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REVIEW

Jurisprudential Foundation of Public Interest Litigation*

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Abstract

Public interest litigation (PIL) with the public interest as the trial object is not only dispute settlement activity but also political activity via which the public participate in public affairs, whereby it is necessary to reflect particular political morality and ethics, and to obtain the jurisprudential support. The individualistic litigation mechanism is deeply influenced by liberalism, and the idea of self-determination of the parties and procedural guarantee contained in it has become the fetters on the development of the PIL system. The partially modified mode of paternalistic litigation still cannot solve the fundamental contradiction between public interest protection and public interest representation. The communitarianism represented by communalism and civic republicanism justifies the collective procedure from the perspective of community value and public space, especially the negotianism, which provides a brand new procedural idea, frame, and mode of judgment for PIL, but the abstractness of "public good" limits its theoretical value. The people-oriented philosophy on development and the thought of a human community with a shared future provide a value basis and political ethics for China's PIL system in the new era. On this basis, reasonable absorbing of various political philosophies can help the PIL system to realize the values of litigation democracy, due process, litigation efficiency, etc.

Keywords public interest litigation (PIL); liberalism; communitarianism; republicanism; people-oriented

The public interest litigation (PIL) system originated in Western countries and flourished in the 1980s.[1] By now, it has become an important system for protecting community interests, promoting public policies, and protecting the interests of vulnerable groups, and it is regarded as a global judicial innovation. It has attracted attention that in the past decade the PIL system in China has developed rapidly. After the Civil Procedure Law of the People's Republic of China (hereinafter referred to as the "Civil Procedure Law") established the system of civil public interest litigation (CPIL) in 2012, the Civil Procedure Law and the Administrative Litigation Law of the People's Republic of China (hereinafter referred to as

[1] There is a "popular action system" in Roman law where citizens, as part of the people, can defend the public interest and their own interests through popular action. Before the *Lex Vostilius*, prosecutions were only allowed on the ground of public interest in the name of others for the cause of the people, liberties, and guardianship. Later, the *Lex Vostilius* expanded *mandatum ad agendum* from cases limited to those involved in public interest to those involving both public and private interest, such as captivity, travel for the state, and stealage sustained by the guardians of such captives and travelers. It is the private affairs of these people that the *mandatum ad agendum* covers, but it is because of the interest of the state that these people cannot take care of their own private affairs, therefore *mandatum ad agendum* has the nature of public interest. See XU Guodong, 优士丁尼《法学阶梯》评注 (*Commentary on Justinian's Institutions*), 北京大学出版社 (Peking University Press), at 541 (2011).

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the "Administrative Litigation Law"), which were respectively revised in 2017, broadened the scope of PIL and formed a pattern in which CPIL and administrative procuratorial public interest litigation (PPIL) are awarded with equal importance. The Rules for the Handling of Public Interest Litigation Cases by People's Procuratorates enacted on July 1, 2021 marked the institutionalization of PPIL. The plentiful practice of PIL calls for the theorization of the system to keep PIL more aligned with social and political life from legal and political perspectives, thereby developing a PIL system with Chinese characteristics.

PIL is a procedural mechanism with which the state protects the public interest, and its procedural complexity is increased due to the particularity of the public interest as the object of litigation. As we all know, public interest, widely present in the fields of public law and private law, is an issue featuring difficulty in defining, confusion in applicability, and complexity in objectives, and because of the difficulties in reaching any social consensus, it often gives rise to troubles through the judicial and public administrative processes. In many cases, public interest is merely viewed as the common denominator of different interests; thus, it is intertwined with concepts such as national interest, social interest, and public welfare and complicated into an issue of the philosophy of law. In this context, only by starting from the attributes, structure, and normative functions of public interest and analyzing its philosophical basis, historical development, and application in different eras and socio-economic conditions can we reveal its essence. Similarly, the PIL system also teems with propositions on the philosophy of law. Traditional research on the PIL system usually focuses on specific and detailed issues such as who is qualified to file PIL, how to define the scope of litigation, and how to design the litigation process. But in fact, the PIL process involves an extreme wealth of legal and political value issues that often trigger various theoretical conflicts and cause people against each other in debate,[2] which often turns into a "culture war," on principled issues in life during the litigation process. By contrast, the Chinese PIL system can maximize social consensus to enable smooth progress in PIL in both the legislative and practical realms. Nevertheless, the fundamental issues concerning PIL, such as what is the value of PIL, which kind of PIL model is good or correct, and how should the PIL system operate to gain more social recognition, are related to the legitimacy and morality of the system and require more in-depth jurisprudential efforts to reveal its essence.

I The Jurisprudence Dimension of PIL

Public interest is a flexible and dynamic concept that is mainly defined from the political and social perspectives. Therefore, PIL, as a means of resolution to public interest disputes, is bound to respond to the difficult issues of value judgment in a series of key theories: In terms of institutional purposes, how can PIL, functioning as both procedural protection and consultative dialogue, protect the right of action and promote social harmony in the resolution of public interest disputes; in terms of the objects of trial, how can PIL balance the protection of individual interest and public interest, and ultimately realize justice in terms of both quality and quantity; in the litigation process, how can PIL ease the tense relationship between

[2] See Rick Bicwood, *Public Interest Litigation*, LexisNexis, at 123 (2006).

individual procedure and collective procedure, and seek a balance between "retail justice" and "wholesale justice"; in terms of litigation results, how can PIL pursue a win-win situation of legal values and political values, and expand the social and political effects of dispute resolution, etc.

A Jurisprudence of the Purpose of the PIL System

Public interest is a vague, hardly perceptible but all-controlling consideration whose legitimacy is compulsorily justified, deeply embedding the PIL system into the political structure.[3] Judged by international experience, public interest is a value generally accepted by the public and PIL resolves disputes about values rather than simple disputes over legal facts. Therefore, it is subject to the ethical norms of political philosophy. For example, PIL cases in the social and political fields, such as protection of human rights, expansion of public participation, improvement of economic conditions, encouraged empowerment at the grassroots level, legal reform, and promotion of government accountability, all involve disputes in which legal and political issues are mixed up. In the past decade, PIL cases in China have mainly focused on the areas of protection of environment and resources, protection of consumer rights, food and drug safety, protection of state-owned assets, protection of natural heritage, and specific private affairs (such as adolescents, heroes and martyrs, marriage invalidation, domestic violence, and abuse). All the more importantly, PPIL is regarded as an important institutional design for thinking and acting under the guidance of the rule of law to promote the modernization of the national governance system and capacity. In other words, PIL is not only a way to resolve social disputes but also an administrative activity or a process of implementing national policies.[4] Experience at home and abroad also shows that when assessing public interest, judicial organs will consciously or unconsciously project their cultural background, ideology, and political environment into its meaning. Even those with the highest sense of morality have been found to intend to impose their own views of the public interest on others. This reflects that the PIL system has developed against the backdrop where various currents of thought in contemporary jurisprudence interact with each other. The entanglement of legal and political factors leads to the multiple tensions on the construction of the PIL system: the tension between the protection of individual interest and the protection of public interest, the tension between private right of action and right of class action, the tension between liberalistic procedure and collectivist procedure, and so on. The PIL system is like an iceberg, of which the small tip on the water surface is the various PIL practices, and the part hidden beneath the sea are the systems and theories with rich connotations. The former is easily observable, while the latter tends to be ignored.

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[3] Jean-Jacques Rousseau argued for the proposition of "general will" in his book *On the Social Contract* that the broad consensus among people does not engender public interest, even if the "sum of interests" they pursue is consistent, there will be differences in their interests. Therefore, it is difficult for public interest to take shape. And it is for the people to interpret what interest is beneficial to the all people. See Jean-Jacques Rousseau, *On the Social Contract*, Dover Publications, at 25 (2003).

[4] See Mirjan R. Damaška, 司法和国家权力的多种面孔 (*The Faces of Justice and State Authority*), translated by ZHENG Ge, 中国政法大学出版社 (China University of Political Science and Law Press), at 153 (2015)

Historically, jurists have tried to understand public interest and PIL from both legal and political perspectives. In Pound's view, public interest is the claims, demands, and wishes concerning the life of a politically organized society and proposed on behalf of that politically organized society. And similarly, social interest is also claims, demands, and wishes concerning the social life of a civilized society and put forward in the name of social life.[5] By its special nature, public interest involves conflicts in basic social values, and resolution of disputes over public interest goes beyond the mode of closing cases and settling disputes. The final adjudication is expected to not only distinguish right from wrong and settle disputes but also make value judgments on the meaning and effects of rights, hence the dual faces of PIL consisting of "judicialization of politics" and "politicization of justice." In short, public interest is the legislative focus of a state and also an applicable legal norm. PIL and judicial review, as the procedural mechanisms of form of protection for it, are also considered to be its inherent components.

From a substantive perspective, the goal of the PIL system is to pursue substantive justice and social justice. The public interest is infringed upon mainly due to such violations of the provisions of the Constitution and legal provisions that cause public harm to fundamental rights. As a comprehensive procedure for rights relief, the most direct substantive goal of PIL is to affirm, restore, and realize public interest and maintain the confidence of the public in both the law-based society and the judicial system. The above goals, which are different in orientations, lead to different types of PIL, the first of which is abstract interest-oriented PIL. This type of PIL is also known as "pure public interest" litigation, which aims to protect the interests of an unspecified majority of people, involves pure and indivisible public interest in dispute, and provides no specific direction for the public interest as the object of litigation. A typical example of that is an environmental protection case simply claiming for ecological restoration. What is stipulated in the PIL legislation in China is exactly an abstract interest-oriented PIL system. The second is community interest-oriented PIL. This type of PIL is also called "collective public interest" litigation, the object of which is "common interest" rather than pure public interest. The litigation, although winding up only binding on members of the community in principle, produces indivisible and expansive effects in a certain sense when it comes to interest.[6] The system of group action (class action, *verbandsklage*, and representative system) designed to resolve such disputes is also a specific form of PIL because it has special significance or benefits to the general public and raises broad and important public issues[7]. And the third is PIL-oriented towards the interests of vulnerable groups. This type of PIL aims to protect the interests of vulnerable groups and serves as a weapon for them to protect their rights. PIL becomes a necessity when the public cannot obtain legal protection due to ignorance, poverty, fear, or a lack of organized effort.[8] Some developing countries (such as India, Brazil,

[5] XUE Kexiang, 经济法的定义 (*Definition of Economic Law*), 中国法制出版社 (China Legal Publishing House), at 191 (2003).
[6] DING Baotong, 民事公益侵害阻断程序研究 (*Research on Civil Procedure Preventing Infringement on Civil Public Interest*), 商务印书馆 (The Commercial Press), at 104 (2020).
[7] See Rachael Mulheron, *The Class Action in Common Law Legal Systems*: *A Comparative Perspective*, Hart Publishing, at 449 (2006).
[8] See Ferdous Rahman, *Public Interest Litigation in Legal World*, *An Analysis and Evaluation*, Lap Lambert Academic Publishing, at 13 (2012).

and Indonesia) regard disputes over social and economic rights such as social security, health, and education as the main objects of PIL, and define social and economic rights as "actionable," implying the expansion of the scope of PIL.

