
The Political Logic of China's New Environmental Courts

Rachel E. Stern*

ABSTRACT

China boasts over 130 environmental courts opened between 2007 and 2013, a trend that promises to re-shape environmental law. What accounts for the political appeal of specialized justice? Overall, China's specialized environmental courts are a method for local officials to signal commitment to environmental protection and a forum to defuse potentially explosive disputes. They symbolize the increasing importance placed by China's leaders on environmental issues, while also offering welcome flexibility. Courts can accept cases when disputes are rising, and turn them away when local power holders are involved and caution appears prudent. Many courts struggle to find enough cases to survive, and even the most active courts do not necessarily tackle China's most pressing environmental problems. A new analysis shows that the Guiyang court's docket is dominated by minor criminal cases—crackdowns against powerless rural residents, rather than more ambitious attempts to hold polluters accountable.

China boasts over 130 environmental courts set up between 2007 and 2013, a trend that promises to re-shape environmental law.¹ What accounts for the sudden popularity of specialized environmental courts in an authoritarian state renowned for economic growth? Even if environmental protection is a rising priority, as a growing literature on “the greening of the Chinese state” suggests, litigation is generally an expensive, divisive method of implementing public policy.² Newfound environmental commitment can take any number of forms besides enlisting the judiciary, such as increased funding for pollution treatment

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1. Xinhua News Agency, “China Resorts to Judicial Protection in Green Push” (21 July 2013), <http://tinyurl.com/nysoscw>, accessed 15 January 2014.

2. Robert A. Kagan, “Introduction”, in Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New Brunswick: Transaction Publishers), p. xxiv. The phrase “greening of the Chinese state” is borrowed from Peter Ho and Eduard B. Vermeer (eds), *China's Limits to Growth: Prospects for Greening State and Society* (Oxford: Blackwell Publishers, 2006).

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or deeper accountability for environmental targets, both of which occurred in the late 2000s.³ Moreover, most authoritarian states tend to be wary of giving more power to courts. Although courts can boost state legitimacy by resolving disputes, there is always a danger that opening a new forum for complaints might also open the door to broader social or political demands.

Drawing on government documents, court decisions, news coverage and 14 interviews conducted in 2011 and 2012,⁴ this article evaluates the early history of the environmental courts in Guiyang, Wuxi and Kunming to expose the political logic undergirding their existence. All three cities were early adopters that became home to some of the highest-profile environmental courts in the nation, heralded by their creators as a triumphant innovation. The first half of this article investigates the initial appeal of the idea and how the interaction between central government signals and local incentives cast specialized courts as a viable solution to worsening pollution. The second half then turns to outcomes, to see what the courts' track record tells us about the depth and breadth of political will behind this new institution. After all, court decisions are a good place to look for clues about state priorities. As legal scholar Inga Markovits writes regarding East Germany, "states punish those acts that contravene their plans and interests."⁵

What emerges is a reminder that China's new environmental courts are not a step toward judicial empowerment, as international observers might be tempted to conclude, but an effort to enlist courts to serve alongside government bureaus in a multi-pronged environmental campaign. As befits this role, judicial activities reach beyond dispute resolution to include policy advocacy, education and social control. Despite a clear environmental mandate, the environmental courts have not yet become strong environmental advocates. An analysis of the 2010 docket of the Guiyang environmental court, in particular, raises concerns that the local government is preoccupied with prosecuting small-time rule-breakers, rather than with tackling pollution.

THE POLITICAL ENVIRONMENT

The environmental courts set up between 2007 and 2013 took various forms: stand-alone environmental tribunals (*renmin fating* 人民法庭), environmental trial di-

3. On efforts to hold local officials accountable for environmental targets, see Alex Wang, "The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China," *Harvard Environmental Law Review*, Vol. 37, No. 2 (2013), pp. 365–440.

4. These interviews took place in Beijing, Kunming, Chongqing, Wuhan and Wuxi. In total, I spoke to five lawyers, five judges, three environmental NGO leaders and one professor.

5. Inga Markovits, *Justice in Lüritz: Experiencing Socialist Law in East Germany* (Princeton: Princeton University Press, 2010), p. 98.

visions (*shenpan ting* 审判庭), designated environmental panels (*heyi ting* 合议庭) and environmental circuit courts (*xunhui fating* 巡回法庭).⁶ The courts in Guiyang, Wuxi and Kunming were among the first opened in 2007 and 2008, following failed experiments in the late 1980s and early 1990s.⁷ In 1989, the Supreme People's Court (SPC) told China's first environmental division, in Qiaokou district in Wuhan, that there were no legal grounds for its existence.⁸ Four years later, another SPC notice deemed environmental tribunals an inappropriate inroad into areas better left to government agencies.⁹

Throughout the 1990s and the 2000s, however, Chinese academics kept the idea of specialized justice alive through articles advocating the virtues of specialization.¹⁰ Rather than continuing to direct environmental cases to ordinary courts where such cases are rare and many judges know little about environmental law, scholars argued, new, specialized courts would accustom judges to environmental cases so that they could write better-informed, more consistent decisions.¹¹ Global momentum behind the idea of green justice also grew. By 2010, there were 350 environmental courts worldwide, half created in the previous two years alone.¹² Although the opening of China's new environmental courts mirrored a global trend, the idea gained traction for domestic reasons.

6. I use "environmental courts" as an umbrella term to cover freestanding environmental courts as well as environmental divisions within courts (sometimes called green chambers) and designated panels of green judges. In many cases, institutional choice was constrained by court level. Only basic-level courts can establish tribunals and circuit courts, while trial divisions can only be set up at, or above, the intermediate court level. All levels of court can create environmental panels, a slate of judges detailed to environmental cases.

7. This paper looks at three examples of early innovation, rather than any of the late adopters. Most likely, later courts are an example of diffusion, the local adoption of good ideas from other places. Diffusion sometimes reflects choices based on evidence that a policy is effective elsewhere, a process known as learning; it sometimes reflects emulation of ideas that appear forward-thinking. Although it is always difficult to get inside people's heads to differentiate between these two possibilities, the number of flash-in-the-pan courts announced with fanfare but little follow-through suggests that at least some emulation is taking place.

8. Supreme People's Court, "Reply of the Supreme People's Court with Regard to the Report on the Circumstances of Establishing an Environmental Division by the People's Court of Qiaokou District in Wuhan Municipality" (10 February 1989), reprinted in *Chinese Law and Government*, Vol. 43, No. 6 (November/December 2010), pp. 41–42.

9. All-China Environment Federation (ACEF) and Natural Resources Defense Council (NRDC), "Tongguo sifa shouduan tuijin huanjing baohu" (Promoting Environmental Protection Through the Law) (January 2011), p. 6. Draft report on file with me.

10. For more on the virtues of specialization, see Lawrence Baum, *Specializing the Courts* (Chicago: University of Chicago Press, 2011), pp. 32–33. Efficiency, one of the arguments often deployed in favor of specialized courts elsewhere, rarely arises in conversations about Chinese environmental courts. This is probably because environmental cases are fairly rare and courts are not under particular pressure to handle them faster.

11. For an example of an article arguing that environmental courts would lead to higher-quality, more uniform decisions, see Alex L. Wang and Jie Gao, "Environmental Courts and the Development of Environmental Public Interest Litigation in China," *Journal of Court Innovation*, Vol. 3, No. 1 (2010), p. 47.

12. George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2010), <http://tinyurl.com/7z4gnfj>, accessed 15 January 2014.

