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ARTICLE

The Rule of Climate Policy: How Do Chinese Judges Contribute to Climate Governance without Climate Law?

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Abstract
China's climate governance is distinguished by the contrast between an abundance of policies on climate change and the lack of legally binding laws. This article argues that Chinese courts bridge this difference, which fosters a 'rule of climate policy' rather than a strict rule of law. The effective authority of Chinese climate policy is made possible in practice both by provisions of the Chinese Constitution and the prevailing use of legal reasoning. China's constitutional design of 'ecological civilization' delegates the duty and the power of managing climate change issues to the executive branch of its government. Most Chinese documents on climate governance have no binding legal force, which means, according to positive law, that they cannot serve as legal grounds for judicial decisions. Chinese judges, in deciding climate-related disputes, must combine legal provisions and non-binding materials to achieve regulatory goals. They use non-legal materials to support statutory or contractual interpretations and determine the existence or limits of rights, which alters the meaning and scope of existing legal terms and principles. This rule of climate policy is possible in the courtroom because judges justify public policy considerations with arguments of principle that are substantiated in various non-binding climate plans.

Keywords: Climate change litigation, Environmental justice, Legal reasoning, Public policy considerations

1. INTRODUCTION: FROM DESCRIPTION TO INTERPRETATION

Adapting law to address the problem of climate change has become a crucial issue in legal scholarship. The Intergovernmental Panel on Climate Change (IPCC) acknowledged, in its Fifth Assessment Report, the 'increasing recognition of the value of social, institutional and ecosystem-based measures and … the extent of constraints to

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adaptation'.[1] As the world's largest carbon dioxide (CO_2) emitter, China's domestic arrangements to address climate change are an indispensable component of global climate governance. Over the past decade China's position on the global stage has switched from a firm defender of economic growth to a high-profile promoter of sustainability, exemplified by its government's recent pledge to achieve carbon neutrality by 2060. Given this, the question arises: how will China's commitment be delivered?

In attempting to resolve this question, some authors have discovered significant characteristics of China's climate governance. One such characteristic is the iron hand of China's authoritarian government and the prominence of the country's executive branch.[2] Wang observes that 'China's regulatory approach relies heavily on top-down, command-and-control regulation, built around bureaucratic targets and controls for local officials and state-owned enterprise leaders'.[3] Such governance depends on 'administrative measures' rather than on statutes.[4] The State Council and the local authorities, instead of public participation, determine how climate policy is implemented in China.[5] As such, control of this top-down process is almost exclusively reserved for the executive branch.

The predominance of the executive branch entails the second characteristic of China's climate governance: its lawlessness.[6] The National People's Congress has not voted on the Law on Addressing Climate Change. Except for two provincial regulations, there are hardly any other domestic legislative instruments that affect citizens' rights and duties with regard to climate change.[7] Rather, the executive branch has enacted a considerable number of national and local action plans on mitigation and adaptation.[8] Some of these, such as the National Plan on Climate Change (2014–20), are targeted directly at addressing climate change. Other plans, such as the National Air Pollution Prevention and Control Action Plan, as well as a number of local green building plans, attempt to pursue the twin objectives of energy conservation and pollution prevention. The term 'climate policy' is used in this article to include all

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1 C.B. Field et al., 'Technical Summary', in IPCC (C.B. Field et al. (eds)), *Climate Change 2014: Impacts, Adaptation and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014), pp. 35–94, at 51.

2 B. Gilley, 'Authoritarian Environmentalism and China's Response to Climate Change' (2012) 21(2) *Environmental Politics*, pp. 287–307. 'Government' in this article generally refers to the executive branch.

3 A.L. Wang, 'Climate Change Policy and Law in China', in K. Gray, T. Richard & C. Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016), pp. 636–69.

4 Ibid., p. 641. See also X. He, 'Legal and Policy Pathways of Climate Change Adaptation: Comparative Analysis of the Adaptation Practices in the United States, Australia and China' (2018) 7(2) *Transnational Environmental Law*, pp. 347–73.

5 J. Lin, 'Climate Governance in China: Using the "Iron Hand"', in B.J. Richardson (ed.), *Local Climate Change Law: Environmental Regulation in Cities and Other Localities* (Edward Elgar, 2012), pp. 300–24.

6 He, n. 4 above; Wang, n. 3 above.

7 He, n. 4 above.

8 See Ministry of Ecology & Environment, 'Enhanced Actions on Climate Change: China's Intended Nationally Determined Contributions', 30 June 2015, available at: http://www.china.org.cn/environment/2015-06/30/content_35950951.htm.

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state policies formulated with the objective of climate governance, as well as those the implementation of which leads to positive outcomes in addressing climate change. These plans or roadmaps are used as disciplinary tools and guidance instruments by Chinese government agencies, but have no legally binding force vis-à-vis citizens. Rather than the rule of law, China's climate governance is very much a regime determined by such policy instruments. Here is the key puzzle that this article tries to resolve: how do Chinese judges create legal reasoning with non-binding climate policies?

The answer to this question may be of value to lawyers in other jurisdictions. It may inform potential strategies for climate change litigants,[9] as well as adding to a growing body of literature on the interpretive methods and judicial techniques used by judges in such cases.[10]

Whether these cases should be categorized as examples of climate change litigation is a matter of definition. In defining 'climate change litigation', scholars have paid attention to the roles of both litigants and judges. Ruhl and Markell define the term as encompassing litigation 'in which the party filing or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts'.[11] A more expansive definition, offered by Peel and Osofsky, weights intention more heavily and conceptualizes climate change litigation as broadly covering any litigation in which climate change is a central or peripheral issue – 'one motivation but not raised as an issue' – or alternatively where there is 'no specific climate change framing but implications for mitigation or adaptation'.[12] Recently, Setzer and Benjamin have called for a focus on the functionality of some seemingly peripheral cases the final decisions of which might result, from a climate-mitigation perspective, in beneficial outcomes.[13]

Given that the admissibility of a particular claim or form of argument varies between jurisdictions, an expansive conceptualization of climate change litigation can help us to grasp the diversity of experience that has emerged in the judicial management of climate policy. Adopting a functionalist, outcome-oriented definition is useful if the focus of research is lawsuit-driven actions and changes to legal and social norms.[14] In a legal culture where arguments are expected to be founded on statutory provisions but

[9] J. Setzer & L. Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9(1) *Transnational Environmental Law*, pp. 77–101; J. Peel & J. Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113(4) *American Journal of International Law*, pp. 679–726; S. McCormick et al., 'Strategies in and Outcomes of Climate Change Litigation in the United States' (2018) 8(9) *Nature Climate Change*, pp. 829–33.

[10] B. Mayer, 'Interpreting States' General Obligations on Climate Change Mitigation: A Methodological Review' (2019) 28(2) *Review of European, Comparative & International Environmental Law*, pp. 107–21; E. Stein & A. Castermans, 'Urgenda v. The State of the Netherlands: The "Reflex Effect" – Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care' (2017) 13(2) *McGill Journal of Sustainable Development Law*, pp. 303–24.

[11] D.L. Markell & J.B. Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2011) 64(1) *Florida Law Review*, pp. 15–86, at 27.

[12] J. Peel & H. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015), p. 8.

[13] Setzer & Benjamin, n. 9 above, p. 87.