From a procedural perspective, PIL not only has the advantages of low cost, quick response to social issues, and great influence but also has two procedural functions. The first one is procedural safeguard, the most basic procedural function of the PIL system. To find a balance between procedural participation and procedural safeguards, the PIL system protects people who are not directly involved in the litigation through public interest representatives and statutory litigation responsibility mechanisms. This way, people who are not directly involved in the litigation can still benefit from the results of the PIL. This basic function can be found in the PIL systems of all countries. And the second is the function of consultative dialogue. Consultative dialogue is based on procedural safeguards. PIL is not only a process where petitions and claims are justified but also provides sufficient space for dialogue and consultation between litigation subjects and the whole society, and leaves ample public space for social members to participate in the resolution of major issues, with the help of such a comprehensive system of justice realization, achieve social harmony, enhance social solidarity, and consolidate the common will of society. Countries in the South Asian subcontinent generally hold this concept as a banner to develop PIL and have drawn social attention to it.

B Jurisprudence of the Objects of PIL

Normally, litigation only resolves legal disputes, but public interest disputes tend to transfer the rights disputes in the political area to judicial organs and bring them to the field of PIL.[9] Whether in determining the object of trial (object of litigation) or delivering the judgments, the courts must do it in strict accordance with the law and fully consider the social integration and value reconstruction functions of PIL. However, there are very few substantive laws that provide a clear definition of public interest, and it is impossible to list one by one which situations fall within the scope of the definition and which do not.[10] This suggests that the basis for judging public interest is not substantive law, or primarily not substantive law, which in one aspect increases the burden of argumentation on plaintiffs in PIL. When filing a lawsuit, they must assert what is public interest, the fact of damage to the public interest,

[9] See Paul Rishworth, Human Rights—From the Top, 68 (2) *Political Quarterly*, 171 (1997).

[10] The role of public interest in legal norms is divided into three: positive clauses where legislators and other state power institutions are expected to take positive actions to promote the realization of the public interest; negative clauses where public interest serves as a reason to restrict people's behavior in order to prevent the public interest from being harmed; and neutral clauses which take neither a positive nor negative attitude, but a purely neutral attitude, towards the promotion of the public interest. See CHEN Xinmin, 宪法基本权利之基本理论（上）(*Basic Theories of Constitutional Basic Rights*) (Vol. 1), 三民书局 (San Min Book Co., Ltd.), at 131 (1992).

and the causation, and produce evidence to prove the same.[11] Reviewing these elements will also increase the burden on the courts, as they will have to judge whether public interest is involved, whether PIL has been abused, and what the consequences of harm to public interest are. The basis for judgment must also focus on factors such as social policies and the functions of state institutions, in addition to the law. Taking consumer protection cases as an example, the United States deems consumer protection merely a policy issue rather than a public interest issue, and the European Union countries are also in two minds as to whether the content involved in such cases should be judicially regarded as public interest; furthermore, most of the European Union countries tend to regard consumer protection as a "sub-constitutional" principle rather than a kind of clear public interest.[12] Obviously, the functional design of the PIL system must focus on both legal value and political value, reflect the expectations of the entire society, and meet the desire of the state, i.e., to observe and handle litigation from a political perspective. In this way, PIL has dual connotations as a litigation process and a political process.

The objects of PIL are determined as a result of public ranking conducted by the judicial organs on behalf of the state. In comparison, pure public interest should definitely be given top priority, where PIL should be initiated by statutory organs, organizations, or even individuals. However, non-pure public interest is equally important. Civil procedure laws usually set up systems such as representative action, *verbandsklage*, class action, and model action to protect such interests.[13] What these procedures have in common with narrow PIL is that by weakening the restrictions on plaintiffs' qualifications in traditional litigation, we can procure that, through trial and judgment, public interest that transcends the personal interest of the litigants serves the wider public. In other words, the scope and ranking of public interest determine the connotation and extension of the PIL system, i.e., not only is the interest of an unspecified majority of people subject to trial in PIL, but the collective interest of those harmed by the same tortious act should also be included in the scope of PIL. Therefore, various class action mechanisms together with the PIL system were combined by the United Kingdom and the United States in the 1960s into "public interest legislation" to resolve new types of environmental issues, social issues, product liability issues, competition law disputes, and other public interest disputes.

C Jurisprudence of the PIL Process

Liberal political philosophy has shaped the adversarial litigation model. This model

[11] For example, in Guiding Case No. 114 of the Supreme People's Procuratorate: People's Procuratorate of Shangrao City, Jiangxi Province v. ZHANG [REDACTED] and Two Other Persons (Civil Public Interest Litigation Case of Deliberate Damage to the Python Peak of the Mount Sanqing), the procuratorate argued that natural relics and scenic spots are part of the environment and are non-renewable resources. The ecological service value of representative natural relics and scenic spots lies in the public's right to enjoy recreation and to appreciate the unique landscapes. Any act of destroying such value will harm the environmental resources shared by all mankind and undermine the public interest. The conditional value method was adopted, as a reference for the court in hearing the case, to determine the amount of damage.

[12] See Luboš Tichý, Michael Potacs ed., *Public Interest in Law*, Intersentia, at 288 (2021).

[13] China is one of the few countries that has enacted special legislation on PIL. In contrast, *verbandsklage* is the main form of promoting public interest in Germany, which protects the rights of general transaction consumers and ordinary consumers by filing lawsuits for inaction; Republic of Korea regards consumer class action lawsuits as PIL.

is centered on giving full play to individual intellectual and moral abilities, respecting individual values, and valuing individual self-realization, and it embodies the value standards of liberalism. However, after the 1960s, the litigation systems around the world became complicated in the aftermath of the recession of liberalism, and public interest became important for the construction and maintenance of order.[14] Because the jurisprudence behind the traditional individual procedure can neither handle PIL nor provide moral arguments for it, theories such as the theory of litigation purpose, theory of right of action, theory of construction, theory of object matter, and theory of *res judicata* developed on the basis of traditional private interest litigation are naturally incapable of addressing relevant issues in PIL.[15] In this case, it is necessary to transform the judicial concept from individualism to collectivism, set "maintaining legal peace" and "protecting the entire legal order" as the guiding ideology of procedural law, and remove obstacles for the development of the PIL system.

The PIL system gets to develop mainly due to breakthroughs of legislation in two aspects as follows. First, the requirement for the *locus standi* of PIL prosecutors (plaintiffs) is relaxed so that organizations or individuals who have not suffered legal damage can also file lawsuits, in which way PIL gets to be launched. In this regard, common law countries took the lead. In the 1950s, the Supreme Court of the United States started to allow plaintiffs to sue to protect the rights of others, and subsequently adopted a more relaxed standard of "special or sufficient interest." In the 1970s, Lord Denning promoted the reform of the British adversary system. The traditional definition is that the plaintiff must be a person who has suffered damage due to infringement upon his or her legal rights and must have sufficient interest in the dispute, but the revised version is that a plaintiff may seek judicial relief as long as he or she has sufficient evidence of the involvement of litigation interest. China also adopted this idea. In 2015, in its judicial interpretation of civil environmental PIL, the Supreme People's Court abolished the requirement that a plaintiff must have a direct interest in the case.[16] Second, the obstacles to PIL are removed by easing the rigid provisions on procedural rules. There is a consensus among different countries on PIL: strict and formal procedures are to be abandoned so that judicial organs can handle social hot issues as PIL. The direction of reform is to simplify the PIL procedure. For example, regarding an accusation or petition as a bill of prosecution, the court may initiate the PIL procedure *ex officio* and relax the traditional jurisdiction rules for the vulnerable groups to file lawsuits. Moreover, it is advisable to hinge whether the PIL judgments have *res judicata* on the nature of the claims and the facts of the case. The above measures are summarized as "form at the service of substance," a principle for the construction of PIL.

The shift from individual procedure to collective procedure undoubtedly meets the objective need for judicial protection of the public interest, and reflects the reality that

[14] See HU Honggao, 论公共利益的法律界定——从要素解释的路径 (On the Legal Definition of Public Interest: From the Perspective of Element Interpretation), 4 中国法学 (*China Legal Science*), 58 (2008).

[15] See DUAN Housheng, 环境民事公益诉讼基本理论思考 (Research on Basic Theories of Environmental Public Interest Civil Litigation), 4 中外法学 (*Peking University Law Journal*), 889 (2016).

[16] See《最高人民法院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》(法释〔2015〕1号)第1条 (Article 1 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations [F. S. 2015 No. 1]).

liberalism has lost its dominance over the litigation procedure system to communitarianism and republicanism. Such a transformation also shapes a new pattern of protection of public interest and individual interest: individual autonomy and self-determination in litigation procedures must give way to the representative mechanism and the judgment expansion mechanism in collective procedure. Such a change is inevitable, despite the stubborn opposition of liberal political philosophers to it.[17]

D Jurisprudence of PIL Results

Traditional litigation is in an adversarial structure where the two parties argue against each other in the procedures for a litigation result that is delivered for the legal relations involved in the case only, and in principle binding on the litigants only and not effective on other people. However, PIL breaks these old conventions and rules such that not only is the scope of litigation determined jointly by the court and the litigants but also the relief methods must be flexible, forward-looking, and specific, and the results of the relief must be of great significance to the relevant members of society. Therefore, revolutionary changes have taken place in the relief methods: relief is not a compulsory measure, but the result of discourse; a judgment does not mean the end of judicial intervention, as the judicial organs will stay involved in related events after the end of the litigation; and the role played by judicial organs is not passive, but active, and their responsibility is not only to determine the facts but also to properly organize and decide the litigation process to ensure the fairness and feasibility of the results.[18]

Obviously, the above changes have broken through the framework of traditional procedural law and reshaped procedural law by political values. This is mainly manifest in the following aspects. First, PIL and its results are public products. From a political perspective, courts and the litigation system have always been regarded as a kind of public good, or more precisely, a kind of political public good.[19] The attribute of PIL as public goods is even more obvious. Since administrative organs are not necessarily professional institutions and may deviate from the law when performing their administrative functions, PIL acts as a correction mechanism to oversee administrative organs in performing their statutory duties, whereby the public service function of PIL is undoubtedly strengthened. Second, the PIL system provides those who do not have the opportunity to participate in administrative decision-making with such opportunities for them to participate in the judicial process of administrative accountability, demonstrate their social value and achieve social justice. Objectively, the process of PIL is a process of negotiation in a public space, and the judgment of PIL is infused with such an attribute of public goods, as distinct as it is, that not only does it have a binding force on the plaintiffs and defendants of PIL, but also its effect will extend to ordinary members of society and meet the needs of the entire society (or the majority). Even if a party to PIL loses

[17] See Martin H. Redish, *Wholesale Justice, Constitutional Democracy and the Problem of the Class Action Lawsuit*, Stanford Law Books, at 89 (2009).

[18] See TANG Xin ed., 公共利益与私人诉讼 (*Public Interest and Private Litigation*), 北京大学出版社 (Peking University Press), at 243 (2009).

[19] See Erlis Themeli, *The Civil Justice System Competition in the European Union*: *The Great Race of Courts*, Eleven International Publishing, at 156 (2018).

the case, the judgment will nonetheless carry the value of the public goods. At least it will enable members of society to obtain useful litigation information for free and to save them from further litigation and, undoubtedly, the erroneous expenditure of costs.[20] And finally, the outcome of PIL is not all about winning or losing a PIL case. Some people believe that the public goods value of the PIL system will be diminished if PIL is not concluded with a judgment but is resolved through mediation, reconciliation, or negotiation. But in reality, there are no real winners and losers in PIL, as in form, all parties to PIL participate in the action in order to involve themselves in the solution of specific public problems, rather than just debating on who will win or lose. In other words, the outcome of PIL is the result of negotiation, not that of a fight.