TOP-DOWN SIGNALS

The Chinese leadership began showing increased concern over the environment in the 2000s and environmental courts only became popular once it was clear to city officials that a shift in central priorities was underway. In a decade replete with environmental rhetoric, two signals stand out.¹³ First, President Hu Jintao (胡锦涛) introduced the term “ecological civilization” (*shengtai wenming* 生态文明) at the 2007 Party Congress in an influential report that also called environmental protection a “vital interest” of the Chinese people. The significance of this statement was not lost on observers. Citing Hu’s report and a 2005 State Council decision, SPC vice-president Wan Exiang (万鄂湘) found it “evident that the Communist Party Central Committee and the State Council have raised the issue of China’s environmental protection to a higher level.”¹⁴

Second, local leaders began to be held accountable for reductions in pollution and energy use during the 11th Five-Year Plan (2006–10). For the first time, prominent officials found themselves responsible for binding energy targets in their annual evaluations. In 2007, after China fell behind its goals for two years running, Premier Wen Jiabao (温家宝) announced that energy efficiency and emissions targets “cannot be changed, and must be unwaveringly achieved.”¹⁵ The same year, the State Council announced that monitoring results would be used to help to determine promotions and bonuses for provincial officials and 1,000 key firms. Some provinces went even further. Regulations in Hebei Province, for instance, specified that county leaders who failed to meet targets would be fired.¹⁶ By the last six months of 2010, officials were under so much pressure to make their numbers by the end of the five-year period that some provinces started forcing blackouts. One town shut off traffic lights for a week to save energy.¹⁷

This environmental turn was accompanied by tentative signs of central backing for litigation designed to speed an ecological civilization along. Rather than feeling threatened by how litigation might expose agency shortcomings, some at the Ministry of Environmental Protection proved vocal supporters of lawsuits as a way to call attention to pollution, implement national policy and raise public consciousness.¹⁸ Even more importantly, a 2001 SPC explanation—instructions

13. For a broader overview of the Chinese government’s turn toward environmental protection, see Rachel E. Stern, *Environmental Litigation in China: A Study in Political Ambivalence* (Cambridge: Cambridge University Press, 2013), pp. 32–35.

14. Exiang Wan, “Establishing an Environmental Public Interest Litigation System and Promoting the Building of an Ecological Civilization” (3 March 2009), re-printed in *Chinese Law and Government*, Vol. 43, No. 6 (November/December 2010), pp. 30–40.

15. Wen Jiabao, “Zhengfu gongzuo baogao” (Government Work Report), 5 March 2007.

16. Alex Wang, “The Search for Sustainable Legitimacy”, p. 400.

17. Leslie Hook, “China Feels the Strain in Rush to Save Energy”, *Financial Times* (19 October 2010).

18. Scott Wilson, “Seeking One’s Day in Court: Chinese Regime Responsiveness to International Legal Norms on AIDS Carriers’ and Pollution Victims’ Rights”, *Journal of Contemporary China*, Vol. 21, No. 77 (September 2010), pp. 863–80.

for lower courts on how to deal with unclear areas of the law—shifted the burden of proof to the defendant in civil environmental cases. Shortly thereafter, the shifted burden of proof was written into the 2004 Solid Waste Law, the 2008 Water Pollution Law and the 2009 Tort Law.¹⁹ The principle was entrenched by the end of the 2000s and, at least on paper, the new rules made it far easier for plaintiffs to win in court.

BOTTOM-UP INCENTIVES

This array of pro-environment signals from the central leadership suggested to some local officials, at least, that environmental protection deserved increased attention. From rural decollectivization to stock market regulation, Party authorities have a long history of encouraging provincial, municipal, township, district and even village officials to try out new approaches so that the best ideas can be adopted nationally.²⁰ As a fresh emphasis on “innovations in social management” (*shehui guanli chuangxin* 社会管理创新) began appearing in high-level Party documents and speeches in the mid-2000s, demands for new initiatives to claim as political achievements also started to weigh more heavily on ambitious bureaucrats.²¹ The idea that experimental governance could demonstrate leadership ability generated pressure for quick accomplishments, especially considering that the average municipal Party secretary appointed between 1993 and 2011 spent just 3.8 years in office.²² The first environmental courts were just such an innovation and, like many experiments, they were aimed simultaneously at a social problem and at higher-ups in the bureaucracy.²³

In all three cities, the all-too-immediate social problem was a pollution crisis.²⁴ In 2007, Guiyang opened two environmental tribunals in an unusually fast

19. Rachel E. Stern, *Environmental Litigation in China*, p. 131.

20. On the history of local innovation, see Sebastian Heilmann, “From Local Experiments to National Policy: the Origins of China’s Distinctive Policy Process”, *The China Journal*, No. 59 (2008), pp. 1–30, as well as Sebastian Heilmann, “Policy-Making Through Experimentation: The Formation of a Distinctive Policy Process”, in Sebastian Heilmann and Elizabeth J. Perry (eds), *Mao’s Invisible Hand: The Political Foundations of Adaptive Governance in China* (Cambridge: Harvard University Press, 2011), pp. 62–101.

21. Christian Göbel and Thomas Heberer, “Governing By Innovation”, conference paper presented at the 11th European Conference on Agriculture and Rural Development in China (11–13 April 2013), Würzburg, Germany.

22. Sarah Eaton and Genia Kostka, “Authoritarian Environmentalism Undermined? Local Leaders’ Time Horizons and Environmental Policy Implementation”, *The China Quarterly* (forthcoming).

23. Nearly all the lawyers and judges whom I interviewed cited pressure on local officials to come up with innovative policies as a factor in the emergence of the environmental courts, an argument also found in Alex L. Wang and Jie Gao, “Environmental Courts”, p. 48. One Kunming lawyer went on to insist that the need for accomplishments is a common concern for public servants everywhere. In his words, “even President Obama needs political achievements! [The environmental courts] are like his efforts to improve health care or solve unemployment. You need to solve problems that real people face.”

24. Alex L. Wang and Jie Gao, “Environmental Courts”, p. 40. Also see Jie Gao, “Environmental Public Interest Litigation and the Vitality of Environmental Courts: The Development and Future of Environmental

68 days because of fears that pollution would jeopardize drinking water for 3.9 million city inhabitants. Likewise, arsenic pollution in Yangzonghai Lake in 2008 accelerated the emergence of an environmental court in nearby Kunming.²⁵ Twenty-six officials were punished over the incident, which prompted a fishing ban and the suspension of 30,000 residents' water supply.²⁶ The Yunnan Provincial Party Secretary, Bai Enpei (白恩培), expressed outrage that "for the sake of making development a tiny bit faster, for pursuing a tiny bit of GDP . . . [we] sacrificed a crystal lake . . . we'd rather not have this kind of GDP!"²⁷ In Wuxi, too, the head of the environmental court cited record pollution in Lake Tai as a factor in the decision to establish his division.²⁸

One reason that environmental courts looked appealing in a crisis was the increasing currency of the idea that courts can head off protest by arbitrating disputes. In a typical example of this argument, the head of the litigation department at the All-China Environment Federation (ACEF), a government-backed NGO, made the case in a 2009 article that environmental lawsuits can "reduce unstable elements in society" and "guide the public to rationally defend their rights" rather than take "extreme measures."²⁹ Although there is little evidence to support the suggestion that litigation moderates passions, it is clear that maintaining stability has been a pervasive worry for local officials in recent years and proposals promising to lessen conflict would be welcome. Pollution-related mass incidents (the official term for protest) rose by an average of 29 per cent annually between 1996

Courts in China" (1 March 2010) (unpublished; draft on file with me). China's most-polluted cities have not established environmental courts, probably because a crisis demands a policy response in a way that ongoing, deep-rooted environmental problems do not.

