from *Fangyuan* magazine filed the first major story on Pingnan’s pollution. More importantly, the reporter also put Zhang in touch with the Beijing-based Center for Legal Assistance to Pollution Victims (CLAPV). Although Zhang had previously considered a lawsuit, he had shelved the idea because of the difficulty of finding a lawyer.

The CLAPV lawyers knew from the start that, as one told the media, “the key [to this case] is local government” (Caijing 2006). The local government was a strong supporter of Rongping chemical plant and the Pingnan villagers’ journey through the courts exemplifies the many ways in which officials can obstruct litigation to shelter large taxpayers. In a 2004 interview with students from Xiamen University, one cadre

²⁷⁹ Document on file with the author.

summed up his take on the dispute this way: “we want to obey the law and maximize our profit.”²⁸⁰ (He was also outraged that the villagers wanted more compensation (13 million RMB) than the country budget (100 million)). The extent of local protectionism made environmental enforcement almost impossible too. As a member of the Pingnan County People’s Consultative Standing Committee anonymously complained to the press, “why is it that every time there’s an inspection inside the factory they know about it and can prepare? This clearly shows that someone inside tipped them off. This kind of collusion... is a form of corruption” (Yang 2002).

Government support for Rongping chemical plant also meant routine harassment of villagers. Some villagers were afraid to join the lawsuit because of safety concerns and, indeed, thugs with suspected government ties beat up some plaintiffs. Government employees were forbidden from joining the lawsuit entirely and, when the villagers formed an organization to raise money for litigation in 2002, the county government confiscated their banner and collection plate (He 2004). As the most visible leader of the lawsuit, Zhang Changjian suffered the most serious repercussions. In 2004, the county government shut down Zhang’s clinic and charged him a 5,000 RMB fine (US 735), leaving him without a source of income.

Still, despite entrenched government opposition, 1,721 villagers joined the 2002 lawsuit against Rongping. Faced with a politically controversial case, the Ningde Intermediate Court tactically stalled for time. They stalled for three years before finally issuing a decision in May 2005. The decision required Rongping to “stop harm” (*tingzhi qinhai*)—a vague, basically unenforceable pronouncement—and mandated 249,000 RMB in compensation (US 36,617), less than 2% of what the plaintiffs had requested. Disappointed at the prospect of a 139 RMB (US 20) payout, Zhang and the other villagers vowed to appeal. Indeed, the Intermediate Court decision provided reasonable grounds for doing so. One of the judges was a graduate of CLAPV’s environmental law training program in Beijing, an experience which the CLAPV lawyers thought helped the panel apply the law accurately (Wang 2007, 219). The court, possibly also emboldened by Rongping’s appearance on a 2002 SEPA list of China’s top fifty-five polluters, clearly acknowledged excessive pollution and correctly shifted the burden of proof to the defendant. In addition, the panel recognized villagers’ claim to compensation due to emotional harm as well as economic damages.

In August 2005, fourteen months after the first court decision, more than fifty villagers got up before dawn to arrive at Fujian High Court by 8.30am to hear the result of their appeal. At this point, they had been working to stop pollution for eighteen years (Caijing 2006). The High Court upheld the Ningde Intermediate Court decision and cautiously increased compensation to 684,178 RMB (US 100,614) or roughly 397 RMB per plaintiff (US 58). Despite the fact that *Legal Daily* and the All China Lawyers’ Association would later name Pingnan as one of 2005’s ten most influential lawsuits, this was a small sum of money even for rural China.

It also more than two years before Zhang and the other villagers received any compensation at all. Although the five legal representatives should have been legally

²⁸⁰ Transcript on file with the author.

empowered to receive and distribute the money, the court demanded the plaintiffs submit a new disbursement plan and check for public objections. Under the combined pressure of media attention, visits from CLAPV lawyers and petitioning of provincial officials, the court finally released some of the money in September 2007.

Nor did the lawsuit stop pollution in Pingnan. After losing his clinic, Zhang Changjian turned to environmental activism full-time. In May 2009, he managed to officially register his NGO, Pingnan Green Home (*Pingnan Lüse Zhijia*).²⁸¹ Pingnan Green Home's pamphlets, blog posts and petitions chronicle a post-2005 history of continued pollution and complaint. From alleged illegal expansion of production to unwelcome, new high voltage power lines, the struggle against Rongping chemical plant is far from over.

