

Legal Dilemma of Preventive Environmental Public Interest Litigation and Its Relief : In conjunction with the "five small-leaf maple case" and the "Yunnan oil case"

Rongwei Zhao

Intellectual Property School, East China University of Political Science and Law, Shanghai, 201620, China

ABSTRACT

In the context of the risk society, environmental risk damage is often characterized by scientific uncertainty, lag and irreversibility. The traditional ex post facto relief is difficult to regulate environmental risks in a timely and effective manner, and it is difficult to repair environmental damage adequately. Therefore, environmental justice urgently needs to be transformed from purely ex post facto damage filling to risk prevention, so as to better cope with environmental risks. In this context, preventive judicial relief came into being, becoming an important shield of environmental protection. The classic preventive environmental public interest litigation cases such as the "five small-leaf maple case" and the "Yunnan Oil case" provide valuable practical samples for the application of the system. However, in practice, there are few preventive cases, and the main problems are: poor interface between judicial power and administrative enforcement power, ambiguous scope of the main body of the prosecution, insufficient knowledge of the sufficient risks, incomplete rules of evidence, and a single way of assuming responsibility, etc. Therefore, this paper explores the root causes of the problem, finds out the crux of the problem, and puts forward corresponding perfect countermeasures, so that the problem can be better implemented in practice, and the ecological environment can be more comprehensively protected.

KEYWORDS

Preventive environmental public interest litigation; Sufficient risks; Rules of evidence

1 Introduction

In recent years, China has paid particular attention to the issue of ecological environmental protection, and the implementation of relevant governance measures has made fruitful progress, but with the further increase in the level of science and technology and industrialization, the ecological environment is also facing new risks and damage. Environmental risk is one of the serious types of risk. In response to the prominent risks, the 2014 amendment to the Environmental Protection Law in China made a principled provision that environmental protection should adhere to the precautionary principle of "prevention first", and in 2015, the Supreme Court promulgated the Interpretation of Civil Public Interest Litigation on the Environment, which stipulates in Article 1 that the relevant authorities and organizations may initiate proceedings against those who have significant risks of harming the public interest. Article 1 of the Interpretation of the Supreme Law on Environmental Civil Public Interest Litigation promulgated in 2015 stipulates that relevant organs and organizations may file lawsuits against behaviors that pose a significant risk of harming the public interest of the society for polluting the environment and destroying the ecology, i.e., preventive civil public interest litigation for the environment, which breaks through the traditional limitation of having relief only when there is damage.

Environmental civil public interest litigation is categorized as either remedial or preventive, and in practice the remedial approach is usually applied to protect the environment, which requires the existence of actual damage. Preventive environmental civil public interest litigation, on the other hand, is initiated on the basis of a sufficient risk. Because of the unpredictability of environmental risks, the results are serious and cannot be restored, purely to the occurrence of damage to the judicial direction of the cost is too large, difficult to bear, so the focus of environmental protection should be shifted from after the relief to the prevention of environmental risks as a new direction in the field of environmental protection and judicial prevention.

In judicial practice, still mainly relief cases, the reasons are as follows: poor interface between judicial power and administrative law enforcement power, the scope of the main body of the prosecution is vague, insufficient knowledge of the sufficient risks, the rules of evidence are incomplete, a single way of assuming responsibility and so on. Therefore, this paper explores the root causes of the problem, finds out the crux of the problem, and puts forward the corresponding perfect countermeasures, so that the problem in practice to get better implementation, the ecological environment to get more comprehensive protection.

At the same time, as the scientific and legal literacy of the nation continues to improve, the public's ability to perceive environmental damage has gradually increased, and in addition to obvious environmental pollution, certain environmental risks that have not yet produced damage may also cause public anxiety, and may even lead to the occurrence of mass incidents. The transformation of environmental risks into actual damages is abrupt, and may cause serious damages to the public's health even before remedies are initiated. Therefore, preventing environmental risks can

address the actual needs of citizens, transform significant risks into manageable actions, and reduce the likelihood of environmental damage. Additionally, it can help alleviate the negative emotions the public may experience due to these risks, while also contributing to social stability.