In short, the PIL system must be constructed based on a specific jurisprudential foundation. First, the criteria for public interest and the judicial protection mechanism for public interest vary based on specific jurisprudential foundations, as the jurisprudential foundation will decisively shape PIL. Second, the strategic use of PIL will also promote the timely improvement of substantive laws and social policies, facilitate meaningful social changes, make up for the shortcomings of legislation and administrative enforcement, keep the judiciary sensitive to social issues, and bring the judiciary closer to social issues.

II Individual Procedure and Liberalism

In a typological sense, litigation procedures can be divided into two types: individual procedure and collective procedure. Individual procedure is a type of litigation that strictly implements the adversary system model, where it is the responsibility of the litigants themselves to determine the trial objects and provide litigation materials, and it is also the litigants themselves who will bear the consequences of the litigation, as happens in traditional civil litigation. Collective procedure is a litigation procedure specifically designed to resolve large-scale disputes as well as a special procedure for protecting public interest or group interest. It includes PIL, a type of "pure public interest" action, group action (representative action), model action, and other types of "collective public interest" action.[21] Although collective procedure covers a wide range of connotations, there is something in common: the introduction of a litigation representative mechanism where statutory or voluntary representatives initiate and conduct litigation on behalf of a class of non-parties. Regardless

[20] In August 2021, the public welfare social organization, ThinkTank Research Center for Health Development, filed administrative public interest litigation, claiming that tobacco trademarks such as "中華" and "人民大会堂" violated the relevant provisions of the Trademark Law of the People's Republic of China, and requesting the National Intellectual Property Administration to revoke them in accordance with the law. The public welfare organization believes that tobacco named with these characters can easily cause the public to misunderstand the quality and origin of tobacco. The public interest litigation was dismissed by the court of first instance.

[21] Although class actions are initiated by individuals, they also have incidental consequences such as punishing, deterring the defendant and stopping its illegal behavior; therefore, objectively, they are also a collective procedure to protect the public interest. Of course, there are differences between class action and PIL, for example: (1) class actions are conducted under the framework of traditional adversarial litigation and, in terms of the litigation model, they are neither a pure adversary system nor a pure inquisitorial system, whereas PIL, in terms of the litigation model, completely negates the adversarial litigation model. (2) The plaintiff in a class action is in most cases a party whose rights have been violated, in addition to whom there are potential victims in the lawsuit, whereas the rights of the plaintiff in a public interest lawsuit are not violated and it files the lawsuit for the only purpose of seeking legal relief for the public. See Redish, fn. 17 at 30.

whether it is PIL or various forms of class action, their judgments have expansive effects as well as force legally binding on the stakeholders represented but not participating in the litigation. In regard to the jurisprudential foundation, individual procedures correspond to liberal theory, while collective procedures reciprocally complement communitarianism. The liberal view of litigation defends the concept of due process, but its conservatism also becomes a hindrance to the development of the PIL system, which provides an opportunity for the collectivist view of litigation to gain ground, break free from the shackles of the liberal one on key points, such as the eligibility of the litigants, and the relativity of the effect of final judgment, and provide a theoretical basis for the development of the PIL system.

A PIL and Individual Procedure

Individual procedure is consistent with liberal political philosophy and subject to great influence of liberal normative claims. Liberalism emphasizes the priority of due process in the litigation system, which is most prominent in the adversarial litigation model, the litigation interest is personal, and the litigation is the own business of the litigants, and their own right of action enjoys the highest priority in the litigation process. At least in the field of civil procedure, it is the responsibility of the litigants themselves to conduct litigation and provide litigation materials, and the disposition principle, which recognizes the freedom to file civil lawsuits, and the debate principle, which supports the freedom to present personal reasons and arguments in legal cases, are pushed to the core of the litigation process. Under the guidance of these two litigation principles, the litigants play a more important, more direct, and more decisive role in litigation than the courts do.

Of course, the individual procedure under the liberal framework does not mean selfishness and unscrupulous egoism, but rather, what it emphasizes is the important value of self-determination of the litigants. In this regard, even collective procedure, which focuses on community spirit and public interest, or the procedural laws of socialist countries, must emphasize the autonomy or self-determination of the litigants as their basis. Individual procedure, which is governed by the liberal view of litigation, emphasizes self-development, individual uniqueness, and the necessity to achieve personal desires and goals, and this is the jurisprudential foundation of due process. In the liberal view, the distinction between public interest and individual interest is so complicated and subtle that when public interest is provided to a certain individual, it will be inevitably and automatically enjoyed by other members of the same community. However, compared with the collectivist view of litigation, liberalism firmly believes that individual procedure is so sufficient to protect individual rights that litigants can achieve relief for individual rights by exercising their right of action and will also indirectly protect the public interest, whereas collective procedure will only ruin the autonomy of litigants in individual procedure.

The concept of individual procedure can be found in Hayek's libertarianism, Rawls's egalitarian liberalism, and Nozick's rights-based liberalism theory. Hayek believes that true individualism ultimately aims to safeguard the value and dignity of individual independence. Saving and defending a free social order ultimately comes down to defending individual

liberty.[22] Therefore, the judiciary must pursue a neutral stance of liberalism and should play a passive role, allowing individuals in dispute to exercise their own right of action in order to achieve private rights protection and procedural safeguards. Although Rawls's egalitarian liberalism, which emphasizes social distributive justice and focuses on protecting the basic liberty and rights of vulnerable groups (the "second principle of justice," which is about equal opportunity and differential compensation), seems to have broken through the individual procedure and to have provided opportunities for the development of collective procedure, in fact, the "first principle of justice" (the principle of maximum equal liberty) is still placed above the "second principle of justice," so that the protection of private rights is above the protection of the public interest, that the collective procedure is still subject to the individual procedure, and that individuals still have the right to decide on the process and results of public interest protection. Nozick's rights-based liberalism is even more conservative, advocating that individuals have rights, and there are some things that other people and groups cannot do to them, as doing so would infringe on their rights, and proposing the concept that "redistribution is tantamount to theft."[23] The principle of minimum intervention upheld by the "minimal state," to all intents and purposes, denies the legitimacy of PIL. In short, liberal political philosophy regards due process as the ultimate truth of the litigation system, focusing on individuals and forgetting the community. Although Marxist political philosophy has forced Western political philosophers to adjust their views in order to fairly share the benefits of capital, a change that Rawls's and Dworkin's political philosophy about resource equality seems to have undergone, fundamentally, contemporary liberal political philosophy is unable to get rid of the chronic disease of "formal liberty." As for the PIL system, liberal theory obviously ignores the objective impact of unequal resource possession on the protection of rights and weakens the necessity of protecting public interest. A conspicuous fact is that in any liberal theory of justice, the fact that the rights of vulnerable groups are poorly protected will not be changed.

The constraints of liberalism on the PIL system come from two sources. First, the rigid theory of litigant qualification makes it difficult to file PIL. The issue of litigant qualification to PIL emphasizes the protection of specific public interest, to be specific, who can sue, respond to lawsuits, and request, in each case, in the capacity of a plaintiff, the court to make a judgment, or by what criteria unqualified litigants are excluded from PIL to prevent the abuse of PIL. To the above questions, liberal political philosophy gives a negative explanation where it takes the protection of individual rights as its starting point and advocates that when public interest is infringed on, priority is nonetheless given to individual rights and the right of action of individuals takes precedence over that of collectives. In other words, any impact that litigation may have on the public interest must be grounded on the individual interest asserted in more specific, narrowly defined cases.[24] Second, liberalism is incapable of correctly explaining the procedural safeguard mechanism in the public interest. From

[22] See ZHOU Suiming, 当代西方政治哲学 (*Contemporary Western Political Philosophy*), 江苏人民出版社 (Jiangsu People's Publishing House), at 47 (2016).

[23] See Robert Nozick, 无政府、国家和乌托邦 (*Anarchy, State and Utopia*), translated by HE Huaihong et al., 中国社会科学出版社 (China Social Sciences Press), at 1 (1991).

[24] See Redish, fn. 17 at 30.

the perspective of liberalism, it is obviously inconsistent with the principle of procedural safeguards and especially with the core value of liberalism, i.e., the concept of autonomy, that in the event that the litigation process and results are completely dominated by others (legal organizations or groups), the beneficiaries of public interest or members of specific groups do not personally participate in the litigation but are made to bear the consequences of the litigation. The legitimate motivation of private individuals to strongly safeguard the public interest is often considered to be malicious.[25] It is a need to maintain self-worth that liberal political philosophy resists the PIL system. According to liberal theory, a lawsuit does not come as a judgment result from the litigation activities carried out by the litigants themselves, and the PIL judgment will inevitably come into effect beyond the scope of the parties who actually participate in the litigation process.[26] When those members of society who do not participate in PIL are to be bound by the judgment of PIL, it means that the relativity of the judgment's *res judicata* is broken through and that the "last refuge of individualism" in litigation will no longer exist, which will undoubtedly impinge on the liberal view of litigation and inevitably incur attacks from liberal theory.

B PIL and Utilitarianism

From ancient times to the present, the issue of *locus standi* has always been the focus of PIL reform. Roman law, upholding the spirit of ideological liberation, promoted the development of "popular action." However, after the end of the 5th century AD, as the Anglo-Saxon law invaded and the strict *locus standi* standard was adopted, "popular action" no longer existed. The logic behind its abandonment was: under the interested party standard, whoever has the right of action may bring an action, and whoever has no interest has no right of action, and where no one gets to claim that it has the right of action over public interest, no one gets to initiate PIL. Therefore, relaxing the litigant qualification standard has become the only option for the PIL system to grow. In the second half of the 20th century, Lord Denning of Britain refreshed the connotation of *locus standi*, arguing that the scope of "right victimization" is very broad and should not be restricted, so that all people grieved about infringement upon their rights falls within the scope.[27] At the same time, with the need to protect diffuse interest, PIL has started its revival around the globe, and the strict standard of litigant qualification for plaintiffs has gone relaxed. Such revolutionary changes are obviously results of the comeback of utilitarian political philosophy, the PIL system should bring maximum benefits to society and more happiness to all members of society. Obviously, the challenge of qualifications of litigants to PIL is brought about by the "public interest" itself, and the design guiding principle of the PIL system varies with the definition of public interest. The way people discuss the initial question of public interest today is not different from the way they did in Jeremy Bentham's

[25] See Damaška, fn. 4 at 275.

[26] See Mauro Cappelletti, 比较法视野中的司法程序 (*The Judicial Process in the Comparative Perspective*), translated by XU Xin et al., 清华大学出版社 (Tsinghua University Press), at 413 (2005).

[27] See Khalid Yahyea, *A Brief of Public Interest Litigation, Concept, Evolution, Procedure, Prospects* (*Focused on South Asia, Particular in Bangladesh*), Lap Lambert Academic Publishing, at 25 (2012).

time: Does it refer to the interest of the majority or the interest of the community? Is it a unified concept? This also means that the public interest and its protection mechanism are destined to be deemed a legal issue.