Dispute over the Shanghai-Hangzhou Magnetic Levitation (Maglev) Train (2007-2008)

In contemporary China, most civil environmental lawsuits center on the issue of compensation for economic losses. Yet however common, court records of failed harvests, fishkills and medical bills are only one type of environmental dispute. To better understand the broader landscape of environmental activism (as well as some of the alternatives to litigation), I chose the 2007-2008 dispute over the extension of the Shanghai-Hangzhou maglev train as one of my case studies. In 2000s China, this kind of not-in-my-backyard (NIMBY) activism was clearly on the rise.²⁸² Newspapers were full of accounts of urban residents banding together to oppose unwelcome neighborhood developments, including opposition to a power plant in Chongqing (2002); a major highway linking Hong Kong and Shenzhen (2004); high voltage electricity transmission towers in Beijing (2004 and 2007); a chemical plant in Xiamen (2007) and a nuclear power plant in Shandong (2007).

Shanghai's maglev train has always been a symbol of the city's high-tech modernity. Amid much fanfare, Shanghai opened the world's first high speed commercial maglev train from the Pudong airport to downtown Shanghai in 2004. Despite the fact that the Pudong maglev was losing money, the central government approved plans in 2006 to extend the maglev to Hongqiao airport (37 km) and to Hangzhou (175km). Initial plans indicated that the Hangzhou extension would cost 35 billion RMB (US 5.1 billion) and trains would reach 450 km per hour (Xinhua 2007). The idea was to complete the new line in time for the 2010 World Expo to reinforce visitors' impression that, as Paris Hilton recently put it, "Shanghai looks like the future!" (Associated Press 2007)

Controversy arose because Shanghai-Hangzhou line was slated to pass through a densely populated residential neighborhood in Minhang District. While residents heard rumors about new maglev train as early as 2006, they were not officially

²⁸¹ For more on Pingnan Green Home, see their website at <http://tinyurl.com/yfwg9e5>

²⁸² Birmingham (2000) argues that researchers shouldn't use the term NIMBY because it is "so firmly associated with limited and self-interested responses to local environmental change" (60). While I agree that the term is somewhat loaded, I've used it here because it so clearly evokes a certain type of collective action.

notified until just before Chinese New Year 2007 (Qian 2007, 64). The initial ‘Notice of Demolition and Resettlement’ posted around the neighborhood was vague. There was no map of the proposed line and it did not specify which residents (if any) would be moved to make way for the new track. The day after Chinese New Year, February 25, 2007, a group of concerned residents went to various government offices to investigate. They discovered that Shanghai-Hangzhou line would pass within 22.5 meters of their community, but there were no plans to demolish the building or compensate the residents (Qian 2007, 65).

This particular section of Minhang has long been cursed by transportation planners. Several major transportation lines already crisscross the area, including a subway, train and elevated highway. Since Shanghai’s southern train station opened in July 2006, upwards of 100 trains per day pass by en route to points south (2007-44). The Shanghai-Hangzhou maglev would run parallel to these tracks, a plan that makes a certain sense in that it would limit transportation impact to one especially forsaken stretch of the city. For the people living in the area, however, news of the maglev was a final indignity at the end of a decade of transportation-related bad news. As one resident said, “if they add a maglev train, it will just be one disaster after another” (Qian 2007, 65).

Residents were particularly concerned that the maglev plans only included a 22.5m safety zone. Living so close to the tracks, they argued, would mean increased noise pollution and exposure to dangerous electromagnetic radiation. Residents also claimed that the 22.5m proposal violates 2003 Shanghai city planning regulations which call for a minimum 50m safety zone on each side of any maglev line. Rumors were rife that initial plans included a 50m safety zone, later changed to 22.5m out of expediency (Qian 2007, 66). This was a credible possibility if only because each side of the Pudong maglev, a product of the same government planning process, is flanked by a 50m non-residential zone. Residents complained that they were “the world’s lab rats” (*shijie de bailaoshu*) and this was a clear case of “one line, two systems” (*yixian liangzhi*) (Jinhong Xiaoqu 2007).

The communities closest to the proposed line quickly began petitioning the government and reaching out to the media. They wrote to the district government, the city government and the central government expressing their concerns. Premier Wen Jiabao and the National People’s Congress also received letters. At first, there were very few domestic media reports because the story was so sensitive. Word on the street was that the maglev train was a pet project of the Shanghai government’s Jiang Zemin clique and had high level support in Beijing (2007-88).

