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Path Selection of Climate Change Litigation from the Perspective of the Risk Prevention Principle

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Abstract: ***Before China achieves the "dual carbon" goal, the judicialization of climate change is also a practical need to ensure that China achieves the two goals of "carbon peak" and "carbon neutrality". At present, the issue of climate change has entered the legal regulation stage, and owing to its inherent global nature and high degree of uncertainty, the law has exposed the shortcomings of insufficient regulation and difficulty in meeting the needs of climate change. At present, there has been heated discussion on the construction of the litigation path of climate change litigation, and it is also meaningful to study litigation path selection in climate change litigation from the perspective of the risk prevention principle. Therefore, this paper discusses the litigation path of climate change litigation to effectively prevent environmental risk from the perspective of the principle of risk prevention on the basis of existing research on the litigation path of climate change litigation in the academic field and with reference to litigation models of environmental public interest litigation and air pollution public interest litigation.***

Keywords: Climate change litigation; Risk prevention principle; Environmental risk; Litigation path.

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1. Introduction

In 2020, China made a solemn commitment to achieve the "dual carbon" goal worldwide. Focusing on this goal, the state has coordinated legislative, executive and judicial work in a coordinated manner, but there is still a long way to go before it can truly and effectively respond to climate change. Because climate change legislation needs to comprehensively consider many factors, such as normativity and predictability, it takes a long time, and it is difficult to meet the urgent needs of China's current climate change practices. As the last line of defense of social justice, the use of justice to solve the problem of climate change is highly important, and it is also the inevitable path of "the principle of final judicial settlement in a society governed by the rule of law". Judicial litigation is an important means to address conflicts and disputes and achieve social governance, and climate change litigation, as a new type of case, plays a pivotal role in promoting climate governance, especially in reducing and controlling greenhouse gas emissions such as carbon dioxide. Climate change litigation has become an important part of China's ecological justice. However, because China has not yet established a climate change litigation system, climate change is still in the exploratory stage in the field of judicial practice. Although China now has the basis for developing climate change litigation, it still faces many problems in development. On the basis of research on existing litigation paths, this paper explores litigation paths that conform to the Chinese paradigm and can effectively prevent environmental risk from the perspective of the risk prevention principle.

2. Development of Climate Change Litigation in China

2.1 Theoretical basis: the basic connotation of climate change litigation

There are many views on the basic connotation of climate change, which is also one of the important issues in academic research. Climate change litigation has always been torn between development and stability, and there are many theoretical disputes; however, a universal legal concept has not yet been formed. In the broad sense,

climate change litigation can cover almost any lawsuit. The scope of climate change litigation in the narrow sense is usually limited to litigation with climate as a "core rather than a marginal topic", mainly including cases where climate change is the driving force and has a clear impact on climate change mitigation or adaptation.

2.2 Judicial Practice: Case Independence and Diversification of Case Types

2.2.1 Independence of the case

Since the Supreme People's Court issued the "China Environmental Resources Adjudication (2020)" white paper, it has been further refined into "criminal, civil, administrative and public interest" climate change litigation according to the existing types of litigation. In 2021, the Supreme People's Court issued the Specifications for the Types and Statistical Specifications of Environmental Resources Cases (for Trial Implementation) (Fa [2021] No. 9), which added a new cause of action for "climate change response cases" as an independent type of case.

2.2.2 The case is highly relevant

At present, although there are no typical cases of climate change litigation in China, China's judicial organs have actively participated in the process of climate change governance following the "dual carbon" goal, opening a new journey of China's judicial governance in response to climate change. However, the existing cases in China belong to the type of climate change litigation in a broad sense, which has a certain correlation with climate change, among which the most typical type of climate change litigation in the broad sense is air pollution public interest litigation, and related litigation of climate change litigation has also begun to appear in judicial practice. Some of the cases that address the characteristics of climate change in China can be divided into three main categories: air pollution public interest litigation, renewable energy substitution litigation, and carbon emission trading and carbon sink trading litigation. China has included related litigation that conforms to the characteristics of climate change in the scope of acceptance, and through the study of the litigation mode of related litigation that conforms to the characteristics of climate change, we can refer to its litigation model when constructing the litigation path of climate change litigation. In particular, there is an overlap between the litigation characteristics of air pollution public interest litigation and climate change litigation, and the exploration of their litigation models can help in choosing the litigation path of climate change litigation.

3. The Practical Dilemma of Judicial Practice in Climate Change Litigation

3.1 The number of cases is too small

Although there are many climate change-related lawsuits in China, the number of "real" climate change lawsuits is very small. The former includes various types of lawsuits, such as air pollution, carbon trading, and energy substitution, all of which have also played a certain role in promoting different aspects of climate change governance. However, despite their sheer volume, such cases are "drowned" among other causes of action, most of which are not counted separately in the name of climate change litigation, which also leads to confusion between them. For example, the cause of action in air pollution environmental public interest litigation is "environmental pollution liability disputes", the cause of action in carbon emission rights and carbon sink trading cases is "contract disputes", and energy substitution lawsuits are classified as "monopoly disputes". This shows that the cause of action in climate change cases has not been effectively implemented and applied in practice, and to a certain extent, it is also a reflection of the failure to implement policies. Therefore, there is a natural lack of practical cases in the construction of climate change litigation systems. To a large extent, trials of climate change litigation can be classified only as other causes of action, which also leads to the inability to determine the independent litigation path of climate change litigation, resulting in the inability to respond better to climate change and standardize. Under the "dual carbon" goal, the behavioral requirements for carbon emissions are stricter, the carbon emission standards for enterprises are more stringent, and climate change governance needs to be improved. The precautionary principle can alleviate the difficulties of climate change governance under the "dual carbon" goal to a certain extent.

