

# The judicial dilemma and perfect path of climate change litigation in China

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**Abstract:** *In recent years, the number of lawsuits caused by climate change has surged around the world, and taking judicial measures to deal with climate change has become the norm. At present, China has conducted legislative research, document issuance and policy implementation in the field of climate change, but there is no special legislation to deal with climate change. Climate change is characterized by its global and lagging nature, the rise of environmental rights has brought more citizens and organizations to the climate and environmental regulatory aspirations, the emission of greenhouse gases urgently need legal constraints, and such constraints need to be ensured by the court's enforcement. The traditional litigation model can not effectively address the emergence of climate change litigation, while certain litigation has a direct and indirect regulatory function, improve the current climate change litigation mechanism is urgent.*

**Keywords:** *Climate change litigation; System dilemma; System perfection*

## 1. Introduction

At present, our country's climate change litigation system is still in the stage of groping and trial and error, although our country government also issued a number of resolution on climate change and documents, but actually failed to combine with our national conditions to form a complete legal system of climate change with Chinese characteristics, especially the lack of legal protection of climate change litigation system. In the process of climate change governance, what kind of legal means should we adopt to effectively regulate and deal with man-made greenhouse gas emissions is its core essence. As a legal means with regulatory attributes, litigation can provide a solid legal guarantee for dealing with the problems and risks brought about by climate change, and its importance is self-evident. Therefore, we should start from the litigation system, and this paper discusses how to construct and improve the legal system of climate change litigation under the international obligations and the current legal system.

## 2. Theory and Judicial dilemma of Climate Change Litigation in China

Climate change litigation is due to the infringement of the legitimate rights and interests of citizens and environmental protection organizations due to the adverse consequences of climate change, hoping that the court will intervene and implement legal measures to bring the existing laws into the issue of climate change. In respect of climate change, litigation can be understood as a process by which plaintiffs expect legal results from the courts to correct the damage caused by climate change effects or somehow support climate action. At present, there are more and more cases requiring judges to deal with arguments and facts related to climate change, or climate science. However, there is no special legislation related to climate change in China at present, and the implementation of climate change litigation in China will encounter difficulties in theory and judicial practice.

### 2.1. The theoretical dilemma of climate change litigation in China

#### 2.1.1. Human environmental needs are constantly increasing

The contradiction between the infinite expansion of human demand and the limited carrying capacity of the environment has led to different environmental problems, and the human demand for climate environment is increasing. In fact, unless some people's needs become the most common needs and are valued at all levels of social development, it is difficult to become a direct source of rights. Therefore, we also need cooperation between each individual as we work together to safeguard

collective rights. Efforts and cooperation here can be either positive or negative. Human needs for clean air, sunlight, ecological resources and a better environment are indispensable, and these needs deserve more attention than material and spiritual needs, because environmental needs and green ecology are related to the survival of human beings and the inheritance of civilization.

What people want is not only to live in a beautiful green environment, but also needs a strong judicial way to remedy the infringed rights. Therefore, the scope of environmental rights is constantly expanding, including not only substantive rights, but also procedural rights. When the environment is seriously damaged, in addition to the direct damage to the personal and property rights of specific subjects, it also leads to a serious deterioration in the quality of the living environment of subjects whose other substantive rights are not directly harmed, but under the basic litigation theory, they have no legal interest and do not have the right to bring a lawsuit.

Fundamentally speaking, the basis of climate change litigation is the severity of climate change and the emergence of environmental rights. Using the court as the medium, it reflects the demands of people affected by climate change. This appeal is environmental rights, mainly including the following requirements: (1) compensating for the actual material damage caused by climate change or the reasonable cost of adaptation to climate change; (2) making reasonable recommendations on relevant legislation and policies concerning climate change or their application; (3) preventing future emissions and adverse impacts on climate change; (4) requiring the government or regulatory authorities to implement effective measures to strictly enforce national or international obligations; (5) raising awareness and putting pressure on companies, regulators or investors.

