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Embedding Private Law into the Green Transition

I. Introduction: Contextualising the Green Principle

In 2017, as a prelude to civil codification in China, the General Provisions of Civil Law (民法总则, equivalent to the *Allgemeiner Teil* of the German *Bürgerliches Gesetzbuch*) was enacted, which introduced an overarching 'Green Principle' to govern private relationships. This principle was later compiled, verbatim, into the long-awaited Chinese Civil Code 2021 (民法典, 'CCC').[1] Art. 9 CCC provides: '*When conducting a civil activity, a person of the civil law shall act in a manner that facilitates conservation of resources and protection of the ecological environment*'.[2] It is one of the seven codified – not just scholarly summarised – 'general principles' of civil law written in the CCC, among classic principles such as good faith and good morals. Based on its wording, the Green Principle entails two distinct but interconnected aspects, namely 'conservation of resources' and 'protection of the ecological environment'. It highlights an

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1 An English translation of the CCC is available on the State Council's website, see https://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html. For a general introduction to the CCC and its legislative history, see https://npcobserver.com/2020/05/2020-npc-session-a-guide-to-chinas-civil-code; https://npcobserver.com/legislation/civil-code.

2 For the legislative history of the Green Principle, see T Zhai and Y Chang, 'The Contribution of China's Civil Law to Sustainable Development: Progress and Prospects' (2019) 11 Sustainability, 294. From a historical perspective, this is not the first time that a green principle appeared in the legislative process in China. Art. 70(1) of the Draft Civil Code (4th draft, 1 May 1982) provided that 'The exercise of ownership must comply with the requirements of environmental protection and ecological equilibrium, and shall not interfere with the public interest and legitimate rights of other citizens'.

economical as well as eco-friendly way of thinking. The Green Principle is widely celebrated for equipping private law with a responsive framework to effectively address the environmental challenges of the 21st century.[3]

The legislature brought up two justifications for the introduction of this principle in its preparatory documents.[4] First, it embodies the traditional Chinese culture of 'the harmonious unity of heaven, land and people (天地人和)' and 'symbiotic harmony between human and nature (人与自然和谐共生)'. While these elements are indeed significant in traditional Chinese culture, they are a rather selective representation. One can easily find expressions like 'man's determination will triumph over nature (人定胜天)' as well, which took strong hold in China since the 1950s as the Communist Party of China ('CPC'), then led by Mao, sought to build up a strong economy for the New China. As such, the second argument put forward by the legislature might bring us closer to reality: the Green Principle is in line with the 'New Development Philosophy (新发展理念)'[5] and 'Xi Jinping's Thoughts on Ecological Civilisation (习近平生态文明思想)',[6] both of which can be found in the preamble of the Constitution of China. They both stressed the growing importance of balancing and coordinating economic growth with environmental protection, especially in light of China's international commitments under the Paris Agreement. Under their auspices, a myriad of environmental legislation has been introduced in recent years in China.[7]

In this light, the political nature of the Green Principle, in my view, is beyond doubt: it is driven by a particular (and perhaps contingent[8]) political vision of the government and, as I will elaborate later, it challenges the neutral, a-political image of private law. As a matter of fact, this political impetus has been the driving force behind the entire codification project from day one. The 4th Plenary Session of the 18th CPC Central Committee decided to 'codify civil legislation' in October 2014,[9] and the CCC was passed in May 2020. After four failed attempts to come up with a civil code since the New China was founded in 1949, the fifth attempt was pulled off in less than 6 years. However, given the time constraints and the urgency to produce political achievements, the CCC represents more of a compilation of existing civil legislation[10] and case law, and less of a technical process of comprehensive re-systematisation. It is probably due to this heavy political touch that the Green Principle was bombarded by a large group of doctrinal private law scholars,[11] especially those who are deeply influenced by German tradition. They first pointed out that the Green Principle is too vague and merely declaratory and lacks justiciability in a civil court. They were further concerned that this rogue principle would disrupt the system of pure private law that underpins interpersonal and corrective justice. These arguments are not all well founded. As I will discuss in Part II, the greening of private law is more concrete than the abstract Green Principle, and the principle itself has been actively mobilised by courts in China. As I will further argue in Part III, the narrow conception of private law as corrective justice should be discarded – or at least modified – in light of constitutionalisation and ecologisation of private law.

