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Individual rights and the environmental public interest: A comparison of German and Chinese approaches to environmental litigation

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Abstract

This article compares the framework of environmental public interest litigation in China to the individualized system of judicial review in Germany. It shows that environmental reform requires modern States such as Germany and China to consider certain objective criteria related to the public interest. These criteria are objective insofar as they relate to certain empirically measurable conditions that have arisen in the context of industrialization, and they relate to the public interest insofar as their treatment requires substantial intervention from the State to ensure that economic practices do not endanger the basic natural preconditions of human life. Between the law's instrumentality to the 'normal' functioning of modern industrial society and reforms enacted in the public interest, environmental public interest litigation in Germany and China stands out as it implies a possibility for various stakeholders outside of the administrative structure to promote environmental interests. This returns a degree of agency to environmental stakeholders in helping to practically determine the transition towards sustainability. The substantiveness of environmental litigation is assessed, first, in relation to its openness, examining which social actors possess standing to litigate in the public interest, and, second, in relation to its scope, referring to which acts become contestable through the framework of public interest litigation. The court cases, academic debates and legislative reforms surrounding environmental public interest litigation in Germany and China reflect the decisive features of their respective legal ideologies, but they are also an area within which the limits of the dominant legal ideology are tested.

1 | INTRODUCTION

Environmental scientists have coined the term 'Anthropocene'[1] to describe the period in which human economic activities have come to rival geophysical processes. This period has arisen from the 'industrialization of the human-metabolic relation to nature',[2] leading to 'large-scale human modification of the Earth System',[3] threatening the foundations of human life, most notably through climate change. Rapid

[1]W Steffen et al, 'The Anthropocene: From Global Change to Planetary Stewardship' (2011) 40 Ambio 739.

[2]A Malm and A Hornborg, 'The Geology of Mankind? A Critique of the Anthropocene Narrative' (2014) 1 The Anthropocene Review 62.

[3]JB Forster, 'Marx and the Rift in the Universal Metabolism of Nature' (Monthly Review, 1 December 2013) <https://monthlyreview.org/2013/12/01/marx-rift-universal-metabolism-nature/>.

industrialization also coincided with the emergence of what Weber termed the modern State. The modern State possesses an interest in allowing for a degree of private autonomy guaranteed by formal law that curbs arbitrary acts of authority and is thus instrumental to the normal functioning of market-based economics.[4] At the same time, the State must undertake certain regulatory and technical interventions, to treat the disorders arising from the conditions of the industrial economy, including environmental degradation.[5]

Environmental public interest litigation (EPIL)[6] opens a domain, namely the protection of the public interest, usually reserved for the systematized administration of the modern State to contestation through legal discourse. The global expansion of EPIL evidences an increased reliance on the judiciary to compensate for regulatory gaps where governments and corporations have failed to address climate change.[7] With climate change likely necessitating significant changes to our way of life,[8] EPIL represents an opportunity to build a new social consensus over which interests the law is oriented towards. China's position is unique as it has formally established a system of EPIL which, in contrast to individual rights-based forms of judicial review, is entirely oriented towards a court-centred approach to addressing public interest issues. This tendency is also reflected in German law, which is increasingly moving away from formalistic and individualistic doctrines of legal standing, and has begun to expressly grapple with public interest issues in the context of rights-based environmental litigation.

The degree of agency EPIL provides to environmental stakeholders depends on what conditions the law sets out for bringing a case. This is a question of legal standing and is controversial in the German context as traditionally rights-based litigation has required a plaintiff to demonstrate that an individual public right guaranteed through law has been violated by an act of public authority.[9] However, the implementation of the Aarhus Convention into European Union (EU) law has expanded legal standing for nongovernmental organizations (NGOs) to contest acts of public authority which infringe EU environmental regulations.[10] The substantive effect that EPIL has on the process of environmental reform is also a question of scope. This concerns which acts are contestable through EPIL and whether the law can with a high degree of certainty affect the practices of corporations and public authorities. This is especially relevant to China where despite the existence of a highly developed system of environmental laws and regulations, many illegal polluting activities continue to take place.[11] This has raised questions related to the accountability of public authorities who fail to carry out their regulatory duties.

This article compares China's recently developed system of EPIL to Germany's individual-rights based approach to environmental litigation. As a critical comparison, the article problematizes, systematizes and reasons around two distinct legal cultures and traditions. The article thus aims to showcase how public interest considerations have come to shape environmental litigation in Germany and China. The focus is particularly on public participation in environmental governance. It is argued that environmental litigation taken in the public interest represents an opportunity for different social actors to contribute to the implementation of environmental reform.

The article is organized as follows. Section 2 outlines the sociological and philosophical doctrines employed throughout this article, the scope of the article, and the methodology used to compare German and Chinese laws. Section 3 examines the context in which EPIL emerged in China, highlights how EPIL operates alongside other forms of environmental litigation and details the three existing forms of EPIL in China. Section 4 discusses the history of the individual public right in Germany and its relation to environmental litigation, how EU law has allowed for representative environmental lawsuits by NGOs, and the Federal Constitutional Court's decision in the *Klima Urteil* which challenged the constitutionality of Germany's emission reduction targets. Section 5 contains the comparative analysis of the article, and Section 6 concludes.

2 | APPROACHING ENVIRONMENTAL REFORM FROM A CRITICAL PERSPECTIVE

2.1 | Environmentalism and legal ideology

This article contextualizes environmental reform within certain forms of legal ideology specific to Germany and China. As an operative legal concept within EPIL, public interest (*Gemeinwohl*,[12] 公益) has a different meaning in Germany and China. The formal–legal characteristics accorded to the concept of public interest will be associated with the dominant legal ideology, demonstrating the continuity between the immediate practical appearance of the law and its 'instrumental rationality'[13] as an agent of the overall ideological system. Legal ideology and its association with certain State–society relations affect the extent to which different actors, such as individuals, NGOs or China's public prosecutors (the procuratorate), can advocate for the environmental public interest.

[4]DM Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) Wisconsin Law Review 720.

[5]A Robert, *Theorie Der Grundrechte* (Suhrkamp 1986) 454.

[6]The abbreviation EPIL or PIEL has appeared in the writings of various scholars. This article will use the abbreviation EPIL.

[7]HM Osofsky and J Peel, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015) 28.

[8]S Adelman, 'The Sustainable Development Goals, Anthropocentrism and Neoliberalism' in D French and LJ Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar 2018) 15.

[9]AK Mangold, 'The Persistence of National Peculiarities: Translating Representative Environmental Action from Transnational into German Law' (2014) 21 Indiana Journal of Global Legal Studies 223.

[10]C Poncelet, 'Access to Justice in Environmental Matters – Does the European Union Comply with Its Obligations?' (2012) 24 Journal of Environmental Law 287.

[11]C Zhang. 'Changzhou Pollution Scandal Highlights Holes in China's Environmental Enforcement' (China Dialogue, 29 April 2016) <https://chinadialogue.net/en/pollution/8892-changzhou-pollution-scandal-highlights-holes-in-china-s-environmental-enforcement/>.

[12]The literal translation of '*Gemeinwohl*' is the 'common good'. While much has been said on the difference between the 'public interest' and the 'common good' (see, e.g., B Douglas, 'The Common Good and the Public Interest' (1980) 8 Political Theory 103), for the purposes of brevity, the concept of *Gemeinwohl* within German jurisprudence will be taken as the closest equivalent to the concept of 'public interest' within Chinese law.

[13]M Weber, *Economy and Society* (University of California Press 1978) 24.

An epistemological position drawing on the fallible discursive form of critical theory developed by Habermas will be employed. Habermas treats problem solving as a fallible learning process contingent on the pursuit of knowledge. Arguments themselves are contestable, but the nature of problem solving requires the formulation of universal means for communities to engage in peaceful forms of critical self-reflection.[14] Accepting that any treatment of ecological problems through a cultural institution such as the law involves fallible truth claims leaves a vital role for critical discourse.[15] The characterizations of ecological problems do not impose themselves on society merely by virtue of better scientific argument—their establishment and processing refer to social conditions (including the law) that the natural sciences cannot provide themselves.[16] Progressively treating environmental problems through law therefore requires a rational-critical discourse grounded on a historically contingent *telos* of sustainability.[17] If the law is a setting in which such a rational-critical discourse can take place, institutional conditions should exist which can accommodate a variety of social actors dedicated to environmentalism and sustainability. This in turn allows actors such as NGOs to contest whether the government is obligated to consider the environmental public interest in the exercise of State authority. The extent to which EPIL contains highly formalized criteria for the exercise of environmental rights is an important determining factor in the adaptability of law to the changing social conditions accompanying the shift towards sustainability.

