

Research on the Possibility of Civil Public Interests Protected by Individual Litigation in China: Based on the Path of Similarity of Interests

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Abstract

The forms of civil public interests relief are mainly citizen suit, class action and test litigation in western countries. The contradiction between the demand of civil public interests relief and the supply of public subjects gradually appears in Chinese civil action. The limitation of Chinese public subjects in public interests relief and the non-finality of civil action relief further aggravate the contradiction. Public interests show the dual attributes of private benefit and public benefit, in which the similarity of private benefit is the theoretical basis of public interests protected by individual litigation. The similarity of private benefit not only provides the theoretical path of individual litigation, but also overcomes the contradiction between the traditional civil public interest litigation and the interest of litigation.

Key words: Civil public interest litigation; Individual litigation; Interest of litigation; Similarity of interest

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INTRODUCTION

With the addition of article 55¹ of the *Civil Procedure Law* issued in 2012 and the detailed provisions on public interest litigation in the *Civil Produce Law* issued in 2015, the

¹ Article 55 of the Civil Procedure Law of the People's Republic of China (2012 Amendment): "where environment is polluted, the lawful rights and interests of a throng of consumers are infringed upon, or other acts impairing the public interests are committed, the organs stipulated by law and relevant organization may bring actions to the people's court."

public interest relief has made a breakthrough and stepped out of the pure theoretical discussion.² Traditional actio theory is based on interest of litigation, article 55 of the *Civil Procedure Law* issued in 2012 does not indicate that the organs stipulated by law and relevant organizations have corresponding interests in public interests, which cannot be concluded that they have obtained the qualification for public interest litigation. Because the express provision of the law is a kind of authorization, so the court certainly obtains the jurisdiction of public interest disputes. Article 55 of the *Civil Procedure Law* solves the first problem of whether public interest litigation can be prosecuted and whether the court can exercise jurisdiction, and also solves the embarrassment that some cases cannot be justified in judicial practice.³ The development of public interest relief is good, while there are also many difficulties, such as whether the public interest relief is sufficient, whether the public subjects, which are the organs stipulated by law and relevant organizations, have enough motivation to prosecute, and how to protect the personal interests, and how to realize the individual litigation.

1. CONTRADICTION OF DEMAND AND SUPPLY OF PUBLIC INTEREST RELIEF

1.1 The Contrast Between Public Interest Judicial Relief and Demand⁴

² There have been academic debates about whether the public interest is actionable. For example, the traditional Actio theory consider: "no interest means no actio" and interest of litigation is the premise of court judgment. However, the public interest can hardly be regarded as personal interest.

³ The first case of public interest litigation in China is Qiu, J.D. V Longyan Post Office (1996), while the plaintiff was meant to exchange the old sign board for the new price tags, so that everyone in the region can enjoy the new preferential tariffs, but which the court accept the case is still only private interest that the plaintiff paid for long-distance 0.6 yuan more. There has nothing to do with public interest.

In Figure 1, there were total 157 first instance civil public interest litigation, including 142 sued by public subjects (procuratorate, relevant organization and administrative organ) which account for 90.4%, 14 sued by natural person and corporate juridical person which account

for 8.9% , 1 sued by other organs that do not meet the requirements of public interest litigation which account for 0.6%. Lawsuits sued by natural person, corporate juridical person and other organs were overruled or dismissed for plaintiffs were unfit.

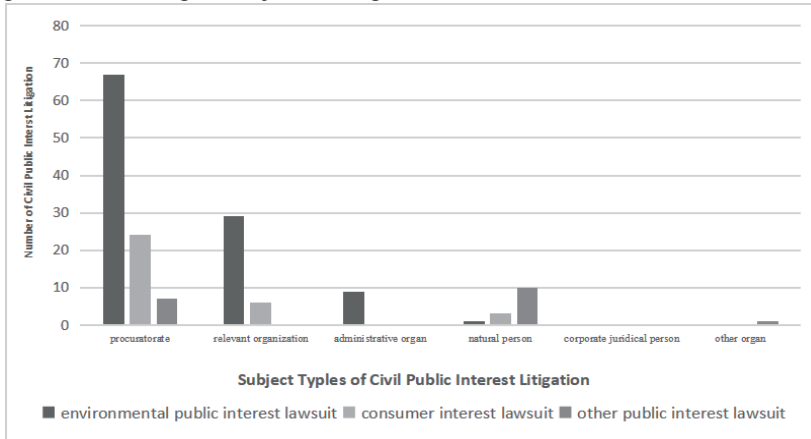


Figure 1
The distribution of plaintiff types of civil public interest litigation from 2013 to 2019