II. Concretising the Green Principle

The Green Principle is indeed highly abstract – just as abstract as other (established) principles like good faith – but the legislature has already consciously devised some more concrete 'green provisions' to implement this abstract principle.[12] I will only name a few here for illustration.[13] Under Book II CCC on property law, Art. 286 provides that condominium owners must act in an economical and eco-friendly manner, and Art. 326 sets out a similar prescription for all holders of limited property rights, especially building rights (Art. 346). Under Book III CCC on contract law, Art. 509(3) requires the parties to avoid waste and pollution in the course of the performance of a contract, and Art. 558 and Art. 625 provide for a post-contractual obligation to recycle used products (subject to the parties' agreement, established practices or law). Art. 619 specifies that goods being sold should be sustainably packaged (in the absence of agreed or generally accepted packaging methods). Under Book VI on tort, Arts. 1229-1233 lay down detailed rules on liability for environmental pollution and ecological damage, introducing devices like a reversed burden of proof for causality (Art. 1230) and punitive damages (Art. 1232). Arts. 1234-1235 further codifies the regime for 'compensation for ecological damage' (similar to the notion of *préjudice écologique* under the French *code civil*[14]), which entrusts local governments to take actions against polluters to restore and compensate for ecosystem degradation as such, without the requirements of identifiable victims and quantifiable harm to them. Admittedly, some of these provisions are still highly

3 For a comment by a leading private law scholar in China, Wang Liming, who has actively participated in drafting the CCC, see http://theory.people.com.cn/n1/2020/0821/c40531-31830976.html.

4 Explanatory notes by the Standing Committee of the National People's Congress, on the General Provisions of Civil Law 2017, see http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-03/09/content_2013899.htm; on the CCC, see https://www.gov.cn/xinwen/2020-05/22/content_5513931.htm#1.

5 See http://en.qstheory.cn/2022-10/28/c_824275.htm; http://en.qstheory.cn/2021-07/08/c_641137.htm.

6 See http://en.qstheory.cn/2020-05/25/c_494972.html; https://www.theguardian.com/environment/2021/oct/16/ecological-civilisation-empty-slogan-cop15-or-will-china-act-on-environment-aoe.

7 See http://www.npc.gov.cn/npc/c2/c30834/202308/t20230815_430994.html.

8 For example, to address the electricity shortage, China is building significantly more new coal plants in 2022, see https://www.npr.org/2023/03/02/1160441919/china-is-building-six-times-more-new-coal-plants-than-other-countries-report-fin; to tackle the food crisis and ensure food independence, China is turning forests into farmland, see https://www.lemonde.fr/en/environment/article/2023/06/27/china-imposes-deforestation-in-the-pursuit-of-food-independence_6038140_114.html.

9 See 'Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law' <https://www.gov.cn/zhengce/2014-10/28/content_2771946.htm>.

10 The last article of the CCC (Art. 1260) provides: 'This Code shall come into force on January 1, 2021. The Marriage Law of the People's Republic of China, the Succession Law of the People's Republic of China, the General Principles of Civil Law of the People's Republic of China, the Adoption Law of the People's Republic of China, the Security Law of the People's Republic of China, the Contract Law of the People's Republic of China, the Real Right Law of the People's Republic of China, the Tort Liability Law of the People's Republic of China, and the General Provisions of Civil Law of the People's Republic of China shall be repealed at the same time.'

11 See, for example, DU Tao, *The Birth of the General Provisions of Civil Law: Introduction to its Key Drafts and Legislative Process and Background* (Peking University Press 2017) 147, 242, 343 (杜涛#《民法总则的诞生#民法总则重要草案及立法过程背景介绍》#北京大学出版社2017年版#第147、242、343页).

12 See the legislative explanation on the CCC, https://www.gov.cn/xinwen/2020-05/22/content_5513931.htm#1.

13 For a thorough summary, see Editorial, 'Civil Code, Which are the Green Provisions? 30 Provisions on the Protection of Natural Resources and Ecological Environment in the Civil Code' (2020) 3 China Ecological Civilisation, 52-53 <http://www.cecrpa.org.cn/zzjx/gd_9804/202007/t20200721_790342.shtml> (本刊编辑部#民法典#绿色条款有哪些#——民法典关于自然资源和生态环境保护的30个条款#载《中国生态文明》2020年第3期#第52-53页). Also see the discussion in T Zhai and Y Chang, 'The Contribution of China's Civil Law to Sustainable Development: Progress and Prospects' (2019) 11 Sustainability, 294.

14 S Taylor, 'Extending the Frontiers of Tort Law: Liability for Ecological Harm in the French Civil Code' (2018) 9 Journal of European Tort Law 1, 81-103.

principled and have no real teeth, thus leaving their practical impact to be determined over time.

Aside from these legislative provisions, the judiciary has also been developing a crude yet enlightening line of case law to identify the functions of the Green Principle. Before delving into the case law, it is helpful to contextualise this jurisprudence against the evolution of the principle of good faith. The principle of good faith, also inherently abstract, has gradually gained tangible form through judicial practice and is now widely embraced in most (civilian) jurisdictions. Though terminologies and precise definitions may vary, in most jurisdictions good faith is said to have three functions: it could play a role in *interpretation*, *supplement* an unwritten duty between the parties and *limit or correct* abuse of rights.[15] In a similar vein, based on a cursory search of existing cases,[16] I observed that the Green Principle serves four distinct functions in civil adjudication: it can be symbolic, interpretative, corrective or gap-filling.