25. Yuan Dingbo, "Shui wuran jizhong zhifa ruanlei, huanbao fating chengqi qingshan lushui baohusan" (Water Pollution Targets Weak Law Enforcement, Environmental Courts Hold up an Umbrella Protecting Natural Beauty), *Fazhi ribao* (Legal Daily) (3 March 2009), <http://tinyurl.com/ykqyds9>, accessed 15 January 2014.

26. Yang Rong, "Yunnan Yangzonghai wuran shijian wenze 26 ren" (26 People Held Responsible for the Yangzonghai Pollution Incident in Yunnan), *Shenghuo xin bao* (Life Daily News) (23 October 2008), <http://tinyurl.com/7nk3287>, accessed 15 January 2014.

27. Wu Hao and Wu Xiaoyang, "Gao yuan mingzhu bian duhu, Yunnan gaoceng fansi jiaoxun" (The Pearl of the Plateau Becomes a Poisoned Lake: Yunnan High-Level Leaders Re-Think a Lesson), Xinhua News Agency (27 October 2008), <http://tinyurl.com/6pvu5v6>, accessed 15 January 2014.

28. Qie Jianrong, "Huanbao fating weihe zongshi shouming yu weinan zhi shi?" (Why Are Environmental Courts Always Seeking Counsel in Times of Crisis?), *Fazhi ribao* (6 October 2008), <http://tinyurl.com/73p3osg>, accessed 16 January 2014.

29. Ma Yong, "Fahui shetuan zuzhi zuoyong, tuidong huanjing gongyi susong" (The Role Social Organizations Can Play in Pushing Forward Environmental Public Interest Litigation), in Chang Jiwen (ed.), *Zhongguo huanjing fazhi* (Environmental Law in China) (Beijing: Law Press, 2009). A 2013 article published in the Party-run newspaper *Renmin ribao* makes an even stronger case that the Guiyang environmental court must break through "old fashioned conventions" and resolve disputes effectively to avoid mass incidents. See Wang Zhiqiu, "Guiyang huanbao fating pin pin liangjian" (The Guiyang Environmental Court Is Frequently a Sharp Sword), *Renmin ribao* (People's Daily) (18 May 2013), <http://tinyurl.com/ouak4m6>, accessed 16 January 2013.

and 2011, and estimates indicate that less than one per cent of environmental complaints go to court.³⁰ Under these circumstances, a new dispute resolution channel was a way to test the proposition that courts could help to realize then-President Hu Jintao's vision of a harmonious society.³¹

Even under pressing conditions, local officials still proceeded cautiously, built coalitions and tried to reduce political risk. To some extent, this was necessary. The steps necessary to set up a new institution, including a revised organizational chart, staff transfers and budget approval, require consent from a daunting array of bureaus and committees. Thanks to bureaucracy, the process of establishing a specialized court necessitates broad buy-in for the idea. To decrease political risk further, some officials also sounded out key players in Beijing about whether local experiments would be welcomed. In Guiyang, for example, a judge involved with the initiative told me that the idea for an environmental court was hatched in consultation with a vice-president from the Supreme People's Court, with further reports sent to the SPC as soon as the new court was founded. Tacit support was necessary because it was not until 2010, well after the wave of interest in environmental courts was underway, that the SPC officially sanctioned specialized courts in areas with many environmental disputes.³²

Whatever maneuvering took place in private, officials were not shy about claiming political credit. In all three cities, public relations teams framed the courts as a visionary step. Echoes of central rhetoric are visible in local government documents that present environmental courts as part of efforts to promote sustainable development and "build up an ecologically civilized city".³³ Just four years after the Wuxi environmental court opened, the court work report took credit for transforming the city from an "industrial civilization" (*gongye wenming* 工业文明) to an ecological one.³⁴ Officials in Guiyang discussed political

30. "Woguo huanjing shijian nianjun dizeng 29%" (China's Environmental Mass Incidents Rise an Average of 29 Per Cent Yearly), *Caijing* (Finance and Business Review) (27 October 2012), <http://tinyurl.com/dycoh82>, accessed 16 January 2014.

31. One Yunnan judge interviewed in 2011 was insistent that environmental courts reflect concern about environmental issues rather than any pressure to stamp out protest.

32. Supreme People's Court, "Guanyu wei jiakuai jingji fazhan fangshi zhuanbian tígong sifa baozhang he fuwu de ruogan yijian" (Various Regulations Regarding the Provision of Judicial Guarantees and Services to Accelerate Transformation of the Mode of Economic Development), effective 29 June 2010.

33. Guiyang Municipal Government, "Guiyang Municipal Regulations on Promoting the Construction of an Ecological Civilization" (16 October 2009), reprinted in *Chinese Law and Government*, Vol. 43, No. 6 (November/December 2010), pp. 43–52. Also see Kunming Municipal Intermediate People's Court, Kunming Municipal People's Procuratorate, Kunming Municipal Public Security Bureau and Kunming Municipal Environmental Protection Bureau, "Implementation Opinions on the Establishment of Mechanisms for Coordinating the Enforcement of Environmental Laws", Document No. 520, 2008, reprinted in *Chinese Law and Government*, Vol. 43, No. 6 (November/December 2010), pp. 69–75.

34. Wuxi Intermediate Court, "Wuxishi zhongji renmin fayuan gongzuo baogao" (Wuxi City Intermediate Court Work Report) (19 January 2011).

achievement even more explicitly. The phrase “protecting green mountains and clear water is a political achievement” (*baozhu qingshan lushui ye shi zhengji* 保住青山绿水也是政绩), coined around 2007, was written into the Guizhou Provincial Party Conference report in 2009.³⁵ By the end of the decade, political leaders had repeated the slogan often enough for it to approach a cliché.³⁶

Some people tied their careers even more tightly to the new environmental agenda. For example, Qiu He (仇和), the Party secretary of Kunming when the environmental court was founded in 2008 as well as a bureaucrat with a reputation for policy innovation, stressed his environmental credentials throughout the late 2000s.³⁷ As he told a reporter in 2008, “we propose that the government should treat the construction of an ecological environment as equally important as a prosperous economy . . . we are issuing a military order to business: if enterprises do not eliminate pollution, let pollution eliminate enterprises.”³⁸ A biography of Qiu, published in 2009 and probably completed with his cooperation, trumpets his environmentalism during an earlier stint as the vice-governor of Jiangsu Province.³⁹ Putting aside Qiu’s sincerity as an environmental campaigner, his embrace of the issue illuminates the tenor of the times. By the late 2000s, pollution was a sufficiently prominent problem that at least some ambitious officials saw an environmental stance as a potential political asset, rather than a liability. By 2011, support for environmental initiatives reached the top levels of the Chinese judiciary. SPC President Wang Shengjun (王胜俊) cited efforts to “promote the establishment of local environmental courts” in his annual work report to the National People’s Congress (NPC).⁴⁰

35. Shi Zongyuan, “Guizhou sheng dishici dangdaihui baogao” (Report of the Tenth Guizhou Provincial Party Congress) (7 May 2009), <http://tinyurl.com/7ke2wj8>, accessed 15 January 2014.

36. For two examples, see: 1) Xinhua News Agency, “Guiyang shengzhang Lin Shusen: baohu zhu qing shan lü shui ye shi zhengji” (Guiyang Governor Lin Shusen: Protecting Nature Is Also a Political Achievement) (25 January 2008), <http://tinyurl.com/6vpbp6z>, accessed 16 January 2014; 2) Gong Jinxing, “Shi Zongyuan: baozhu qing shan lü shui ye shi zhengji” (Shi Zongyuan: Protecting Green Mountains and Blue Water Is Also a Political Achievement), *Renmin ribao* (5 March 2010), <http://tinyurl.com/83713tv>, accessed 16 January 2014. The exact origin of the phrase is unclear.

