

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.

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).

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 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)

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).

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 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

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

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 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

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).

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).

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

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).

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 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

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.

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).

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 Sturgeon) et al. v. Zhongguo Shiyou Tianranqi Jituan Gongs* (Beijing/Heilongjiang, 2005), *Zhang Changjian et al. v. Rongping Huagong Youxian Gongs* (Fujian 2005) 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

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.

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).

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, Heilongjinag, Hubei, Shanghai and Zhejiang, I benefited greatly from talking to locals that were not part of the usual crew.

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 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

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

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

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

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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.