The ecologization of the Chinese Civil Code

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Although the emergence of sustainability development in civil law has triggered substantial discussion, scarce literature is available in English on the introduction of ecological norms to the newly promulgated Chinese Civil Code, which came into force at the beginning of 2021. This article intends to fill the gap by providing an overview of the structure and significance of the principles and rules designed to render the Civil Code more adaptable to the global urgency of sustainable development. The ecological principle added to the Civil Code is designed to promote public interests rather than individual liberty. Unlike other civil law principles, the ecological principle needs to be scientifically justified, which no longer depends only on judicial discretion. Regarded as a continuation of the movement for socialization, the ecological principle contributes to the global trend of questioning anthropocentrism in law and manifests itself in a new understanding of human activity. Ecologizing the Civil Code entails a methodological agenda that incorporates more pragmatic, coherent, and policy-oriented argumentation in judicial practice. Moreover, it entails an ontological agenda, still in formation, that urges us to recognize the inevitable connections between human and nonhuman worlds on the ontological side. Within the scope of this principle, the section of the Civil Code on property law imposes the duty to act in accordance with the necessity of resource conservation and environmental protection. It is also predictable that stricter limitations will be imposed on property rights, in the name of good neighborliness. State intervention by courts due to ecological considerations will become more frequent in contractual disputes. Finally, the Code introduces the notions of punitive liability and pure environmental harm, which diverge from the classical continental tradition of understanding civil liability. Despite the theoretical novelties, the question of to what extent civil adjudication can achieve a comprehensive ecological transformation still needs to be scrutinized.

Keywords: ecological principle, pragmatism, state intervention, private autonomy, punitiveness, environmental protection, resource conservation.

Introduction

When investigating the transformation of private law in the 21st century, it is difficult to overestimate the challenges to many fundamental aspects of modern law that are provoked by consciousness of the decisive impact of human activity. According to eminent French philosopher Michel Serres, modern law must undergo substantial transformations to adapt to the new social necessities[1]. Scholars from many jurisdictions and domains — from environmental law to international law, from administrative law to property law — have taken action to identify the necessary changes[2].

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[1] *Serres M.* Le droit peut sauver la nature // Pouvoirs. 2008. No. 127. P. 8.

[2] See, in general: *Viñuales J.* The Organisation of the Anthropocene: In Our Hands? Leiden: Brill, 2018; *Biber E.* Law in the Anthropocene epoch // The Georgetown Law Journal. 2017. Vol. 106 (1). P. 1–68; *Grimonprez B.:* 1) La Fonction Environnementale de La Propriété // Revue Trimestrielle de Droit Civil. 2015. No. 3. P. 539–550; 2) Le droit de propriété à l'ère du changement climatique // Le Changement Climatique:

It is in this context, a rising global eco-awareness in law, that Article 9 of the newly promulgated Chinese Civil Code enters the scene[3]. This clause, the ecological principle (or, as it is more commonly known, the "green principle")[4] announces, "when undertaking civil activities, the subjects of the law shall take into consideration the necessity of resource conservation and environmental protection"[5]. The reception of this principle has been far from universal among Chinese legal scholars. Though often praised by environmental lawyers as a unique contribution of Chinese civil law doctrine[6]. the integration of ecological consideration is sometime resented by civil lawyers, either as a black sheep that troubles the purity of the civil law system[7] or as a repetition of the principle of *ordre public*[8]. No matter how passionately defended or harshly criticized the ecological principle was, however, legislators have already adopted it as a fundamental principle of civil law, and the challenge for jurists is now to understand its scope and interpretation in order to achieve its purpose without jeopardizing the overall coherence of the legal system. To meet this challenge, we will elaborate the principle from a comparative perspective and document the existing cases in which relevant provisions have been applied. We believe that the value of such efforts, because they fuel reflection on how a philosophical shift can contribute to the law's increasing ecological focus without relying on an excess of legislative endeavors, shall transcend the boundaries of China and civil law.

The main body of this article is organized into two parts. In the first, we will elaborate the methodological and ontological shifts pointed to by the ecological principle within the global trend of eco-consideration in civil law. The second part will identify the new rules introduced in various books of the Civil Code implement this principle, as well as the potential changes to the interpretation of existing rules that the principle may inspire. The domains most central to our examination are property law, contract law, and civil liability. This research is at once descriptive and prescriptive: it aims to reveal how judges apply the relevant provisions, and to reflect on the efficiency of these norms in "ecologizing" civil law. While I have addressed elsewhere the perspective of "ecological consideration" — taking account the well-being of nonhuman beings for their own sake — that Article 9 encompasses[9], I here use "ecologizing" in a different way. Inspired mainly by Bruno Latour, I use this term to refer to an agenda that refutes the artificial boundaries that the process of modernization has created between law, politics, and science and aims to rejuvenate the uncertain relationships of subordination among human and nonhuman beings[10].

Quel Rôle Pour Le Droit Privé? Paris: Dalloz, 2019. P. 243–254. Available at: https://hal.archives-ouvertes.fr/hal-01882843 (accessed: 01.12.2021).

[3] Article 9 and the other clauses of the General Provisions have been valid since 2017, while the Civil Code is promulgated in May, 2020.

[4] We do not endorse this nickname, though green has become the visual identification of ecological movement. Nature has more colors than the fifty shades of green.

[5] Since there is not yet an official translation of the Chinese Civil Code, the cited clauses are translated by the author.

[6] 参见吕忠梅课题组：《"绿色原则"在民法典中的贯彻论纲》，载《中国法学》2018 年第1期，第5–27页。[*Lv Zhongmei* (ed.) Implementation outline of the Green Principle in the Civil Code // China Legal Science. 2018. No. 1. P. 5–27.]