[14] Peel & Osofsky, n. 12 above, p. 3.

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where there is no enforceable climate change legislation, climate change concerns may be absent from pleadings and judgments. Regardless, courts can still issue rulings in cases that have significant positive or negative influences on climate mitigation, adaptation, and resilience. Excluding such cases from the scope of our investigation would jeopardize our assessment of the role that a judge can play in climate governance. In particular, while Chinese environmental non-governmental organizations (NGOs) have recently started to sue grid companies – with mitigation being a central issue[15] – specific climate change issues tend not to appear in pleadings. Nonetheless, Chinese courts continue to cite existing climate policies,[16] and their decisions can clearly have extraneous or coincidental climate-related effects. For instance, courts may require the shutting down of highly polluting coal-fired power stations under anti-pollution legislation, which may lead to climate mitigation as a co-benefit.[17]

This article examines 'core' cases in which climate-related law or policy issues are discussed, as well as certain 'peripheral' cases which have had unintended impacts – either positive or negative – on climate governance. Our definition of climate litigation, like that of climate policy, is broad. Admittedly, such expansive definitions risk conflating climate change litigation with other forms of environmental protection (such as air pollution prevention). However, these may help us to achieve a more authentic understanding of reality, which is that public attitudes on climate governance in China are driven by concerns about air pollution.[18] This mixture of climate change and pollution issues is reflected in the discourse of both litigants and judges in China.

Another reason to employ inclusive rather than more specific terminology is that the techniques of citing and interpreting policies in the selected cases may contain information about how the judiciary may intervene in climate change issues in the future. The Supreme People's Court (SPC) has expressed its determination to pave the way for climate change litigation in China.[19] Meanwhile, ongoing international debates

15 See 28 Dec. 2018, 自然之友环境研究所诉国家电网甘肃公司案，甘肃省高级人民法院 (2018) 甘民终 679 号民事裁定书。[*The Friends of Nature Institute* v. *Gansu State Grid*], (2018) Decision No. 679, High Court of Gansu Province (*Gansu State Grid*). We will discuss this case in Section 2.2.

16 Y. Zhao, S. Lyu & Z. Wang, 'Prospects for Climate Change Litigation in China' (2019) 8(2) *Transnational Environmental Law*, pp. 349–77.

17 'Co-benefit' is also the key term that allows scholars to discuss judicial climate governance through air pollution cases in China; see 赵悦：《气候变化诉讼在中国的路径探究 – 基于 41 个大气污染公益诉讼案件的实证分析》,《山东大学学报（哲学社会科学版）》2019 年第 6 期，第 26–35 页 [Y. Zhao, 'Potential Pathways for Climate Change Litigation in China: Empirical Analysis of 41 Public Interest Litigation Cases Involving Air Pollution' (2019) 69(6) *Journal of Shandong University*, pp. 26–35].

18 B. Wang & Q. Zhou, 'Climate Change in the Chinese Mind: An Overview of Public Perceptions at Macro and Micro Levels' (2020) 11(3) *WIREs Climate Change* online articles, pp. e639–57, available at: https://onlinelibrary.wiley.com/doi/full/10.1002/wcc.639; B. Wang, Y. Shen & Y. Jin, 'Measurement of Public Awareness of Climate Change in China: Based on a National Survey with 4,025 Samples' (2017) 15(4) *Chinese Journal of Population Resources and Environment*, pp. 285–91.

19 The Supreme People's Court (SPC) expresses its determination to contribute to climate governance in its annual report on environmental justice; see 最高人民法院：《中国环境资源审判(2019)》 [People's Supreme Court of China, 'White Paper on Environmental Justice' (2019)], available at: http://www.court.gov.cn/zixun-xiangqing-228341.html. Also, the only periodical administered directly by the Supreme Court has committed to introduce climate change law and cases in foreign jurisdiction; see "编者按"，《人民法院报》 2019 年 12 月 20 日第 8 版 ['Editorial', *Daily of People's Court*, 20 Dec. 2019], available at: http://rmfyb.chinacourt.org/paper/html/2019-12/20/node_9.htm.

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around climate change litigation have barely been echoed in Chinese legal scholarship,[20] and even less so among legal practitioners. If Chinese courts – driven by the ambitions of the nation's highest judicial organ, which has steering power and disciplinary authority over lower courts – are to consider more climate-related cases, they must rely on the experience accumulated in the context of earlier peripheral cases.

While researchers have documented that Chinese judges refer to various climate policies in climate-related cases, the available literature rarely discusses the practical value of these texts, much less the way in which courts may implement them in private disputes. For instance, some unanswered questions about climate policies include the following. Are they legally binding? What are the correct ways of citing policies in a judicial decision? Understanding these dogmatic and methodological aspects is the first step towards an evaluation of the outcome, or a comprehensive cultural interpretation, of China's judicial efforts towards climate governance. Justice Holmes once reminded students of the insufficiency of the historical method, the predominant approach of his time: 'When you get the dragon out of his cave onto the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step'.[21] This article, as the beginning of a larger project of anthropological and interpretative study of China's judicial climate governance, proceeds in this vein: that is to say, seeking to 'get the dragon out of his cave'.

The dynamic combination of policy and statutory law in judicial argumentation has drawn the attention of scholars of climate change litigation for over a decade.[22] In developing a trend of suing private entities for climate change-related damage (or threats thereof) caused by activities that are ordinarily authorized by statutory law,[23] policy has obvious practical value in justifying limitations on the liberty of citizens.

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[20] Since *Massachusetts* v. *Environmental Protection Agency*, 549 US 497 (2007), environmental law scholarship in China has included some articles on climate change litigation. Most of them concern specific cases in other jurisdictions and focus mainly on admissibility and stance; see 李艳芳：《从“马萨诸塞州等诉环保局”看美国环境法的发展》,《中国人民大学学报》 2007 年第 6 期，第 106–114 页 [Y. Li, 'New Proceedings of US Environmental Law: A Case Study of the Environmental Law from the Case of *State of Massachusetts et al vs. Environmental Protection Agency et al*' (2007) 21(6) *Journal of Renmin University of China*, pp. 106–14]; 马存利：《全球变暖下的环境诉讼原告资格分析 – 以马萨诸塞州诉联邦环保署案出发》,《中外法学》 2008 年第 4 期，第 630–9 页 [C. Ma, 'Stance of the Plaintiff in the Era of Global Warming: Case Analysis of *Massachusetts vs. EPA*' (2008) 30(4) *Pekin University Law Journal*, pp. 630–9]; 王燕：《“利害关系”的嬗变：美国温室气体排放诉讼原告资格的发展趋势》,《江苏社会科学》2015 年第 1 期 [Y. Wang, 'Currents of Developments concerning the Stance of the Plaintiff in Emission of GHGs: Litigation in the US' (2015) 36(1) *Jiangsu Social Science*, pp. 157–65]. Only very recently have scholars started to discuss the pathways for climate change litigation in China; see, e.g., Zhao, n. 17 above. Current literature in Chinese contains scant discussion of public policy considerations, the use of scientific evidence, choice of strategies, or equity. Anecdotally, the author has submitted an article on the co-production of scientific and judicial authority to some Chinese journals and has met only rejection because 'it is not a law article'.