First, the reference to the Green Principle is *symbolic* when its inclusion does not impact the interpretation of legal provisions or the outcome of the case but simply highlights the expressive function of law by erecting a model of just conduct for private persons.[17] For example, courts have often invalidated contracts for violation of mandatory (environmental) standards such as waste classification,[18] charcoallicensing[19] and tailpipe emission standards.[20] In these cases, the direct legal basis is Art. 153(1) CCC (illegal contracts are void), but courts would also refer to the Green Principle to strengthen its reasoning. The Green principle has also been used to reinforce the aggrieved party's duty to mitigate, which is already provided under Art. 591 CCC.[21] Such frequent references to the Green Principle can likely be attributed to the Chinese courts' general preference for general principles, which can be traced back to the historical inertia arising from years of navigating around principled legislation as a result of both the limited state capacity during the early years of New China and the complexities of a vast nation. Moreover, as Chinese courts also undertake the responsibility to educate the general public and guide their behaviours in line with the law, referencing general principles that resonate with a common sense of social conscience can probably enhance the acceptance of court decisions within society.

Second, when a legal norm is open to divergent interpretations, the Green Principle may direct the judges' discretion to pinpoint one *interpretation* that agrees best with sustainable values. For example, the Supreme Court has endorsed the approach adopted by local courts in a line of 'bitcoin cases'.[22] These local courts, led by the Green Principle, have incorporated environmental industrial policies on cryptocurrency activities into 'public policies and good morals' under Art. 153(2) CCC and quashed a highly carbon-intensive cryptocurrency mining contract for violation of these public policies. Also, under Art. 563(1)(4) CCC, a contract can be terminated when the contractual purpose is impossible to fulfil. This 'purpose' could be interpreted in a purely economic sense, but one court opted to take the ecological impact of the contract into account when assessing whether its purpose is frustrated or not.[23] In another case about a long-term contract, the court considered one party's investment of substantial resources into the preparation for the performance of the contract and denied the other party's right to termination to uphold the contractual relationship to avoid wasting economic resources.[24] The Green Principle is not the sole legal basis for denying the right to termination, but it offers a gateway for courts to duly consider the specific features of long-term contracts in deciding whether they should be brought to an end or not.[25] Another court has applied the Green Principle in its interpretation of 'force majeure' and concluded that a government order to halt a housing construction project due to severe air pollution is not a force majeure, as the real estate developer should take into account such environment-related incidents in its planning and properly manage its development schedule.[26] The Green Principle could enable the courts to take on more innovative interpretations to facilitate ecological civilisation.

The Green Principle sometimes lends itself to judicial activism beyond the black letters of the law. The court has employed the Green Principle to *correct* an outcome or limit the exercise of rights that would be detrimental to the environment. In several cases, the courts rejected the claimants' otherwise rightful claims to demolish illegally built houses[27] or to cut down unlawfully planted trees,[28] as granting these claims would result in resource waste, such as the construction

15 MW Hesselink, 'The Concept of Good Faith' in AS Hartkamp et al (eds), *Towards a European Civil Code* (4th edn Kluwer Law International 2010) 624–627.

16 A burgeoning body of empirical scholarship is now delving into the case law surrounding the Green Principle, see, for example, GONG Gu, 'The Categories and Functions of the Judicial Application of the Green Principle under the Civil Code – An Analysis Based on Relevance Case Law' (2021) 20 Journal of Nanjing Tech University (Social Science) 6, 1-14 (巩固#《民法典》"绿色原则"司法适用的类型与功能——基于相关判决的分析#载《南京工业大学学报#社会科学版#》2021年第6期#第1-14页); MA Mi et al, 'The Judicial Application of the Green Principle: Reality of Practice and Pathways of Improvement – Based on the Judicial Application of Art. 9 of the General Principles of Civil Law' (2020) 23 Legal Application, 49-57 (马密#黄荣#常国慧#《民法典》绿色原则的司法适用#实践样态与优化路径——以《民法总则》第9条的司法适用为基点#载《法律适用》2020年第23期#第49-57页); CHEN Honglei, 'The Judicial Application of the Green Principle in the Context of the Civil Code' (2020) 23 Legal Application, 58-70 (陈洪磊#民法典视野下绿色原则的司法适用#载《法律适用》2020年第23期#第58-70页).

