

Integration of Public and Private Law in the New Era—The Green Principle of the Chinese Civil Code

ZHENG Jun

University of International Business and Economics, Beijing, China

To integrate regulatory policies into the civil code reflects the convergence of private law and public law, which is a common legislative phenomenon since the 20th century. The Green Principles in the Chinese Civil Code are essentially a typical example of the fusion of private law and public law. By applying public law instruments with regulatory overtones to the private law sphere, it upholds private rights in fair disputes while effectively responding to the environmental governance challenges faced in civil disputes. The legal provisions related to Green Principles have been gradually applied widely in Chinese judicial cases, but they have encountered many challenges. For example, the criteria for identifying Green Principles are very vague, how to integrate Green Principles well with the traditional basic principles of civil law, how to modify and improve other supporting legal provisions to play a supporting role, etc. It is of great significance to explore how to better play the role of Green Principles, and gradually explore a path of integrating public and private law governance in China's judicial practice.

Keywords: Green Principle, integration, public law, private law, environment protection

Introduction

The conventional idea of the division of public and private law inherited from Roman law prevailed in civil law countries after the 18th century. It has been accepted that the objectives and the regulating method are different between the public and private law. This division was reasonable due to the individual's primacy, absolute private rights, and party autonomy during the period of free competition. After the 20th century, with the transition from the era of free competition to the monopoly stage, the relationship between the state and economic activity has changed considerably. The government not only increasingly intervenes directly in economic activities, restricting the absolute and freedom of private rights, but also participates heavily in economic life, appearing directly as a civil subject. Thus, there is also a growing trend towards the publicization of private law and the privatization of public law (Lv, 2005). The Green Principle in China's Civil Code is the result of the publicization of private law and a typical example of the integration of public and private law in the new era.

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ZHENG Jun, Ph.D. candidate, School of Law, University of International Business and Economics, Beijing, China.

In modern law, although private law autonomy or freedom of contract is still a fundamental principle of civil law, it is no longer the situation it once was, and private law autonomy or freedom of contract is limited in many ways. This includes the regulation of transactions in public law. Some example comes as follows. In the field of civil law, the principle of honesty and good faith and the principle of public order and morality limit the autonomy of private law or freedom of contract, and the law directly provides that certain contract clauses are invalid (Liang, 1987).

The Green Principle of the Chinese Civil Code is the concrete embodiment of environmental protection in civil law.¹ Environmental issues arise directly and in large numbers in the field of private law, but that is a previously unregulated area of private law, which requires the use of public rule tools. It would be impossible to fundamentally solve environmental problems if some specific public law instruments to protect the environment do not reach into the private law sphere and regulate the behavior of civil subjects that is harmful to the environment. The penetration of public law instruments into the private law sphere has greatly contributed to the interpenetration and integration of public and private law, and environmental rights are the product of this change (Lv, 2005). The civil rights system is an open and evolving system, and there is no “threshold” barrier to the incorporation of environmental rights into civil law (Wang, 2016). The Civil Code, as is known an encyclopedia of social life, is an important basic law in Chinese legal system.

This article firstly introduces the Green Principle of the Chinese Civil Code in general, analyzes the background and reasons for the emergence of the Green principle, and points out that the emergence of the Green Principle in the Civil Code is an effective response to the needs of social development and helps to overcome the drawbacks of the separate governance models of public and private law in the social development process. Secondly, it introduces the specific application of the Green Principle in the Chinese Civil Code to judicial cases in China. While fully recognizing the positive role of the Green Principle, its scope of application and boundaries should also be clarified. Third, as a newly created basic principle of civil law in the Chinese Civil Code, scholars in China still have different views on its role. The relationship between the Green Principle and the traditional basic principles of civil law should be handled well, so that the Green Principle can function better within the statutory scope. The rule system of Green Principle in the Chinese Civil Code needs to be continuously improved in order to make the Civil Code work better in the new era.

Driving Forces to Green Chinese Civil Code

Eco-Debts as a Result of Fast Development in the Past Decades

Environmental deterioration and pollution has become one of the most significant issues encountered by Chinese society today. China’s fast economic growth over the past 40 years has resulted in irrecoverable damage to its natural environment (Jiang, Blazey, Wang, & Ashiabo, 2020). The 13th Five-Year Plan for Environmental Protection acknowledged major environmental concerns, including heavy pollution of the air, water, and soils, considerable ecological degradation, and high environment risks by industrial activities. For instance, 78.4% of

¹ The “Green Principles” discussed in this article include the “basic principles” in Article 9 of the General Provisions of the Civil Code and the legal provisions on “ecological protection of the environment” and “conservation of resources” in the various sub-chapters.

the cities failed to meet the air quality standards set by the Chinese Government (State Council, 2016). In some areas, heavy air pollution occurs frequently in winter. The number of days when air pollution reaches severe and above is high as a percentage of the time of the year.

The water pollution problem is serious. The level of safety and security of drinking water sources needs urgent improvement. Hazardous and poisonous chemicals have been unscrupulously emitted and discharged into the air and rivers from factories all over the country. Inappropriate disposal of manufacturing and domestic waste has contaminated the lands and water. Black smelly water bodies exist in large numbers in cities and villages. The problem of eutrophication in lakes and reservoirs remains prominent, and many rivers and lakes and other water bodies are still heavily polluted. The soil of arable land suffers from serious pollution. The problem of soil contamination on abandoned industrial and mining land is prominent.

As a consequence, extreme weather conditions, air pollution, acid rain, chemical residues, and excessive contents of heavy metals in foods and drinking water, have seriously endangered the health of individuals and undermined the quality of life of ordinary people. Moreover, many plants and animals are facing extinction resulting from the direct and indirect threats of legal activities, such as poaching and habitat destruction (Jiang et al., 2020). Greater awareness about such issues has given rise to public protests (Zhang & Mayer, 2017).

The World Bank in its Report 2030 on China (2012) warned the government that unless it moved to a green economy, the resulting environmental degradation and resource depletion would approach 10 percent of its GDP (World Bank, 2012). The Bank stated that quite apart from stimulating growth, green development would significantly improve the quality of China's economic growth so that less production and the use of fossil fuels would greatly reduce health issues from air and water pollution, water scarcity, and land subsidence.

It is well recognized that China's environment has suffered as a consequence of rapid economic development. As a result of the government realizing the serious consequences of the unsustainable development model, the situation has gradually improved. The importance of ecological civilization construction and the strategies for accelerating ecological progress were re-emphasized in the 19th CPCNC Report.