[7] 苏永钦：《现代民法典的体系定位与建构规则》，载《交大法学》（第1卷），上海交通大学出版社2011年版，第59–93 页。[*Su Yongqin.* The systematization and rules of construction of modern Civil Codes // Shanghai Jiaotong University Law Review. 2010. No. 1. P. 59–93.]

[8] 尹田：《民法基本原则与调整对象立法研究》，载《法学家》2016年第5期，第10–19页。[*Yin Tian*. Review on "Basic Principles" (Chapter 1) of General Principles of Civil Code // Jurist. 2016. No. 5. P. 10–19.]

[9] 朱明哲：《生态原则与民法的当代转型》，《学术月刊》2020年第6期，第84–97页。[*Mingzhe Zhu*. Sustainability and the ecological turn of contemporary civil law // Academic Monthly. 2020. No. 6. P. 84–97.]

[10] *Latour B.* To modernize or to ecologize? That's the question // Remaking Reality: Nature at the Millenium. London; New York: Routledge, 1998. P. 221–242.

1. Philosophical Significance of the Ecological Principle

Hardly to be found in other civil codes, the seemingly revolutionary ecological principle has its roots in a broader, enduring background of institutional, political, and intellectual developments within the tradition of continental legal systems. This section first identifies both the risks and methodological insights of the ecological principle. Then, we link the ecologization of law with its socialization and reveal changing presumptions of human behavior — and ultimately, perhaps, the relationship between the individual subject of the law and the other.

1.1. Pragmatic Shift and Its Risks

The adoption of the ecological principle is driven by a clear political force. The principle is considered one of the components of the Chinese response, symbolized by the promotion of "ecological civilization", to the international urgency of exploring ways of sustainable development. Remotely recalling the "ecological culture" of the USSR, "ecological democracy" of the UK[11], and no doubt many other currents of political ecology, the idea of ecological civilization entered the Chinese context in 2007, when the 17th National Congress of the Chinese Communist Party identified its construction as one of the Party's explicit goals[12]. In 2018, "ecological civilization" was adopted into the preamble of the Chinese Constitution, and it now appears in both the most recent five-year plan and the title of the 2020 Biodiversity Conference. The political will that supports ecological civilization — and the ecological principle as a component thereof — aims observably towards sustainability in light of the socio-environmental challenges of the 21st century. Worded in a more theoretical, Dworkinian language, the ecological principle is in fact no more than a policy disguised as a principle: it aims to promote public interests, rather than individual liberty, and is rooted in deliberate design, rather than in the integrity of the "chain novel" of common law jurisprudence, as it is cooperatively and organically developed[13].

Chinese legislators, however, are not Dworkinian, and they seem to be comfortable granting the status of "fundamental principle" to whatever norm suits them, regardless of ongoing doctrinal disputes. Article 9 is a perfect example of this. The magnitude of this clearly policy-oriented clause exceeds the justification of certain rules or the alteration of the interpretations of others; it lies mainly in the potential that a pragmatic approach to legal reasoning is being legitimized, if not encouraged. Civil law doctrine in the continental tradition has been long characterized by its attachment to a certain degree of dogmatism[14]. This approach has been said to stress the objective meaning of the legal order itself, not the life or subjective perception of the law, which are subjects of the "social theories"[15]. The degree of dogmatism varies across jurisdictions and depends on a num-

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[11] *Gare A.* From "Sustainable development" to "Ecological civilization": Winning the war for survival // Cosmos and History: The Journal of Natural and Social Philosophy. 2017. Vol. 13 (3). P. 130–153; *Morrison R.* Ecological Democracy. Boston, MA: South End Press, 1995.

[12] *Zhang Z.* Climate mitigation policy in China // Climate Policy. 2015. No. 15 (sup1). P. S1–S6; *Pan J.* China's Environmental Governing and Ecological Civilization. Berlin; Heidelberg: Springer-Verlag, 2016; *Bachtell J.* Toward ecological civilisation // The Guardian. 2018. September 12.

[13] *Dworkin R.* Law's Empire. Cambridge: Harvard University Press, 1986. P. 176–225.

[14] I use the term "dogmatic/dogmatique/dogmatic" as it is defined by Robert Alexy, which consists of three aspects: 1) the description of the valid laws; 2) the conceptual-systematic research of them; and 3) the elaboration of proposals for solving problematic legal cases (*Alexy R.* Theorie Der Juristischen Argumentation. Berlin: Suhrkamp, 2001. S. 308).

[15] Cf.: *Radbruch G.* Rechtsphilosophie. Heidelberg: Hüthig Jehle Rehm, 2003. Ch. 15.

ber of factors[16]. Still, it is safe to say that law students in this tradition are more preoccupied with appreciating its systematic coherence than with assessing a given solution's practical outcomes[17].

Article 9's stipulation of resource conservation and environmental protection suggests that pure dogmatic reasoning is no longer favorable. It allows a party to argue that her proposition is the eco-friendlier one, and the judge may, whenever such an argument is raised, measure the environmental impacts of the different legal propositions. Unlike more widely accepted principles such as those of autonomy, equality, or good faith, which are often subject to the adjudicator's free evaluation of evidence, the ecological principle demands that falsifiable arguments be presented and verified with objective proof. Recently, Chinese courts have developed the habit of soliciting environmental-science experts in litigation concerning pollution or biodiversity loss. It is reasonable to presume that judges in civil actions will also rely more heavily on consequentialist arguments of physical necessity are founded upon scientific evidence and the purpose of Article 9. Indeed, as we will demonstrate in the following sections, judges are, increasingly, adapting this model of reasoning already. One can hardly think of occasions other than civil cases with environmental impacts that are more perfectly suited to pragmatic calculation. Such evaluation has a clear purpose, though one whose concrete content remains still arguably vague: environmental protection. Further, a series of complex algorithms and models may serve to calculate the impact of any proposition. The ecological principle, therefore, creates more room for pragmatism in a domain allegedly dominated by dogmatism[18].