17 On the symbolic and expressive functions of law, see D Pessers, 'The Symbolic Meaning of Legal Subjectivity' in B van Klink et al (eds), *Symbolic Legislation Theory and Developments in Biolaw* (Springer International Publishing 2016).

18 Guiyang Intermediate People's Court of Guizhou Province (2018) Qian 01 Civil-Final No. 5662 (贵州省贵阳市中级人民法院(2018)黔01民终5662号民事判决书).

19 Mianning Primary People's Court of Sichuan Province (2019) Chuan 3433 Civil-First No. 134 (四川省冕宁县人民法院(2019)川3433民初134号民事裁决书).

20 Suizhou Zengdu Primary People's Court of Hubei Province (2017) E 1303 Civil-First No. 1303 (湖北省随州市曾都区人民法院(2017)鄂1303民初2999号民事判决书).

21 Changsha Intermediate People's Court of Hunan Province (2021) Xiang 01 Civil-Final No. 3575 (湖南省长沙市中级人民法院(2021)湘01民终3575号民事判决书).

22 See M Zhu, 'The "Bitcoin Judgements" in China: Promoting Climate Awareness by Judicial Reasoning?' (2023) 32 Review of European, Comparative and International Environmental Law 1, 158-162.

23 Xiushui Primary People's Court of Jiangxi Province (2018) Gan 0424 Civil-First No. 1333 (江西省修水县人民法院(2018)赣0424民初1333号民事判决书).

24 First Intermediate People's Court of Beijing Municipality (2021) Jing 01 Civil-Final No. 5614 (北京市第#中级人民法院(2021)京01民终5614号民事判决书).

25 Discussing the specific features of long-term contracts, see H Collins, 'Is a Relational Contract a Legal Concept?', in S Degeling et al (eds), *Contract in Commercial Law* (Thomas Reuters 2016).

26 Liaocheng Intermediate People's Court of Shandong Province (2019) Lu 15 Civil-Final No. 2172 (山东省聊城市中级人民法院(2019)鲁15民终2172号民事判决书).

27 Zhumadian Intermediate People's Court of Henan Province (2019) Yu 17 Civil-Final No. 3783 (河南省驻马店市中级人民法院(2019)豫17民终3783号民事判决书); Luoyang Intermediate People's Court of Henan Province (2018) Yu 03 Civil-Final No. 212 (河南省洛阳市中级人民法院(2018)豫03民终212号民事判决书).

28 Xixian Xinyang Primary People's Court of Henan Province (2017) Yu 1528 Civil-First No. 4405 (河南省信阳市息县人民法院(2017)豫1528民初4405号民事判决书); Suining Primary People's Court of Hunan Province (2017) Xiang 0527 Civil-First No. 969 (湖南省绥宁县人民法院(2017)湘0527民初969民事判决书).

materials, and environmental harm, as trees could help prevent soil erosion. Instead, the courts ordered that the claimants become owners of the houses or trees after paying some compensation to the defendants. It is worth noting that the land use in these cases has already been granted licences for residential and forestry purposes, but it nonetheless seems to be a very intrusive approach to redistribute proprietary entitlements. Last but not least, as recognised by the Supreme Court, all 'general principles' of civil law could serve a *gap-filling* function to fill a legislative lacuna,[29] including the Green Principle. For example, Art. 235 CCC allows an action for *rei vindicatio* but does not specify its exact timing. One court delayed the restitution of a piece of land until the wheat planted on it had been harvested to avoid the risk of waste.[30] Another court reversed a homeowner association's resolution that prohibited a homeowner from installing an electric vehicle charging station in the parking lot.[31] The decision was primarily inspired by the Green Principle, highlighting the scientific fact that electric cars can reduce fossil fuel consumption and have zero tailpipe emissions. A useful annotation here is that the Chinese authority has been actively promoting electric cars since the early 2000 s.[32]

Except for these inspiring examples of the greening of private law, there are also cases where the Green Principle is instrumentally mobilised to promote economic efficiency, which does not pertain to ecological sustainability per se. For example, due to a new policy by local authorities, only corporations (legal persons) are granted market access for lighterage operations on the Yangtze River. A local court enforces the defendant's contribution agreement to form such an operating corporation, as it can contribute to the ecological governance of the Yangtze River.[33] It goes without saying that a binding contract should be performed, so the court's somewhat superfluous reference to the Green Principle, in my view, is essentially instrumental to justifying the marketisation reforms. Moreover, even deducting residual value from insurance compensation could be derived from the Green Principle as it economises 'social resources',[34] while another court used the Green Principle – together with the prohibition on abuse of rights under Art. 132 CCC – to discourage frivolous litigations as they would result in the wastage of 'judicial resources'.[35] The term 'resources' under Art. 9 CCC seems to be interpreted very broadly by courts,[36] which might help boost the Green Principle's application in judicial practice but might also undermine its unique value by blurring its boundaries.