[21] O. Holmes, 'The Path of the Law' (1897) 10(8) *Harvard Law Review*, pp. 457–78, at 467.

[22] N. Durrant, 'Tortious Liability for Greenhouse Gas Emissions? Climate Change, Causation and Public Policy Considerations' (2007) 7(2) *Queensland University of Technology Law and Justice Journal*, pp. 403–24.

[23] See G. Ganguly, J. Setzer & V. Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies*, pp. 841–68.

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Yet, simultaneously, this must be exercised with caution.[24] Information on the methodologies through which magistrates in local jurisdictions restrict the decision making of domestic private actors in the name of 'global' concerns, and the extent to which they do so, help us to observe how strategies of judicial climate governance may either converge or diverge. This will facilitate greater understanding of how private law is transforming in response to environmental challenges.[25]

The main body of this article is divided into three sections. The next section (Section 2) conducts a general survey of the normative landscape of China's judicial efforts on climate governance. It argues that the dominance of the executive branch in climate rulemaking is a consequence of the allocation of powers set down by the Chinese Constitution. Section 3 critically examines the applicability of climate policy, finding that most of the existing climate policies are not legally binding in civil litigation cases. Nonetheless, courts can, and do, implement these policies through contractual and statutory interpretation, especially in determining what constitutes the 'public interest' in any given case. Chinese courts thereby have attempted to distribute the global responsibility of addressing climate change across private actors. Finally, Section 4 briefly analyzes the justification of public policy considerations by indirect application of climate policy. It finds that such justification is still in line with arguments of principle – that is, those of rights.

2. CONSTITUTIONAL AND LEGAL FRAMEWORK

2.1. *Constitutional Arrangement of Climate Change Management*

The Constitution of China conveys a clear message: that the state is the master of climate. The seventh paragraph of the Preamble to the Constitution after the 2018 Amendment lists 'ecological civilization' as a 'national goal' and, in Article 89(6), designates the State Council as the organ in charge of the implementation of this goal.[26] Together with Articles 9, 10(5) and 26, these provisions create the constitutional framework for China's environmental governance, of which climate governance is a part.[27] These constitutional provisions cast an image of the government as a *bonus pater familias*, the authority and discretion of which lie beyond the challenge of the

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24 See F. Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2015) 94(3) *Nebraska Law Review*, pp. 685–736.

25 See E. Biber, 'Law in the Anthropocene Epoch' (2017) 106(1) *The Georgetown Law Journal*, pp. 1–68.

26 The Chinese version of the Constitution uses the term '生态文明' [*shengtai wenming*] in the Preamble, and '生态文明建设' [*shengtai wenming jianshe*] in Art. 89(6). The literal translations of these terms are 'ecological civilization' and 'the implementation of ecological civilization', respectively. However, the English translation approved by the National People's Congress does not use 'ecological civilization'. Rather, it uses 'ecological advancement' in the Preamble and 'ecological conservation' in Art. 89(6). We prefer the term 'ecological civilization', not only because it is closer to the constitutional text in Chinese, but also because it has become familiar in the fields of both environmental law and China studies. The English translation of the Constitution is available at: http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml.

27 Art. 9 provides that all natural resources are owned by the state, except for those owned by collectives as prescribed by law. Art. 10(5) requires the use of land to be 'appropriate'. Art. 26 provides the state's responsibility for environmental protection. See 张翔：《环境宪法的新发展及其规范阐释》，《法学

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administered. A careful reading of the relevant constitutional provisions serves as the first fundamental step towards understanding the rule of climate policy in China.

As in Roman times, the Chinese state's duty of care comes with its *patria potestas*, the authority it exercises over all subjects within its jurisdiction. The backbone of China's environmental charter is Article 26(1) of the Constitution, which charges the state with the duty of environmental protection and improvement, as well as that of pollution control and prevention. The state's duty of protection, rather than citizens' environmental rights, became enshrined in the Constitution.[28] As a result, China's ecological governance depends on state discretion. Notwithstanding the practical importance of private sector initiatives, in the eyes of the Constitution what matters is the command of the state.

More specifically, according to Article 89(6) of the Constitution, climate governance depends on the State Council of the Central People's Government. Modified in 2018, this constitutional provision grants the State Council power and responsibility to direct and manage the implementation of 'ecological civilization'. Although the National People's Congress, in 2020, adopted the Biosecurity Law and the Law on the Protection of the Yangtze River, and is actively drafting the Law on National Parks, it does not contradict the power of the State Council to ratify decrees in the same areas. Article 65(2) of the Law on Legislation endows the State Council with the power of rulemaking in the areas listed in Article 89 of the Constitution. Also, the legislative body has, until now, left climate-related issues to the executive branch. It is arguably rational, therefore, to expect that the State Council will continue to be the most powerful actor in both the drafting and enforcement of rules relating to climate governance.

2.2. *Predominance of Planning*

The first organizational effort towards climate governance was the 2007 establishment of the National Leading Group to Address Climate Change.[29] The Prime Minister chairs this working group, whose tasks are, firstly, to decide on strategies, policies and reactions in addressing climate change; secondly, to coordinate the implementation of measures, as mentioned above; and thirdly, international cooperation.[30] Similar working groups exist at the provincial level. In 2008 the National Development and Reform Commission, one of the most powerful cabinet agencies, created its climate change division to prepare for the Copenhagen climate summit. An institutional reform, in 2018, integrated this division into the Ministry of Ecology and Environment. Among many other tasks, this division oversees China's climate change response and emissions reduction efforts, implements climate strategy, and leads the design of climate policies, plans, and institutions.

家》2018年第3期，第90–97页 [X. Zhang, 'New Development of Environmental Constitution and Its Normative Value' (2018) 33(3) *Jurist*, pp. 90–7]

28 Ibid.

29 《国务院关于成立国家应对气候变化及节能减排工作领导小组的通知》, 国发〔2007〕18号 [Notice of the State Council on the Establishment of the National Leading Group on Addressing Climate Change], 12 June 2007, Guo Fa (2007) No. 18.

30 Ibid.

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The existing laws related to energy transition also delegate to the executive branch the power to decide specific measures to implement transitional goals. Although the Congress has never voted on the 2016 Draft Law on Addressing Climate Change, several texts related to energy matters are available, such as the Electricity Law (2018), the Energy Conservation Law (2018), and the Renewable Energy Law (2009). These laws stipulate that the state supports the use of non-fossil fuel resources, and that the power to adopt the necessary measures in this respect belongs to the executive branch. For instance, Article 4 of the Renewable Energy Law (REL) declares that renewable energy is the priority in energy development, and its Article 5(1) grants the energy division of the State Council the competence to manage the exploration and utilization of renewables at the national level. Other provisions of this law request the State Council to conduct surveys, make development plans, standardize technical requirements, provide research funding, administer energy enterprises, and incentivize by price management and subsidies.[31] Similar legal-institutional arrangements appear in instruments related to mitigation. The State Council and local governments have authority to observe, understand, plan, decide, and act to ensure the compliance of major actors, particularly enterprises. In addition to its enforcement role (or the law's 'iron hand'), the government operates as the 'learned hand', which formulates the rules for addressing climate change, as well as the 'caring hand', which supports and guides industry.

