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PUBLIC PARTICIPATION IN THE ENFORCEMENT OF CHINA'S ANTI-POLLUTION LAWS

Jennifer Wu

STUDENT NOTE



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1

INTRODUCTION

China has experienced spectacular economic growth, growing on average 9.4 per cent per year for the past twenty-six years. At the same time, the absolute poor population in rural areas has fallen from 250 million to 26.1 million, and the incidence of absolute poverty plunged from 31 per cent to just 2.8 per cent.¹ However, China's massive rate of industrialisation has caused a pollution crisis more severe than anywhere else in the world, leading to serious health and environmental concerns such as air pollution and contaminated drinking water supplies.

As any Beijing tourist can tell you, air pollution is one of the most visible problems in China, due mainly to the dependence on coal as an energy source. China is already the world's second largest energy consumer after the United States, and almost 68 per cent of its energy comes from burning coal, leading to high levels of sulphur dioxide and particulate air pollution. Although particulate concentrations have declined since the 1980s, about 50 per cent of China's cities still did not meet Chinese air quality standards as of 2005.² Water pollution is also a serious concern in China due to industrial wastewater discharge (from industries such as the pulp and paper industry) as well as agricultural runoff containing pesticides and fertilizers. According to the Chinese Ministry of Water Resources, about 25,000 kilometres of Chinese rivers failed to meet the water quality standards for aquatic life and about 90 per cent of river sections around urban areas were seriously polluted.³ A consultancy estimated that with a national daily sewage discharge rate of around 3.7 billion tonnes, it would require 10,000

wastewater treatment plants just to achieve a 50 per cent treatment rate.⁴

The prevalence of environmental pollution has a significant impact on the Chinese economy due to premature deaths, restricted activity and other negative health effects; a World Bank study estimated that the total cost of air and water pollution alone was at least 362 billion yuan in 2003, or about 2.68 per cent of GDP for that year.⁵

Other countries are taking notice of China's environmental problems. Monitoring stations in Hawaii have identified the presence of five- to ten-day-old arsenic, copper and zinc in emissions from smelting operations in China.⁶ Severe dust storms originating in China have carried industrial pollutants eastward into North and South Korea and Japan, and this 'yellow sand' has been identified in the United States.⁷

The Chinese Communist Party (CCP) has long been trying to control the adverse environmental effects of industrialisation. Today China has a multitude of environmental laws, hundreds of regulations, and is party to over eighty environmental treaties.⁸ Yet an official from the state environmental agency has described this situation as 'a wealth of laws with shallow roots'.⁹ Indeed, despite all its legal commitments, Chinese cities remain some of the most polluted areas on earth: in 2006, a pilot

1 UNDP China, 'China Human Development Report 2005', available at <http://www.undp.org.cn/modules.php?op=modload&name=News&file=article&catid=18&topic=40&sid=242&mode=thread&order=0&thold=0> at 8.
2 The World Bank, *Cost of Pollution in China: Economic Estimates of Physical Damages*, Report No. 39236 at 3 (01 February 2007), available at <http://go.worldbank.org/7LM8L9FAV0> [hereafter World Bank Report].
3 *Id.* at 33.

4 'A Great Wall of Waste', *The Economist*, 19 August 2004, Special Report (2), available at http://www.economist.com/displayStory.cfm?story_id=3104453 [hereafter Great Wall of Waste].
5 See World Bank Report, note 2 above, at xvii.
6 R.J. Ferris Jr. and Hongjun Zhang, 'Reaching Out to the Rule of Law: China's Continuing Efforts to Develop an Effective Environmental Law Regime', 11 *Wm. & Mary Bill Rts. J.* 569, 574 (2003).
7 *Id.* and David Pilling and Mure Dickie, 'Beijing learns lessons from Tokyo's clean energy habits', *Financial Times*, 13 April 2007, page 5.
8 See R.J. Ferris Jr. and Hongjun Zhang, 'The Challenges of Reforming an Environmental Legal Culture: Assessing the Status Quo and Looking at Post-WTO Admission Challenges for the People's Republic of China', 14 *Geo. Int'l Envtl. L. Rev.* 429, 430 (2002) [hereafter Post-WTO Environmental Challenges].
9 A SEPA official noted in an interview that China has 'a wealth of laws with shallow roots'. See Ferris and Zhang, note 6 above, at 589.

Environmental Performance Index ranked China 128th out of 133 countries in terms of air quality, and 116th overall for water pollution.¹⁰

The purpose of this paper is to examine the discrepancy between law and practice in combating pollution in China. The first section begins with an overview of the development of China's environmental legal regime, together with a brief description of some particular anti-pollution laws. Section 2 describes some reasons why such legislation fail to protect the environment, including the vague wording of legal obligations, the poor enforcement of laws in local jurisdictions, and the lack of funding for government agencies. The third section examines how to increase the role of public participation, with supporting pillars such as NGOs, media, and legal aid. This paper concludes that in addition to addressing the institutional problems in enforcing anti-pollution laws, there is room for the Chinese government to improve and facilitate public participation in protecting the environment, through the sharing of public and centralised information.

2 THE DEVELOPMENT OF CHINA'S ENVIRONMENTAL LEGAL REGIME

China's first step in international environmental protection was in 1972 when Premier Zhou Enlai sent a representative to the Stockholm Conference on Human Environment, despite internal opposition within the Communist Party.¹¹ Legal protection of the environment was not to become a reality until years later; it was only in 1978, when

Deng Xiaoping started wide-sweeping reforms, that the drive to establish a functioning legal system in China was initiated.

