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RESEARCH ARTICLE

The Substantial Analysis of Civil Public Interest Litigation*

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Abstract

The current civil public interest litigation system is based on Article 58 of the Civil Procedure Law of the People's Republic of China as the backbone with expansions of the public interest protection fields in specific laws. It overall focuses on the qualification of the subject of the litigation and the public interest protection fields, and neglects the establishment of substantive rules. In practice, the environmental civil public interest litigation would refer to the substantive rules applicable to the ecological and environmental damage compensation system, while other civil public interest litigations would refer to the substantive rules of tort liability under private law. The governance and non-litigation nature of civil public interest litigation cannot deny the application of the underlying logic of the right to claim. The legislation on public interest litigation should take into account both procedure and substance. Based on clarifying the governance authority of the procuratorial organs for the protection of public interest, the legislation on public interest litigation should provide for the interests of action in civil public interest litigation, the scope of claims, the justifiability of punitive damages, the allocation of the burden of proof, and other issues closely related to the substance.

Keywords civil public interest litigation (CPIL); basis of claim; litigation claim; burden of proof

Civil public interest litigation (CPIL) under positive law in China is institutionally based on Article 58 of the 2021 Civil Procedure Law of the People's Republic of China as the backbone with protection fields expanded through specific laws. In terms of substance, the only clause regarding public interest litigation (PIL) in the Civil Code of the People's Republic of China is Article 185, which deals with the protection of the personal rights of heroes and martyrs. Moreover, this article itself is an incomplete norm that fails to specify neither the subject who exercises the right of claim nor the specific legal consequences.[1] Besides, Book Ⅶ Tort Liability of the Chinese Civil Code generally continues the institutional logic of the 2009 Tort Law of the People's Republic of China (Expired) in protecting private rights, so it does

[1] A complete norm is expressed in the form of a hypothetical proposition and divided into two parts: constituent elements and legal effects. A norm that is incomplete or fails to specify constituent elements, or lacks legal effect, contains no statement that vests itself with effect. See ZHU Qingyu, 民法总论 (*The General Theory of Civil Law*), 北京大学出版社 (Peking University Press), at 46 (2016).

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not directly stipulate the substantive system for CPIL.[2] The existing CPIL system in China is mainly based on procedural rules that stipulate the subjective status of plaintiffs and the actionable fields. There has been much discussion in both theoretical and practical circles on the structural or procedural issues of CPIL,[3] but there has been insufficient research on substantive rules or on those procedural issues that are determined by substance. In terms of the substantive formation of PIL, judicial practice has been good at innovation but not so good at uniformity and standardization. This article, in light of the governance and non-litigation nature of PIL, follows the main line of "right of action—litigation claim—burden of proof," and based on an in-depth analysis of existing rules and practices and on the exhaustive application of interpretation techniques, puts forward legislative suggestions on the improvement of the system of CPIL from the perspective of substantive analysis.

I Interest of Action of CPIL

The interest of action refers to the necessity and possibility of referring specific disputes to a court for relief. The interest of action includes the status for rights protection and the interest of rights protection.[4] In the field of PIL, whether it is CPIL or administrative public interest litigation (APIL), the legal interests protected by the two can be said to be homogeneous or even overlapping. Therefore, how to deal with the relationship between CPIL and APIL and whether CPIL needs a certain filtering mechanism constituted the specific issues faced by the mechanism of interest of action asserting itself in the field of CPIL.

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[2] The system of compensation for damage to the ecological environment stipulated in Articles 1234 and 1235 of the Chinese Civil Code originates from the 2015 Plan for the Pilot Reform of the System of Compensation for Damage to the Ecological Environment (abolished) and the 2017 Plan for the Reform of the System of Compensation for Damage to the Ecological Environment. Although the subjects of the right of action stipulated in the Civil Code include "the authority specified by the state or the organization specified by law," the subjects of the right of action stipulated in Article 1 of the Several Provisions of the Supreme People's Court on the Trial of Cases on Compensation for Damage to the Ecological Environment (Trial Implementation, 2020) are limited to the people's government at the provincial or prefecture city level or the relevant department or institution designated by it or the department authorized by the State Council to exercise ownership of all natural resource assets of the whole people, and exclusive of social organizations; Article 17 also stipulates that in the application of the relief mechanism, litigation of compensation for damage to ecological environment takes precedence over environmental civil public interest litigation. For the legislative reasons for the system of compensation for damage to ecological environment, see HUANG Wei, 中华人民共和国民法典侵权责任编解读 (*Interpretation of the Tort Liability of the Civil Code of the People's Republic of China*), 中国法制出版社 (China Legal Publishing House), at 257–258 (2020). Of course, there are also views that Articles 1234 and 1235 of the Civil Code are both the substantive law basis for environmental civil public interest litigation. See the Leading Group for the Implementation of the Civil Code of the Supreme People's Court, 中华人民共和国民法典侵权责任编理解与适用 (*Understanding and Application of Tort Liability in the Civil Code of the People's Republic of China*), 人民法院出版社 (People's Court Press), at 555–557 (2020).

[3] See ZHANG Chenguo, 论公益诉讼中处分原则的限制与修正——兼论新民诉法解释第 289、290 条的适用 (On the Limitation and Modification of the Disposition Principle in Public Interest Litigation: On the Application of Articles 289 and 290 of the Interpretation of the New Civil Procedure Law), 4 中外法学 (*Peking University Law Journal*), 902–927 (2016); WU Jun, 环境民事公益诉讼的程序构造 (The Procedural Structure of Environmental Civil Public Interest Litigation), 8 华东政法大学学报 (*Journal of the East China University of Politics & Law*), 40–51 (2015); WANG Taigao & TANG Zhang, 论检察机关提起公益诉讼的体系展开 (On the Systematic Development of Public Interest Litigation Initiated by the Procuratorate), 1 苏州大学学报 (法学版) (*Journal of Soochow University* [*Law Edition*]), 1–2 (2023).

[4] See Ito Makoto, 民事诉讼法 (*Civil Procedure Law*), translated by CAO Yunji, 北京大学出版社 (Peking University Press), at 119 (2019).

A The Relationship between CPIL and APIL

Given the legal interests protected by APIL and CPIL overlap, APIL may in fact constitute a pre-intervention or filtering mechanism for CPIL.

The pre-litigation urging procedure in APIL actually stems from respect for the power of initial administrative judgment. In administrative litigation, the theory of the power of initial administrative judgement means that during judicial review, a court should respect the administrative organs' priority power to make judgments and handle administrative affairs; for certain matter that the administrative organ has failed to judge and handle within its authority, the court may not make decisions on behalf of the administrative organs, instead, it shall wait for the administrative organs to handle it first, then it may review whether the administrative act of the administrative organ is legitimate.[5] A judgment on whether an administrative act is legitimate is actually embedded in the initiation of APIL by a procuratorial organ, that is, the procuratorial organs will only consider filing APIL when it believes that the administrative act is illegal. It is precisely because the courts respect the priority power of the administrative organs to judge administrative affairs in administrative litigation that it is necessary to set up a pre-litigation urging procedure in APIL, namely, only when the act undertaken by a procuratorial organ to exercise legal oversight over administrative organs fails to fully protect public interest does the procuratorial organs have to file APIL. From the perspective of encouraging the procuratorial organs to exercise their legal oversight power in accordance with the law and encouraging the administrative organs to perform their duties of protecting public interests in accordance with the law, and considering that administrative relief can directly and quickly safeguard the public interest, a procuratorial organ, when filing a CPIL, should actually submit materials that prove that it has fulfilled its legal oversight duties and urged the administrative organs to perform their duties in accordance with the law.[6] In short, it is an important manifestation of the value of the PIL system that the procuratorial organs promote the resolution of torts on public interests by urging administrative organs or relevant social organizations to perform their duties.[7] Since administrative power is non-disposable, if any damage to public interests is caused by the illegal act of an administrative organ, APIL will take precedence over CPIL in legal procedures.

However, in terms of existing rules and practices, CPIL and APIL actually run parallel. In the field of environmental PIL, a relief system where administrative performance of duties is put alongside CPIL has been clearly established. Article 12 of the 2015 Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations (hereinafter referred to as the "Interpretation on Environmental CPIL") stipulates that "The people's court shall, within ten days after

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[5] HUANG Xianxiong, 行政首次判断权理论及其适用 (The Theory and Application of the Power for Initial Administrative Judgement), 5 行政法学研究 (*Administrative Law Review*), 114 (2017).

[6] See WU, fn. 3 at 45.

