



教育部人文社会科学重点研究基地《环境法学文库》

王树义 主编

环境法私人实施研究

A STUDY OF PRIVATE ENFORCEMENT OF ENVIRONMENTAL LAW

冯 汝 著

中国社会科学出版社



教育部人文社会科学重点研究基地《环境法学文库》

王树义 主编

环境法私人实施研究

A STUDY OF PRIVATE ENFORCEMENT OF ENVIRONMENTAL LAW

冯 汝 著

中国社会科学出版社

图书在版编目(CIP)数据

环境法私人实施研究 / 冯汝著. —北京: 中国社会科学出版社, 2017. 1
(教育部人文社会科学重点研究基地《环境法学文库》)
ISBN 978 - 7 - 5161 - 9617 - 5

I. ①环… II. ①冯… III. ①环境保护法 - 研究 IV. ①D912. 604

中国版本图书馆 CIP 数据核字(2017)第 005175 号

出 版 人 赵剑英
责任编辑 梁剑琴
责任校对 石春梅
责任印制 李寡寡

出 版 中国社会科学出版社
社 址 北京鼓楼西大街甲 158 号
邮 编 100720
网 址 [http: //www. csspw. cn](http://www.csspw.cn)
发 行 部 010 - 84083685
门 市 部 010 - 84029450
经 销 新华书店及其他书店

印刷装订 北京市兴怀印刷厂
版 次 2017 年 1 月第 1 版
印 次 2017 年 1 月第 1 次印刷

开 本 710 × 1000 1/16
印 张 15
插 页 2
字 数 246 千字
定 价 58. 00 元

凡购买中国社会科学出版社图书, 如有质量问题请与本社营销中心联系调换
电话: 010 - 84083683
版权所有 侵权必究

总 序

《环境法学文库》是由教育部人文社会科学重点研究基地武汉大学环境法研究所和中国社会科学出版社悉心培育、联合推出的环境法学学科的大型学术丛书，目的在于加速中国环境法学研究的进一步发展，推动中国环境法治的不断进步。

武汉大学环境法研究所是中国国家环境保护总局^①和武汉大学共同建立的一个以环境法学为专门研究领域的学术研究机构，1999年首批进入教育部普通高等学校人文社会科学重点研究基地。2002年，基地的“环境与资源保护法学”学科被教育部评审为国家级重点学科，次年，该学科又被列入教育部“211”工程的第二期重点建设项目。

武汉大学环境法研究所的研究基本上涵盖了整个环境法学学科的研究范围，并且，其整体科研水平在中国环境法学界居领先地位，在国内外具有广泛影响。自20世纪80年代初成立以来，武汉大学环境法研究所紧紧跟随中国环境法治前进的步伐，密切结合中国环境法治建设的实际需要开展研究和教学工作，取得了一系列显著的成绩。20多年来，研究所陆续为国内外培养出了几百个环境法学学科的硕士和博士，出版了几十部环境法学研究的学术专著和教材，发表了千余篇环境法学研究的学术论文，参加了中国数十部环境法律、法规和地方性环境法规的起草、调研和修改工作，向国家和地方提供了许多具有参考价值的环境立法方面的研究咨询报告，受到国内外同行的瞩目。

21世纪是中国全面进入世界先进行列的世纪，可以预见，中国在许多领域还将走在世界的最前列。为此，中国正在努力着、奋斗着，而在这努力奋斗着的队伍之中就有环境法学人的身影。环境法学人的梦想就是让中国环境法学的研究同样走在世界的前列。为了这个梦想的实现，武汉大

^① 现改组为“环境保护部”。

学环境法研究所作为教育部环境法学研究的基地，拟将《环境法学文库》作为研究所长期支持的一个出版项目，面向国内外所有的环境法学者及其他所有关心、支持并有该学科相应研究成果的专家开放，每年推出数本。凡环境法学学科领域内有新意、有理论深度、有学术分量的专著、译著、编著均可入选《环境法学文库》。文库尤其钟情那些在基本理论、学术观点、研究视角等方面具有原创性或独创性的著作，请各位学者、专家不吝赐稿。让我们共同努力，为繁荣中国的环境法学研究、加快中国环境法治的进程略尽绵薄之力。