37. Alongside this environmental agenda, Qiu He also continued to focus on economic development. Many of his policy innovations were centered on GDP growth and he is well known for pressuring officials to attract outside investment to Kunming. For more on Qiu’s autocratic leadership style, see Joseph Fewsmith, *The Logic and Limits of Political Reform in China* (Cambridge: Cambridge University Press, 2013), pp. 52–67.

38. Bao Yonghui and Xu Taosong, *Zhengdao: Qiu He shi nian* (The Right Way: 10 Years of Qiu He) (Hangzhou: Zhejiang Renmin Chubanshe, 2009), p. 259.

39. Bao Yonghui and Xu Taosong, *Zhengdao*, p. 248. In an interesting analogy on the same page, the biography compares the relative importance of economic growth and environmental protection: “. . . GDP growth remained the government’s primary target. Environmental protection was like a beautiful concubine. Regardless of how much a lord liked her, she had no chance of becoming a wife.”

40. Supreme People’s Court, “Zuigao renming fayuan gongzuo baogao” (Supreme People’s Court Work Report) (20 March 2011), <http://tinyurl.com/mxz4u3v>, accessed 29 January 2014.

MULTIPLE FUNCTIONS OF THE ENVIRONMENTAL COURTS

Even while environmental issues rose in prominence, however, economic growth and stability remained paramount priorities. For local officials striving to meet multiple goals, part of the appeal of environmental courts lay in their flexibility. Specialized courts provided a way to show responsiveness to new environmental concerns, while also occasionally aiding (or at least not obstructing) the ongoing pursuit of GDP growth and social stability. China's environmental courts are not a step toward judicial empowerment, as they might appear at first glance, but an effort to shore up state capacity through an institution designed to coordinate and act as a backstop for government agencies. As one lawyer explained to me in 2012, environmental courts “play a role between administration and law” and serve multiple functions, including policy advocacy, education and social control.

In all three cities, environmental courts were part of a broader push to boost environmental protection as a policy priority. Specialized courts were a way to “get the work of society done”, to borrow legal sociologist Philip Selznick's phrase, by reshuffling state resources to achieve a particular outcome.⁴¹ In Guiyang, for example, court officials talked about their work as part of a multi-pronged regulatory strategy that included administrative, economic and legal solutions to environmental problems. Along similar lines, Tian Chengyou (田成有), the Deputy President of Yunnan High court, explained in a 2011 interview that the environmental courts were designed to raise awareness and reduce the difficulties of litigation, rather than to “follow the crowd and put on a show”.⁴²

As befits an organization with a policy mission, neutrality is not necessarily part of how judges see their job. In 2008, the head of the Guiyang environmental tribunal told reporters that judges should “break through neutrality” and encourage government agencies to cut off electricity, loans and cheap credit to polluters.⁴³ A few judges have wholeheartedly embraced this new role as de facto environmental regulators. “You need the mindset of an environmental judge to decide cases”, one judge told me in 2012, not the “traditional mindset” (*chuantong de siwei* 传统的思维) common in other courts. In his environmental court, he says, “we put our hearts in our work” and sometimes conduct follow-up inspections to ensure that a cleanup has followed a judicial decision. Still, even judges with strong environmental leanings nearly always acknowledge the importance of

41. Quoted in Robert A. Kagan, “The Organization of Administrative Justice Systems: The Role of Political Mistrust”, in Michael Adler (ed.), *Administrative Justice in Context* (Oxford: Hart Publishing, 2010), p. 163.

42. Tang Shihua, “Yunnan fayuan pojie huanjing sifa baohu kunju you zhaoshu” (The Yunnan Court Has a Trick for Breaking Through Difficulties with Environmental Protection Law) (13 June 2011), <http://tinyurl.com/cm74ddk>, accessed 16 January 2014.

43. Wang Zhiqiu, “Guiyang huanbao fateng qidai dapo pingjing” (The Guiyang Environmental Court Looks Forward to Breaking Through a Bottleneck), *Renmin ribao* (18 September 2008).

economic growth, and aim to strike a balance between environmental protection and development. As one judge known for his interest in environmental protection writes, judges must “find a balancing point (*pingheng dian* 平衡点) between political and legal wisdom to handle environmental protection cases”.⁴⁴

China’s environmental courts also fit comfortably into a tradition of socialist courts as consciousness-raising institutions.⁴⁵ Courts serve an “educational purpose”, as one lawyer told me, and lectures at local universities and Party schools are an occasional part of environmental judges’ routine. In addition to public outreach, court decisions are also seen as educational. In conversations, environmental judges expressed hope that their work will scare would-be lawbreakers into better behavior, an attitude echoed in news reports comparing the environmental courts to “a sharp sword” hanging above polluters’ heads.⁴⁶ Sometimes, government officials are the intended audience. An early criminal case in the Guiyang court recounted to me by a local judge, for example, sent an Environmental Protection Bureau (EPB) head to jail for fabricating data on fees for emissions permits. The three-year jail term served to caution others and the judge says that the bureau subsequently became more diligent.

Last, environmental courts serve one of the most basic functions associated with courts: social control. Environmental criminal cases, more prominent in some environmental courts than others, illustrate the punitive function of law. Each decision punishes individual lawbreakers and, in so doing, publicly affirms the limits of acceptable behavior. Criminal cases, which target a handful of high-profile polluters as well as scores of ordinary rural residents, send a message about how much pollution is tolerable and the cost of ignoring the law. Criminal charges can also be levied against environmental protesters in retribution for actions perceived as overly demanding or violent.

In serving all three functions, environmental courts are enmeshed in the bureaucracy. There is no sharp divide between Chinese courts and other government bureaus, and environmental courts are seen locally as a way to enhance cooperation to solve crises. This focus on intra-agency coordination is especially clear in Kunming. In the aftermath of the arsenic incident, the Kunming Party Committee put in place an environmental protection law enforcement group.⁴⁷ The Kunming environmental court was part of the new system, along with quarterly meetings between the procuratorate, public security bureau, EPB and intermediate court to

44. Yang Kai, “‘Zhong dou de gua’ de jieguo yu huanbao gongyi susong de kaiduan” (“Plant Beans, Get Melons” and the Start of Environmental Public Interest Litigation), *Huanjing ziyuanfa luncong* (Environmental Law and Resources Law Review), Vol. 8 (2010), p. 310.

45. Inga Markovits, “Pursuing One’s Rights Under Socialism”, *Stanford Law Review*, Vol. 38 (1985–86), p. 711.

46. Wang Zhiqiu, “Guiyang huanbao fating pin pin liangjian”. The article calls the Guiyang court a “sword of environmental protection”.

47. Wu Xiaoyong and Chen Yu, “Kunming chengli huanbao fating” (Kunming Establishes an Environmental Court), Xinhua News Agency (11 December 2008), <http://tinyurl.com/c5rgh2n>, accessed 16 January 2014.

“coordinate matters related to environmental criminal cases”.⁴⁸ Along similar lines, a 2010 government analysis of the Guiyang court’s first two years lists strengthening communication with other agencies as a strategic goal.⁴⁹ Judges from Guiyang also say that they frequently call the EPB to try to find an administrative solution before turning to law. “Everyone is pushing in the same direction to help government to solve problems”, one Guiyang judge explained to me.

