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# **Environmental Public Interest Litigation: When will it Flourish in China?**

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## **I. Environmental Public Interest Litigation: Current Situation in China**

Research on the issues of public interest litigation started during the 1990s in China. Before that, as Environmental Law developed in China, some scholars had introduced citizen suits, which are popular in American environmental law, in their translation book. For example, a large portion of *Environmental Law* (1986) introduced cases of American citizen suits, the issues of standing, jurisdiction of the disputes, standards of judicial review and methods of remedies etc. However, since there were no traces of western law tradition in Chinese legal history, the legislations on the civil and administrative litigation were still under construction and the situation of the national legal system poor; consequently research on environmental public interest litigation in western countries was not appreciated in legal profession. Thus litigation based on public interest is still viewed as a Utopian doctrine only in text books that teach environmental law, especially in the compositions that introduce American law execution.

Since the 1990s, as the issue of *Administrative Procedural Law* (April, 1989) and emendation of the *Amendment to Civil Procedural Law* (April, 1991), fundamental legal systems in China have been consummated. Then, the *Administrative Reconsideration Law* (April, 1999) was enacted in order to prevent and redress illegal or inappropriate concrete administrative action, to protect the citizens,

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artificial person and other organizations' rights; the *Legislation Law* (March, 2000) was enacted in order to regulate legislation activities (including administrative regulations enacted by the State Council and its departments).

Since the 1990s, local governments made illegal programming, authorized illegitimate sanctions, and inadequately performed legal supervision and responsibilities, in order to pursue huge growth in GDP. Such actions resulted in various environmental damages. Subsequently, the rights of citizens were seriously infringed and administrative cases against illegal approval and nonfeasance quickly increased.

In the Economic Law area, jurisprudential discussions on public interest and economic public interest litigation (consumer right protection, labor right protection, anti-monopoly litigation and anti-unfair competition) emerged. Besides, Jurisprudence scholars often discuss questions about public interest.

Chinese scholars' opinions on public interest litigation differ, due to the vagueness of the concept. For example, there are: theory of Administrative Litigation, theory of Civil Litigation, theory of Civil or Administrative Public Prosecution, and theory of Criminal Litigation on the recognition of the nature of public interest litigation. As most environmental litigations are limited to civil damage litigation area, legal profession, especially procedural law, paid little attention to Environmental Law research and the discussion on public interest litigation is limited to Environmental Law area.

## **II. Analyzing the Existing Problems of Environmental Public Interest Litigation from Several Typical Environmental Public Interest Cases**

### *1. Three case studies about lawsuit on Environmental Public Interest*

At the end of 2000, a few citizens in Qingdao City filed the first administrative lawsuit which had the characters of environmental public interest litigation in China. They acclaimed that the Programming Bureau in Qingdao unjustly authorized the construction of residential communities in urban music square, and demolished the view seen from the square and the beach.

In October, 2001, two citizens in Nanjing City brought forward an administrative

litigation which had the characters of environmental public interest litigation. They claimed that the Programming Bureau in Nanjing authorized the construction of a sightseeing stand in Zijin Mountain, a famous place of interest, and demolished the natural landscape. In the former case, the court decided that the plaintiff had no standing. In the latter case, the court decided that it is not under the jurisdiction of the court since it did not have significant impact on its jurisdictional area.

Although the judgments of the courts are not satisfying, more and more people gradually realized the intimate correlation between environmental pollution, national damage, and poor supervision, improper programming and illegal sanctions. In consequence, there is more and more legal research in progress centering on the issue of environmental public interest litigation. The State Council clearly stated that the social organizations should play a part in the movement. The Council encouraged impeachment and reporting of various illegal behaviors against the environment, and promoted environmental public interest litigation in *Decisions on the Implementation of Scientific Outlook on Development and Promotion of Environmental Protection* issued on December 3<sup>rd</sup>, 2005.