At this time, legislation had to be drafted from scratch because of the demolition of the entire legal system during Mao's Cultural Revolution of 1966-76. In its haste to re-establish a functioning body of law, the Chinese Communist Party developed legislation in a centrally planned top-down manner, either through legal transplantation from abroad or by directly translating policy into statute form. Uncertain of the consequences these new laws might bring, the country followed a 'crossing the river by feeling the stones' (摸石头过河, *mo shitou guo he*) approach in legislating.¹² Hence overarching legal principles are not the basis of these instruments of law; rather, a pragmatic approach was taken, whereby laws were tested on a trial basis. As such, China's first and most general environmental statute—the *Environmental Protection Law of the People's Republic of China*—was adopted in 1979 for trial implementation,¹³ but was only to be enacted into its final form a full ten years later.¹⁴

While the Chinese legal system is relatively young, the government has incorporated environmental concerns since the very beginning. The CCP has included environmental goals in its five-year plans from 1980 onwards, and has enshrined its commitment to environmental protection in Article 26 of the 1982 Constitution:¹⁵

The state protects and improves the living environment and the ecological environment, and prevents and

10 Center for Environmental Law & Policy (Yale University) and Center for International Earth Science Information Network (Columbia University), 'Pilot 2006 Environmental Performance Index' (21 January 2006), available at <http://epi.yale.edu/Home> at Appendix A: Policy Category Tables & Maps.

11 The Chinese government at the time generally felt that there was no need to participate in a global conference to address environmental protection because it was only a problem for capitalist countries. See Post-WTO Environmental Challenges, note 8 above, at 430.

12 This was one of Deng Xiaoping's credos. Benjamin van Rooij, *Regulating Land and Pollution in China* 2-3 (Leiden: Leiden University Press, 2006).

13 See *Environmental Protection Law of the People's Republic of China (for Trial Implementation)* (13 September 1979), available at http://www.novexc.com/environmental_protect Law.html.

14 Stefanie Beyer, 'Environmental Law and Policy in the People's Republic of China', 5 *Chinese J. Int'l L.* 185, 192 (2006).

15 John Copeland Nagle, 'The Missing Chinese Environmental Law Statutory Interpretation Cases', 5 *NYU Envtl. L.J.* 517, 527 (1996).

controls pollution and other public hazards. [...]¹⁶

Due to the central government's initiative, China has in the past thirty years enacted hundreds of environmental statutes and regulations. The National People's Congress (NPC) acts as China's supreme legislative organ, with powers to enact and amend basic laws; however, most legislation is actually enacted by the NPC Standing Committee, since the NPC is in session only once a year.¹⁷ The State Council, China's chief executive body, has the power to adopt administrative measures and enact administrative regulations and rules.¹⁸ On the provincial level, people's congresses and their respective standing committees may adopt local regulations provided they do not contravene higher-level statutes and regulations.¹⁹

The main regulatory agency that deals with environment on the national level is the State Environmental Protection Administration (SEPA). It has been given the duties of developing national policies and laws for environmental protection, supervising the utilisation activities of natural resources that impact ecological environment, and investigating and handling major environmental pollution accidents and ecological damage cases.²⁰ On the provincial and local (township and county) levels, Environmental Protection Bureaus (EPBs) are responsible for enforcing compliance with national environmental laws and regulations within their jurisdiction. EPBs form part of local governments, and their duties for environmental protection include drafting local laws, issuing administrative regulations, carrying out environmental monitoring and control, and providing education and training on environmental issues.²¹

2.1 Legislation: The EPL, WPPCL & APPCL

China's main legislation on environment is the *Environmental Protection Law* of 1989 (EPL), which contains general provisions for pollution control, environmental impact assessments (EIAs) and the supervision and management of environmental protection by the state.²² The basic obligation and right is provided in Article 6:

All units and individuals shall have the obligation to protect the environment and shall have the right to report on or file charges against units or individuals that cause pollution or damage to the environment.²³

Chapter IV of the EPL deals with the prevention and control of environmental pollution. All units must adopt effective measures to prevent and control pollution and harms caused by waste emissions.²⁴ Best technologies are to be used for the low discharge and treatment of pollutants and the comprehensive utilisation of waste.²⁵ Construction projects must be approved by SEPA (or the relevant EPB) according to an environmental impact statement.²⁶ Finally, enterprises and institutions discharging pollutants in excess of local standards are liable to pay fines and are responsible for eliminating and controlling pollution.²⁷

In addition to the EPL, there are laws that deal specifically with pollution. The *Water Pollution Prevention and Control Law* (WPPCL) was enacted in 1984, with the most recent amendments in 1996.²⁸ As with the EPL, it foresees a role for individuals to prevent pollution, as stipulated in Article 5:

16 *Constitution of the People's Republic of China* (1982), available at http://www.liu-shen.com/laws/zgxf_en.htm Art. 26 [hereafter 1982 Constitution].

17 'Chapter 6: Sources of Law and the Law-Making System', in Albert Chen, *An introduction to the legal system of the People's Republic of China* 101-02 (Hong Kong: Lexis/Nexis, 2004). See also 1982 Constitution, *id.*, Arts. 57-58.

18 See 1982 Constitution, note 16 above, Art. 89.

19 *Id.* Art. 100.

20 See 'About SEPA: Mission' (04 July 2007), available at http://english.sepa.gov.cn/About_SEPA/Mission/200707/t20070704_106099.htm.

21 See Beyer, note 14 above, at 189.

22 *Environmental Protection Law of the People's Republic of China* (1989), available at http://english.sepa.gov.cn/Policies_Regulations/laws/environmental_laws/200710/t20071009_109928.htm.

23 *Id.* Art. 6.

24 *Id.* Art. 24.

25 *Id.* Art. 25.

26 *Id.* Art. 26.

27 *Id.* Art. 28.

28 See *Law of the People's Republic of China on Prevention and Control of Water Pollution* (1984), available at http://english.sepa.gov.cn/Policies_Regulations/laws/environmental_laws/200710/t20071009_109915.htm.