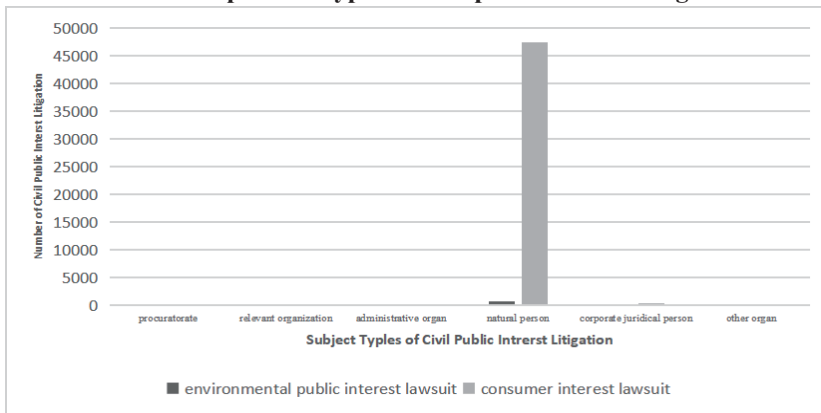


Figure 2
The distribution of plaintiff types of environment tort and protection of consumer interests among civil public interest litigation from 2013 to 2019

As shown in Figure 2, there were total 928 first instance environment tort cases from 2013 to 2019, including 48 sued by public subjects which account for 5.2%; there were total 48178 first instance protection of consumer interest cases from 2013 to 2019, including 19 sued by public subjects which account for 0.03%. The private subject (natural person, corporate juridical person and other organs), especially the natural person, has become the main subject of environmental infringement and protection of consumer interests cases, accounting for 99.4%.

1.2 Inquiry Into the Phenomenon of Public Interest Individual Relief

As we can see from the above two figures, the status quo of public interests protection is not optimistic. There is a huge gap between the number of prosecutions and the quantity of public interests to be protected. The private subjects in Figure 2 express a strong need for relief. The motivation for private subjects to file public interest lawsuits can be traced from the following reasons.

1.2.1 The Limitation of Public Subjects to File Public Interest Litigation

In Figure 1, there were 15 cases sued by natural person, corporate juridical person and other organs. The private subjects became the pioneers of individual public interest litigation when the law did not grant them the right to sue. There is no public interest lawsuit filed by any public subjects against the infringed public interests before private subjects take action. The best example is the other public interest lawsuits in Figure 1, where 11 of the 18 the

⁴ The sources of data are Non-lawsuit Database (<https://www.itslaw.com/bj>) and China Judgment Online (<http://oldwenshu.court.gov.cn/>). Figure 1, by searching the keywords Public Interest litigation, there were total 157 first instance civil cases, including 106 environmental public interest lawsuits, 33 consumer interest lawsuits and 18 other public interest lawsuits. Figure 2, by searching the keywords Environment Tort, there were 928 first instance civil cases; by searching the key words Protection of Consumer Interest, there were 48178 first instance civil cases. The last visit date was October 30, 2019.

other public interest lawsuits were private litigation, while they were all overruled or dismissed for not becoming legally actionable public interests, such as public health and public security. In front of the protection of public interests, the public subject is restricted by both objective means that it is impossible for public bodies to bring public interest litigation without legal authorization and subjective ability that there were not enough specified number of judges.

1.2.2 The Non-final Nature of Relief in Ordinary Civil Action

As shown in Figure 2, the environment tort and protection of consumer interests cases were mainly accepted as ordinary civil cases at present, while they were as public interest litigation was negligible in this big database. Environmental interests and consumer interests involve not only individual interests, but more public interests. Public interests and private interests are damaged at the same time, but the degree of relief is so different. The ordinary civil litigation can only protect private interests, and the public interests that have been put on hold have not been relieved. The adverse sanctions imposed on the public interests infringer are very small compared with the benefits he gains illegally. The Cost-benefit theory tells us that the maintenance of private interests is only temporary, and there will still be the risk of damage.