Utilitarians represented by Bentham prefer to define public interest from an individualistic standpoint, believing that public interest is "the aggregation of individual interests." One of his famous quotes is that a community is nothing more than a virtual group composed of its members, and the interest of the community is the sum of the interests of its members.[28] Hume summarized the public good as follows: justice is indeed praised only for its tendency promote to the public good.[29] Mill regarded "utility" or the "greatest happiness principle" as the creed of the moral foundation, believing that the right and wrong of deeds are proportional to their tendency to happiness or misfortune.[30] In the eyes of utilitarian scholars, a deed is good if it tends to promote the greatest happiness for the greatest number of people it affects.[31] Such a value judgment obviously strongly supports the institutional construction of PIL. Compared with individual lawsuits or merged lawsuits, PIL boasts significant advantages of legal and political value as, when it comes to the protection of social and public interest, it obviously maximizes the total utility of members of society or members of specific groups and creates the greatest happiness for them.

Marxist theory criticizes utilitarianism, arguing that it bases itself on the "goodness" of things themselves so that, without the support of teleology, it cannot find a basis for moral behaviors, leaving the entire moral argument out of place.[32] Practices at home and abroad have also fully shown that utilitarian political philosophy only brings very limited morality to PIL. To begin, utilitarianism says that protecting individual rights should make way for PIL, which comes before protecting individual rights. This will definitely weaken the legal protection of individual rights and make it impossible to find a good answer to the question of how to make sure that laws are in the public interest. Therefore, utilitarianism cannot provide ideological support for the protection of public interest. Second, utilitarianism gives legislators or judicial personnel the power to judge whether PIL maximizes the overall happiness of society, making PIL operate by the principles of utilitarianism, thereby turning PIL into a kind of "paternalistic litigation"—powerful institutions, organizations, or groups sue on behalf of society or groups, while individual choices are curtailed and individual rights even become instrumental items, the only use of which is to pursue the happiness of the entire team.[33] It can be seen from this that utilitarianism cannot fundamentally resolve the tension between the protection of the public interest and that of personal interest.

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[28] Bentham, 道德与立法原理导论 (*An Introduction to the Principles of Morals and Legislation*), translated by SHI Yinhong, 商务印书馆 (The Commercial Press), at 15 (2000).

[29] Hume, 人性论 (*A Treatise of Human Nature*), translated by GUAN Wenyun, 商务印书馆 (The Commercial Press), at 662 (1981).

[30] See John Stuart Mill, 功利主义 (*Utilitarianism*), translated by XU Dajian, 上海世纪出版集团 (Shanghai Century Publishing [Group] Co., Ltd.), at 7 (2007).

[31] See Hobhouse, 社会正义纲要 (*Elements of Social Justice*), translated by ZENG Yixuan, 商务印书馆 (The Commercial Press), at 4 (2020).

[32] See WANG Xinsheng, 马克思政治哲学研究 (*Study of Marx's Political Philosophy*), 科学出版社 (Science Press), at 105 (2018).

[33] See Richard A. Posner, Utilitarianism, Economics, and Legal Theory, 8 (1) *The Journal of Legal Studies*, 103–140 (1979).

C Issues of Representation in PIL

In form, liberal political philosophy regards the "will of the people" as the direct source of common interests. Accordingly, direct democracy is regarded as the most appropriate way to achieve public interest.[34] But obviously, public interest is an issue too complex to be decided by direct voting; instead, it can only be settled through representative means. Therefore, the principle of majority decision-making is generally observed as an objective benchmark for public interest.

It is also a democratic issue about who gets to represent society or the public interest in procedural law. The organizations and organs under the law on PIL may file PIL, but such general provisions do not mean that these organizations and organs will definitely become proper plaintiffs in specific cases. First, when a plaintiff files PIL, the public interest and the damaged group are still in such an unclear condition that it is impossible to determine whether they are a unified entity and what the group size is. This means that the "group rights and interests" represented by the plaintiff in the PIL, as stipulated by the law, are so flexible that their nature can only be defined under specific circumstances.[35] Second, if there is no such specific objective being as public interest but only abstract public interest, then the abstract conferment of such interest upon a certain type of subject by procedural law will not automatically entitle them to represent specific public interest cases. Therefore, in addition to the abstract statutory conferment, a proper plaintiff must meet the conditions of appropriateness and adequacy of representation. The reason why the relation of representation is a necessary condition for the eligibility of plaintiffs in PIL is that in modern society, it is impossible for a large group composed of all citizens to directly participate in the litigation process, and even more so for judicial practice to allow the existence of such a form as all-citizen action, in which all members of society personally participate in litigation debates and dispositions regarding facts. In particular, no modern liberal ideals will force citizens into litigation. Then the questions become how to identify public interest representatives and how to improve the appropriateness and adequacy of representation.

There are several legislative ways to solve the representation problem. First, public interest groups (including both private and semi-official types) authorized by law file lawsuits on behalf of the public interest, for instance, organizations protecting consumer rights and public interest organizations protecting the environment. Second, administrative organs or procuratorial organs authorized by law file PIL on behalf of the public interest. For example, the United States Federal Trade Commission may file lawsuits against any competitive practice that violates antitrust laws and infringes on consumer interests, and another example is that the procuratorial organs in China may file PIL. Third, individuals with common interests may initiate litigation of a public interest nature; typically, litigation representatives, plaintiffs (representatives) in class actions, and model actions represent other parties in litigation.

The problem is that the legislature, staying out of the resolution of specific issues, authorizes relevant organizations to raise public interest in legislation, but fails to consider

[34] See Tichý, fn. 12 at 35.

[35] See ZHANG Chenguo, 论公益诉讼中处分原则的限制与修正 (Limitation and Reinterpretation of Disposition Principle in Public Interest Litigation), 4 中外法学 (*Peking University Law Journal*), 905 (2016).

how to protect the interests of those members of society who are not represented by groups or organizations (non-group interest). The difficulty therein is that representatives of the public interest must meet the requirements of litigation democracy—being "non-electoral representatives" or "self-authorized representatives," they do not have direct authorization from the represented persons, but they have to represent them, hence the problem of their legitimacy. Although it can be explained by the theory of litigation responsibility, which gives non-rights holders the right to file a lawsuit, that is, the right to file litigation, in the eyes of liberals, the self-determination (right of disposition) of litigation parties is still a completely moral existence in the litigation, but the mandatory representation of group interests by relevant organs or organizations is a denial of the value of self-determination, a practice tantamount to treating members of society as children or animals rather than as full members of the community.[36] As is claimed by liberals, any group has the right to advance an agenda through democratic means, but it is one thing to convince your fellow citizens thereof and another to impose your views thereon in the absence of a democratic majority.[37] Therefore, the adequacy of public interest representation determines the legitimacy of the PIL outcome. If a plaintiff lacks adequate representation, one can hardly assert that the PIL outcome is justified.

First of all, procedural law authorization alone is not enough for an organ or organization to obtain the right to represent specific public interest matters because statutory litigation responsibility and public interest representation are separate issues. After the public interest is infringed on, it is common that there is more than one representative of the public interest. Who is more representative of the public interest is a question of political value judgment—state organs are elected by public opinion organs through democratic procedures, showing that statutory organs have the full power to represent the public interest within their jurisdiction. But this is only an abstract norm and does not mean that they can truly represent specific public interests, because voters and the group of public interest victims are not the same group, and politically elected representatives and public interest representatives are also not the same people. In other words, if the public interest is regarded as an "entity" by which the individual interests of the represented members of society may be absorbed, then individual autonomy in litigation will no longer exist, as individual interests will be not more than elements in a large organism, which is unacceptable to liberal political philosophy. Therefore, it is a democratic election procedure that the selection of litigation representatives for group action actually follows.[38] For PIL or group action, due to the fact that it is impossible to hold elections for the represented persons, their qualifications for representation are restricted on the following aspects: First, a certain number of people is a prerequisite criterion for identifying public interest representatives, and based on the number, the case

[36] See Will Kymlicka, 当代政治哲学 (*Contemporary Political Philosophy*), translated by LIU Xin, 上海译文出版社 (Shanghai Translation Publishing House), at 270 (2015).

[37] See Bicwood, fn. 2 at 1.

[38] In an group action stipulated in the Civil Procedure Law, the procedure for electing representatives is as follows: If the exact number of litigants in one party that has numerous litigants is certain at the time of filing of a lawsuit, all or some of the parties may elect a representative; if the parties cannot elect a representative, they may file lawsuits otherwise. If the exact number of litigants in one party that has numerous litigants is uncertain at the time of filing of a lawsuit, the parties shall elect a representative; if the parties cannot elect a representative, the court shall recommend a candidate and negotiate with the plaintiff; if the negotiation fails, the court may designate a representative according to its functions and powers.

can be treated as PIL to identify the representative.[39] Second, each member of the group must have a good record, or at least a clean one, which is a measure to enhance the qualification of representatives.

Second, for a statutory organ or organization to file PIL, the protection of the individual victims' right of action will also face the problem of representation paradox, that is, the victims are "not present yet somehow present," as the plaintiff in a PIL case is not nominated by them, and it is impossible for the represented members of society to hold the representative (organization or group) accountable. Moreover, differences in resources and endowments lead to greater likeliness for powerful groups to obtain such self-authorized representation, and the representation is mostly conferred upon elite members, who inevitably give distorted expression to the preferences of the general public.[40] Taking consumer-related PIL as an example, it is not clear whether consumers have a real desire to sue or whether they are willing to select a consumer protection organization to file PIL on their behalf. But it is clear that consumer organizations representing unspecified consumers in consumer-related PIL have their own external boundaries, beyond which their behavior of representation will no longer be valid. In fact, the jurisdiction clauses are stipulated in judicial interpretations in China for PPIL and consumer-related PIL[41] to determine the representative standards, based on geographical factors, for prosecutors and consumer associations, thereby enhancing the adequacy or qualification of representing the public interest.

Finally, paternalistic litigation can solve the problem of public interest representation to a certain extent, but not fundamentally. Paternalistic litigation, also known as patriarchal litigation, is such a form of litigation initiated by specific state organs (procuratorial organs or administrative organs) to protect general interests independent of specific individual interests that are beyond individuals and in the interest of the government itself.[42] In this type of litigation, a state organ, as a public interest representative, takes litigation actions within its *ex officio*, just like a parent taking care of family members. For example, it has a case docketed based on clues at hand, investigates evidence *ex officio*, etc., and paternalistically provides humanistic care. It presupposes that, even if individual litigants have the right to make procedural choices, representatives can better protect their rights and better understand how to assert their rights than the litigants themselves do. However, in the view of liberal theory, paternalistic litigation is nothing more than an externally imposed force that will only exist within the liberal framework—every normal adult should be entitled to a certain

[39] Article 95.3 of the Securities Law of the People's Republic of China stipulates that an investor protection institution, upon the entrustment by 50 or more investors, may participate in litigation as the representative. In Germany, except for consumer centers funded by public financial resources, an aggregate corporation that files a consumer group-related lawsuit against inaction must consist of more than 75 members. For a public interest aggregate corporation or incorporated foundation in Taiwan Province of China to file PIL, it must have more than 500 members as a minimum and more than 20 authorizers who grant in writing the right to conduct the litigation.

