

The Significance of the Separate-Regulatory Paradigm

Subjects: Law

Contributor: Tiantian Zhai

This separate-regulatory paradigm is strongly backed up by its significance in maintaining a clear line between tort law and environmental law, providing remedies tailored to the natural environment, and bypassing the logical difficulties in incorporating environmental damage into the tort system. The failure of tort law to fashion an effective remedy to the damaged environment in complex environmental issues such as climate change further illustrates such significance.

Keywords: environmental civil liability ; separate-regulatory paradigm ; environmental tort

1. Providing Particularized Remedy to the Natural Environment

There is a long-standing doctrinal debate on the role of tort law and environmental law in achieving environmental objectives. The current scholarly consensus is that environmental law has developed to cope with the complexities of modern environmental harm inadequately handled by tort law, and tort law has become relegated to a “gap-filling” role ^[1] ^[2] ^[3] ^[4]. Generally speaking, the fundamental purpose of tort law is corrective justice through a compensation system for vindicating individual rights ^[5] ^[6] (p. 919), while prevention and deterrence are core principles underlying most environmental law ^[2] (p. 745). However, the emergence of liability schemes such as CERCLA and ELD bestows on environmental law the new objective of providing corrective justice to the environment rather than to individuals, which gives rise to the separate-regulatory paradigm of environmental liability. Therefore, concerning the objectives of tort law and environmental law, the separate-regulatory paradigm respects clear boundary lines and refrains from distorting tort law for alleged environmental damage based on goals outside of the tort system ^[2] ^[7] ^[8]. Besides, under the public liability scheme of CERCLA and the ELD, the environmental authorities can choose to clean up and implement the remedy themselves and reclaim the costs later, which ensures a more timely and effective remedy for the damaged environment, especially in cases where responsible parties are unidentifiable or insolvent. This is why in the US and elsewhere, the separate-regulatory paradigm is increasingly accepted, and it has become a minority view to regard tort law as an efficacious environmental risk regulation mechanism ^[9] (pp. 49–53).

The practical significance of the separate-regulatory paradigm lies in its recognition of the distinctions between the two facets of liability, and in its provision of particularized remedies for the damaged environment and natural resources. As already pointed out, effective remedy mechanisms available under the two sets of liability systems are quite distinct. The remedies most commonly awarded for environmental torts include injunction and monetary damages. Damages, in particular, are regarded as an appropriate means to compensate for the economic loss and emotional distress caused in property and personal injury cases. By contrast, the most desirable remedy for environmental damage is restoring or replacing the injured environment and resources instead of pecuniary compensation. It is difficult to put a price tag on the natural environment, and monetary damages are often considered insufficient for restoring the environment to its original, pre-injury condition. Alternatively, even if pecuniary compensation is awarded on rare occasions, especially in cases where the defendant is unable to restore the impaired environment, or where restoration is not feasible, the compensation standard applied is quite different from that in tort cases. Put simply, compensation for environmental damage is usually based on the costs of restoring or replacing the damaged environment and natural resources, the interim losses during restoration and the costs for the assessment of the damage ^[10] (art. 9607(f)). In contrast, damages in environmental torts hinge on the loss of economic value or emotional distress suffered by the victim. Therefore, the separate-regulatory paradigm fully takes into account the specificities of environmental damage that could not be easily addressed through the classic private law structures of tort law and provides appropriate remedies accordingly.

2. Theoretical Difficulties for Tort-Based Environmental Remediation

The significance of the separate-regulatory paradigm can be further illustrated by the unsound theoretical attempts to graft environmental damage onto the tort system. Three representative academic approaches have been proposed for this end,

but they are inconsistent with either legislation or judicial practice due to departing too far from established legal theory or reflecting far-fetched or flawed reasoning.