2. MODE OF CIVIL PUBLIC INTERESTS PROTECTED BY INDIVIDUAL LITIGATION

Western countries do not reject to protect public interests by individual litigation, on the contrary, facing the increasingly damage of public interests, they have developed a set of mature individual litigation system, such as the United States class litigation, citizen litigation, public and private fine litigation, private attorney system and so on. At present, it is also necessary for individuals to make up for the deficiency of the public subjects in relieving public interests by individual litigation in China. From the perspective of the auxiliary principle of the exercise of administrative power, the government must delegate its powers and responsibilities to the level of the least jurisdiction, or the level closest to citizens, where such powers and responsibilities can be effectively performed (Han, 2013). According to the auxiliary principle, the lower the level of the implementer, the closer it is to the real appeal of interests, the more effective it is to protect interests and save costs. The auxiliary principle is also applicable in public interest litigation. Individuals are the direct victims of environmental pollution and loss of consumers' interests. So it is undoubtedly the most effective remedy for individuals to file public interest litigation. However, it is a theoretical problem to be solved that the subject of public interests is the public as a whole, how can a member of the public represent the public? Let's first

look at the western countries how to solve the theoretical legitimacy of individuals to file public interest litigation.

2.1 Citizen Suit

The citizen suit is a necessary clause of the federal environmental protection legislation in the United States, and also the core clause of the federal environmental protection law. The citizen suit first appeared in Section 304⁵ of *Clean Air Act (CAA) (1970 Amendment)*. According to Section 304 of *Clean Air Act (CAA) (1970 Amendment)*, any person can commence a civil action on his own behalf against the United States and any other governmental instrumentality or agency or the Administrator. Section 304 of *Clean Air Act (CAA) (1970 Amendment)* authorized any person to commence a civil action on his own behalf, did not require the plaintiff has a "legal interest" element of traditional civil procedure law, what *CAA* only attached importance to is the public interests of damaged air. Section 304 of *Clean Air Act (CAA) (1970 Amendment)* established individual relief in public interest litigation, which allowing individuals to sue without personal benefit. The *Clean Water Act* of 1972 limited the ability of individual plaintiffs to sue. The *Clean Water Act* defines "person" as any entity such as an individual, corporation, partnership, association or state, and the plaintiff must be a person whose legitimate interests have been damaged. (Gong, 2017) An individual filing a public interest litigation in the *Clean Water Act* had to meet the element of "actual damage" and took the same criteria as other types of civil litigation. What the *Clean Water Act* established is the incomplete personal relief of public interest litigation. In addition to the actual damage of the public interests, the plaintiff was also required to suffer the actual damage. When an individual filed a public interest lawsuit, the plaintiff must also file a private interest lawsuit at the same time. As we have noticed, from the *Clean Air Act* to the *Clean Water Act*, the American citizen suit provisions were narrowed by granting citizens to commence a civil action on his own behalf, but the prosecution conditions have been limited. Individual citizens are no longer completely "public interests defender", but have personal interest's appeals that are personal actual damage to prosecute, which is the motive force of individual to commence civil public interest litigation.

2.2 Class Action

⁵ Section 304 of Clean Air Act (CAA) (1970 Amendment): "(a) Except as provided in subsection (b), any person may commence a civil action on his own behalf— (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator."

Section 23⁶ of *Federal Rules of Civil Procedure* established the class action system in 1938 and amended it in 1966. Section 23 expressed the gist of class action that is the judicial economy. Class action is a lawsuit brought by the majority of people with common problems. Class action can only be established when it has obvious advantages over individual actions. For many years following the adoption of the modern federal class action rule (Section 23) in 1966, most U.S. courts believed that the class action device was a salutary tool for the administration of justice (Robert, 2013). American class action is applied in antitrust, securities, mass infringement and consumer class action, but it is mainly applied in retail consumer class action in the field of consumer interests relief. Retail consumer class action involves a large number of consumers, and the loss of each consumer is very small, so the cost of individual litigation is too high, and seriously does not conform to the cost-benefit theory, and the result is that there is no incentive for an individual to sue. However, what the retail consumers correspond to be large financial groups and multinational companies, whose customers are countless, but the losses of each consumer are collectively large illegal gains. The illegal profit of the big financial group seriously destroys the justice and fair mechanism of the law, which is a phenomenon that no law can allow to exist. This is also expressed in Section 23 that class action has obvious advantages over individual action, and class action is a rational choice of judicial economy. According to the Section 23 of *Federal Rules Of Civil Procedure*, a class action is a representative action, class action rules allow