[40] See NIE Zhiqi & TAN Huosheng eds., 代表理论：问题与挑战 (*The Theory of Representation: Issues and Challenges*), 广东人民出版社 (Guangdong People's Publishing House), at 18–19 (2018).

[41] See《人民检察院公益诉讼办案规则》第 14 条 (Article 14 of the Rules for the Handling of Public Interest Litigation Cases by People's Procuratorates), and《最高人民法院关于审理消费民事公益诉讼案件适用法律若干问题的解释》第 3 条 (Article 3 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Public Interest Actions Regarding Consumption).

[42] See SHEN Guanling, 消费者团体诉讼之再构建 (*Reconstruction of Consumer-Related Group Action*), in 团体诉讼专题研究 (*Special Research on Group Action*), edited by XU Zhengxian et al., 元照出版公司 (Angle Publishing Co., Ltd.), at 122 (2019).

range of self-determination rights that must be respected by others, and only when people are unable to protect their own interests will the paternalistic litigation be legitimate. For this reason, some courts in the United States hold that paternalistic litigation shall never be a choice when a private right lawsuit can be filed to seek damages. There are also case-ruling opinions that insist that the interest of each state is attached to individual interest.[43] In short, from the perspective of liberalism, the fact that the litigants are controlled by an external force according to values that they do not support will not make their lives better.[44] Instead, it may create some meaningless lawsuits, which can be regarded as a negative example of the Western PIL system.

In short, issues such as public interest, litigation subjects, procedural processes, and judgment effect in the PIL system, all reflect the confrontation, exclusion, and interaction between individualistic and collectivist litigation concepts. Liberalism defends the concept of due process, but it also creates obstacles to the PIL system. It reveals the tension between individual litigation and collective litigation: PIL will deprive members of society of their influence on the litigation process and results, thereby compromising the legitimacy of the litigation results. Members of society may be unaware of the ongoing PIL, or in a state of "rational indifference," each of which will become an important factor in the validity of PIL. For this reason, liberalism and individual procedure must eliminate such drawbacks in reasonable measure, for example, by relaxing the litigant qualification standard for plaintiffs to ensure that qualified representatives of "non-group interest" can effectively participate in litigation. And as another example, we should try to maintain consistency between the provisions of statutory litigation responsibility and the scope of the groups involved in the litigation, i.e., PIL for specific groups should be represented by the most representative organizations as qualified plaintiffs. Meanwhile, for those who were not originally interested in litigation justice, explanations can be given by issuing announcements to implement the concept of litigation openness and participation, leaving them with room for self-determination.[45] These foreign measures guarantee procedural safeguards in PIL to a large extent and provide us with inspiration that the construction of the PIL system should focus on protecting the right to know of members of society and groups, and strengthening procedural safeguards,[46] in order to ease the tension between individual procedure and collective procedure in China's PIL system.

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[43] Id.

[44] See Kymlicka, fn. 36 at 275.

[45] See Mauro Cappelletti ed., 福利国家与接近正义 (*Welfare States and Access to Justice*), translated by LIU Junxiang et al., 法律出版社 (Law Press・China), at 113 (2000).

[46] See《最高人民法院、最高人民检察院关于检察公益诉讼案件适用法律若干问题的解释》第 18 条 (Article 18 of the 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),《最高人民法院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》第 9 条 (Article 9 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations), and《最高人民法院关于审理消费民事公益诉讼案件适用法律若干问题的解释》第 5 条 (Article 5 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Public Interest Actions regarding Consumption). All three judicial interpretations above emphasize that a people's court believing that the claims filed by a plaintiff (people's procuratorate) are insufficient to protect the public interest may exercise the right of interpretation to demand the plaintiff to change the claims or add new ones.

III Collective Procedure and Communitarianism

In the second half of the 20th century, along with the progress in industrialization and globalization, a large number of new, social, collective, and scattered rights and interests, and the objects protected by substantive laws have shifted from individual rights to collective rights. This also requires adjustments in the means and forms of judicial relief. It is in the above context that the ideological trends of liberal litigation have been retreating from the litigation field farther and farther and are even regarded as an undesired moral concept in the litigation system. Meanwhile, communitarianism has facilitated the conceptualization of collectivist litigation and the transformation of the litigation system from "due process of individuals into that of society," hence the thriving PIL system. Of course, it should also be noted that although communitarianism, together with republicanism, as the jurisprudential foundation of collective procedure, has partially filled the void of liberalism and found a certain basis for the PIL system, it did not escape the set pattern of liberalism as its struggle with liberalism in the field of litigation is nothing more than a debate between the two. For the construction of the PIL system in China, this system is only of reference significance.

A PIL and Communitarianism

Collective procedure is shaped by communitarian political philosophy. Hannah Arendt's classical republicanism, Habermas's critical social theory, and Sandel and MacIntyre's communitarianism (communalism, corporatism) are all important theoretical branches of communitarianism. They advocate that the principle of justice should draw its moral force not only from values commonly held or widely shared by people in a particular community or tradition but also depend on the moral value or intrinsic goodness of the purposes they serve,[47] that is, "good is prioritized over rights and justice." Therefore, ideas protected by community value and public interests, such as the country and the community, are given priority. "Community (society) first, individual second" has become the slogan for the development of PIL. Moreover, it is necessary to hold consultations to remove the danger that people may be deceived when safeguarding the public interest. To this end, consultation and democratic opinion should be made the only source of procedural legitimacy.[48] The propositions under the critical social theory, for instance, that the public sphere is a space for citizens to freely discuss public affairs and participate in politics, have enriched the content of PIL and provided a procedural concept and a framework that are different from procedural safeguards.

In the development history of litigation, communitarian political philosophy was first used as a supplementary theory for PIL, to bolster its legitimacy. Although communitarianism has only taken shape in recent decades, the political philosophy of collective procedure can be traced back to the era of Roman law, which stated that anyone can sue for himself or for others...for the people, for liberty, and for guardianship.[49] The theory of representation

[47] See WANG, fn. 32 at 233.

[48] See Habermas, 在事实与规范之间：关于法律和民主法治国的商谈理论 (*Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*), translated by TONG Shijun, 三联书店 (SDX Joint Publishing Company) at 45 (2014).

[49] See XU, fn. 1.

developed since the 17th century links representation with the concepts of agent and acting on behalf of others, paving the way for the "popular action" (*actio popularis*) system, that is, any citizen can sue for acts that harm the public interest. This provides the legitimacy basis for constructing a representative litigation system, such as PIL, litigation responsibility, and litigation agent system. The political value of collective procedure or large-scale litigation is further explained as follows: humans are social animals, and for the greater social benefit, the social structure must be maintained, and the interests of the community need to be respected and protected.

From the perspective of communitarianism, individualism in litigation should not be absolute, as there is a prerequisite for the self-determination of the litigants—individual liberty and well-being can only be achieved in a community. Therefore, individual autonomous decision-making should be subject to the public will in order to protect the public interest to the greatest extent. Specifically, it is advocated that the decision-making right of general affairs should be given to the entire community rather than individuals in order to emphasize the democratic nature of decision-making by keeping individual autonomy against independence from the community's decision-making right, as the motivation for people to choose actions usually comes from the community's experience.[50] In addition, objectively, there are good decisions and bad decisions, and the government has the responsibility to formulate policies to promote a "good life" for the entire society and guide society towards the predetermined ideal goals. To this end, individual preferences must be constrained in order to maximize social benefits. In this way, the "rights politics" as in liberalism should be replaced, or at least supplemented, by "politics of common interests."[51] Based on the above analysis, communitarianism advocates that equality outweighs liberty, that public interest protection outweighs private rights protection, and that PIL outweighs private interest litigation. Such public ranking has a huge impact on public interest and on the methods of such protection, as it provides a value basis for them.

However, while emphasizing community value, communitarian theory neglects individual growth and development, which brings new challenges to the moral justification of the PIL system. Although PIL provides the legitimacy for groups and organizations to file PIL and solves the issue of litigant qualification for plaintiffs in PIL, it is prone to ignoring the rights of individual litigants by often excluding, in the name of public interest, the mixture of public and private interests.[52] Therefore, PIL, under the dominance of communitarianism, must rely on litigation democracy as a compensatory mechanism to leave space and opportunities for individual autonomy and self-determination to play their part through the process. On the contrary, if there is a lack of basic respect for individuals, the concept of litigation democracy in PIL will ultimately fall out of consistency.

[50] See Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 *Harvard Law Review*, 685 (1990).

[51] See Kymlicka, fn. 36 at 269.

[52] See ZHANG Xudong, 环境民事公私益诉讼并行审理的困境与出路 (Dilemma and Solutions of Concurrent Trial of Environmental Civil Public and Private Interest Litigation), 5 中国法学 (*China Legal Science*), 280 (2018).

B PIL and Republicanism

Like communitarianism, republicanism is also a correction of liberal political philosophy. It is a political philosophy theory that balances and restrains individualism. As confirmed by the research conducted by Hannah Arendt, people in ancient Greece had begun to distinguish between two lifestyles: family life and polis life. The former, an economic lifestyle, belonged to the private sphere, while the latter, a political one, belonged to the public sphere,[53] which was the early form of republicanism. Contemporary civic republican theory is considered to be a mixture of racist, theological, and anti-sexist moral principles.[54] As explained by Cass Sunstein and Frank Michelman, civic republican theory has shifted to the pursuit of public interest carried out through consultation, thereby transcending selfish, diversified, and narrow individual interests.[55] In short, "personal interest is subservient to public interest." From the perspective of civic republicanism, this is a way to resolve citizens' selfishness syndrome and apathy to political participation for them to demonstrate their civic virtues by leading an active public life.[56]

The contemporary PIL system has enlisted legitimacy support from civic republicanism, a typical example of which is the citizen litigation system in the United States, where citizens can hold government officials accountable for administrative liability in accordance with administrative regulations if they object to government decisions on the environment and other aspects. Subject to provisions on citizen suits, citizens and non-governmental organizations have the right to file lawsuits when any state or federal government violates corresponding environmental laws or when other private individuals violate environmental laws.[57] The Chinese scholars, whose views are also consistent with the proposition of civic republicanism, suggest that every citizen be given the republican rights to protect public assets and public wealth from being embezzled, that the citizens participate in political life under the drive of the republican rights and, in doing so, face up to the grim fact that a large amount of public assets and public wealth have been embezzled, and take positive action upon call-up to protect them from being embezzled.[58] Citizens are expected to assume an active role imbued with a spirit of participation, public concern, and civic virtues, participate in PIL, and play a role. According to the theory of civic republicanism, it is a basic condition for the development of PIL that citizens actively participate in public life and have the motivation and opportunity to express their demands.

In the Western legal system, civic republicanism provides strong support for the development of the PIL system. First, civic republicanism inspires citizens to participate in

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[53] See ZHOU, fn. 22 at 72.

[54] See Linda Kerber, Making Republicanism Useful, 97 (8) *Yale Law Journal*, 1665 (1988).

[55] See Cass Sunstein, Beyond the Republican Revival, 97 (8) *Yale Law Journal*, 1539 (1988); Frank Michelman, Law's Republic, 97 (8) *Yale Law Journal*, 1493 (1988).