[7] See CAO Jianming, 最高人民检察院关于检察机关提起公益诉讼试点工作情况的中期报告——2016 年 11 月 5 日在第十二届全国人民代表大会常务委员会第二十四次会议上 (Interim Report of the Supreme People's Procuratorate on the Pilot Project of Public Interest Litigation by Procuratorates: At the 24th Meeting of the Standing Committee of the 12th National People's Congress on November 5, 2016), 1 最高人民检察院公报 (*Gazette of the Supreme People's Procuratorate of the People's Republic of China*), 10 (2017).

accepting an environmental CPIL, inform the department assuming environment and resources protection supervision and administration functions with respect to the defendant's conduct." And Article 26 provides that: "Where the plaintiff applies for withdrawing the case since all the claims thereof have come true owing to the lawful performance of functions by the department responsible for environmental and resource protection oversight and administration functions, the people's court shall grant such an application." The above-mentioned provisions are reserved in the above-mentioned judicial interpretation when revised in 2020. The reason for such an institutional arrangement is that the departments responsible for environmental protection oversight and administration functions are endowed with superior professional technology, equipment, law enforcement methods, etc., and are the main force in protecting the public interest of the environment. As the last line of defense of social fairness and justice, the judiciary is an important supplement to and effective supervision of the power of environmental administrative law enforcement. Therefore, it is necessary to establish a coordination mechanism for environmental resource law enforcement, especially the connection between environmental administrative law enforcement and environmental justice.[8] Although the above-mentioned institutional arrangement blurs the relationship between administrative power and CPIL, it strengthens the priority of environmental public interest protection. Ecological and environmental damage has its own characteristics. If the environmental administrative authorities intervene in the governance as early as possible, it will, on the one hand, maximize the social and environmental effects of the PIL procedure, and on the other hand, convert the liability for tort on the public interest into a monetary debt, avoiding problems like difficulty in execution and extremely high execution costs as incurred at the execution stage by environmental tort liability, including non-monetary debts such as environmental restoration. In fact, when an administrative organ has illegal administrative acts or inaction, causing damage to national interests or social public interests, such as those regarding personal information protection and women's rights protection, there will be issues on priority in the selection of PIL procedures. According to Article 27 of the 2018 Organic Law of the Villagers' Committees of the People's Republic of China, no villagers' charter of self-governance, village regulations, folk conventions or decision made by the villagers' assembly or the villagers' representatives assembly shall conflict with the Constitution, laws, regulations, and state policies or shall contain any information infringing upon the personal rights, democratic rights, and lawful property rights of villagers; if any villagers' charter of self-governance, a village regulation or folk convention, or a decision made by the villagers' assembly or the villagers' representatives assembly violates the preceding provision, the people's government of the township, ethnic township, or town shall order it to correct. The Supreme People's Court believes that if a resolution made by any village collective organizations violates laws or regulations or infringes upon the legitimate rights and interests of villagers, the villagers have the right to complain and report to the primary-level governments and request supervision. After receiving the villagers' report and application, the primary-level governments have the statutory duty to exercise oversight and

[8] See ZHENG Xuelin et al.,《关于审理环境民事公益诉讼案件适用法律若干问题的解释》的理解和适用 (Understanding and Application of the Interpretation on Several Issues Concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations), 5 人民司法 (应用) (*People's Judicature* [Application]), 26 (2015).

order rectification in accordance with the law.[9] The failure of the primary-level governments to perform their oversight obligations will constitute a failure in their statutory duties and fall within the scope of administrative litigation that the people's court shall accept and hear.[10] Therefore, the courts in some jurisdictions have made it clear that disputes over membership in rural collective economic organizations do not fall within the scope of civil litigation but within the jurisdiction of township people's governments. The specific practice is that any villager wishing to request a rural collective economic organization to confirm his or her membership should first submit an application to the township (town) people's government or subdistrict office for handling. If the villager is dissatisfied with the handling decision or the township (town) people's government or subdistrict office fails to handle the application within the prescribed time limit, the villager has the right to apply for reconsideration to the people's government at the next higher level or directly file an administrative lawsuit with the people's court. Only after an administrative organ makes a determination regarding the membership of the rural collective economic organization can the civil subject file a civil lawsuit to remedy the civil rights and interests to which it is entitled based on his or her membership of the rural collective economic organization, which is the relief model of "administrative handling (membership confirmation) + civil litigation (rights and interests relief)."[11] Taking personal information protection as a further example, pursuant to Articles 13 and 41 of the 2021 Measures for the Supervision and Administration of Online Trading, if an online trading business illegally collects and uses consumer personal information, the market oversight and administration department has the power to enforce the law, or at least has the power to order *ex officio* the illegal business to take corrective actions within a time limit.

In summary, a coordination mechanism between administrative law enforcement and civil litigation can be established in all areas of public interest protection. Since CPIL is an individual action, it is very inefficient to file CPIL one by one for acts in which multiple subjects of tort extensively infringe on the public interest or on the interests of numerous subjects of private rights. Therefore, in terms of legislation, we may refer to the institutional model set forth in the Interpretation of Environmental CPIL for the litigants of PIL to choose the appropriate type of litigation. Nevertheless, where any violation of laws or nonfeasance of the administrative organs causes damage to the public interest, proceedings of APIL must be filed.

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[9] 最高人民法院行政裁定书，（2017）最高法行申 5157 号 (Administrative Ruling of the Supreme People's Court [2017] Z. G. F. X. S. No. 5157).

[10] 最高人民法院行政裁定书，（2017）最高法行申 5824 号 (Administrative Ruling of the Supreme People's Court [2017] Z. G. F. X. S. No. 5824).

[11] See 2021 年广东省清远市中级人民法院《清远市辖区内农村集体经济组织成员资格确认及相关待遇行政争议处理意见》第 1、2 条 (Articles 1 and 2 of the 2021 Opinions on the Handling of the Administrative Dispute over the Confirmation of Membership and Related Treatment of Rural Collective Economic Organizations within the Jurisdiction of Qingyuan City issued by the Intermediate People's Court of Qingyuan Municipality of Guangdong Province). This model is actually the practice throughout Guangdong Province. For relevant judgment documents, please refer to 广东省广州市中级人民法院民事判决书，（2021）粤 01 民终 26132 号 (Civil Judgment of the Intermediate People's Court of Guangzhou City of Guangdong Province [2021] Y. 01 M. Z. No. 26132); and 广东省惠州市中级人民法院民事判决书，（2022）粤 13 民终 9160 号 (Civil Judgment of the Intermediate People's Court of Huizhou City of Guangdong Province [2022] Y. 13 M. Z. No. 9160).

B Allocation of Right of Action in CPIL

Litigation is the final resort. If the purpose of PIL is achievable through warnings or negotiations rather than proceedings, the need for litigation will be significantly reduced. For CPIL, a certain pre-action warning mechanism may be set up by reference to the legislative approach to the interest of action of affirmation of no tort and the pre-action urging procedures for APIL.[12] In comparative law, the Consumer Contract Act of Japan introduced a consumer collective litigation system when it was revised in 2006, granting consumer protection groups or organizations that have undergone a certain certification procedure the status of plaintiffs and allowing them to file lawsuits against business operators to seek prohibition of certain business practices. A consumer group intending to file a public interest lawsuit must first send to the company or merchant to be named as the defendant a written notice requiring it to immediately stop infringing on consumer rights. No consumer group may file a lawsuit with a court except that the other party fails to make any reasonable response more than one week after its receipt of the written notice. The procedural design of "pre-intervention by means of prior notice" serves the purpose of forcing, through negotiations rather than proceedings, business operators to stop infringing on consumer rights.[13] In fact, the Plan for the Reform of the System of Compensation for Damage to the Ecological Environment, which is equivalent to the function of environmental CPIL, stipulates a system of pre-litigation negotiation on compensation where the compensation obligees may negotiate with the compensation obligors on specific issues such as the facts and extent of the damage, the start date and deadline for restoration, the method for liability assumption and deadline for compensation, and take into comprehensive consideration the technical feasibility of the restoration plan, cost-effectiveness optimization, the compensation capacity of the compensation obligor, the feasibility of third-party governance, etc. to reach a compensation agreement. Article 26 of the abovementioned Interpretation on Environmental CPIL is also compatible with the practice where the plaintiffs in CPIL require, through pre-litigation negotiations and warnings, the tortfeasor to bear the tort liability. In addition, Article 19 of the 2020 Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law for Cases Regarding Procuratorial Public Interest Litigation (hereinafter referred to as the "Interpretation on Procuratorial Public Interest Litigation") provides: "Where, in the trial of a CPIL case, all claims of a people's procuratorate come true and the people's procuratorate withdraws the lawsuit, a people's court shall permit such withdrawal." This actually provides institutional space for the plaintiffs in CPIL to urge, before they initiate any action, the tortfeasors to assume tort liability on their own initiative. In fact, there is no need in practice to file CPIL simply seeking an apology from the tortfeasor, who will in most cases not refuse the claim for

[12] Article 18 of the 2009 Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Patent Infringement Dispute Cases stipulates: "Where a right holder gives a warning of patent infringement to another person, the person warned or an interested person reminds in writing the right holder of exercising his or her right to sue, the right holder neither withdraws the warning nor files a lawsuit within one month after receipt of the written reminder or within two months after the written reminder is sent, and the person warned or the interested person files a lawsuit with the people's court to request a confirmation of his act as not infringing the patent, the people's court shall accept such a case."