These cases well illustrated the Green Principle's considerable potential as well as pitfalls. By presenting this selection of case law, I hope to flag up the need to unleash the judicial resilience of the principle by systematising and categorising case law – much like what jurists did with the good faith principle. This exercise could help flesh out the correct meaning of the Green Principle in a dynamic way while preserving legal certainty for private actors. More importantly, such a descriptive restatement would generate a normative guideline that assists in defining the *green boundary of private autonomy*: how ownership could stop being a device for the accrual of personal wealth and derives a social obligation of the owners in the sustainable transition; how contracts could be viewed as a relational management device to navigate sustainable collaboration beyond a transactional tool to externalise social and ecological costs; how tort liability could open up its rigid reading of loss, causality and other notions to support the fight for environmental justice. At the end of the day, in defining the green boundary of private autonomy, we get to uncover a new image of private law, which I will discuss now.

III. Theorising the Green Principle

To tease out its systematic significance and avoid instrumentalisation that betrays its very purpose, it is essential to embed the Green Principle into the broader theoretical discussion on how we understand (private) law in relation to the environment. At first blush, there seems to be an antagonistic relationship between private law and environmental law. A classic understanding of private law hinges on an internal, interpersonal perspective that focuses on the 'direct and immediate connections between the parties' and that seeks to restore the wrongs between them to achieve corrective justice.[37] As such, private lawyers may be allergic to external, politically driven policy goals like distributive justice or environmental sustainability. Meanwhile, environmental lawyers are also suspicious of the effectiveness of the individualistic and ex-post remedial approach of private law in tackling collective environmental problems and prefer to leave environmental protection to public law.[38] This represents the same debate in China. However, the codification of the Green Principle signals a departure from this siloed way of thinking about private law and environmental law. Instead, it embraces the growing prominence of ecological sustainability in private relationships, which marks, on the one hand, the *constitutionalisation* of private law, and on the other hand, the *ecologisation* of private law.

Constitutionalisation of private law in the broadest sense refers to the direct application or indirect influence of fundamental rights and the constitutional order at large in private legal relationships.[39] In China, the Constitution[40] lacks formal

29 See Art. 1 of the Interpretation by the Supreme People's Court on the Application of the General Part of the Civil Code of the People's Republic of China (最高人民法院关于《中华人民共和国民法典》总则编若干问题的解释), Fashi [2022] No. 6 < http://gongbao.court.gov.cn/Details/2dfca1b19663c57f990410a8a60795.html>.

30 Shanxian Primary People's Court of Shandong Province (2017) Lu 1722 Civil-First No. 4797 (山东省单县人民法院(2017)鲁1722民初4794号民事判决书).

31 Jing'an Primary People's Court of Shanghai Municipality (2018) Hu 0106 Civil-First No. 3616 (上海市静安区人民法院(2018)沪0106民初3616号民事判决书).

32 See https://www.technologyreview.com/2023/02/21/1068880/how-did-china-dominate-electric-cars-policy.

33 Wuhan Maritime Court of Hubei Province (2018) E 72 Civil-First No. 651 (湖北省武汉海事法院(2018)鄂72民初651号民事判决书).

34 Ziyang Intermediate People's Court of Sichuan Province (2018) Chuan 20 Civil-Final No. 427 (四川省资阳市中级人民法院(2018)川20民终427号民事判决书).

35 Taian Intermediate People's Court of Shandong Province (2019) Lu 09 Civil-Final No. 3147 (山东省泰安市中级人民法院(2019鲁09民终3147号民事判决书).

36 A small-scale empirical research presented by Jakub Zwierzchowski at the 17th Annual Conference of the European China Law Studies Association reveals that in more than half of the selected case law on the application of the Green Principle in contractual disputes (around 200 cases), the courts interpreted 'resources' as some kind of social resources as opposed to natural resources.

37 A classic account of this understanding of private law, see E J Weinrib, *The Idea of Private Law* (Oxford University Press 2012).

38 D Howarth, 'Environmental Law and Private Law' in E Lees and J E Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press 2019).

39 On the constitutionalisation process in Europe, see, for example, C Mak, 'Uncharte(re)d Territory: EU Fundamental Rights and National Private Law', CESCL Working Paper Series No. 2013-05, Amsterdam Law School Research Paper No. 2013-25; A Colombi Ciacchi, 'European Fundamental Rights, Private Law and Judicial Governance', in H W Micklitz (ed), *The Constitutionalisation of European Private Law* (Oxford University Press 2014).