All units and individuals shall have the duty to protect the water environment and the right to supervise and inform against any pollution or damage to the water environment.

Any unit or individual that has suffered damage directly from a water pollution hazard shall have the right to demand elimination of the hazard and compensation for the damage by the polluter.²⁹

The WPPCL covers the prevention and control of pollution of all bodies of water except for marine pollution (which is governed by another law).³⁰ Although SEPA has authority to establish national standards for the discharge of water pollutants, lower-level governments may adopt more stringent standards for their own locality.³¹ A pollutant discharge registration system is provided for in the WPPCL, through which pollutant-discharging enterprises and institutions must pay discharge fees (including fees for excess discharges over prescribed limits).³² EPBs are granted the power to carry out on-site inspections of pollutant-discharging units in their jurisdiction;³³ in cases of emergency, they also have the authority to order enterprises or institutions to reduce or stop pollutant discharge.³⁴ The WPPCL expressly forbids the discharge of certain pollutants, such as oil, mercury and radioactive substances.³⁵

The main statute addressing air pollution is the 1995 *Air Pollution Prevention and Control Law* (APPCL). Like the EPL and WPPCL, it also gives the right to individuals to file charges against polluters. As stated in Article 5,

All units and individuals shall have the obligation to protect the

atmospheric environment and shall have the right to report on or file charges against units or individuals that cause pollution to the atmospheric environment.³⁶

Since coal burning is the main source of air pollution, the APPCL originally aimed only at controlling particular pollutants from coal combustion; however, this law was substantially amended in 2000 due to its lack of effective measures in combating air pollution.³⁷ The new amendments now include measures for monitoring the volume of pollutants entering 'total emission control' areas designated by provinces and municipalities; in these areas, enterprises and institutions must control their total emission of air pollutants according to the standards and licenses provided by the local government.³⁸ The APPCL further allows for the charging of fees on the basis of categories and quantities of discharged pollutants, rather than for excess emissions only (as was the case before the amendments).³⁹ The amended APPCL provides control measures for automobiles, vessels, and domestic heating and cooking ranges, in addition to industrial enterprises and power plants.⁴⁰ Key cities may now designate areas in which the production and consumption of 'seriously polluting fuels' are banned, and only the consumption of 'clean energy' (such as natural gas, liquefied petroleum gas, or electricity) is allowed.⁴¹ Finally, newly built or expanded large and medium enterprises (such as power plants) that exceed prescribed standards for sulphur dioxide discharge must install facilities for desulphurisation and dust removal.⁴²

In addition to the WPPCL and APPCL, there are other statutes related to preventing and controlling pollution, including the *Prevention and Control of Environmental Pollution by Solid Waste Law* (1995),

29 *Id.* Art. 5.

30 *Id.* Art. 2.

31 *Id.* Art. 7.

32 *Id.* Arts. 14-15. See also Zachary Tyler, 'Transboundary Water Pollution in China: An Analysis of the Failure of the Legal Framework to Protect Downstream Jurisdictions', 19 *Colum. J. Asian L.* 572, 588 (2006).

33 *Id.* Art. 25.

34 *Id.* Art. 21.

35 *Id.* Arts. 29, 31, 34. See also Tyler, note 32 above, at 588.

36 *Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution* (1995), Art. 5, available at http://english.sepa.gov.cn/Policies_Regulations/laws/environmental_laws/200710/t20071009_109943.htm [hereafter APPCL].

37 See Beyer, note 14 above, at 194.

38 See APPCL, note 36 above, Art. 15.

39 See Beyer, note 14 above at 194. See also *id.* Art. 14.

40 *Id.* Arts. 29, 32-35, 53.

41 *Id.* Art. 25.

42 *Id.* Art. 30.

the *Environmental Impact Assessment Law* (2002), and the *Promotion of Clean Production Law* (2002).⁴³ Indeed, China has created a wide array of environmental laws and institutions, comparable to that in many Western countries.⁴⁴ It is not due to the lack of adequate legislation that the pollution problem continues unabated.

3

INSTITUTIONAL IMPEDIMENTS TO ANTI-POLLUTION ENFORCEMENT

This section explains some reasons why, in spite of the plethora of laws, China fails to adequately address its pollution problems.

First of all, vague and aspirational language found in legislation is of no guidance in practical implementation. In addition, the lack of coordination between various levels of government creates a noticeable gap between (national) policy and (local) enforcement. Finally, SEPA and local EPBs lack the resources to adequately monitor compliance and follow up on situations.

3.1 Aspirational Legislation

One major difficulty in controlling pollution through legal means is the vagueness of Chinese legislation. The rapid construction of a new legal system and a rapidly changing society are the dominant factors behind the overly broad and weak language used in drafting laws.

As mentioned above, China's haste in establishing a legal system resulted in a pragmatic approach to law making. One technique of this approach was to first adopt laws on a trial basis, to be changed into regular

legislation later—as was the case for the *Environmental Protection Law*. Another technique was to bring about legislation containing abstract general rules, to be specified later using easily changeable lower-level administrative regulations.⁴⁵ Both of these techniques were essentially piecemeal:

[...] the piece-meal approach meant that legislation was highly abstract and not too strict, making it adaptable and feasible, but also uncertain and inadequate.⁴⁶

As a result, the abstract nature of many environmental provisions makes them seem more like 'policy statements and propositions of ideals' rather than laws.⁴⁷ Actions are encouraged but not required, or if they are, little guidance is provided as to procedures and specific goals. For example, the use of the word 'should' (应 or 应该) instead of stronger terms such as 'shall' (必须) or 'must' (得) is frequent.⁴⁸

Vague rights and obligations are useless as they are impossible to implement and enforce. Recognising this, Chinese leadership strove to create more specific legislation, resulting in stricter environmental statutes such as the amendments to the APPCL in 2000 and the *Environmental Impact Assessment Law* (EIAL) enacted in 2002.⁴⁹ However, weak language continues to plague legislation due to a practice of enacting so-called 'policy laws': laws that do not set out specific requirements but rather outline general policies.⁵⁰ For example, the *Promotion of Clean Production Law* (2002) states in Article 20:

When products and packaging are designed, their influences on mankind and natural environments during their life-cycle must be considered and

43 See SEPA Laws & Regulations – Environmental Laws, available at http://english.sepa.gov.cn/Policies_Regulations/laws/.

44 Benjamin J. Richardson, 'Is East Asia Industrialising Too Quickly? Environmental Regulation in its Special Economic Zones', 22 *UCLA Pac. Basin L.J.* 150, 190 (2004).

