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978-1-107-02002-3 - Environmental Litigation in China: A Study in Political Ambivalence

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Excerpt

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## Introduction

**T**HIS IS A BOOK ABOUT THE IMPROBABLE: SEEKING LEGAL relief for environmental pollution in contemporary China. It is an account that involves judges, lawyers, and international non-governmental organizations (NGOs), as well as the individuals who file civil environmental lawsuits. This last group includes such people as the herdsmen from Inner Mongolia who sued a paper factory over poisoned groundwater and the Shandong villager who demanded compensation for noise that allegedly killed 26 foxes on his farm.<sup>1</sup> Empirically, this book 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 unravel how 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 authoritarian states.<sup>2</sup> Even pursuing

1 While I occasionally make reference to key administrative cases, my focus is on civil litigation. Overall, civil cases comprise the vast majority of cases in Chinese courts – 87 percent in 2010 – and touch fewer political nerves than cases that entail direct confrontation with state agencies (China Law Yearbook 2011, 1051). For more on administrative environmental litigation, see Zhang (2008).

2 I borrow political scientist 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). Throughout this book, the terms “authoritarian” and “illiberal” are used interchangeably.

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## ENVIRONMENTAL LITIGATION IN CHINA

legal remedies with slim hopes of success, in a country where expectations would be that law wouldn't much matter, litigation can provide a limited opportunity for judges, lawyers, academics, and NGOs to explore new roles and, in so doing, gently expand the universe of political possibilities.

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 splashed across headlines around the world. More than 300 million Chinese citizens lack access to safe drinking water, as a start, and China is home to some of the most polluted cities in the world (Wang 2013). But with few exceptions, there was also little up-to-date research on either the political story behind such dramatic environmental problems or proposed solutions.<sup>3</sup> Part of the appeal of this project lay in its policy implications. Could litigation play a role in either stopping pollution or spurring environmentalism?

As a student of politics, I found environmental lawsuits interesting for a second reason as well. One of the first insights of my fieldwork was that civil environmental lawsuits occupy a "safety belt" (*anquan dai*), as one Chinese lawyer put it, between cases that are unequivocally forbidden by the state (like defending the banned spiritual group 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 to complainants than other rights-related cases while remaining "a little bit sensitive" (*you yidian mingan*) – somewhat politically touchy, but not taboo. Sometimes environmental lawsuits proceed quietly, with no more impediments than any other private dispute. But at other times, cases spark interest from political power holders who pressure litigants, lawyers, and judges to meet their wishes, or drop litigation altogether.

<sup>3</sup> When I started the project in 2005, exceptions included Jahiel (1998), Jing (2000), and Economy (2004). Much more on Chinese environmental issues was published in the mid- and late-2000s, a reflection of the growing importance of the topic.

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Various undermined, ignored, or encouraged, environmental cases sit near the boundary of the politically permissible. This places them on the outskirts of allowable legal action in an authoritarian state, an excellent vantage point to assess the potential and limits of law.

My starting point is the observation that courts pose a dilemma to authoritarian states. Although law can resolve disputes and boost legitimacy, all but the most orchestrated show trials can also threaten government interests or authority. One strand of the growing literature on law in authoritarian states explores this tension, particularly the reasons regimes devolve power to courts and the ways in which they control them.<sup>4</sup> But how does the authoritarian dilemma concerning courts – a high-level desire to 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 toward law tamp down or inspire social change?

**Political Ambivalence**

*Environmental Litigation in China: A Study in Political Ambivalence* investigates these questions. Until now, most accounts of litigation and social change have focused on democracies, especially the United States.<sup>5</sup> 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, the chapters that follow

4 For a partial selection, see Markovits (1996, 2010), Moustafa (2003, 2007, 2007a), Solomon (2007, 2008, 2010), Moustafa and Ginsburg (2008), Ghias (2010), Cheeseman (2011), Hendley (2011), Rajah (2011, 2012), and Massoud (forthcoming). Earlier work on courts in authoritarian states includes Toharia (1975), Tate (1993), Hendley (1996), and Epstein, Knight, and Shvetsova (2001).