The introduction of this principle to the Civil Code marks an epistemological transformation that urges us to think of law primarily as a means to an end, as opposed to a set of categorical ethical imperatives. Even if one can accept this transformation without too much struggle, it is nonetheless accompanied by unignorable risks. That it may jeopardize individual autonomy in civil activities is perhaps the most obvious one[19]. Also, considering the Chinese judiciary's function of policy implementation[20], the recognition of nature in the most significant legislative text of the Xi administration threatens visible impacts on daily judicial practice. Needless to say, this principle opens the door to increased state intervention in private life. In its most radical form, the ecological principle can require that every rule must be interpreted in the eco-friendliest way, which leaves very little room for individuals to organize their lives according to personal preferences. But I suspect no scholar would actually endorse this reading. Experience with the socialization of private law has already taught civil lawyers how to preserve the notion of private autonomy while still, for the collective good, imposing some restrictions on individual choice[21]. If the threat to autonomy is a devil, it is the devil we know only too well.

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[16] For the cases of France and East Asia, see: *Jestaz P., Jamin C.* La doctrine. Paris: Dalloz, 2004; Juristische Methodenlehre in China Und Ostasien / Hrsg. Yuan Shibu. Tübingen: Mohr Siebeck, 2016.

[17] Cf.: *Jamin C.:* 1) Les habitudes d'enseigner / Les habitudes du droit / éd. N. Dissaux, Y. Guenzoui. Paris: Dalloz, 2015. P. 91–98; 2) L'enseignement Du Droit à Sciences Po : Autour de La Polémique Suscitée Par l'arrêté Du 21 Mars 2007 // Jurisprudence. Revue Critique. 2011. No. 1. P. 125–137.

[18] Some might rightly argue that the other principles, such as autonomy, good faith, and ordre public have also their pragmatic origines. But these origins are remote and hard to detect. It will be interesting to see if the ecological principle will lose its pragmatic aspect in the subsequent developments of civil law doctrine and become a dogma. See: *Jouffroy T.* Comment les dogmes finissent // Globe. 1825. T. 2, No. 111.

[19] 樊勇：《私人自治的绿色边界》，《华东政法大学学报》2019年第2期，第116–123页。[*Yong Fan*. The Green boundaries of private autonomy // Eastern China University of Political Science and Law Journal. 2019. No. 2. P. 116–123.]

[20] Cf.: *Damaska M.* The Faces of Justice and State Authority: A Comparative Approach to the Legal Process. New Haven: Yale University Press, 1986. P. 88.

[21] Cf.: *Charmont J.* La socialisation du droit // Revue de Métaphysique et de Morale. 1903. Vol. 11 (3). P. 380–405; *Josserand L.* De l'esprit des droits et de leur relativité. Paris: Dalloz, 1927; *Mages A.* La so-

The devil that civil lawyers know less well — and therefore the more dangerous one — is the risk that the so-called "green" clause will amount to little more than greenwashing. Similar critiques have been raised against other aspects of ecological civilization[22]. Worse yet, apparently bold reforms that aim to enforce environmental protection can eventually become powerful tools of misdirection and deception[23]. In practice, fraudulent citations of the ecological principle are not uncommon. In a case where a supplier of anti-pollution equipment failed to meet the buyer's quality requirements, the court should simply have ruled against the former by virtue of the precise rules governing the quality of goods in the execution of sales contracts; in reality, Article 9 was at the heart of the court's ruling[24]. In other cases, too, judges rushed to resolve contracts by citing the ecological principle, failing to consider the conditions of resolution prescribed by the relevant rules or to weigh the environmental impacts of different solutions.

To prevent greenwashing, or at least to distinguish between the use and abuse of Article 9, we must not be satisfied by merely identifying pragmatism as the epistemological orientation of the ecological principle. We must also reveal the new ontology that emerges in the process of ecologization.

1.2. Ontological Transformation

The ecological principle also suggests a renewed worldview on the nature of human activities and the relationship between the individual and the other. The ecologization thesis is both continuous with and transformative of the developments of private law that arose from socio-political disturbances after the late 19th century. On the one hand, it carries on the business of the socialization movement by refuting the notions of the atomic individual and the neutrality of private transactions. On the other hand, it transcends the scope of the previous revolutions of private law by advocating that the law's subjects have a duty not only to their fellow members of society but also to nonhuman beings with whom they share a common habitat: the earth.

The philosophical stance that dominated the "long 19th century" of codification conceives of human activities as abstract, shallow, neutral, and value-free. From this perspective, a transaction is neither good nor evil in itself. Some transactions, under certain circumstances, may harm other subjects of the law, but the law needs only to deal with these adverse externalities to the extent that it internalizes them[25]. Transactions of the externality-causing sort shall be carried on in a different setting in the future, and there is no reason to ban any transaction unless doing so is provided for by law[26]. These neutral and abstract activities are carried out by subjects of the law who are reasonable, abstract, equal, and who shall be treated only as ends in themselves, not as means to something

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cialisation du droit privé à Lyon (1870–1940) marque-t-elle la fin des droits subjectifs? // L'histoire des facultés de droit de province / éd. J. C. Gaven, F. Audren. Toulouse: Presses Universitaires Toulouse, 2011. P. 363–383.