What is missing from this consultative approach is judicial independence, a point raised by Chinese lawyers in interviews. Judges are team players, meant to be responsive to the views of other agencies, and intra-government communication often reminds them that economic growth and social stability targets are as important as (if not more than) environmental ones. As Yang Su and Xin He note, Chinese courts are “a branch of local government, its organization and operation are tightly meshed with other departments, and all are subject to Party leadership”.⁵⁰ Certainly, environmental judges enjoy significant leeway to weigh non-environmental priorities in decision-making. As officials must have known from the start, hanging a plaque, re-assigning judges and sending out a press release is no guarantee that an environmental court will live up to its name by making pro-environment decisions. As political pressures shift and officials re-order their goals, environmental courts can recalibrate too.

ARE THE COURTS EFFECTIVE REGULATORS?

Now that China’s earliest environmental courts are at least half a decade old, their track record offers a way to assess how much political will backs their environmental mandate. Are the environmental courts purely a symbolic innovation designed to burnish the government’s reputation or, as some have argued, a bright spot in the environmental landscape?⁵¹ A closer look at the Guiyang, Kunming and Wuxi environmental courts—arguably the three leading environmental courts in the nation—suggests an answer in the middle of this spectrum. Though all three courts have exceeded cynical forecasts of inaction, they are also

48. Kunming Intermediate Court *et al.*, “Implementation Opinions”, p. 70. Other cities besides Kunming have also introduced procedures to enhance cooperation between government agencies and the environmental courts. In Zhengzhou, for example, an inter-agency environmental team that includes court officials meets regularly. See ACEF and NRDC, “Promoting Environmental Protection Through the Law”, pp. 12.

49. Xiao Jun and Chen Qingxiang, “Dui 2008 nian yilai Guiyang shi fasheng po huanjing ziyuan fazui qingkuang de fenxi” (Analysis of Environmental and Natural Resource Crimes in Guiyang from 2008 on) (17 December 2010), <http://tinyurl.com/a63qo9d>, accessed 16 January 2014.

50. Yang Su and Xin He, “Street as Courtroom: State Accommodation of Labor Protest in South China”, *Law & Society Review*, Vol. 44, No. 1 (2010), p. 181.

51. For example, political scientist Scott Wilson writes: “the brightest hope for environmental litigation comes in the form of China’s newly minted environmental courts”. Scott Wilson, “Seeking One’s Day in Court”, p. 871.

clearly constrained actors expected to work in concert with other government agencies and to consider multiple priorities.

Civil Cases

One highlight of the three courts' record has been their tentative willingness to expand the universe of plaintiffs with legal standing to bring a lawsuit. In ordinary courts, plaintiffs seeking financial compensation for pollution-related damages file the vast majority of civil environmental lawsuits. Well ahead of the rest of the country, trial regulations in Guiyang, Kunming and Wuxi expanded standing beyond pollution victims. Shortly after they were founded, each court passed trial regulations allowing the EPB, the procuratorate, social organizations (*youguan shehui tuanti* 有关社会团体) and citizens to sue in the public interest.⁵² In July 2009, the Guiyang and Wuxi environmental courts accepted the first two cases brought by a social organization, the government-backed All-China Environment Federation. These cases, heralded as a breakthrough at the time, now look like experiments with what later became national law.⁵³ In 2012, the Civil Procedure Law was revised to allow lawful authorities (*falü guiding de jiguan* 法律规定的机关) and relevant organizations (*youguan zuzhi* 有关组织) to initiate environmental public interest lawsuits. Although it is not yet clear how "lawful authorities" or "relevant organizations" will be defined—and many environmentalists are afraid that grass-roots NGOs will be denied court access—the change indicates growing support for an idea central to the existence of specialized environmental courts: that China should give law greater clout in its battle against pollution.⁵⁴

However, many Chinese environmentalists have been disappointed by the courts' caution and an embarrassing lack of cases (see Table 1).⁵⁵ One issue is the type of case filed. In Kunming and Guiyang, court dockets include many criminal cases

52. In Guiyang, all three of these groups plus concerned citizens are permitted to bring environmental public interest litigation. In Kunming, standing is limited to the EPB, the procuratorate and NGOs. In Wuxi, only the procuratorate and NGOs can initiate environmental public interest litigation. ACEF and NRDC, "Promoting Environmental Protection Through the Law", p. 22.

53. Following the two cases an SPC judge told reporters, "this kind of innovative environmental enforcement coordination mechanism strengthens legal environmental protections and is increasingly urgent and necessary". See Yuan Dingbo, "Shui wuran jizhong zhifa ruanlei, huanbao fating chengqi qingshan lushui baohusan". For an example of the kind of media attention that the cases received in the international press, see Jonathan Schieber, "Courting Change: Environmental Groups in China Now Have the Ability to Sue Polluters, But Will They?", *The Wall Street Journal* (7 December 2009), <http://tinyurl.com/ybm7aus>, accessed 17 January 2014.

54. The phrase is borrowed from an article written by Chinese legal scholar JIANG Ping, "Give Law Greater Clout in Battle Against Pollution", *China Daily* (31 July 2006), <http://tinyurl.com/yz9foaf>, accessed 17 January 2014.

55. Sun Youhai, "Baozhang jingji zhuanxing wei hu huanjing quanyi" (Guaranteeing an Economic Transformation and Protecting Environmental Rights), *Zhongguo huanjing bao* (China Environment News) (27 August 2010), <http://tinyurl.com/bdfpydp>, accessed 17 January 2014. Lei Qing, "Kunming nijian huanjing

Table 1: Environmental court caseloads⁵⁷

Environmental court	Date established	Total no. of cases
Guiyang	2007	619 (through 7/2013)
Wuxi	2008	>300 (through 5/2009)
Kunming	2008	106 (through 12/2012)

brought by the procuratorate. In Wuxi, meanwhile, close cooperation between the environmental court and the EPB has translated into high numbers of non-litigation administrative execution cases (NAECs) (*feisu xingzheng zhixing anzi* 非诉行政执行案子), a type of litigation in which government agencies seek court enforcement of administrative decisions.⁵⁶ Despite a few moments of innovation, what is missing from all three dockets are civil environmental lawsuits, especially high-profile, important cases.

Moreover, critics say that the handful of public interest lawsuits too often tackle easy targets and fail to boost judicial authority. Environmental lawyers say that cases brought by government agencies require so much intra-governmental consultation that the hearing can feel like a show (*biaoyan* 表演) followed by a preordained decision. Along these lines, Kunming's first public interest lawsuit, the 2010 case in which the procuratorate and the EPB jointly sued two pig farms, was especially controversial, and many complained that the case was too insignificant to have lasting influence. In the press, environmental lawyers compared the lawsuit to "using anti-aircraft guns to kill a mosquito",⁵⁸ and one lawyer told me, "a breakthrough can't come from nowhere". In addition, others found it unfair that the EPB could serve simultaneously as an enforcer and as a public interest plaintiff. In response, court officials countered that the 4.3 million yuan (US\$682,539) in mandated compensation will serve as a valuable deterrent to other polluters.⁵⁹

gongyi susong jiuji jijin" (Kunming Plans to Establish an "Environmental Public Interest Litigation Relief Fund), *Kunming ribao* (Kunming Daily) (5 April 2010), <http://tinyurl.com/4u53xht>, accessed 17 January 2014.

56. As of May 2009, the Wuxi court reported that 95 per cent of its cases were NAECs. See Rachel E. Stern, *Environmental Litigation in China*, p. 119.