40 An English translation of the Constitution of China is available on the National People's Congress' website, see http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node_2825.htm.

justiciability since the abolition of the *Qi Yuling* jurisprudence in 2008, even in instances against public bodies.[41] The (apparent) rationale is that all constitutional provisions should be implemented through parliamentary laws, which then serve as the legal basis for judicial rulings. Against this backdrop, I submit that the constitutionalisation of private law in China[42] takes a rather unique form in two senses. First, instead of the direct or indirect reference to constitutional provisions to adjudicate private disputes, some critical fundamental rights such as the right to life (Art. 1002 CCC), the right to bodily integrity (Art. 1003 CCC) and the right to privacy (Art. 1032 CCC) – traditionally found in the constitution – are directly provided and justiciable under Book IV CCC on personality rights. Private parties can simply refer to these CCC provisions to exercise their constitutional prerogatives. In particular, the recognition of the 'general personality right' under Art. 990 (2) CCC – derived from personal freedom and human dignity – makes the CCC's scope of protection for private fundamental rights infringement significantly broad.[43] As human dignity is often viewed as the basis for fundamental rights protection,[44] a generous interpretation of the general personality right – in line with Art. 33(3) of the Constitution affirming a general commitment to human rights protection – could further expand its already extensive protective scope. Second, the private adjudication processes in China are shaped not only by constitutional norms in a narrow sense but also by the broader fundamental political order. This includes informal authorities like CPC rules or government documents., alongside the formal Constitution and state laws. Indeed, Party rules and regulations sometimes take on a preeminent role of 'law' in China[45] – at least, reading between the lines of Party documents gives government officials as well as judges more incentive to apply the law in a certain direction. As such, due to a closer fusion of law and politics, the politically sensitive Chinese judges favour aligning judicial reasonings with the priorities and agenda of the CPC, such as the 'Core Socialist Values (社会主义核心价值观)',[46] in order to achieve an 'organic unity of political, legal and social effect(iveness)'.

Back to the Green Principle, Art. 9(2) and Art. 26(1) of the Constitution of China set out the state obligations to promote 'rational use of natural resources' and protect 'living environments and ecological environment' The 'New Development Philosophy' and 'Xi Jinping's Thoughts on Ecological Civilisation' as mentioned before are not only ubiquitous in CPC documents but also formally incorporated into the preamble of the Constitution. In this light, the Green Principle serves as an interlocutor – an open norm placed in the CCC itself – that channels the constitutional order of environmental protection and the CPC value of ecological civilisation into civil adjudication. Indeed, in its recent guideline, the Supreme Court has been actively mobilising local courts to provide 'judicial services' in order to achieve carbon peak and carbon neutrality, where it is highlighted the significance of 'correctly applying the Green Principle and the green provisions'.[47] Thus, the Green Principle effectively opens up the body of private law to synergistic dialogues with constitutional law, public (environmental) law, procedural law (e. g. environmental public interest litigation,[48] climate litigation[49]) and CPC policies. Of course, the Green Principle does not, and should not, replace state obligations in combating climate change. State organs are equally bound by the constitutional and public law mandates of environmental protection[50] and, when they act in a private capacity, the Green Principle. In sum, the Green Principle aligns the public and private obligations as well as the private, collective and public enforcement of environmental law and policies.

While constitutionalisation extends the forefront of private law from individual autonomy to public interests, *ecologisation* further stretches the boundary of the anthropocentric private law to envelop the non-human world and nature.[51] One might argue that the ecological boundaries of private law – as a general public interest limit to private relationships – could already be found in the principle of public order and good morals. However, while good morals still focuses on a version of intra-generational justice collectively formed by fellow good citizens, the Green Principle asks for an inter-generational perspective to understand where we are here and now, the human world and present generation, by posi-

41 In 2001, the Supreme Court issued a piece of judicial interpretation (Fashi [2001] No. 25), in the context of *QI Yuling v. CHEN Xiaoqi et al*, where Chen Xiaoqi went to a school in Qi Yuling's name and thus deprived Qi Yuling's opportunity to do so, and explicitly acknowledged that Qi Yuling's constitutional right to education as protected by Art. 46 of the Constitution was infringed and should be entitled to private law compensation. In 2008, the Supreme Court published a document that officially abolished several judicial interpretations, including the Qi Yuling jurisprudence, without even a brief explanation. For more detail, see Q Zhang, 'A constitution without constitutionalism? The paths of constitutional development in China' (2010) 8 International Journal of Constitutional Law 4, 950–976.