[56] See REN Jiantao, 论积极公民——共和主义与自由主义的公民定位分析 (On the Active Citizenship: Analysis on Citizens Positioning of the Republicanism and Liberalism), 1 武汉大学学报 (哲学社会科学版) (*Wuhan University Journal* [*Philosophy & Social Sciences*]), 7 (2014).

[57] See QI Shujie et al., 美国公民诉讼的原告资格及其借鉴意义 (The Standing of the Plaintiff of the United States Citizen Suit and Its Inspiration), 9 河北法学 (*Hebei Law Science*), 161 (2009).

[58] See XIAO Bin, 让公民直面 "res publica": 当代共和主义塑造积极公民的战略性选择 (Have Citizens Be vis-à-vis Res Publica: A Strategic Option for Contemporary Republicanism in Cultivating Active Citizens), 6 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*]), 50–51 (2006).

PIL. In the eyes of civic republicans, on the one hand, citizens' political participation is part of a good life, and PIL, as a form of social participation, also constitutes an integral part of the good life, and this is what happens when citizens are incented by their active identity. On the other hand, those organs (especially the procuratorial organs) that are more consistent with voters' views have better legitimacy than other public interest organizations do. Therefore, it is regarded as an ideal model of PIL where PIL is initiated by such institutions. This is because citizens are the real rulers of the country and elected officials are their agents, hence greater credibility of state organs. Second, civic republicanism has provided a justification for the participating and negotiating mechanism of PIL, and supported the shift from a "voting-centered" democratic theory to a "dialogue-centered" one in the early 1990s and advocating "deliberative democracy" in the field of PIL.[59] This is a huge theoretical contribution to the construction of the PIL system. Because the procedure requires a wider range of representation upon initiation, greater participation through the proceedings, and more consultation for the outcome rather than a lose-lose situation.

As a value evaluation standard for the PIL system, republican theory also has its shortcomings as follows. First, it claims that the pursuit of individual interests, whether based on individuals or groups, is harmful rather than beneficial. In this regard, republicanism scholars have to admit that for community democracy to function properly, individuals must retain their own space for autonomy. At a minimum, individuals must have autonomy in their efforts to participate in the democratic process, i.e., each person "possesses a unique core that should display or express its feelings and intuitions," and a group is in many ways just a carrier of more rights of the sovereign.[60] Second, the greater the influence of the collectivist litigation concept in PIL is, the weaker the individualistic factors in the litigation will be, and the fewer opportunities individual litigants will have to defend their own rights. Over-emphasizing public interest will undoubtedly threaten or even undermine liberal political and legal values and weaken both the protection of rights and procedural subject rights. Ideologically driven environmentalists in Western countries often abuse PIL resources, causing another form of damage to public interest when in essence what they do to a large extent is act under the banner of public interest to kidnap society and groups.[61]

C PIL and Negotiation Rationality

Modern society is a human community with a shared future. As a legal concept, public interest is a unified concept on the one hand and has a relatively independent status and different functions in different disciplines or departmental laws in the other, which makes the practice of PIL so complex and diverse that the specific circumstances of the public interest as well as the different positions taken by different regions and organs must be taken into

[59] See ZENG Jimao, 共和主义与公民参与——评金里卡《当代政治哲学》中关于共和主义的评述 (Republicanism and Civil Participation: On Will Kymlicka's Remarks on Republicanism in Contemporary Political Philosophy), 5 四川大学学报 (哲学社会科学版)(*Journal of Sichuan University* [*Philosophy and Social Science Edition*]), 66 (2005).

[60] See Takeshi Kojima, 司法制度的历史与未来 (*The History and Future of the Judicial System*), translated by WANG Zuxing, 法律出版社 (Law Press · China), at 17 (2000).

[61] See Steven P. Croley, *Civil Justice Reconsidered*, *Toward a Less Costly*, *More Accessible Litigation System*, New York University Press, at 2 (2017).

account. This means that the various interests of the community could not be protected unless they are always continuously and effectively involved in the decisions of administrative and judicial organs. Therefore, channels for social participation should be reserved in both administrative and judicial procedures. As a judicial mechanism of collaboration, dispute resolution, and integrity,[62] PIL bears the dual responsibilities of guiding value awareness and resolving disputes. It is necessary to work hard to make sure this channel is clear.

Within the framework of litigation, the consultative dialogue mechanism provides a new litigation concept, procedural structure, and judgment method, which effectively enhance the legitimacy function of PIL both in terms of procedural process and judgment results. First, the consultative dialogue mechanism plays an important role in promoting the legitimacy of PIL results and ensuring the participation, cooperation, and consultation of members of society. This mechanism is summarized as the "non-judgment doctrine" feature of PIL, that is, it does not rely on an either-or judgment result. In this regard, Habermas's theories of consultative dialogue ethics and deliberative democracy provide people with the procedure for self-legislation carried out during consultative dialogue and the legitimacy of such self-legislation.[63] Second, dialogue or consultation in PIL provides opportunities for litigants to express their claims, supply information, and express their opinions, with the possibility of treating the results of the consultative dialogue as the achievement of procedural cooperation and forming a judgment based thereon.[64] Practical experience shows that PIL, in the practice in some Western countries and developing countries, has gone beyond the realm of dispute resolution and has played a role of judicial activism to make up for the failure of the democratic system, although the judiciary has neither the power nor the ability to achieve this goal.[65] In the eyes of consultative dialogue theorists, although representatives are elected and nominated, they are bound to stand aloof from their voters. To participate in politics, people must do it themselves, express themselves and take action personally, and achieve true democratic participation and governance of society through participation, consultation, and dialogue in PIL.

Outside of the framework of litigation, the consultative dialogue doctrine is also of particular importance, in the following aspects, to judicial authority. The first one is to achieve social justice through public participation. In the Fertilizer Corporation Kamagar Union case, the Supreme Court of India proposed for the first time the "participatory" PIL model, where not only will the plaintiff's qualifications in PIL be recognized upon the initiation of procedure, but individuals in the litigation will also have the autonomy to participate in substantive collective decision-making procedures and, by expressing their opinions, make a difference in the outcome of the litigation. American scholar Louise G. Trubek further proposed the opinion on civil justice, believing that behind specific systems

[62] See James Fowkes, Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge, 3 (1) *Cambridge Journal of International and Comparative Law*, 239 (2012).

[63] See WANG Xiaosheng, 从实践理性到交往理性——哈贝马斯的社会整合方案 (From Practical Rationality to Communicative Rationality: On Habermas' Theory of Social Integration), 6 云南大学学报 (社会科学版) (*Journal of Yunnan University* [*Social Sciences Edition*]), 30 (2008).

[64] See DUAN Housheng, 诉审商谈主义论纲：一种基于法律商谈理论的诉讼构造观 (Outline Comment on Parties-Judge Argumentation Theory: A View of Procedure Construction Based on Argumentation Theory of Law), 5 上海交通大学学报 (哲学社会科学版) (*Journal of Shanghai Jiaotong University* [*Philosophy and Social Sciences*]), 22 (2011).

[65] See Rahman, fn. 8 at 130.

such as the litigant qualification system, attorney fee system, and legal service system, the public has a desire for "civil justice," that all citizens should have sufficient opportunities to participate in common life, and that all citizens must have sufficient and equal opportunities to participate in the public sphere. The difficulty in public participation lies in how to provide protection for those "unrepresented interests" and then include these interests in the decision-making process. The contribution of PIL in this regard is that it solves the problem, i.e., the protection of "unrepresented interests," by expanding the traditional "*locus standi*" and provides a channel for democratic participation in PIL. The second aspect is to achieve rational justice through consultative dialogue. By expanding traditional *locus standi*, PIL ensures that "unorganized interests" are represented by statutory organizations and groups, through which participatory justice is achieved. This is a prerequisite for giving full play to the consultative function of PIL and realizing "participatory justice." Based on this goal, the eligibility to file PIL should be recognized in such a manner that not only should relevant organizations and groups have the *locus standi* to litigate on behalf of the public interest, but the eligibility for citizens to litigate should also be gradually expanded. In addition, the theory of deliberative democracy also provides an avenue to protect the interests of the group as a whole, for example, the protection of workers' rights and interests, the protection of minors' interests, and the protection of women's rights and interests can all be resolved on the strength of the democratic consultation mechanism. By giving representatives better capability of disposition and deliberative dialogue and better legitimacy, we expect people to prefer judicial settlement in its competition against street justice (self-help) over violent actions and enjoy rational justice. The final one is to expand the consultation effect through the social participation mechanism. Participation in PIL is to, by bringing plaintiffs, defendants, other litigation participants, and even various nongovernmental actors into joint participation in PIL, promote the benign interaction and mutual complementarity between the judiciary and society and to maximize the public interest.[66] This weakens the adversarial nature of PIL and turns PIL into a field of consultative dialogue. All stakeholders involved in PIL should work together to solve problems, engage in dialogue and consultation under the organization of judicial organs, and all litigants should conduct litigation in the spirit of cooperation and problem-solving. During both pre-litigation procedures and litigation, we must uphold the spirit of cooperation and problem-solving and achieve the goal of protecting the public interest through consultation.

IV Jurisprudential Foundation of PIL in the New Era in China

PIL started late in China, but developed rapidly and soon gained distinct characteristics. The reasons why the PIL system has obtained remarkable results in safeguarding people's rights and interests and promoting people's well-being are twofold: It is the result of adhering to Marxism and the people-oriented development ideology, and it is also the result of breaking away from the constraints and influence of Western liberal morality. Similar to theories such as liberalism and communitarianism, Marxism has also been playing a committed role in

[66] Id. at 52.

regulating and defending the justice of real life and its systems. Unlike theories of justice such as liberalism, Marxism, based on the transcendental ideal of equality, takes the standpoint of the proletariat and the masses of the people, emphasizes that it is necessary to do everything for the people, with reliance on the people, and work wholeheartedly for the interests of the people, which is the fundamental foothold and starting point of Civil Procedure Law.[67] In other words, in terms of the political value judgment of PIL, Marxism advocates an egalitarian theory that is different from liberalism, and adheres to universal moral values such as liberty, self-realization, and human community.

In terms of moral beliefs, Marxism is not diametrically opposed to liberalism, but rather, it inherits the moral ideals of liberty, equality, and fraternity of Enlightenment thinkers, and regards them as the most basic moral norms that allow people to freely and autonomously decide their own affairs.[68] However, fundamentally different from the formalistic argumentation method of liberalism, Marxism emphasizes the people-oriented principles, the principle of integrity, and the principle of fairness. The people-oriented principle, which is implemented through PIL, is manifested in providing effective judicial reliefs for acts that infringe upon the public interest and fundamentally guaranteeing the subsistence and development of the people. The principle of integrity is manifested in fundamentally eliminating obstacles to plaintiff eligibility, granting statutory organs and organizations the right to file PIL, highlighting the state's responsibility in protecting public interest, and attaching importance to community interest at all levels. The principle of fairness is manifested in respecting the parties' right to be procedural subjects and right to choose, emphasizing the unity of public and private interests, attaching importance to both the protection of public interest and the protection of individual rights,[69] as well as in protecting both collective and individual litigation rights.[70]

A People-Oriented PIL

As far as the construction of China's PIL system is concerned, Western liberalism stands too apart from China's traditional people-oriented thinking to serve as the fundamental basis for political evaluations. China need to base itself on the rule-of-law tradition and its own

[67] See SONG Chaowu ed., 民事诉讼法学 (*Civil Procedure Law*) (2nd Edition), 高等教育出版社 (Higher Education Press), at 6 (2018).