2.2 | Scope, comparison and critique

Frankenberg warns that some of the dominant paradigms of comparative law can lead to 'reductions of complexity' and, being overly preoccupied with conceptual tidiness, are mainly concerned with determining in a positivist sense what the law is in another country.[18] Although Frankenberg's critique of comparative legal scholarship helps demystify the 'machinery of thought'[19] of formalistic legal comparisons, it still leaves open the task of establishing a basis of comparison which can maintain a historicist and critical perspective. This section sets out the comparative scope of this article. It aims to summarize how public interest considerations are conceived within environmental litigation in Germany and China. A critical basis for comparison is established by accepting the historical necessity of environmental reform and reflecting on how State–society relations affect public participation in environmental governance.[20]

Comparing environmental litigation in Germany and China highlights the fundamental difficulty of distinguishing between subjective and objective interests in environmental law. In the case of Germany, it is argued that there is an underlying tension between the principle of individual (subjective) rights and environmental protection. The consequences of environmental degradation have taken on global proportions, and their full impact is often only revealed in the future. However, the doctrine of the individual subjective right is traditionally focussed on the atomized interests of the individual and how those interests (or rights) are directly, personally and presently affected. It is the evolution of the individual public right in this context that allows for a viable comparison with EPIL in China. It is shown that individual public rights in Germany are increasingly interpreted in line with objective criteria, derived from the international climate agreements that Germany is a party to. This tendency is increasingly discussed within German jurisprudence as emblematic of the interrelatedness of *subjective* rights and the *objective* goods attributable to the environmental public interest.[21] In the case of China, a different subject–object paradigm in environmental law will be explored. EPIL does away with the subjectivist considerations of tort law or rights-based judicial review by allowing for the procuratorate, local governments and NGOs to act as representatives of the environmental public interest. The Party,[22] sitting above other State institutions, generates concerted efforts from different branches of the State to improve environmental governance.[23] The framework of EPIL developed by the Party allows for some involvement from NGOs. Nevertheless, it is fundamentally the Party which, through the ideological framework of socialism with Chinese characteristics, defines the *objective* interests of society at large. However, positioning the Party as the only actor capable of defining the *objective* interests of society fails to consider that the Party–State has become a *subject* in its own right.[24] In other words, uncritically accepting the Party–State as an ahistorical entity, an *object* which is infallible in its pursuit of the public interest, forgets that public participation in environmental law involves a discourse in which the Party–State's own actions and interests might be open to criticism. As Chinese citizens become ever more aware of environmental issues,[25] the Party may neglect to reform State institutions to allow for a more substantive discourse between it and society at large. Whether environmental litigation supports a substantive State–society discourse is related to the previously mentioned issues of *openness* and *scope*. This article offers a critical perspective on State–society relations in China by examining whether EPIL allows environmentally conscious citizens and NGOs to apply pressure on the State to produce concrete, and in line with Marxist theory historically *necessary*[26] steps to improve environmental governance.

[14] G Stokes, 'Popper and Habermas: Convergent Arguments for a Postmetaphysical Universalism' in G Stokes and J Shearmur (eds), *The Cambridge Companion to Popper* (Cambridge University Press 2016) 318.
[15] M Deflem, 'The Legal Theory of Jürgen Habermas' in R Banakar and M Travers (ed), *Law and Social Theory* (2nd edn, Hart 2013) 70.
[16] C Besio and G Romano, *Zum Gesellschaftlichen Umgang mit dem Klimawandel: Kooperationen und Kollisionen* (Nomos 2016) 8.
[17] DC Lee, 'The Concept of "Necessity": Marx and Marcuse' (1975) 6 Southwestern Journal of Philosophy 47.
[18] G Frankenberg, *Comparative Law as Critique* (Edward Elgar 2016) 11ff.
[19] G Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 Harvard International Law Journal 411.
[20] ET Feteris, *Fundamentals of Legal Argumentation: A Survey of Theories on the Justification of Judicial Decisions* (Springer 2017) 77–93.
[21] See generally J Krüper, *Gemeinwohl im Prozess: Elemente eines funktionalen subjektiven Rechts auf Umweltvorsorge* (Duncker & Humblot 2009).
[22] The Chinese Communist Party, hereinafter referred to as 'the Party' or 'CCP'
[23] L Li, 'Chinese Characteristics of the "Socialist Rule of Law": Will the Fourth Plenum Cure the Problems of the Chinese Judicial System?' (2015) 20 Asia Policy 17.
[24] A Feenberg, *The Philosophy of Praxis: Marx, Lukács and the Frankfurt School* (Verso 2014) 243.
[25] S Chen, 'Tool of Emancipation or Domination? Debating the Contentious Nature of China's Online Environmental Activism' (2015) 11 China Media Research 16.
[26] Lee (n 17).

This article treats environmental law broadly, rather than restricting the comparative scope to neatly defined categories such as environmental litigation and climate litigation.[27] The rights-based environmental litigation in Germany discussed here often concerns climate issues such as targets for the reduction of greenhouse gas emissions. China does not have legally binding emissions reduction targets that are contestable through the courts, and the Chinese EPIL cases reviewed in this article mostly concern localized incidents of pollution that contravene China's environmental laws. Seen historically, however, environmentalism as a social movement has had to shift its attention from combatting localized incidents of pollution to addressing some of the more nebulous and long-term effects of industrialization (including climate change).[28] Laws related to public participation in environmental governance cannot be neatly demarcated along formal-legal criteria.

3 | THE CONFLUENCE OF EPIL AND OTHER FORMS OF ENVIRONMENTAL LITIGATION IN CHINA

3.1 | The emergence of public interest litigation in China

The perceived need for a system of EPIL in China arose because of a larger public awareness of environmental issues. Although China's spectacular economic growth has lifted hundreds of millions of people out of poverty, it did not come without an ecological cost.[29] Incidents such as the 2014 Maoming anti PX protest or the 2013 Jiangmen anti-nuclear demonstration were motivated by the perceived inadequacy of existing dispute resolution mechanisms such as petitioning.[30] Outbreaks of public unrest are perceived by the CCP as threatening to China's developmental interests. Local governments with vested interests in environmentally controversial projects blame public opposition on the 'scientific illiteracy'[31] of local residents, even where environmental mismanagement by local authorities is a common knowledge.[32] It fell on the central government to develop an environmental governance strategy to resolve environmental disputes before they spiralled into social disorder. The Xi administration wishes to improve issues of implementation and accountability in environmental law through EPIL.[33] However, as part of the drive to 'govern the country according to law',[34] EPIL is instrumentalized towards the maintenance of 'social harmony'.[35] A 'harmonious' relationship between the party and the people allows for public participation in environmental law insofar as it is in line with the Xi administration's conception of 'civility'.[36] Such a conception emphasizes legal rationalization while bolstering party leadership over all areas of social and economic life. However, it leaves little room for a progressive discourse between the State and an increasingly well-educated and environmentally aware public.[37]

3.2 | Distinguishing EPIL from other forms of environmental litigation in China

China has developed a system of EPIL that aims to improve the enforcement of environmental law through 'objective and impartial lawsuits', by allowing the judiciary to directly address issues of the environmental public interest.[38] EPIL in China can be split into four categories: civil EPIL by NGOs, civil EPIL by the procuratorate, administrative EPIL by the procuratorate and the recently developed system of ecological environmental damage compensation (EEDC) by local governments. However, as a means of holding private entities liable for environmental harms as well as holding public authorities accountable for environmental mismanagement, EPIL does not operate alone.

Ecological Marxists in China have recognized that the huge progress over the last 30 years in China's system of environmental governance is at least partially indebted to 'the environmentalists and environmental legal professionals in the West … given that they helped guide and open the progress of China's environmental law'.[39] However, China's system of environmental governance should not be equated with Western models. For example, unlike Germany, individual litigants play a marginal role in environmental litigation against public authorities. One case saw an individual plaintiff brings a judicial review case against the Hejin Municipal People's Government for not performing its environmental protection duties.[40] The court did not

[27] J Setzer and C Higham, 'Global Trends in Climate Change Litigation: 2021 Snapshot' (Grantham Institute – Climate Change and the Environment, London School of Economics and Political Science 2021).

[28] In the case of China, see S Dong, 'Environmental Struggles and Innovations in China: A Historical Perspective' in S Dong, J Bandyopadhyay and S Chaturvedi (eds), *Environmental Sustainability from the Himalayas to the Oceans* (Springer 2017) 17.

[29] ZX Zhang, 'Programs, Prices and Policies Toward Energy Conservation and Environmental Quality in China' in S Managi (ed), *The Routledge Handbook of Environmental Economics in Asia* (Routledge 2015) 532.

[30] K Lee and M Ho, 'The Maoming Anti-PX Protest of 2014' (2014) 3 China Persepctives 33; C Sheng, 'Petitioning and Social Stability in China: Case Studies of Anti-nuclear Sentiment' (2019) 30 International Journal of Voluntary and Non-profit Organizations 381.

[31] '茂名px事件前的31天 (the 31 Days before the Maoming Px Incident)' (The Beijing News on Saturday, 5 April 2014) <http://epaper.bjnews.com.cn/html/2014-04/05/content_504334.htm?div=-1>.

[32] M Tiajie, 'The PX Protest Drama in China' (Caixin Global, 4 April 2014) <https://www.caixinglobal.com/2014-04-04/the-px-protest-drama-in-china-101045817.html>.

[33] The State Council Information Office of the People's Republic of China, 'Human Rights Action Plan of China (2021–2025)' (9 November 2021) <http://english.www.gov.cn/news/topnews/202109/09/content_WS6139a111c6d0df57f98dfeec.html>.

[34] P Xiang-Chao, 'Research on Xi Jinping's Thought of Ecological Civilization and Environment Sustainable Development' (2018) 153 IOP Conference Series: Earth and Environmental Science.

[35] E Smith, 'The Conception of Legality under Xi Jinping'in RJEH Creemers and S Trevaskes (eds), *Law and the Party in China: Ideology and Organisation* (Cambridge University Press 2021) 97.

[36] M Gow, 'The Core Socialist Values of the Chinese Dream: Towards a Chinese Integral State' (2017) 49 Critical Asia Studies 92.