[22] Many researchers criticize China for branding its "Belt & Road Initiative" green but just greenwashing. Cf.: *Harlan T.* Green Development or Greenwashing? A Political Ecology Perspective on China's Green Belt and Road // Eurasian Geography and Economics. 2020. Vol. 62 (2). P. 1–25.

[23] *Wang A. L.* Symbolic legitimacy and Chinese environmental reform // Environmental Law. 2018. Vol. 48, No. 4. P. 699.

[24] "浙江润洁环境科技股份有限公司与山东百伦纸业有限公司买卖合同纠纷案"，莱芜中级人民法院（2018）鲁12民终27号判决书。[Zhejiang Runjie Ltd v. Shandong Bailun Ltd, Intermediate Court of Laiwu. 2018.]

[25] *Capra F., Mattei U.* The Ecology of Law: Toward a Legal System in Tune with Nature and Community. Oakland: Berret-Koehler Publ., 2015. P. 101.

[26] *Viñuales J.* The Organisation of the Anthropocene. P. 3.

else[27]. Equal, reasonable, and ethical persons enjoy the largest freedom to dispose of their property, to conclude contracts according to nothing but their own will, and to bear liability when they are at fault; the law's intervention, when it occurs, shall only ever be an exception. Under quills guided by this Enlightenment philosophy of atomic, ethical human beings were penned Article 544 of the *Code civil des français* and the § 903 of Germany's civil code, the *Bürgerliches Gesetzbuch* (BGB). The subjects of the law, for as long they possess property, are that property's sovereigns — even its tyrants. The notion of neutral transactions, best represented by the absoluteness of ownership, remained unchallenged during the 19th century. Both the French notion of *bon voisinage* and the German rule on *Zuführung unwägbarer Stoffe* (§ 906) entail foremost the neighbor to tolerate the deeds of the property owner[28]. The law's subjects, in the realm of 19th-century civil law doctrine, are at the same time vicious masters of nature and tolerant neighbors.

The 19th-century image (*Bild*, in German) of the law's subjects and their transactions is the product of the logic of modernization, which has also produced a series of "empty and homogeneous" concepts: territory, time, market, state, etc.[29] However, the modernist, mechanical way of envisioning the world met with serious resistance precisely when modernization was advancing with the highest speed.

Just at the dawn of the 20th century, this notion of neutrality — this indifference to the distributive outcomes of adjudication — was under attack in a wave of socialization of private law[30]. Adverse externalities of transactions were no longer trivial, only to be dealt with in rare occasions. Individual autonomy remained broad, but it would not be taken for granted. Doctrinal authorities began to question the *raison d'être* of ownership and concluded that owners would dispose of their property in the pursuit of certain genuine interests[31]. Under this view, if owners seek some concrete personal interest and cause no harm to neighbors, then their sovereignty over the property is beneficial to the society[32]. On the one hand, scholars in the early 20th century moved toward a refusal of "mechanical jurisprudence" and emphasized the social dimension of private law[33]. On the other, they realized the absurdity of regarding transaction as solitary events in a vacuum, insisting that the legal categorization of a transaction is not possible without considering its outcomes and causes. If there is any doubt about the accomplishments of this movement, it is sufficient to recall the revisionary and interpretative history of § 906 BGB, in the course of which the interest in a healthy neighborhood environment gradually overcame the interest in development[34].

In addition to denouncing the neutrality notion of activity, the socialization movement also re-created the image of individuals under the law. In an industrialized society faced

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[27] *Ewald W.* Comparative Jurisprudence (I): What was It like to try a rat // University of Pennsylvania Law Review. 1995. Vol. 143 (6). P. 1889–2149.

[28] *Collart-Dutilleul F., Romi R.* Propriété Privée et Protection de l'environnement // L'Actualité Juridique. Droit Administratif. 1994. No. 9. P. 571–592; *Günter Hager.* Umweltschäden — ein Prüfstein für die Wandlungs- und Leistungsfähigkeit des Deliktsrechts // Neue Juristische Wochenschrift. 1986. Bd. 39 (32). S. 1961 usw.

[29] *Benjamin W.* Illuminations: Essays and Reflections / ed. by H. Arendt, transl. by H. Zohn. New York: Schocken Books, 1969. P. 263; *Beck U., Bonss W., Lau C.* The theory of reflexive modernization: Problematic, hypotheses and research programme // Theory, Culture & Society. 2016. Vol. 20 (2). P. 4–5; *Polanyi K.* The Great Transformation: The Political and Economic Origins of Our Time. 2nd ed. Boston, MA: Beacon Press, 2001. P. 60.

[30] *Charmont J.* La socialisation du droit. P. 380–405.

[31] *Josserand L.* De l'esprit des droits et de leur relativité.

[32] Ibid.

[33] *Pound R.:* 1) Mechanical jurisprudence // Columbia Law Review. 1908. Vol. 8 (8). P. 605–623; 2) The scope and purpose of sociological jurisprudence // Harvard Law Review. 1911. Vol. 24 (8). P. 591–619.

[34] E. g.: *Hager G.* Umweltschäden. S. 1964 usw.

with undeniable economic inequality, the conceptualization of individuals as abstract, reasonable, formally equal, and atomic could not be sustained. In the reinvention of the social, the schema of the "free, self-interested, and shrewdly calculating", "Adam- or Robinson-like person" (concurring Radbruch) ceded its position to the "collective" person of the society. At the same time, a person's gender, class, occupation, and age have been also taken into account[35]. The socialization movement has reintegrated human beings into the web of social relationships.