In Dec. 2005, based on the serious water pollution in Songhuajiang River caused by the explosion in the benzene factory of China Petroleum & Chemical Corporation, Jilin Branch, three law professors including myself and three graduate students at Peking University Law School filed an environmental public interest civil litigation against PetroChina Company Limited etc in the name of Songhuajiang River, sturgeons, and the Sun Island, to the High Court of Heilongjiang Province. The plaintiff requested the defendant to pay the damages of RMB 10 billion in order to set up a pollution abatement fund for Songhuajiang River, which would be used to recover the biological balance in Songhuajiang River, protect the living right of sturgeons, right to environmental cleanliness of Songhuajiang River and Sun Island and the right of landscape appreciation and wonderful imagination for the national persons including the plaintiffs. However, the court declined to accept the case and the reason was that “the water pollution in Songhuajiang River has no connection with the plaintiffs and it was up to the State Council to make any decision.”

In fact, Barriers on public interest litigation practice exist in other Civil Law tradition countries. For example, in Japan, which have a good environmental litigation system, administrative litigation may include some environmental public interest litigations, many environmental public interest litigation, which is different from ordinary public interest litigation in nature and content, cannot be put into

practice because of theoretical barriers. The barriers are formed by juristic theory and institutional arrangement of public interest litigation, which is different from China.

In China, as the need for social stabilization grows, there are limitations in the existing litigation regulations about public interest litigation and group suit. Recently, as the socialistic economy develops and social conflict spread due to insufficient supervision, public interest litigation is appearing in the form of ordinary administrative litigation or civil suits. Environmental public interest litigation is rare.

## *2. The Systematic and Legal Barriers of Implementing Environmental Public Interest Litigation System in China*

### *A. The barriers caused by the political system and systematic imperfection*

China implements a socialist system, which is led by the China Communist Party. The construction system of China Communist Party and the agency system of national power are almost parallel. Theoretically speaking, the advantage of such a system is to ensure timely implementation of the Party's policy in legislation, judicature and administration. The disadvantage is that the Party's good wills and objectives are hard to realize in the areas which have been arranged by the legal system. However, in the areas in that are yet to be provided by the legal system, the implementation of the policies made by the Communist Party depends on the individual or group wisdom of the specific official (specifically referring to the people in charge of the legislative, judicial and administrative agencies).

Over the past twenty years, the performance of the local governments and officials have been mainly decided according to the GDP increase and social stability under the instruction of the development policy, which considers the economical construction as a central part of growth. Although the political goals accord with the general will of the public, the conflicts in the implementation of policies always have different results, due to different understandings of individuals or groups.

For example, a large-scale state-owned enterprise can both be an important source of tax locally or nationally but at the same time it can also be a main cause of pollution, engendering serious environmental pollution and ecological destruction in the local area. Most local governments' major officials (they are always the core members of the local party organizations, and thus the party's political power and administrative power are compounded) put up with such behaviors, in order to

pursue GPA's increase. This has resulted in loss of local environmental interest and damage to the people's health and property.

The personnel and finance of local environmental protection agencies and judicial agencies are dominated by local party agencies, which is the main reason why legal responsibilities of the environmental protection agencies and judicial agencies are interfered. Consequently, it is the attitude and behavior of the local party officials that lead to lack of supervision and insignificant judicial protection. Generally, the policy of the local government portrays the will of some officials and plays the role of a mouthpiece for related interest groups. In such system, incomplete legal system has been the "Jingu Stick" held by local officials: when "rule by law" is needed, they evaded it with an unsubstantial excuse such as consideration of "the situation of China," even though such considerations are not necessary in implementing the law.

These flaws of the Chinese political system and mechanisms directly indicate that there is no practical remedy available when there is ubiquitous disinterest among the public concerning environmental public interest. For example, when the public complain to the government or the supervision agency about environmental pollution and damage, in words, the government and its administrative agency in charge usually agree to resolve the issue. However, due to the reasons mentioned above, the issue will most likely not be resolved. Then the public may turn to litigation, but the court may decline to accept the case for various reasons. Sometimes it accepts the case, but it won't hear it, or it won't make a decision after the hearing, or the decision won't be implemented. If the unsatisfied public holds a group protest, the local government will penalize them in the name of disturbing social order or destroying social stability.

#### B. The barriers caused by the legislative system

The legislation of public interest litigation has long been advocated by legal scholars and the central government in various documents. The system of environmental public interest litigation is a double-edged sword to the existing political system. It will cause the existing decision-making system to waver and raise costs to the administrative and judicial agencies while protecting citizens' basic rights and environmental interest. So improving the legislation of the litigation system regarding public interest is a difficult task.