3.2 There is a great deal of controversy over the application of the litigation path

In judicial practice, owing to the obvious instrumental purpose of the selection of litigation relief paths, the application of relief paths that can meet litigation claims on the basis of the specific facts of the case and the plaintiff's claims is the result of environmental infringement litigation, environmental public interest litigation,

and ecological environmental damage compensation systems being mixed with each other, and the lack of systematization is not conducive to the institutionalization of climate change response. On the one hand, some scholars believe that the ecological environmental damage system should be adopted, mainly considering that the development of China's existing environmental civil public interest litigation system is not yet mature and that the environmental civil public interest litigation system itself has the characteristics of returning to its natural state and has inherent limitations, so it is difficult to apply its litigation model to climate change litigation. The compensation system for ecological and environmental damage is based on the theory of state ownership of natural resources and aims at the relief of ecological and environmental damage by the state (government). On the other hand, some scholars advocate the adoption of environmental public interest litigation for the following reasons: First, the precondition for a lawsuit for compensation for ecological and environmental damage is that the act is illegal, but the carbon emission act is not illegal, and it is impossible to file a lawsuit against the carbon emission act. Second, the legislative purpose of the ecological damage compensation system is to restore the ecological environment that has been actually damaged, and it is impossible to file a lawsuit for climate risks that have not yet occurred. Third, the development of litigation for compensation for ecological and environmental damage is in its infancy and needs to be improved, and excessive expansion of the scope of application is not conducive to its development. The purpose of preventive environmental civil public interest litigation is to prevent risks, and its expansion of the judgment of "major risks", the application of preventive liability, and the exploration of the operation of "shuanggui" for practitioners are more in line with the practical needs of judicial regulation of climate risk. Some scholars also believe that there is homology and synchronization between air pollution and climate change and that there is a synergistic effect in reducing emissions. Successful judicial experience in civil public interest litigation on air pollution can provide important ideas for climate change litigation in China.

4. Feasibility Analysis of the Application of the Precautionary Principle to Climate Change Litigation

4.1 Necessity of applying the precautionary principle to climate change litigation

4.1.1 It can be supervised by the administrative acts of the government

Item 15 of the 1992 Rio Declaration on Environment and Development provides the "precautionary principle". This principle emphasizes the need to intervene in the source of danger through the regulatory actions of public institutions, which in turn influence people's behavior and ultimately prevent damage. This kind of regulatory behavior of public institutions is usually transformed into administrative organs formulating order standards, setting administrative licenses, supervising compliance with the law, and imposing administrative punishments. The precautionary principle has a positive effect on the regulatory behavior of public institutions, the government's status in climate justice governance has been enhanced, and it is easier for the government to play a supervisory role in regulating enterprises that exceed standard carbon emission behavior.

In contrast, climate change risk comes from a single actor, risk administration is the closest place to the source of risk, and it may itself become a source of risk. In the face of the scientific uncertainty of climate change risk, there are inevitably regulatory difficulties in the administration of environmental risk, and judicial review can play a role in regulating the exercise of administrative power. In fact, most of the regulations that apply in climate change litigation in the United States have been formed through litigation, and these regulations have formed the vast majority of climate change laws in the United States. Some scholars classify climate change litigation in the United States according to direct and indirect impacts, and the lawsuits that have a direct impact include constitutional interpretation, legal interpretation, and common law. Litigation related to the interpretation of laws and regulations includes the issuance of orders, authorizations, permits, environmental impact assessments, etc., which are the most important types of litigation. Although China has not yet formed a complete set of laws and regulations on climate change litigation, the corresponding judicial policies are conducive to guiding the courts to review and make judgments in judicial practice to a certain extent. In the institutional construction of climate change litigation, the principle of risk prevention is used to select the litigation path, and to a certain extent, the environmental public interest litigation path is combined with administrative public interest litigation.