42 A general discussion on the constitutionalisation of private law in China, see A Stone Sweet et al, 'Breaching the Taboo? Constitutional Dimensions of China's New Civil Code' (2023) Asian Journal of Comparative Law, 1-26. As a background, it should be mentioned that the constitutionalisation of private law is undoubtedly taking place in China. Art. 1 CCC routinely declares that the Civil Code is enacted in accordance with the Constitution. Moreover, on 14 June 2023, SHEN Chunyao, the director of the Legislative Affairs Commission of the Standing Committee of the National People's Congress, published a short piece entitled 'Fully Understanding the Constitutional Significance of China's Civil Code (充分认识我国民法典的宪法意义)', see http://www.npc.gov.cn/npc/c2/kgfb/202306/t20230614_430008.html. The constitutionalisation process is, of course, not without controversy. An interesting anecdote is that even the routine reference to the Constitution under Art. 1 CCC is criticised by some scholars as the 'constitutional' trap of the making of the Civil Code (民法典制定的宪法陷阱)', see https://www.aisixiang.com/data/98003.html.

43 It can be read as the constitutionalisation arising from Art. 37 (on personal freedom) and Art. 38 (on human dignity) of the Constitution.

44 J Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights', in The Crisis of the European Union: A Response (Cambridge: Polity Press 2012), 71-100.

45 See https://theasiadialogue.com/2017/09/19/ruling-the-country-by-red-letterhead-documents/

46 See the Guiding Opinions on Deeply Promoting the Integration of Socialist Core Values into the Analysis and Reasoning of Adjudicative Instruments (关于深入推进社会主义核心价值观融入裁判文书释法说理的指导意见) issued by the Supreme Court on 18 February 2021 <https://www.court.gov.cn/fabu-xiangqing-287211.html>. For a comment, see https://supremepeoplescourtmonitor.com/2021/03/25/integrating-socialist-core-values-into-court-judgments/?utm_source=pocket_saves. It should be noted that the phrase 'Core Socialist Values' is actually formally included under Art. 24(2) of the Constitution.

47 See the Opinion on Fully and Accurately Implementing the New Development Philosophy and Providing Judicial Services to Actively and Prudently Promote Carbon Peak and Carbon Neutrality (关于完整准确全面贯彻新发展理念 为积极稳妥推进碳达峰碳中和提供司法服务的意见) issued by the Supreme Court on 17 February 2023 <https://www.court.gov.cn/zixun-xiangqing-389351.html>. For a comment, see https://climatechangenews.com/2023/03/07/china-strengthens-role-of-courts-in-meeting-carbon-targets.

48 See, for example, W You et al, 'Types of Environmental Public Interest Litigation in China and Exploration of New Frontiers' (2023) 20 International Journal of Environmental Research and Public Health 4, 3273; Y Wang and Y Xia, 'Judicializing Environmental Politics? China's Procurator-led Public Interest Litigation against the Government' (2022) 253 The China Quarterly, 1-17.

49 See https://climatecasechart.com/non-us-jurisdiction/china.

50 This is in terms of both duly exercising their power to regulate environmental compliance and properly fulfilling their duty to act in an environmentally friendly way. For the former, see, for example, the Environmental Protection Law 2014 which lays out the framework for environmental supervision. For the latter, see, for example, Art. 9 of the Public Procurement Law which requires that public procurement should promote, inter alia, environmental protection.

51 Along similar lines, see M Zhu, 'The Ecologization of the Chinese Civil Code' (2020) 64 Pravovedenie 4, 511-525.

tioning ourselves in relation to there and then, the non-human world and future generations. Private dealings are not just a matter between direct parties but should answer to their implications for the environment and limited resources on our planet. The Green Principle adds a fresh new perspective to private law. It invites the courts to factor scientific facts – such as the environmental benefits of trees and electric vehicles – into resolving private disputes, enabling the representation of nature and non-human entities who do not have a voice. It unsettles the holy tenets of absolute ownership and unfettered contractual freedom that have enabled private parties to outsource the externalities of their actions while reaping all the rewards. It lays bare the uncomfortable truth that the scope of private autonomy is historically contingent and legally defined,[52] implying that its boundaries are socially and ecologically adaptable. It advocates for a holistic perspective to examine the imprint of human activities on nature and seeks to incorporate private law – once part of the problem – as part of the solution.

While these words represent my optimistic invitation for a recalibration of private law doctrines through the lens of this small provision, countless other provisions in the CCC reinforce the status quo. Indeed, the CCC lays out an institutional framework that supports the functioning of liberal markets and the paradigm of economic growth,[53] which might just be the underlying cause of unsustainable production and consumption patterns. Moreover, recall that even the Green Principle itself is subject to market instrumentalisation. To mitigate the potential disruption of the Green Principle to the pure private law system, one scholar even contends that the future of the principle lies in the minimisation of social costs and maximisation of social wealth, namely applying the law and economics thinking to private law.[54] This interpretation, in my view, completely throws away the most valuable contribution of the Green Principle to private law, as I previously discussed. The Green Principle offers a starting point to problematise market maximisation as the unquestionably dominant organising principle in our modern society without accounting for the environmental externalities of economic activities – but it is merely a starting point. More needs to be done, both within and outside the principle.