[13] See WANG Yaxin, 日本公益诉讼立法动向与我国新民诉法第五十五条的适用 (Legislative Trends in Japan's Public Interest Litigation and the Application of Article 55 of China's New Civil Procedure Law), 10 中国审判 (*China Trial*), 24–25 (2020).

an apology.[14]

PIL, due to its attribute of governance, is essentially an activity of law enforcement. From the perspective of directness and quickness of relief, it is more appropriate for the plaintiff in CPIL to engage in pre-litigation negotiation with the tortfeasor, issue a warning that a CPIL will be filed if the tortfeasor fails to make corrections or provide compensation, and specify the alleged tort committed by the tortfeasor and the form of liability to be assumed by the same. Such a practice is similar to the pre-litigation procedure of APIL, and the practice of APIL has proved that pre-litigation negotiation and urge have good practical effects. Based on that, CPIL may develop toward a prospect of flexible law enforcement, offering an option besides filing a civil lawsuit as a court case. Therefore, we may in legislation turn the system of pre-litigation negotiation on compensation set forth in the 2017 Plan for the Reform of the System of Compensation for Damage to the Ecological Environment into a generally available means, and stipulate that the plaintiff in a CPIL may, before filing a lawsuit, negotiate with the tortfeasor to discuss the possible tort liability, the extent of the liability, and the form of liability assumption and, upon successful negotiation, make the compensation agreement public and perform the judicial affirmation procedure, so as to ensure that the principle of punishment is not abused, which is the practice of "social supervision (publicity) + court review."

The allocation of right of action in CPIL also involves the relationship between CPIL filed by the procuratorial organs and CPIL filed by other subjects. Pursuant to Article 58.2 of the Civil Procedure Law, the right of action of the procuratorate in relation to CPIL is subsidiary. In practice, the procuratorial organs should urge through announcements other subjects to file CPIL, and they have the right to file CPIL if such other subjects fail to do so. However, the specific law on PIL interest litigation does not follow the logic of allocation of right of action behind the Civil Procedure Law. In the areas of protection of the reputation and honor of heroes and martyrs, protection of minors, production safety, anti-monopoly, combat against telecommunications and online fraud, agricultural product quality, and protection of women's rights, the right of action in relation to PIL is granted to the procuratorial organs alone. From the perspective that special laws take precedence over general laws, the procuratorate is not required to make pre-action announcements in CPIL in these areas. The right of action for PIL in relation to personal information protection stipulated in Article 70 of the Personal Information Protection Law of the People's Republic China is granted to "the people's procuratorate, consumer organizations prescribed by law, and other organizations determined by the national cyberspace administration." This article does not mean in literal words that the right of action of the procuratorate is subsidiary; therefore, the rights to action should be

[14] For relevant cases, see 吉林省长春市中级人民法院民事判决书，（2016）吉 01 民初 191 号 (Civil Judgment of the Intermediate People's Court of Changchun Municipality, Jilin Province [2016] J. 01 M. C. No. 191); 吉林省长春市中级人民法院民事判决书，（2016）吉 01 民初 819 号 (Civil Judgment of the Intermediate People's Court of Changchun City, Jilin Province [2016] J. 01 M. C. No. 819); and 广东省广州市中级人民法院民事判决书，（2017）粤 01 民初 386 号 (Civil Judgment of the Intermediate People's Court of Guangzhou City, Guangdong Province [2017] Y. 01 M. C. No. 386). At present, apart from the protection of the reputation and honor rights of heroes and martyrs, civil public interest litigation cases simply seeking apologies are rare.

equal and parallel among the subjects.[15] Even though the right of action in CPIL enjoyed by the procuratorate is subsidiary, this right cannot be waived and has the attributes of official authority. Therefore, the procuratorate is actually a competent authority for the protection of public interests. From the perspective of legislative theory, we may not only consider abolishing the institutional structure where the procuratorial organs' right of action for CPIL is subsidiarity but also stipulate the procuratorial organs' competent authority over the protection of public interests.

II Scope of Claims in CPIL

In those countries and regions with civil law systems, lawsuits aimed at protecting the public interest are mainly litigations seeking injunctions, especially class action lawsuits in those countries, such as Germany and Japan. The reason as to the aforesaid fact is that, on the one hand, class action lawsuits are mainly applicable to scattered infringements involving small amounts, and based on the individualistic legal view, the right to claim damages can only be exercised by individuals. On the other hand, when it comes to damages, it is inevitable to face the challenge of how to distinguish between a group's right of action and a litigant's right to claim damages.[16] CPIL in China is not limited to actions seeking injunctions. Plaintiffs may claim rights to stop infringement, remove obstacles, eliminate dangers, request restitution, receive compensation for losses, and others. CPIL involves civil tort disputes, so substantively, we must consider it from the perspective of the basis of the claim when handling it. Civil disputes typically involve a plaintiff "requesting" the defendant to make a certain payment, and the positive legal norms or legal acts that underlie the plaintiff's "claim" are the basis of claim.[17] To consider a dispute from the perspective of the basis of claim, one should begin with the following question: "Who can claim what from whom and on what basis?" The basis of the claim includes two parts: constitutive elements and legal effects.[18] By the logic of the basis of the claim, the scope of CPIL should be limited to the needs of protection of public interests *per se*, and the applicability scope or applicable conditions of claims lodged for compensation in the nature of monetary payment need to be strictly limited. Of course, considering the non-uniqueness of legal effects, plaintiffs in CPIL should be allowed to lodge subsidiary claims, and the courts should be allowed to make subsidiary arrangements for the forms of liability in judgments or mediation documents.

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[15] In practice, some procuratorates make pre-action announcements. For example, in the civil public interest litigation case involving LIU [REDACTED]'s infringement upon the personal information of certain citizens, the People's Procuratorate of Qijiang District, Chongqing Municipality made a pre-action announcement before filing a civil public interest lawsuit in accordance with Article 70 of the Personal Information Protection Law. See 重庆市綦江区人民检察院公告，渝綦检民公告（2023）3号 (Announcement of the People's Procuratorate of Qijiang District, Chongqing Municipality [2023]Y. Q. J. M. G. G. No. 3).

[16] See WU Zeyong, 欧洲群体诉讼研究——以德国法为中心 (*Collective Litigation in Europe: A Study Focusing on German law*), 北京大学出版社 (Peking University Press), at 261 (2015).

[17] See WU Xiangxiang, 请求权基础：方法、体系与实例 (*Basis of Claims: Methods, Systems and Cases*), 北京大学出版社 (Peking University Press), at 2 (2021).

[18] See ZHU Xiaozhe, 请求权基础实例研习教学方法论 (Teaching Methodology of Case Studies on the Basis of Claim), 1 法治研究 (*Research on Rule of Law*), 28 (2018).

A The Basis of Claim for Compensatory CPIL

From the perspective of legislative techniques of civil substantive law, it is a usual practice in China to stipulate legal liability independent while ignoring the facts of constitutive elements in the assumption of specific legal liability and the right holders who may claim specific legal liability (legal effects). The model of providing effects in a package (civil liability method) severs the connection between elements and effects, so that the normative links break apart and scatter around.[19] Although Article 98 of the 2021 Rules for the Handling of Public Interest Litigation Cases by People's Procuratorates stipulates that the procuratorial organs may file lawsuits for damages and punitive damages in CPIL, this Article is rather a replica of the legal liability clause than a basis for a claim.

Looking at all fields of CPIL in China, we will see that the only field in which legislation and judicial interpretations clearly grant the right to claim compensation is ecological environment and resource protection. In this regard, Articles 18 to 22 of the Interpretation on Environmental CPIL establish the basis for claims for environmental CPIL so that the compensation items that the plaintiffs may claim are completely consistent with the matters of compensation for damage to the ecological environment stipulated in Article 1235 of the Civil Code. Although there is the possibility that a plaintiff may file a claim for compensation in a case of protection of state-owned property and the transfer of the right to use state-owned land, the current legislation is limited to the field of APIL. Such an arrangement aims to oversee the illegal exercise of power or inaction of administrative organs with supervisory and management responsibilities in activities such as the disposal and management of state-owned property, or more specifically, the supply of state-owned land and the transfer of the right to use land.[20] In order to ensure that national interests and social public interests are effectively protected, as the state organs of legal oversight, the procuratorates, by filing APIL, could urge administrative organs to perform their duties in accordance with the law. For major illegal acts, the courts may, depending on the circumstances, revoke them, order them to be undertaken anew, or declare them invalid; where an administrative organ fails to fully, properly, and promptly perform its relevant statutory duties, and the procuratorate lodges any claim for the declaration of such illegality and requests the administrative organ to perform its statutory duties, the court should support the claim and request in accordance with the law.[21] Regarding the issue of claims for compensation in CPIL other than ecological environment and resource protection, legislation and judicial interpretations generally do not directly grant plaintiffs in CPIL the right to file claims for compensation. For example, with regard to infringements on women's legitimate rights and interests that have caused damage to social public interests, the legislation only provides for those types of litigation claims such

[19] TANG Wenping, 法典编纂视野下的请求权体系研究 (Research on the System of Claim under the Perspective of Codification), 3 兰州学刊 (*Lanzhou Academic Journal*), 130 (2016).

