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Public Interest and Private Actors

How Chinese CSOs have changed environmental law enforcement

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Six years after Chinese civil society organizations (CSOs) were empowered to participate in environmental law enforcement by filing public interest litigation, they have proven the value of their role. Although the number of claims they file are few, CSOs are energizing government enforcement and creatively expanding the types of claims and remedies being sought against polluters.

For years the Chinese government relied almost entirely on official regulatory actions, including filing civil and criminal suits, to enforce environmental laws. But the state ended its own monopoly on the enforcement of environmental law in 2015 with the implementation of a revised Civil Procedure Law and revised Environmental Protection Law. These two laws authorized environmental CSOs to bring enforcement actions against environmental polluters in the form of environmental public interest litigation (EPIL). For the first time, non-state actors were legally entitled to access courts and support existing government enforcement efforts.

The 2015 law initially granted CSOs the legal standing to bring lawsuits against both commercial entities and government agencies, although their standing for the latter was withdrawn later. It eliminated the requirement for CSO plaintiffs to prove a direct interest in the case so that they could represent broader social needs and protect the public interest. It also authorized the government's prosecutorial agencies, known as procuratorates, to file public interest litigation against both commercial and government actors.

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I have studied the evolution of EPIL and litigation filed by CSOs during the period from 2015-2018, and analyzed the merits and risks of private enforcement, as well as some of its preliminary effects on environmental law enforcement, innovation of the legal system, and environmental governance generally. I find that EPIL has catalyzed the re-establishment of the oversight function of public prosecutors and increased their

zealousness in enforcing environmental laws. Moreover, in the CSO-filed cases, private actors have acted as litigation laboratories by identifying new areas for environmental protection, developing novel legal theories, pursuing new types of legal remedies, and pushing courts to accept more accurate and scientific techniques to calculate environmental damages methodologies.

First, public prosecutors have long had formal oversight responsibilities over other state agencies. However, this function ceased from about 1960 as the Chinese legal system disintegrated in the period of turmoil, and was not fully restored even after the country returned to stability. With EPIL, this responsibility of public prosecutors was reinstated: the amendment of the Civil Procedure Law (Article 55) and the Administrative Procedure Law (Article 25) effective from July 2017 gave exclusive standing to public prosecutors to handle administrative litigation in which government agencies are defendants. Public prosecutors are now charged with ensuring that local government agencies are held accountable relative to their public mandates.

The reinstated supervisory role of public prosecutors can be seen in the statistics of public interest cases. During the second half of 2017, public prosecutors filed 130 administrative litigations (including 52 environmental administrative cases). This number increased to 587 administrative litigations (including 376 environmental cases) in 2018. In 2019, public prosecutors filed 2,309 environmental lawsuits (including 355 administrative cases) and in 2020, they filed 3,454 environmental public-interest lawsuits of all kinds. It is likely that EPIL, and the involvement of private actors in such litigation, boosted prosecutorial engagement with environmental law enforcement.

Second, in the first six years under EPIL, CSOs have brought innovative cases that are diverse and novel. For instance, lawsuits brought by NGOs to protect a desert (the Tenggar Desert Case) and biodiversity (the Green Peafowl Case) reflect a different environmental perspective from that of government agencies. These two cases sought to protect environmental public goods that had not been prioritized in previous lawsuits because their damage had less direct impact on humans and their activities (open desert without inhabitants and a habitat for endangered species, respectively). Such lawsuits have redirected enforcement to better align with societal and environmental interests.

CSO plaintiffs also introduce and advocate for remedies to compensate environmental damage by polluters and pay for ecosystem services. The value of a public-owned ecological environment was not fully recognized or measured under public enforcement. For instance, in the Tenggar Desert EPIL case mentioned above, the court supported the CSO plaintiff's claim and ordered the defendant to pay for repairing the damaged environment and future protection actions amounting to almost 100

times the criminal penalty that it had already been assessed for polluting the desert. Furthermore, CSO-filed cases stimulate the courts to support the development and application of new calculation methodologies to define environmental damage and use new technical standards for environmental restoration. Those cases also require more transparency and monitoring during the restoration process. This helps pioneer and test new approaches for use in future environmental cases.

Some EPIL claims filed by CSOs have requested injunctive orders from the courts to stop development projects before they cause irreversible environmental harms. Such cases are new to China's legal system and emphasize ex-ante efforts compared with a more conventional ex-post approach for environmental cases.

Uncertainties and risks lie ahead for CSO engagement in EPIL. Relatively few CSOs are eligible to bring such claims under the law, and even fewer have filed claims. The law requires that plaintiff CSOs must have been formally registered with government agencies at a certain level for more than five years. Theoretically, more than 7,000 organizations are eligible to be EPIL plaintiffs, yet the number that has gone to court is only in the double-digits. CSOs filed only 103 cases in 2020, a tiny number considering the vast range of types of environmental issues spread all across the country. What has constrained NGOs from participating in EPIL? More research is needed to understand the roles of external factors such as the general policy environment or competition for legal information resources with public actors, as well as internal organizational capacity and resource limits.

The six-year period of EPIL is too short to reach final conclusions about private environmental law enforcement in China. From experience, we learn that private actors may have triggered more zealous public law enforcement and can bring in new legal theories, remedies, and methods to the courts. We are left with further questions for investigation. For example, does private enforcement of environmental laws support cooperation and complementarity with public litigants or lead to competition and co-optation? The effectiveness of private enforcement also deserves more study: given the novelty that private actors bring into the law enforcement process, does their litigation lead to more positive environmental outcomes? The road ahead for private actors in public interest litigation is by no means linear, but CSOs have paved a way into China's environmental law enforcement with their societal role and function, and those efforts will not end anytime soon.

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Watch the recording of Hao Zhuang's Sept. 22, 2021 virtual talk at USALI, Public Interest and

Private Actors: Environmental Public Interest Litigation in China

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