[68] See WANG, fn. 32 at 96, 101.

[69]《最高人民法院关于审理生态环境损害赔偿案件的若干规定》(试行) (Several Provisions of the Supreme People's Court on the Trial of Cases on Compensation for Damage to the Ecological Environment [Trial Implementation]), Article 17 sets the priority of relief of individual rights down as a principle, namely, when the people's court accepts a case of lawsuit on compensation for damage to the ecological environment and the case of civil public interest lawsuit filed against the same damage to the ecological environment, the trial of the case of civil public interest lawsuit shall be suspended first, and after the trial of the case of lawsuit on compensation for damage to the ecological environment is completed, a judgment shall be made on the litigation claims not covered in the case of civil public interest lawsuit in accordance with the law.

[70]《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》(Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China), Article 288 stipulates the "separate litigation" system: The acceptance of a public interest action by a people's court does not affect the initiation of an action by a victim of the same tort. 人民检察院公益诉讼办案规则 (Rules for the Handling of Public Interest Litigation Cases by People's Procuratorates), Article 90.1 (2) also fully respects the right of action of victims, namely, in the event that the claimant for ecological and environmental damages has reached a damages agreement by consultation with the person under an obligation to pay damages, or has filed a lawsuit for ecological and environmental damages, the People's Procuratorate shall close the case.

national conditions, answer the moral questions of the PIL system from the perspective of legal theory, and promote the modernization of the national governance system and capacity. To that end, the following aspects require our efforts:

The first is to balance the contradictory relations in public interest protection. Public interest is the product of modern democratic political countries, and only through democracy and the rule of law could social public interest be achieved. To construct the PIL system in the new era in China is to set the protection of the interests of the social community as one of the goals and to consolidate the social community through dispute resolution. In this process, the interests of the social community are closely linked to social policies. In this process, the interests of the social community are closely linked to social policies. Through the equalization of judicial resources, the role of PIL in interest distribution, promotion, integration, and implementation is leveraged to promote the "free and well-rounded development" of individuals. To this end, the practice of public interest protection in China focuses on the legislative process by clarifying the scope and content of public interest in various departmental laws, especially by strengthening the legislation on public interest protection in areas such as state-owned assets, people's livelihoods, environmental protection, cultural heritage protection, labor disputes, and protection of vulnerable groups. In addition, in the practice of PIL, judicial organs have been properly handling the relationship between various types of public interest and other interests, reasonably balancing the relationship between "decisive public interest" and "parallel public interest" by the principle of proportionality, and have struck a balance between the importance and feasibility of public interest protection.

The second is to focus on realizing fairness and justice through PIL. The realization of public interest is usually a compromise among several competing public interests. This process should be oriented towards substantive equality rather than formal equality, which is the basic requirement of Marxist thought on equality, also the basic requirement of socialist good laws and good governance, i.e., reflecting the will of the people through judicial work, gaining the support of the people, maintaining fairness and justice, carrying forward virtues and good deeds, and promoting social harmony.[71] The PIL system in China pays attention to the structural relationship between public interest and individual interest, organically combines individual procedure with collective procedure, gives equal consideration to people's interests, and realizes substantive equality. It is required to implement in PIL the principles of "giving priority to citizens' rights," "giving priority to vulnerable groups," and "benefiting the majority," put into effect the people-oriented idea in a concrete way, and promote the development of PIL towards "strategic impact litigation." In terms of procedural safeguards, it is necessary for those who have never actually participated in litigation to truly enjoy the benefits of litigation, and then for the judiciary to make authoritative distributions

[71] See the Editorial Group of the Introduction to XI Jinping's Thought on the Rule of Law, 习近平法治思想概论 (*Introduction to XI Jinping's Thought on the Rule of Law*), 高等教育出版社 (Higher Education Press), at 14 (2021).

of values for the entire society,[72] and implement the idea that development is for the people and by the people, and its benefits are shared by the people.

The third is to oppose formalistic PIL. Specifically, adherence to the people-oriented development idea emphasizes the effectiveness of the PIL system and opposition to "symbolic justice" and judicial populism. This is explainable from the following two perspectives: First, it is necessary to prevent PIL from being alienated into "symbolic justice." The PIL system will become idle if the symbolic significance of PIL becomes greater than its practical value, and the authority of the PIL system will be undermined if PIL judgments cannot be enforced. In current practice, although it frequently happens that some organs or organizations win the PIL filed by them, the actual social and legal effects are not obvious. Second, it is necessary to put an end to worthless PIL. Western experience shows that a great deal of worthless PILs not only fail to benefit society but also may set down the value of the rights themselves. The overrun of some PILs related to the right to life has been followed by a great deal of PILs on so-called social rights, including the right to food, the right to education, the right to health, and the right to housing. These lawsuits have deceived the Western public, misled a considerable number of vulnerable groups, repeatedly created the conformity effect, and wasted judicial resources. China should especially take this as a warning for the development of our PIL system, steer clear from this tendency of judicial populism, draw a clear line between public interest and "matters of public concern," and preclude us from initiating or accepting cases impertinent to litigation interest just to cater to social hot issues, avoid system idleness, and maintain judicial authority.

B Overall PIL

Like the protection of social public interest, the protection of the "community" interest of groups or organizations is an important area of the PIL system. The PIL system in China simplifies the litigation relationship, and leaves the initiation of action to statutory organs or organizations, thereby reflecting the integrity of PIL. As mentioned above, both communitarianism, as in communalism, and republicanism begin with the "common good" to demonstrate that community values play an important guiding role in cultivating civic virtues, enhancing civic awareness, and inspiring patriotism.[73] In China, social interest is consistent with the interest of community, and the community does not exist outside of

[72] The newly revised Law of the People's Republic of China on the Protection of Minors has come into effect as of June 1, 2021. Article 106 of the law stipulates that where any infringement upon the lawful rights and interests of minors involves social public interests, the people's procuratorates shall have the right to institute public interest litigation. In August 2021, a Beijing procuratorate filed a lawsuit against a subsidiary of Tencent, accusing it of violating the "legitimate rights and interests of minors" and issued an announcement that if a lawsuit is filed by an organ or relevant organization prescribed by the law, the People's Procuratorate may support the prosecution. Organs and social organizations that intend to bring CPIL may provide written feedback to the procuratorate on the relevant circumstances within 30 days of the issuance of this announcement.

[73] See MA Junfeng & MA Qiaoen, 构建人类命运共同体的历史性研究 (*Historical Research on Building a Human Community with a Shared Future*), 人民出版社 (People's Publishing House), at 35 (2019).

society.[74] Therefore, protecting community value is an important part of protecting the public interest in China and is also the purpose of PIL. In contemporary society, people have diverse interests that are in coexistence and dependent on each other. The PIL system must, of course, be aimed at enhancing the sense of social community, safeguarding people's democracy, maintaining social fairness and justice, protecting people's rights to equal participation and equal development, and bringing out the maximum enthusiasm, initiative, and creativity of people.[75] Based on this, the Chinese PIL system should further give effect to the idea of a human community with a shared future and achieve harmonious coexistence and common development of the whole society.

The first is to include more in the scope of beneficiaries of PIL so the benefit could spread across the entire society. Diffuse interest is a kind of social benefit and the most typical public interest, which is difficult to protect through private law means.[76] Therefore, it is necessary to expand the actionability scope of public interest and the current case acceptance scope of PIL, such as ecological environment and resource protection, food and drug safety, state-owned property protection, transfer of the right to use state-owned land, protection of minors, protection of natural relics, and scenic spots. It is necessary to further broaden the expandability and protectability scope of new rights, such as the right to social security, the right to residence, and the regulation of online platforms, so that PIL can provide substantive and true equality and social justice. In addition, the difficulty in protecting diffuse interest lies in the lack of suitable litigation representatives or the impossibility of being adequately represented.[77] Therefore, in correspondence to the expansion of the scope of PIL cases, the channels for PIL should also be broadened. Subject to international practices and the needs of judicial practice in China, China should include all the representative action, class action, and model action procedures in the category of collective procedure, and transform the overall process from an individualistic-centered litigation mechanism into a "people-oriented" collective procedure in a holistic manner in order to diversify diffuse interest reliefs.

The second is to adhere to the concept of the rule of law shared by all people and promote public participation in PIL. The basic logic behind this litigation development in contemporary China is to protect public interest through consultative democracy that includes cooperation and consensus as its basic elements, so that the whole society can share the results of public interest protection as follows. The first is to implement the concept of "sharing by all people" by effectively protecting the interests of an unspecified majority of people, gathering the individual interests of the people to the greatest extent to put public interest under holistic and diversified protection, and bringing the benefits of PIL to all people. The second is to, through PIL, implement the concept of "sharing by all people," protect the

[74] At the end of the 19th century, German scholar Ferdinand Tönnies identified the difference between community and society: community is a lasting and real common life, while society is merely a short-lived and superficial common life. Correspondingly, the community itself should be understood as a living organism, whereas society should be seen as a mechanical aggregate and an artificial product. See Ferdinand Tönnies, 共同体与社会 (*Community and Society*), translated by ZHANG Weizhuo, 商务印书馆 (The Commercial Press), at 71 (2019).

[75] See 十八大以来重要文献选编 (*Selected Important Documents Since the 18th National Congress of the Communist Party of China*), 中央文献出版社 (Central Party Literature Press), at 789 (2016).

[76] See TANG, fn. 18 at 186.

[77] See Stefan Wrbka, Steven Van Uytsel & Mathias Siems, *Collective Actions, Enhancing Access to Justice and Reconciling Multilayer Interests*? Cambridge University Press, at 9 (2012).

people's legitimate rights and interests in all aspects, and give play to the integrative and normative role of PIL in social life. It is necessary to prioritize the development of PIL related to people's livelihood (health care, education, etc.) and the environment, set the aspirations of people for a better life as our goal, and serve to improve the living conditions of all people. The third is to, by implementing the concept of "co-construction and sharing," encourage the people to participate in the process of public interest protection, to jointly safeguard public interest, and to share the results of public interest protection, and fully enthuse the people in participating in the management of state and social affairs.

The final one is to strengthen the protection of vulnerable groups and give full play to the function of the PIL system in balancing social interests. Establishing a PIL system, protecting the legitimate rights of vulnerable groups and achieving social justice have become the primary tasks of PIL in some developing countries.[78] Before the enactment of the first Civil Procedure Law, China has been adhering to the concept of socialized litigation so that if a subject of rights does not file a lawsuit due to inability, unwillingness, fear, or other reasons, or if the legitimate rights and interests of the state, collective, or individual citizens are infringed on but no one files a lawsuit, the procuratorial organs can file a lawsuit.[79] Since the PIL system was stipulated in our Civil Procedure Law and Administrative Litigation Law, the practice of PIL has always revolved around the protection of vulnerable groups. Justice is not the "interest of the strong," and we cannot stay indifferent to the demands of vulnerable groups while letting "restrictive justice" ride. In the process of achieving social fairness and justice, building a rule of law country, and safeguarding human rights in our country, it is necessary to enable all citizens to have access to justice and enable vulnerable groups in society to enjoy the dividends of public interest protection.