Even where legal duties are articulated, courts may require the government to develop policies to clarify the ambit of those legal duties in situations where they are drafted in broad terms and no specific consequence is prescribed if an actor fails to carry out its duties. Such was the case when a biomass company sued Sinopec for not purchasing its biomass-based diesel fuel. The court found that Article 16(3) REL requires the petroleum companies to purchase liquid fuel produced by biomass, but does not specify the legal consequences in the event of refusal to trade. The court held that a local regulation that specifies biomass-based diesel transactions is necessary; otherwise, it cannot hold that the oil giant violated its obligations pursuant to the REL.[32] On many occasions local authorities tend to adopt regulations to confirm licence requirements for high-emissions production or make grid connection mandatory. Still, local authorities sometimes simply fail to build markets for certain smaller trades such as biomass-based diesel. The courts may find that the lack of local regulation prevents them from enforcing the requirements of laws on energy transitions.

Nevertheless, the potential impact of energy legislation on mitigation efforts should not be underestimated. In a groundbreaking case, the Friends of Nature Institute sued the State Grid Corporation for its high curtailment rate of wind power on the basis of Articles 2 and 14 REL.[33] The High Court of Gansu Province ruled in favour of the

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[31] For a detailed review of the law, see S. Schuman & A. Lin, 'China's Renewable Energy Law and Its Impact on Renewable Power in China: Progress, Challenges and Recommendations for Improving Implementation' (2012) 51 *Energy Policy*, pp. 89–109.

[32] 28 Aug. 2017, 云南盈鼎生物能源股份有限公司、中国石化销售有限公司云南石油分公司拒绝交易纠纷二审民事判决书，云南省高级人民法院民事判决书 (2017) 云民终 122 号 [*Yingding Biomass Ltd* v. *Sinopec Yunnan Ltd*] (2017) No. 122, High Court of Yunnan Province.

[33] *Gansu State Grid*, n. 15 above.

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plaintiff on procedural issues. While Article 2 only provides a definition of 'renewables', Article 14 requires that the grid companies shall 'purchase all electricity generated from renewable energy sources' and 'provide connection service'. The strictly literal interpretation of Article 14 suggests that a grid company does not have a duty to put all the renewable electricity it purchases on the grid. Under Article 29 of the same law, a grid company is responsible only for failure to purchase all electricity produced from renewable sources if such failure were to cause economic damage to the producer. However, the law remains silent on whether a grid company is responsible for the ecological loss (for instance, emissions of CO_2 or air pollutants from coal-fired power plants that should have been reduced) caused by the curtailment of clean electricity. In this case the company purchased the electricity generated by wind power and solar energy, but did not connect it to the grid. The producer of renewable electricity suffered no economic loss, and the NGO claimed to hold the grid company responsible for the ecological harm. The key questions, therefore, are whether a grid company has a duty to connect all renewable electricity that it purchases, and whether it is responsible for the damage resulting from failure to do so. In its White Paper on Environmental Justice (2019), the SPC cites this case as evidence of both China's progress in climate change litigation, as well as the court's burgeoning role in climate governance.[34] It is highly likely that the judiciary will seize upon the opportunity to build on this judgment.[35]

Climate policy may eventually help climate change litigation in China. Therefore, it is crucial to examine the legal and factual value of national and local plans in the Chinese courts. The government can make at least two forms of decree which may have legal effect in addressing climate change. One is the State Council decree, which can be adopted on the basis of Article 89 of the Constitution and Article 65 of the Law on Legislation. Article 90 of the Constitution and Article 80 of the Law on Legislation also recognize the power of ministries to enact national regulation. These 'decree laws' can add new rules to the hierarchy of norms, provided they do not contradict any existing legislation. Depending on the specific nature of a case, they can be legally binding and serve as the legal basis for a judicial decision.[36] Considering the broad autonomous rulemaking powers of the executive branch, astonishingly only two local regulations have been enacted.[37] Besides, local regulations enacted according to Article 82 of the Law on Legislation cannot be cited as binding law in civil

[34] See 最高人民法院：《中国环境资源审判 (2019) 》 [People's Supreme Court of China, White Paper on Environmental Justice (2019)], 8 May 2020, available at: http://www.court.gov.cn/zixun-xiangqing-228341.html.

[35] Art. 1234 of the Civil Code (2021) stipulates that where the remediable ecological degradation is caused by a violation of the national provisions but no personal harm is identifiable, the state or other organizations specified by law can demand that the responsible person proceeds with the remediation in due course. If the court decides that this provision has retrospective binding force and that the duty of 100% purchasing entails the duty of 100% connecting, it can hold the grid company responsible.

[36] 法释 (2009) 14 号《最高人民法院关于裁判文书引用法律、法规等规范性法律文件的规定》 [Supreme Court, Regulation on the Citation of Law, Decrees and other Normative Documents in Judgments], 4 Nov. 2009, Fa Shi No. 14 (2009), available at: http://www.npc.gov.cn/zgrdw/npc/xinwen/fztd/sfjs/2009-11/04/content_1525975.htm (SPC Citation Regulation).

[37] Analysis of the measures of Shanxi and Qinghai; see He, n. 4 above, p. 354.

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adjudication. In contrast to the marginal number of decree laws and regulations, there exist a vast number of national and local plans. Although not legally binding *per se*, these plans potentially carry authority in the courtroom.[38]

Climate policy may be used by litigants in public interest or civil actions. Amendments to the Administrative Procedure Law (APL) and Civil Procedure Law (CPL) in 2017, together with the Environmental Protection Law (amended in 2015), create the legal framework that allows environmental NGOs and prosecutors to file environmental public interest actions. Nonetheless, civil actions pertaining to climate mitigation greatly outnumber public interest actions.[39] In civil disputes, a decree law ratified by the State Council has only secondary value, and most climate policies are not formal sources of law at all. The following section will analyze the judicial application of climate policy and reveal the techniques that enable Chinese judges to incorporate policy in civil adjudication.

3. JUDICIAL TREATMENT OF CLIMATE POLICY IN CIVIL ACTIONS

3.1. *Direct (In)Applicability of Climate Policy*

In applying climate policy in civil disputes, Chinese judges have tended to behave more akin to enforcers of state policy than as impartial arbitrators of the law.[40] The question of whether existing climate policies constitute a legal basis for judgments in civil actions now has a very straightforward answer. In strictly formal terms, they cannot. Climate policy is not legally binding upon Chinese courts. Since the promulgation of the Book on General Provision of the Chinese Civil Code in 2017, its Article 10 identifies only statutory laws and custom as formal sources of civil law.[41] This provision repeals Article 6 of the General Principles of Civil Law of 1986, which provided that a civil law case should be decided on the grounds of 'state policy' if legislation is silent. With this repeal, many policies, including climate policies, lost their binding force in civil matters.[42] However, even if the scope of 'state policy' of the 1986 rule was ambiguous and a source of disputes,[43] most climate policies are so inferior in the hierarchy of norms that citing them as the legal basis was merely irregular. As will be demonstrated in the following paragraphs, the promulgation of the Book on General Provisions did not mark a rupture in the judicial application of climate policy. Before and since 2017,

[38] A case that draws attention from many scholars concerns the installation of solar water-heating facilities, and the judgment cites the Qinghai Green Building Action Implementation Plan; see the *Yong Hui* v. *Qinghai Sanxing Real Estate Co. Ltd* litigation at nn. 48 and 49 below and accompanying text.