The concerns of the legislators are as follows: first, since the establishment of

public interest litigation system will breach the restrictions of standing, it may cause a boom of complaints; second, there is no persuasive opinion on the definition and scope of public interest; third, due to the limitation of the research on the issues of litigation interest, the interest of public interest litigation is not clear; fourth, there is not enough research on the practical difficulties and problems of public interest litigation in judicial practice, so we can not make thorough systematic arrangements and guarantees; fifth, the status and function of the NGOs are limited in China; sixth, the construction of rule of law in China is still in a very low level and thus the establishment of public interest litigation system before the establishment of many fundamental national laws may lead to legislative and practical confusion.

Also, the opinions of the national judicial agencies (specifically referring to the Supreme Court and the Supreme Procuratorate) differ. The Supreme Court is concerned that the establishment of the public interest litigation system will increase the number of cases and raise work pressure to levels of people's courts. Their position is based on a conservative outlook on the system. On the other hand, the Supreme Procuratorate advocates the establishment of the public interest litigation system. Moreover, it advises that we should strengthen the national public prosecution system, which is represented by the procuratorate.

Since the matter of legislation relate to different social interests, the laws in China will result in consequences such as coming in conflict with the interests of legislators sometimes. Some consequences result from the balance of different departments' interest, but some from justice yielding to unrighteousness.

Take the legislations of environmental protection for example. Firstly, there are a lot of legal systems in conflict with legal principles among the legal provisions of environmental protection. For instance, the *Environmental Protection Law* (1989) provides that if the enterprises pay the fee, it is not illegal to dump the waste over the standards; the *Environmental Impact Assessment Law* (2002) provides that it is not illegal if the company takes the environmental impact assessment after the construction project is complete.

Secondly, although the laws assign responsibilities to the government, they don't provide legal liability that must be activated when the government doesn't perform these responsibilities. Consequently, the laws are not complied by the local government. For example, the *Environmental Protection Law* provides that the local governments are responsible for the environmental quality in their jurisdictional area. Yet, during the past twenty years, the governments have not carried out their

responsibilities. Neither have they acknowledged their responsibility for environmental deterioration; the *Environmental Impact Assessment Law* provides that the programming made by the government and its administrative departments in charge should be assessed. However, the programming made by the government and its administrative departments have rarely been assessed. So it is not strange that the first-year objective of consumption and emission reduction in the *Eleventh Five-Year Plan* is impossible to achieve.

Local governments cooperate frequently with the industry and when interests conflict, they often stand up for the benefit of the industry instead of the public. Moreover, the government or its administrative departments usually object to admitting the liabilities of government officials in the legislative Procedure. As a result, illegal actions or nonfeasance by the administrative are often neglected.

Thirdly, regarding the procedure of making special environmental protection laws, the common practice is to entitle the administrative departments in charge of the State Council to draft the law. The problem is that the administrative agencies focus on strengthening the implementation of administrative laws, instead of the methods and measures of resolving environment disputes by judicial methods. Consequently, besides the outbreak of the provisions of traditional law, it is already difficult to provide for the articles of citizen suit or environmental public interest litigation under the legislative procedure controlled by the administrative department.

### C. barriers caused by the judicial system

On account of the existing *Administrative Procedural Law* and *Civil Procedural Law*, since both present such strict restrictions on the issue of standing, there is no legal basis for environmental public interest litigation in China at the present. For example, Article 41 of *Administrative Procedural Law* exhibits the conditions of raising a lawsuit: (a) the plaintiff should be the citizens, legal persons or other organizations who consider that the concrete administrative action violates their legal right and interest; (b) there is a specific defendant; (c) there is concrete claim and fact; (d) it's within the scope of accepting cases of the people's court and under the jurisdiction of the court which accepted the case.

However, citizens can raise administrative environmental public interest litigation by third-party litigation or revocation litigation in administrative litigation when implementing the judicial interpretation of the *Administrative Litigation Law*.

According to Article 12 of *The Interpretation of Several Issues on the Implementation of Administrative Procedural Law of P.R. China* issued by the Supreme Court in November, 1999, the citizens, legal persons or other organizations that have legal interest on the concrete administrative action and are unsatisfied with the action could file administrative litigation. Item 4 of Article 13 provides that the citizens, legal persons or other organizations that have legal interest on the dismissal or modification of a concrete administrative action could file administrative litigation according to the law.