57. Compiled from Xinhua News Agency, "China Resorts to Judicial Protection"; Jie Gao, "Environmental Public Interest Litigation"; Lei Qing, "Kunming nijian huanjing gongyi susong jiuji jijin", and Kunming Intermediate Court, "Kunming zhongyuan fabu huanjing sifa baohu lübishu" (Kunming Intermediate Court Announces Green Paper on Environmental Law) (17 October 2013), <http://tinyurl.com/lvpb7rq>, accessed 30 January 2014.

58. Chu Wanzhong, "Yunnan sheng gaoyuan diaoyan huanbao fating faxian ganga shi" (An Investigation of the Environmental Courts by the Yunnan High Court Uncovers Embarrassing Problems), *Fazhi ribao* (18 October 2010), <http://tinyurl.com/4hkyl2f>, accessed 17 January 2014.

59. "Kunming huanbao fating shouan gao yangzhu qiye" (The Kunming Environmental Protection Court's First Case Against a Pig-Raising Enterprise), *Renmin ribao* (24 February 2010), <http://tinyurl.com/3hp6yrr>, accessed 19 January 2014. All rates of exchange are calculated at 6.3 yuan per dollar.

In keeping with the courts' caution, litigation brought by NGOs has inspired particular unease.⁶⁰ The Kunming environmental trial division, for example, never replied to a 2010 request to file the first environmental public interest lawsuit brought by a grass-roots NGO, an attempt by Chongqing Green Volunteers to sue a coal-fired power plant over failure to operate desulfurization equipment. The lawyers who drafted the complaint knew that the case was unprecedented and might be turned down, but hoped that officials would explain their reasoning.⁶¹ When I asked about the case in 2011, a Kunming judge called it "a declaration of war (*zhandou xiwen* 战斗檄文), not a case with a basis in law". Still, the court kept silent, preferring to let the issue die rather than publicly debate the legal merits. Even cases brought by the government-backed ACEF have been contentious. The head of the Wuxi environmental court describes the court's most daring moment, accepting an ACEF-initiated case in July 2009, as a "foolhardy" decision made without input from higher-ups. In his retelling, the case ended in mediation rather than a legal decision, because of fears that progressing too fast would be counterproductive.⁶²

In addition to political caution, inexperience has also slowed courts down. At first, an environmental lawyer recalled in 2011, Kunming government agencies "had no idea how to bring a lawsuit or what to do". Even three years after the environmental trial division opened, judges were still wrestling with practical issues such as how much evidence should be required to file a lawsuit and how to commission an appraisal based on sound science.⁶³ City officials are likewise still pondering how to distribute money from Kunming's environmental public interest litigation fund, established in 2010 to provide eligible NGOs and government agencies with funding for litigation.⁶⁴ Of course, moving slowly also hedges against the possibility that future priorities might change, especially after changes in local leadership. A wait-and-see approach can be safest, especially in the transition period before a new administration makes its priorities clear.⁶⁵

60. Environmental courts are also cautious about litigation brought by citizens. Only Guiyang allows citizen-initiated environmental public interest litigation.

61. Complaint on file with me.

62. Meng Dengke, "Huanbao fating tingzhang: huanjing gongyi susong jidai jilei sifa shijian" (Environmental Court Head: Environmental Public Interest Litigation Urgently Accumulates Practical Experience), *Nanfang zhoumou* (Southern Weekend) (12 October 2010).

63. These are issues in all environmental lawsuits. They are usually resolved on an ad hoc basis because environmental cases comprise such a small percentage of a court's docket.

64. For more on the fund, see Chu Wanzhong, "Yunnan sheng gaoyuan diaoyan huanbao fating faxian ganga shi". As of March 2011, officials had yet to fix fair lawyers' fees and set up a reimbursement process to distribute money from the fund.

65. Sarah Eaton and Genia Kostka, "Authoritarian Environmentalism Undermined?"

Criminal Cases

Much public criticism of the environmental courts dwells on the dearth of public interest cases brought by environmental NGOs and concerned citizens. However accurate this critique might be, focusing exclusively on the courts' failure to usher in a new era of public interest litigation overlooks much of what they have actually done. The high proportion of criminal cases in Guiyang and Kunming, in particular, suggests that prosecuting environmental crimes is an important part of both courts' day-to-day work.⁶⁶ Under Articles 338 and 339 of China's Criminal Law (*Zhonghua Renmin Gongheguo xingfa* 中华人民共和国刑法), sanctions can be brought against the individuals responsible for extreme pollution incidents, as well as for illegal mining, fishing or logging. Recent years have seen a small flurry of legislative amendment and judicial interpretation of those two articles, with a focus on spelling out an expanded definition of what constitutes an environmental crime and on stiffening sanctions. In 2010, the Standing Committee of the NPC re-defined criminal liability to enable prosecution for pollution, even in the absence of major financial losses, injury or death,⁶⁷ and in 2013, a joint interpretation by the SPC and the Supreme People's Procuratorate (SPP) noted that the most serious pollution incidents could merit the death penalty.⁶⁸

Against this backdrop, I examined 103 publicly available criminal decisions from the 2010 caseload of the Qingzhen District environmental court in Guiyang.⁶⁹ Cases in Chinese courts are numbered sequentially and it proved possible to access 83.7 per cent of the 123 cases handled between 28 December 2009 and 26 November 2010. Despite the missing 20 cases, the sample appears broadly representative of the Guiyang court's 2010 criminal caseload.⁷⁰ Although these

66. Outside these two cities, too, criminal cases are a larger part of the landscape of environmental litigation in China than is often acknowledged. Although government statistics on civil and administrative environmental lawsuits are rarely released, the 2010 numbers discussed by the Deputy Director of the research department of the SPC, Sun Youhai, give a sense of proportion: 1,783 civil, 2,647 administrative and 10,767 criminal cases. See Sun Youhai, "Baozhang jingji zhuanxing weihu huanjing quanyi".

67. Rachel E. Stern, *Environmental Litigation in China*, p. 39.

68. "Zuigao renmin fayuan, zuigao renmin jianchayuan guanyu banli huanjing wuran xingshi anjian sheyong falü ruogan wenti de jieshi" (Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in the Handling of Criminal Cases of Environmental Pollution) (17 June 2013).

69. In October 2012, my research assistants printed the full text of 103 decisions from the environmental case database run by the All-China Environment Federation (ACEF), available at <http://www.hjajk.com/envCase/list.aspx>. Copies of all decisions analyzed are on file with me.

70. Technical errors in the database appear responsible for about half of the missing decisions. Although the titles were visible (and in keeping with the sample of cases examined here), the link to the full text of the decision was broken. Nor does it seem that politically sensitive cases were necessarily held back from public view. The Qingzhen court reports providing 100 per cent of its decisions to the ACEF database, and the

Table 2. Types of crime in the Qingzhen District environmental court (2010)

Crime	No. of cases
Fire starting by negligence	58
Illegal logging	37
Other	8

n = 103

cases only cover a single year in the history of a single court, they raise broader concerns about how environmental crimes are defined and prosecuted.

In Guiyang in 2010, at least, most criminal cases were small-fry prosecutions of poor people. The two most common environmental crimes were fire starting by negligence (*shi huo zui* 失火罪) and illegal logging, comprising 56.3 and 35.9 per cent of cases respectively (see Table 2).⁷¹ Although court decisions say little about motivation, most crimes seemed to stem from poverty, a mistake (such as fires caused by smokers who fell asleep) or bad luck (such as a wind that turned an incense-burning ritual at a gravesite into a forest fire). Although there were six cases involving more serious crimes, such as illegal mining and abuse of official authority (*lanyong zhiquan* 滥用职权), none of the cases in the sample sought criminal liability for pollution accidents.