Eco-Civilization as a New Direction of Development

"Civilization" is the opposite of "barbarism" and "backwardness" and reflects the progress and development of human society and human nature (Kezo, 2005). It characterizes a progressive cultural form and an aggressive value choice. Eco-civilization is one of the basic forms of human civilization in modern society, and is another new civilization paradigm of human society after primitive civilization, agricultural civilization, and industrial civilization (Yu, 2005).

"Building an Eco-Civilization" was first proposed in the Report of the 17th Communist Party of China's National Congress (CPCNC) in 2007. In 2012, the report of the Third Plenary Meeting of the 18th Communist Party of China Central Committee (CPCCC) once again introduced the construction of ecological civilization and emphasized the importance of building ecological civilization. At the Third Plenary Meeting of the 18th Communist Party of China Central Committee (CPCCC), held in November 2013, a blueprint was published that focused on improving protection for ecosystems due to the drain environmental degradation was having on

China's GDP. "Decision of the CPC Central Committee on Several Major Issues of Comprehensively Deepening Reform" put forward clear requirements for the construction of ecological civilization, to establish a systematic and complete system of ecological civilization, and use institutional rules to protect the ecological environment, including the establishment of the strictest source protection mechanism, damage compensation rules, accountability system, improve environmental governance and ecological restoration mechanism, etc. (Wang, 2014).

Furthermore, in the 2018 Constitutional amendments relating to ecological civilization construction was added to paragraph 7 of the preamble and Article 89(6) of the PRC Constitution. This is the first time that ecological civilization construction has appeared in the PRC Constitution. In order to adapt changes in state policies regarding the environment and to facilitate the implementation of ecological construction, the restructure of ministries and commissions was initiated after the Third Plenary Meeting of the 19th CPCCC in early 2018. The restructure of the State Council, which included establishing the Ministry of Natural Resources (MNR) and the Ministry of Ecology and Environment (MEE), was instigated to integrate authorities in order to improve environmental governance (China Government Network, 2018). The corresponding institutional restructure was completed at local government levels during the following year. These changes did away with government departments and agencies engaged in overlapping responsibilities (China News, 2018). The MEE and MNR work closely with other government departments on various environmental governance programs and campaigns.

Article 9 of the General Provisions of the Civil Law 2017 explicitly states that "the parties to civil legal relations shall conduct civil activities contributing to the conservation of resources and protection of environment". This new principle, known as the Green Principle, has become one of the fundamental legal principles and guidelines included in all civil cases in China.

The Green Principle—A Case of the Integration of Public and Private Law

Origin and Development of the Green Principles

The Green Principle, also known as the Ecological Principle, refers to the basic guideline that civil law requires civil subjects to engage in civil activities that should be conducive to conserving resources, protecting the ecological environment, achieving a balance in the relationship between people and resources, and promoting harmony between people and the environment. This is the first time that China's civil law provides for the Green Principle and takes it as one of the basic principles of civil law, which is an important new rule (Yang & Li, 2020).

The first to propose the Green Principle of civil law was the Draft Green Civil Code, which was drafted by Professor Xu Guodong. The high tension between human and resources is a dilemma from which human society has not yet escaped. It is reflected in the opposition between the two elements of "person" and "property", which are the objects of civil law regulation. We can say that civil law is "green" if it alleviates the tension between the two elements with its various institutions. The opposite of civil law can be described as "yellow". It means that after the destruction of the vegetation, the yellow land is forced to reveal its original appearance and is left to be beaten by the wind (Xu, 2003).

The Civil Code is contemporary, always responding to the major social needs at the time of its creation. Nowadays the serious environmental pollution and ecological crises threaten the survival and development of every human being (Chen, 2017). The legislation of the civil code should respond to the needs of environmental rights protection based on the perfection of the traditional civil rights system, and change the situation that environmental law and civil law are separated from each other (Wang, 2016).

For a long time, in environmental civil trials, it is difficult for judges to “find the law” and the dilemma is that the norms of different jurisdictions are not systematic. The solution to the problem requires both the restriction of private rights by public rights and the incorporation of public law obligations into the system of private rights, and the two paths correspond to the systematization of environmental law and the greening of the civil code, respectively (Wang, 2016).

The rule construction of the green provisions of the Civil Code is led by Xi Jinping’s thought of ecological civilization and followed by the constitutional provisions. The “Green Principles” include the “basic principles” in Article 9 of the General Provisions of the Civil Code and the legal provisions on “ecological protection of the environment” and “conservation of resources” in the various sub-chapters. The implementation of the Green Provisions of the Civil Code should be guided by the Green Principle, and focus on the reconfiguration of property, contract, and tort rules. It also should be supported by relevant environmental resource laws (Wang, 2020).

There are about 28 green articles in each subpart of the Civil Code, which has formed a relatively complete normative system of “principles + rules”. To a certain extent, the effect of the system’s normative control is achieved, providing specific guidance for the normative application of the principle (Chen, 2020).

Public and Private Law Approaches to Environmental Protection

The subjects of property rights have no intrinsic motivation to pursue the ecological and other non-economic values of environmental resources, and no external pressure to protect the ecological and other non-economic values of environmental resources. One of the most direct and simple ways to resolve the conflict between the ecological and economic values of environmental resources is to use public power to inhibit negative effects. In this way of thinking, environmental law is guided by the public law perspective, which directly restricts private rights by public law means, such as restricting ownership rights, restricting access rights, restricting freedom of contract, etc. But there are some obvious drawbacks: huge costs, serious disincentives for individuals, and greater environmental damage caused by government abuse of power.

Such a situation led to the search for another solution to the problem, and the idea of private law began to emerge. However, the use of private law tools must first resolve the contradiction between the public interest of environmental resources and the personal interest orientation of civil law. There are two prerequisites for the use of civil law tools: first, the ecological value of environmental resources must be measurable as specific interest that can be economically valued; second, other non-economic values of environmental resources must become legal personality interests. So it is the interest in environmental resources that may become an interest at the disposal of the individual, that is, the content of a right under civil law. The construction of a civil law protection system for environmental rights is not only possible but also necessary, provided that the need for civil law protection can be met (Lv, 2005).

The Green Principle, as a basic principle of civil law established by the Civil Code, provide guidelines for the application of law, legal interpretation, filling of legal loopholes, and value judgment and choice in case of conflict of interest in judicial practice. In terms of judicial practice, the Green Principles are also important in strengthening the environmental effects of established decisions and expanding the environmental education function of cases (Gong, 2021). The establishment of the Green Principles makes environmental protection stand out in the value sequence of civil law, gaining a separate status and taking a higher position. It “forces” or “induces” factual determinations in favor of the environment—considering environmental impacts and making perceptions that are consistent with environmental positions. This is fully reflected in judicial practice and is the main area where the Green Principles come into play (Gong, 2021).