Frustrated by their attempts to get national attention, the residents went international. In this solidly middle-class community, residents had internet access, relatives abroad and, most importantly, a strong sense of being part of a global world. Just as Keck and Sikkink’s activist NGOs seek international allies to pressure their home government (1998), this group of Shanghai citizens started looking for pressure points outside China. Germany was a logical first step because German companies Siemens and ThyssenKrupp were part of the maglev construction consortium. The residents wrote to Andrea Merkel requesting intervention: “You know perhaps more

than us about the noise caused by the Transrapid [maglev train] and the damage caused by the electronic magnetic field. We hope with all our heart that you can help us” (Spiegel Online 2007). Others suggested using the Olympics to attract attention. When the Olympics arrive, a BBS post suggested, “we should all hang English signs” (4/30/07, 15.28).

In March and April, residents became more proactive in their efforts to get the government’s attention. They hung huge banners with slogans like “we want environmental protection” (*yao huanbao*) and “we want a public hearing” (*yao tingzheng*) from the top of buildings. These banners had two advantages: they were hard for public security officials to rip down and they were easily visible from the nearby elevated highway (2007-44). Unlike websites and blogs, which were routinely blocked by city authorities, the banners got the message out. Journalists from official state news agencies like Xinhua and the international media started covering the dispute.

At the same time, residents began weekly demonstrations in front of government offices. They worked out a schedule where they would gather one week at the city government and the next week at the district government. According to Xinhua reports, the Minhang District government received more than 5,000 petitioners in a single day in March 2007. These alternate week protests lasted from the end of March through the end of April. Participants estimate that there were over five hundred people at some of the demonstrations, including over 100 people on the day that they delivered a petition to the city government in People’s Square (2007-44; 2007-45; 2007-88). During this high period of activism, many residents would log on to QQ (a popular Chinese instant messenger service) after work to discuss the dispute (2007-46). One housing complex also organized nightly gatherings from 8-9pm in the lobby of one of the buildings (2007-44).

The Shanghai government responded by organizing a series of meetings (*kantanhui*) in April 2007 (2007-88). The main purpose of these meetings was to “work on the residents” so that they would understand that maglev train “wouldn’t be any more dangerous than using a microwave oven” (2007-86; 2007-46). As a Shanghai EPB official explained it to me, “economic development has to move forward and it may influence the masses (*laobaixing*)” (2007-86). The trick is to help them “do thought work” (*zuo sixiang gongzuo*)” so they can accept the outcome (2007-86). While residents were not allowed to see the complete text of the 2006 Environmental Impact Assessment, they were reassured that the report did not foresee undue noise pollution as long as the train did not exceed 200km/hour in residential areas (Qian 2007, 66). Residents were also invited to investigate the Pudong maglev in the hopes that seeing a working train would assuage their fears (2007-86).

None of the government’s thought work was particularly effective in an already suspicious community. In mid-May 2007, the government suspended construction of the Shanghai-Hangzhou line pending revisions to the plan and new approval from the central government.²⁸³ The residents decided to also take a break

²⁸³ It is not clear why the government suspended construction. In the initial Xinhua report, an unnamed source from the Shanghai Municipal People’s Congress said that concerns raised by residents were a

from activism until new developments occurred or the weather cooled down and the 17th Party Congress was safely past (2007-88).²⁸⁴

As of fall 2009, the project was still on hold pending central approval. Construction on a new Shanghai-Hangzhou high speed rail is underway and at least some Shanghai officials feel that an additional maglev train would be a waste of money, especially if community concerns forces construction underground (Chenzhong 2009). For the time being, at least, the potential advantages of a new maglev line seem outweighed by costs and opposition.

Xunhuan Yu (Chinese Sturgeon) et al. v. Zhongguo Shiyou Tianranqi Jituan Gongsi (Beijing/Heilongjiang, 2005)

On November 13, 2005, an explosion at a Sinopec petrochemical plant in China's northeastern Jilin Province released 100 tons of toxins into the Songhua river. Within two weeks, this was international headline news, both because of the size of the spill and because the Songhua river flows over China's northern border into Russia. In the first five days after the accident, however, factory management and local government officials tried to fix the crisis without notifying Beijing, even dumping reservoir water into the river to dilute contaminants (Green 2008). Secrecy continued even after the central government was notified on November 18th. When the 50-mile benzene slick started approaching Harbin, a large city dependent on the river for running water, city officials cut off the municipal water supply claiming a sudden need for repairs. Wild rumors about the real cause of the water shut down were rife until the government went public with information about the spill on November 25th. A front-page headline just after the official disclosure reassured the public that "There Will Not Be an Earthquake in Harbin" (Yardley 2005).