First, some scholars propose to remediate the damaged environment through the tort system by treating natural objects as legal property, so that the right-holders could seek remediation for those natural objects through tort suits ^[11]. This approach is partly feasible, because many parts of the environment such as soil, rivers or forests may also serve as the objects of property rights. Nevertheless, the efficacy of this approach in remediating the environment is quite limited. On the one hand, this approach is based on the premise that damaged natural objects can be translated into legal property, but this is not always the case in reality. Some parts of the environment such as the air, endangered species, wetlands and wild rivers do not have a specific rightsholder, and thus are unable to be protected through tort claims. On the other hand, even when those natural objects can be protected as property, the most frequently used remedy in property cases is monetary damages based on lost economic value instead of restoration, especially when the costs of repair or restoration largely outweigh the market value of the property ^[12]. Under such a scenario, the commonplace remedies under a separate liability scheme for damage to the environment, including primary, complementary and compensatory remediation, become unavailable under the tort system.

The second approach attempts to achieve environmental remediation through tort law by regarding the cleanup and restoration costs paid by environmental protection authorities as a type of economic injury in tort law, so that those authorities are conferred standing to sue for environmental damage through tort actions ^[13] (p. 57). This approach is flawed in three aspects. To begin with, the so-called economic burden placed on governmental authorities can also be eliminated through administrative penalties without going through convoluted tort proceedings. Besides, liability for environmental damage is not limited to cleanup and restoration costs, but also includes interim losses, which can hardly be taken as an economic loss suffered by the government. Therefore, this tort-based approach cannot provide a full remedy for the injured natural environment. Furthermore, although this approach may rationalize the standing of environmental authorities in tort actions, it fails to explain the standing of authorized social organizations and the procuratorate to sue for environmental damage, as is practiced in China.

Besides, some efforts have been made trying to remediate the damaged environment by conferring legal rights and status to nature, so that the natural environment could seek remediation just like humans ^[14] (pp. 220–260). A frequently cited authority for this proposition is Professor Stone's argument, which makes natural entities the bearers of legal rights and allows them to have standing in the court ^[15]. Undoubtedly, granting enforceable rights to nature itself reflects a progressive understanding of the relationship between humans and nature and may offer a breakthrough in overcoming standing barriers for the remedying of ecological harm, but it is not without problems. First of all, Professor Stone's argument on the rights of nature (RoN) has not been unanimously accepted ^[16]. Second, the success rate all over the world for RoN cases seems to be quite low ^[17]. Take the practice of Ecuador as an example. It is the world's first country to include RoN in its constitution, but the wide variation in outcomes between its extant RoN cases reveals "the problems inherent in a formulation of nature's rights based on a universal subject" ^[18], and also indicates that for RoN to produce real environmental impact, certain obstacles such as politicization must be overcome first ^[19] (p. 138). The utility of the RoN approach in remedying environmental damage is further questioned if one considers the constitutional challenges to the regional and local RoN bylaws in the US ^[17]. Even *Colorado River Ecosystem v. The State of Colorado*, famous for being the first RoN case in the US, was withdrawn after a few months ^[20]. Third, even if the RoN approach is effective to a certain degree, it cannot persuasively demonstrate that tort law alone is sufficient for environmental remediation, for the majority of existing RoN cases are not based on tort law, but on constitutional law or administrative law. What is more important is that the legislation on RoN, such as that of Ecuador and New Zealand, is founded in a specific political context, and is considered as "a historically contingent experiment in the ongoing pursuit of greater indigenous political authority" with no environmental results embedded in it ^[18] (pp. 446, 452). Therefore, although existing RoN endeavours may inform international efforts, whether and to what extent other countries will have the same development is doubted, and it at least seems quite difficult in the near future for RoN to be recognized in legislation or judicial practices in China, for it severely contradicts its prevalent legal theory, especially in terms of legal entities ^[21].