45 See Van Rooij, note 12 above, at 45-46.

46 *Id.* at 46.

47 See Beyer, note 14 above, at 205.

48 *Id.*

49 See Van Rooij, note 45 above, at 99.

50 Meixian Li, 'China's Compliance with WTO Requirements Will Improve the Efficiency and Effective Implementation of Environmental Laws in China', 18 *Temp. Int'l & Comp. L.J.* 155, 165-66 (2004).

priority accorded to selecting toxin-free, non-hazardous, easily degraded and easily recycled options.

Enterprises should package the products in a reasonable manner to reduce the overuse of packaging materials and reduce the generation of packaging wastes.⁵¹

Nowhere in this law are the key terms defined, and no specific guidelines are stated: there is no benchmark against which to measure how the influences of packaging on natural environments are 'considered', and the weak term 'should' implies there is no mandatory obligation on enterprises at all. Thus Article 20 does not really set out any requirements for environmentally safe and efficient packaging; it merely shows a policy of discouraging wasteful packaging.⁵² Such vaguely defined obligations are nearly impossible to enforce, and opens the opportunity for polluters to evade regulation.⁵³

3.2 The Implementation Gap between Beijing and Local Government

Even if the problems of vague legislation could be fixed, there is still a considerable gap between what is decided nationally and what is actually enforced on the local level. As one study showed, the main problem stems from local governments protecting local political, social and economic interests while resisting non-local policies and laws.⁵⁴

This 'implementation gap' occurs because national laws are sometimes in conflict with the social and economic interests of local communities.⁵⁵ Some

provisions in the APPCL and EIAL, for example, would have a negative impact on local incomes if fully implemented. There are inevitably some sectors in which industrial growth is at odds with environmental protection; the biggest problem, however, lies where anti-pollution laws impede the main source of revenue for a community, without provisions for alternate means of income. For instance, in the case of Kunming in Yunnan province:

Industrial sectors such as phosphor production or the paper industry developed while environmental law was weak or weakly enforced. For the paper industry, once enforcement became stricter, the sector was nearly extinguished in peri-urban Kunming. Phosphor production, which forms the most important source of income in Kouxiang Township, continued while violating Beijing's pollution laws. Without alternatives, the local need for [illegal] but dominant sources of income has been so high that local governments and even local communities, if completely depended on such industries, condoned their violations. There seems to be a logic to local protectionism: without it Beijing's national legislation would adversely affect local livelihoods and dominant local sources of income.⁵⁶

Political support and legitimacy are important to local governments, as they facilitate the cooperation and compliance of citizens in pursuing governance goals. Local economic development helps garner this support and diminishes the causes of social unrest. Perhaps more importantly, economic development also creates profits from local businesses, increasing the tax revenue that funds and maintains the local government;⁵⁷ in some cases, local governments even sponsor or own the industries themselves.⁵⁸ Thus, although SEPA has formal authority over lower-level EPBs, in practice it cannot compete with the support and funding provided by local economic

51 *Law of the People's Republic of China on the Promotion of Clean Production* (2002), Art. 20, available at http://english.sepa.gov.cn/Policies_Regulations/laws/envir_elatedlaws/200710/t20071009_109966.htm.

52 See Li, note 50 above, at 166.

53 Adam Briggs, 'China's Pollution Victims: Still Seeking a Dependable Remedy', 18 *Geo. Int'l Envtl. L. Rev.* 305, 313 (2006).

54 See Van Rooij, note 45 above, at 264.

55 The term 'implementation gap' is used in Briggs, note 53 above.

56 *Id.* at 269-70.

57 See Briggs, note 53 above, at 316-17.

58 See Beyer, note 14 above, at 207.

actors—which is why local governments are more willing to boost short-term (local) development in favour of these actors, even to the detriment of long-term (national) environmental goals.⁵⁹ In turn, local governments pressure EPB officials to ignore or limit the penalties on certain polluters, so as not to impede industrial and economic development. Since an EPB is typically funded by the local government to which it is attached, it is not in its interest to disobey; as one author noted:

EPBs rely on [local governments] for virtually all their support, including their budgets, career advancement, number of personnel, and resources such as cars, office buildings, and employee housing. Not surprisingly, EPBs are typically quite responsive to the needs and concerns of the local government.⁶⁰

Another important reason why economic growth and social stability are given priority over environmental goals is because they are the main measurement criteria in the vertical management system imposed by the central government. In this system, local governments are evaluated based on their economic and social performance (考核, *kaohé*): local leaders get bonuses and promotions for improvements, and fines for failures. Thus, shutting down a community's main polluter risks damaging the political reputation of local governments: it often means stunting a major portion of the local economy and causing job losses (which threatens social stability). Indeed, EPB officials have stated that the *kaohé* evaluation system has made local governments more concerned about economic and social development than environmental protection.⁶¹