Article 108 of the *Civil Procedural Law* provides that the conditions of raising a lawsuit includes: (a) the plaintiff should be the citizen, legal person and other organizations who have direct interest on the case; (b) there is a specific defendant; (c) there are concrete claim, fact and causes; (d) it's within the scope of accepting cases of the people's court and under the jurisdiction of the court which accepted the case. Therefore, even when one is attempting to raise a civil environmental public interest litigation about damage on environmental interest, the conditions do not accord with the regulations specified in the *Civil Procedural Law*.

Although the conditions of raising a lawsuit are strictly limited by the *Administrative Procedural Law* and the *Civil Procedural Law* in China, some plaintiffs who satisfy the conditions can raise environmental administrative or civil litigation under strict limitations.

Since the end of the 20<sup>th</sup> century, social conflicts became prominent along the process of development in China, resulting in an increase of major cases appealed to the court. In order to protect social stability and reduce adverse social impacts from several significant cases, the Supreme Court issued the *Notice on the Issue of the People's Court Accepting Joint Litigation*. The notice interprets the provisions on joint litigation and jurisdiction in *Civil Procedural Law* in the following two aspects: first of all, the court can accept the cases separately if one party or both parties are composed by many people; and second, the cases which have significant impact in the jurisdictional area of the high court should be accepted by the intermediate court.

Actually, the notice issued by the Supreme Court sets two restrictions on environmental litigation that has the nature of a joint litigation: firstly, it advises the local courts to separate the joint civil litigation raised by the victims of the environmental pollution damage caused by reasons that are alike, which not only increases the economical burden of the plaintiff, but also breaks the legislative intention of joint litigation provided in *Civil Procedural Law*; secondly, considering



that the second trial is also the final trial in Chinese litigation law, the provisions in the notice actually appoints the intermediate court to accept only the cases which might be accepted by the high court in the first trial and thus it eliminates the possibility of other cases being appealed to the Supreme Court.

Directed by this notice, environmental pollution joint litigations are “separately accepted”. 1721 Farmers of Pingnan County, Fujian Province v. Fujian Province Rongping Chemical Limited Company, which was chosen as one of “2005 China Ten Most Influential Litigations,” is a representative case. The case was a joint litigation, but was separated to several cases by the court.

Besides, some local courts at the provincial level have some inner regulations to limit the “new-type, sensitive and puzzling” or “broad influential, strongly sensitive and socially concerned.” For example, *The Opinions on the Acceptance of New-type, Sensitive, puzzling Cases at the High People’s Court in Shandong Province (trial implementation)* provides “the acceptance of new-type, sensitive and puzzling cases should comply with the principles of considerable acceptance, timely establishment of the case, cooperation among different levels of courts, and make overall plans by taking all factors into consideration.” “The acceptance of the new-type, sensitive and puzzling cases should be decided by taking a thorough view of the whole situation. The court should be sensitive and have the wisdom to look ahead, in order to avoid the judicial difficulty caused by the improper acceptance of the cases.” “The new-type, sensitive and puzzling cases should be considered separately in the aspects of legal background, social background and adaptability of the court system.” Another example is Article 41 of *The Provisions on Strengthening the Administration of Trial Time Limit by the High Court in Beijing (trial implementation)*, which provides: “cases which have significant impact around the city, the country or the world, and politically sensitive cases and group dispute cases should be reported to the high court.”

The inner provisions of the court actually restricted or eliminated the legal rights of the parties to file cases. In conclusion, the judicial interpretations and inner provisions are also capable of seriously breaching the laws or fundamental legal principles.

Under the context of the judicial interpretations mentioned above, it is not unexpected that many environmental public interest cases are denied by the courts. Take the Songhuajiang River Case for example. Actually, article 112 of *Civil Procedural Law* provides: “When a people’s court receives a motion of complaint or

an oral complaint and finds that the complaint meets the requirements of a civil lawsuit after reviewing the complaint, the court shall accept the case within seven days and notify the parties involved; if the complaint does not meet the requirements of a civil lawsuit, the court shall, within seven days, make a ruling to reject the complaint.” Even if the case was accepted, it will be rejected for not meeting the requirements of a civil lawsuit according to article 112 of the *Civil Procedural Law*. Most of the time, the *Civil Procedural Law* was fully respected and implemented. Unfortunately, the *High People’s Court in Heilongjiang Province* declined to accept the case without legal basis.