3. The Tensions between Torts Doctrines and Climate Change Litigation

Apart from the above theoretical endeavors, environmental activists have practically used tort law as a promising vehicle to address complex environmental issues such as climate change ^{[22][23][24][25][26]}. However, potential obstacles exist in such tort suits, including the political question doctrine, standing, causation and implied preemption to merit adjudication ^{[27][28]}. Even if the plaintiffs have overcome judicial hurdles of standing, proof of harm and causation in climate change tort litigation, the remedy they seek can only provide little, if any, remedy for the environment ^{[22][24][29]}. This is what

necessitates a public law remedial scheme for the environment itself ^[2], thus rationalizing the separate-regulatory paradigm.

The clumsiness of tort law to deal with climate change has been substantiated not only by the judicial practices of the United States, but also by that outside the U.S. Thus far, the vast majority of climate cases, filed against governments for their administrative inaction (accounting for 90% in the US and 76% outside the US) ^[30] or against private actors for GHG emissions, are based on international law, constitutional law, human rights law, environmental protection law, commercial law, consumer law, etc., with only 12 cases on tort law outside the US ^{[31][32]}. For the very small number of tort-law-grounded climate change cases, they are still premised on harm to humans ^[29], absent of which they cannot provide a direct remedy to the damaged environment itself, let alone the fact that not all of them have been successful. Among the 12 tort-law-grounded cases, only in *Milieudefensie et al. v. Royal Dutch Shell plc.* were the requests of the plaintiff upheld by the court, relying on “the unwritten duty of care” under Dutch tort law ^[33], and this case is likely subject to appeal and may have the same outcome as the *Urgenda* case where both the Hague Court of Appeal and the Dutch Supreme Court declined to base its decision on tort law ^{[34][35]}. The other cases further highlighted the tensions between torts doctrines and climate change litigation. For instance, in *Luciano Lliuya v. RWE AG*, where Para. 1004 of the German Civil Code was referred to by the plaintiff, the court dismissed all the plaintiff’s requests ^[27]. In the most recently decided case *Smith v. Fonterra Co-operative Group Ltd.*, the Court of Appeal of New Zealand firmly concluded “as a matter of principle and policy” that tort law was not “an appropriate vehicle for addressing the problem of climate change”, which it described as being “quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination” ^[36]. Even in the widely considered to be ground breaking *Urgenda Foundation v. State of the Netherlands* where the government’s obligation to reduce Dutch GHG emissions was upheld, both the Hague Court of Appeal and the Dutch Supreme Court declined to anchor the ruling in tort law ^{[34][35]}. In another recently hotly discussed case *Sharma and others v. Minister for Environment*, although the Australian Federal Court established the defendant’s common law duty of care, it declined to issue an injunction against the coal mine under challenge ^[29]. Similarly, in the Belgian case *VZW Klimaatzaak v. Kingdom of Belgium & Others*, while finding the defendants breached Article 1382 of the Civil Code, the Brussels Court of First Instance declined to issue an injunction ordering the government to set the specific emission reduction targets, which they concluded were a matter for the legislative and executive bodies to decide ^[37]. These cases substantiated academic commentary on the seemingly insurmountable doctrinal barriers of tort law faced by plaintiffs of climate cases ^[38].

Tort suits may have implicit regulatory effects, such as deterring wrongdoing, spreading risk, attracting public attention and catalyzing governance, which seem to give tort law a “public life” ^[9] (pp. 48–65). Nonetheless, those regulatory effects are not the core function of tort as a private law system, but just the ancillary impacts. The nature of tort law in adjudicating claims of specific victims against specific wrongdoers ^[9] (p. 57) makes it a clumsy mechanism to cope with climate change, which is characterized by its diffuse origin and diffuse effects ^[39] (pp. 834–844). Just as the critics of climate change lawsuits have argued, tort law is ill-suited to address problems “this inducibly global and interconnected in scope” ^[40] (p. 21), and is “an expensive, haphazard, and inexpert apparatus for the identification, assessment, and regulation of risk” ^[9] (p. 51).

Therefore, when the tort system is unequipped or ill-suited to provide a remedy for environmental damage, courts and legislators should understand and respect its limits instead of stubbornly relying on it. Under such circumstances, the separate-regulatory paradigm becomes a feasible alternative.