the representatives to litigate on behalf of absentees, all as one class, and without the absentees' involvement or, sometimes, even their knowledge (Thomaskayes, 2013). The choice of representatives determines the final fate and the original intention of fairness and justice of the class action. In order to prevent the betrayal of representatives and the repetition of similar lawsuits, compared with individual lawsuits, the court needs to assume more judicial review obligations in the class action. From the perspective of the purpose, class action is to maintain justice of all members of the group, but as the representative of the class action, it is also necessary to prove the substantial relevance with the case. Although class action is a choice in line with economic benefits and an expression mechanism of justice, it is also limited in terms of the conditions of prosecution, that is, the plaintiff's representative who files the lawsuit is the subject related to the interests of the class action.

2.3 Test Action

There are test action provisions in German, British and Japanese law. The scholar thought that the court could select one or more cases from a large collection of the collected cases which were diffuse or personal interest litigation, and mass disputes having common legal or factual problems, so the judgment of the court on test action has binding force on other mass disputes with common legal and factual issues (Xiao, 2007). It has become a global trend to seek collective compensation for victims in similar legal positions (Huang, 2015). The test action in Germany was initially limited to the cases necessary to protect the interests of consumers, and after the implementation of *Model Procedure Law for Investors* in 2005, the test action was mainly used in the field of securities. Similar to the retail consumer class action, the lost of each investor in the securities is small, but the mechanism for initiating securities compensation is extremely complex and often requires expert witnesses to appear in court, resulting in high litigation costs. A single securities investor also has no motivation to sue. If a class action is adopted, the case will be more complicated with more parties and more tedious procedures. For the consideration of judicial economy, the court will choose test action to solve similar cases. According to *Civil Procedure Rules (UKCPR)*, test action actually developed from group litigation. The Japanese court adopts the method of priority lawsuit, which is mostly used in public nuisance damage compensation cases. The priority lawsuit is also an alternative to test action. Test action and group litigation have a natural relationship that there are generally a large number of similar cases and parties, on which producing test cases, and the *UKCPR* provided that test cases arose from registered groups. The selection of test cases is as significant as the selection of class action representatives, where the court has absolute discretion. German law stipulates that state courts have

⁶ Section 23 of USCS Fed Rules (Civ Proc R 23) (1966 Amendment): (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. (b) Types of Class Actions. A class action may be maintained if Rule 23 (a) is satisfied and if: (1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests; (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

exclusive jurisdiction over test action and have the right to select test cases and their parties, and such power cannot be examined. Although the selection of test cases enjoys absolute jurisdiction by the court, the consent of the parties must be obtained before a model trial can be conducted. After all, the parties as experimental cases have to bear more responsibilities, obligations and risks, and the convenience of the court cannot be generated on the innocent sacrifice of any parties. The trial of test action not only solves one case, but also solves similar cases, which is also a kind of public interest litigation. There is no need to doubt that such public interest litigation is inseparable from the existence of private interests. Test action itself is a case, and without the doping of private interests, there would be no test cases.