[37] Z Zhang, H He and M Fan, 'The Ecological Civilization Debate in China' (Monthly Review, 1 November 2014) <https://monthlyreview.org/2014/11/01/the-ecological-civilization-debate-in-china/>.

[38] Q Gao and S Whittaker, 'Standing to Sue Beyond Individual Rights: Who Should Be Eligible to Bring Environmental Public Interest Litigation in China?' (2019) 8 Transnational Environmental Law 327.

[39] Zhang et al (n 37).

[40] 张某其他行政行为二审行政裁定书 (Second-instance administrative ruling on Zhang's other administrative actions) (2020) 晋行终337号<https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=98197e9c3fb1481dbd80acbc0188e761>.

refute the plaintiff's claim that the Shanxi aluminium plant had caused ground water pollution, and that the municipal government had not performed its environmental protection duties. A shutdown of the plant had occurred in May 2019 when locals complained that the dumping of red mud, which had contaminated the local river system, was having an impact on their crops.[41] Although not necessarily related to the dumping of contaminated mud, one study has suggested that aluminium exposure among workers at the plant is associated with cognitive impairment.[42] To furthermore highlight the complex vested economic interests surrounding this case, it should be noted that Shanxi is the second biggest aluminium-producing region within China.[43] The court acknowledged that the plaintiff had a right to participate in environmental protection efforts of the affected Cangtou Village following Article 53 of China's 2015 revised Environmental Protection Law (EPL). The court furthermore highlighted the right of individual citizens to criticize, make suggestions and file a complaint against any State organ or functionary under Article 41 of China's constitution.[44] Finally, the court accepted that according to Article 6 of the EPL local governments are responsible for the environmental quality within their respective administrative regions. However, the case was dismissed on procedural grounds as the plaintiff was, following Article 25 of the Administrative Litigation Law (ALL), unable to demonstrate a direct interest in the case. It is generally held that administrative litigation by individuals is limited to 'subjective litigation' in China, with environmental public interest litigation in the administrative sphere remaining solely under the remit of the procuratorate.[45]

This case demonstrates that the principle of public participation in environmental law contained for example in Article 53 of China's revised EPL is not intended as an expansion or reform of traditional models of judicial review reflecting Western conceptions of individual autonomy *vis-à-vis* the State. The court also questioned whether the plaintiff possessed the 'qualifications' to bring a claim, pointing out that a high degree of 'scientific and technological knowledge' is required to prove that the contaminated mud is a health hazard. Perhaps this implicitly suggests that a professional procuratorate acting on behalf of the environmental public interest is a more suitable pathway for such claims. Finally, the court reminded the plaintiff that if they believe that the red mud piles cause pollution to the living environment of local villages, they can petition the procuratorate to file an administrative EPIL lawsuit.[46] Some scholarship suggests, however, that environmental petitions are easily captured by vested interests within local government.[47]

In the civil sphere too, EPIL operates alongside other forms of litigation open to individual private claimants, most obviously tort law. Compensation for environmental harms was previously governed by Article 41 of the EPL, with environmental tort liability today being governed by the Civil Code in Article 1229 onwards.[48] China appears to have adopted an innovative approach by specifically codifying tortuous liability arising from environmental damages into civil law. Furthermore, environmental damages governed by the Civil Code include provisions on harm to the environment itself, as opposed to property damage or personal harm with a causal link to some form of environmental harm.[49] The practical implications for environmental litigation brought about by China's new Civil Code remain somewhat unclear. Zhai gives an interesting account of the lack of a 'separate regulatory paradigm' for ecological damage compensation in Chinese law, highlighting that the tort law provisions in the newly implemented Civil Code do not give an appropriately developed definition of ecological environmental damage and furthermore fail to clarify how EPIL and environmental damage compensation should be coordinated.[50]

3.3 | Civil EPIL by NGOs

Civil EPIL by NGOs in China was first established through the 2012 revision of the Civil Procedure Law (CPL).[51] Article 55 of the CPL stipulates that 'legally designated authorities and relevant organisations' may instigate proceedings against acts that jeopardize the public interest—including acts which are causing pollution to the environment.[52] However, it was only with the 2014 reform of China's EPL that the legislative framework for EPIL by NGOs was fully implemented.[53] The definition of the 'authorities or relevant organizations' that may file EPIL is somewhat prohibitive. Contained in Article 58 of the EPL, this definition requires an NGO to have been registered with a civil affairs authority at prefecture level or above. Furthermore, the NGO must have been engaged in activities related to environmental protection in the public interest for at least five consecutive years without any record of legal violations.[54] However, in practice, civil affairs authorities have a large amount of leeway in applying the 'public interest' category to social organizations, making registration

[41]'China Alumina Prices Spike on Shanxi Shutdowns' (Kitco, 15 May 2019) <https://www.kitco.com/news/2019-05-15/China-alumina-prices-spike-on-Shanxi-shutdowns.html>.
[42]SM Xu et al, 'Cross-sectional Study Based on Occupational Aluminium Exposure Population' (2021) 83 Environmental Toxicology and Pharmacology 103,581.
[43]'Chalco Delegate Pushes for China's Bauxite-rich Shanxi to be Aluminium Hub' (Reuters, 25 May 2020) <https://www.reuters.com/article/us-china-parliament-aluminium-idUSKBN2310ZY>.
[44]See further BL Liebman, 'Article 41 and the Right to Appeal' (2014) <https://scholarship.law.columbia.edu/faculty_scholarship/1878/>.
[45]D Pappano, 'Administrative Law and the Chinese Legal System: Some Issues on Judicial Review of Administration Activity' in G Della Cananea and M Bussani (eds), *Judicial Review of Administration in Europe* (Oxford University Press 2021) 326.
[46]晋行终337号 (n 40).
[47]Y Cai and T Zhou, 'Online Political Discussion in China: Local Government and Differentiated Response' (2019) 228 The China Quarterly 335.
[48]Environmental Protection Law of the People's Republic of China (promulgated by the Standing Committee of the National People's Congress, 26 December 1989, revised 24 April 2014, effective 1 January 2015) art 41 (China) (Environmental Protection Law, 2015); Civil Code of the People's Republic of China (promulgated by the National People's Congress, 28 May 2020, effective 1 January 2021) arts 1229–1235 (China).
[49]T Zhai, 'Double-Faceted Environmental Civil Liability and the Separate-Regulatory Paradigm: An Inspiration for China' (2022) 14 Sustainability 4369.
[50]uvu
[51]ZJ Wang and J Chen, *Dispute Resolution in the People's Republic of China* (Brill/Nijhoff 2019) 228ff.
[52]Civil Procedure Law of the People's Republic of China (promulgated by the Standing Committee of the National People's Congress, 9 April 1991, revised 27 June 2017, effective 1 July 2017) art 55 (China) (Civil Procedure Law, 2017).
[53]R Zhang and B Mayer, 'Public Interest Environmental Litigation in China' (2017) 1 Chinese Journal of Environmental Law 202.
[54]Environmental Protection Law, 2015 (n 48) art 58.

difficult.[55] Some sources suggest that the registration requirement may exclude as much as 60% of all NGOs in China.[56]

Civil EPIL has nevertheless seen some modest success in China since its implementation. From 2015 to 2019, a total of 423 civil EPIL cases by NGOs were accepted by the courts.[57] A guiding case of civil EPIL by an NGO concerned the construction of a pyrite ore mining facility near the Qianzhangyan reservoir.[58] Although the mining company had undertaken an environmental impact assessment (EIA), it failed to implement the recommendations contained therein. Subsequent pollution led to organic toxicity of the reservoir, and an emergency response from the local government was required. The Chongqing Green Volunteer League, an NGO that is committed to the protection of the Yangtze River region, successfully brought a claim, and the mining company was ordered by the court to issue an apology to the media and carry out a restoration of the environment at a cost of 991,000 yuan.[59] This case fits the pattern of 'sensational' civil EPIL cases pursued by NGOs. These are often high-value cases that receive a great deal of media attention.[60] Civil EPIL by the procuratorate meanwhile tends towards 'mundane' incidents.[61]

NGOs, however, do not possess standing for administrative EPIL. This was exemplified in the case *FON* et al. *v Yunnan Prefecture Environmental Protection Bureau*. In this case, a Beijing-based NGO called Friends of Nature (FON) attempted to bring a case against a local Environmental Protection Bureau (EPB) in Yunnan. FON was the first nationwide NGO in China and has accumulated a membership of more than 30,000.[62] Notably, FON was a plaintiff in 24 out of a total of 128 cases of EPIL cases filed by NGOs from 2015 until 2018.[63] FON claimed that the EPB had improperly approved the EIA for a plant being constructed by the Fugong Qunsheng Electric Salt Technology Co.[64] The case was dismissed on the ground that an NGO has no standing to bring administrative EPIL.[65] According to Article 25 of the ALL, a plaintiff other than a procuratorate must show a direct interest in the administrative fault at issue.[66] This case demonstrates that the government is not yet prepared to allow organized civil society to directly litigate against government authorities. Finally, the case shows how the most advanced NGOs are testing the limits of which EPIL cases they can bring under China's new environmental legislation.