Uphold the Basic Logic of Civil Law Under the Green Principles

Without a full understanding of the Green Principles of the Civil Code, some people may ask the following question: If energy companies lower the price of natural gas to allow the public to use it more, does this violate the Green Principle?

The analysis of this question should not only focus on the literal meaning of the Green Principles, but should also take into account the specific legislative purpose of the specific legislation and the Green Principles. The judgment on the legal issues and the application of the Green Principles should be based on the specific legal rules and then combined with the facts of the case to make a final conclusion and judgment. Civil law is the law to maintain private rights, and when disputes over rights arise between civil subjects of equal status, the disputes between the two parties are resolved through the rules of civil law. The energy supply enterprise, in compliance with the Energy Supply Agreement and national regulations and policies on energy prices, reduced the price of natural gas and did not violate the civil rights and interests of any individual or enterprise, and therefore did not violate the Green Principles in the Civil Code. Although the Green Principle is a basic principle of the Civil Code, it is not a primary principle, but a relatively secondary principle (Chen, 2017). The Civil Code should respect the basic logic of the Civil Law to uphold private rights when applying the Green Principles.

Judicial Application of the Green Principles

Overview of Civil Cases Related to Environmental Protection and Resource Conservation

It has been two years since the promulgation of the Civil Code, and a large number of legal cases have been judged according to the Green Principles. The author used “China Judgments Online” (<https://wenshu.court.gov.cn>) as the search platform, limited the case type to “civil”, and set the cut-off date to August 10, 2022. The search was conducted using three different keyword combinations, followed by a brief analysis.

The first group of keywords is “Civil Code of the People’s Republic of China” and “resource saving”, and a total of 712 cases were retrieved. According to the types of cases, there were 466 contract disputes, 172 property disputes, 46 tort liability disputes, and 28 other types of cases. Please see Figure 1 for related results.

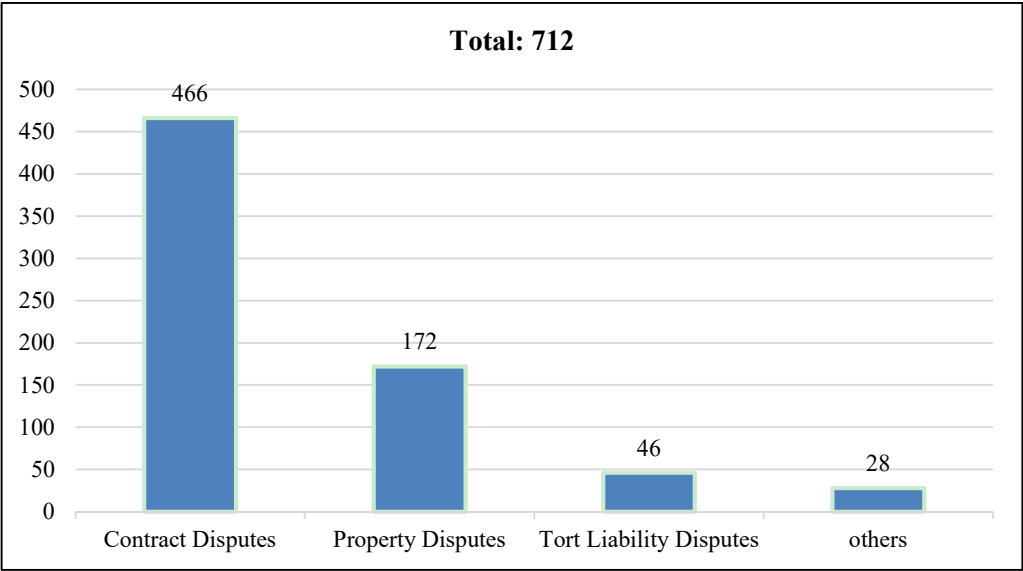


Figure 1. Cases related to resource saving.

The second group of keywords was “Civil Code of the People’s Republic of China” and “protection of ecological environment”, and a total of 606 cases were retrieved. According to the type of cases, there were 420 contract disputes, 150 property disputes, 27 tort liability disputes, and 9 other types of cases. Please see Figure 2 for related results.

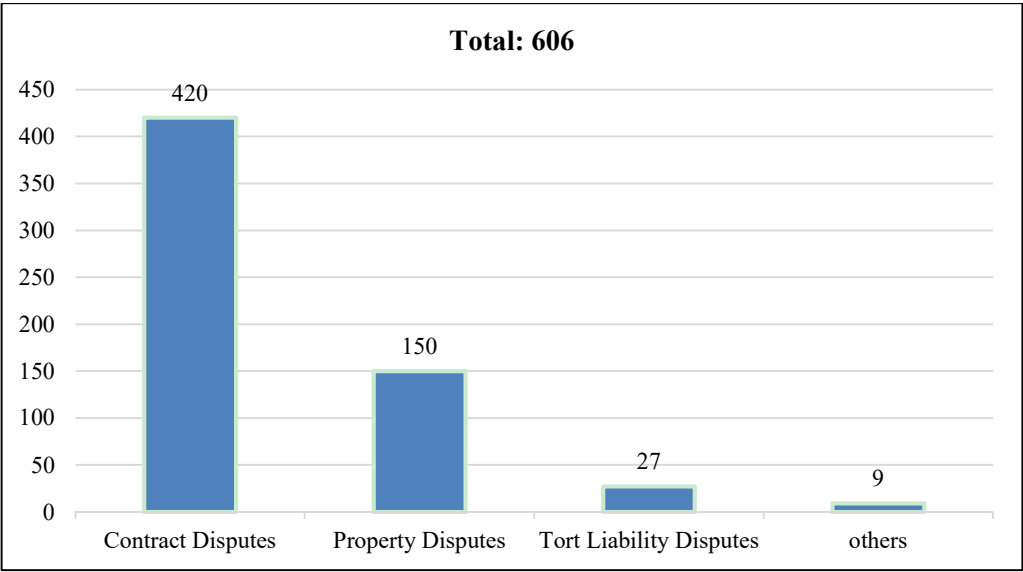


Figure 2. Cases related to protection of ecological environment.

The third group of keywords is “Civil Code of the People’s Republic of China” and “conservation of resources”, “protection of ecological environment”, and a total of 448 cases were retrieved. According to the type of cases, there were 306 contract disputes, 116 property disputes, 20 tort liability cases, and 6 other types of cases. Please see Figure 3 for the related results.