IV. Conclusion: Unleashing the Green Principle

A spiritual bond between humans and nature is not unfamiliar in traditional Chinese culture and other cultures, but somehow, we have lost track of this soulful connection as we worship economic growth and romanticise financial affluence in the name of development and modernisation. Now, we are forced to reconsider that connection in light of the social, environmental and climate malaise of our time. The Green Principle serves as a compelling example to enhance the resilience of private law doctrines and reconfigure the role of private law in reclaiming our connection with nature. This is not the sole example. Art. 14 of the Argentinian Civil and Commercial Code prevents abuse of rights that may reversely affect the environment, and Art. 1094 of the same code juxtaposes 'consumer protection' and 'access to sustainable consumption' as the fundamental principles of the interpretation of consumer law.[55] Art. 240 of this code further addresses the issue in the context of property law, which requires the exercise of property rights not to 'affect the functioning and sustainability of the ecosystems of flora, fauna, biodiversity, water, cultural values, landscape, among others'. Art. 1228 of the Brazilian Civil Code internalises the social and environmental function of property in a similar way.[56] In Asia, Art. 172 of the Vietnamese Civil Code erects a general obligation of owners to protect the environment. Furthermore, more and more jurisdictions are even recognising the rights of nature,[57] including private rights of nature.[58]

In Europe, a comprehensive 'Green Deal' has been put forward to address the climate crisis. Due to its functional approach, private law, in particular consumer law, has inevitably been entangled into this debate. Is patching up the current paradigm or tinkering with quick fixes sufficient? Is a top-down European green principle in private law desirable? Or, is such a principle already hidden in our private law doctrines and yet to be discovered in a bottom-up manner? One possible solution seems to be readily available under primary EU law already – but it is simply not made full use of. Art. 11 of the Treaty on the Functioning of the European Union ('TFEU') provides that environmental protection requirements must be 'integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'. Taking this integration obligation seriously means that environmental protection should be considered in *all* EU law areas, including areas 'where environmental concerns traditionally have not been even considered'[59] such as private law and consumer law.[60] In this sense, when it comes to interpretation, EU law, including European private law, should always 'be interpreted in a way that renders it consistent with environmental protection requirements' and, if possible, 'preference should be given to an interpretation in line with environmental protection requirements'.[61] If taken more seriously, Art. 11 TFEU could be a European expression of the Green Principle. Moreover, the preamble of the Charter of Fundamental Rights of the European Union also declares that the enjoyment of fundamental rights entails 'responsibilities and duties with regard to other persons, to the human community and to future generations', which further justifies individuals' obligation to care for the community, including the environment. In any case, it is high time to get rid of our obsession with *here and now* and extend the boundary of law to *there and then*. ■

52 M Bartl, 'Toward Transformative Private Law: Research Strategies', NEXTLAW Working Papers 1/2023, Amsterdam Law School Research Paper No. 2023-11, Amsterdam Centre for Transformative Private Law Working Paper No. 2023-02.

53 On the constitutive role of private law for the functioning of (global) capitalism, see K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

54 HE Jian, 'The Green Principle and Law and Economics' (2019) 2 China Legal Science, 110-127 (贺剑#绿色原则与法经济学#载《中国法学》2019年第2期#第110-127页).

55 See S S Barocelli, 'Taking Care of Business: Engaging Dialogue on Solutions to Unsustainable Commercial Practices', in A Amaral Junior et al (eds) *Sustainable Consumption: The Right to a Healthy Environment* (Springer 2020), 137-152.

56 There is a long history of debate on the social function of property in Latin American, see, for example, S Foster and D Bonilla, 'The Social Function of Property: A Comparative Law Perspective' (2011) 80 Fordham Law Review, 101.

57 For an overview of the Rights of Nature movement, see D R Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (ECW Press 2017); L Burgers and J den Outer, *Compendium Rights of Nature: Case-Studies from Six Continents* (Embassy of the North Sea 2021).

58 L Burgers, 'Private Rights of Nature' (2022) 11 Transnational Environmental Law 3, 463-474.

59 B Sjåfjell and A Wiesbrock (eds), The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously (Routledge 2015), 114.

60 In the context of European consumer law, see E Terryn, 'Can Consumer Law Become Sustainable?', in H W Micklitz and C Twigg-Flesner (eds) *The Transformation of Consumer Law and Policy in Europe* (Bloomsbury Publishing 2023) (forthcoming, on file with author).

61 M Wasmeier, 'The Integration of Environmental Protection as a General Rule for Interpreting Community Law' (2001) 38 Common Market Law Review, 162, 176.