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

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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, defined as observable indications of official preferences, regarding the desirability of certain types of citizen action. Ambivalence, meaning the simultaneous existence of opposing preferences, sums up the official attitude toward environmental litigation. It is not that individual bureaucrats or political leaders are conflicted, although this is certainly possible, but that citizens are 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 conflicting statements, cases, and regulations. In contemporary China, this often translates into ground-level uncertainty. When information is conflicting, and also often incomplete or unreliable, it is difficult to gauge the government's "tolerance interval," let alone figure out how to act accordingly (Epstein, Knight, and Shvetsova 2001).

Let me emphasize that writing about political ambivalence does not mean the Chinese state is a single-minded organism, any more than a reference to the body politic describes a being that might sit up and start walking. On the contrary, the Chinese state is "a heap of loosely connected parts" with divergent perspectives on the wisdom of suing polluters (Migdal 2001, 22).<sup>6</sup> Rather than delving into bureaucratic politics, however, this book looks at the state as reflected in society, or how individuals experience the state. Here, variation about which parts of the state support and oppose environmental litigation pale beside the larger truth that both low-level bureaucrats and normal citizens often encounter a state that behaves *as if* it is ambivalent. Political ambivalence, in other words, describes the state as seen from below, from the perspective of people trying to suss out political attitudes without perfect

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

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information. The phrase is shorthand for a common experience of everyday Chinese politics – that of interpreting signals sent by different parts of a state that can't seem to make up its mind.

Some reasons for political ambivalence are universal. Whenever multiple bureaucracies or levels of government take part in policymaking, mixed signals are likely. Including more officials from more agencies inevitably introduces different interests, agendas, and voices. Hierarchy, especially many layers of hierarchy, also decreases the likelihood of a single, clear message as policies make their way from higher to lower levels with opportunities for distortion (both deliberate and inadvertent) each step of the way (Wedeman 2001).

But even if political ambivalence is difficult to avoid in all but the most tightly controlled regimes, it seems amplified in China. One reason for this is the country's physical size – just slightly smaller than the United States – and unusually high degree of decentralization.<sup>7</sup> For some time now, decision-making has been fragmented, with a range of bureaucracies and officials enjoying latitude to adjust and make policies (Lieberthal and Oksenberg 1990). Bargaining, increasingly with pressure groups as well as bureaucrats, is an enduring presence in Chinese policymaking, and behind-the-scenes jockeying often produces conflicting cues (Kennedy 2005; O'Brien and Li 2006; Mertha 2008).

Political ambivalence also reflects a “guerrilla policy style” that dates back to the revolutionary mobilization of the 1930s and 1940s. Guerrilla policymaking, as political scientists Sebastian Heilmann and Elizabeth Perry explain, is a process of “continual improvisation and adjustment” that prioritizes flexibility and accepts “pervasive uncertainty” (Heilmann and Perry 2011, 12 and 22). Local officials are given leeway to try new approaches and good ideas are sometimes rolled out nationwide

<sup>7</sup> Even after recentralizing revenues in the mid-1990s, spending by local governments still accounted for nearly 70 percent of government spending, a level of fiscal decentralization surpassing that of nearly every other authoritarian state. China's level of fiscal decentralization has been exceeded only by Yugoslavia in the years immediately preceding its breakup (Landry 2008, 3–6).

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(Heilmann 2008). Mixed signals are a feature of today's political landscape, in part owing to this tradition of experimentation and comfort with variation. Demonstration areas for economic and political innovation dot the nation and, at times, what economist Albert Hirschman once called a "disparity of attention" while leaders are occupied with "more vital *other* interests" can serve as a green light (Hirschman 1978, 47).