2.4 Analysis of Commonality of Three Models

In general, the United States adopts the model of citizen suit in environmental pollution public interest litigation, and adopts the model of class action in the protection of interests of consumers (mainly retail consumers), while test action is based on group litigation. Although the three models have different system design, in fact, the theoretical root of the systems is the private attorney theory. The private attorney concept became prominent in early civil rights and environmental law, and most environmental law statutes passed since the 1970s include “citizen suit” provisions, and the concept expanded with the growth of mass tort and consumer class action litigation since the 1980s (David, 2005). The basic premise of the private attorney is that, by empowering private persons with causes of action to sue for their injuries, the individual not only obtains direct relief, but also accomplishes important public policy goals (Kathleen, 2009). The private attorney system proves that the public interests enables the accused to comply with constitutional standards or general statutory norms, and decisions obtained with the support of private attorney commonly reflect the basic principle of judicial decisions that the plaintiff’s victory exceeds the case’s victory, and that the creation of binding precedents is an adjunct to the case. The private attorney system began with the concept of the private attorney general, which was mainly used in administrative law and other public law fields (Liu, 2017), and the goal was to give the private attorney general the power to prosecute wrongful officers on behalf of the public interests, then it developed into that it could no longer only authorize public officials (attorney general) to exercise the right of public interest litigation, but any citizen or group could become attorney general, which is now the private attorney general. Later, the private attorney general system was no longer confined to the field of administrative law, but extended to the civil field, and the latter was more widely used. The private attorney general theory endows citizens with the qualification of plaintiff in public interest litigation, which not only solves the justice of individual cases, but also safeguards the social justice.

2.4.1 Judicial Economy

The subjects of public interests are certainly not single, and the cases involved are often complex. Maybe the legal issues are simple, and the single factual issue is simple, but because the wide range of involved people is so complex and multifarious, and if the court separately deals with the cases, it will take time and effort but not reach the ideal effect. If the same interests, factual problems or legal problems can be found in multitudinous cases, the court is more willing to choose the way of a case of lawsuit to solve public interest cases. The court considers the civil public interests protected by individual litigation from the dimension of judicial economy or judicial efficiency. After all, with the explosive growth of civil cases, more cases than manpower is a difficult problem faced by judicial practice in various countries, so handling similar cases together is an efficient and economical choice.

2.4.2 Symbiotic Public Benefits and Private Benefits

Although the private attorney general system is an expression of public policy, it is not a pure public purpose. As an individual plaintiff in public interest litigation, he or she must have its own interests claim to be qualified to sue. The evolution of the restriction of citizen suit in the United States had explained the importance and necessity of private interests in public interest litigation. Private interests alone cannot become public interest litigation. Private interests are only a lever to leverage public interest litigation, essentially, it is to protect public interests. Environmental pollution and the interests of multitudinous retail consumers themselves are collective and divergent interests, while illegal acts infringe private interests, and they also infringe public interests. Public interests are the purpose and core of relief in the public interest litigation. From the perspective of the plaintiff alone, it is the individual’s right to sue for private interests, while it is the citizen’s responsibility and obligation to sue for public interests. Public interest litigation is a system in which private interests and public interests coexist.

2.4.3 The Functional Authority Nature of the Court

There is a significant difference between public interest litigation and traditional civil litigation. The functional authority of the court is prominent, even when individual files a public interest litigation, the positive position of the court cannot be shaken. For examples, in the citizen suit, the conditions of individual prosecution are examined by the court at its discretion. And in the class action, the standard of the group and the selection of the group representatives are all authority behavior of the court. When it comes to the test action, the authority behavior of the court is more obvious, where the court has absolute jurisdiction over the selection of experimental cases and cannot be debated or questioned. Although it is an individual lawsuit, the goal of the whole case is the public interests. Although the initiation of the case is based on private interests, the purpose of the court

and legislation is to solve disputes of public interests. The difference between public interests and private interests lies in the non-exclusive nature of public interests, which in law can completely belong to a private subject, but public interests is shared. The feature of public interests also determines that no private subject can fully represent public interests. Under the dual structure of the court and the parties in civil litigation, the court can take the initiative in the procedure and exercise the command of the procedure, which can better show the neutrality and fairness of the procedure.

3. THE ANALYSIS OF SIMILARITY OF PRIVATE INTERESTS IN PUBLIC INTERESTS

After analyzing the representative models of individual litigation in public interest litigation in western countries, it is not difficult to see that the emergence of private interest's relief system in public interest litigation, and the similarity of civil interests is the practical basis of individual case relief. How the similar relationship between public interests and private interests is actually a core element in defining public interests and one of the basic problems in solving public interest litigation (Xing, 2018). The similarity of private interests in public interests is the starting point of public interest litigation.