教育部人文社会科学重点研究基地

——武汉大学环境法研究所所长

王树义

2005年春月于武昌珞珈山

内 容 摘 要

私人实施法律是现行社会和经济制度的一项普遍特征，在某些情况下，私人实施法律比公共实施具有更高的效率。虽然私人实施法律在环保领域也已经广泛存在，并被认为应该得到提倡，但对于环境法私人实施的概念、范围等却存在不同认识。本书认为，环境法的私人实施是指私人为维护自己的权益或社会公共利益，通过行使自己的权利实施环境法律，依法对环境违法行为进行监督、追诉、制裁和执行，以实现环境保护的目的。

从国际范围来看，在美国、日本等环境法律较完备的国家，私人在环境法的实施中发挥了重要的作用。私人可以为了自身利益或社会公共利益，通过诉讼、检举、协商等多元的方式实施法律。并且，私人实施环境法律的行为有相应的激励和限制机制，完善的法律援助、资金支持等配套措施来保障其运行。与此相比，我国私人实施环境法的权利和能力虽然在逐步增强，但由于法律制度不完备、激励保障机制不足、衔接机制不健全等原因，导致在实践中环境法私人实施的状况不佳，主要表现为：私人诉讼数量较少、私人对检举救济功能的过分依赖、私人自力救济暴力性事件多发等。

针对我国环境法私人实施的现状，本书认为应通过增强私人实施的权利能力、完善相应制度支撑，使私人权利在法律中得到确立和细化、在运行中得到保障，发挥私人在环境法中的作用。具体来讲：第一，增强私人诉讼的能力和作用，完善我国相应的诉讼法律制度，包括完善环境群体性诉讼制度，推进公益诉讼制度，建立诉讼费用承担及惩罚性赔偿制度等诉讼激励制度，构建法律援助、环境公益基金、律师参与等诉讼保障制度等。第二，增强环境检举信息汇集及处理的功能，建立健全检举人激励与保护制度，发挥私人在执法中的信息优势。第三，通过法治途径解决环境自力救济中的暴力性问题，将自力救济作为私人利益表达的合法化途径，

发挥环境协商的作用。

但对上述观点,存在不同意见,很多学者从法律的成本、法律的可提供性、法律的文化基础等方面对增强私人实施的必要性与可行性提出了质疑,对于环境自力救济和检举的完善与定位提出了不同意见。概括起来,针对增强私人实施的争辩包括:第一,对于环境私人诉讼,从必要性而言,环境诉讼与环境行政执法相比是否具有优势?应加强环境行政执法抑或环境私人诉讼?私人诉讼在环境法中是否能够发挥相应的作用?是否能够达到改善环境状况,惩罚、减少和预防违法行为,维护社会公共利益的目的?私人诉讼的各项具体制度和规则是否能够发挥效果?从可行性而言,我国是否具备相应的司法基础、环境法律文化?诉讼是否符合效率原则?第二,我国的环境检举与环境信访交织在一起,具备权利救济、信息提供两大职能,是否应该将权利救济功能从环境检举中剥离开来?第三,环境私人自力救济暴力化问题是通过政治化途径解决、通过加强公共机构的执法能力来进行预防,还是应该通过法治化途径解决、通过畅通诉讼及利益表达机制来进行预防和制裁?私人通过集会、游行、示威等形式进行的环境自力救济活动从形式上看属于非法行为,但从实质上这些行为是否是非法的?是否应该合法化?

对于上述问题,本书通过对现有私人实施的理论和实践进行梳理和分析,在借鉴国外法律与实践的基础上,立足于我国的实际,认为,环境法私人实施的增强不仅是必要的而且是可行的。私人通过诉讼、检举等方式完全可以在维护环境公共利益、解决大规模环境污染问题、制裁和预防环境违法行为等方面发挥重要作用,也可以极大地促进公共机构履行职责,与公共实施形成互动,提高环境法的整体实施效果。私人实施的不足是我国当前环境法实施效果不佳的重要原因之一。随着我国环境司法专门化的展开,民众环境保护意识的增强,私人实施环境法律有了相应的基础。我国应该通过相关法律制度的完善,健全私人利益表达、信息提供、权利救济的渠道和方式,提高法律自身的经济性和可实施性,通过完善私人实施的激励、保障以及内外部互动机制,促进私人积极行使权利,使公众成为法律实施的能动参与者。

关键词: 环境法的私人实施;环境法的公共实施;环境私人诉讼;环境私人检举;环境私人自力救济

Abstract

Private enforcement law is a common feature of the current social and economic system. In some cases, it has a higher efficiency than the public enforcement law. Generally speaking, it is believed that it is common in the field of environmental protection, and should be strongly advocated. In this paper, private environmental law enforcement means that private enforcers exercise their rights to monitor, litigation, sanctions and execution against environmental illegal acts, in order to safeguard their own rights and interests or social public interests and achieve the purpose of environmental protection.