All these sources of mixed signals precede the obvious fact that the Chinese state is more divided over some subjects than others. Certain topics, like Taiwanese or Tibetan independence or the right to practice Falun Gong, are uniformly off limits. There is no such clarity over environmental litigation. Pollution cases touch on two debates in Chinese politics: the pros and cons of encouraging court cases and disagreement about how to weigh environmental considerations against economic growth. The tent of the Chinese Communist Party is big enough to encompass differing opinions, and, so far, the leadership has not stepped in with a definitive policy statement.

By diving into one area in which political ambivalence is particularly pronounced, this book highlights two responses to uncertainty. Often, mixed signals about the desirability of legal solutions lead to self-censorship. Judges protect polluters when higher-ups demand it (Chapter 5), lawyers screen out politically sensitive cases (Chapter 6), and international NGOs gravitate toward less controversial programs (Chapter 7). At the same time, mixed signals also leave creative leeway for bottom-up experimentation. In an inhospitable environment for both law and activism, conflicting signals crack open enough political space to allow the formation of new institutions (Chapter 4), give breathing room to limited judicial innovation (Chapter 5), permit legal activism (Chapter 6), sustain international encouragement (Chapter 7), and promote environmental policy ideas (Chapter 8).

These are significant changes, especially given the tightening tenor of the times. Under President Hu Jintao and Premier Wen Jiabao, both of whom came to power in 2003, there was a widespread sense that space for legal advocacy was shrinking. Certainly, the lawyers pushing for government accountability, civil rights, and social justice had a difficult

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time in the 2000s, a decade replete with high-profile roundups, warnings, and arrests. Nor did political change appear to be anywhere on the agenda, despite Premier Wen's occasional calls for political reform. Instead, the Chinese leadership was preoccupied with "maintaining stability" (*weiwén*) and preventing protest. In 2009, the Chinese budget for internal policing reached the equivalent of US\$95 billion, surpassing the People's Liberation Army budget for the first time (Lam 2011). For the most part, this worked. In a decade full of mass mobilization, from the Color Revolutions in the former USSR and Balkan states to the Arab Spring, China appeared so stable that many social scientists turned their analytic attention to the roots of authoritarian resilience.

Yet no political system is static. Even in the absence of opposition politics (no one in these pages is much interested in regime change), there is room to bend the rules of who gets what, when, and how. This is especially true in areas such as law that are changing rapidly. All of the changes described here happened in the first ten years of the twenty-first century. Keep in mind that as recently as 1995, the vast majority of lawyers were state employees, and the Ford Foundation was one of very few international non-governmental organizations with an office in Beijing. By the mid-2000s, nearly all lawyers had joined the private bar, and it was impossible to overlook the presence of international groups looking to influence and improve environmental law. These kinds of small-scale social shifts help track how the Chinese Communist Party's well-documented turn toward law is also changing China itself. 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" (quoted in McCann 1992, 733).

**The Cases**

Outside China, the most common reaction to this project is surprise that China has environmental lawsuits. This reaction, I think, is two-fold. First, people are surprised that cases are interesting enough to be worth

studying in a place widely known for weak, closely monitored courts.<sup>8</sup> Indeed, Chinese courts rely on local government for yearly budgets even as Party representatives vet key appointments and occasionally intervene in individual decisions (Peerenboom 2002, 302–309; Zhu 2007, 179). 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 2007a, 3).<sup>9</sup> At times, especially when broad-based mobilization proves difficult, lawsuits can also be a tool of social activism.<sup>10</sup> Even when cases fail (as they frequently do), litigation can bring attention to an issue and serve as “an effective tool of political theater” (Moustafa 2007a, 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 the death of 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 complaints about pollution that is affecting quality of life, such as noise or restaurant smoke. And in both places, lawsuits are often inspired by crisis events like an oil or chemical spill. Disruptions to quotidian routines concentrate outrage far better than ongoing problems (Snow, Cress, Downey, and Jones 1998; Stern 2003, 797; van Rooij 2010, 59). Certainly, the number of

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 in China, see Zhao (2003), China Labour Bulletin (2007), Lee (2007), Kellogg (2007), Pils (2007), Fu and Cullen (2008), and Lü (2008).