The famous case of *Urgenda Foundation v. the Netherlands*<sup>[1]</sup> is the first civil public interest lawsuit filed by a non-governmental environmental organization in the world. The foundation and more than 900 citizens asked the court to order the Dutch authorities to raise their greenhouse gas emission reduction targets, and finally won the lawsuit. From this case, we can find that climate change litigation can be used as a powerful way to protect the environment and citizens from the impact of climate change caused by industrial activities, and is an important step for the plaintiffs to ask the defendants to take action to improve the issue of climate change. Therefore, the value of environmental change litigation is increasingly prominent. Its attribute is the same as other lawsuits, and its ultimate goal is at resolving disputes and realizing fairness and justice, which actually reflects people's urgency and initiative to increase efforts to improve the climate and environment. If the environmental right is not clearly defined and recognized by law, then the subject of the climate change lawsuit is completely excluded from the directly interested parties, which will lead the court to directly reject the citizens who enjoy the interest of environmental quality.

### **2.1.2. Lack of basis for claim**

Different from the traditional tort liability, the environmental public interest litigation has its particularity. Environmental civil public interest litigation is a new litigation mode involving public interests. In essence, it has gone beyond the scope of civil liability mainly for protecting private rights, so environmental civil public interest litigation should not be placed in the traditional civil tort liability system. Because environmental civil public interest litigation has obvious public interest attributes, China's current civil legal norms have made specific provisions on it, but there is no clear provision on the subject qualification of environmental civil public interest litigation. Therefore, the court can only make the help of the current civil litigation mode to try this kind of cases. In the specific process of handling cases, the judge can only find appropriate and accurate laws and regulations from the current civil tort legal system in China, which is undoubtedly very difficult.

When environmental rights are infringed but there is no basis for the claim, the claimant's claim for compensation will not be supported by the court, and the judge will not be able to accurately apply the law in environmental civil public interest litigation cases, the uncertainty of the applicable law enables us to use the analysis mode of the right of claim to obtain an applicable formula based on the current relevant legal provisions: for the purpose of protecting the environment, can the claimant make a clear claim to the person who may infringe the environment according to the provisions of the current environmental tort law?<sup>[2]</sup>

According to the above formula, it can be seen that the main purpose of the plaintiffs in environmental civil public interest litigation is to protect the public interest. However, China's current laws and regulations do not clarify the basis for compensation for environmental infringement damage, and there is no clear provision on the constitutive elements of environmental infringement. In short, if laws and regulations do not require specific factors that harm environmental public welfare, the judge cannot complete the reasonable classification of "what basis" on the question of "who asks who, what

and what request".<sup>[2]</sup>

## **2.2. The dilemma of the judicial practice of climate change litigation in China**

### **2.2.1. Lack of legal basis for regulating the object**

Generally speaking, the purpose of starting climate change litigation is to regulate greenhouse gas emissions with the help of court decisions. In this process, the court must take the identification and regulation of greenhouse gases as the main premise. First, China's current "Air Pollution Prevention and Control Law" and "Environmental Impact Assessment Law" stipulate common harmful substances (such as carbon monoxide, methane, pm2.5, etc.), but do not include greenhouse gases in the category of air pollutants. According to the Interpretation of the Law on the Prevention and Control of the People's Republic of China on Air Pollution formulated by the Standing Committee of the National People's Congress, air pollution refers to the phenomenon that the air index changes malignant by human activities and causes certain concentrations in the air, thus damaging human health and damaging the ecological environment. From this definition, we can infer that the Air Pollution Prevention and Control Law of the People's Republic of China is not only to protect the health of people's health, but also to serve the purpose of protecting the green ecological environment and improving air quality. Therefore, including greenhouse gases as air pollutants can be an effective measure to deal with climate change.