A final problem worth mentioning is the manner in which EPBs charge fines for regulation violations. These charges are often negotiated with polluters and end up being far lower than the cost of damage caused by the pollution, and is nowhere near to covering the costs of pollution control facilities; one estimate sets the amount of effluent fees collected as

representing less than 5 per cent of the costs of treatment.⁶² Furthermore, fees and penalties are often returned to polluting enterprises in the form of grants or credits.⁶³ Credits are sometimes meant as an incentive to improve pollution control facilities, but EPBs rarely supervise this practice. At worst, polluters seem to view these fees as entitling them to act unlawfully, regardless of whether they intend to improve their pollution control equipment or not.⁶⁴

Despite the fact that fines are so low, EPBs are also partially funded by them. This naturally has adverse effects on the independence of EPBs, which now have the incentive to ensure that local businesses do not close down regardless of their environmental record. To guarantee this source of funding, EPBs may warn companies ahead of time so that they can improve their pollution control facilities during inspection periods, only to return to prior practices when it is over.⁶⁵

3.3 Lack of Government Resources

Ambiguous laws and local politics are the main determinants of the implementation gap; however, the lack of funds and resources also prevents EPBs from effectively enforcing anti-pollution laws. There are simply too many enterprises to be monitored in China and too few trained personnel to carry out inspections.⁶⁶

The past decade has seen an increase in the central government's political will to seriously address environmental problems. In 1998, SEPA was given ministry status by Premier Zhu Rongji; in 2001, the Tenth Five-Year Plan for Environmental Protection boosted environmental spending to 700 billion yuan—an increase from 0.8 to 1.3 per cent of GDP.⁶⁷ In spite of this, SEPA is under-funded, with only 300 central staff for a country of 1.3 billion people.⁶⁸ Thus, SEPA remains highly dependent on local EPBs to carry out enforcement activities, and even these bureaus are under-resourced. There are

⁶² *Id.* at 581.

⁶³ See Great Wall of Waste, note 4 above.

⁶⁴ See Beyer, note 14 above, at 207.

⁶⁵ See Tyler, note 32 above, at 595.

⁶⁶ See Briggs, note 53 above, at 317.

⁶⁷ See Great Wall of Waste, note 4 above.

⁶⁸ *Id.*

⁵⁹ See Van Rooij, note 45 above, at 270.

⁶⁰ See Tyler, note 32 above, at 583.

⁶¹ *Id.* at 270-71.

innumerable claims that are simply not investigated because local governments deem them 'prohibitively expensive' or politically complicated (for example, if pollution originates in another jurisdiction).⁶⁹ Failure to implement regulations may also be due to lack of training, as many local officials remain ignorant of environmental issues and of statutory environmental requirements.⁷⁰

4 ENABLING PUBLIC PARTICIPATION

Enforcement by government agencies is not the only legal means of mitigating environmental harm. There is also a role for public participation by means of public interest litigation. As seen above, the EPL, APPCL and WPPCL each provide the right for individuals to file charges against polluters. The Chinese government promotes this avenue of public action: in 2004, Senior SEPA official Pan Yue begged for more citizens to use the law to 'bring actions' against polluters in order to 'help people protect themselves against the country's worsening environment'.⁷¹

4.1 Rights Consciousness

As the plea indicates, Chinese citizens do not take full advantage of the legal rights made available to them. This can be partially attributed to a lack of knowledge about the law. Yet even when people are made aware of their rights, it does not necessarily translate into *rights consciousness*—the ability to seize rights to defend one's interests.⁷²

Each day there are plenty of grievances occurring in China, from unemployed labourers to disgruntled

peasants and unhappy couples.⁷³ But only a small proportion of these grievances actually turn into legal claims.⁷⁴ Though this is no different from other legal systems, there is a sense that even fewer disputes make it to court in China because of the large presence of organised communities and a strong civil society. Most issues are tolerated, settled through unassisted negotiations, or mediated by a third party.⁷⁵

Putting aside the cases where extrajudicial settlement or mediation occurs, it is important to examine why many environmental injuries are simply endured rather than developing into disputes. For aggrieved citizens, the law may not be an effective means to redress wrongs because they cannot mobilise the resources to exploit existing legal rights.⁷⁶ As Charles Epp's study of individual rights in four countries shows, given equally liberal laws and activist judiciaries, 'successful rights litigation' occurred more in countries with various interest groups, lobbies, foundations and rights advocacy groups that were willing to provide financial resources to poor litigants:⁷⁷

Ordinary individuals typically do not have the time, money, or experience necessary to support a long-running lawsuit through several levels of the judicial system. [...] A *support structure* can provide the consistent support that is needed to move case after case through the courts.⁷⁸ [*emphasis added*]

Thus, although India enjoys a respected judiciary and body of laws, it experiences relatively little rights-based litigation when compared with countries such as the US, Canada and Great Britain, due to the lack of a comparable support structure.⁷⁹ Consequently, the reasons for China's lagging rights consciousness may be revealed in an examination of its citizen-enabling support structure.

69 See Briggs, note 53 above, at 317.

70 John Copeland Nagle, 'The Missing Chinese Environmental Law Statutory Interpretation Cases', 5 *NYU Envtl. L.J.* 517, 536 (1996).

71 See Briggs, note 53 above, at 324.

72 N.J. Diamant, S.B. Lubman and K.J. O'Brien, 'Law and Society in the PRC' in Neil J. Diamant, Stanley B. Lubman and Kevin J. O'Brien eds, *Engaging the Law in China: State, Society, and the Possibilities for Justice 4* (Stanford: Stanford University Press, 2005).

73 *Id.* at 6.

74 See 'The Disputing Pyramid' in *id.* at 7.

75 Hualing Fu, 'Creating a Support Structure for Rights: Legal Aid and the Rule of Law in China', *The Asia Foundation* 13 (2005), available at http://asiafoundation.org/pdf/CH_legalaid.pdf.

76 See Diamant, Lubman and O'Brien, note 73 above, at 9.

77 *Id.* at 10.