[39] Zhao, Lyu & Wang can select 177 civil action cases to analyze, while the same author can only identify 42 cases of public interest litigation: Zhao, Lyu & Wang, n. 16 above; Zhao, n. 17 above.

[40] See M. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986), pp. 168–70.

[41] The other books of the Civil Code were voted in 2020 and entered into force on 1 Jan. 2021. The new Civil Code further repeals the General Principles of Civil Law and other civil enactments.

[42] 于飞：《民法总则法源条款的缺失与补充》，《法学研究》 (2018) 年第 1 期，第 36–51 页 [F. Yu, 'The Lack of Provision on the Sources of Law and Its Construction' (2018) 40(1) *Legal Studies*, pp. 36–51].

[43] 李敏：《民法上国家政策之反思》，《法律科学》 (2015) 年第 3 期，第 96–111 页 [M. Li, 'National Policy in Civil Law' (2015) 33(3) *Legal Science*, pp. 96–111].

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climate policy has assisted the court as persuasive authority or as the basis for the interpretation of statutes or private contracts. This continuity preserves the relevance of past case law in understanding the current position of climate policy in China. To illustrate this point, distinctions will be made between State Council decrees and other policies, as well as between regular use and abuse of policy.

Although the State Council has the authority to adopt a wide range of policy, from opinions to decree laws, only State Council decrees (行政法规, [*xingzheng fagui*]) adopted in accordance with Article 65 of the Law on Legislation can be included within the term 'state policy'. If 'policy' is used as an umbrella term to cover all governmental and party policies, the State Council decrees, or *xingzheng fagui*, refer only to a specific category of norm, the scope, drafting, signature, and promulgation of which are determined by Articles 65 to 71 of the Law on Legislation. Other policy statements – including central and local action plans, ministerial and local regulations, Chinese Communist Party (CCP) policy, and documents co-released by the CCP and the State Council – must all be considered as non-binding in civil actions, according to the 1986 General Principles of Civil Law.

Most, if not all, of the existing climate policy does not fit the definition of a State Council decree. Even if we define climate policy in the broadest manner, the only possible candidates are, firstly, the Regulation on Energy Conservation in Buildings of Civil Usage (2008), which aims to facilitate mitigation, and, secondly, the Regulation on the Implementation of the Environmental Protection Tax Law (2017), which includes the imposition of a tax on air pollutants. Other national and local governmental climate policies cannot constitute the legal basis for a judgment.

To determine the direct applicability of policy, we shall also consider the SPC regulation on citation of authorities, which regards State Council decrees as the only binding state policy prior to the repeal of the 1986 General Principles of Civil Law. The Court stipulates that civil judgments may rely on statutes, judicial explanations delivered by the SPC, decree laws of the State Council, or ordinances agreed by local congress.[44] Among these categories, only State Council decrees are enacted by the executive branch. In contrast, the SPC explicitly lists ministerial regulations as applicable rules in administrative litigation.[45] Including ministerial regulation in the provision regarding administrative litigation, while excluding it in civil litigation, is indicative of the intention of the SPC to rule it out as an explicit legal ground in deciding civil cases.

This position also takes into consideration an important nuance between civil and administrative procedures. In administrative procedures the court has the power to examine – upon the plaintiff's request – whether a regulatory measure that is inferior to ministerial regulation violates a higher norm, as provided by Article 53 of the amended APL. According to Article 64 of that statute, in the case of such a violation the court cannot declare the rules in question to be invalid. Rather, the court must

44 SPC Citation Regulation, n. 36 above, Art. 4. According to Art. 32 of the Law on the Organization of People's Courts, the SPC has the power to 'explain the application of law and decree in judicial practice'. The SPC routinely publishes 'judicial explanation' to unify the interpretation of norms.

45 SPC Citation Regulation, n. 36 above, Art. 5.

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communicate its recommendation to the executive branch, which may refuse to apply the rules in question. In practice, magistrates at all levels use this power to examine the legality of policy in administrative procedures. Moreover, the SPC appears to encourage this exercise by pointing out, in its fifth guiding case, the limits of local regulations.[46] By contrast, judges in civil litigation cannot question the conformity of a policy with a higher law. Any ruling on grounds of ministerial or local regulation in civil proceedings could create the risk of using texts the legality of which is doubtful. Therefore, it seems rational to limit the legal grounds of their decisions to laws and State Council decrees, even in the context where 'state policy' was considered as a supplementary source of civil law. Now, as the new Civil Code further excludes State Council decrees from the sources of civil law, none of the climate policies have binding force in civil adjudication.

While the first distinction between binding and non-binding climate policy was relevant only before 2017, the second distinction between the uses and abuses of non-binding climate policy is more crucial now. As the Chinese Civil Code treats all climate policy as non-binding in civil actions, it would clearly be unlawful for courts to treat climate policy as binding. Which alternative uses of climate policy are permissible in litigation, however, is more difficult to discern and requires further examination.

The distinction between regular use and abuse of policy in litigation can be illustrated by a comparison between two contractual disputes concerning solar energy facilities. In a case concerning the installation of solar water-heating systems, the judges of Qinghai Province relied on the province's Green Building Action Implementation Plan, a document adopted by the provincial urban planning and construction bureau.[47] A key issue in this dispute was whether the plaintiff, the buyer of an apartment, could refuse to pay for solar water-heating facilities that were not specifically identified in the supply contracts. The defendant, a property developer, argued that the installation of solar energy facilities was required to comply with provincial action plans, and therefore did not constitute an arbitrary and unilateral revision of the contract. The court of first instance endorsed the latter argument, finding that the defendant could modify the agreement, signed in 2016, in the light of the 2013 Action Plan.[48] The court of second instance went further and explained that, since the promotion of renewable energy was both national and local policy, the plaintiff's demand to have the cost of installation waived should be rejected.[49]

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[46] 29 Apr. 2011, 鲁潍（福建）盐业进出口有限公司苏州分公司诉江苏省苏州市盐务管理局行政判决书，江苏省苏州市金阊区人民法院 (2009) 金行初字第 0027 号 [*Suzhou Branch of Luwei Co. Ltd* v. *Salt Administration of Suzhou Municipality*], (2009) Case No. Jin Administrative 0027, Court of Jinlv District, Suzhou Municipality.

[47] This case was discussed by Zhao, Lyu & Wang, n. 16 above, p. 359. We offer a critical account of the judgment.

[48] 26 Dec. 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. *Qinghai Sanxing Real Estate Co. Ltd*] (2016) Case No. Qinghai 0102 Civ. 2790, Court of Dongcheng District, Xining Municipality.

[49] 10 Apr. 2017, 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. *Qinghai Sanxing Real Estate Co. Ltd*] (2017) Case No. Qing 01 Civ. Appl. 301, Court of Xining Municipality.

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Even though their expressed support towards the installation of energy conservation facilities is generally desirable, the reasoning of the first and second instance courts is problematic. As the action plan was available to the developer in 2013, arguably the developer could have predicted the need to install the facilities and have adjusted the price accordingly by the time of the events in 2016. Compared with an individual purchaser of the apartment in question, the developer was undoubtedly in a superior position to modify the terms of sale. In addition, regulations on construction standards set by provincial governments are targeted at the upstream level – that is to say, at property developers rather than citizens.