3.1 Similarity of Public Interests and Civil Interests

Article 55 of the *Civil Procedure Law* has clearly defined the social public interests has environmental interests and the interests of multitudinous retail consumers. Now the paper takes these two public interests to analyze the similarities of civil interests.

3.1.1 Similarity of Environmental Interests

The current *Environmental Protection Law of China (2014 Amendment)* mostly stipulates the protection duties of citizens and government offices from the perspective of obligation, but rarely from the perspective of rights, and does not consider environmental interests as a civil right. As early as December 2011, central people's government of china proposed that environmental quality was a public goods and a public service that the government must ensure. Some scholars have pointed out that the environment is a kind of commons, which is related to the direct interests of private subjects as well as the common interests of the public, and the environmental right is the basis of environmental public interest litigation (Hu, 2017). Commons is a kind of intermediate state between private property and public property, which is non-exclusive to the unspecified majority. The subject of commons is not the State Council as the representative of the public, but each person constituting the "public", so the right to use commons is a kind of public welfare and public right of individual (Cai, 2015). As a kind of commons, everyone in the environment enjoys the same right. At this time, the individual right is a kind of private interests in the

overall public interests, and everyone's private interests is similar. From the perspective of the environment as the object of public right, the environment is integral and inseparable, for example, the air, water, soil and other resources in the environment are mobile and shared. Although the environment can be divided artificially from the geographical area, the sharing of environmental resources determines that the environment cannot be divided ecologically, and the so-called physical segmentation is only an artificial assumption. The object of environment is the identity of environmental resources that determines the subject of environmental that is everyone in the public having same interests. From the perspective of the producer of environmental pollution, the environmental pollution in a certain area is often generated by the same pollution source, and the environmental pollution damage suffered by the public is also caused by similar pollution behavior of the same polluter. For example, if a sewage treatment plant discharges illegally, the nearby river will be polluted, and the residents along the river will be harmed by the pollution. Many residents affected by water pollution are caused by the same discharges illegal act of one polluter that is the sewage treatment plant. The consistency of environmental polluters and their pollution behavior leads to similar damage to the interests of environmental subjects. Of course, due to individual differences, there are distinctions in the degree or type of damage, but their compensation interests and the environmental interests are consistent.

3.1.2 Similarity of Multitudinous Retail Consumers Interests

Class action is often used to protect multitudinous retail consumers interests, the relatively large amount consumers' infringement often taken the form of individual litigation, which is the original intention of the establishment of class action system. On the one hand, serious infringement involves a huge amount of money, and the cost of individual litigation is far lower than the income after winning the lawsuit, so everyone has motivation to sue, and there is no real need to exercise it passively. On the other hand, the serious infringements are often case examples in consumer disputes, if they are universal serious infringement, such as large amount frauds, having violated the criminal law, and it is no longer civil public interest litigation can solve. The scarcity and the complexity of the cases decided that the relatively large amount consumer tort disputes can only be remedied by individual cases. When this paper discusses the interests of multitudinous consumers, it is only from the perspective of multitudinous retail consumers' disputes. Although small loss is also personal loss, but after all, personal loss is too small to sue, and retail consumers are facing large companies, and there is an obvious gap in litigation ability. In multitudinous retail consumers' dispute litigation, class actions are

more often filed by representatives of consumers with a sense of justice and responsibility. The citizen suit in environmental litigation is a kind of civil right, and the retail consumer's class action is a civil obligation. Traditional social science interest group theory believes that individuals will work for the common interests of the group. Mancur Olsen put forward the hypothesis of "logic of collective action" from the perspective of economic rational man, who will definitely start from the maximization of individual interests and take a free ride in collective action, resulting in the "dilemma of collective action" (Cai, 2012). It is a civil duty for plaintiffs of multitudinous retail consumers public interest litigation to be as a representative of the lawsuit, so there is unlikely to be a free-riding in public interest action. Compared with consumer organizations, the consumer groups have natural advantages that is the similarity of consumers' personal interests. Although consumer organizations serve consumers, but they are essentially consumer management organizations, and sometimes consumers even become the object of management. Therefore, it is difficult for a consumer organization to truly represent the fundamental interests of consumers. Just like environmental pollution, multitudinous retail consumers are faced with the same infringement subject which are large companies, who often adopt a unified business model to sell the same products, and basically consumers are also faced with the same infringement. Among the collective interests of multitudinous retail consumers, the private interests of each consumer are similar.