[20] On December 17, 2020, the Supreme People's Procuratorate released nine model cases of public interest litigation in the fields of protection of state-owned properties and transfer of the rights to use state-owned land, all of which were cases of administrative public interest litigation.

[21] Although this practice is aimed at environmental administrative public interest litigation, it is actually a general way of adjudicating administrative public interest litigation. See 2019 年《最高人民法院办公厅关于印发江必新副院长在全国法院环境公益诉讼、生态环境损害赔偿诉讼审判工作推进会上讲话的通知》(The 2019 Notice of the General Office of the Supreme People's Court on Issuing the Speech of Vice President JIANG Bixin at the Promotion Conference of National Courts on the Trial Work of Environmental Public Interest Litigation and Eco-Environmental Damage Litigation).

as declaration of invalidity, cessation of infringement, and correction of errors, but does not directly include claims for compensation. Behind the membership of collective economic organizations is the right to properties of collective economic organizations. Any violation of the membership of rural women in collective economic organizations will also involve the violation of the property rights of rural women in the collective economic organizations. Pursuant to Article 77.1 of the 2022 Law on the Protection of Women's Rights and Interests, if any confirmation of rural women's membership in collective economic organizations infringes upon women's rights and interests or upon women's rights to contract rural land, entitlement to collective revenue, rights and interests in land expropriation compensation and distribution, and rights and interests in the use of homestead, resulting in damage to the public interest, the procuratorates may bring a PIL in accordance with the law. However, the above provision does not explicitly grant the procuratorates the right to file a claim for compensation. From a legal perspective, the right to contract rural land, entitlement to collective income, rights and interests in land expropriation compensation and distribution and the rights and interests in the use of homestead based on membership in collective economic organizations are private rights of the right holders, and these rights do not fall within the scope of rights directly protected by PIL.

However, in the field of consumer-related CPIL, claims for compensation have been prevailing and have almost become a common practice. CPIL is essentially a kind of lawsuit for damages against acts that infringe upon the public interest. And it is the task of the law on damages not only to determine the scope of the objects of damages but also to determine the scope of the persons who shall be compensated for the damages. The general idea is that the scope of persons who may claim damages is determined by the "theory on creditor's interest," and that they can only request compensation for the damages sustained by themselves.[22] Whether in Article 148 of the 2015 Food Safety Law of the People's Republic of China or in Article 55 of the 2013 Law of the People's Republic of China on the Protection of Consumer Rights and Interests, both the right holders of the claim for compensatory damages and those of the claim for punitive damages is required to be specific consumers who have made actual consumption. In practice, plaintiffs in CPIL and many courts are aware that the substantive rights and interests of the claim for punitive damages belong to the specific injured consumers.[23] Therefore, the claim for punitive damages arising from infringement upon consumer rights belongs in substance to specific consumers exclusively. As plaintiffs

[22] See WANG Zejian, 损害赔偿 (*Compensation for Damages*), 北京大学出版社 (Peking University Press), at 272 (2017).

[23] Relevant cases include 广东省广州市中级人民法院民事判决书，（2017）粤 01 民初 383 号 (Civil Judgment of the Intermediate People's Court of Guangzhou City, Guangdong Province [2017] Y. 01 M. C. No. 383); 内蒙古自治区高级人民法院民事判决书，（2021）内民终 500 号 (Civil Judgment of the Higher People's Court of Inner Mongolia Autonomous Region [2021] N. M. Z. No. 500); 内蒙古自治区赤峰市中级人民法院民事判决书，（2018）内 04 民初 92 号 (Civil Judgment of the Intermediate People's Court of Chifeng City, Inner Mongolia Autonomous Region [2018] N. 04 M. C. No. 92); 江苏省无锡市中级人民法院民事判决书，（2019）苏 02 民初 451 号 (Civil Judgment of the Intermediate People's Court of Wuxi City, Jiangsu Province [2019] S. 02 M. C. No. 451); 江西省萍乡市中级人民法院民事判决书，（2020）赣 03 民初 72 号 (Civil Judgment of the Intermediate People's Court of Pingxiang City, Jiangxi Province [2020] G. 03 M. C. No. 72); 吉林省辽源市中级人民法院民事判决书，（2020）吉 04 民初 48 号 (Civil Judgment of the Intermediate People's Court of Liaoyuan City, Jilin Province [2020] J. 04 M. C. No. 48); 陕西省紫阳县人民法院刑事附带民事判决书，（2020）陕 0924 刑初 19 号 (Judgment of Civil Action Incidental to a Criminal Case of the Primary People's Court of Ziyang County, Shaanxi Province [2020] S. 0924 X. C. No. 19); and 江苏省南京市高淳区人民法院刑事附带民事判决书，（2018）苏 0118 刑初 12 号 (Judgment of Civil Action Incidental to a Criminal Case of the Primary People's Court of Gaochun District, Nanjing City, Jiangsu Province [2018] S. 0118 X. C. No. 12).

in CPIL, consumer associations and the procuratorial organs have in substance no claim for punitive damages. Even if they win a case, they have no right to dispose of punitive damages that belong to specific consumers. The plaintiffs in consumer-related CPIL are on no legal basis to directly assert the claim for compensation that belongs to specific consumers; moreover, the practice of nationalizing the compensation further deprives consumer-related civil public interest litigation of the substantive rationality of becoming collective litigation.[24]

From the perspective of theoretical analysis, most incidents involving infringement upon the rights and interests of many consumers are scattered damages involving small amounts; that is, there are a large number of victims but the damage suffered by each victim is relatively insignificant. For minor damage, it is not economical for each victim to personally seek right relief, as the time, energy and financial resources that the victim is willing to invest in defending his or her rights are extremely limited, basically he or she will end up choosing to swallow the damage down and not lodge any litigation. In the event that individual victims have low desire and weak ability to defend their rights and that benefits they could obtain from doing so are insignificant, it is indeed a solution with substantive reasonableness and feasibility in practice to remedy, through the PIL system, the legal rights of many consumers who have suffered minor damages and to punish tortfeasors. In CPIL, asserting the claim for compensation that belongs to a large number of specific consumers is actually allowing CPIL to play the role of collective litigation. However, the judicial system and litigation procedures are reserved matters in legislation. For the sake of allocation of the claim for compensation in consumer-related CPIL, we must follow the principles of system interpretation and unity of legal order, and make systematic institutional arrangements in legislation to avoid inconsistency in rule design, especially to properly handle the relationship between the right of action for PIL and the right of action for private interest litigation.[25]

B Applicable Conditions for Environmental Restoration Costs in Environmental CPIL

In environmental CPIL, there is controversy in practice as to whether the tortfeasors should pay compensation or bear the cost of environmental restoration if no actual restoration of the ecological environment is carried out. For those environmental pollution incidents where no restoration is necessary, a practice has developed in which the compensation for environmental damage is calculated by the method of hypothesized governance costs. Pursuant to the 2014 Recommended Methods for Environmental Damage Identification and Assessment (2nd edition) and the 2014 Recommended Methods for Environmental Damage Identification and Assessment during Emergency Response to Environmental Incidents, the method of hypothesized governance costs is one of the methods to assess environmental

[24] It should be noted that mechanisms where consumers may apply for the distribution of compensation awarded in consumer-related civil public interest litigation have been established in many places, but these mechanisms also lack a legal basis. For example, local documents such as the 2021 Interim Measures for the Management of Public Welfare Fund of Consumer-Related Litigation in Suzhou and the 2023 Measures for the Management of Compensation for Consumer-Related Civil Public Interest Litigation in Yibin both stipulate that consumers who are victims of infringements alleged in specific consumer-related civil public interest litigation have the right to claim compensation for the consumer-related civil public interest litigation.