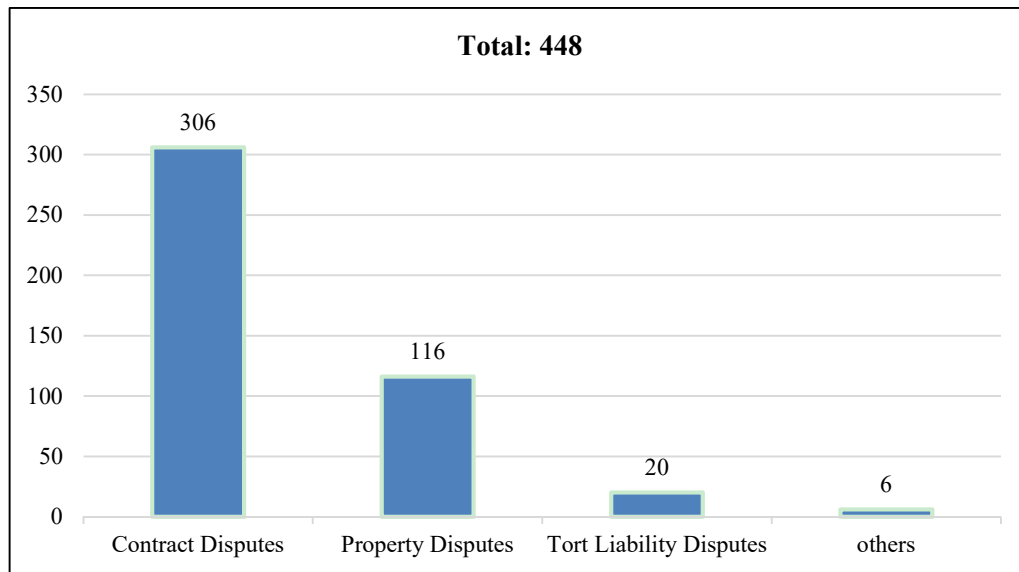


Figure 3. Cases related to conservation of resources.

Based on the above search results, we can learn that in the current judicial practice of Chinese courts, civil dispute cases related to resource conservation and ecological environment protection based on the Civil Code are mainly focused on three categories of cases: contract disputes, property disputes, and tort liability disputes.

The Green Principles are incorporated into specific legal rules in the Civil Code subdivisions and play an important role in civil dispute cases. First of all, the property rights codification greened the property utilization behavior, such as the exercise of usufruct rights, construction land use rights, and owner's rights all specify green obligations, while emphasizing the public ownership of important environmental elements. Judges can use Article 9 of the General Provisions to moderate the absolutism of ownership protection and avoid the abuse of freedom by rights holders to bring about the consequences of environmental degradation. Secondly, the contract codification incorporates the Green Principles into the contract specification from the perspective of contract content, contract performance, contract termination, and other property transactions, such as the post-contractual obligations for recycling of used items, the subject matter packaging methods, and the seller's recycling obligations. Thirdly, the Tort Liability Division has achieved the punishment of environmental torts, such as the inclusion of ecological damage into the scope of tort, the addition of ecological restoration liability and punitive damages system, which implanted the "teeth" of the Green Principle (Chen, 2020).

Restrictions of Green Principles on Property Rights

The Civil Code amended the provisions on property rights, requiring property owners to further take the responsibility of environmental protection while exercising their rights, realizing the change from absolute ownership to the dual protection of public and private interests. Judges should pay attention to taking the balance between using everything to the fullest and the application of the green clause in the judicial trial cases (Wang, 2020).

Article 326 of the Civil Code specifies the obligation to carry out reasonable exploitation, which is conducive to urging usufruct owners to pay attention to the protection of the ecological environment while

maximizing economic benefits.² Article 346 and Article 350 stipulate that the right holder should use his right to use the land for construction reasonably. These provisions help to promote the developer's responsibility for reasonable development, implement the requirements of resource conservation and ecological environment protection, and achieve the harmonious unity of economic and ecological benefits (Wang, 2020).³

In a case, the judge used the Green Principle to limit the rights of the parties to the case under Article 35 of the former Property Law.⁴ According to the original Property Law, the parties had the right to remove the illegally occupied items on the land they had already legally leased. However, considering that the removal of the trees may have a certain impact on the survival rate of the trees, which is not conducive to the full use of the property and will damage the ecological value function of the trees. This would be contrary to the requirements of the Green Principle regarding the conservation of resources and the protection of the ecological environment, so the judge limited the way in which the parties' rights could be exercised. In other words, the judge ruled out the right of the parties to exercise their rights in rem by "removing the tree".⁵

The Green Principle as a New Lens to Judge the Validity of Contracts

Contract law, belonging to the category of private law, is a legal norm that regulates the transaction relations between equal civil subjects. Contract law is the area where the principle of autonomy of meaning in civil law is most thoroughly implemented. The Civil Code and related laws and regulations also intervene in certain contractual acts from the perspective of protecting resources and the ecological environment, and this state intervention can be called "green intervention". It is based on environmental public interest considerations and places certain restrictions on freedom of contract. Ecological protection of the environment is included in the system of rights and obligations as a mandatory duty, and the ecological value of natural resources is also included in the process of contractual transactions. It is important to achieve the goal of green intervention on the basis of upholding autonomy in applying the green clause of the civil code (Wang, 2020).

Courts are careful in determining the validity of contracts. If there is an element of illegality in the contract, it is difficult to distinguish the complexities associated with whether the contract should be classified as void. After the establishment of the Green Principles, environmental violations not only have the illegality of public law, but also receive a direct negative evaluation in civil law for violating the intrinsic value system of civil law itself, which has an important impact on the determination of contract validity. In recent years, the courts have become increasingly strict on environmental violation contracts, and it is not uncommon to see cases in which the contract is deemed invalid due to illegal behavior or improper consequences, and the Green Principle plays a key role.

² Article 326 stipulates that a usufructuary shall, when exercising his right, abide by the provisions of laws on the protection, rational exploitation, and utilization of resources, and the protection of the ecological environment. The owner may not interfere with the exercise of such rights by the usufructuary.

³ Article 346 stipulates that the right to use a lot of land for construction purposes shall be created in conformity with the requirements for conservation of resources and protection of the ecological environment, and in compliance with the provisions of laws and administrative regulations on the planned use of the lot, and may not impair the rights to usufruct already created thereon. Article 350 stipulates that a person who has the right to use a lot of land for construction purposes shall make reasonable use of the lot and may not change its planned use. Where it is necessary to change the planned use of the lot, approval shall be obtained from the competent administrative department in accordance with law.