Globally, since the 1970s, many countries like the United States and Japan increasingly come to rely upon private law enforcement as a means of attaining public environmental objectives. Over the past four decades, private enforcers have been playing an important role in the implementation of the environmental law of in these nations. Whereas, compared with these countries, Although China established its environmental law system, its implementation, falls well short of the public's expectations. In that paper, it is believed that inadequately private enforcement law is one of the key causes of under-enforcement. In China, the private enforcement law is a sufficiently new phenomenon in the environmental law that little is known about it. What determines the amount of private enforcers' activities? What are the consequences of these acts? Whether and to what extent under-enforcement of private enforcement may be attributable to the legislature for inadequately designed legislation? These questions should be focused and analyzed.

Therefore, in this paper, many questions about private environmental law enforcement will be explored, including why and how the private enforcers implement environmental statutes, and whether private enforcement can be an ef-

fective cure for the environmental under-enforcement problem and so on. This paper proceeds as follows. The first chapter briefly defines the concept, scope, characteristics of private environmental law enforcement. The second chapter analyses the theoretical basis, motivation, function, advantages and disadvantages of private environmental law enforcement. Based on the theoretical analyses, the third chapter analyses from the aspect of theory and practice of foreign environmental law, the trend of legislation abroad and the experience of private enforcement in other countries are summarized. The fourth chapter summarizes the development in private enforcement of China's environmental law regime. After that, linking with empirical analysis, the status quo and the existing problems of private enforcement is evaluated and analyzed. This part finally proposes a few obstacles of private enforcement existing in the environmental law regime. In the fifth chapter, many doubts and arguments are analyzed, for example, whether private suits for public interest can or cannot be an effective remedy for under-enforcement? By describing and analyzing private enforcement law pros and cons seen from theory and practice, this part finds it is necessary and feasible to enhance the role of private enforcers in the maintenance of environmental public interest, solving the problems of environmental pollution on a large scale and the implementation of the environmental law. Private enforcers through litigation, prosecutions and other ways can greatly promote public institutions to perform his duties, subsidize government's insufficient enforcement, and maximize the overall effect of the environmental law. In the last chapter some suggestions on how to improve private enforcers' function in the existing enforcement scheme is given, including improving the economic benefits of the legislation, promote the private enforcers' rights, strengthen the motivation and safeguard system of the private enforcers and so on.

Key Words: private environmental law enforcement; public environmental law enforcement; private enforcers; privatelitigation; prosecution; self-reliancerelief

目 录

引言	(1)
一 问题的提出及研究意义	(1)
二 文献综述	(4)
三 研究思路及方法	(11)
四 创新点	(12)
第一章 环境法私人实施概述	(14)
第一节 法律的私人实施	(14)
一 法律实施与法的私人实施	(14)
二 环境法与法的私人实施	(17)
第二节 环境法的私人实施	(21)
一 环境法私人实施的概念及特征	(21)
二 环境法私人实施的基本方式	(25)
第三节 环境法私人实施之相关问题	(28)
一 环境法私人实施与公共实施	(28)
二 环境法私人实施与公众参与	(29)
三 环境法私人实施与私人守法	(32)
第二章 环境法私人实施之理论考察	(33)
第一节 环境法私人实施之理论基础	(33)
一 私人实施权利来源的理论基础	(33)
二 私人实施方式整合的理论基础	(35)
三 私人实施的法经济学理论基础	(41)
第二节 环境法私人实施之内在逻辑	(43)
一 环境法私人实施的逻辑起点	(43)
二 环境法私人实施的动力	(47)
三 环境法私人实施的作用	(49)