78 *Id.*

79 *Id.*

4.2 The Pillars of China's Support Structure: NGOs, Media, Legal Aid

China's support structure is characterised by the capacity for individuals to engage in collective petitioning, the capability for high-level media attention, and the existence of financial support in the form of legal aid.⁸⁰ Collective petitions create support by generating group solidarity, which goes a long way in pushing forward a dispute that otherwise would not be initiated by the average individual.⁸¹ The *Civil Procedure Law* (1991) provides one legal mechanism for collective action in the form of class action suits, which can be brought by parties of either fixed or uncertain number.⁸²

This legal provision alone, however, is insufficient to jointly mobilise individuals with potential claims. This is where non-governmental organisations come in: they act as an information focal point for citizens to converge their grievances, in addition to providing legal information and resources. Perhaps the most well-known example of this is the Center for Legal Assistance to Pollution Victims (CLAPV), an environmental NGO that has achieved many legal successes on behalf of pollution victims. One important resource set up by CLAPV is a hotline to receive calls regarding environmental problems; this has served to facilitate its work in initiating lawsuits on behalf of individuals all over the country who would otherwise not have had access to any remedy.⁸³

Environmental NGOs thus provide an important stimulus for increasing public participation through the dissemination of information, whether through educating the public or monitoring potential polluters. However, the vital role of NGOs is constrained because they remain under state control (of varying degree, depending on their status)—to the extent that scholars often refer to them as

'GONGOS', or government-organised non-governmental organisations.⁸⁴ All such 'social organisations' in China must follow a registration procedure, and those engaging in preliminary activities without approval are liable to criminal prosecution.⁸⁵ Registration facilitates the control of NGOs by the CCP, which actively monitors groups it considers a threat to its authority, even using force when necessary.⁸⁶ In many cases, NGOs simply practise 'self-censored advocacy' to avoid conflict with the government.⁸⁷ Thus, even though environmental NGOs may be relatively safe from scrutiny (being less politically sensitive than human rights NGOs, for example), they are not completely free to act.

Another important pillar in China's 'support structure' for individual litigants is media attention, accorded through means such as television, newspapers, magazines and even letters to the editor. Citizens who can attract enough public sympathy through media exposure of their case have a greater chance of transforming their grievances into claims.⁸⁸ One famous example of this is the 2003 Sun Zhigang incident, in which the active role of Chinese media and public opinion was credited with facilitating the protection of (civil) rights.⁸⁹ This is most effective when exposing government official wrongdoing (舆论监督, *yulun jiandu*), as shown by this and several other high-profile cases that would not

80 *Id.* at 10-11.

81 Legal action is often initiated by assertive risk-takers with 'atypical forceful personalities'. *Id.* at 9.

82 *Civil Procedure Law of the People's Republic of China* (1991), arts. 54-55, available at <http://en.chinacourt.org/public/detail.php?id=2694>.

83 See Briggs, note 53 above at 324-25. See also Center for Legal Assistance to Pollution Victims in China, available at <http://www.clapv.org/>.

84 C. David Lee, 'Legal Reform in China: A Role for Nongovernmental Organisations', 25 *Yale J. Int'l L.* 363, 376 (2000).

85 *Regulation on Registration and Administration of Social Organisations* (1998), Peoples Republic of China State Council Order No. 250, Arts. 3, 35, available at <http://www.lawinfochina.com/law/displayModeTwo.asp?db=18&id=5613&keyword=social,registration>.

86 See Lee, note 85 above, at 376.

87 Katherine Morton, 'The emergence of NGOs in China and their transnational linkages: implications for domestic reform', 59(4) *Australian J. Int'l Affairs* 519, 522 (2005).

88 See Diamant, Lubman and O'Brien, note 73 above, at 10.

89 Dingjian Cai, 'The development of constitutionalism in the transition of Chinese society', 19(1) *Columbia J. of Asian Law* 1, 11-12 (2005) and Keith J. Hand, 'Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China', 45(1) *Columbia J. of Transnational Law* 114, 122-24, 135-37 (2007).

have been resolved in the public interest without the media's intervention.⁹⁰ Likewise, a pollution claim that is clearly facilitated by EPB wrongdoings will have a greater chance of being resolved in favour of affected individuals if the media spotlight can be directed towards it.

As much as the media can be the 'single most important and effective avenue for citizen redress',⁹¹ in China it suffers from significant state control, either directly or through self-censorship. It is well known that China practises media content control, which involves a complex system of regulations, policy statements, editor responsibility, and post-publication sanctions for violations.⁹² In terms of self-censorship, many local newspapers still behave as Party mouthpieces and simply report the successes of local leaders, effectively continuing 'old forms of propaganda reporting'.⁹³ Proper investigative reporting, even on local matters, is generally done by only the national media. However even in this case, the targets are limited; for example, CCTV's daily news program 'Focus', the 'most influential media voice in China', mostly exposes wrongdoing by county and township officials.⁹⁴ Criticism of higher-level officials is rare, and at any rate media are careful to align themselves with Party policy. Given all these factors and the relatively small number of national media for a country of 1.3 billion people, the use of media as a means to uncover environmental wrongdoings is quite limited.

The final pillar of China's 'support structure' is legal aid. An important obstacle to bringing claims to court is the lack of financial resources. It costs money to hire a lawyer and pay for various court fees, which undoubtedly prevents some plaintiffs from initiating environmental actions in the first place. This results in a serious social justice issue, because the poor suffer disproportionately from environmental harms: they possess the least resources to cope with

pollution—whether legally, medically, or politically—and have the least mobility in locating themselves to less hazardous areas.⁹⁵ The Chinese government has been alerted to the access to justice problem in recent years and in 2003 enacted the first national legal aid regulation, proclaiming legal aid as the duty of government.⁹⁶ By 2004 China had 3,023 legal aid centres supported by 10,458 staff, with funding of over 200 million yuan.⁹⁷ These centres provide key services in education, consultation and legal information, mediation and litigation.