⁴ Article 35 of the Property Law (Expired), stipulates that where a real right has been or may be obstructed, the right holder may petition for removing the impediment or eliminating the danger.

⁵ China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2020) 冀 07 民终 1533 號.

In one case, the court of first instance found the contract valid after the two companies entered into a contract with some clauses that violated the local regulations on mandatory separation of domestic waste. However, the court of appeals invoked the Green Principle and held that the relevant clauses “violated the mandatory provisions of compulsory waste separation and separate collection and disposal, and seriously hindered the promotion of ecological civilization and harmed the sustainable development of environment and resources and other important public interests”, so the court held the contract invalid.⁶ There are many other cases in which the validity of a contract has been denied for violating the Green Principles.⁷

The Green Principle can also have the positive effect of supporting the determination of contract validity in certain circumstances. A dispute arose between the two parties over the contribution of shares in a ship, and one party claimed that the contract was invalid on the grounds of defects in the signing and performance of the contract. In view of the environmental protection background of the contract and the good environmental resource benefits of the contract performance, the judge found the contract to be legal and valid on the grounds that the intention was true and the content fully complied with the Green Principle, and all parties should abide by it.⁸

In the context of contract rescission, the Green Principle makes environmental consequences an important factor in determining whether a relevant act or state of affairs is sufficient to constitute grounds for rescission. Thus, “factual” situations that appear identical from a legal perspective alone may be determined quite differently depending on the environmental consequences.

In one case, the plaintiff’s contractual purpose of leasing the defendant’s land for the construction of a gas station could not be realized for some reason. The judge found that the continuation of the contract was unfair to the plaintiff and would result in a waste of land resources, and finally upheld the termination of the contract.⁹

Similar to the above case, the parties signed a land contract, and the defendant should choose to plant forest trees under the guidance of the plaintiff, and turn in the fruit profits as agreed. The defendant originally planted date palm trees, and later changed to plant tea trees because of bad profits. The defendant has not been turned in profit funds, the plaintiff requested to cancel the contract. The judge held that, in the defendant in consecutive years of losses, not profitable situation, the plaintiff asked it to turn over profits and cancel the contract, obviously unfair. Only economic defects in the performance of environmental management purposes have been achieved, ecological and environmental effects of soil and water conservation contract, does not constitute a fundamental breach of contract, so the judges do not support the request to cancel the contract.¹⁰

The plaintiff signed a contract with the defendant to lease the land for the purpose of building a gas station. But after the contract was signed, the plaintiff, for reasons that cannot be attributed to the failure to build a gas station on the land, leased the land for the purpose cannot be achieved; the land is still in idle state. The judge

⁶ China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2018) 黔 01 民終 5662 號.

⁷ China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2019) 魯 1103 民初 1213 號, (2017) 鄂 1303 民初 2999 號.

⁸ China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2018) 鄂 72 民初 651 號.

⁹ China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2018) 豫 15 民終 3261 號.

¹⁰ China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2018) 贛 0424 民初 1333 號.

considered that if the continued implementation of the contract is obviously unfair to the plaintiff, and will cause a waste of land resources, and the original, the defendant in the contract agreed to the lease period, the plaintiff can return the lease. The judge finally supported the plaintiff's request to cancel the contract.¹¹

In one case, the parties entered into a Land Lease Contract in which the defendant leased the plaintiff's land and was supposed to pay the land lease fee annually. In addition, the parties agreed that the lessor had the right to terminate the lease contract if the lessee did not pay the lease fee on time. After the defendant leased the land, since 2017 there has been a delay in paying the lease fee as agreed in the contract, and the plaintiff claimed to cancel the contract. The judge of the first trial held that, according to the law, the contract in this case should be cancelled. However, the time for the cancellation of the contract should be determined after comprehensive consideration. The appellate trial judge did not support the termination of the contract for the following reasons: first, although the defendant's late submission of rent is a breach of contract, but the defendant's breach of contract is very short and did not cause serious consequences. Therefore, the breach did not constitute a fundamental breach of contract. Secondly, the loss caused by the termination of the contract would be far greater than the loss caused by the continued performance of the contract. Third, because the land rented by the plaintiff has been flooded, if the contract is cancelled, the land will continue to be flooded, the plaintiff cannot use the land, not only is not conducive to the use of land resources, but will intensify the conflict between the two sides.¹²

Build the Foundation for Environmental Civil Public Interest Litigation

The green clause of the tort section aims at the control of environmental torts. The ecological damage is included in the scope of infringement. It provides for a system of ecological restoration liability and punitive damages. All these measures have implanted the "teeth" of the green principle.

Article 1234 and Article 1235 of the Civil Code provide for the liability for environmental torts that cause damage to the ecological environment and public interest, which provides the substantive law basis for civil environmental public interest litigation.¹³ It improves the type structure and liability system of environmental private interest tort liability and environmental public interest tort liability, and lays the foundation for the effective connection between the Civil Code and the relevant legal system of ecological environmental protection. The transformation of environmental tort liability into environmental private tort liability and environmental public interest tort liability has kept the environmental damage remedy system quite open (Wang, 2020).

The following case is a guiding case issued by the Supreme People's Court of China regarding civil public interest litigation for ecological damage. Yangtze River eel fry is an aquatic animal fry with important economic value and prohibited from fishing. On July 15, 2019, the public interest litigation prosecutor, Taizhou City People's Procurator ate of Jiangsu Province, filed a civil public interest lawsuit on the grounds that related

¹¹ China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2017) 豫 1426 民初 5091 號.

¹² China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2019) 川 1528 民初 618 號, (2019) 川 15 民終 1840 號.