2 Literature review

2.1 Current status of domestic research

At present, China's legal provisions on preventive litigation are not yet sound, and the exploration of this system is in the preliminary stage. For example, what is "significant risk" is not clearly defined, the rules of evidence with reference to the application of the existing environmental infringement litigation content. At the same time, there are also uncertainties and some disputes about the interface between environmental justice and administrative power, the scope of the main body of the prosecution, the rules of evidence, and the mode of assuming responsibility.

In delving into this system, scholars have focused on key issues such as how to accurately define sufficient risk and how to appropriately apply the rules of evidence. They have continued to explore the challenges and solutions involved, with a view to providing more precise and practical guidance for relevant legal practice. The litigation system is aimed at achieving governance at source, preventing and resolving sufficient risks, and preventing damage to the ecological environment. Therefore, the identification of sufficient risks and the application of evidence rules are the key to promote the development of the system. Scholars Han Kangning and Leng Luosheng defined the concept of significant risk and clarify its basic object through literal dismantling and responsibility reversal. They clarify that the premise of the determination standard is the dynamic adjustment under the uncertainty of risk assessment, and they think that it should be determined twice in different degrees according to different stages. According to Kang Jingwen, the essence of "significant risk" is based on the legal evaluation of environmental risk and is futuristic in nature. The difficulty of identifying "significant risk" is due to the uncertainty of environmental risk, the lack of expertise of the fact-finder, and the difficulty of proving causation. We should explore the value theory of "significant risk" and reconstruct the causation determination system according to the special value orientation of public interest litigation. Scholars Xu Yiyang and Li Xilian split the significant risk into two criteria, namely, significant and risk, and then make a specific determination, and at the same time, they believe that the plaintiff should reduce the burden of proof, and allocate the burden of proof based on normative theory and presumption of causality through the basic facts of the preliminary proof materials^[2]. Zhang Yang, Wu Aibin scholars on the "yunnan oil case" analysis, they found that due to the definition of significant risk is not clear, leading to the determination of the subject of responsibility problems and risk assessment process is not clear and a series of chain reaction.

2.2 Current status of foreign research

Most countries have recognized the dangers of unpredictable environmental risks to human society and have embarked on research and prevention of major environmental risks to stop them from evolving into real hazards. Countries are therefore exploring systems that are effective in their own circumstances, given the environmental risk threats they face.

The foreign environmental civil public interest litigation system has developed earlier, and the research on the preventive protection system related to the environment is more in-depth. The initial research mainly focuses on environmental risk, Daniel believes that environmental risk has the typical characteristics of scientific uncertainty, but not because of uncertainty and do not take action to prevent environmental damage. After deeply understanding the nature of environmental risk and the importance and rationality of its prevention, academics have generally focused their research on the key issue of how to effectively respond to environmental risk. Researchers have conducted in-depth discussions along two main directions: the first is the practical application of the precautionary principle, and the second is the specific measures and strategies adopted by countries in environmental risk management. Natasha Geiling believes that adopting the precautionary principle in response to irreversible environmental pollution and ecological damage is essential, such as preventing the extinction of species. Smith has studied the measures taken by the state to respond to the environmental risks, and he points out that citizens' lawsuits are not the only way to prevent environmental damage. Smith conducted a study on the measures taken by the state in response to environmental risks, and he pointed out that citizen lawsuits are to make up for the government's shortcomings in managing environmental problems, and they are to supervise the enforcement of law by the administrative authorities, and citizen lawsuits can effectively promote the enforcement of law by the administration. The fundamental purpose of citizens' litigation is to prevent administrative organs from abusing their power and violating the law in the process of law enforcement, so the precautionary principle should be adopted.

Although preventive environmental civil public interest litigation is known by different names in different countries.

However, the core idea of these similar regimes is similar, which is the preventive role of justice in relation to environmental risks.