The marginalization of NGOs must be understood in a broader context. NGOs are hampered by the cutting of funding from international groups[67] and are perceived by the CCP as a vehicle for 'Western liberal values'.[68] Although this characterization of NGOs is instrumental to the CCPs vision of governing the country according to law, an overly dualistic discourse that emphasizes the 'struggle'[69] between Chinese and Western understandings of civil society may underestimate the social practices developed by NGOs somewhat independently of the State narrative. Through their practices, NGOs can extend the boundaries of China's political system and improve the institutional conditions for environmental activism. For example, many NGOs can organize personal meetings with EPBs to discuss specific issues, something which is not possible for ordinary citizens.[70] The legal practices NGOs employ by attempting to push the boundaries of EPIL should not solely be analyzed through the reifying lens of the law: 'Instead of focussing on what they [NGOs] are not currently permitted to do under current law … it may be more practical and helpful to start on what they can do, including low-value cases.'[71] An alternative viewpoint would be to view these legal practices as a 'jurisprudence of insurgency',[72] which reflect a growing environmental consciousness within society even when cases are dismissed for lack of standing.

3.4 | Civil EPIL by the procuratorate

Civil EPIL by procuratorates was fully implemented with the 2017 revision of the CPL.[73] Article 55 of the CPL states that the procuratorate may file an action for civil EPIL for any act that does environmental harm, provided that 'any legally designated institutions and relevant organisations' (such as NGOs) have not brought a lawsuit. Perhaps because of the vast investigatory resources public procuratorates possess in comparison to often underfunded NGOs,[74] the

[55]H Ma 'Guangdong's New Registration Policy for Social Organizations: Progress and Challenges' (China Development Brief, 4 August 2014) <https://chinadevelopmentbrief.org/reports/guangdongs-new-registration-policy-social-organizations-progress-challenges/>.
[56]Zhang and Mayer (n 53).
[57]Q Zhang, 'A Database on Environmental Public Interest Litigation Filed by NFOs in China: 2015 to Present' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3065111>; Supreme People's Court, '中国环境司法发展报告(绿皮书)及典型案例新闻发布会 (China Environmental Judicial Development Report (Green Book) and Press Conference on Typical Cases)' (2 March 2019) <https://www.court.gov.cn/hudong-xiangqing-145072.html>; Supreme People's Court, '中国环境资源审判 (2019年) China Environmental Resources Trial (2019)' (8 May 2020) <https://www.court.gov.cn/zixun-xiangqing-228341.html>.
[58]'指导案例134号:重庆市绿色志愿者联合会诉恩施自治州建始磺厂坪矿业有限责任公司水污染责任民事公益诉讼案 (Guiding Case No. 134: Chongqing Green Volunteer League v. Enshi Autonomous Prefecture Jianshi Sulfon Changping Mining Co., Ltd.)' (2020) <https://www.court.gov.cn/shenpan-xiangqing-216961.html>.
[59]ibid.
[60]An example of an English language news report on the Qianzhangyan reservoir incident can be found online at: 'Water Supply Cut Off after Pollution in Reservoir' (China Internet Information Centre, 18 August 2014) <http://www.china.org.cn/environment/2014-08/18/content_33268253.htm>.
[61]L Xie and L Xu, 'Environmental Public Interest Litigation in China: A Critical Examination' (2021) 10 Transnational Environmental Law 441.
[62]Friends of Nature, 'Our Story' <http://www.fon.org.cn/story>.
[63]Zhang and Mayer (n 53).
[64]WJ Schulte and H Li, 'Yunnan Chemical Factory Becomes Testing Ground for Citizen Lawsuits' (China Dialogue, 23 August 2017) <https://chinadialogue.net/en/pollution/9983-yunnan-chemical-factory-becomes-testing-ground-for-citizen-lawsuits/>.
[65]W Wang and D De Boer, 'China's Prosecutors Are Litigating Government Agencies for Being Soft on Pollution' (China Dialogue, 22 February 2019) <https://chinadialogue.net/en/pollution/11095-china-s-prosecutors-are-litigating-government-agencies-for-being-soft-on-pollution>.
[66]Administrative Litigation Law of the People's Republic of China (promulgated by the Standing Committee of the National People's Congress, 4 April 1989, revised 27 June 2017, effective 1 July 2017) art 25 (China) (Administrative Litigation Law, 2017).
[67]J Dai and AJ Spires, 'Advocacy in an Authoritarian State: How Grassroots Environmental NGOs Influence Local Governments in China' (2018) 79 China Journal 62.
[68]L Dean, 'Will There Be a Civil Society in the Xi Jinping Era? Advocacy and Non-Profit Organising in the New Regime' (Made in China, 15 July 2021) <https://madeinchinajournal.com/2021/07/15/will-there-be-a-civil-society-in-the-xi-jinping-era-advocacy-and-non-profit-organising-in-the-new-regime/>.
[69]ibid.
[70]Dai and Spires (n 67).
[71]Xie and Xu (n 61).
[72]ME Tigar and MR Levy, *Law & the Rise of Capitalism* (Monthly Review Press 2000) 237.
[73]Civil Procedure Law, 2017 (n 52) art 55(2); Administrative Litigation Law, 2017 (n 66) art 25(4).
[74]Dai and Spires (n 67).

Supreme People's Court has required the procuratorate to make a public announcement of their intention to initiate EPIL 30 days before trial.[75] This gives NGOs an opportunity to litigate themselves or offer support. Furthermore, when a suitable NGO decides to bring civil EPIL proceedings, the procuratorate may render assistance as a 'supporting litigation unit' by aiding in investigations, attending trials to support NGO plaintiffs, and submitting opinions to courts.[76] The notification requirement and the priority for NGOs to file imply that the procuratorate was not intended to supersede NGOs in the area of civil EPIL. Some scholars have emphasized that civil EPIL by the procuratorate is a method of 'last resort' and 'fills the gap' in civil EPIL.[77] More recently, however, it has been highlighted that civil EPIL by NGOs has generally become increasingly marginal and frequently overlaps with administrative or criminal proceedings.[78] Statistics seem to suggest that civil EPIL by the procuratorate is not merely a gap-filling provision. For example, in 2018 alone, the courts accepted a total of 113 civil EPIL cases brought by the procuratorate.[79] The involvement of the procuratorate in civil EPIL cases is justified by their investigatory powers and a lack of capacity for NGOs to shoulder the burden of ensuring compliance with environmental law in the civil sphere—particularly in regions where NGOs are less active.[80] On the other hand, the involvement of procuratorates in civil EPIL exacerbates the marginalization of NGOs in China and raises questions about the political motivation behind procuratorial involvement in civil EPIL. It has been suggested that administrative intervention or executive interference in the dealings of the procuratorate, whose role has been described as increasingly political in recent years,[81] may cause sensitive instances of environmental damage to be overlooked. Indeed, it could be argued that the very justification behind the encroachment of procuratorial civil EPIL is indicative of a reified understanding of high conviction rates and case numbers. High conviction rates and case numbers are presented as empirical evidence supporting the role of a professional procuratorate as opposed to sensationalist NGOs.[82] However, this presentation of court statistics does not account for the incentive for procuratorates to dissuade NGOs from initiating civil EPIL to increase their own prosecution rates,[83] nor does it reflect the high litigation costs borne by NGOs in civil EPIL cases.[84]

3.5 | Civil EPIL by local government

Civil EPIL by local government authorities is not strictly codified in Chinese law. Following a pilot programme beginning in 2015, the Supreme People's Court issued the 'Provisions on Ecological Environment Damage Compensation Cases (Trial)'.[85] The reason for treating EEDC cases under the banner of EPIL is because cases are operated under the CPL.[86] Thus, EEDC cases have the same core character as civil EPIL cases with local authorities acting in the *public* or *national* interest to force polluting enterprises to pay for the harm caused to, and restoration of, the natural environment. The legal-ideological justification for the EEDC system, however, rests on the principle of State ownership of natural resources enshrined in the Chinese constitution.[87] Local governments possess standing as parties with an *interest* in safeguarding China's natural resources, even where certain land *use* rights have been granted to private entities through China's property law.[88] Under Article 1 of the EEDC provisions, a local government at the provisional or prefecture city level may file a lawsuit if any 'serious, or particularly serious environmental emergency occurs'.[89] This provision is significant, as in practice EEDC mostly concerns high-profile cases.[90] It has also been argued that this is attributable to the central government setting case quotas, which follow from the initial Central Committee Reform Plan establishing the EEDC system.[91]

In terms of the practical implications for China's transition towards sustainability, EEDC cases can only be seen as a form of progress insofar as they address some of the immediate deficiencies in China's environmental liability regime. In contrast to China's NGO sector, local governments can better absorb litigation costs associated with high-profile and complex civil EPIL cases.[92] EEDC cases furthermore complement China's administrative enforcement of environmental law through which local authorities can investigate, fine and close polluting economic units.[93] The enforcement of environmental law through the administration has previously been criticized as inconsistent, paradoxically resulting in further costs being borne by local authorities as they end up paying for cleaning up pollution and restoring the environment.[94] Thus, EEDC cases represent a powerful instance of centrally driven reform though which local authorities can quickly step in to ensure that polluters themselves carry the costs for the worst instances of illegal pollution.