It is perhaps useful to compare this with the judgment given by a court in Shandong Province in a case with similar facts. A property owner sued a developer for failing to install a solar water-heating system. The defendant claimed that installing such a system was not a contractual obligation. However, the court found that the energy conservation project in the appendix to the contract had to be interpreted as an enforceable duty in the light of a national policy on information disclosure for new buildings. The judge argued that if the conservation project in the appendix was required under national regulation, the solar-warming system had to be installed by the developer, rather than by the property owners themselves.[50]

National climate policies cannot inform courts on how to resolve civil disputes, as they do not prescribe well-defined legal rights and duties of private entities. However, the policy targets expressed in those policies may still serve as a source of inspiration in adjudication. Some creative legal reasoning may be required for this to align with positive law and judicial practice. The following section will discuss the indirect application of climate policy in Chinese case law.

3.2. *Application of Indirect Policy*

Although they are not legally binding, governmental climate policies still have practical value in civil adjudication, which may impact upon the development of the law. An indirect or explanatory reference to climate policy is a legitimate technique of legal reasoning. Judges consider national and local policies as context, or they infer from these policies the teleological interpretation of statutory law. Both techniques empower judges to transform these non-binding documents into vital elements in civil adjudication. When used in this way, the 'soft' climate policies that affect the interpretation of statutory terms and basic legal principles introduce climate change considerations into the existing legal system, even absent any 'hard' climate change legislation. In the context where the new Civil Code adopts several environmental clauses, the use of climate policy to guide contractual and statutory interpretation will become more frequent and further inspire renewal in the interpretation of Chinese civil law.

Firstly, judges often cite climate policy as a contextual factor and decide if it can be used as an interpretive or evidentiary tool, alongside established formal legal norms.

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[50] 29 Jan. 2019, 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 [*Mujie Jia* v. *Shandong Hailiang Real Estate Co. Ltd*] (2018) Case No. Lu 0104 civ. 6255, Court of Huaiyin District, Jinan Municipality.

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For example, in many instances related to taxi-management contracts or logistics contracts involving highly polluting vehicles, courts have referred to notices or circulars issued jointly or separately by several ministries to determine whether the vehicles in question are subject to prohibition from commercial use.[51] The judges found in these cases that the relevant action plans and circulars obstruct the performance of contractual duties and ruled that the taxi-management or logistics companies could cancel the contracts. On such occasions climate policies are treated as factual circumstances that constitute an impossibility in contract law and allow one party to terminate the contract.

Similar uses of policy have also found their way into contract performance disputes concerning heavy industrial activities, such as cement production or coal purchase agreements. A cement manufacturing corporation in Shandong Province had purchased a considerable amount of coal and had partially paid the contract price before the provincial government implemented a local air pollution prevention and control action plan, which halted the corporation's cement production. The corporation refused to pay the balance of the price and proposed returning the unused coal to the seller, arguing that the action plan changed circumstances and frustrated the coal purchase agreement. The court did not endorse this argument, deciding that the cement producer should have foreseen the development of environmental policy. This is because the action plan was not a new policy, but a local – and more specific – implementation of existing national environmental requirements.[52] Again, the court did not rule on the ground of policy, because the question was not whether an industrial entity can burn coal but revolved around the impact of a local action plan. As the court expected that private agents would adjust their business plans to align with state policy, it held that the cement producer should continue, in that case, to pay for the coal that it was nevertheless prohibited from using.

Chinese environmental NGOs occasionally bring actions against power plants and other industrial entities on the ground of air pollution, aiming strategically at emissions reduction.[53] In the case discussed in the previous paragraph, neither party raised the question of mitigation. We discuss the coal purchase contract dispute not because it is a core example of climate litigation in the strict sense of the term, but because the

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[51] 13 Mar. 2017, 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 Co. Ltd*] (2017) Case No. Yue 08 Civ. Appl. 110, Court of Zhanjiang Municipality; 22 Sep. 2016, 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*] (2016) Case No. Yue 0811 Civ. 148, Court of Zhanjiang Municipality; 20 Jun. 2019, 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 Co. Ltd* v. *Juan Chen*] (2019) Case No. Chuan 0114, Civ. 2394, Court of Xindu District, Chengdu Municipality.

[52] 24 Oct. 2018, 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. *Shandong Huasen Cement Co. Ltd*] (2018) Case No. Lu 13 Civ. Appl. 6156, Court of Linyi Municipality.

[53] J. Liu, 'The Influence and Challenges of Climate Change Litigation in China: From NGOs' Perspective', Conference presentation at the Duke University of Kunshan Conference, 'International Seminar on Climate Litigation as a Tool of Governance', Kunshan (China), 24 Oct. 2020, available at: https://nicholasinstitute.duke.edu/media/jinmei-liu-influence-and-challenges-climate-change-litigation-china-ngos-perspective.

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judge relied upon a local regulation that had mitigation co-benefits. The court's judgment suggested that it was the industries' duty to take mitigation considerations seriously and arrange their operations accordingly. Strong judicial intervention in private arrangements may be exceptional in other jurisdictions, but in the Chinese case it could be key in understanding the role of the judiciary in China's governance of climate change.

Secondly, a court can use climate policy to determine the interpretation of statutory terms.[54] The most obvious example of such use is perhaps the determination of public interest. A mining company sued the State Grid and its engineering company for having built infrastructure in the plaintiff's mining area, which prevented prospecting activities. Before arguing to restrict the scope of the plaintiff's mining right, the defendants raised an argument based on public policy considerations – namely, that the infrastructure project was one of 12 major electricity transmission networks designed to implement the National Air Pollution Prevention and Control Action Plan. The defendants advanced this argument by claiming that the network's construction would reduce emissions of CO_2, among other greenhouse gases (GHGs), by 44 billion tonnes per year. The defendants contended that the infrastructure project, which was authorized by the government, would promote public interests and that 'modern civil legislation across the world imposes social duties to property rights'. Among other arguments, the court found it plausible that the Action Plan and mitigation effects should be taken into consideration, and the mining company's right would not be exercised to the extent that it jeopardized the public interest.[55]

On the basis of these judgments, therefore, it appears clear that courts can interpret policies as circumstances provided by law which can affect contractual performance, or interpret a statutory rule in accordance with these policies. In neither circumstance does the policy in question serve as the legal ground *per se* for the judgment. In both cases, however, the judiciary functions as the implementer of climate policy in order to prioritize mitigation goals over private autonomy. In implementing climate plans, judges have adopted an argumentative strategy that synthesizes binding laws and non-binding policies. Despite the reputation of the Chinese judiciary of being pragmatic and policy-oriented,[56] it was not until 2018 that this strategy was normalized by the SPC. This endorsement is made explicit in the SPC's Recommendations on Strengthening and Standardizing Arguments in Judicial Decisions.[57]

[54] Zhao, Lyu & Wang, n. 16 above, p. 360.

[55] 28 Dec. 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 Co. Ltd* v. *Electricity Engineering Company of Hunan Province*] (2016) Case No. Jing 0102 Civ. 1894, Court of Xicheng District, Beijing Municipality.