3 Methods

Literature research method: systematically collect, organize and analyze the literature related to the topic is the first step to carry out legal research work. In this paper, the writings and periodicals related to preventive litigation are comprehensively and systematically collected and analyzed to ensure the breadth and depth of the research. And through the literature, we can understand the historical development of the system, seek experience for the solution of the real problem, seek theoretical basis for the solution of the research problem and can synthesize and summarize to form our own viewpoints and conclusions.

Normative research method: The normative research approach focuses on analyzing and explaining the normative aspects of a given phenomenon, such as how norms of law, morality, custom, and policy affect individual and collective behavior. This paper analyzes and organizes the legal system concerning preventive litigation and explores the mechanism of the system's operation.

Case study method: The case study method is a qualitative research method for in-depth study of specific individuals, events, decision-making processes, policies or social phenomena. This paper selects a number of representative and typical preventive litigation cases, such as "Yunnan Oil Case" and "five small-leaf maple Case". Through the systematic organization and analysis of the cases, the problems and dilemmas in practice are summarized.

Comparative research method: Comparative research method is an important research method in the field of legal research. In this paper, scholars at home and abroad conduct a comparative study on the legal system of preventive litigation to understand the connotation and extension of preventive litigation in a deeper way, broaden their horizons, and learn from the excellent legal system and solutions.

Empirical analysis method: collect typical cases of preventive environmental civil public interest litigation through China Judgment Online, PKU LAW and Wolters Kluwer, etc., to understand the differences, application defects, and find out the real problems, which plays an important role in clarifying the application of the current situation and finding out ways to improve it.

Among them, this study focuses on the subject of prosecution, the assumption of significant risks and the burden of proof in the light of classic cases such as the "Five Small Maple Case" and the "Yunnan Oil Case".

4 Results

4.1 The identification of significant risks is vague

The focus of the Yunnan Oil case was the plaintiff, Friends of Nature, which argued that the defendant's actions posed a significant risk to the ecological environment. The defendant, Yunnan Petrochemical, submitted materials to prove that its construction project had been approved by the State Environmental Protection Department and had passed an environmental impact assessment. The Plaintiff argued that the Defendant had violated the environmental impact assessment process and that the approval by the administrative authorities did not prove that its actions did not pose a significant risk. This case reflects a major issue in preventive environmental civil public interest litigation, that is, the environmental protection department of the environmental impact assessment report can show that the behavior of the actors do not have significant risk. Similarly, one of the points of contention in the Green Peacock case was the determination of significant risk. The parties disagreed on whether the construction of the project in question was an act of ecological damage, and whether it posed a risk to the ecology of the reservoir inundation area. Due to the lack of legal system on the determination of the criteria, both sides around this focus of the dispute a large number of evidence and debate, invariably increase the burden of litigation. For the initiation of litigation criteria that the determination of significant risk of ambiguity made preventive environmental civil public welfare litigation in a difficult situation.

4.2 Prosecution of a single subject

From the cases that can be collected so far, it appears that the plaintiffs are all environmental protection organizations. For example, the plaintiffs in the five small-leaf maple case were the Green Development Council, the plaintiffs in the green peacock case and the Yunnan oil case were the Friends of Nature, and the plaintiff in the case of the Environmental Protection Federation v. Texas Jinghua Group Zhenhua Co., Ltd. was the China Environmental Protection Federation. This fully highlights the key role played by environmental organizations in the field of preventive environmental civil public interest litigation. However, it must also be recognized that there is currently a single plaintiff party in this litigation. This

singularity of plaintiffs has also become an obstacle to the development of the preventive public interest litigation system.

4.3 Difficulty of proof for the plaintiff and defendant

Preventive environmental civil public interest litigation is a "pending litigation", where the fact of damage has not yet occurred, which means the facts to be proved are of a preconceived and hypothetical nature, which makes it difficult for the plaintiffs and defendants in preventive environmental civil public interest litigation to adduce evidence. For example, the plaintiff in the "green peacock case" said in an interview that the collection of evidence is more difficult. In the "five small-leaf maple case", the defendant also claimed that the administrative authorities had not yet approved the environmental impact assessment report of the hydroelectric power plant. In addition, the project in question had not been formally launched, so the evidence submitted by the plaintiff was not sufficient to meet the requirements of the law on the admissibility of such cases, and the case should not be admitted.