However, some academics have highlighted the further weakening of NGOs within EPIL following the emergence of EEDC cases.[95]

[75]The Supreme People's Court and Supreme People's Procuratorate Interpretation on Several Issues Regarding the Application of Law in Public Interest Litigation by the Procuratorate (promulgated by The Supreme People's Court, The Supreme People's Procuratorate, 23 February 2018, amended 29 December 2020, effective 1 January 2021) art 13 (China).
[76]Zhang and Mayer (n 53).
[77]L Wenjia, 'Study on the System for Initiation of Public Interest Litigation by Procuratorates in China' (2018) 6 China Legal Science 92.
[78]Xie and Xu (n 61).
[79]中国环境司法发展报告(绿皮书)及典型案例新闻发布会 (n 57).
[80]F Wu, 'Environmental Activism in Provincial China' (2013) 15 Journal of Environmental Policy and Planning 99.
[81]S Seppänen, 'Disorientation for the New Era: Intraparty Regulations and China's Changing Party-State Relations' in Creemers and Trevaskes (n 35) 214.
[82]L Xie and L Xu, 'Environmental Public Interest Litigation in China: Findings from 570 Court Cases Brought by NGOs, Public Prosecutors and Local Government' (2022) 34 Journal of Environmental Law 53.
[83]Gao and Whittaker (n 38).
[84]Y Zhuang, 'The Challenge of Litigation Costs and Damage Assessment Feed in Environmental Public Interest Litigation in China' (Asia Environmental Governance Blog, 15 May 2017 <https://asia-environment.vermontlaw.edu/2017/05/15/the-challenge-of-litigation-costs-and-damage-assessment-fees-in-environmental-public-interest-litigation-in-china/>.
[85]'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)' (China Law Translate, 6 April 2019) <http://lawinfochina.com/display.aspx?lib=law&id=30510>.
[86]W Wu, 'The Reform of the Compensation System for Ecological and Environmental Damage in China' (2020) 60 Natural Resources Journal 63.
[87]Xianfa art 9 (2018) (China).
[88]Wu (n 86).
[89]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) (n 85).
[90]Xie and Xu (n 82).
[91]Wu (n 86).
[92]Wu (n 86).
[93]Environmental Protection Law, 2015 (n 48) art 25
[94]Wu (n 86).
[95]Xie and Xu (n 61).

Although civil litigation by NGOs still takes precedent over the procuratorate, any cases brought by NGOs must be suspended if a local government chooses to bring an EEDC trial.[96] Using statistics taken from China Judgements Online, Xie and Xu highlight that the number of local government EEDC cases has been rising rapidly since 2019 and is quickly approaching the level of civil EPIL cases bought by NGOs.[97] Seen in a broader context, the EEDC system strikes at the core of the evolution of China's governance model in the context of an unbalanced and unsustainable model of economic development.[98] Certainly, EEDC cases are important in ensuring *post factum* that environmental damages are paid for by polluters. However, when it comes to ensuring that environmental laws are followed by enterprises in the first place, the EEDC system arguably detracts from government accountability by shifting the responsibility for safeguarding the environment into the realm of private law. Considering that public pressure is often a key factor in ensuring that local government addresses environmental issues,[99] proper accountability for the correct implementation of environmental laws remains a key concern.

3.6 | Administrative EPIL by the procuratorate

The public procuratorate has long been critical to the process of State regulation and administrative management in China.[100] The public procuratorate is one of the main pillars of the State disciplinary regime.[101] In a technical-legal sense, the procuratorate is a specialized supervisory organ of the State responsible for the investigation and prosecution of criminal cases and illegal acts of public authority.[102] In a Weberian sense, the procuratorate is part of a process of legal rationalization as it helps secure the legitimacy of the legal order.[103] It does this by acting as a specialized agency that enforces norms through its investigatory powers backed by the threat of coercive sanctions.

Administrative EPIL by the procuratorates is set out in Article 25(4) ALL that states

> When a people's procuratorate … finds that an administrative organ with the duties of supervision and administration in the fields of ecological environment … functions in violation of any law or conducts nonfeasance, which infringes upon … public interests, the people's procuratorate shall issue procuratorial suggestions to the administrative organ and urge the latter to perform its duties pursuant to the law. If the administrative organ still fails to perform duties pursuant to the law, the people's procuratorate shall bring a lawsuit to the competent people's court pursuant to the law.[104]

The need for a system of administrative judicial review is particularly pronounced in China, considering that many issues related to government accountability and the proper implementation of environmental law remain. Although administrative authorities themselves already possess many regulatory tools for the enforcement of environmental law through the new EPL as well as through the recently introduced EEDC mechanism, abuse of administrative power remains a concern.[105] For example, between 2015 and September 2017, 362 EIA agencies were punished by the Ministry of Environmental Protection for publishing fraudulent environmental impact assessments with 14 of those agencies having their EIA licences revoked.[106]

Exponents of the role the procuratorate plays in administrative oversight often cite the extremely high conviction rate of administrative EPIL: 'The prosecutors have established themselves as the cornerstone of the system by being the most efficient in winning the greatest number of cases.'[107] An example of a successful administrative EPIL case by the procuratorate involved the Suining County Ecological Environment Bureau.[108] In the aftermath of a preceding criminal trial and civil EPIL trial, judicial officers of the procuratorate found that the environmental bureau had not carried out its duty to store and dispose of a polluting oil sludge.[109] Having been unable to find a resolution following the pre-litigation procedure, the procuratorate filed an administrative EPIL lawsuit. The court held that the environmental bureau did not perform its legal duties to store and dispose of the sludge.[110] This case demonstrates that EPIL by the procuratorate can impact the performance of administrative duties related to environmental protection. However, the system of procuratorial oversight is not without its flaws. Some scholars draw attention to a lack of supervision of the procuratorates and a lack of capacity to handle cases.[111] Furthermore, the

[96]Several Provisions of the Supreme People's Court on the Trial of Cases on Compensation for Damage to the Ecological Environment (For Trial Implementation) (promulgated by The Supreme People's Court, 20 May 2019, effective 5 June 2019) art 17 (China).
[97]Xie and Xu (n 82).
[98]Z Bai and J Liu, 'China's Governance Model and System in Transition' (2020) 9 Journal of Contemporary East Asia Studies 65.
[99]Z Li et al, 'What Drives Green Development in China: Public Pressure or the Willingness of Local Government?' (2022) 29 Environmental Science and Pollution Research 5454.
[100]G Ginsburgs and A Stahnke, 'The Genesis of the People's Procuratorate in Communist China 1949–1951' (1964) 20 The China Quarterly 1.
[101]L Li, 'The 'Organisational Weapon' of the Chinese Communist Party: China's Disciplinary Regime from Mao to Xi Jinping' in Creemers and Trevaskes (n 35) 187.
[102]Xianfa (n 87) art 134: 'The people's procuratorates of the People's Republic of China are the legal oversight organs of the state.'
[103]Trubek (n 4).
[104]Administrative Litigation Law, 2017 (n 66) art 25(4).
[105]Gao and Whittaker (n 38).
[106]'Ministry of Environmental Protection: Severe Penalties for All Fraudulent Environmental Assessments' (27 September 2017) <http://env.people.com.cn/n1/2017/0927/c1010-29563263.html>.
[107]Xie and Xu (n 61).
[108]The Supreme People's Procuratorate of the People's Republic of China, 'Suining County People's Procuratorate of Jiangsu Province v. Suining County Ecological Environment Bureau Administrative Public Interest Litigation' (22 July 2019) <https://www.spp.gov.cn/spp/zdgz/202007/t20200722_473621.shtml>.
[109]'Notice by the Supreme People's Procuratorate of Issuing the Twenty-Nineth Group of Guiding Cases of the Supreme People's Procuratorate' (China Law Translate, 19 August 2021) <http://www.lawinfochina.com/display.aspx?id=36827&lib=law&EncodingName=big5>.
[110]ibid.
[111]S Shao and X Chen, 'Research on Environmental Administrative Public Interest Litigation Instituted by Procuratorial Organs' (2020) Proceedings of the 2020 International Conference on Management, Economy and Law.

issue of transparency remains a concern. Although judgements of administrative EPIL cases that reach the courts are available to view online,[112] there is little information available on the substantiveness of any corrective steps taken by administrative authorities in the aftermath of pre-litigation procedures. In 2019, 69,236 EPIL cases were handled by the public procuratorate. Of these, approximately 97% never came to court, having likely been resolved through 'pre-litigation procedures'.[113]

High case numbers and conviction rates demonstrate that EPIL by the procuratorate is successful on its own terms. It certainly strengthens the process of legalization developed by the Party in line with its interpretation of Marxist theory. An Habermasian adherence to fallibilism, however, would require the process of socialization to be open to a rational-critical discourse within society.[114] The procedural barriers faced by NGOs that prevent them from initiating administrative EPIL, together with the restrictions placed on Chinese civil society more generally, undermine the role that civil society can play in holding administrative authorities to account. Furthermore, the lack of transparency of administrative EPIL makes it hard to gauge the extent to which the procuratorate can effectively impact the behaviour of local authorities.

4 | PUBLIC INTEREST LITIGATION AS AN INDIVIDUAL RIGHTS-BASED PROCEDURE UNDER GERMAN LAW

Seen in a legal formalistic sense, the German practice of environmental public interest litigation bears little resemblance to its Chinese counterpart. Although Germany has a comprehensive regulatory framework for environmental protection that is strictly enforced, there is no system of judicial review solely based on an overarching concept of the public interest. Nevertheless, Germany's system of administrative and constitutional judicial review increasingly interprets legal doctrine based on public interest considerations.