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pollution-related complaints and protests are rising. There were 696,134 environmental complaints nationwide in 2009, an increase of 53 percent from the year 2000 (China Environment Yearbook 2001 and 2010, 687 and 604). Pollution was also responsible for 13 percent of rural disputes in a 2010 survey, ranking just below disagreements with neighbors as the second most common type of countryside grievance.<sup>11</sup>

What about the number of environmental lawsuits? In 2010, the Supreme People's Court (SPC) counted 12,018 pollution compensation cases (SPC 2011). Although official data should be treated with skepticism, this number is a valuable reference point because government statistics on civil environmental litigation are rarely released.<sup>12</sup> Although twelve thousand cases is a tiny fraction of the more than six million civil cases heard annually, it marks a significant increase over the volume of civil environmental litigation earlier in the decade. A 2008 article from Xinhua, the official government news agency, reported 4,453 pollution-compensation cases in 2004, followed by 1,545 cases in 2005, and 2,146 in 2006.<sup>13</sup>

11 Data from the survey has not yet been published. The numbers cited here come from personal communication in May 2010 with Ethan Michelson, associate professor at Indiana University. The survey covered sites in six provinces. In a 2012 lecture organized by the Standing Committee of the National's People's Congress, the vice-chairman of the Chinese Society for Environmental Science, Yang Chaofei, also reported that the number of environmental protests grew an average of 29 percent annually between 1996 and 2011 (Caijing 2012).

12 In general, official numbers warrant caution. To take one example, data from the annual China Environment Yearbook shows the number of environmental complaints plummeting in 2007 to 123,357 from 616,122 the year before. The next year, the number of environmental complaints popped back into the 600,000 range. Without a reasonable explanation for the drop – surely China's environment did not markedly improve for a single year – it is hard to avoid the conclusion that official statistics are sometimes either accidentally inaccurate or manipulated for political reasons. In any case, the China Environment Yearbook contains annual data on the number of administrative environmental lawsuits, but not the number of civil environmental lawsuits.

13 Alongside these numbers, which are nowhere near as complete as would be ideal, observers agree that environmental litigation is slowly becoming more popular (Interviews 45, 103, 106). An official at the SPC, the highest court in China, told me in 2007 that pollution cases were rising 25 percent per year (Interview 103). That same year, the Vice Minister of Justice publicly agreed that “conflicts over... environmental policies are growing by the day” (quoted in Human Rights Watch 2008, 28–29).

The largest collection of environmental cases currently available, more than 700 civil decisions collected by a team at Zhongnan University of Economics and Law, highlights two key aspects of environmental cases.<sup>14</sup> First, there is a class dimension to lawsuits. Two-thirds of civil cases in the Zhongnan sample were brought by workers or peasants, two groups largely left behind by China's economic boom (Lü, Zhang, and Xiong 2011, 85). Likely, workers and peasants suffer more exposure to pollution. They may also be forced to turn to courts when their money or connections prove insufficient to engineer a backdoor solution instead. The Zhongnan project also found that plaintiffs won at least some financial compensation in 43 percent of first-instance cases (Lü et al. 2011, 89). This win rate suggests that once a case is accepted by the court – no small obstacle – plaintiffs' prospects improve markedly. Going to court can sometimes pay off, even against long odds.

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. The vast majority of environmental disputes are handled through government-brokered deals, private concessions, or simply when plaintiffs give up and go away. Still, low-frequency events can illuminate social dynamics 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.

### Sources

Like many interesting topics in China, environmental lawsuits are hard to study. The biggest problem is that there is no comprehensive

14 In 2007 and 2009, researchers from Zhongnan fanned out across the country to visit courts and request copies of environmental decisions. Although the decisions they amassed are not a complete record, as it proved impossible to visit every court, and local enthusiasm for unearthing cases varied, they created the largest collection of environmental cases currently available: 782 civil decisions, 61 criminal decisions, and 111 administrative decisions in total.