This movement is by no means unified, but one of its most everlasting heritages is perhaps the recognition of those connections or relationships that are omnipresent: between an individual and her social conditions and fellows; between a transaction and its causes and outcomes. In this sense, ecologizing is a continuation of this agenda, which moves against mechanical jurisprudence and toward a relational, or organic, way of constructing the world. The only novelty that distinguishes ecologization from its predecessor is its slight, hesitating, reluctant opposition to the anthropocentricism that characterizes modern law as a whole. Again, this paradigm shift is represented by its new perception of human beings and activities.

The factors that determine the legal categorization of a given transaction are not limited to its immediate impacts on other members of society; they also encompass its impacts on nonhuman beings, including those that are, for the time being, uncertain. Cases of conflict between humans and animals are uniquely revealing. When a hunter encountered — and eventually shot — a brown bear in a protective area, the necessity of self-preservation failed to justify the shooting before the French *cour d'appel*. In another case, the European Court ruled that the noise of construction should not disturb the bird habitat near the construction site[36]. Furthermore, as a new generation of climate change litigation seeks to hold liable the emitters of greenhouse gases through private law actions[37], a new notion of private activities has appeared. If parties (petroleum giants, for example) can be held responsible for transactions they conducted whose adverse impacts were unknown at the time, then the neutrality notion must be abandoned at once. If the same logic is applied to the present — that is, if an activity's potential danger is huge, even without present-day proof — restrictions on private enterprise are justifiable[38]. The absence of adequate restrictions will allow even states to be held in breach of their duties of care[39]. Under ecologization, activities are no longer empty and homogenous; each transaction is concretized and individualized by the endless various relationships that it may affect and whose nature are undetermined to us.

The world is no longer divided into human beings and their constructed entities, the subjects of the law, and nonhuman beings, the present or potential objects of humanity's sovereignty and action. In roughly a decade, the extension of the law's protection and governance to nature or its elements has become a global trend. The 2008 Constitution of Ecuador consecrates, via its Article 10, nature as the subject of the law. Further, its Article 71 solemnly declares: "Nature, or Pachamama, where life exists and is reproduced, has the right to exist and persist, and to maintain and regenerate its vital cycles, structures, functions, and evolutionary processes". In 2010, Bolivia adopted the *Ley de Derechos de*

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[35] *Radbruch G.* Du droit individualiste au droit social // Archives de Philosophie Du Droit et de La Sociologie Juridique. 1931. No. 2. P. 387–398.

[36] *Hermitte M.-A.* La nature, sujet de droit? // Annales. Histoire, Sciences Sociales. 2011. Vol. 66 (1). P. 173–212.

[37] *Ganguly G., Setzer J., Heyvaert V.* If at first you don't succeed: Suing corporations for climate change // Oxford Journal of Legal Studies. 2018. Vol. 38 (4). P. 841–868.

[38] Comp.: *Jasanoff S.* A new climate for society // Theory, Culture & Society. 2010. Vol. 27 (2–3). P. 242.

[39] ECLI:NL:HR: 2019:2007, para 5.3.2.

la Madre Tierra, recognizing "the Mother Earth" as a collective subject of public interests. "The judges' ecology" is also well spread. In India and Colombia, several groundbreaking cases grant subjecthood to animals, rivers, or forests[40]. The ancient civil law technique of fiction, or the logic of treating something as if it is a person, serves to create a reality, a legal form, that functions in an entity's own name to protect its interests[41]. The application of this technique is creating a universe in which humans and nonhumans (itself quite an anthropocentric distinction) must learn to coexist.

Therefore, a comprehensive understanding of Article 9 of the Chinese Civil Code within comparative legal history acknowledges that it symbolizes the restoration or recognition of the relationship that exists between human society and the external world, between human activity and its causes and outcomes — the very relationship that was once denied by modernity. Of course, granting nature the title of subject of the law will not automatically prevent the risk of deception. The Mother Earth clauses failed to stop the Bolivian government from licensing oil extraction in more than 60 of its national protection areas and 22 national parks in 2015[42]. Indeed, the representatives of these new subjects of the law must be competent enough to advocate for their interests. It is no less true that there must still be specific rules by which judges can implement the idea of ecologization in ordinary judicial practice.

2. Ecologization of the Rules

2.1. Property Law

The Book on Property Law, the second book of the new Chinese Civil Code, modifies the formulation of numerous provisions of the previous Law on Property and introduces some new ones as well. In addition to the duty to comply with laws, regulations, and covenants, Article 286 requires apartments or condominium owners to "act in accordance with the necessity of resource conservation and environmental protection". Similarly, Article 326, as one of the general provisions governing usufruct, stipulates that usufruct shall be exercised in accordance with the laws and regulations concerning "environmental protection and the reasonable exploitation and use of resources". This provision instructs the judge to refer to regulatory laws whose general applicability in civil actions remains a subject of debate. More specifically, Article 346 imposes a duty, when granting the right to use land for construction, to consider the need to conserve resources and ensure the protection of the ecology and environment.

An apartment owner who improperly disposes of waste in public areas or who irresponsibly wastes water and electricity could therefore give the property-management company an excuse to intervene. A rural economic collective, as the owner of a piece of agricultural land, could sue the contracting peasants, should they fail to properly preserve the productivity of the soil. The state could reclaim the right to construction if a locality's commercial or industrial development may jeopardize the habitat of an endangered spe-

[40] Animal Welfare Board of India v. A. Nagaraja & Ors, Civil appeal No. 5387 of 2014 (2014); Mod. Salim v. State of Uttarakhand, Writ Petition No. 126 of 2014 in the High Court of Uttarakhand at Nainital (2017); Tierra Digna y otros v. Presidencia de la República y otros, Colombian Constitutional Court, ruling T-622 of 10 November 2016, Expediente T-5.016.242; Dejusticia y otros v. Presidencia de la República y otros, Colombian Supreme Court, ruling STC4360 of 4 May 2018.