3.2 Similarity of Private Interests and Individual Litigation

At present, the public interest litigation system established by various countries is not merely the public interests relief. The filing of public interest litigation must have private interests, namely the plaintiff's litigation qualification, such as the actual loss of the plaintiff. The reason why we no longer pursue the pure public welfare of public interest litigation is that, on the one hand, it is out of the rational understanding of human beings, whether from the perspective of economic rational man, or from the perspective of sociology, no one can have no selfishness, especially when the plaintiff is a economic rational man, who completely pursuit the maximization of personal interests. On the other hand, it is the value of the existence of individual litigation, and when compared with the relief of public organs and organizations, private interests is the original power to start public interest litigation. The pure purpose of public welfare can be fully exercised by social agencies, such as the existing group institutions, state organs and other public interest litigation institutions. The pure public interests can be handled by a third-party agency, which is more in line with the psychological expectations of the public, and which is a more fair choice. The existence of private interests in

public interests does not mean that individuals have the qualification to sue in public interest litigation, if the private interest is extremely personality, it will not play an important role in judicial economy and saving resources, when gathers all the different private interests blindly. On the contrary, it will increase the huge cost of investigation of facts and evidence and court management costs. The similarity of interests is the realistic basis of public interest litigation. In fact, only similar interests can have a common purpose and the possibility of the existence of public interests. The basic attribute of the public interest is sharing, and the public's common ownership and common usage can be integrated into public interests. At the same time, the non-exclusive nature of public interests determines that public interests cannot be separated. Whether it is individuals, organizations or state organs to protect public interests, they must protect the whole of public interests rather than some private interests in public interests. The dual nature of public interests, which is both public welfare and private benefit, shows the duality of the subject of public interests. As the subjects of public interests, organizations and state organs can obtain agency authority through the public trust theory. However, for the private interest attribute, the third-party agency cannot obtain agency authority through the authorization of the public. The private interest attribute can only be used and transferred by the individual, and the public can only obtain the private interests through the authorization of the individual.

4. THE FUTRUE OF PUBLIC INTEREST LITIGATION SUED BY INDIVIDUALS IN CHINA

4.1 The Dialogue Between the Similarity of Interests and Actio

The actio theory is the logical starting point of the independent existence of civil procedure law, and the emergence of the concept of actio realizes the separation of procedural law and substantive law (Jolowicz, 2008). Although it is significant to make the procedural law independent at the beginning of actio, the cognition of it is passive. According to the traditional theory of continental law, there are four elements of actio: the plaintiff must have the right, interest, qualification and litigation ability (Cai, 2016). The definition of actio in France is inseparable from the entity right.⁷ Nowadays, the right of action in France has got rid of the monism, and it is believed that the actio theory is the combination

⁷ Article 30 of French Code of Civil Procedure: "For a claimant, the right of action is the right to obtain substantive grounds for a judge to hear his claim so that the judge can determine whether his claim has a basis. For the other party, the right of action is the right to debate whether the claimant has substantive basis."

of private right and litigation procedure (Jean, 2001). While acknowledging that *actio* is independent from right, it is also considered that *actio*, as a subjective right, is dependent on the subject of action. *Actio* in *German Code of Civil Procedure* has also experienced the evolution from the right of action in private law to the right of action in public law, and to the right of action in constitution. In this process, the right of action and the substantive rights or interests have experienced the interdependence from the beginning, to the absolute separation (Chao, 2017), and to the relative return.⁸ The right of action is concomitant with the interests of litigation. If an individual brings a lawsuit to the court without interests, it will not be accepted. However, in public interest litigation, some organs can obtain the right of action by authorization. At this time, the right of action has nothing to do with the interests of litigation, which is a legal right of action. In the *actio* theory, the public interest litigation right of public subjects is an exception. From the analysis of interest similarity, we can see that there are not only public interests but also private interests in public interest litigation, and private interests are the interests of individuals who file public interest litigation. It does not need the exception of the *actio* theory, but the return of *actio*. The public subject cannot find the interests of litigation as a support in *actio*, so it has the exception of legal authorization or public trust as an alternative. The logical starting point for individuals to file public interest litigation is private interests, and the similarity of interests is the unity of the interests of litigation and the public authorization.