The typical environmental criminal had a middle-school education, at most, and lacked legal representation (see Table 3).⁷² He or she was almost certain to be convicted, and received an average sentence of 15 months if sent to prison.⁷³ In addition, 58 per cent of decisions mandated monetary penalties, either in the form of fines or compensation for economic losses.⁷⁴ Nearly all penalties involved

sample available included cases that might be considered politically sensitive. One good example is case 113, which dealt with abuse of power and corruption in the mining industry.

71. Unlike arson, the crime of fire starting by negligence does not require intent; it is necessary only that the defendant acted in disregard of substantial risk. As a practical matter, guidelines issued by the State Forestry Administration and the Ministry of Public Security suggest that courts should admit a case if the fire burned at least 2 hectares of forest, or if it resulted in serious injury or death. See State Forestry Administration and the Ministry of Public Security, "Guojia linye ju, gongan bu guanyu senlin he lu sheng yesheng dongwu xingshi anjian guanxia ji lian biao zhun" (State Forest Administration and Ministry of Public Security Case Filing and Jurisdiction Standards for Criminal Cases Involving Forests and Terrestrial Wildlife) (10 December 2013), available at <http://tinyurl.com/l42r3s7>, accessed 15 April 2014.

72. Court decisions always list the formal education of the defendant. Just 12.5 per cent of defendants employed either a lawyer or legal worker to represent them.

73. Thirty defendants received a suspended sentence. The sample also includes two cases in which the defendant was released without punishment and two cases in which only a fine was levied. Note also that the average prison sentence is influenced by a few cases with especially stiff sentences.

74. Defendants are only held responsible for economic losses if the procuratorate brings a civil case alongside the criminal one.

Table 3: Biographical data of criminal defendants in the Qingzhen District environmental court (2010)

Category	Attribute	% of category
Gender	Male	82.5
	Female	17.5
Education	Illiterate	17.0
	Elementary school	48.8
	Junior high school	28.8
	High school or college	5.4
Ethnicity	Han Chinese	86
	Ethnic minority	14

n = 136

substantial sums. Fines in the sample ranged from 1,000 to 550,000 yuan, with a median of 3,000 yuan (US\$488), and the median compensation ordered by the court was 80,235 yuan (US\$12,735). Considering that the average Guiyang rural household earned just 7,174 yuan (US\$1,168) per year in 2010, all but the lightest financial penalties would impose a significant burden on defendants.⁷⁵

This sketch of environmental crime raises concerns about justice. Although preventing fires and protecting forests are laudable goals, the extent to which criminal charges are levied against poor rural residents is troubling. The vast majority of defendants are not hardened polluters but some of China's least-educated, most-disadvantaged citizens. Even reporters, who tend to file reports praising the environmental court's criminal work, feel a tug of sympathy for defendants. After watching two bailiffs escort a 71-year-old peasant to the stand, one reporter wrote, "it is hard to believe that this quivering old man deliberately burned 22.7 acres of forest."⁷⁶ Nor is it clear that prosecution of the powerless can help to fix China's most pressing environmental problem, pollution. Although it remains to be seen whether the nationwide pattern is similar, this sample of cases suggests that Chinese prosecutors may be busier suing small-time rule-breakers than assembling major cases against polluters. Although prosecuting fire-starters and illegal loggers may help to protect state resources and public safety, two goals that crisscross historical time and vastly different governments, neither serves to warn business that the old days of "pollute first, control later" might be drawing to a close.

75. *Guiyang tongji nianjian* (Guiyang Statistical Yearbook) (Beijing: China Statistics Press, 2011), p. 307. Of course, it is not clear whether this money was paid or just mandated.

76. Liao Bo, "Qixun laozhe xiefen fanghuo shao shan" (An Old Man Over 70 Set a Hill Fire to Vent His Anger), *Guizhou dushi bao* (Guizhou Urban News) (8 April 2010), <http://tinyurl.com/aaguzkj>, accessed 19 January 2014.

To be fair, courts have little control over the criminal cases on their docket. Judges sentence criminals caught and charged by the other agencies, and, in this reactive role, they observe the ebb and flow of certain crimes. A spike in prosecutions can reflect a new political priority, such as during periodic “strike hard” campaigns, or the rising frequency of a crime. Eighty-nine per cent of the fire-related cases handled by the Guiyang court, for example, took place in February or March 2010, during the dry season. It is the time of year when farmers burn crop husks and, knowing that, the city released a slew of documents pinpointing fire prevention as a key concern. On 25 February, the Guiyang City government announced a three-month ban on all fires within 100 meters of a forest.⁷⁷ Much of the responsibility for enforcement fell to the Guiyang Forestry Bureau, and their 2010 work plan declared an ambition to “strike hard” against law-breakers.⁷⁸

Faced with a wave of cases, thanks to the combination of the season, local farming practices and stepped-up enforcement, there are signs that the Guiyang judges tried to shelter defendants from the harshest sentences and to temper justice with sympathy. Ninety per cent of the decisions for the February and March instances of fire-related cases explicitly mention either discretion (*zhuoqing* 酌情) or lightening the punishment (*congqing chufa* 从轻处罚) when reducing sentences for reasons such as age, lack of a criminal record and demonstrable repentance.⁷⁹ Even outside the February-to-March deluge of fire-related cases, 70 per cent of decisions refer to discretion or light punishment to justify penalties that are not nearly as harsh as the criminal law allows. The average 15-month prison sentence falls substantially below the three-year legal maximum for logging and fire starting by negligence.⁸⁰ As much as the criminal docket of the Guiyang environmental court raises concerns about class-based penalization, the decisions also show the judges striving to moderate the severity of the law. This fits the pattern observed in Benjamin Liebman’s recent empirical study of criminal cases in Henan Province, which shows leniency to be a routine part of everyday justice.⁸¹

COURTS AS REGULATORS: FUTURE POSSIBILITIES

China’s environmental courts were never set to become powerful regulatory actors overnight. Some of the judicial tools critical to environmental legal victories

77. Guiyang Forestry Bureau, “Guiyang shi renmin zhengfu fabu senlin fanghuo jinhua ling” (Guiyang City Government Announces Order Banning Fires to Prevent Forest Fires) (3 March 2010).

78. Guiyang Forestry Bureau, “Guiyang shi 2010 nian senlin fanghuo gongzuo anpai yijian” (Guiyang City 2010 Work Plan for Preventing Forest Fires) (2 February 2010).

79. Article 67 of China’s Criminal Law offers a lighter sentence for defendants who voluntarily turn themselves in and confess. Other signs of demonstrable repentance mentioned in court decisions include voluntarily replanting trees before the hearing and helping to fight the fire.

80. See Articles 139, 344 and 345 of the Criminal Law. Judges could also draw on Article 114, which allows a sentence of up to 7 years for crimes that endanger public security.

81. Benjamin L. Liebman, “Leniency in Chinese Criminal Law? Everyday Justice in Henan”. *Berkeley Journal of International Law*, forthcoming, Fall 2014.

elsewhere, such as injunctions and punitive damages, are virtually absent from the repertoire of Chinese courts.⁸² In addition, ongoing pressure to listen to other parts of government limits possibilities for deterrence. The very virtue that made environmental courts appealing, flexibility, comes with unpredictability. As long as it is uncertain when courts will act, and what they will do, would-be law-breakers seem unlikely to stop short due to fear of punishment. At least for now, most environmental activists agree that judicial decisions lag behind administrative solutions for time, cost and efficiency.⁸³ Even after fighting a groundbreaking public interest case, one staff member at an environmental NGO asked rhetorically in a 2012 interview: “can courts really solve problems that the government cannot?”