第三节 环境法私人实施之利弊分析	(51)
一 环境法私人实施的相对优势	(51)
二 环境法私人实施的局限性	(54)
第三章 国外环境法私人实施的实践	(57)
第一节 国外环境法私人实施的发展与现状	(57)
一 环境私人诉讼	(57)
二 环境私人检举	(64)
三 环境私人自力救济	(67)
第二节 环境法私人实施的国外经验	(69)
一 激励与限制机制平衡	(69)
二 环保组织为重要的实施主体	(70)
三 法律援助和律师的作用	(72)
四 私人实施的方式互补和促进	(74)
五 私人实施与公共实施的结合	(76)
六 制度的保障与支持	(77)
第四章 我国环境法私人实施的实践	(79)
第一节 我国环境法私人实施的历史考察	(79)
一 古代环境法的私人实施	(79)
二 民国时期环境法的私人实施	(81)
三 新中国环境法的私人实施	(81)
第二节 我国环境法私人实施的现状及存在的问题	(88)
一 环境私人诉讼的现状及存在的问题	(88)
二 环境私人检举的现状及存在的问题	(92)
三 环境私人自力救济的现状及存在的问题	(97)
第三节 我国环境法私人实施存在问题之原因分析	(105)
一 私人实施法律制度不完善	(105)
二 私人实施保障机制不足	(117)
三 私人行为存在利益障碍	(123)
四 私人实施方式之间内部关系断裂	(126)
第五章 推进我国环境法私人实施的基本思考	(128)
第一节 加强环境法之私人诉讼	(128)
一 我国是否应该确立惩罚性赔偿制度	(128)

二 我国群体性诉讼制度应如何选择	(133)
三 环境公益诉讼能否发挥应有实施效果	(139)
四 私人诉讼是否可以维护公共利益	(143)
第二节 完善我国环境私人检举和自力救济之路径	(148)
一 我国环境私人检举的定位	(148)
二 我国环境私人自力救济存在问题的解决路径	(150)
第三节 加强我国环境法私人实施应考虑的因素	(156)
一 社会转型的背景	(156)
二 司法基础	(162)
三 社会与文化因素	(167)
四 经济与效率分析	(171)
第六章 完善我国环境法私人实施之对策建议	(175)
第一节 完善环境法私人实施法律制度	(175)
一 完善环境私人诉讼制度	(175)
二 完善环境私人检举制度	(186)
三 环境私人自力救济的规范和制度化	(189)
第二节 构建环境法私人实施保障机制	(192)
一 完善环境法律援助制度	(192)
二 加强律师在私人实施环境法过程中的作用	(194)
三 环保组织应作为实施环境法律的重要主体	(196)
第三节 构建环境法私人实施的内外互动机制	(197)
一 构建环境法私人诉讼内部互动机制	(197)
二 构建环境法私人实施方式的衔接制度	(202)
三 构建环境法私人实施与公共实施互动机制	(204)
参考文献	(208)
后记	(221)

Contents

Introduction	(1)
1 Issues Raised and Research Significance	(1)
2 Literature Review	(4)
3 Research Purposes and Methods	(11)
4 Innovations	(12)
Chapter One The Overview of Private Enforcement of	
Environmental Law	(14)
1 Private Enforcement of Law	(14)
1.1 Law Enforcement and Private Enforcement of Law	(14)
1.2 Environmental Law and Private Enforcement of Law	(17)
2 Private Enforcement of Environmental Law	(21)
2.1 The Concept and Features of Private Enforcement of Environmental Law	(21)
2.2 The basic ways of Private Enforcement of Environmental Law	(25)
3 Related Issues of Private Enforcement of Environmental Law	(28)
3.1 Private Enforcement of Environmental Law and Public Enforcement	(28)
3.2 Private Enforcement of Environmental Law and Public Participation	(29)
3.3 Private Enforcement of Environmental Law and Private Law – abiding	(32)
Chapter Two The Theoretical Review of Private Enforcement of	
Environmental Law	(33)
1 The Theoretical Basis of Private Enforcement of Environmental Law	(33)