[41] *Demogue R.* La notion de sujet de droit: caractères et conséquences // Revue trimestrielle de droit civil. 1909. No. 8. P. 630.

[42] Cf.: *Calzadilla P. V., Kotzé L. J.* Living in harmony with nature? A critical appraisal of the rights of Mother Earth in Bolivia // Transnational Environmental Law. 2018. Vol. 7 (3). P. 420.

cies. Without concrete case law, however, it is premature to say with certitude what will happen in cases where these ecological duties are breached.

What judicial practice does shed light on, within the scope of the ecological principle, concerns not new formulations but rather the reinterpretation of an existing provision. A property owner in Chongqing Municipality sues the developer of a mansion across the street of his apartment, claiming that the LED screen on the mansion disturbs the ordinary life of his family and causes mental stress[43]. The court qualifies this plea as a tort case and introduces the idea of precautionary measures, extending the term "damage" to include harm that is not yet present. But it also, threatening to guild the lily, cites Article 90 of the Law on Property, now integrated without the slightest revision into the Code as Article 294, which is a clause on good neighborhood. This clause stipulates, "A holder of real property may not discard solid waste or discharge atmospheric pollutants, water pollutants, or such harmful substances as noise, light, or magnetic radiation by violating the relevant provisions of the state".

This seemingly redundant, superfluous application of Article 90 might suggest a vital shift. The formulation of the clause is inspired by § 906 of the BGB[44]. Although judicial practice and civil law doctrine seem to have a tendency to underplay the necessity of state provisions and adopt the "objective approach" that stresses the real suffering of the plaintiff, the general trend has still been to prioritize the interests of the emitters. Among some eighty cases in which the plaintiffs argued upon this clause, the emitters won more than fifty. Most decisions that favored the victims obliged restaurants to redesign their kitchen ventilators or farmers to relocate their livestock. When cases concerned local industrial giants such as grid companies, the victims had almost zero chance. Hence, the duty of tolerance remains the most significant component of this clause in judicial practice, which is comprehensible under the neutrality notion: the use of property shall be free from intervention unless the inconvenience it causes is unbearable according to present, immediate proof.

However, in the context of the promulgation of the General Provisions of the Civil Code in 2017, the municipal court of Chongqing alters this course. By holding according to this clause, the court insists that the suffering need not be tremendous. It need not even be present. To confirm the negative impact of light pollution on health, the court consulted scientists and vulgarized their scientific argumentation into plain language for its decision. Therefore, if the court is convinced of a potential harm by sufficient scientific proof, it can — and shall — intervene to stop the emission.

The Supreme Court, having selected this judgement as its No. 128 guiding case, has endorsed this interpretation. Even though the legal argumentation in this somewhat isolated decision might not represent how the majority of judges will reason, it remains revealing. It suggests how the installation of a new principle can change the interpretation of old rules, how the court can gradually move away from the established notion of neutrality without even realizing it, and how judges can approach scientific evidence.

2.2. Contract Law

While the Book on Property Law does little more than impose environmental considerations as a limit to certain rights, the Book on Contract Law makes sustainability a basic principle of contractual execution, on par with good faith. Article 509 (3) requires that all parties shall avoid resource waste, environmental pollution, and ecological degradation

[43] 李劲诉华润置地（重庆）有限公司环境污染责任纠纷案，重庆市江津区人民法院（2018）渝0116民初6093号。[Jing Li v. Huarun Real Estate Ltd., Court of Jiangjin District, Chongqing Municipality. 2018.]

[44] 全国人大法工委编：《中华人民共和国物权法释义》，法律出版社2007年版，第206–209页。 [Bureau of Law of the National People's Congress. Explanatory Notes of Law on Property. 2007. P. 206–209.]

in executing the terms of a contract. More specifically, when executing a contract of sale, the seller shall use eco-friendly packaging in the absence of a customary or agreed-upon packaging method (Article 621). The legislature's explanatory note gives us no more information than that these articles are enacted to implement Article 9[45]. Nevertheless, contractual disputes have become a gateway through which civil judges regulate environmental issues.

The court can evaluate whether the execution of a contract will cause excessive pollution. For instance, many municipal judges hold that taxi-management or logistics contracts shall not be borne out because the vehicles in question are energy-inefficient and highly polluting[46]. In other cases, the court may grant a producer the excuse of subsidizing the contractor with a more energy-efficient or less polluting vehicle, as long as the producer pays for the other party's economic loss. Or, in less novel fashion, the judges will consider whether the government regulation banning certain industrial activities, such as cement production or coal-fired electricity generation, in a given region can be considered *force majeure* and render contract execution impossible[47].