Second, the civil public interest litigation stipulated in the Environmental Protection Law amended in 2014 only targets torts that directly cause environmental pollution and damage the ecology, but it does not specify the extent of greenhouse gases' impact on the environment, and there is currently a lack of scientific and efficient methods to distinguish greenhouse gases from toxic gases in the air, and greenhouse gas emissions cannot be further determined in practice. Therefore, in the context of the new environmental protection law, social organizations that comply with the legal provisions will also be unable to file public interest lawsuits due to technical barriers.

Third, the adverse effects of climate change are different from environmental pollution, and victims of climate change are difficult to find effective legal means to make up for their losses. China's current laws and regulations related to environmental protection and climate change governance have not detailed the litigation procedures for climate change. Although the Climate Change Response Law, which has been put on the agenda, has specific provisions on how to deal with climate change, there are deficiencies in how to operate the specific stage of litigation, how to prove causality, and how to distribute the burden of proof.

### **2.2.2. It is difficult to determine the prosecution qualification of the plaintiff and the defendant**

First, based on the theory of interest, whether the plaintiff is qualified to Sue is conditioned on whether he has the relevant interest. Climate change litigation, the interests of the interests should be closely around the damage, and global is a significant feature of climate change, the parties may be both the victim and perpetrator, therefore, whether they have climate change victim subject identity is difficult to prove, on the applicable law, the plaintiff proposed climate change impact damage compensation is difficult to get the support of the court. In addition, even if they are the plaintiff, it is difficult to quantify the damage to the legitimate rights and interests of the plaintiff. The lagging impact of climate change determines that the legitimate rights and interests of the plaintiff are not directly damaged. Such damage is more potential and indirect, and sufficient evidence cannot be found in a short time.

Second, the defendant in climate change litigation should be a direct perpetrators of climate change, but once the greenhouse gas emissions into the air will be combined with other emissions, this will cause climate change, and climate change belongs to the global environmental problems, its production may be caused by various factors, the behavior of multiple countries, numerous entities produced artificial emissions of carbon dioxide and other greenhouse gases cause global warming, it is difficult to clear the source of emissions. Therefore, the fundamental cause of climate change cannot be reflected in the behavior of a certain countries and real enterprises.

### **2.2.3. It is difficult to prove the causality**

Due to the variability of climate change, the logical relationship between climate change and its adverse effects is often blurred, presents the situation of "one cause and many causes", which makes it difficult to establish the legal causal relationship.

How the plaintiff has proved that a campaign or facility emits greenhouse gases into the atmosphere and has a negative impact on the local people and the environment is the key to the court's appeal. The problems in this evidence are reflected in all areas of climate change litigation, whether based on infringement, public law or international causes of action. For example, in a climate change civil tort action, it is generally necessary to prove a causal relationship between the defendant's tort and the damages suffered by the plaintiff. In climate change administrative litigation or international litigation, the issue of proof of damage may directly affect the court's analysis of the eligibility issue, or become a factor to determine whether the greenhouse gas emission behavior of an enterprise has a significant impact on a specific environment.

The problem of proof faced by the plaintiff in climate change litigation is mainly due to the gap or uncertainty in the relevant climate science, which leads to a more complex causal relationship of the plaintiff in climate change litigation. This causal relationship is often referred to as the liability of downstream emissions. For example, greenhouse gas emissions do not occur in the coal mining process, but in the downstream link where coal is used for energy production. The success of the plaintiff's lawsuit is based on whether the court can recognize the direct and indirect effects of a particular activity on climate change. To investigate the indirect effects of a particular activity on climate change, it is also necessary to pay attention to the extension of the chain of causation. However, in the judicial practice of various countries, the explanation of the issue of causation is vague.

In conclusion, it is difficult for the plaintiffs to prove that the damage arising from climate change results from the emission behavior of the specific defendants and so on.