### **III. Conclusion: Hopes for Environmental Public Interest Litigation to Flourish in China**

The legislative agencies in China are working on the amendments for the *Administrative Procedural Law* and *Civil Procedural Law* at the present. For example, in the draft amendment of the *Civil Procedural Law* proposed by legal scholars, the public interest litigation system is established as a content of the revised version. Additionally, the draft amendment plans to change the reviewing system of filing cases to a registering system of filing cases, which means that the courts cannot refuse to accept the complaints filed by the public. In addition, when the victims do not file the litigation or it is burdensome to confirm the victims, the people’s procuratorate, other government agencies, social organizations and faculty in state-owned enterprises, in order to protect the public interest, can file civil litigation against the infringer to stop the tort and ask for remedies for the victims.

In my opinion, in order to reform the existing administrative and civil litigation system and establish environmental public interest litigation system in China, there are more issues needed to be specified in legislations such as the following.

First of all, when amending the *Administrative Procedural Law* and the *Civil Procedural Law*, we should add the principle articles of the environmental public interest litigation system to the section of general principles, amend the provisions of standing, and expand the plaintiff’s standing. Environmental public interest litigation that can be raised by the procuratorate should be established. Besides, the law should provide citizens, juridical person or other organizations with an appropriate atmosphere in which each can raise environmental public interest litigation when

they think that concrete administrative action has infringed the public's environmental interest. For example, the law can provide that "when environmental public interest is or may be infringed, procuratorates, social groups, or citizens that have conflicts of interest can raise a lawsuit."

Since the U.S.A established the Citizen Suit System, cases did not explode in China, despite the worries of the legislators. Therefore, it would be helpful to take the example of the statistical data provided by the US Judicial Bureau. In the federal level, the number of citizens suits raised according to the *Clean Water Act* was 43 in 1996, 53 in 1997, and 49 in 1998. The number of citizen suits raised according to the *Clean Air Act* was 3 in 1995, 7 in 1996, 4 in 1997, and 2 in 1998. I think that in order to avoid the sudden increase of cases, a provision can be added while amending the *Administrative Procedural Law*. A possible solution can be reached in this way: if the interested person considers that the concrete administrative action of the administrative agency violated or might violate the environmental public interest, he or she should first turn to the administrative agencies in paper. Afterwards, when there is no concrete reply during the given legal period, then he or she should file the administrative litigation.

In order for this system to work, we should specify the burden-shifting principle between the plaintiff and the defendant on the issue of evidence in environmental public interest litigation in the *Administrative Procedural Law* and the *Civil Procedural Law*, or the *Civil Evidence Law* enacted in the future. In the environmental public interest litigation, the plaintiff only has the obligation to provide the prima facie evidence that the environmental public presently suffers or may suffer from the infraction, in order to facilitate the environmental public interest litigation.

Secondly, when making or amending environmental laws in the future, we should add special provisions on environmental public interest litigation. In related material laws, besides the provisions on the contents of citizens' environmental rights (such as clean air right, tobacco detesting right, clean water right, peace right, sunlight right, ventilation right, overlooking right, viewing right and other rights), they should also provide the related procedural contents for various environmental tort cases, in order to be in coincidence with the amended provisions on standing in administrative and Civil Procedural Laws.

What's more, we should externalize the provisions in the existing environmental protection laws on the citizens' right to impeach and sue the enterprises or

individuals polluting and demolishing the environment and provide special basis for the establishment of the citizens' standing in environmental public interest litigation. Since the environmental public interest litigation is mainly for the well being of the public, the court fee for the plaintiff should be reduced as much as possible. In addition, if the defendant loses in the environmental public interest civil litigation, the defendant should be required to pay the court fee and attorney fee and other costs brought to the plaintiff because of the litigation.

Finally, we should add protective measures for environmental public interest litigation. For example, provide grounds for the court to issue injunctions on environmental public interest torts according to its own responsibilities, or permit plaintiffs to apply for it themselves.

KEY WORDS: Environmental Public Interest Litigation, Barriers Cause, Legislation, Judicature