References

1. Abraham, K.S. The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview. *Washburn Law J.* 2002, 41, 379–398.
2. Latham, M.; Schwartz, V.; Appel, C. The Intersection of Tort and Environmental Law: Where the Twins Should Meet and Depart? *Fordham Law Rev.* 2011, 80, 737–773.
3. Murphy, J. Noxious Emissions and the Common Law Liability: Tort in The Shadow of Regulation. In *Environmental Protection and Common Law*; Lowry, J., Edmonds, R., Eds.; Hart Publishing: Oxford, UK, 2000.
4. Shapo, M.S. Tort Law and Environmental Risk. *Pace Environ. Law Rev.* 1997, 14, 531–544.
5. Wigmore, J.H. Responsibility for Tortious Acts: Its History. *Harv. Law Rev.* 1894, 7, 315–337.
6. Goldberg, J.C.P.; Zipursky, B.C. Torts as Wrongs. *Tex. Law Rev.* 2010, 88, 917–988.
7. Brennan, T.A. Environmental Torts. *Vanderbilt Law Rev.* 1993, 46, 1–73.

8. Schroeder, C.H. Lost in the Translation: What Environmental Regulation Does That Tort Cannot Duplicate. *Washburn Law J.* 2002, 41, 583–606.
9. Kysar, D.A. The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism. *Eur. J. Risk Regul.* 2018, 9, 48–65.
10. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. pp. 9601–9675. Available online: <https://www.govinfo.gov/content/pkg/USCODE-2011-title42/html/USCODE-2011-title42-chap103.htm> (accessed on 6 February 2022).
11. Li, C. Eco-injury: From the Perspective of Law of Torts. *Mod. Law Sci.* 2010, 1, 63–73.
12. *Ewell v. Petro Processors of Louisiana*, 364 So. 2d 604 (La. Ct. App. 1978). Available online: <https://casetext.com/case/ewell-v-petro-processors-of-louisiana-1> (accessed on 6 February 2022).
13. Li, H. On the Structure of Tortious Liability of Ecological Damage: With an Approach of Fictitious Clause of Damage. *J. Nanjing Univ. Philos. Humanit. Soc. Sci.* 2019, 1, 49–60.
14. Chen, Q. *Philosophy of Environmental Law*; China Legal Publishing House: Beijing, China, 2012.
15. Stone, C. Should Tress Have Standing? Towards Legal Rights for Natural Objects. *South Calif. Law Rev.* 1972, 45, 450–501.
16. Doremus, H. Environmental Ethics and Environmental Law: Harmony, Dissonance, Cacophony, or Irrelevance? *U.C. Davis L. Rev.* 2003, 37, 1–11.
17. DARPO, J. Can Nature Get it Right? A Study on Rights of Nature in the European Context. 2021, p. 22. Available online: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU\(2021\)689328_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU(2021)689328_EN.pdf) (accessed on 6 February 2022).
18. Tanasescu, M. Rights of Nature, Legal Personality, and Indigenous Philosophies. *Transnatl. Environ. Law* 2020, 9, 429–453.
19. Kauffman, C.M.; Martin, P.L. Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian lawsuits Succeed and Others Fail. *World Dev.* 2017, 92, 130–142.
20. Unopposed Motion to Dismiss Amended Complaint with Prejudice, *Colorado River Ecosystem v. Colo.*, No. 1:17-cv-02316-NYW, at 1 (D. Colo. Dec. 3, 2017). Available online: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171203_docket-117-cv-02316_motion-to-dismiss.pdf (accessed on 6 February 2022).
21. Sina News. Teachers and Students from Pecking University Represented Songhua River to Filed Against Sinopec For 10 Billion Yuan, and the Court Did Not Accept the Case. 2005. Available online: <http://news.sina.com.cn/o/2005-12-22/05307769580s.shtml> (accessed on 6 February 2022).
22. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), Rev'd, 131 S. Ct. 2527. 2011. Available online: <https://casetext.com/case/connecticut-v-american-electric-power> (accessed on 6 February 2022).
23. *Comer v Murphy Oil USA Inc* 607 F.3d 1049 (5th Cir 2010). Available online: <https://casetext.com/case/comer-v-murphy-oil-usa> (accessed on 6 February 2022).
24. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). Available online: <https://casetext.com/case/native-village-of-kivalina-v-exxonmobil-corporation-2> (accessed on 6 February 2022).
25. Kysar, D.A. What Climate Change Can Do About Tort Law. *Environ. Law* 2010, 41, 1–71.
26. Ganguly, G.; Setzer, J.; Heyvaert, V. If at First You Don't Succeed: Suing Corporations for Climate Change. *Oxf. J. Leg. Stud.* 2018, 38, 841–868.
27. District Court Essen. *Luciano Lliuya v. RWE AG*, 2015, No. 2 O 285/15. 2016. Available online: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161215_Case-No.-2-O-28515-Essen-Regional-Court_decision.pdf (accessed on 6 February 2022).
28. Ewing, B.; Kysar, D.A. Prods and Pleas: Limited Government in an Era of Unlimited Harm. *Yale Law J.* 2011, 121, 350–424.
29. Federal Court of Australia. *Sharma and Others v. Minister for Environment*, FCA 560. 2021. Available online: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210527_VID3892021_judgment.pdf (accessed on 6 February 2022).
30. Setzer, J.; Higham, C. Global Trends in Climate Change Litigation: 2021 Snapshot. p. 12. Available online: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf (accessed on 6 February 2022).