### **3. The perfect path of climate change litigation in China**

#### ***3.1. Connection between air pollution litigation and climate change litigation***

From the perspective of public interest litigation, there have been climate change litigation in a broad sense in China, among which the most important is air pollution public interest litigation. Although similar climate change claims are not clearly proposed in air pollution public interest litigation, it is of great value for alleviating and coping with climate change.<sup>[3]</sup>

##### ***3.1.1. The connection between air pollution and climate change***

Although the concepts of air pollution and climate change vary, the two are closely related. First, the two are the same, both from the deterioration of atmospheric quality caused by the burning of traditional fossils. Coal and other fuels not only release sulfur dioxide, nitrogen oxides and other air pollutants during combustion, but also constantly release other greenhouse gases such as carbon dioxide, which are known as "climate pollutants."<sup>[4]</sup> Second, when the interaction between air pollutants and greenhouse gases reaches a certain level, air pollution will also aggravate global warming. Finally, they can cooperate to reduce emissions: on the one hand, treating greenhouse gases can reduce the emissions of atmospheric pollutants such as sulfur dioxide and carbon monoxide; on the other hand, controlling air pollutants can also reduce or absorb greenhouse gases such as carbon dioxide.<sup>[5]</sup>

##### ***3.1.2. Air pollution public interest litigation makes climate change litigation possible***

Although public interest litigation on air pollution cannot fundamentally ensure that greenhouse gas emissions can be immediately and effectively controlled, it can indirectly provide a legal basis for climate change litigation.

Methods of civil public interest litigation for air pollution. Similar to air pollutants, the possible harmful effects of greenhouse gas emissions are also complex and potential, which leads to many problems in the determination of the causal relationship, the determination of the scope of damage and the choice of relief methods in environmental public interest litigation. Therefore, the identification of the above problems in the civil public interest litigation of air pollution can produce positive reference value and practical significance for the climate change litigation. In addition, greenhouse gases are similar to air pollutants, the geographical extent and extent of the damage to the public interest are difficult to determine, and the recovery cost is high, which means that post-damage relief becomes another issue. How to take or take what specific measures to reasonably solve the destructive consequences of air pollution and climate change has become a common problem facing the world today. Therefore, how the judge determines the amount of compensation for air pollution damage and what relief methods to take can provide valuable experience for climate change litigation.

The way of public interest litigation for air pollution administration. Compared with the civil public interest litigation of air pollution, the administrative public interest litigation has significant advantages, which avoids the identification of damage and causality, and can timely file a lawsuit against the inaction or unreasonable behavior of the administrative organs, and the victory rate is usually higher. Therefore, air pollution administrative litigation can better combine air pollution public interest litigation with climate change litigation, and help to promote an important part of the environmental rule of law in China. In the administrative public interest litigation cases of air pollution, the specific administrative act sued is mainly the omission of the administrative environmental protection department. As the administrative supervision responsibility of the government in the field of energy conservation and emission reduction has not been further clarified from the legal level, it is still challenging to directly Sue the administrative organs in practice. In the construction of climate change litigation system, we should focus on one goal, that is, to achieve the collaborative emission reduction of greenhouse gases and air pollutants. On the basis of achieving this goal, administrative public interest litigation of air pollution is an efficient and convenient way, which is more conducive to administrative organs to perform their responsibilities of air pollution control.

### ***3.2. Expand the qualification of prosecution and the scope of accepting cases***

The global nature of climate change, including the global source of greenhouse gas emissions and impacts, is the biggest difference between climate litigation and other environmental pollution lawsuits. In the traditional sense, environmental pollutants mainly refer to the pollutants that are harmful to the atmosphere and water bodies, and the discharge area of the lawsuit behavior should have a geographical correlation, which is difficult to prove in climate change litigation.