[25] A legislative example worth learning from is the special representative litigation stipulated in Article 95.3 of the 2019 Securities Law of the People's Republic of China.

value.[26] The method of hypothesizing governance costs, being a method to assess, based on the pollution control costs, environmental value, lies on the basic assumption that as long as pollutants are effectively controlled before being discharged and no damage is caused to the external environment, the pollution control costs can be theoretically considered the minimum environmental damage. In actual environmental pollution incidents, pollutants in most cases have gone into the external environment and caused impacts of varying degrees on the ecological environment. And such an impact is generally greater than the cost of pollution control. Therefore, the environmental sensitivity coefficient (ESC) is used to adjust the method of hypothesized governance costs to obtain the "minimum environmental damage." The ESC is determined based on the environmental functional zoning, i.e., the higher the environmental functional zone category is, the higher the ESC is, which means that discharging pollutants into zones with higher ecological service functions will cause greater damage. Pursuant to the 2016 Technical Guidelines for Identification and Assessment of Environmental Damage, the identification and assessment of ecological environment damage, when it comes to application, gives priority to the method of alternative equivalent analysis based on physical restoration, and only when restoration measures are not feasible will the method of hypothesized governance costs be applied.[27]

Environmental CPIL also implements the principle of loss-gain compensation, that is, the losses are based on the actual losses incurred or the losses that are bound to occur. Pursuant to the Plan for the Reform of the System of Damage to Ecology Environment and Article 1235 of the Civil Code, items of compensation for damage to ecological environment include losses resulting from the failure of service functions through the period from the occurrence of damage to ecological environment to the completion of restoration, or losses resulting from permanent damage to the functions of ecological environment, expenses for the investigations, appraisals, and assessments of damage to ecological environment, expenses for removal of pollution and restoration of ecological environment, and reasonable expenses incurred to prevent the occurrence and expansion of damage. From the perspective of system interpretation and literal interpretation, the costs of restoration of ecological environment should be the actual costs incurred. The method of hypothesizing governance costs is actually inconsistent with the forms of liability stipulated in the Plan for the Reform of the System of Damage to Ecology and Environment and Article 1235 of the Civil Code. In practice, perpetrators of environmental infringements in most cases would hold the negative view on whether compensation should be paid for restoration costs that have not actually been incurred. For example, in the key points of the judgment of Guiding Case No. 133 issued by Supreme People's Court, "Environmental CPIL Case of the People's Procuratorate of Yantai City, Shandong Province v. WANG and MA," the court holds that if a polluter having

[26] For details on the applicability scope of the method of hypothesized governance costs, please refer to the attachment Explanation about the Circumstances for Application and Instructions for Calculation of the Method of Hypothesized Governance Costs to the 2017 Reply to Issues Concerning the Application of the Method of Hypothesized Governance Costs in Identification and Assessment of Damage to Ecological Environment, issued by the General Office of the former Ministry of Environmental Protection.

[27] See WANG Wei, 收费标准法适用对象是谁？——专访生态环境部环境规划院环境风险与损害鉴定评估研究中心主任於方 (Who Does the Law on Fee Rates Apply to: An Interview with YU Fang, Director of the Environmental Risk and Damage Identification and Assessment Research Center of the Environmental Planning Institute of the Ministry of Ecology and Environment), 中国环境报 (*China Environment News*), p. 8, Mar. 25, 2019.

discharged pollutants into a water body in violation of national regulations and having caused damage to ecological environment claims exemption from or relief of responsibilities for restoration of ecological environment on the grounds that the polluted waters are self-cleaning and that the water quality has been restored, the people's court will not support such claim. As another example, in the case of PIL involving environmental pollution filed by Taizhou Environment Protection Federation against Jiangsu Changlong Agrochemical Co., Ltd. et al., Taizhou Environment Protection Federation claimed that according to the Technical Report on the Assessment of Damage to Environmental Pollution in the December 19 Incident of Waste Acid Dumping in Taixing City ([2024] S. H. X. J. Z. No. 140401) issued by Jiangsu Society Environmental Sciences, the total cost (hypothesized governance costs) that the six defendant companies should have spent on legally treating hazardous waste which has been illegally disposed of in the pollution incident was 36,620,644 yuan. As for the costs of pollution remediation, the total amount, based on the hypothesized governance costs and given the multiple of 4.5, is more than 1.6 billion yuan. The defendants argued that the claim of the Taizhou Environment Protection Federation was untenable on the ground that there was no factual basis for calculating the losses based on hypothesized governance costs because the water quality of the Rudong-Taixing Canal and the Gumagan River had recovered and no artificial intervention measures were needed for restoration. Ultimately, the first-instance court ruled in favor of calculating the damage to environmental pollution based on 4.5 times of the hypothesized governance costs. However, the second-instance court allowed the tortfeasors to offset 40% of the cost of environmental restoration against the upgrading cost of environmental protection technology.[28] The practice of offsetting the cost of environmental restoration against the upgrading cost of environmental technology is confirmed by the guiding case.[29]

In the gazette case, the court holds that the damage to the ecological environment determined by the method of hypothesized governance costs is actually the costs incurred for the proposed environmental restoration, that is, the restoration costs of the ecological environment stipulated in Article 20.2 of the Interpretation on Environmental CPIL.[30] In fact, the "restoration costs of ecological environment" in the Interpretation of Environmental CPIL include the costs of actual restoration and the costs of alternative restoration. Where it is possible to take measures to make restoration happen, the court shall order the defendant to restore the state and function of the ecological environment as they had been like before the damage occurred. Only when the state and function of the ecological environment cannot be restored completely can the defendant adopt alternative restoration methods, such as off-site restoration.[31] Alternative

[28] 江苏省泰州市中级人民法院民事判决书，（2014）泰中环公民初字第 00001 号 (Civil Judgment of the Intermediate People's Court of Taizhou City, Jiangsu Province [2014] T. Z. H. G. M. C. Z. No. 00001); 江苏省高级人民法院民事判决书，（2014）苏环公民终字第 00001 号 (Civil Judgment of the Higher People's Court of Jiangsu Province [2014] S. H. G. M. Z. Z. No. 00001).

[29] 最高人民法院指导案例 204 号"重庆市人民检察院第五分院诉重庆瑜煌电力设备制造有限公司等环境污染民事公益诉讼案" (Guiding Case No. 204 of the Supreme People's Court, "Fifth Branch of the People's Procuratorate of Chongqing Municipality v. Chongqing Yuhuang Electrical Equipment Manufacturing Co., Ltd. et al., Civil Public Interest Litigation for Environmental Pollution).

[30] 重庆市人民检察院第一分院诉重庆市昆仑化工有限公司水污染责任纠纷环境民事公益诉讼案 (The First Branch of the People's Procuratorate of Chongqing Municipality v. Chongqing Kunlun Chemical Co. Ltd., Environmental Civil Public Interest Litigation for Water Pollution Liability), 11 最高人民法院公报 (*Gazette of the Supreme People's Court*), 44–48 (2021).

[31] See ZHENG et al., fn. 8 at 24.

restoration refers to off-site and/or other methods reasonably adopted to control and build an ecological environment when it is impossible or unnecessary to repair the damaged ecological environment in situ, so as to ensure that the damaged ecological environment receives corresponding compensation within the regional or river basin scope. Alternative restoration is not hypothesized governance, and hypothesized governance is not actual restoration, nor is it alternative restoration.[32] The method of hypothesizing governance costs is a system that has been in existence before the enactment of the Civil Code. Although the method of hypothesizing governance costs does not take into account the value of lost environmental functions, the amount of compensation calculated by this method is in most cases higher than that based on the calculation standard set forth in Article 1235 of the Civil Code. The practice of calculating the civil liability of a tortfeasor by the method of hypothesized governance costs in the event that no actual cost of environmental restoration has been incurred actually carries the overtone of punitive damages. Therefore, legislation on PIL should clarify the method of calculating the costs of alternative restoration in environmental pollution cases, so as to change the situation where the method of hypothesized governance costs is overly applied.

III Legitimacy of Punitive Damages

In addition to the basis for allocating a claim for compensation, another major substantive issue in CPIL is the legitimacy of punitive damages. The implementation of punitive damages in CPIL has not only become a tendency in institutional rules, but also enjoyed academic support. Although Article 98 of the Rules for the Handling of Public Interest Litigation Cases by the People's Procuratorates cannot be regarded as the basis for a claim, the article clearly stipulates that in cases in the field of damage to the ecological environment and resource protection, as well as in the field of food and drug safety, claims for punitive damages may be filed under certain conditions. In theory, although the claims of a subject of the right of action claims in CPIL are those for compensation and punitive damages that individual consumers are originally entitled to, a negative evaluation has been drawn from the interpretation theory.[33] There is a view that an independent claim for punitive damages inherent in CPIL should be created.[34] It can be seen that it requires further analysis on how PIL legislation should respond to the system of punitive damages.

A Application of the Statutory Principle of Punitive Damages in CPIL

In the field of private rights relief, the tort laws of the two major legal systems in principle

[32] See 司法部 2021 年度十大环境损害司法鉴定指导案例 "废气超标排放致大气环境损害鉴定案" (One of the 2021 Top Ten Guiding Cases of Forensic Appraisal of Environmental Damage Issued by the Ministry of Justice, "Case of Appraisal of Atmospheric Environmental Damage Caused by Excessive Waste Gas Emissions").