31. The Climate Change Laws of the World (CCLW) Database. Available online: <https://climate-laws.org> (accessed on 6 February 2022).
32. The United States Climate Litigation Database. Available online: <http://climatecasechart.com/climate-change-litigation/> (accessed on 6 February 2022).
33. The Hague District Court. Milieudefensie et al. v. Royal Dutch Shell PLC., C/09/571932/HA ZA 19-379. 2021. Available online: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment.pdf (accessed on 6 February 2022).
34. The Hague Court of Appeal. State of the Netherlands v Urgenda Foundation, NL:GHDHA:2018:2610. 2018. Available online: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610> (accessed on 6 February 2022).
35. Dutch Supreme Court. State of the Netherlands v Urgenda Foundation, NL:HR:2019:2007. 2019. Available online: <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> (accessed on 6 February 2022).
36. The Court of Appeal of New Zealand. Smith v. Fonterra Co-Operative Group Ltd., CA128/2020 NZCA 552, at 13, 16. Available online: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20211021_2020-NZHC-419-2021-NZCA-552_appeal.pdf (accessed on 6 February 2022).
37. Brussels Court of First Instance. VZW Klimaatzaak v Kingdom of Belgium & Others, No. 2015/4585/A. 2021. Available online: https://prismic-io.s3.amazonaws.com/affaireclimat/18f9910f-cd55-4c3b-bc9b-9e0e393681a8_167-4-2021.pdf (accessed on 6 February 2022).
38. Giabardo, C.V. Climate Change Litigation and Tort Law: Regulation Through Litigation? *Diritto Processo* 2019, 361–382. Available online: <http://dx.doi.org/10.2139/ssrn.3858956> (accessed on 6 February 2022).
39. Schwartz, V.E.; Goldberg, P.S.; Schaecher, C. Why Courts Have Been Quick to Cool “Global Warming” Suits. *Tenn. Law Rev.* 2010, 77, 803–848.
40. Tribe, L.H.; Branson, J.D.; Duncan, T.L. Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine. Washington Legal Foundation Critical Legal Issues WORKING PAPER Series. 2010. Available online: https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/workingpaper/012910Tribe_WP.pdf (accessed on 6 February 2022).

Retrieved from <https://encyclopedia.pub/entry/history/show/51830>