¹³ Article 1234 stipulates that where a tortfeasor causes damage to the ecological environment in violation of the State regulations and restoration is possible, the State authorized agencies or the organizations authorized by law have the right to request the tortfeasor to bear the responsibility for restoration within a reasonable period of time. Where the tortfeasor fails to restore it within the time limit, the State authorized agencies or the organizations authorized by law may initiate the restoration on its own or entrust it with others, provided that any expenses thus incurred shall be borne by the tortfeasor. Article 1235 stipulates that where ecological damage is caused in violation of the State regulations, the State authorized agencies or the organizations authorized by law have the right to request the tortfeasor to compensate the following losses and expenses.

defendants had committed illegal fishing, trafficking, and acquisition of eel fry in the Yangtze River, damaging the ecological resources of the Yangtze River and harming the public interest of society. The judge ruled that the relevant defendants were jointly and severally liable for RMB 8,589,168 for the loss of ecological resources caused by their illegal trading of eel fry. The relevant acquirers and fishermen were jointly and severally liable with the direct acquirers according to the number of eel fry they participated in the illegal trading or fishing.¹⁴

This is the reason given by the judge for the decision. Firstly, illegal fishing caused serious damage to ecological resources, when sales are the sole purpose of illegal fishing, and the acquirer and the illegal fisher formed a fixed buying and selling relationship, the acquisition induced illegal fishing and jointly damaged ecological resources, the acquirer should be jointly and severally liable with the fisher for the loss of ecological resources caused by the jointly implemented ecological damage. Secondly, when the loss of ecological resources cannot be accurately counted, the scope and extent of ecological damage, the scarcity of resources, and other factors should be taken into account, the destructive manner, time sensitivity, and location specificity of the illegal act should be fully considered, and expert opinions should be consulted to make judgments as appropriate.

This is the first case in the country in which the entire chain from fishing, acquisition, to trafficking of eel fry in the Yangtze River was ordered to bear the responsibility of compensation for ecological damage since China set a fishing ban in the Yangtze River basin in January 2016. This case fully reflects the determination and strength of the court to protect the ecological environment of the Yangtze River with the strictest system and the strictest rule of law. The case was heard by a seven-member collegial court. Through the use of experts in court, the ecological damage was measured and the loss of ecological resources was scientifically calculated. At the same time, the judge clarified that the defendant could use labor in lieu of compensation to offset part of the ecological damage compensation amount. The case provided an effective path for ecological restoration of the Yangtze River, which is of great positive significance for maintaining ecological security in the Yangtze River area, comprehensively strengthening the protection of aquatic life in the Yangtze River and forming a green development pattern of harmonious coexistence between man and nature.

The “Teeth” of the Green Principles—Punitive Damages Rule

The Civil Code expands the scope of environmental tort liability remedies and establishes a more complete environmental tort liability system. The provisions of Articles 1229, 1230, and 1231 of the Civil Code accept the theory of environmental jurisprudence and recognize the duality of environmental torts in terms of causal acts, damaging acts, damage consequences, subjects of remedy, and value objectives.¹⁵ The Civil Code distinguishes between “acts of environmental pollution” and “acts of ecological damage”. It treats the “environmental pollution consequences” and “ecological damage consequences” separately. On the basis of the original Tort Liability Law, the Civil Code introduces “ecological damage” as a cause of action and provides for the reversal of the burden of

¹⁴ China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2019) 蘇民終 1734 號.

¹⁵ Article 1229 stipulates that a tortfeasor who has polluted the environment or harmed the ecological system and thus causes damage to others shall bear tort liability. Article 1230 stipulates that where any dispute arises from environmental pollution or ecological damage, the actor shall bear the burden to prove that he should not be liable or that his liability could be mitigated as provided by law, and that there is no causation between his act and the damage. Article 1231 stipulates that where environmental pollution or ecological damage is caused by two or more tortfeasors, the extent of liability of each tortfeasor shall be determined according to the factors such as the type, concentration, and quantity of discharge of the pollutants, the way, scope, and degree of damage to the ecological system, and the impact of the act on the consequences of damage.

proof for environmental torts, the environmental tort of several persons, and the fault of third parties. This initiative solves the problem that the original tort liability law only includes “environmental pollution liability” as a special tort liability without including “ecological damage liability” (Lv, 2022).

Punitive damages are awarded when the perpetrator commits an act in bad faith or is grossly negligent in relation to the act, with the aim of imposing punishment on the perpetrator and pursuing a general disincentive effect, and the court may order the perpetrator to pay the victim damages that are high above the actual loss, in addition to the usual damages. In addition to the same damage filling function as damages in the usual sense, punitive damages also have the multiple functions of punishing and deterring wrongful acts, and are of great importance in preventing the occurrence of the same type of damages (Wang, 2000).

The Civil Code establishes the rule of punitive damages in the environmental tort of Article 1232.¹⁶ In environmental tort liability, “punitive damages” remedy damages are difficult to be remedied by traditional tort jurisprudence and liability mechanisms, and have the dual functions of increasing the cost of violation and expanding the extent of environmental benefits relief. Tort law remedies require “redress ability” of the damage. It should be characterized by the violation of a legally protected interest, the certainty of the damage, and the personal nature. However, the damage of environmental pollution and ecological damage is cumulative, latent, and uncertain, and it is difficult to be recognized as “compensable damage” according to traditional tort standards. The traditional concept of “filling” damages based on the difference between the amount of damages and the amount of compensation cannot meet the requirements of environmental tort damages (Lv, 2022).

The defendant is a chemical company, and from March to July 31, 2018, the company’s staff handed over the company’s production of sodium sulfate waste to individuals without hazardous waste disposal qualifications, who transported and dumped 30 truckloads totaling 1,124.1 tons of sodium sulfate waste in a rural, hilly area. This act caused widespread surface and groundwater contamination, damaging the environment of the 6.6 square kilometer watershed surrounding the countryside and impeding the safety of drinking water for more than 1,000 local residents. After identification and measurement, the related ecological restoration costs, environmental functional loss costs, testing and appraisal fees, and costs of taking reasonable preventive and disposal measures total RMB 2,848,965.56. The people involved have been criminally tried and have been sentenced in separate cases to prison terms ranging from six years and six months to three years and two months for the crime of polluting the environment. The public interest litigant sued to request the defendant company to compensate for the related ecological damage. The judge ruled that it was ordered to pay RMB 2,168,000 for environmental remediation, RMB 57,135.45 for functional environmental damage, RMB 532,860.11 for emergency disposal, RMB 95,670 for testing and appraisal, and RMB 171,406.35 for punitive damages for environmental pollution, for a total of RMB 302,571.91 above. In addition, the judge also ordered the defendant to apologize to the public in the national news media for polluting the environment by illegally dumping sodium sulfate waste solution.¹⁷

¹⁶ Article 1232 stipulates that where a tortfeasor intentionally pollutes the environment or harms the ecological system in violation of the provisions of law, resulting in serious consequences, the infringed person has the right to request for the corresponding punitive damages.

¹⁷ China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2020) 赣 0222 民初 796 号.