1. 1	The Source of the Right of Private Enforcement	(33)
1. 2	The Theoretical Basis of Integrating the ways of Private Enforcement	(35)
1. 3	Legal economics theoretical basis of Private Enforcement ...	(41)
2	The Intrinsic Logic of Private Enforcement of Environmental Law ...	(43)
2. 1	The Logical starting point of Private Enforcement of Environmental Law	(43)
2. 2	The Dynamic of Private Enforcement of Environmental Law ...	(47)
2. 3	The Function of Private Enforcement of Environmental Law ...	(49)
3	The Advantages and Disadvantages analysis of Private Enforcement of Environmental Law	(51)
3. 1	The Relative Advantages of Private Enforcement of Environmental Law	(51)
3. 2	The Limits of Private Enforcement of Environmental Law ...	(54)
Chapter Three The Practice of Private Enforcement of Foreign Environmental Law		
		(57)
1	The Development and State of Private Enforcement of Foreign Environmental Law	(57)
1. 1	Environmental PrivateLitigation	(57)
1. 2	Environmental Private prosecution	(64)
1. 3	Self – preservation in Environmental Protection	(67)
2	The Foreign Experience of Private Enforcement of Environmental Law	(69)
2. 1	Balance of the Incentive and Restriction Mechanism	(69)
2. 2	Environmental Protection Organizations as the Main Body of Enforcement of Environmental Law	(70)
2. 3	The Effect of The Legal Aid and Lawyers	(72)
2. 4	The Promotion and Complementation of ways of Private Enforcement	(74)
2. 5	Combining Public Enforcement with Private Enforcement ...	(76)
2. 6	The Support and Guarantee of the Legal System	(77)

Chapter Four The Chinese Practice of Private Enforcement of

Environmental Law	(79)
1 The Historical Review of Private Enforcement of Chinese Environmental Law	(79)
1.1 The Private Enforcement of Ancient Environmental Law	(79)
1.2 The Private Enforcement of Environmental Law of The Republic of China	(81)
1.3 The Private Enforcement of Environmental Law of The People's Republic of China	(81)
2 The State and Problems of Private Enforcement of Chinese Environmental Law	(88)
2.1 The State and Problems of Environmental Private Litigation / ...	(88)
2.2 The State and Problems of Environmental Private Prosecution	(92)
2.3 The State and Problems of Self – preservation in Environmental Protection	(97)
3 The Reason Analysis of the Problems of Private Enforcement of Chinese Environmental Law	(105)
3.1 The Defect Legal Systems of Private Enforcement	(105)
3.2 The Inadequacy of Safeguard mechanisms of Private Enforcement	(117)
3.3 The Interest Barriers of the Personal Behavior	(123)
3.4 Broken Relations between the ways of Private Enforcement	(126)

Chapter Five The Reflection on Promoting Private Enforcement of

Chinese Environmental Law	(128)
1 Strengthen the Environmental Private Litigation	(128)
1.1 Whether the Punitive Compensation System Should be Established in Our Country?	(128)
1.2 How to Perfect the Group lawsuit system in Our Country?	(133)
1.3 Whether the Environmental Public Interest Litigation will Play Their Effects?	(139)

1.4	Whether the Private Litigation can Maintain the Public Interest?	(143)
2	The Path of Perfecting Environmental Private Prosecution and Self – preservation in Environmental Protection	(148)
2.1	The Role of Environmental Private Prosecution	(148)
2.2	The Path of Perfecting Self – preservation in Environmental Protection	(150)
3	The Considered Factors of Promoting Private Enforcement of Chinese Environmental Law	(156)
3.1	The Background of Social Transition	(156)
3.2	The Judicial Basis	(162)
3.3	The Social and Cultural Factors	(167)
3.4	Economy and Efficiency Analysis	(171)
Chapter Six Suggestions on Perfecting Private Enforcement of Chinese Environmental Law		
1	Perfect the Legal System of Private Enforcement of Environmental Law	(175)
1.1	Perfect the of Environmental Private Litigation	(175)
1.2	Perfect the Legal System of Environmental Private prosecution	(186)
1.3	Perfect the Self – preservation in Environmental Protection ...	(189)
2	Construct the Guarantee Mechanism of Private Enforcement of Environmental Law	(192)
2.1	Perfect the Environmental Legal Aid System	(192)
2.2	Enhance the Role of Lawyers in enforcing Environmental Law	(194)
2.3	Environmental Protection Organizations as the Main Body of Enforcement of Environmental Law	(196)
3	Construct the Internal and External Interaction Mechanism of Private Enforcement of Environmental Law	(197)
3.1	Construct the Internal Interaction Mechanism of Environmental	

Private Litigation	(197)
3.2 Construct the Connection of the Ways of Private Enforcement of Environmental Law	(202)
3.3 Construct the Interactive Mechanism between Public Enforcement and Private Enforcement	(204)
Bibliography	(208)
Acknowledgement	(221)