[33] See DU Leqi, 消费公益诉讼惩罚性赔偿解释论 (On the Interpretation of Punitive Damages in Consumer Public Interest Litigation), 1 南京大学学报(哲学・人文科学・社会科学) (*Journal of Nanjing University* [*Philosophy, Humanities and Social Sciences*]), 119–136 (2022).

[34] See YANG Huixin, 公益诉讼惩罚性赔偿问题研究 (Research on Punitive Damages in Public Interest Litigation), 4 比较法研究 (*Journal of Comparative Law*), 12 (2021); YANG Yani & LIU Lei, 消费民事公益诉讼惩罚性赔偿的实践与反思——以 776 份判决书为基础的分析 (Practice and Reflections on Punitive Damages of Consumer-Related Civil Public Interest Litigation: Analysis Based on 776 Judgments), 3 南海法学 (*The South China Sea Law Journal*), 101–102 (2022).

implement the principle of *restitutio in integrum*. The purpose of tort relief is to help the victim of the tort, by providing he or she with necessary material or economic compensatory damages, to go back to the state he or she had been in before the infliction of the tort.[35] However, people who commit harmful acts may intentionally infringe on others' rights, assuming the odds where they are accused of harmful acts and the victim seeks legal relief are on their side. It is precisely because of the low probability of being caught and held accountable for violations that some offenders can just benefit from committing a large number of infringements. Therefore, imposing the tort liability upon the perpetrators in isolated cases cannot prevent them from committing harmful acts continuously and extensively. Meanwhile, the dichotomy between private law liability and public law liability actually creates a blank space between the two, where the private law liability is too light, but the public law liability, especially criminal liability, is too high to apply. As a result, the system of punitive damages has gradually been brought into being in the Anglo-American legal system.[36]

The system of tort liability in China is based on compensatory damages as the principle and punitive damages as the exception. The Law on the Protection of Consumer Rights and Interests, enacted in 1993, provided for a system of punitive damages for the first time. Article 49 of the Law on the Protection of Consumer Rights and Interests stipulates: "Business operators engaged in fraudulent activities in supplying commodities or services shall, on the demand of the consumers, increase the compensations for victims' losses; the increased amount of the compensations shall be two times the costs that the consumers have paid for the commodities purchased or services received."[37] Article 179.2 of the Civil Code provides: "Where punitive damages are available as provided by law, such provisions shall be followed." That means punitive damages are an exception and the statutory principle is implemented. The reason why punitive damages are subject to statutory principles is that they are quasi-criminal in nature. Judged from the case law and legislation of various countries, the system of punitive damages is stipulated in the rules for civil case adjudications and civil substantive laws, suggesting that at least in form it belongs to civil liability. However, liability for punitive damages is more similar in nature to public law liability and is homogeneous with criminal fines. In a manner of speaking, punitive damages are both a public law liability with the functions of punishment and containment and a private law liability with the function

[35] Avihay Dorfman, What Is the Point of the Tort Remedy? 55 *The American Journal of Jurisprudence*, 105 (2010).

[36] Regarding the origin of the punitive damages system, see Helmut Koziol & Vanessa Wilcox, 惩罚性赔偿金：普通法与大陆法的视角 (*Punitive Damages: Common Law and Continental Law Perspectives*), translated by DOU Haiyang, 中国法制出版社 (China Legal Publishing House), at 1–3 (2012); James B. Sales & Kenneth B. Cole Jr., Punitive Damages: A Relic That Has Outlived Its Origins, 37 *Vanderbilt Law Review*, 1119–1120 (1984); David G. Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 *Villanova Law Review*, 368–370 (1994).

[37] After the two revisions of the Law on the Protection of Consumer Rights and Interests in 2009 and 2013, its original Article 49 was amended to the current Article 55, reading: "Business operators which fraudulently provide commodities or services shall, as required by consumers, increase the compensation for consumers' losses, and the increase in compensation shall be three times the payment made by a consumer for the commodity purchased or the service received or be 500 yuan if the increase as calculated before is less than 500 yuan, except as otherwise provided for by the law." "Where business operators knowingly provide consumers with defective commodities or services, causing death or serious damage to the heath of consumers or other victims, the victims shall have the right to require business operators to compensate them for losses in accordance with Articles 49 and 51 of this Law and other provisions of laws, and have the right to claim punitive damages of not more than two times the amount of losses incurred."

of indemnity. They are public law liabilities in essence but private law liabilities in form; in a word, they are a special form of legal liability. Punitive damages are actually "quasi-criminal," lying between civil law and criminal law. They are the "damages" awarded by courts to plaintiffs in private right litigation; however, in most jurisdictions in the United States, the purpose of such awards is expressly considered to be non-compensatory and of a punitive nature. Given the civil nature of such serious damages, the procedural safeguards of criminal law (such as the burden of proof beyond a reasonable doubt and the prohibitions against double jeopardy, excessive fines, and compulsory self-incrimination) are generally considered inapplicable. This strange system that mixes the objects and effects of criminal and civil laws has created criminal remedies that "invaded" the field of civil law.[38]

It is based on the position that punitive damages are public law liabilities that the continental law countries and regions generally are very conservative towards punitive damages. For example, the German Federal Supreme Court believes that judgments rendered by foreign courts to award punitive damages cannot be enforced in Germany. Such judgments is bad for the public because, under the German legal system, punishment and deterrence are part of the duties of criminal courts.[39] Even though the protection provided by criminal law may be insufficient, particularly in the field of intellectual property, tort law cannot be reshaped in contradiction with the fundamental principles of private law. On the contrary, criminal law should be improved so that it can meet the requirements of both punishment and prevention. A step in this direction would appear to be an innovation in the punishment of both natural and legal persons, and such a move of development would make it possible for some gaps in criminal protection to be filled.[40] Even among British and American scholars, there are views opposing the system of punitive damages. For example, some American scholars believe that punitive damages may have played an important role in the ancient legal system. But in today's society, punitive damages should be abolished. If punishment or deterrence is needed, the legislature should enact appropriate criminal laws to provide protection—usually in the form of fines.[41]

Punitive damages are a type of civil liability in the nature of a fine, especially punitive damages in consumer-related CPIL, which directly carries the overtone of public law liability. Although the enforcement mechanism for punitive damages is civil litigation, depriving tortfeasors of their properties is the result of the exercise of court power. Therefore, the power of adjudication must comply with the requirements of the rule of law on the exercise of power, especially with the principle of proportionality and the requirements of due process. In judicial practice in China, the vast majority of judgments of cases involving punitive damages are to impose the maximum punitive damages, which violates the principle of proportionality because the amount of punitive damages must be determined based on the severity of the wrong deeds committed by the defendant, the severity of the damage suffered by the plaintiff, and the property status of the defendant.[42] The standard of proof and burden of proof in

[38] See Owen, fn. 36 at 365–366.
[39] See Helmut Koziol, Punitive Damages—A European Perspective, 68 *Louisiana Law Review*, 742 (2008).
[40] Id. at 753.
[41] See Sales & Cole Jr., fn. 36 at 1171–1172.
[42] See Owen, fn. 36 at 365.

litigation over punitive damages are not different from those in ordinary civil litigation, and these issues need further reform.

B Impact of Tortfeasors' Liability on Punitive Damages

In the laws of China, the allocation of public law liabilities not only emphasizes due process but also takes into account the ability of offenders to bear liability. In the field of administrative liability, Article 5.1 of the Law on Administrative Penalty stipulates: "Administrative penalty shall be imposed in adherence to the principles of fairness and openness." Article 5.2 states: "Creation and imposition of administrative penalty shall be based on facts and shall be in correspondence with the facts, nature, and severity of the violations of law and damage done to society." Some courts have adjudication rules that administrative penalties and fines should be made in light of the economic ability of the counterparty to bear such penalties and fines.[43] In the field of criminal liability, the determination of fines must also be made in light of the criminal's ability to bear property liability. Article 52 of the 1997 Criminal Law of the People's Republic of China stipulates that the circumstances of the crime are the sole basis for determining the amount of the fine. However, the 2000 Regulations of the Supreme People's Court on Several Issues Concerning the Application of Property-Oriented Penalty changed its position on the issue of factors determining the fine amount, as evidenced by Article 2.1 stipulating: "The people's court shall, according to the circumstances of the case, such as the amount of illegal gains and the losses incurred, and according to the criminal's ability to pay the fine, give him a fine by the law. The minimum amount shall be not less than 1, 000 yuan, if the standard of the amount of the fine is not clearly provided in the criminal law." The reason why the courts, when deciding the amount of the fine, are required to consider, in addition to the circumstances of the crime, the criminal's ability to pay the fine is based on the following considerations: judicial practice shows that it is often difficult to effectively punish criminals and give full play to the role of the fine if the amount of the fine is simply determined based on the circumstances of the crime. Some criminals are almost financially immune to the property-oriented penalties, because they can easily pay the fines; some criminals are unable to pay the fines because they have no property, which would turn the pecuniary penalties into an "empty adjudication" and dent the authority and seriousness of the court judgments. Accordingly, when a court determines the amount of the fine, it must take into consideration the criminal's ability to pay the fine in addition to the circumstances of the crime, so as to maintain the seriousness of the court judgment and enable property penalties to produce their due penal effect.[44] This operating principle in practice has been consistently implemented in subsequent

[43] 广东省深圳市中级人民法院行政判决书，（2020）粤 03 行终 18 号 (Administrative Judgment of the Intermediate People's Court of Shenzhen City, Guangdong Province [2020] Y. 03 X. Z. No. 18).