The relationship between climate change and individual interests is complex and subtle, coupled with its own scientific uncertainty, the aggrieved party cannot prove whether they have a strict and direct interest in the negative impact of climate change. In this case, setting too strict conditions will undoubtedly not conducive to the realization of judicial justice, but also increase the cost of safeguarding rights. Therefore, in judicial practice, the threshold of climate change litigation should be lowered, which can be achieved through judicial interpretation. At this point, we can learn from the damage-specific theory of the United States, that is, as long as the party proves that the specific damage suffered due to the impact of climate change is due to the specific administrative act of the administrative organ, we can determine that the party has a legal interest in the sued act. For example, if we lower the requirements for the eligibility of prosecution and the scope of accepting cases, as long as citizens can prove that they have suffered physical damage (such as respiratory damage), they can be determined to have a legal interest.<sup>[6]</sup>

### ***3.3. Incorporate greenhouse gases into the scope of application of the Air Pollution Prevention and Control Law or the Environmental Impact***

On the one hand, we can make a judicial interpretation of "air pollution" based on the "Air Pollution Prevention and Control Law", that is, some substances enter the atmospheric environment due to human activities, produce chemical, physical, biological or radioactive adverse effects, and then harm the physical health, damage the ecological environment and other atmospheric quality deterioration phenomenon. According to the above interpretation, we have a legal basis for the regulation of greenhouse gas emissions.

On the other hand, the Environmental Impact Assessment Law can also be expanded and applied to construction projects that may produce greenhouse gas emissions. Then, the impact of greenhouse gas emissions can be considered in the assessment process to determine what impact the project will have on the atmospheric environment. In general, in a case of inaction against administrative agencies, the greenhouse gas emissions from new projects are not fully considered throughout the environmental impact assessment process. Generally speaking, in lawsuits against administrative inaction, the main reason for administrative counterparts is that the greenhouse gas emissions of new projects lack comprehensive consideration in the whole environmental impact assessment process.<sup>[7]</sup> Most of the defendants in the environmental impact assessment litigation are administrative agencies, because the overall consideration of the environmental impact of greenhouse gas emissions from the new project, which is an unreasonable action of the administrative authorities.

### 3.4. Give full play to the mutually promoting role of climate litigation and policy making

Climate change litigation is actually conducive to the formulation and implementation of national environmental and energy policies. This leads to a classic case of climate change litigation—Massachusetts v. EPA. The federal Supreme Court ultimately ruled that carbon dioxide was a pollutant contained in the Clean Air Act. After the ruling, the federal EPA was authorized by Congress to regulate greenhouse gases such as carbon dioxide and set stricter policies on motor vehicle emissions standards, putting Congress put climate change legislation on the agenda. This is enough to show that litigation can promote the development of climate change legislation, policy making and litigation system, and reflects the benign interaction and mutual promotion of litigation and legislation.

In that case, the U. S. Supreme Court has been firm, like environmental groups, that the adverse consequences of climate change should be regulated by the government. In China, the role of the court in the society should be the maker of public policy, which requires the courts to use the corresponding laws and professional knowledge to accurately compare and explain the current laws and regulations, and then make judgments conducive to the response to climate change.<sup>[8]</sup>

In view of this, the reference significance of this case in the United States for China lies in that the Federal Supreme Court forced the government to perform its regulatory function through the form of litigation and judgment, which opened up a feasible way for the governance of climate change. To some extent, China's current courts have the ability to force the executive power to cope with climate change through judicial power. Under the existing legal system, our courts can actively respond to national policies on climate change through more flexible judicial interpretations, and can also make full use of their regulatory functions to solve various problems of citizens and environmental protection organizations that resort to courts due to the negative effects of climate change.

## 4. Conclusions

Climate change litigation is an effective legal way to boost the domestic and international active response to climate change issues. At present, there has not been a real climate change litigation in China, but the new judicial phenomenon of air pollution, a public interest litigation in recent years, is enough to become an effective way to integrate climate change litigation in China. Specifically, the identification of the plaintiff's litigation qualification, the proof of causality and the choice of relief methods can learn from the basic requirements of civil public interest litigation; the general public usually chooses to avoid civil public interest litigation to remedy the infringed rights in order to eliminate the trouble and infeasibility of the above proof problems. Then, atmospheric pollution administrative public interest litigation is more likely to become a convenient path—by suing local government or environmental protection department, not only can make their rights and interests of legal protection, also can effectively through litigation mode reversed transmission government regulation and regulation of greenhouse gases, thus intensify the response to climate change.

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