[56] The anti-formalist attitude of China's judicial power and jurisprudence is well documented. What we argue here is not that China's judges *are* formalists, but that their style of decision writing is formalistic. For the anti-formalism of the Chinese court, see S. Seppänen, 'Anti-formalism and the Preordained Birth of Chinese Jurisprudence' (2018) 24(4) *China Perspectives*, pp. 31–8; X. Yu, 'Legal Pragmatism in the People's Republic of China' (1989) 3(1) *Journal of Chinese Law*, pp. 29–51.

[57] 《关于加强和规范裁判文书释法说理的指导意见》(2018) [The Supreme People's Court, Recommendations on Strengthening and Standardizing Arguments in Judicial Decisions], 12 June 2018, Fa No. 10, available at: http://www.court.gov.cn/zixun-xiangqing-101552.html.

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The SPC Recommendations signify a shift from formalism to a more pragmatic approach of judicial argumentation, making more room for the use of state policy. The first recommendation is that legal reasoning will serve simultaneously to resolve the dispute and promote social values. In climate change litigation the SPC recommendation means that judges can, and will, think beyond the confines of a particular case and consider political questions regarding mitigation and adaptation measures. The second recommendation further requires judges to elaborate on the background to and motivations for their interpretation of law and judgment. According to recommendation 13, such considerations may include non-binding material such as legal theory, scholarly opinions, and 'other materials that are not in conflict with the law'.

The judicial implementation of climate policy in private litigation will continue to be an important theme in Chinese environmental justice because of the inclusion of certain environmental clauses within the new Chinese Civil Code. The most famous example is Article 9, or the 'ecological principle', the significance of which will be discussed further below. Article 509(3) stipulates that 'resource conservation and environmental protection' is a principle of contract law. This article is particularly relevant for climate change litigation as a large proportion of cases in China are contractual disputes. A judge may refer to standards, action plans and recommendations, as well as local or ministerial regulations, to determine the needs of resource conservation and environmental protection in concrete circumstances. The same can be said of Articles 346 and 621, which operate on similar overarching principles. Article 326, 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'. As environmental legislation in China broadly delegates to the executive branch the authority for making specific rules, judges may eventually find that environmental policies could be relied upon to implement significant restrictions of usufructuary rights – the above-mentioned dispute between the State Grid and the mining company being an example on this point. They may also need to turn to policy to determine the level of damages or clarify the substantive content of the law, especially when interpreting Article 1232, which prescribes punitive compensation where ecological damage results from the 'intentional violation of the provisions of laws'. In a nutshell, this 'second form' of climate policy application in civil adjudication is likely to become more frequent in the future.

The same expectation applies also to judicial climate governance through contractual dispute resolution. The SPC has recently introduced mitigation considerations into its judicial policy on resolving contractual disputes. In May 2020 it published 40 leading cases pertaining to 'environmental justice'. Among these was an arguably peculiar case which, on its face, had little relevance for environmental law. A coal-coking company concluded a contract with a technology company that specialized in energy conservation. The latter company designed and built a coke dry-quenching system, but the coking company failed to pay the full price of the contract.[58] Although this

[58] 27 May 2019, 中节能科技投资有限公司与罗焱明等服务合同纠纷，北京市高级人民法院 (2019) 京民终 156 号民事判决书 [*Zhongjieneng Technology Investment Co. Ltd* v. *Mingyan Luo et al.*] (2019) Case No. 156 Civ. Appl., High Court of Beijing Municipality.

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dispute appeared to be resolved on the basis of a relatively conventional application of contract law, the SPC categorized energy-management contract litigation as a 'new form of environmental litigation' and as encouraging the 'development of [the] energy management market'.[59] Notwithstanding the contract law-based reasoning of the municipal court, this case was identified in the SPC's publication because it considered mitigation effects as a public good.

Indirect and explanatory references to climate policy before the courts in contractual and statutory interpretation cases enrich the existing legal system with climate change considerations. They extend legal reasoning beyond the purview of a static set of rigidly defined rules and concepts. Rather, we observe a dynamic combination of – and interaction between – legal sources, methods of interpreting and understanding the law, and legal professional praxis.[60] The introduction of climate change considerations in civil law through climate policy alters both the interpretation and application of legal terms and principles in individual disputes. As the new Chinese Civil Code recognizes the conservation of resources and environmental protection as fundamental principles of civil law, it requires judges to interpret other provisions in conformity with these principles, and to protect ecological goods as independent values.[61] The term 'public interest', therefore, is to be interpreted in a less anthropocentric way than had been the case previously, and include interests that cannot easily be reduced to those of individuals or social groups.[62] Other jurisdictions might not have the same principle, but the dynamics of judicial interpretation uncovered in this article may still be relevant beyond Chinese borders. After all, the continuous interaction between principles, rules, and policies exists not only in China, but in many legal cultures that are also confronting the challenges of climate change.

In sum, despite lacking legally binding force, the abundance of Chinese climate policies informs judges of the precise nature and requirements of this common concern of humankind. This answers the key issue at stake in this article: judges are able to consider China's climate policies in interpreting legal texts. Broadly speaking, this use of climate policy may implant climate change considerations into civil law by altering the meaning of legal terms. Admittedly, such an indirect application of climate policy risks limiting the scope of private autonomy in the name of collective interests. Therefore, this must be justified by careful legal reasoning. Hence, we now move to a more theoretical analysis of the use of policy in legal reasoning in civil litigation.

[59] 最高人民法院：2019 年度人民法院环境资源典型案例 [The Supreme People's Court, 'Leading Cases of Environmental Justice in 2019'], available at: http://www.court.gov.cn/zixun-xiangqing-228361.html.

[60] See R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39(1) *The American Journal of Comparative Law*, pp. 1–34.

[61] 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 [M. Zhu, 'Sustainability and the Ecological Turn of Contemporary Civil Law' (2020) 52(6) *Academic Monthly*, pp. 84–97].

[62] Ibid.

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4. PRINCIPLE, POLICY, AND PUBLIC POLICY CONSIDERATIONS

Each jurisdiction – depending on its social, cultural, political, and intellectual factors – may have a distinctive set of methods and rules for determining applicable legal principles. Researchers have recently highlighted the importance of heterodox legal reasoning in the global south, where judges may decide 'to enforce existing progressive environmental and/or climate legislation or, in its absence, to decide favorably for litigants in strategic regulatory climate litigation'.[63] Such climate change litigation often involves a degree of judicial activism and generates a shared concern about 'the legitimacy of generally unelected members of the judiciary to create new laws and shape regulatory tool[s]'.[64]

In global south jurisdictions with robust civil societies and legal systems, the judiciary – especially the highest court in each jurisdiction – may justify its decision and method of interpretation with reference to human rights, or to ethical ideals such as intergenerational equity.[65] This 'rights turn' and ethics-based justification are absent in climate change-related cases argued before Chinese courts of justice. The Chinese judiciary turns instead to national or local state policies to determine what is required for the global public good, and thus justify its rulings and interpretations. To understand this legitimizing function of policy, it can be helpful to recall the classical distinction between two forms of argument.

According to Dworkin, 'arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right', whereas 'arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole'.[66] Dworkin further proposed 'the thesis that judicial decisions in civil cases … characteristically are and should be generated by principle not policy'.[67] Human rights or ethics-based justifications of judicial decisions can usually be categorized as arguments of principle. What is not so transparent is the classification of arguments that involve climate change policies, as in the previously discussed Chinese climate change cases.