[44] See LI Bing,《关于适用财产刑若干问题的规定》的理解与适用 (Understanding and Application of the Regulations on Several Issues Concerning the Application of Property-Oriented Penalty), 2 人民司法 (*People's Judicature*), 7 (2001).

judicial documents.[45]

It can be seen that punitive damages should be determined in line with the principle of proportionality, in consideration of the economic ability of the perpetrators, and in compliance with the requirements of due process. Since punitive damages are criminal sanction in nature and are quasi-criminal, the procedural safeguards for litigation over punitive damages should be different from or higher than the procedural safeguards for ordinary civil litigation. In CPIL, for those who have been held criminally responsible, the courts may consider not ordering them to further bear liability for punitive damages. In practice, cases of CPIL involving claims seeking punitive damages from defendants but not supported by the courts are basically the cases in which the defendants have already been held criminally liable.[46] In legislation, the conditions and factors for the application of liability for punitive damages in CPIL should be clearly defined to avoid a one-size-fits-all approach.

IV Allocation of the Burden of Proof

It is stipulated by the law that whichever party bearing the burden of proof for a certain legislative fact, if the legislative fact could not be corroborated, shall bear the consequences of losing the case. In criminal and administrative litigation, the burden of proof shall, in principle, be borne by the party that holds public power. In civil litigation, the practice set forth in the 2001 Several Provisions of the Supreme People's Court on the Evidence for Civil Actions, i.e., allocating the burden of proof according to the type of case (Articles 4 to 6) and supplementing the allocation with judicial discretion (Article 7), is changed by Article 91 of the Interpretation on the Application of the Civil Procedure Law. The changed practice relies on the norm theory among the theories on the classification of legal elements, as the theoretical basis for the allocation of the burden of proof; that is, unless special provisions are made in legislation, specific case types are no longer distinguished in the allocation of the burden of proof. Although the system of CPIL is stipulated in the Civil Procedure Law, it is still worth reviewing whether the allocation of the burden of proof in CPIL is special.

[45] For example, the 2021 Notice by the Supreme People's Court and the Supreme People's Procuratorate of Issuing the Guiding Opinions on Sentencing for Common Crimes (for Trial Implementation) stipulates: "Where a pecuniary punishment is imposed, the amount of fine shall be legally determined on the basis of circumstances of crime and by taking into full account of the defendant's ability to pay fines." Article 15 of the 2022 Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in the Handling of Criminal Cases Concerning Endangering Drug Safety stipulates: "For those who commit the crime of producing, selling, and providing counterfeit drugs, the crime of producing, selling, and providing inferior drugs, or the crime of hindering the administration of drugs, the capacities of defendants to pay fines shall be considered and the fines shall be imposed thereupon according to the law in consideration of the amount of the crime and the illegal income of the defendants."

[46] See 广东省深圳市中级人民法院民事判决书，（2017）粤 03 民初 547 号 (Civil Judgment of the Intermediate People's Court of Shenzhen City, Guangdong Province [2017] Y. 03 M. C. No. 547); 四川省成都市中级人民法院民事判决书，（2019）川 01 民 初 5508 号 (Civil Judgment of the Intermediate People's Court of Chengdu City, Sichuan Province, [2019] C. 01 M. C. No. 5508); 广西壮族自治区高级人民法院民事判决书，（2019）桂民终 227 号 (Civil Judgment of the Higher People's Court of Guangxi Zhuang Autonomous Region [2019] G. M. Z. No. 227); 安徽省淮南市中级人民法院民事判决书，（2019）皖 04 民终 1553 号 (Civil Judgment of the Intermediate People's Court of Huainan City, Anhui Province [2019] W. 04 M. Z. No. 1553); and 安徽省蚌埠市禹会区人民法院民事判决书，（2020）皖 0304 民初 2194 号 (Civil Judgment of the Primary People's Court of Yuhui District, Bengbu City, Anhui Province [2020] W. 0304 M. C. No. 2194).

A Scope of Application of the Theory on Classification of Legal Elements

The allocation of the burden of proof is closely related to the structure of the norms under civil substantive law. A defendant may "object" to (or "admit," on the contrary) the plaintiff's claim. Regarding the plaintiff's claims about legislative facts, the defendant may admit, deny, remain silent, or assert ignorance. He may also assert that although the legislative facts claimed by the plaintiff are established, the plaintiff's rights have never been established in the first place, or that the plaintiff's rights have been extinguished after they were established (the fact that the claim has been extinguished), or that the plaintiff's rights cannot be exercised temporarily or forever. Whether a certain right or legal relation (the subject matter of the lawsuit) is established is actually the conclusion drawn from the combination of the above-mentioned legal effects. Regarding how to handle a case when the specific legal elements could not be corroborated, the law has pre-allocated the risk of losing the case, namely, the party who gains benefits from a certain legal effect shall bear the burden of proof for the legal elements required by the legal effect. In other words, the party who benefits from the occurrence of the right shall bear the burden of proof for the legal element facts involved by the right in accordance with the provisions; the party who benefits from the obstruction, extinguishment, or non-exercisability of the right shall bear the burden of proof for the legal element facts involved in the prevention provisions, extinguishment provisions, and obstacle provisions.[47] The aforementioned mechanism for the allocation of the burden of proof is the norm theory among the theories on the classification of legal elements. Article 91 of the Interpretation on the Application of the Civil Procedure Law adopts as its legal basis the norm theory among the theories on the classification of legal elements,[48] i.e., this provision takes the legal relations as the object and divides the legal relations into four factual states, namely, existence, change, extinguishment, and interference, and there is no substantial difference between those and the types of civil rights, i.e., establishment, prevention, extinguishment, and obstruction.

Although Article 91 of the Interpretation on the Application of the Civil Procedure Law establishes general rules for the allocation of the burden of proof, it clearly stipulates that the exceptional provisions of the law on the allocation of the burden of proof shall apply where it is otherwise prescribed by any other law. For example, in the field of environmental pollution infringing on private rights, Article 1230 of the Civil Code provides 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." Based on that, for disputes involving any environmental pollution or ecological damage that infringes on other people's private rights, the burden of proof for the causality requirement is inverted. From the perspective of system interpretation, the system of compensation for damage to the ecological environment stipulated in Article 1234 of the Civil Code also inverts the burden

[47] See Shinichi Yoshikawa, 民法与要件事实 (*Civil Law and Legislative Facts*), in Takashi Uchida & Atsushi Omura, 民法的争点 (*Controversial Issues of Civil Law*), translated by ZHANG Ting et al., 中国人民大学出版社 (China Renmin University Press), at 94–95 (2023); and WU Jun, 债务人异议之诉的实体基础与程序构 (Substantive Basis and Procedural Structure of the Debtor's Objection Litigation), 2 中国政法大学学报 (*Journal of China University of Political Science and Law*), 163–164 (2023).

[48] See DU Wanhua, 最高人民法院民事诉讼法司法解释实务指南 (*Practical Guide to the Judicial Interpretations of the Supreme People's Court on the Civil Procedure Law*), 中国法制出版社 (China Legal System Publishing House), at 143 (2015).

of proof in relation to causality. Although litigation over compensation for damage to the ecological environment is homogeneous with environmental CPIL, its institutional logic is based on the litigation over infringement on private rights in which the national authority is the civil subject. In addition, Article 86 of the 2016 Law of the People's Republic of China on the Prevention and Control of Environment Pollution Caused by Solid Wastes[49] and Article 98 of the 2017 Water Pollution Prevention and Control Law of the People's Republic of China respectively provide for the inversion of the burden of proof in relation to causality in litigation over compensation for damages caused by solid waste pollution and water pollution.

Since the Interpretation on the Application of the Civil Procedure Law stipulates both the rules for the allocation of the burden of proof and the procedural structure of CPIL, from the perspective of system interpretation, CPIL is tort litigation, where the establishment of tort liability generally requires four elements: fault, tortious act, harmful consequences, and causality; therefore, in principle, the burden of proof in CPIL is borne by the plaintiff who claims the establishment of tort liability. However, the Interpretation on Several Issues Concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations does not provide for the inversion of the burden of proof in environmental CPIL. From the perspective of subjective interpretation theory, the Civil Code, the Law on the Prevention and Control of Environment Pollution Caused by Solid Wastes, and the Water Pollution Prevention and Control Law are not legislated from the perspective of PIL; therefore, it is difficult to directly determine, based on the above-mentioned substantive legislation, the inversion of the burden of proof in relation to causality in the procedures for environmental CPIL. The allocation of the burden of proof is statutory; that is, the burden of proof is allocated by law and in principle cannot be allocated by the judges. The process through which judges allocate the burden of proof is actually a process of applying the law, a process of discovering the rules for allocating the burden of proof determined by law through analysis of substantive law norms, rather than creating the rules for allocating the burden of proof.[50] The inversion of the burden of proof, another way to allocate the burden of proof, also follows statutory principles. Therefore, in the absence of clear provisions in legislation, the inversion of the burden of proof in relation to the causality requirement is not applicable to environmental CPIL.