This is the first case in China in which the punitive damages clause of Article 1230 of the Civil Code for environmental pollution was applied.¹⁸ The judge adopted the “base + multiplier” calculation method when calculating the amount of punitive damages. The judge took into account the defendant’s degree of negligence, attitude towards compensation, damage consequences, financial ability to assume responsibility, and administrative penalties, and decided to use three times as a multiplier to determine the final amount of punitive damages. The judgment reflects the purpose of civil public interest litigation to protect the public interest, and is more in line with the legal principle of equal punishment. The application of punitive damages in this case has a warning and deterrent effect on illegal acts such as polluting the environment and destroying the ecology, which is in line with the legislative spirit of the Civil Code

Challenges to and of the Green Principles

Debate on the Judicial Application of the Green Principles

Many people agree with the Green Principle, perhaps not with the “principle”, but with the “green”. In other words, some scholars agree that civil law should include some rules that help protect the environment and ecological resources, but do not agree to include the Green Principle in the basic principles of civil law. Incorporating Green Principles into the basic principles of civil law may face many risks. Firstly, there is a contradiction between the Green Principle and traditional civil law principles in terms of legislative values. Second, the issue of the broad concept of the Green Principle may lead to the confusion of legal principles and rules functions by the judges. Third, the incomplete rule system of the Green Principle leads to the lack of effective regulation by judges in the application of the law.

The Green Principles differ from traditional civil law principles in terms of legislative value orientation. The Green Principles aim to achieve the public purpose of saving resources and protecting ecological environment by limiting the private rights and autonomy of civil subjects, and ultimately for the better realization of private rights, which is a kind of regulation logic of public first and then private. However, the restrictive principles such as honesty and trust and fairness, which are also basic principles of civil law, adhere to the path of private first and public second. Although the public interest goal of social stability and order is also hidden behind them, the primary purpose is the maintenance of freedom and equality among private subjects and the reconciliation of their interests. These differences, to a certain extent, make it difficult for the Green Principle to be refined and expressed through specific systems of civil law (Chen, 2020).

The “Green Principle” poses a new challenge to the codification of China’s civil code. There has been no consensus within civil law, especially between civil law and environmental law, on such fundamental issues as the positioning of civil law in terms of its environmental protection function for a long time. Many civil law researchers believe that environmental law and civil law belong to two completely different legal systems, for example: civil law emphasizes individualism, while environmental law emphasizes holism; civil law emphasizes the protection of individual rights, while environmental law aims to protect and preserve the public interest. If we

¹⁸ Article 1230 stipulates that where any dispute arises from environmental pollution or ecological damage, the actor shall bear the burden to prove that he should not be liable or that his liability could be mitigated as provided by law, and that there is no causation between his act and the damage.

don't solve this problem of opposing disciplines, the "Green Principle" will eventually become an empty slogan, and the "green civil code" will be just a label in a formal sense (Lv, 2018).

The concept of the Green Principle is too broad and may lead to ambiguity. In the judicial work, it is easy to lead to excessive discretion of judges and the problem of "legal application escaping to general provisions" (Chen, 2020). Regarding the textual expression of the Green Principle in the Civil Code, the concepts of "ecological environment" and "resources" are very broad in this text. At the same time, they have different connotations according to the changes of society and the times. Faced with the complexity, comprehensiveness, and holistic nature of the environmental and resource fields, judges evaluating the facts of these cases may find that the Green Principle that is the major premise of the triad of adjudicative reasoning seems to be all-encompassing. Adjudicators may differ in their judgments as to whether the relevant principles apply and what they mean. The uncertainty of the connotation of the concept itself is an important reason for the court's decisional dilemma.

Regarding the Green Principle, the Civil Code has initially formed a normative system of "principles + rules", with the Green Principle established in the General Part and about 28 green articles in each subpart. To a certain extent, this has achieved the effect of normative control of the system. However, there are still many unreasonable aspects of this normative system, which need to be improved and perfected continuously. In the environmental civil trial, it is still difficult for judges to "find the law" and the dilemma that the norms of different jurisdictions are not systematic (Wang, 2016).

The Meaning of Green Principles Needs to Be Clarified

Only by correctly understanding the various risk problems faced by the Green Principle in legal application, scientifically analyzing and discovering the theoretical sources and practical needs of the problems, and summarizing the good experiences in legal theory and legal practice, can we continuously and constantly improve the content of the Green Principle in the Chinese Civil Code. This will help to truly bring into play the advantages of the public legalization of private law and make up for the logical and institutional shortcomings of the traditional civil law theory.

Reconcile the green principle with traditional civil law principles. From the perspective of economic development, on the one hand, environmental problems are a manifestation of primitive market failure, and on the other hand, environmental problems are also a manifestation of government failure. Therefore, a balance and coordination between market mechanisms and government intervention must be sought to solve environmental problems. The individualistic rights system pays insufficient or almost no attention to the ecological rights of human beings. When the exercise of individual rights directly threatens the survival and development of human beings, this system not only fails to solve environmental problems, but also becomes an obstacle to solve environmental problems. However, after a period of development, it has been found that the environmental law system, which aims at the protection of public interests and is mainly based on administrative regulatory means, often fails to achieve the goal of effectively solving environmental problems in its implementation, with rigid administrative mechanisms, high management costs, or difficulties in covering all aspects of economic and social life. Seeking a balance and interaction between public law and private law mechanisms has become a major issue in the construction of the legal system of environmental protection (Lv, 2018).

Whether the relationship between the Green Principle and other basic principles is well coordinated has an important impact on the fate of the Green Principle in the Civil Code. In a book explaining the application of the law in the Civil Code, some Chinese legislative experts make the following points. First, the Green Principles are restrictive rules. Being a restrictive rule means that the principle is not the root and dominant principle of civil law, but a correction and remedy to the basic system of civil law centered on individual interests. Secondly, like other basic principles, the Green Principle is not an adjudicative norm and cannot serve as a premise of the private law trilogy, but can only play a role as a content of Chinese civil law to supplement legal interpretation and loopholes (Chen, 2017).

The Green Principle is different from other principles in terms of expression. Other principles use the expression “shall follow” and “shall not violate”, while The Green Principle use the expression “shall be conducive to”. The purpose of this approach is to regulate the basic orientation of civil activities and establish the concept of sustainable development. According to the Supreme People’s Court of China, the Green Principle, as one of the basic principles of the Civil Code, plays an important role in: (1) guiding civil legislation and taking the Green Principle as a guide when formulating relevant civil legal norms; (2) regulating civil behavior and establishing the basic guidelines for civil subjects to follow when engaging in civil activities; and (3) providing standards for judicial judgment activities, with the judiciary taking resource conservation and ecological environment protection as an important consideration when deciding relevant cases (LGSPC, 2020). The Green Principles provide guidelines for the application of law, legal interpretation, filling of legal loopholes, and value judgment, and choice in case of conflict of interest in judicial practice.