C Ethical Standards of the PIL System

PIL is not a normal state of litigation, as it involves more political factors, such as policymaking. Because of that, it is criticized in Western countries where the facts that judicial activism deviates from traditional legal authority and the public sees the courts as the processors of political issues have put such concern into the mind of the people that the PIL system is threatening the parliament and even the democratic system. Therefore, scholars condemn the courts for no respect for their duties and the law, and the public complains that the courts "impose resolutions supported by the elite on everyone."[80] The essence of this issue is how to ensure that PIL is strictly subject to political ethics. The minimum standard of the PIL system is to comply with legal principles. First, the Constitution or political structure must provide a basis, explanation, and support for PIL. Second, PIL must honor the spirit of social justice contained in the Constitution. In short, in the development of the PIL system, political ethics should play a role, which is detailed as the following points, in regulating litigation subjects.

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[78] See Rahman, fn. 8 at 7.

[79] See CHANG Yi ed., 新中国民事诉讼法学研究综述 (1949—1989)(*A Review of Research on Civil Procedure Law in New China from 1949 to 1989*), 长春出版社 (Changchun Publishing House), at 96 (1991).

[80] See Bicwood, fn. 2 at 101, 104, 105.

The first is to adhere to the principle of division of powers. The PIL system is established on the basis of the political system. It is the constitutional obligation of administrative organs to realize public interest, and judicial organs are assistants thereto who can help them solve management problems, improve governance capacity, and improve the governance system.[81] Western countries usually resort to PIL as a means of judicial review and as a mirror of the intensity of judicial review. But in China, legislation lays administrative PIL down as an auxiliary and supplementary means to urge administrative organs to perform their duties correctly. Even if a procuratorial organ initiates administrative PIL, the prerequisite is that the duty performance by certain administrative organs fails to effectively safeguard the public interest. Moreover, from the perspective of law enforcement effectiveness, PIL initiated by the procuratorial organ is definitely the most time-consuming and labor-intensive way and it does not conform to the principles of economy and efficiency. What is particularly important is that excessively frequent resort to PIL will result in laziness and indolence of administrative organs. Therefore, PIL should not be easily initiated if there are effective alternative reliefs available. If the administrative organs have already taken up the matter, the judiciary should not launch a parallel investigation. In short, the construction of the PIL system must follow the principle of division of power, embody the principle of division of power and checks and balances, subject to which judicial organs cannot overstep their boundaries and interfere in legislative and administrative activities.

The second is to give full play to the active role of the judiciary. Unlike ordinary litigation, judicial organs play an active judicial role in PIL. In terms of the conduct of litigation, the Civil Procedure Law and relevant judicial interpretations stipulate that judicial organs must fulfill their obligations on notice of litigation, on explaining changes in claims and joinder of actions, and on adoption of the *ex officio* system. In terms of factual findings, the inquisitorial system in evidence investigation should be adopted to strengthen orders in litigation in court trials. Judicial activism has made PIL a brand-new litigation model where PIL embodies the following technical characteristics: the trial of a case should not be limited by specific facts of the past and may involve investigations into current issues; it does not adopt an adversarial litigation model so that judicial organs play an active role in organizing and shaping PIL; the cases wind up with forward-looking, flexible, and remedial reliefs. In addition, it is advisable to combine the act preservation system with PIL for the courts to rule *ex officio* that the defendant should undertake or not undertake certain acts, such as ordering polluting enterprises to close down or compliant enterprises to resume business. The reliefs may be negotiated by the litigants and are not limited to compensation for damages. Even after PIL cases are adjudicated or handled, the judicial organs must, by carrying out "follow-up re-examination," continue to play the role of administrative justice so as to form a mechanism of sustainable judicial protection of the public interest.

The third is to enhance the adequacy of procuratorial organs in representing the public interest. PPIL is a mechanism of public law enforcement. In August 2021, The Opinions of the Communist Party in China Central Committee on Strengthening Legal Supervision by

[81] See the Law and Policy Research Office of the Supreme People's Procuratorate ed., 公益诉讼指导性案例实务指引 (*Practical Guidelines for Guiding Cases of Public Interest Litigation*), 中国检察出版社 (China Procuratorial Press), at 23 (2019).

Procuratorial Organs in the New Era positions the people's procuratorates as an important force in protecting national interest and social public interest, which is a highlighted characteristic of public law enforcement. Obviously, the legislation clarifies what the public interest is, but it also provides the judicial organs (especially procuratorial organs) with the power to "declare what the public interest is," as the judicial organs, because of their knowledge, experience, and responsibilities, are worthy of such empowerment. The problem is that, in essence, any expression in the form of representation cannot be regarded as a true expression of social will, and the judgment of public interest requires the participation of the general public. Based on objective needs, it is necessary to draw on the standards of political representation, strengthen the connection between statutory authorization and representation of the public interest, and establish the power of procuratorial organs on a social basis. Moreover, it is doable to incorporate certain consultation mechanisms into the explanation of the rationality of public interest representation. For example, a coordination mechanism between the oversight by the people's congresses and PPIL may be established to enhance the adequacy of PIL representation by maintaining the dual representative relationship between representatives and voters.[82] On this basis, an effective measurement mechanism should be established to ensure that PIL meets the legal purpose (necessity), that PIL is consistent with the legal system (appropriateness), and that the negative impact of the PIL results is smaller than the positive results (economy). It does not matter how many people support PIL or how influential it is.

The last point is to weaken the role of criminal means in PIL. PPIL belongs to "public law enforcement." In practice, this public power plays such an extremely important role in PIL that criminal prosecution has become the most important means to promote public interest and that CPIL incidental to criminal action has developed rapidly.[83] In contrast, there are very few CPIL filed by relevant organizations and groups, which also indicates the reality that the social channels for PIL are not smooth enough. The procuratorial organs are legislatively designed to merely play a supplementary role in filing PIL,[84] so that they can only file PIL when there are no resources of "private law enforcement." Based on the rule-of-law principle, the above-mentioned role should not be repositioned and the right to implement PIL should

[82] The People's Procuratorate of Baoshan District, Shanghai has explored the PIL observer system, engaging some people's congress deputies, members of political consultative conference, people's supervisors, etc. to provide clues for the of PIL cases and to participate and assist in PIL work. Id. at 67.

[83] According to statistics, the procuratorial organs handled 19,695 PIL cases from July 2017 to June 2021, including 17,356 CPIL cases (including 15,320 cases of CPIL incidental to criminal action, accounting for 88% of all CPIL cases). See 检察公益诉讼：以诉的形式履行法律监督本职——最高检第八检察厅负责人就检察公益诉讼起诉典型案例答记者问 (Procuratorial Public Interest Litigation: Fulfilling the Duties of Legal Oversight in the Manner of Action—The Head of the Eighth Procuratorate Department of the Supreme People's Procuratorate Answering Reporters' Questions on Model Cases of Procuratorial Public Interest Litigation), 民主与法制时报 (*Democracy and Legal Times*), p. 2, Sep. 17, 2021.

[84] Article 58.2 of the Civil Procedure Law provides that the people's procuratorate may file a lawsuit with the people's court if there is no authority or organization prescribed in the preceding paragraph or the authority or organization prescribed in the preceding paragraph does not file a lawsuit. Article 2 of the Rules for the Handling of Public Interest Litigation Cases by People's Procuratorates (effective as from July 1, 2021) stipulates that: People's procuratorates in handling public interest litigation cases are tasked with, by independent and lawful exercise of procuratorial powers, supervising and urging administrative authorities' lawful performance of their duties of oversight and administration, supporting eligible parties in the lawful exercise of the right of public interest litigation, safeguarding national and public interests, safeguarding social fairness and justice, safeguarding the authority of the Constitution and laws, and promoting the modernization of the national governance system and governance capabilities.

be given back to society, which is determined by the democratic value and efficiency value of litigation for the following reasons. First, citizens can improve, through citizen litigation, their basic skills of managing social affairs and participating in public affairs, and by initiating and participating in PIL, they can take compatible participation actions based on the concepts of consultation and compromise and reject confrontational participation,[85] so that social harmony can be promoted. Second, the citizen litigation mechanism can fill the gaps in the PIL system. Although the current PPIL has institutional advantages, it also has problems such as slow action, poor flexibility and efficiency, and high costs. To this end, it is necessary to give full play to the role of social organizations and groups in implementing litigation, try the practice of citizens assisting procuratorial organs in filing PIL,[86] and promote the improvement of society's self-help function. In addition, considering the reality that the association system is not much developed in China, it is advisable to add a mechanism of "private law enforcement" to legislation and incorporate citizen litigation into the PIL system.[87] The above two approaches are expected to fundamentally weaken the deterrence of criminal means in PIL, create a good business environment, give better expression to the social characteristics of PIL, and promote social harmony.

V Conclusion

Public interest is not only a legislative benchmark but also a benchmark for the application of law. Both substantive law and procedural law set very demanding requirements on public interest and its protection. Compared with such demanding requirements, the theory of contemporary PIL system is still quite underdeveloped. In this context, it is undoubtedly of great significance to go beyond simple technical discussions and deepen the exploration of the PIL system at the "meta-theory" level to discover the principles and logic for the construction of the PIL system. In the past few decades, jurisprudence, as a "meta-theory," has been a steady supplier of various overall and comprehensive ideological resources for the legislation and practice of PIL, and has played an important role in proving the legitimacy of public interest and their protection.

All theories of Western jurisprudence have been trying to establish a unitary system of justice criteria so that their doctrines can exclusively provide normative arguments for political activities. But in fact, the efforts to establish a unified standard are futile, as regardless whether it is the timeless and unchangeable "objective standard" pursued by Plato, or the utilitarianism, communitarianism, and republicanism that provide an individualistic interpretation of PIL, each doctrine has failed for all practical purposes to provide a practical value judgment standard for PIL. In contrast, Marxism, as an ideological resource for the PIL system, provides a justice benchmark not only for building a fair, safe, and harmonious

[85] See REN Jiantao, 公共的政治哲学 (*Public Political Philosophy*), 商务印书馆 (The Commercial Press), at 518–519 (2016).

[86] In this regard, the "taxpayer action" in France or the "relator action" in United Kingdom provides valuable experience. See Cappelletti, fn. 26 at 397.

[87] China does not completely exclude "citizen litigation" from legislation. The Trust Law of the People's Republic of China stipulates that there shall be trust oversight personnel for public trusts, and that the trust oversight personnel has the right to institute an action or carry out other legal acts in his own name in order to protect the interests of the beneficiary. This includes public interest trust litigation, also a specific form of citizen litigation.

society, but also for constructing the PIL system. The political value and political principles of PIL revealed by Marxist jurisprudence require us to improve, based on social and economic conditions, the structure of the PIL system; follow the people-oriented political philosophy and the idea of a human community with a shared future; draw upon the strengths of other doctrines by absorbing reasonable factors such as the due process theory as in liberalism, the theory of protection of community value as in communitarianism, the theory of public space as in republicanism, and the theory of dialogue as in consultative dialogue doctrine; pay more attention to democratic value; balance the protection of public interest and the protection of individual right; make the PIL system more fair, transparent, predictable, and more conducive to accountability; and effectively protect the public interest, so that the PIL system can act as a social integration mechanism for communication and contact between citizens, society, and the state.