B Law Enforcement Nature of CPIL and the Allocation of the Burden of Proof

Although the interpretation theory can lead to the conclusion that the inversion of the burden of proof in relation to the causality requirement is not applicable to environmental CPIL, there is a tendency in practical cases to invert the burden of proof in relation to the causality between the act of environmental pollution and harmful consequences. For example, in

[49] The Law on the Prevention and Control of Environment Pollution Caused by Solid Wastes revised in 2020 deleted from the old version the provision, "For a damage suit arising from the environmental pollution by solid wastes, the inflicter shall assume the burden of proof for the statutory causes for exemption and the nonexistence of causation between its act and harmful consequences."

[50] See the Office of the Leading Group for the Implementation of the Civil Code of the Supreme People's Court, 最高人民法院新民事诉讼法司法解释理解与适用 (*Understanding and Application of the Judicial Interpretation of the Supreme People's Court on the Civil Procedure Law*), 人民法院出版社 (People's Court Press), at 255 (2022).

Guiding Case No. 131 released by the Supreme People's Court, "All-China Environment Federation v. Dezhou Jinghua Group Zhenhua Co., Ltd. (CPIL for atmospheric pollution liability)," Guiding Case No. 133 released by the Supreme People's Court, "People's Procuratorate of Yantai City, Shandong Province v. WANG Zhendian and MA Qunkai (environmental CPIL)," and Guiding Case No. 204 released by the Supreme People's Court, "Fifth Branch of the People's Procuratorate of Chongqing Municipality v. Chongqing Yuhuang Electrical Equipment Manufacturing Co., Ltd. et al. (CPIL for environmental pollution)," all the courts held that it was the defendant who should bear the burden of proof that there is no causality between the act of pollution and the harmful consequences. Although the inversion of the burden of proof in relation to the causality requirement is not a key point in the judgments on the above-mentioned three guiding cases, the discussion in the description of the judicatory grounds at least suggests a certain attitude of the Supreme People's Court.

Be it CPIL or APIL, the core of the institutional nature lies in the protection of public interest rather than the type of litigation. Public institutions, which will intervene when large-scale infringements occur, have discretion in case management and implementation methods. PIL is actually a form of public law enforcement.[51] The system of CPIL is based on the civil litigation procedure, and the legislation itself does not make special procedural arrangements for CPIL; to wit, the structure of ordinary civil and commercial adversarial procedure applies. However, it is logically wrong to protect public interests by applying rules and procedures designed for the protection of private rights, and sometimes this practice is as absurd as applying special rules designed in favor of disadvantaged individuals (such as rules for environmental tort) to powerful countries and societies. Moreover, this kind of public accountability that bypasses public law regulations and procedures is also risky for the protection of citizens' rights.[52] In addition, as mentioned above, APIL and CIPL actually overlap in many fields. The procuratorial organs, which monopolize the right to file APIL, have the right to choose between the procedures for CPIL and those for APIL, and APIL itself is functionally intended to oversee administrative power, implying that the burden of proof in relation to the legality and rationality of any APIL initiated over administrative non-performance or performance of duties lies with the administrative organs. In summary, the restricted self-admission of parties in civil public interest disputes, the obligation of the courts to conduct investigations and collect evidence, and the legal liability largely of the nature of public law liability, make plaintiffs in CPIL the ones to bear the burden of proof in relation to all infringement requirements.

In the "Guiding Significance" section of Guiding Case No. 28 released by the Supreme People's Procuratorate, "People's Procuratorate of Changzhou City, Jiangsu Province v. XU Jianhui and XU Yuxian (CPIL)," the Supreme People's Procuratorate believes that the procuratorial organs must conduct investigations and verifications around the constitutive elements of infringement. Although the principle of inversion of the burden of proof

[51] See ZHANG Chenguo, 恢复性司法：检察机关提起的个人信息保护公益诉讼 (Restorative Justice: Public Interest Litigation for Personal Information Protection Initiated by Procuratorates), 2 清华法学 (*Tsinghua University Law Journal*), 42 (2023).

[52] See GONG Gu, 公益诉讼的属性及立法完善 (The Nature and Legislative Perfection of Public Interest Litigation), 6 国家检察官学院学报 (*Journal of National Prosecutors College*), 64 (2021).

applies to the causality in cases of environmental pollution tort, in order to ensure accurate supervision exercised in accordance with the law, the procuratorial organs should conduct full investigations and verifications all the same to ascertain the facts of the cases. The investigation and verification mainly involve the following aspects: First, the tortfeasor has committed acts of polluting the environment; second, the tortfeasor's acts have harmed the public interest; third, there is a correlation between the tortfeasor's acts of polluting the environment and the harmful consequences. It can be seen that although it is recognized in Case No. 28 that the burden of proof in relation to causality in cases of environmental pollution tort is subject to the inversion rule, it still shows the normative orientation that the procuratorates should actively bear the burden of proof in the behavioral sense, in relation to the facts involved by constitutive elements.

In fact, adjudication in relation to the burden of proof is the driving mechanism for ascertaining case facts and enriching evidence. Adjudication in relation to the burden of proof is a substantive approach that the judiciary should avoid as much as possible, and the goal of the judiciary is always to ascertain the facts of the case based on a thorough investigation of evidence. PIL itself carries the overtone of governance, and prosecutorial PIL has the element of law enforcement, therefore; in all types of CPIL, including environmental CPIL, plaintiffs should enrich the evidence methods, and the courts should also exhaust *ex officio* the evidence methods. From the perspective of legislative theory, legislation should clearly define the allocation of the burden of proof in PIL, and stipulate the courts' authority to conduct investigations and collect evidence *ex officio*, so as to avoid adjudication in relation tothe burden of proof as much as possible.

V Conclusion

The system of PIL should include both procedural and substantive aspects. CPIL is essentially a kind of litigation over tort that harms the public interest; therefore, the litigation proceedings must run in response to the substantive system that harms the public interest. The substantive rules for CPIL are made mainly by reference to the provisions of the Civil Code on tort liability; however, based on the governance and non-litigation characteristics of CPIL, the allocation of substantive relations in CPIL presents particularities shown in individual cases and even overall inconsistency. "Where there is a legal loophole, people need to draw analogies based on norms that govern similar facts. Where disputes cannot be resolved in this way, people need to make judgments based on the general principles of the order of state law."[53] From the perspective of the timeliness and effectiveness of relief and the non-disposability of administrative functions and powers, APIL should take precedence over CPIL. However, legislation can give plaintiffs the right to choose the procedure, and CPIL can also establish a pre-litigation warning mechanism. The scope of claims in CPIL can only be judged based on the public interest protected by the CPIL itself. PIL lacks the legitimacy to turn into collective litigation *per se* and will only receive a negative evaluation

[53] Gregor Christandl, 意大利法律方法论——19 世纪以来意大利民法学简史 (Legal Methodology in Italy: A Brief History of Italian Private Law Scholarship since the 19th Century), translated by LIU Zhiyang & ZHOU Pingqi, 4 苏州大学学报(法学版) (*Journal of Soochow University* [*Law Edition*]), 156 (2022).

from a systemic interpretation. Punitive damages in CPIL, in addition to being subject to the constraints of the right to implement litigation, should also be affected by factors such as the principle of proportionality, the tortfeasors' capacity for liability, and whether or not they have assumed public law liability. The logic by which the burden of proof is allocated in CPIL, different from the principle of private rights relief based on the classification theory of legal elements, should be legislatively stipulated from the perspective of the law enforcement nature of CPIL, i.e., the burden of proof shall be borne by plaintiffs. In short, PIL urgently needs special legislation. In addition to stipulating special rules on procedural structure, it is particularly necessary for legislation to systematically respond to the needs for rules of PIL, especially CPIL, in the substantive sense. In terms of legislative technique, it is doable to stipulate the requirements for exercising the right of action, the scope of claims, the form of liability assumption, the allocation of the burden of proof, etc. in the form of special provisions. In terms of the allocation of substantive rights and obligations, in addition to the general provisions under special legislation on PIL, the clauses on PIL in specific laws may contain detailed arrangements for civil liability for damage to the public interest in specific areas and should apply in compliance with the basis of the claim and the basic principles of public law liability.

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