4.1 | The German *Grundgesetz* and the individual public right (*subjektives öffentliches Recht*)

Pivotal to the understanding of the rule of law (*Rechtsstaat*) in Germany is the doctrine of the individual public right.[115] The classic definition of the doctrine was introduced by Ottmar Bühler during the early 20th century. Bühler stated that '[t]he Individual public right is the legal position of the subject vis-à-vis the State according to which the subject can claim something from the State or is entitled to do something vis-à-vis the State on the basis of a cogent legal provision that is intended to protect the subject's individual interests'.[116] Standing requirements of administrative judicial review are set out in section 42(2) VwGO (Administrative Procedure Law) that states that 'unless otherwise stipulated by law, an action is only admissible if the plaintiff claims that his rights have been violated by the administrative act or its rejection or omission'.[117]

More difficult, however, is the problem of identifying when a particular norm confers an individual public right. The prevailing legal and academic opinion draws on the 'protective norm theory' (*Schutznormtheorie*) for this purpose. According to the *Schutznormtheorie*, a norm confers an individual public right if it is at least also intended to serve the interests of individual persons or groups of persons.[118] The *Schutznormtheorie* received its impetus from the experience of National Socialist legalism. Although the early Nazi regime made reference to the principle of individual public rights, their exercise was subordinated to the 'safeguarding of the national order of life' (*Gestaltung und Sicherung unsere nationalen Lebensordnung*).[119] Fundamental rights which created a sphere, untouchable by the State, for individuals to act freely was irreconcilable with the totalitarian principle of the new State.[120] In essence, National Socialist legality appropriated the mode of German legal positivism and its associated dogma to secure the unity of the *Volk*, personified by the Führer, as its own self-legitimizing principle. The historical experience of National Socialism is also reflected in the resistance of German jurisprudence to concepts of the public interest (*Gemeinwohl*). The National Socialist maxim 'common good comes before self-interest' has been described by some scholars as disregarding the human ability to reason as the inescapable basis of justice.[121] By this logic, any judicial methodology used to describe the collective interest inevitably results in the arbitrary exercise of power.[122] The *Schutznormtheorie*, therefore, offered in the post war era a legal construction upon which the sanctity of the individual public right could be defended.

The sanctity of individual public rights is also secured by reference to the German Basic Law (*Grundgesetz*, GG). Access to justice against acts of public authority is constitutionally guaranteed through Article 19(4) GG.[123] Furthermore, German legal doctrine today holds that fundamental rights themselves can be considered individual

[112]See generally 'China Judgements Online' <https://wenshu.court.gov.cn/>.
[113]Xie and Xu (n 61).
[114]Stokes (n 14).
[115]EW Böckenförde, 'Entstehung und Wandel des Rechtsstaatsbegriffs' in H Ehmke, C Schmid and H Scharoun (eds), *Festschrift für Adolf Arndt zum 65 Geburtstag* (Europäische Verlagsanstalt 1969) 53.
[116]O Bühler, 'Die subjektiven öffentlichen Rechte und ihr Schutz in der deutschen Verwaltungsrechtsprechung (Individual Public Rights and their Protection in German Administrative Jurisprudence)' (1914) 32 Archiv des öffentlichen Rechts 580.
[117]§ 42 Abs. 2 VwGO.
[118]Wysk/Wysk, 3. Aufl. 2020, VwGO § 42 Rn. 113–117. The abbreviation 'Rn' stands for *Randnummer* (margin number). Margin numbers appear in legal commentaries (as is the case here) and case reports. When referring to German case reports and legal commentaries, this article will use the abbreviation 'Rn' instead of 'paragraph' or 'para' to avoid confusing margin numbers with paragraphs of German legal code.
[119]O Koellrutter, *Der Nationaler Rechtsstaat: Zum Wandel der deutschen Staatsidee* (Mohr 1932) 32.
[120]I Ermakoff, 'Law against the Rule of Law: Assaulting Democracy' (2020) 47 Journal of Law and Society 164.
[121]F Ekardt, ‚Verfassungs- und Verwaltungsrechtliche Gründe für eine Liberale Klagebefugnis: Zugleich eine Kritik der Begreiffe "Gemeinwohl" und "Vorsorge"' (2005) 44 Der Staat 622.
[122]ibid.
[123]Grundgesetz (GG) art 19(4): 'If someone's rights are violated by public authority, legal recourse is open to him or her.'

public rights. As such, fundamental rights within the constitution do not merely protect individual interests against specific acts of public authority and also have their own substantive content that represent a core area of the State.[124]

This then leads to the question of whether a substantive environmental right can be derived from the *Grundgesetz*. According to Article 20a GG the State 'shall, with responsibility to future generations, protect the natural foundations of life and animals within the framework of the constitutional order by means of legislation and … by means of executive power and the administration of justice'.[125] This provision is not part of the fundamental rights guaranteed in the *Grundgesetz*. Instead, it is a 'State objective' that has a binding effect over the legislative, executive and judicial branches as a *target* without prescribing the means by which such an objective can be concretely achieved.[126] The *Grundgesetz*, therefore, does not contain a subjectively enforceable fundamental environmental right. However, Article 20a GG together with the reformulation of certain dogmatic principles of legal interpretation have imposed a quasi-obligation on the State to consider environmental issues in the exercise of State power insofar as they relate to the *core interests* contained in other fundamental rights. This epitomizes the tension between the individualized impairment of rights doctrine and the objective interests imposed by climate change, which affect the life chances of all humans and reach beyond the 'epistemological individualism of Classical Liberalism'.[127]

Within legal and academic circles, the precautionary principle (*Vorsorgeprinzip*) remains a particular point of contention in the area of rights-based environmental litigation.[128] The precautionary principle holds that where the potential for irreversible ecological harm exists, anticipatory measures should be enacted to prevent such harm from occurring. Furthermore, a lack of scientific certainty as to the extent or likelihood of such harm should not lead to the postponement of cost-effective preventative measures.[129] In terms of specific environmental protection measures, the principle can be seen in Germany's Federal Emissions Protection Law (BImSchG), which mandates for certain plant operators that '[p]recaution will be taken against harmful effects on the environment, … significant disadvantages and significant nuisances, in particular by means of state of the art techniques'.[130] Significant here is the emphasis on the avoidance of emission risks unrelated to individual incidents and the placement of responsibility on plant operators without setting a concrete standard.[131] As such, it gives administrative authorities the competence to prevent certain economic activities in the public interest based on an abstract concept of precaution. The precautionary principle is furthermore understood to be, in an 'indeterminate' fashion, derivable from Article 20a GG.[132] Therefore, it does to some extent also relate to a public participatory form of EPIL insofar as it factors into the teleological interpretation of fundamental rights or other individual public rights when scrutinized through judicial review. As a principle that emphasizes 'objective value decisions' over the 'subjective' quality of fundamental rights, the precautionary principle demonstrates the adaptability of the German legal system to the changing social and economic conditions accompanying environmental reform.[133]

Article 20a GG is furthermore related to what has been described as the 'objective-legal value of the *Grundgesetz*' (*objektivrechtlichen Wertentscheidung des Grundgesetzes*). This teleological principle imbues fundamental rights with a purpose that not only protects the subjective interests of individuals against public authority but also at the same time guarantees the protection of posterity through certain objective considerations such as the protection of the environment.[134] This doctrine is not explicitly contained within the constitution itself but has instead been developed through the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) by way of teleological interpretation of fundamental rights.[135] However, as has been previously argued in the context of China, it is not sufficient to formalize objective criteria relevant to the environmental public interest within the legal system. The 'reifying' effect of law takes place when 'forms of social coordination and domination are backed by formalized and anonymous legal power'.[136] The motivating force behind the consideration of public interest in environmental litigation is deeply intertwined with environmentalism as a social justice movement. Law, as a form of 'institutionalized deliberation',[137] must be able to create space for the initiatives of environmentally conscious social actors. This once again emphasizes that the question of legal standing is central to the development of EPIL.[138]

Academic consensus in Germany increasingly considers environmental law to have pushed the boundaries of legal theory and practice, with the dogmatically rigid concept of the individual public right having partially been broken up.[139] A new openness to public participation in environmental law is at times difficult to reconcile with the formalistic jurisprudence underlying the theory of individual public rights. Nevertheless, leading jurisprudence increasingly applies objective considerations to the interpretation of individual public rights, often with reference to Article 20a GG, thereby equating the protection of individual public rights with the duty of the State to protect the public interest.

[124]Krüper (n 21) 113.
[125]GG (n 123) art 20a.
[126]S Schlacke, *Umweltrecht* (8th edn, Nomos 2021) 61.
[127]ID Balbus, 'The Concept of Interest in Pluralist and Marxian Analysis' (1971) 1 Politics and Society 151.
[128]Krüper (n 21) 19.
[129]M Feintuck, 'Precautionary Maybe, but What's the Principle? The Precautionary Principle, the Regulation of Risk, and the Public Domain' (2005) 32 Journal of Law and Society 371.
[130]§ 5 Abs. 1 S. 1 Nr.2 BImSchG.
[131]Krüper (n 21) 65.
[132]ibid 42–43.
[133]ibid 45.
[134]M Kloepfer, *Umweltschutz und Recht: Grundlagen, Verfassungsrahemen und Entwicklungen* (Duckler & Humblot 2000) 18.
[135]HD Jaras, 'Grundrechte als Wertentscheidungen bzw. Objektivrechtliche Prinzipien in der Rechtsprechung des Bundesverfassungsgerichts' (1985) 110 Archiv des öffentlichen Rechts 363.
[136]T Hedrick, 'Reification in and through Law: Elements of a Theory in Marx, Lukács, and Honneth' (2014) 13 European Journal of Political Theory 178.
[137]J Habermas, 'Paradigms of Law' (1996) 17 Cardozo Law Review 771.
[138]Schlacke (n 126) 69.
[139]ibid 62.