What of the future? Over time, could the environmental courts build legitimacy and expand their authority? So far, progress has been slow. Although being active enough to claim success is important, the general view is that this must be done without antagonizing local leaders. “Judges are in a passive position”, one Kunming judge explained to me. “It is dangerous to go out looking for cases and we should only resolve disputes that come to us”. There is a chance, however, that risk aversion could be strategic. Elsewhere, courts have sometimes expanded their authority through calibrated acts of assertiveness, which mark the culmination of quieter long-term efforts to build public support in low-profile cases before tackling decisions with real political stakes.⁸⁴ Patience can be an important part of building authority, an insight that casts caution as a potentially savvy (if perhaps unintentional) route to a more substantial role on the regulatory landscape.⁸⁵

The worst-case scenario, which judges view as a real danger, is that environmental courts will be disbanded unless they attract more cases. “Political achievements depend on cases”, a lawyer in Wuxi told me. “If there are no cases, then there is no achievement. The court is just a waste of resources.” If an environmental

82. In February 2013, the Guiyang environmental court issued a first preliminary injunction. See Wang Zhiqiu, “Guiyang huanbao fating pin pin liangjian”.

83. Some scholars and activists have suggested reforms to refashion environmental courts into stronger proponents of environmental protection. Ideas include fee-shifting provisions so that the losing party pays all court and attorneys’ fees, wider power to issue injunctions and the ability to direct compensation to an earmarked environmental public interest litigation fund. See ACEF and NRDC, “Promoting Environmental Protection Through the Law”.

84. Lee Epstein, Jack Knight and Olga Shvetsova, “The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government”, *Law & Society Review*, Vol. 35 (2001), p. 154. See also Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan, “Introduction”, in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge: Cambridge University Press, 2013), p. 34.

85. Acts of strategic assertiveness require leadership and it is not clear whether China’s diverse group of environmental judges includes any would-be trailblazers. At one end of the spectrum, one judge interviewed for this article indicated interest in bending the law to make injunctions and environmental restoration possible. At the other end of the spectrum, however, another judge described his job as “allocating legal resources” to keep environmental cases from hogging time or money. Nor is the Chinese legal system set up so that a lone heroic judge can make a difference. Environmental decisions require de facto consensus from a panel of three judges, which means that creativity requires support from like-minded colleagues.

court needs 100 cases per year to justify its existence, as one comparative study suggests,⁸⁶ it is not clear whether the majority of environmental courts in China will be able to stay open. The only courts currently handling over 100 cases per year deal with an exceptionally broad range of cases, including the NEACs that predominate in Wuxi and the prosecutions for minor crimes so common in Guiyang. Shutting down the pet project of a previous administration is also likely to be an easy political decision. One implication of China's stress on local innovation is that it is far easier to found new institutions than to keep them going.

The best-case scenario is that environmental courts will mimic the success of administrative court divisions.⁸⁷ Although administrative divisions are now well established inside Chinese courts, they struggled through the early 1990s. There were few cases at first because the idea of citizens suing the government, a possibility introduced by the 1989 Administrative Litigation Law and the 1990 Administrative Procedure Law, felt fresh and strange. To fill their time, some newly minted administrative judges handled civil cases or participated in educational outreach.⁸⁸ Over time, however, administrative work became a full-time job once the volume of cases rose from 6,247 in 1987 to 135,679 in 2010.⁸⁹

Much hinges on the future supply of cases and, here, working in concert with other government agencies may be the quickest route to expanded judicial authority. Litigation brought by the procuratorate and the EPB could help environmental courts to secure a reliable stream of cases while also showing other parts of the bureaucracy how litigation could expand their power. Tighter ties between the courts and the EPB, for example, could help two weak actors. Although some EPB officials still view lawsuits as an admission of failure, others appreciate how court orders to freeze assets or detain top managers can help to pressure polluters. 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."⁹⁰ Success may require the environmental courts to become even more embedded in the bureaucracy, lest independence lead to irrelevance.

86. George Pring and Catherine Pring, *Greening Justice*, p. 33. Low caseload is not a problem unique to China. On p. 31, Pring and Pring discuss how environmental judges in Trinidad and Tobago are embarrassed to admit that they handle just five to eight cases annually.

87. Thanks to Sida Liu for this idea.

88. Sida Liu, "Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court", *Law & Social Inquiry*, Vol. 31, No. 1 (2006), p. 91.

89. Zhu Jingwen, *Zhongguo falü fazhan baogao* (Report on China Law Development: Database and Indicators) (Beijing: Renmin University Press, 2007), p. 205. Supreme People's Court, "2011 Annual Work Report".

90. Xuehua Zhang, *Enforcing Environmental Regulations in Hubei Province, China: Agencies, Courts, Citizens*, PhD Dissertation, Stanford University (2008), p. 171.

CONCLUSION

This account of the early years of three prominent environmental courts highlights the ongoing political appeal of three ideas about how law can serve political ends. The first idea is that courts can help to resolve disputes and, in so doing, contribute to social stability. Though this view plainly resonates with government officials, who often repeat it, it is less clear whether it is true. Certainly, environmental cases with sympathetic defendants, such as the 71-year-old jailed for starting a forest fire, raise the possibility that perceptions of injustice could fuel public anger, instead of dampening it. It is also easy to imagine that a court's refusal to hear a case, a common occurrence, might leave complainants with no options except protest. Much more work is needed to untangle the relationship between litigation and protest, especially to see whether environmental courts reinforce locals' belief that the local government is doing a good job or fan outrage over decisions considered to be unfair.

New regulations expanding standing, first locally and now nationally, also showcase growing interest in drafting non-state actors into the task of enforcing government regulations. Although public interest litigation is often discussed as a step toward the development of civil society, it is important to place private enforcement within a CCP tradition of recruiting the masses to meet policy goals when state resources are limited. Expanding standing harks back to an earlier era of public involvement in policy implementation, even if it also gestures toward greater government accountability. One way to view private enforcement is as a new form of loyalist political participation and, from this vantage point, it hardly seems surprising that many advocate limiting the right to initiate public interest litigation to groups with close ties to the state.

Finally, the enduring logic that law should serve political ends is evident in the policy mission of the environmental courts. Unlike the two-dimensional view of authoritarian law as an instrument of social control, China's environmental courts remind us that good governance matters to at least some regimes aspiring to longevity and, when that is the case, law can extend beyond repression to encompass affirmative responsibilities. Environmental protection is a rising policy priority in China, and the rationale for specialized justice is similar to the motivation for opening juvenile courts, business courts and other specialized courts in the United States: a desire to bring judicial decisions into line with political values.⁹¹ The rise of China's environmental courts reflects a real recognition of the EPB's failure to control China's worsening environmental problems.

Nothing so far suggests that environmental courts mark a new direction in China's legal development rather than a continuation of the Chinese Communist

91. Lawrence Baum, "Specializing the Courts".

Party's long-standing belief that law, including legal institutions, legal professionals and legislation, should help to realize state policy goals. This vision of law seeks to cleave fair, efficient dispute resolution from judicial independence and, in so doing, to provide an important public service without unduly compromising political control. One result of meshing the environmental courts to the bureaucracy is measured compromise in judicial decision-making. For all that the environmental courts serve a clear policy purpose, ties to other parts of the state remind judges to keep multiple goals in mind. In the end, environmental protection is just one goal, to be balanced carefully with the need to safeguard social stability and the continued, vital importance of economic growth.