Meanwhile, back in Beijing, a group of six Beijing University professors and graduate students saw the Songhua spill as an opportunity to push forward environmental public interest law. Driven by a desire to call attention to the issue of standing (e.g. allowing a wider range of groups or individuals to sue over environmental harm), they drew up an unusual legal response to the pollution accident in just two weeks. Rather than suing on their own behalf, the academics chose to list themselves as "representatives" (*daibiaoren*) for the real plaintiffs: the Chinese sturgeon, Songhua River and Taiyang Island. In compensation for plaintiffs' harm, they requested 100 million RMB (US 14.7 million) to establish a foundation to clean up the Songhua river. 100 million RMB is a large number—certainly large enough to make people pay attention—but, considering the length of the Songhua river and Sinopec's deep pockets, the Beijing University team thought it was reasonable.

major reason for suspending the project (2007). Other press reports suggested that the deal fell apart because the two sides couldn't agree on a price for German technology transfer (Deutsche Presse-Agentur 2007).

²⁸⁴ In January 2008, there were additional anti-maglev demonstrations in People's Square and along Nanjing Road. According to news reports, protestors were angry about lack of transparency and public input surrounding recently released plans to extend the train to Hongqiao airport as well as Hangzhou.

As discussed further in chapter 5, the decision to sue on behalf of an animal, a river and an island reflected the influence of American environmental law. Some members of the group were working on a translation of American environmental law decisions at the time and the lyrical brief explicitly draws on U.S. precedent. In keeping with Justice Douglas's minority view in *Sierra Club v. Morton* (1972), the brief argues that "woodpeckers who eat wood, coyotes and bears, lemmings and river salmon should all have their day in court" (2005). Furthermore, "countries with an advanced conception of environmental protection have already started to put this new legal idea into practice...In America, for example, it is firmly established that endangered species and environmental NGOs can team up to bring litigation."

This is fairly radical stuff and, from the start, no one involved thought the case would go to trial. Rather, they conceived of the case as political performance—an opportunity to illustrate an academic argument and, in so doing, bring attention to public interest law at a moment when both the Administrative and Civil Procedure Laws were under revision. As a result, it came as no surprise on December 7th when judges at the Heilongjiang High Court case acceptance division refused to even read the legal brief, let alone accept the case. The court's stated reason, however, had nothing to do with standing. Instead, the judge told them that "this case has nothing to do with you. At the moment, in accordance with what the State Council decided, this case does not fall under the scope of what courts can adjudicate." Higher-ups, in other words, had ordered courts to steer clear of the Songhua River controversy.

Up to the point when the case was refused by the High Court, the Beijing University academics kept the impending lawsuit quiet and low-profile. Afterwards, however, they put the legal brief up on Beijing University Law Net where it started attracting attention as well as online discussion. Two weeks later, Beijing University hosted a standing-room only panel on the lawsuit and, for a short time, there was a certain amount of elite buzz over whether using animals as plaintiffs constituted inspired innovation or pure craziness. Yet, despite outside interest, the protagonists decided not to speak to the media. As one legal representative later explained, "we wanted to make clear that this wasn't a political activity" and "staying out of trouble" (*zhao mafan*) also meant staying away from the press.

This attempted lawsuit was only possible because of the prestige and protection afforded by the Beijing University name. Beijing University is one of the country's most prestigious universities as well as a campus with a history of political activism and this reputation helped cast the six legal representatives as respected academic provocateurs rather than threatening radicals. As a judge at the Heilongjiang High Court told one of the Beijing University professors, "only you Beijing University people could do this." The professors' professional and social connections also propelled the would-be lawsuit into the public eye even without much news coverage. As discussed in chapter 6, the 2006 national judicial examination included a thinly disguised question about the Songhua case—a question that, if nothing else, brought the term "public interest litigation" into the consciousness of over 200,000 test takers.

In the end, the severity of the Songhua spill itself also increased central attention to environmental issues. The petrochemical company was fined the highest fine possible for pollution, US 128,000, and the State Council passed a 2006-2010 five-year plan to improve water pollution along the river. Environmental protection, at least for a time, was more of a priority in the heavily industrial northeast. As one Jilin EPB official told me in 2007, “[after the Songhua accident] we suddenly had status” (*diwei mashang shang lai le*).