4.2 An Attempt to File a Public Interest Litigation by Individuals

Individual litigation is feasible both in theory and in practice in western countries, but it can't be rushed to success in China. Summarizing the viewpoints of scholars and news reports, it is concluded that the obstacles faced by individual litigation are: the lack of citizen litigation ability, the possibility of abuse litigation, and the exhaustion of court litigation. However, these reasons are not convincing, and the litigation ability can be supplemented by court investigation, litigation agency and other systems. Through the analysis of the similarity of interests, it can be seen that the individual prosecution of public interest litigation is more from the perspective of responsibility and obligation, and the possibility of abuse of litigation is small. The individual litigation itself is from the perspective of the judicial economy of the court, and it is impossible to produce litigation burden. Of course, the design and reform of any system cannot be accomplished at one stroke, but should be done step by

⁸ In public law, the right to claim for protection of rights is divided into general litigation elements (formal elements of prosecution) and right protection elements (substantive rights elements and litigation protection elements: the parties are qualified and have the interests of litigation).

step. The author thinks that combining with the current judicial environment in China, we can try from the following two aspects.

4.2.1 The Supplementary Relief of Individual Litigation

Since the effect of group organizations and state organs in the public interest litigation is limited, it needs to be strengthened by individuals, and individual litigation can make up for the incompleteness of the former two remedies by means of supplementary relief. The so-called supplementary relief is a kind of relief method which is arranged in order among the three main bodies of group organizations, state organs and individuals, with group organizations and state organs as the first priority relief and individuals as the second priority relief. When the subject who in the first order is not relieves effectively, the subject for remedy in second order, that is, individuals can file the public interest litigation. When the second ranking subject sues, it needs to prove that the first ranking subject did not taken remedies within a reasonable time. Reasonable time is based on the severity of damage to public interests. For examples, if the environmental pollution is serious enough to endanger the public health, and the first ranking subject still has not filed public interest litigation, at this time, it can be considered that a reasonable time has passed, and the second ranking subject can file a lawsuit. It is the court's burden to examination whether the first ranking subject has passed a reasonable time.

4.2.2 Limited Relief of Individual Litigation

Limited relief is complementary to supplementary relief, and the limitation is mainly reflected in the procedure and means. Before filing a public interest litigation, an individual should not only prove that the subject first in order has not filed a lawsuit within a reasonable period of time, but also prove that he has applied for administrative remedies but has not yet obtained reasonable remedies. According to US law, except for major emergencies, citizens should inform the polluter or authority in advance before prosecution, and a 60-day notification period is allowed before filing a lawsuit.⁹ The public interest itself is the object of administrative organs' management

⁹ Section 304 of Clean Air Act (CAA) (1970 Amendment): "(b) No action may be commenced— (1) under subsection (a) (1)— (A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or (B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right. (2) under subsection (a) (2) prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412 (i) (3) (A) or (f) (4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation."

and service. Only when administrative organs fail to fulfill their reasonable management obligations can public interest litigation be established, which is also a systematic consideration for the rational allocation of social management and judicial resources to avoid duplication and waste. In addition, it is also possible to participate in individual litigation through the support of procuratorate or the ministry of Justice, which not only strengthens the defect of individual litigation ability, but also avoids the risk of social stability.

CONCLUSION

Individual litigation of public interests has become a trend in the world. China's civil public interests are also faced with practical defects of insufficient protection. Theoretically, there is no obstacles for individual litigation of public interests. On the contrary, due to the dual attributes of private interests and public interests and the similar characteristics of private interests, individual litigation can make up for the traditional defects of the lack of litigation interests in public interest litigation. Public interest litigation filed by individuals has not only practical needs, but also theoretical foundation in China. However, it still needs to be combined with the current judicial reality to restrict the relief sequence and relief procedures, which not only initially realizes the value of individual litigation, but also effectively avoids the stability risk, and can also be examined as an experimental way.

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