4.2 | EU legislation and the introduction of representative environmental action under German law

The increasing importance of EU (environmental) law in Germany, referred to as 'Europeanization',[140] has long been recognized within academic discourse. The effect of EU law on the German administrative system has been particularly significant, leading some scholars to prognosticate a 'new administrative jurisprudence' corresponding to the 'developmental openness'. Europeanization has infused into the legal system.[141] Significant EU legalization relating to public participation in environmental governance arose from the translation of the Aarhus Convention into EU law. An emerging body of transnational environmental law has emphasized the role that NGOs play in raising awareness over environmental issues through public interest litigation.[142] Significantly, following Principle 10 of the Rio Declaration,[143] the Aarhus Convention defines the *public concerned* as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making …'.[144] Article 2(5) then continues to state that 'for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'.[145]

Trianel is an example of an EU case relevant to Germany's system of judicial review. The parties involved were Friends of the Earth Germany, a well-established NGO, and the *Bezirksregierung Arnsberg*, a local government authority.[146] The case concerned an authorization issued by the *Bezirksregierung Arnsberg* for the construction and operation of a coal-fired power plant. The key question raised was whether Article 10a of Directive 85/337 allows NGOs to rely by way of judicial review on a rule that is oriented towards the public interest and does not have a 'subjective' right conferring function.[147] The Court of Justice of the European Union held that

> organisations must be able to rely on the same rights as individuals, it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organisations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest.[148]

The norm in question was contained in the 2006 *Umwelt-Rechtsbehelfsgesetz* (UmwRG) that implemented Directive 2003/35 into German law.[149] Section 2(1) UmwRG allowed for NGOs to bring an action without being required to maintain an impairment of its own rights.[150] However, Section 2(5) held that actions could only be brought if a decision infringed legislative provisions that confer individual rights.[151] Following the decision, the UmwRG was amended and no longer includes the requirement for NGOs to litigate against the infringement of an individual public right.[152] This landmark decision extended the legal powers of NGOs to claim infringement of environmental protection regulations arising from EU law—including those that only protect the interests of the general public and not the legal interests of individuals.

4.3 | Challenging the constitutionality of environmental legislation in Germany

On 24 March 2021, the Federal Constitutional Court ruled that the Federal Climate Change Act was incompatible with Germany's fundamental rights as it lacked sufficient provisions for the further reduction of greenhouse gas emissions from 2031 onwards.[153] The legislature was ordered to enact provisions no later than 31 December 2022 on the updating of emissions reduction targets after 2031 until the point when carbon neutrality is achieved.[154] The case was significant for several reasons. For one, it is reflective of an international trend of fundamental rights-based challenges in the environmental public interest.[155] Commentators have furthermore highlighted the Federal Constitutional Court's incorporation of a 'planetary perspective',[156] by which the court relied on leading global climate science including the issue of so-called 'tipping points'.[157]

The case has been described by German scholars as a 'revolutionary' change in both procedural and substantive terms.[158] The case was brought by a number of children, adolescents and young adults, including two natural persons living in Nepal and Bangladesh, as well as two environmental NGOs. The case involved a total of four constitutional complaints, only one of which was successful. However, in

[140]RH Liu, 'Europäisierung des deutschen Umweltrechts' (Marburg University 2008).
[141]JP Schaefer, *Die Umgestaltung des Verwaltungsrechts* (Mohr Siebeck 2016) 214.
[142]Mangold (n 9).
[143]Rio Declaration on Environment and Development in 'Report of the United Nations Conference on Environment and Development' UN Doc A/CONF.151/26 (vol I) (12 August 1992) Principle 10.
[144]Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention) art 2(5).
[145]ibid.
[146]Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, ECLI:EU:C:2011:289 para 11.
[147]E Kružíková, 'Implementation of Public Participation Principles: Experience of the EU' in G Bandi (ed), *Environmental Democracy and Law: Public Participation in Europe* (Europa Law Publishing 2014) 141.
[148]Case C-115/09 (n 146) para 46.
[149]Directive 2003/35 of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17.
[150]§ 2(1) UmwRG, BGBL. 2006 I 58.
[151]ibid.
[152]I Pernice, 'Umweltvölker- und europarechtliche Vorgaben zum Verbandsklagerecht und das System des deutschen Verwaltungsrechtsschutzes Beobachtungen zur Rechtsentwicklung im Mehrebenenverbund' (2015) 70 Juristen Zeitung 967.
[153]Bundesverfassungericht, 'Constitutional Complaints against the Federal Climate Change Act Partially Successful' (29 April 2021) <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>.
[154]ibid.
[155]HP Aust, 'Climate Protection Act Case, Order of the First Senate' (2022) 116 American Journal of International Law 150.
[156]LJ Kotzé, 'Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?' (2021) 22 German Law Journal 1423.
[157]TM Lenton et al, 'Climate Tipping Points: Too Risky to Bet against' (2019) 575 Nature 592.
[158]Christian Calliess, 'Das "Klimaurteil" des Bundesverfassungsgerichts: "Versubjektivierung" des Art. 20a GG?' (2021) 6 ZUR 355.

the tradition of environmental activism, each of the four claims can be seen as a strategic attempt to test the limits of rights-based environmental litigation and thus even the failed complaints were significant. The two NGOs were denied legal standing in their claim, in which they acted as 'advocates of nature', to argue on the basis of Article 2 (1) GG in conjunction with Article 19(3) and Article 20a GG in the light of Article 47 of the EU Charter of Fundamental Rights that the legislator had failed to act on binding requirements under EU law to protect the natural foundations of life.[159] Although Article 19(3) of the *Grundgesetz* stipulates that fundamental rights also apply to domestic legal entities 'insofar as they are applicable to them by their nature',[160] claimants must still demonstrate that they have been infringed in their own rights. Standing for altruistic claims as an 'advocate of nature' cannot be constitutionally derived. NGOs in this case failed to replicate the success of altruistic claims in the Netherlands, and the Federal Constitutional Court remained true to the constitutionally anchored principle of individual rights protection.[161] Neither would the Federal Constitutional Court accept standing based on a fundamental right to an 'ecological minimum standard of living' for future human and non-human life, consistent with the concept of human dignity guaranteed under Article 1(1) GG and the State objective to protect the natural basis of life under Article 20a GG.[162] However, in a broad interpretation of standing requirements, the petitioners from Bangladesh and Nepal passed the threshold of admissibility.[163] The complaints of the petitioners outside of Germany were eventually turned down because of national sovereignty limiting the possibility for the German State to afford protection to people living abroad.[164] However, the court emphasized the responsibility of the German legislature, derived from international law, to address greenhouse gas emissions whose effects are often most felt in countries located in the Global South.[165] Furthermore, the court stated in the context of altruistic claims by NGOs that the environmental protection mandate in Article 20a GG would 'obviously have a greater impact if its enforcement were strengthened by the possibility of seeking legal protection before the Federal Constitutional Court'.[166] Important to recognize here is that even in relation to those claims which were unsuccessful, the Federal Constitutional Court extended standing for fundamental rights by acknowledging that climate change is a global phenomenon that affects everyone; complicated the State's duties arising from constitutionally enshrined fundamental rights by reference to international law; and mooted the benefits of a constitutional change allowing for altruistic claims by individuals or NGOs through Article 20a GG.

Even in relation to the single successful constitutional complaint, the court did not find that the Federal Climate Change Act (KSG) presently or previously infringed upon the fundamental rights of the complainants. The unconstitutionality of the norms in question was derived by way of the 'intertemporal dimension' of fundamental rights—a doctrinal innovation.[167] Because the permissible greenhouse gas emissions until 2030,[168] set out in the Federal Climate Change Act, are overly generous, the German complainants are threatened with massive restrictions for the period after 2030, likely to become necessary when the government has to impose draconian measures to rapidly transition towards net zero.[169] This formulation builds on the precautionary principle recognizable in Article 20a GG and allows the court to review the effectiveness of State protective measures insofar as these relate to the 'objective dimension of fundamental rights'.[170] Because the court reviewed this objective dimension with reference to Germany's obligations under the Paris Agreement,[171] they extensively drew on sources of authoritative global climate science, specifically the Intergovernmental Panel on Climate Change (IPCC) Special Report on the impacts of global warming of 1.5°C.[172] This in turn is relevant to the global heating thresholds set out in the Paris Agreement.[173] The concept of precaution is concretized on a constitutional level by entangling Article 20a GG with Germany's international obligations whose implementation can be assessed by reference to leading climate science. By directly referring to climate tipping points, the court recognized the material consequences of unsustainable economic activity and thereby set an objective standard necessary to ensure the *core area* of fundamental rights is secured far into the future. This accepts the subjective interests of the plaintiffs as somewhat analogous to the objective interests implicated in the transition towards sustainability.