Precisely understand the scope of the use of the green principle. The Green Principle is a controversial new civil law principle. The Green Principle, like the principle of public order and decency, is a restriction on civil activity, but such restrictions should be within reasonable limits (Chen, 2020). Scholars and judges have different views on the concepts of “ecosystem” and “resources”.

First, the understanding of “ecological environment” is different. Some scholars believe that this concept should be strictly limited to the ecological environment, emphasizing more natural factors. Some scholars believe that ecology should not be a qualifier of environment, but should include the living environment and reflect the human factor. In judicial practice, there are some judges who limit the application of the Green Principle to the former view, such as judging the illegality of ecological environmental acts such as destruction of forest land and grassland.¹⁹ However, there are cases in which it is applied in the context of “living environment”, for example, in another case, the judge made the following analysis by invoking the green principle:

The quality of living environment is increasingly concerned by the society, and the state has also increased the protection efforts, every citizen has the obligation to consciously comply with and care for. The defendant discharged water directly into the plaintiff’s courtyard, and the flow of water not only brought hindrance to the plaintiff’s living life, but also affected the surrounding environment, which is not conducive to the improvement and enhancement of environmental health, and the act should be prohibited by law.²⁰

Second, scholars have different perceptions of “resources”. The “resources” in the Green Principle include

¹⁹ China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2019) 滬0151民初3894號, (2018) 吉0721民初5483號.

²⁰ China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2018) 蘇0116民初1135號.

natural resources, such as trees, minerals, land, water, etc. However, in some parts of China, some judges believe that property resources are also included, such as house decorations, residential neighborhood landscaping, houses, and existing gas pipes.²¹ Some judges even believe that human and judicial resources should also be included in the green principle.²²

As a “basic principle”, the Green Principle should be interpreted with a certain degree of openness in order to cope with the changing world of civil law. “Ecological environment” is not strictly limited to the word “ecology”, but also the living environment. First, from the systemic interpretation, the Tort Liability Division of the Civil Code adds “ecological damage liability” to the Tort Liability Law, which is parallel to “environmental pollution liability”. The distinction between “ecology” and “environment” is a positive response to the difference between the two laws of nature and to the consensus of the academic community that the two have different institutional implications and rule needs. Obviously, the legislator does not consider the environment to be strictly limited to the word “ecology”, which also leaves room for the interpretation of “environment” to include the living environment. Secondly, the Civil Code is essentially a human law that protects private rights, and the main object of adjustment is human beings, which reflects the humanistic concern for people’s welfare. Disputes arising from the living environment, which is closely related to human life, usually occur between private individuals, such as disputes over drainage between neighbors and community waste, which are directly related to the quality of human life and should be included in the scope of the green principle. Third, with economic development and social progress, the relationship between human beings and nature has become closer, and it is obviously difficult and unnecessary to distinguish between ecological environment and living environment (Chen, 2020).

Coordinate the relationship between the civil code and the environmental law. The background of Chinese civil legislation is different from that of the West. The emergence of civil codes in modern capitalist countries mostly predates interventionist legislation, which goes on to make adjustments in some areas on the basis of the market economy created by the former. Therefore, the basic relationship between the two does not need to be explained much in the civil law and taken for granted. China’s development is the reverse, moving from a planned economy to a macro-regulated economy, and then “backfilling” this foundation with a more basic norm of market autonomy (Su, 2005).

For historical reasons, China’s legislative practice is objectively irrational. Environmental and resource legislation came first and then civil legislation, and the civil legal norms in environmental and resource legislation lack synergy. Natural resources and environmental protection legislation are separated, resulting in conflicting regulations on resource development and utilization and ecological environmental protection (Lv, 2018).

The most important thing for a civil code in modern society is not only to have a logical systematization or to make a momentary declaration of values, but also to build a sufficiently general and stable structure, while at the same time being able to communicate well with other laws in terms of rules and values through various channels (Mao, 2013). The Green Principle has established a variety of communication channels based on theoretical and institutional innovation, and put forward the need to interface with systematic environmental law (Lv, 2022).

²¹ China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2019) 蘇 0582 民初 2569 號.

²² China Judgements Online, <https://wenshu.court.gov.cn>. Case No.: (2019) 魯 09 民終 3147 號.

The Green Principles need to be complemented and supported by other environmental law norms. The green provisions of the civil code have both peremptory norms and arbitrary norms; both behavioral norms and adjudicative norms; both public law norms and private law norms. Most of them need to have exogenous laws, or as a holistic concept, or as the boundary of the conduct norms, or as the basis of the adjudication norms, with obvious incomplete legal characteristics, they are either on the composition of the elements, or on the legal effect part, instructed to refer to another legal article, only in combination with other legal articles, can jointly create legal effects. This means that the concrete implementation of the “green clause” requires a large number of environmental law norms to supplement and support (Lv, 2022).

The absorption of environmental resources law by civil law and the establishment of the Green Principle as a basic principle of civil law are aimed at achieving the legal goal of sustainable development of modern environmental resources law through the inherent characteristics of civil law, especially its spontaneous, and efficient realization mechanism (Ma, 2017).

Conclusions

Private law tends to become public rules when it not only invalidates the legal relationship between individuals who violate the restrictions, but also imposes public law sanctions on violators by the power of the state. It is already common in modern legislation to have civil norms between equal subjects, primarily or incidentally, assume a subsidiary regulatory policy. Such civil norms, on the one hand, achieve fairness and justice in private law, and, on the other hand, reduce the burden of enforcement of state regulation and improve the efficiency of regulation through the inducement of private benefit realization (Su, 2005).

The civil legislator cannot start from the civil perspective only, nor from the administrative perspective only, but should realize the conceptual and technical stitching of the two normative policies in the same law. The dual nature of environmental torts, the dual character of environmental tort liability, and the compound aspect of environmental tort disputes all make it difficult for environmental rights and the interests behind them to be included in the existing types of rights. And the old civil law norms cannot provide adequate protection for environmental rights and interests (Wang, 2016).

The Green Principle is a creation of the Chinese Civil Code, which is based on a critique of the traditional civil rights system and effectively responds to the need for protection of environmental rights and interests. By establishing environmental rights in civil law to achieve communication between the two jurisdictions, it effectively alleviates the governance dilemma that environmental law and civil law are fragmented from each other.

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