Policy can help to determine the existence of rights and responsibilities. Where a regulation prohibited the commercial operation of certain vehicles, the relevant taxi managers and logistics companies were exempted from their contractual duties to the vehicle owners and had the right to interrupt their arrangements. Hence, if a policy change leads to a *force majeure* or a change in circumstances, the affected party will enjoy the right not to keep to its original promise. The affirmative form of this interaction, in which a party may be expected to do more than initially agreed, applies also in the case where energy-conservation information was required by a national standard, a property owner had the right to demand that the developer install a solar-

[63] Setzer & Benjamin, n. 9 above, p. 97.

[64] J. Peel, 'Issues in Climate Change Litigation' (2011) 5(1) *Carbon & Climate Law Review*, pp. 15–24, at 23.

[65] Setzer & Benjamin, n. 9 above.

[66] R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), p. 82.

[67] Ibid., p. 84.

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heating system. Accepting Dworkin's definition of arguments of principle as arguments about rights,[68] the judges merely employed policy to make arguments of principle.

Policy can also serve to determine the public interest, the collective goods that further determine the scope and limits of the execution of rights. The judges did not attempt to 'justify a decision by showing that, in spite of the fact that those who are benefited do not have a right to the benefit, providing the benefit will advance a collective goal of the political community'.[69] Rather, the judges ruled that the community would be better off if the construction of infrastructure (and the mitigation effects thereof) were not jeopardized by the right of mine prospecting, or if a provider of renewables were to receive its payment as a contractual right. Applying the Dworkinian distinction, the judges still provided arguments about rights in both cases, even though their argumentation was informed by policy documents.

Indeed, public policy considerations are omnipresent in Chinese private climate change litigation. However, they are concretized by references to state policy and justified by arguments of principle. Although there must be many occasions where no environmental policy is considered, we suspect that, with the adoption of the new Civil Code, Chinese judges will be quicker to limit individual liberties in the name of the collective social or ecological good. This mode of legal reasoning suggests that public policy considerations sometimes can be an intrinsic part of arguments of principle. If judges incorporate consequentialist thinking into arguments of rights, their progressive statutory interpretation does not change the characteristics of civil cases identified by Dworkin.

By citing non-binding policies as contextual factors or secondary materials, Chinese judges have circumvented the formal lawlessness of climate governance. One of the precarious boundaries between the legitimate and illegitimate judicial implementation of climate policy lies in the choice of decisive authority. Existing legal provisions supply judges with general concepts such as the public interest and the need to conserve resources. They can use these concepts as pathways both to harden soft policies and to alleviate concerns of legitimacy. Meanwhile, the abundance of China's climate action plans and roadmaps enables the judiciary to individualize the global responsibility of mitigation, without any great need to deal with historical responsibility or scientific uncertainty.[70] As the ecological civilizers of society, Chinese judges deploy the instrumentality of the court to implement the state's climate policy and guide private entities towards more sustainable business activities and lifestyles.

5. CONCLUSION

From its ratification of the United Nations Framework Convention on Climate Change[71] in 1992 and the publication of the White Paper on 'China's Population,

[68] Ibid., p. 297.

[69] Ibid., p. 294.

[70] See Mayer, n. 10 above; S. Jasanoff, 'A New Climate for Society' (2010) 27(2–3) *Theory, Culture & Society*, pp. 233–53.

[71] New York, NY (United States), 9 May 1992, in force 21 Mar. 1994, available at: https://unfccc.int/resource/docs/convkp/conveng.pdf.

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Environment and Development in the 21st Century',[72] China has accumulated some thirty years of experience in addressing climate change. Here emerges a mode of governance that depends on the rule of policy. The constitutional framework of environmental governance creates a platform from which the executive, judicial, and prosecutorial powers can implement climate policy, despite the absence of detailed legislative instruction. From the environmental provisions in the Constitution, and from national legislation to departmental and municipal regulation, and all the way down to the individual interpretation of contracts, the sovereign willingness to defend the 'community of common destiny' against disastrous climate events courses through the capillaries of power to all segments of social life.

China's rule of climate policy is possible in practice both because of its constitutional arrangements and the judiciary's use of legal reasoning. The Constitution, an often-forgotten document,[73] entrusts the executive branch with the power to decide on climate matters. Though most of the policies enacted by the executive branch are not directly justiciable, they are nevertheless incorporated into judicial practice. In an ideal setting, judges interpret the law in the light of climate policy and implement the instructions of the executive branch. Particularly in civil adjudication the courts impose limitations on private autonomy in the name of the global public good and justify their decisions by referring to climate policy. From a theoretical point of view, though Chinese judges do not raise issues of human rights or intergenerational equity, their arguments are still based on principle, not on policy. While lawyers in China may have methods of reasoning that are quite distinct from those of their counterparts in other jurisdictions, their experiences illuminate the flexibility of statutory interpretation and judicial argumentation, which can inspire deeper reflection on climate change litigation from the perspective of legal theory.

In the real world the implementation of climate policy can be practically ineffective. A recent *Transnational Environmental Law* editorial identifies the present as the dawn of a climate resistance movement.[74] So, too, in China. The supremacy of the State Council in mastering China's climate is not free from challenges and resistance by the state-owned energy and oil giants. Furthermore, we should not pretend that climate governance in China will lead to a brave new world. There are struggles between businesses, classes, genders, and species; and there are ecological degradations perpetrated by or in the name of sustainable policies. The story told in this article is, after all, a story of the professional, the powerful, the haves, and the humans. Another story might be told of the profane, the powerless, the have-nots, and the non-humans.

[72] 中华人民共和国国务院新闻办公室:《中国 21 世纪人口、环境与发展》, 2000 [State Council Information Office, 'China's Agenda 21: White Paper on China's Population, Environment and Development in the 21st Century'], 19 Dec. 2000, available at: https://www.chinanews.com/2000-12-19/26/62210.html.

[73] SPC policy is that the courts cannot make decisions on the ground of constitutional provisions. Literature in English on Chinese environmental law also largely ignores the Constitution.

[74] T.F.M. Etty & V. Heyvaert, et al., 'The End of a Decade and the Dawn of a Climate Resistance' (2020) 9(1) *Transnational Environmental Law*, pp. 1–9.

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However, our findings do stress the existence of dynamic and stable factors that are not elaborated in written rules. It is essential for the legal profession to understand the requirements and consequences of law, procedure, and the Constitution. It is at least equally essential to grasp the way in which the rules and decisions create the world and envisage its good governance, as well as the underlying socio-political structures that co-produce, with the law, real outcomes. Moreover, we must interrogate the meaning that agents give to their deeds. As many eminent authors have already proposed, the change we need is perhaps not a modification of the rules, but a shift in the way we understand the world, and the position of law in it.[75]

[75] P. Descola, *Par-Delà Nature et Culture* (Gallimard, 2005); F. Capra & U. Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Berret-Koehler, 2015); B. Latour, *Facing Gaia: Eight Lectures on the New Climatic Regime* (Polity, 2017); Biber, n. 25 above; J. Viñuales, *The Organisation of the Anthropocene: In Our Hands?* (Brill, 2018).

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