5 | STATE–SOCIETY RELATIONS AND THE PUBLIC INTEREST AS A BASIS FOR ENVIRONMENTAL LITIGATION. A COMPARISON OF GERMAN AND CHINESE APPROACHES

From a comparative perspective, it is interesting to note how environmental problems are framed within environmental litigation. In a sense, both Germany and China are grappling with the same issue. Both countries have highly developed manufacturing bases[174]; and both countries have committed to transitioning towards sustainability, be it through the 'State objective' enshrined in Article 20a GG[175] or the goal of achieving 'ecological civilization' found in the preamble of

[159]BVerfG, 24.03.2021–1 BvR 2656/18, Rn. 136 (*Klima Urteil*).
[160]GG (n 123) art 19(3).
[161]N Nguyen, 'Klimaschutz vs. Individualrechtsschutz: Wie sich das BVerfG um Ausgleich bemüht' (Junge Wissenschaft im Öffentlichen Recht, 7 May 2021) <https://www.juwiss.de/45-2021/>.
[162]*Klima Urteil* (n 159) Rn. 113–114.
[163]ibid Rn. 101.
[164]ibid Rn. 179.
[165]Kotzé (n 156).
[166]*Klima Urteil* (n 159) Rn. 136.
[167]Calliess (n 158).
[168]§§ 3 Abs. 1 S. 2, 4 Abs. 1 S. 3 KSG
[169]*Klima Urteil* (n 159) Rn. 123, 223.
[170]ibid Rn. 152.
[171]Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740 art 2(1)(a).
[172]IPCC, *Global Warming of 1.5°C* (IPCC 2018).
[173]K Pittel, 'The Intertemporal Distribution of Climate Policy Burdens and the Decision of the German Constitutional Court' (2021) 22 CESifo Forum 15.
[174]United Nations Industrial Development Organization, 'Germany Still Leads the World in Industrial Competitiveness, but China Is Inching Closer' (28 April 2020) <https://www.unido.org/news/germany-still-leads-world-industrial-competitiveness-china-inching-closer>.
[175]GG (n 123) art 20a.

the Chinese constitution.[176] From the Weberian standpoint of legal rationality, further similarities are apparent. Both Germany and China accept a distinction between public and private law that is instrumentalized towards the functioning of market-based economics.[177] Both countries pursue the environmental public interest through a systematic set of environmental norms implemented by an extensive administration. However, for law to be able to adapt to the changing social and economic conditions accompanying environmental reform, it must be evaluated by the relationships its laws produce and whether those relationships are based on rational discourse and accountability or something not being allowed, excluded or supressed.[178]

In the civil sphere, China's system of EPIL is not severely constrained by a legal distinction between public and private interests. By applying the standard of the environmental public interest to civil subjects, environmentally conscious social actors have some agency in directly affecting environmentally polluting economic activity. Practically speaking, this can be seen when polluting enterprises are ordered to restore the environment to its original condition after successful civil EPIL cases.[179] Furthermore, China's newly reformed Civil Code has established tortuous liability for harm to the environment itself. This stands in contrast to Germany, where it is notoriously difficult to meet causation requirements in environmental tort cases.[180] Rather than taking a tort-law based approach, German law offers a separate regulatory pathway for compensating damage to the *environment as such* through the Environmental Damage Prevention and Remediation Act.[181] This act, which implements EU Directive 2004/35, straddles both the public and private spheres deals with environmental damages in legally defined areas such as damage to biological species, natural habitats, or water and soil.[182]

In the administrative sphere, it is important to note that Germany's system of judicial review has no direct equivalent to the procuratorate in China's system of administrative EPIL. Certainly, there are advantages to enforcing environmental law though a powerful and centralized agency. It has been shown that the procuratorate has become the mainstay of EPIL in China. The procuratorate can quickly address suspected cases of environmental mismanagement through pre-litigation proceedings without having to resort to costly and time-consuming lawsuits. The lack of transparency surrounding these proceedings, however, makes it difficult to assess the extent to which they improve government accountability. China also allows for individual litigants to contest state acts that infringe upon their subjectively enforceable rights. However, individual rights-based judicial review in China based on the EPL is more restrictive than its German counterpart, precluding for instance the ability to 'strike down' legislative acts and lacking a separate administrative court system.[183] Administrative judicial review in Germany meanwhile offers an opportunity for activism, which can help establish a new social consensus on the extent to which the State is obliged to consider certain objective interests related to the transition towards sustainability. It is noteworthy, for instance, that the Federal Constitutional Court in its judgement on the constitutionality of Germany's emissions reduction targets stated:

> In order to achieve climate neutrality in our current way of life – including in activities as common and mundane as the construction and utilisation of new buildings or the wearing of clothes – fundamental changes and restrictions are needed in patterns of production, consumption and everyday activity.[184]

Nevertheless, rights-based judicial review could be expanded in Germany by allowing NGOs standing to litigate as 'advocates of nature', thereby extending the subjectivity of rights beyond the mythical Kantian autonomous individual[185] and towards the environmental goods which are the subject of human activity.[186] In China, the institutional conditions for substantive legal discourse could be improved by increasing the transparency of pre-litigation procedures. One option may be an amendment to the ALL requiring a report to be made publicly available detailing the corrective action taken in the aftermath of pre-litigation proceedings within a certain timeframe.

6 | CONCLUSION

The treatment of environmental issues requires the law to be able to rely on objective criteria. The use of objective criteria in environmental law is an act of recognition by a law-making authority. The State recognizes the material consequences of unsustainable economic activity such as pollution levels or greenhouse gas emissions because they represent an existential threat to humanity and therefore require a rational authority to implement reforms that regulate economic activity to achieve environmental sustainability. This can be seen in Germany's legally binding commitment to net zero. China too has undertaken a programmatic series of reforms aimed at achieving ecological civilization.

Both Germany and China are, in a Weberian sense, modern States with highly rationalized legal systems and an extensive administration. Both countries employ a formally rational legal system to provide what Weber termed a 'calculable normative order' instrumental to

[176]NPC Observer, 'Annotated Translation: 2018 Amendment to the P.R.C. Constitution' (11 March 2018) <https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/>.
[177]X Yu, 'State Legalism and the Public/Private Divide in Chinese Legal Development' (2014) 15 Theoretical Inquiries in Law 27.
[178]G Frankenberg, *Autoritarismus: verfassungstheoretische Perspektiven* (Suhrkamp 2020) 69.
[179]Xie and Xu (n 61).
[180]M Wandt, 'Liability for Environmental Damage and Insurance Coverage under German Law' (2020) 109 Zeitschrift für die gesamte Versicherungswissenschaft 209.
[181]Umweltschadensgesetz in der Fassung der Bekanntmachung vom 5. März 2021 (BGBl. I S. 346).
[182]Wandt (n 180).
[183]W Cui, J Cheng and D Wiesner, 'Judicial Review of Government Actions in China' (2018) 1 China Perspectives 35.
[184]*Klima Urteil* (n 159) Rn.37.
[185]I Kant, 'On the Proverb: That May Be True in Theory, but Is of no Practical Use (1793)' in T Humphrey (translator), *Perpetual Peace and Other Essays* (Hackett 1983) 61.
[186]GJ Gordon, 'Environmental Personhood' (2019) 43 Columbia Journal of Environmental Law 49.

the functioning of market-based economics,[187] while simultaneously regulating economic activity based on a utilitarian calculus that considers objective criteria oriented towards the public interest. This currently holds true regardless of whether law operates within the theoretical framework of market socialism in China or the social market economy in Germany.

However, the recognition and treatment of environmental problems through law cannot be separated from environmentalism as a social justice movement. The meaning of the public interest itself must be open to negotiation through an inclusive rational-critical discourse between the State and its subjects. EPIL in this respect holds an emancipatory potential as it allows environmentally conscious social actors to affect, through legal argumentation, the practical implementation of environmental reform. EPIL as an example of public participation in environmental law echoes Habermas' recognition that power cannot be separated from public discourse. The discursive legal paradigm of EPIL reflects the markedly different characteristics of legal ideology in Germany and China.

In Germany, environmental rights-based litigation has led to dogmatic innovations in the interpretation of constitutionally enshrined rights. By imbuing fundamental rights with an objective content, the antimony between the subjective interests of right bearers and the objective interests of society is narrowed. Because the scope of environmental rights-based litigation can contest both administrative acts and environmental legislation itself, institutional conditions exist in which environmental activists can substantively affect the pace of environmental reform. Although the reach of legal discourse over environmental issues in Germany is substantial, the vestiges of the individual public right still can represent a barrier to public participation in environmental law. A re-orientation of Article 20a GG towards the protection of ecological assets through environmental advocacy by NGOs would be a significant improvement in this respect. Because of the highly formalized distinction between public and private interests in German law, the dogmatic shift in the individual public right has not found application in the civil sphere. Nevertheless, both Germany and China have implemented laws to hold private entities liable for the environmental harms they produce, with the appropriate scope and definition of environmental harm being a point of contention in both countries.

Unlike Germany, China has explicitly introduced a legal framework of EPIL through the recently reformed EPL in conjunction with the CPL and ALL. By relating the achievement of ecological civilization to the concept of public participation, the State has recognized that civil society organizations can play a role in improving issues in environmental governance. That this development was in part motivated by incidents of public unrest demonstrates that EPIL is instrumental to the legitimacy of the entire system of law-based environmental governance. EPIL in the civil sphere is open to participation by NGOs with the procuratorate often playing a constructive supporting role. However, despite high case numbers, administrative EPIL reflects the CCP's unwillingness to allow society at large to contest environmental mismanagement by administrative authorities through the courts. Reforms could be aimed at improving the transparency of administrative EPIL, particularly in relation to what corrective action is taken in the aftermath of pre-litigation proceedings.

DATA AVAILABILITY STATEMENT

The data that support the findings of this study are available in China Environmental Judicial Development Report" (Green Book) and Press Conference on Typical Cases, at <https://www.court.gov.cn/hudong-xiangqing-145072.htm>.

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[187] Trubek (n 4).