Legal aid centres are successful in that they bring judicial remedies within the reach of thousands who previously had no means of acquiring legal services at all. However, as with many government-backed programmes, they suffer from the lack of resources. In combination with an ill-designed infrastructure, this has resulted in disparate geographic inequities. For instance, as of 2005 there were only approximately 24,000 lawyers practicing in the twelve Western (poorer) provinces and autonomous regions of China, resulting in an average of one lawyer serving 20,000 people. As many as 206 Chinese counties did not have a single lawyer. Finally, the 200 million yuan in annual funding for legal aid must be considered in light of China's large population: it comes to a mere 3.22 yuan of spending per capita.⁹⁸

4.3 Using Information to Strengthen the Support Structure

There is obviously room for improvement by the government in strengthening the existing support structure in China. It could allocate more resources to legal aid. It could allow NGOs to operate freely throughout the country. It could ease the controls exercised on the media. However, each of these solutions contradicts essential policy and ideological decisions made by the CCP that are unlikely to change for environmental reasons alone.

90 These cases include the Shenyang 'Liu Yong case', the 'BMW case', and Hunan's Jiahe County 'Violent Demolition case'. Cai, *id.* and Benjamin L. Liebman, 'Watchdog or Demagogue? The Media in the Chinese Legal System', 105 *Colum. L. Rev.* 1 (2005).

91 See Liebman, *id.* at 7.

92 *Id.* at 41.

93 *Id.* at 34.

94 *Id.* at 33-34.

95 See Luke W. Cole, 'Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law', 19 *Ecology Law Quarterly* 619 (1992).

96 See *Regulation on Legal Aid*, Ministry of Justice, the People's Republic of China, Art. 3, available at http://www.legalinfo.gov.cn/english/LegalAid/legalaid2_1.htm.

97 See Fu, note 76 above, at 4.

98 *Id.* at 5.

An alternative need not be politically sensitive. An example can be taken from a regulatory strategy that has achieved unexpected success in the United States: the Toxics Release Inventory (TRI) implemented by the Environmental Protection Agency (EPA). Under the TRI program, manufacturing firms of a certain size are required to report their annual emissions of 581 chemicals, which are compiled by the EPA and made available in a public database.⁹⁹ Despite the fact that there is little regulation and relaxed compliance, both manufacturers and environmentalists acknowledge the remarkable success of the program.¹⁰⁰ The TRI has been described as having ‘dramatically outperformed all other EPA regulations’ by reducing overall toxics emissions by over 45 per cent, and at the fraction of the cost of other programs.¹⁰¹

The reason for the TRI’s success lies in its ability to mobilise civil society. Since the database is open to the public, many journalists and environmentalists access the data to identify the worst polluters. ‘Blacklists’ are formed, comparing manufacturers with each other; with this information citizens can also evaluate the performance of companies in their communities. Whether through pressure by community groups or by negative effects to reputation alone, once this information is readily available many manufacturers are induced to continually improve their performance lest they be blacklisted as a worst offender for a given year.¹⁰²

Of course, one cannot expect that a scheme that works in the US can be simply transplanted into China with similar success; due to a long experience with litigation, Americans may be more inclined to defend their rights. However, the TRI is still instructive in thinking about how China could

improve its own support structure. By disseminating information throughout the public, ordinary citizens are empowered to take action about their own environment. Individuals who discover they are living in the most heavily polluted area may be mobilised to do more than they would have previously. Group solidarity can be strengthened in communities that discover they are affected by the same polluters. Media attention can be focused more efficiently on industrial offenders.

This information-based scheme could mitigate the restrictions that government controls place on information gathering by NGOs and the media. It may also alleviate the problems with EPB enforcement by empowering citizens to go to court with disputes that would otherwise not have been addressed by the local bureau. A public information database could help well-intentioned EPBs to enforce regulations; it further makes them more accountable to the public and SEPA, who can now measure EPB activity against database information.

4.4 Recent Efforts: EIAs and the China Pollution Source Census

With respect to enabling public participation, two recent initiatives by the Chinese government are worth noting: guidelines for Environmental Impact Assessments (EIAs) and the China Pollution Source Census.

Though EIAs have existed in China since the 1970s, prior to the EIAL in 2002 the role of the public was effectively absent from the process.¹⁰³ As with other laws, the EIAL was formulated in overly ambiguous terms, so in 2006 SEPA released provisional guidelines to clarify and strengthen the process for soliciting public opinion for plans and projects that require Environmental Impact Reports (EIRs).¹⁰⁴

⁹⁹ ‘TRI Chemicals’, *U.S. Environmental Protection Agency*, available at <http://www.epa.gov/tri/chemical/index.htm>.

¹⁰⁰ The EPA inspects only 3 per cent of firms a year; further, data is self-reported and based on industry estimates rather than actual measured emissions. A. Fung and D. O’Rourke, ‘Reinventing Environmental Regulation from the Grassroots Up: Explaining and Expanding the Success of the Toxics Release Inventory’, 25(2) *Env. Management* 115, 116 (2000).

¹⁰¹ *Id.*

¹⁰² *Id.* at 120.

¹⁰³ Jesse L. Moorman and Zhang Ge, ‘Promoting and Strengthening Public Participation in China’s Environmental Impact Assessment Process: Comparing China’s EIA Law and U.S. NEPA’, 8 *Vt. J. Envtl. L.* 281, 282 (2007).

¹⁰⁴ *Id.* at 304. See also Sun Xiaohua, ‘Public to help assess impact on environment’, *China Daily*, 23 February 2006, available at [China Daily](http://www.chinadaily.com.cn/english/doc/2006-02/23/content_523022.htm) http://www.chinadaily.com.cn/english/doc/2006-02/23/content_523022.htm.