Another set of cases concerns energy conservation[48]. In executing a contract, parties may perform more than what is required in the original agreement, in which case the judges should decide who bears the cost. This situation is particularly common in contracts of sale of real property because real estate developers sometimes install energy-conservation facilities required by local regulation prior or subsequent to the signature of the contract, which may specify neither the installation nor its price. In a dispute before the municipal court of Xining, the plaintiff refused to pay for solar water-heating facilities that did not feature in the original contract signed in 2016. The defendant argued that the province's Green Building Action Implementation Plan, enacted in 2013, required the installation of solar-energy facilities. Both the first- and second-instance courts endorsed the defendant's argument and refused to waive the cost of installation for the plaintiff[49]. Having had knowledge of what was required by the 2013 regulation, the developer should have adjusted the contract accordingly. In comparison with this highly questionable distributional strategy, a decision in Shandong province seems much more methodical. In that case, the owner of a property sued the developer for failure to install a solar water-heating

[45] See: 黄薇主编：《中华人民共和国民法典释义（中）》，法律出版社2020年版，第973、1197页。[*Wei Huang* (ed.). Explanatory Notes of Law on Property. 2020. P. 973, 1197.]

[46] 周福彬与湛江市麻章区大安汽车运输有限公司挂靠经营合同纠纷二审民事判决书，湛江市中级人民法院（2017）粤08民终110号 [Fubin Zhou v. Da'an Vehicle Transport Ltd, Court of Zhanjiang Municipality. 2017]; 陈海强与湛江市麻章区大安汽车运输有限公司挂靠经营合同纠纷一审民事判决书，湛江市麻章区人民法院（2016）粤0811民初148号 [Haiqiang Chen v. Da'an Vehicle Transport Ltd, Court of Zhanjiang Municipality. 2016]; 成都珂旭物流有限公司与陈娟挂靠经营合同纠纷一审民事判决书，四川省成都市新都区人民法院（2019）川0114民初2394号 [Kexu Logistics Ltd v. Juan Chen, Court of Xindu District, Chengdu Municipality. 2019]。

[47] 李宗明、山东华森水泥集团有限公司买卖合同纠纷二审民事判决书，临沂市中级人民法院（2018）鲁13民终6156号 [Zongming Li v. Senhua Cement Ltd, Court of Linyi Municipality. 2018]; 承德县乾宇矿业有限责任公司与湖南省送变电工程公司等财产损害赔偿纠纷一审民事判决书，北京市西城区人民法院（2016）京0102民初1894号 [Qianyu Mining Ltd v. Electricity Engineering Company pf Hunan Province, Court of Xicheng District, Beijing Municipality. 2016].

[48] *Zhao Y., Lyu S., Wang Z.* Prospects for climate change litigation in China // Transnational Environmental Law. 2019. Vol. 8 (2). P. 349–377.

[49] 惠勇与青海三兴房地产开发有限公司商品房预售合同纠纷案一审民事判决书，西宁市城东区人民法院（2016）青0102民初2790号民事判决。[Yong Hui v. Sanxing Real Estate Ltd, Court of Dongcheng District, Xining Municipality. 2016]; 惠勇与青海三兴房地产开发有限公司商品房预售合同纠纷案二审民事判决书，西宁市中级人民法院（2017）青01民终301号。[Yong Hui v. Sanxing Real Estate Ltd, Court of Xining Municipality. 2017.]

system, and the court held that the contract's energy-saving project, described in the appendix, would be interpreted as a contractual clause[50].

A glance at how Chinese judges incorporate ecological considerations in contractual disputes demonstrates their relative openness to the option of adjusting contractual arrangements to meet the requirement of sustainability. With the introduction of sustainability as a basic principle of contract execution, we can expect more decisions in which judges rely on environmental policy or science.

2.3. Civil Liability

Besides the introduction of the ecological principle via Article 9, the most visible ecologization effort must be the Chapter 7 of the Book on Civil Liability, which is entirely dedicated to liability for "environmental pollution and ecological degradation". Among the seven articles of this chapter, some aim to concretize the regime of environmental damage that has existed since 1986; others incorporate punitive damages and pure ecological harms, the Code's novel contributions to Chinese civil law.

Article 1229 stipulates, "Anyone can be liable for the harm to another person caused by environmental pollution or ecological degradation". Unlike Article 65 of the Law on Civil Liability (2009), this clause includes the notion of "ecological degradation". The legislative body explains that the motive of this modification was originally to standardize the use of an expression that has become common in legal texts since 2010[51]. But it also recognizes that the change of wording brings a change of the law. As the legislature believes that ordinary semantics distinguish between "the emission of hazardous materials that undermine the quality of the environment" (environmental pollution) and "the irrational exploitation of natural resources that jeopardizes ecological function or balance" (ecological degradation)[52], the formulation as written indeed broadens the scope of environmental liability. It will be interesting to see how Chinese judges assess ecological degradation in practice. Article 1230 crystallizes the rule of the presumption of liability that has been developed in much environmental legislation and case laws. Article 1231 further confirms the mutual nature of damage among multiple polluters, which is the existing judicial policy of the Supreme Court, and details the factors that shall be considered in determining the respective liability of each.

Even if the aforementioned clauses do not visibly change the landscape of environmental liability, the same cannot be said of Article 1232, which stipulates, "Where a tortfeasor violates the provisions of laws and intentionally causes environmental pollution or ecological damage, resulting in serious consequences, the victim shall have the right to claim commensurate punitive compensation". This constitutes the first time that the notion of punitive damages has been instituted in the regime of environmental liability. To be clear, neither special legislation nor judicial practice has established punitive damage in environmental affairs before. Despite the long-lasting objection to and recent heated debates around this notion in the continental countries[53], Chinese civil law has introduced punitive damage in various domains, including food safety, product liability, consumer

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[50] 贾木杰与山东海亮房地产开发有限公司商品房预售合同纠纷一审民事判决书，济南市槐荫区人民法院（2018）鲁0104民初6255号。[Mushu Jia v. Hailiang Real Estate Ltd., Court of Huaiyin District, Jinan Municipality. 2018.]