5 Conclusion

While China's economy continues to develop and science and technology continue to advance, environmental problems are becoming increasingly serious. Once the environment is damaged, it is difficult or even impossible to repair, and the traditional path of post-damage relief is no longer able to cope with China's environmental problems. At present, China's social development to the stage of risk society, man-made risk beyond the natural risk to become the dominant content of environmental risk. For example, in the case of five small-leaf maple, the defendant's construction of tooth root hydroelectric power plant and the construction of supporting highway facilities has the risk of threatening the survival of the five small-leaf maple, posing a direct threat to the public interest of the society. In the case of the green peacock, the habitat of the endangered animal green peacock is threatened by the defendant's construction of the Jarsha River hydroelectric power plant behavior, with the possibility of being submerged. The impact of environmental pollution and ecological damage is not only on the natural world, but may also endanger human health and even cause the collapse of social civilization. Good environmental conditions have attracted attention as one of the essential conditions for human survival. The precautionary principle has become the first principle to be considered in dealing with environmental risks.

Most importantly, we need to improve the environmental public interest litigation "significant risk" identified problems. Not only to clarify the connotation of sufficient risks constitute the standard, but also to identify the sufficient risks of the determination of the main body, which requires the court to play an important role in the reality of the environmental risk is not static, part of the damage to the environment, even if in the behavior of the administrative organs are not recognized as a violation of the law, but with the change of the source of the risk of the subsequent changes will become a sufficient risk. Therefore, the court should play a leading role in risk identification, and the court should be listed as the only role in risk identification.

The road to environmental protection is long and arduous, but full of hope. We firmly believe that, with the continuous deepening of the research, the existing problems of the preventive environmental civil litigation system will gradually be solved. Its unique preventive function will be fully released, building a solid legal defense for environmental protection. On this basis, we are expected to build a more perfect and effective environmental protection system, to promote the early realization of China's sustainable development goals, and to create a green, ecological, livable and beautiful home for future generations.

References

- [1] Han Kangning, Leng Luosheng. Judicial Determination of "Significant Risk" in Preventive Environmental Public Interest Litigation in China[J]. China Population, Resources and Environment, 2023, 33(7): 202-212. (in Chinese).
- [2] Kang Jingwen. Discussion on the Identification of "Significant Risk" in Preventive Environmental Civil Public Interest Litigation—By Taking the Justification of Fact Finding as the Perspective[J]. Henan Social Sciences, 2023, 31(4): 76-84. (in Chinese).
- [3] XU Yiyang, LI Xilian. On the Building Rules of Proof for Preventive Environmental Civil Public Interest Litigation: Centered on the Interpretation of "Major Risk"[J]. Journal of Guangxi Police College, 2023, 36(1): 84-92. (in Chinese).
- [4] Wu Aibin. Proof of causation in environmental civil public interest litigation[J]. Zhongzhou Journal, 2022(9): 58-66. (in Chinese).
- [5] Zhang Yang. Institutional Positioning of Preventive Environmental Civil Public Interest Litigation: A Normative Analysis Based on the Yunnan "Green Peacock Case"[J]. Kunming University of Science and Technology Journal (Social Science Edition), 2022, 22(3): 19-28. (in Chinese).
- [6] Farber Daniel A. Coping with Uncertainty: Cost-Benefit Analysis, the Precautionary Principle, and Climate Change[J]. Washington Law Review, 2015, 90(4): 1659-1671.
- [7] Geiling Natasha. Can the Precautionary Principle Save the Endangered Species Act from an Uncertain Climate Future? [J]. Ecology Law Quarterly, 2020, 47(2): 305-338.