These guidelines state that details of a project or plan subject to an EIA must be made public within fifteen days of commencing EIA investigations. Once a draft EIA document has been finalised, the investigating organisation must publish notice of the availability of EIA information and solicit suggestions from the public prior to submitting it for approval; public comments may be solicited through questionnaires, expert consultations, workshops, debates and hearings.¹⁰⁵

Although welcome, the strengthened EIA process is not centralised—and without that critical feature it is likely to be insufficient to mobilise civil society. The advantage of a public and centralised database is the ease of comparing polluting firms, whether across localities or across industries. If EIAs across the country could be parsed into comparable data and were accessible in a single place, this could do much for improving China's support structure. Unfortunately, the enforcement problem seems to be affecting EIAs as well; not even all the biggest projects appear to be soliciting public participation, despite the new guidelines.¹⁰⁶

A more promising initiative, the China Pollution Source Census (CPSC), was started by SEPA in February 2008 to address the lack of trustworthy statistics on pollution sources across the country. Factories, farms, and other polluters must provide detailed information on how much and what kind of pollutants they discharge and/or treat. To encourage truthful reporting, the government is offering immunity from fines and prosecution for discharges; furthermore, results of the census will not be linked to the evaluation of local administrations.¹⁰⁷

The primary aim of the CPSC is for SEPA to assess the distribution of pollution sources across the country, in order to better formulate policy recommendations, improve supervision measures,

and address prominent problems.¹⁰⁸ For this purpose an office has been installed in each province, autonomous region and municipality to manage the CPSC.¹⁰⁹ Such comprehensive information will no doubt be valuable to the central government, but at present it is unclear how useful it will be to civil society; this will depend on the extent to which census findings will be made available to the public. If widely accessible it will aid in the mobilisation of civil society, since Chinese citizens appear to be increasingly willing to protest against projects that threaten their environment: in 2007, ten thousand people turned out to demonstrate against a planned chemical plant in the city of Xiamen, and earlier this year hundreds of Shanghainese protested against a proposed extension to the maglev train, worried about health risks.¹¹⁰ The CPSC has thus the potential to be a valuable information resource for citizens, but its full impact will not be seen until the first census is published in 2009.¹¹¹

5 CONCLUSION

The gap between law and practice in combating pollution in China can be explained by legislative, organisational and financial problems that prevent the implementation of the goals set out in anti-pollution laws. Legislation is too vaguely worded to be useful in creating enforceable rights and obligations. There is also a considerable gap between policies promulgated by SEPA and implementation by EPBs. The funding structure of EPBs makes them beholden to local governments, which are in turn dependent on the biggest industrial actors in the

¹⁰⁵ *Id.* at 306.

¹⁰⁶ See Pallavi Aiyar, 'China: Another dammed gorge', *Asia Times Online*, 3 June 2006, available at <http://www.atimes.com/atimes/China/HF03Ad01.html>.

¹⁰⁷ 'China's 1st nationwide pollution census to start in February', *Embassy of the PRC in the USA*, 4 January 2008, available at <http://www.china-embassy.org/eng/xw/t396330.htm> [hereafter Embassy News].

¹⁰⁸ See 'The State Council Holds the Teleconference on the First China Pollution Source Census' (7 January 2008), available at http://english.sepa.gov.cn/News_service/news_release/200801/t20080124_116772.htm.

¹⁰⁹ See Embassy News, note 108 above.

¹¹⁰ 'A large black cloud', *The Economist*, 13 March 2008, available at http://www.economist.com/surveys/displaystory.cfm?story_id=10795813.

¹¹¹ Michael Bristow, 'China to log its worst polluters', *BBC News*, 29 February 2008, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7269149.stm>.

locality (often also the biggest polluters) for economic development and jobs. EPBs cooperate with local manufacturers—even ensuring they are not shut down despite discharge violations—to guarantee their own survival. Although this can be superficially blamed on a lack of resources, it stems more from the design of government budget and tax structures; hence an improvement in implementation depends more on this restructuring, and not simply on additional funds.

One way to get around the inadequacies of government agencies is to allow citizens to bring their own actions in enforcing the law. But disputes do not arrive in courts by themselves; it greatly depends on the will of individuals to actively defend their rights. This requires a strong support structure to provide the necessary resources for public participation: information and funding. In China, these are furnished through the work of NGOs, the media and legal aid centres; however, all of these are greatly limited by government intervention. One potential initiative for increasing information flows is the establishment of a public emissions database similar to the TRI program that was hugely successful in the US. The new China Pollution Source Census has the potential to provoke similar results, but until it is published it is too early to determine its impact.

There are shortcomings with China's current environmental regulation schemes, and much room for improvement on the side of the government. Ultimately, the gap between the goals set out in legislation and what is practised on the ground can be best reconciled with a fully developed system of governance based on the rule of law. There are other obstacles impeding the development of China's legal system that were not discussed here, not least of which is the lack of a solidly independent judiciary.¹¹² But the CCP's increasing commitment

to environmental protection gives hope for pollution victims, along with what appears to be growing rights consciousness in China. As one Chinese environmental activist stated optimistically, '[s]ome people have started to think it is possible to try and protect themselves with the law'.¹¹³ Perhaps the best indicator for the rule of law is when all of China's citizens are emboldened to think this way.

112 Courts suffer the same funding problems as EPBs, and are thus also heavily influenced by local economic, social and political interests. See e.g., Hualing Fu, 'Putting China's Judiciary into Perspective: Is It Independent, Competent, and Fair?', in Erik G. Jensen and Thomas C. Heller eds, *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* 193 (Stanford: Stanford University Press, 2003).

113 Eric W. Orts, 'Environmental Law with Chinese Characteristics' 11 *Wm. & Mary Bill Rts. J.* 545, 561 (2003).

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