[51] See 黄薇主编：《中华人民共和国民法典释义（下）》，法律出版社2020年版，第973、1197页。[*Wei Huang* (ed.). Explanatory Notes of Law on Property. 2020. P. 2385.]

[52] Ibid.

[53] See: *Martínez Alles M. G.* Punitive damages: Reorienting the debate in civil law systems // Journal of European Tort Law. 2019. Vol. 10 (1). P. 63–81; *Koziol H.* Punitive Damages — A European perspective // Louisiana Law Review. 2008. Vol. 68 (3). P. 741–764.

protection, and intellectual property. Therefore, there shall be no significant doctrinal objection to the integration of punitiveness into environmental liability. Still, many previous provisions concerning punitive damages limit the extent to which the wrongdoer can be punished; Article 1232 of the Civil Code does not. In practice, Chinese judges have developed the habit of reaching this limit. The determination of punitiveness will be another topic of research after Civil Code is promulgated.

Another novelty is the installation, inspired by French law, of pure ecological harms. Article 1234 stipulates that where remediable ecological degradation is caused by a violation of national provisions but no personal harm is identifiable, the state or other organizations specified by law can demand that the responsible person proceed with remediation in due time. In this case, there is no need to justify the gravity of the harm, and the demander or third-party can take the wrongdoer's place in carrying out the necessary operation, charging the offender to reimburse the expense. The final clause of this same chapter, Article 1235, details the reparations that the state or organizations can demand from the tortfeasor.

Though the construction of the regime of pure ecological harms in the Chinese Civil Code is less comprehensive and sophisticated than the source of its inspiration, namely Articles 1246–1252 of the French Civil Code, it presents no less divergence from the classical civil law doctrine of the continental tradition. That no specific victim or personal harm need be identified suggests that this regime participates in the current trend of depersonalization of liability. Also, by granting state agencies and NGOs standing for civil law action, Articles 1234 and 1235 further blur the distinction between private actors and state authority, making the Civil Code a little less a body of rules that governs the relationships between equal agencies. This regime clearly embodies the shift in conceiving of individuals and their place in the world, which is precisely the essence of the ecologization thesis.

Conclusions

In the era of decodification, the promulgation of the Chinese Civil Code not only provokes long-lasting discussion in China but also offers a chance to study the current evolution of the continental legal tradition. This uniquely 21st-century code institutes a "bloc of ecological norms:" Article 9 lies at the center, being substantiated by the other rules that refer to ecological considerations and further surrounded by others yet whose interpretation is susceptible to ecologization. Though praised by its friends as an innovation and criticized by its foes as a heresy, this effort of ecologization is heir to the socialization movement that aims to refute both the shallow conception of law as a mere set of rules and the boundaries between subject and object, human and nonhuman, society and nature that are artificially and arbitrarily defined by modernity. Ecologizing the Civil Code entails a methodological agenda that incorporates more pragmatic, consequentialist, and policy-oriented argumentation to judicial practice. It also entails an ontological agenda, still in formation, that urges us to adopt a new philosophy of human nature.

In terms of specific rules, the Chinese Civil Code introduces very few new formulations other than the notions of punitive damage and pure ecological harms. However, it is predictable that the disposition of property will face more limitation and that judges will intervene more often when considering contractual clauses. This bloc of ecological norms reshapes the landscape of Chinese civil law, and how its interpreters balance individual autonomy, social equality, and environmental protection will be subject to continuous discussion. The true force and fate of the ecologization of civil law are still to be revealed in judicial practice.

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Экологизация китайского Гражданского кодекса*

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Появление в цивилистике концепции учета устойчивого развития вызвало значительную дискуссию, однако литература на английском языке о введении экологических

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норм в недавно принятый Гражданский кодекс Китая (ГК КНР), который вступил в силу в начале 2021 г., остается скудной. Эта статья восполняет пробел, предоставляя общий взгляд на структуру и значение принципов и правил, призванных сделать ГК КНР более адаптируемым к глобальной актуальности устойчивого развития. Экологический принцип, добавленный в ГК, призван содействовать общественным интересам, а не личной свободе. В отличие от других принципов гражданского права, экологическому принципу необходимо давать научное обоснование, больше не зависящее только от судейского усмотрения. Экологический принцип, который естественнее всего рассматривать как продолжение движения за социализацию, способствует глобальной тенденции ставить под сомнение антропоцентризм в праве и проявляется в новом понимании человеческой деятельности. Экологизация ГК КНР порождает методологическую потребность в правовом регулировании, включающем в себя более прагматичную, последовательную и ориентированную на политику аргументацию в судебной практике. Более того, это влечет за собой онтологическую повестку дня, все еще находящуюся в стадии формирования, которая побуждает признать неизбежные связи между человеческим и нечеловеческим мирами в онтологии. В рамках этого принципа раздел ГК КНР о вещном праве налагает обязанность действовать в соответствии с необходимостью сохранения ресурсов и охраны окружающей среды. Также предсказуемо, что во имя добрососедства будут введены более строгие ограничения права собственности. Вмешательство государства, осуществляемое судами из экологических соображений, станет более частым в договорных спорах. Наконец, ГК вводит понятия штрафной ответственности и чисто экологического вреда, которые расходятся с классической континентальной традицией понимания гражданско-правовой ответственности. Несмотря на теоретические новшества, вопрос о том, в какой степени гражданское судопроизводство может обеспечить всеобъемлющую экологическую трансформацию, все еще нуждается в тщательном изучении.

Ключевые слова: принцип экологичности, прагматизм, государственное вмешательство, частная автономия, наказуемость, охрана окружающей среды, сохранение ресурсов.

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