4.1.2 Contributing to corporate responsibility

In recent years, the number of climate change lawsuits filed directly against companies has been limited, but the momentum should not be underestimated. The 2021 case of Friends of the Earth et al. v. Royal Dutch Shellplc. was a milestone in climate change litigation against businesses. While the responsibility for emissions has

traditionally been attributed to the state, nonstate actors have sometimes been primarily responsible for carbon emissions as well. In this context, China's large carbon-emitting enterprises or multinational companies face more climate risks and legal liabilities, which also means that Chinese companies engaged in overseas production and business activities are more likely to be sued. In view of this, the establishment of a climate change litigation system in China can, on the one hand, improve enterprises' awareness of "climate litigation risk", accumulate experience in the face of future extraterritorial climate change litigation, and enhance their ability to resist the risk of climate litigation. On the other hand, it can also encourage enterprises to increase their emission reduction targets under the risk of climate litigation, accelerate the green transformation of enterprises, and help China achieve the "double carbon" goal. Whether from the perspective of facilitating the review of enterprises or the way in which enterprises bear responsibility, the environmental public interest litigation path is more conducive to playing the role of climate governance, but on the basis of the environmental public interest litigation path, it can increase its plaintiff qualifications and introduce the government under the risk prevention principle to reduce environmental risk.

4.2 Reasonableness of the Application of the Precautionary Principle to Climate Change Litigation

Risk reresponse Since the emergence of environmental problems, there are three types of environmental damage, environmental hazards, and environmental risks, depending on whether they have occurred and the likelihood of occurrence. Among them, environmental damage and environmental dangers were recognized by human beings earlier, and a set of relatively mature coping methods have also been developed. However, the concept of environmental risk was developed relatively late, and environmental risk cannot be solved by traditional means of response. Climate change falls into the category of environmental risk. As an abstract hazard, risk places greater emphasis on the uncertainty of the occurrence of damage; that is, the occurrence of damage can neither be ruled out by scientific means nor determined by empirical rules. The distinction between danger and risk lies in the magnitude of the probability of occurrence and the degree of certainty.

According to the German scholar Breuer's three-point theory, the legal order does not allow danger to exist, and the government must intervene in danger. According to the principle of risk prevention, the uncertainty of risks cannot be a reason not to take risk regulatory actions, and the government should take measures to prevent possible risks. Residual risk refers to the risk that must be endured to maintain the normal order of society. Among the known environmental risks, climate change risks are the most common. Climate change risk refers to the possibility that changes in the climate system adversely affect the natural ecological environment and human socioeconomic systems. The existence of climate change risks stems from scientific uncertainty, in which the main scientific uncertainty adjusted by law is in the methodological sense, which exists objectively but cannot be accurately predicted and discovered owing to limitations at the scientific level. In general, the problem of climate change presents very different characteristics from traditional environmental problems, and its potential harm is not only scientifically proven but also cannot be completely ruled out, resulting in uncertainty.

4.3 Enlightening the Selection of the Litigation Path Under the Principle of Risk Prevention

The choice of climate change litigation model should consider the above two characteristics of climate change: first, the litigation must act on the damaged ecosystem with the aim of relieving environmental interests; second, the lawsuit should address environmental risks. In addition, the scientific uncertainty of climate change issues has led to greater requirements for the willingness and ability of plaintiffs in climate change lawsuits. In the face of the uncertainty of climate change, the author tries to weaken its uncertainty from the perspective of risk prevention to determine a litigation path suitable for China's national conditions. First, since environmental public interest litigation is limited by the qualifications of plaintiffs, it will be passive in the application of climate change litigation, and the author believes that administrative public interest litigation can be introduced on the basis of environmental public interest litigation to fully supervise the government's administrative acts, which can not only weaken the passivity of the environmental public interest litigation path but also remedy it to a certain extent when climate change has not fallen into too serious a situation. When punishing an enterprise's illegal carbon emissions, it is necessary not only to compensate for damage after the fact but also to regularly review the total carbon emissions of the enterprise for the purpose of risk prevention to ensure that the company's carbon emission behavior meets the national standard under the premise of achieving the "double carbon" goal so that the content of the review can also be used as evidence when pursuing responsibility through litigation so that the enterprise that violates the emission can be punished. In addition, environmental public interest litigation is combined with administrative public interest litigation to supervise the government's administrative actions and review the carbon emission behavior of enterprises. If the environmental public interest litigation path is combined with the

administrative public interest litigation path, climate justice governance can be better realized, and environmental risk prevention can be better performed.

5. Conclusion

Against the background of the "dual carbon" goal, climate change litigation will also be further developed in China. Climate justice is the last line of defense against climate change, climate change litigation itself is not a new and independent litigation system, and the litigation model of climate change litigation should be improved in combination with the existing litigation model to form a litigation path suitable for China's national conditions. However, climate change litigation has developed its own unique characteristics, and many of these characteristics reveal empirical difficulties in judicial practice. At present, it is necessary to first respond to how it can be identified and fit with the existing litigation system and then consider establishing it as an independent type of litigation for research and practice. Litigation for compensation for ecological and environmental damage and environmental public interest litigation have the same public interest orientation, but each has different purposes and functions and should play different roles in climate change issues. From the perspective of the principle of risk prevention, we can provide some new paths in the selection of litigation paths for climate change litigation to realize the institutional construction of climate justice governance. Therefore, this paper aims to provide a new idea for the Chinese approach to climate change litigation on the basis of existing research and risk prevention principles and combines its environmental public interest litigation path with the air pollution environmental litigation path to further inject judicial power into the realization of the "dual carbon" goal.

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