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LEGAL STRATEGIES AND CHALLENGES IN CLIMATE CHANGE MITIGATION IN VIETNAM: THE ROLE OF NON-CONTRACTUAL DAMAGES COMPENSATION

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Abstract

Vietnam is exploring numerous strategies to combat climate change, with a growing emphasis on enhancing national legal provisions, particularly those related to non-contractual environmental damage compensation. However, it is a matter of debate whether Vietnam's current regulations on non-contractual damages effectively contribute to climate change mitigation. This article highlights both the impact and limitations of existing laws concerning environmental non-contractual damages. It argues for a legal approach that prioritizes preventing wrongful environmental acts over merely addressing their consequences. This article is structured into four parts: (i) An overview of climate change in Vietnam; (ii) Comparative analysis of non-contractual compensation for climate-related damages across various jurisdictions, (iii) An examination of Vietnam's legal framework for non-contractual compensation due to environmental pollution; and (iv) Conclusions and recommendations.

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Climate change refers to significant and lasting changes in the Earth's climate, primarily caused by human activities that affect the composition of the global atmosphere. This change is beyond what is observed from natural climate variability over similar time periods.[1] Climate change determines the difference between the long-term average values of a climate parameter or statistic. Among which, the average is taken over a specified period, usually several decades.[2] Thus, climate change refers to long-term shifts in temperature and weather patterns. Such shifts can be natural, due to changes in the sun's activity or large volcanic eruptions. But since the 1800s, human activities have been the main driver of climate change, mainly due to the burning of fossil fuels such as coal, oil, and gas.[3]

As a developing country, which has just commenced industrialization over the past three decades and is heavily affected by climate change, despite various difficulties in resources, Vietnam has demonstrated responsibility and proactively implemented international commitments on climate change.[4] Vietnam's climate

1 Clause 2, Article 1 of the United Nations Framework Convention on Climate Change in 1992.
2 Open Development Vietnam (2018), 'Climate change and impacts in Vietnam'. Retrieved from: https://data.vietnam.opendevelopmentmekong.net/vi/organization/vietnam-organization [accessed 10 Nov 2023].
3 United Nations, 'What is Climate Change'. Retrieved from: https://www.un.org/en/climatechange/what-is-climate-change, [accessed 10 Nov 2023].
4 Vietnam submitted its Intended Nationally Determined Contribution (INDC) in 2015; signed and approved the Paris Agreement, developed a National Plan to implement the Paris Agreement in 2016. The Law on Environmental Protection (2020) has a chapter on responding to climate change regulating responsibility for reducing greenhouse gas emissions, adapting to climate change, implementing Vietnam's NDC and the Paris Agreement.

continues to change following the trends identified in the 2020 Nationally Determined Contribution (NDC). Climate extremes are recorded with greater intensity and higher frequency. During the period 1958–2018, the country's average annual temperature increased by about 0.89°C, equivalent to 0.15°C/decade, and the country's average annual rainfall increased by 2.1%, of which the highest increase in the South Middle and such decreased in the north and west of Central Highlands, the number of strong typhoons increased, the number of hot days and droughts increased, the number of days of cold and freezing cold decreased, extreme rain increased, the average sea level at coastal monitoring stations increased by 2.74 mm/year, especially in the period 1993–2018 increased by 3.0 mm/year.[5]

Climate change has been causing negative impacts on both nature and humans. It is the center of attention of society in the 21st century. Addressing climate change and mitigating its adverse effects is a global responsibility that extends beyond individual countries or regions. In that context, in June 1992, in Brazil, 162 countries including Vietnam signed the United Nations Framework Convention on Climate Change (UNFCCC).[6] In 1997, the Kyoto Protocol on reducing greenhouse gas emissions was also submitted and took effect in 2005.[7] Pursuant to this protocol, industrialized countries committed to reducing greenhouse gas emissions during the period up to 2012. Developing countries and newly industrialized countries with fast growing economies have yet to make commitments in Kyoto. In addition to the UNFCCC and the Kyoto Protocol, the Vienna Convention on the Protection of the Ozone Layer (March 22nd, 1985) and the Montreal Protocol on Substances that Deplete the Ozone Layer (September 16th, 1987) are also involved in limiting negative impacts of climate change. Furthermore, the Paris Agreement on climate change was adopted at the 21st Conference of the Parties to the UNFCCC (COP21), which is a global legislation regulating responsibilities of all parties in responding to climate changes by way of NDC implementation.

In the current climate change situation, many countries have proactively adopted solutions to mitigate climate change[8] within their national capabilities,

5 The Socialist Republic of Vietnam (2020), 'Updated Nationally Determined Contribution'. Retrieved from: https://unfccc.int/sites/default/files/NDC/2022-06/Viet%20Nam_NDC_2020_Eng.pdf [accessed 10 Nov 2023].

6 Vietnam signed the Framework Convention on Climate Change on June 11, 1992, ratified it on November 16, 1994; and signed the Kyoto Protocol on December 3, 1998, ratified it on September 25, 2002.

7 Vietnam participated in ratifying the Protocol on September 25, 2002. The focal agency implementing this Protocol is the Ministry of Natural Resources and Environment.

8 Climate change mitigation is activities aimed at reducing the level or intensity of greenhouse gas emissions. Read: Institute of Meteorological, Hydrological and Environmental Sciences (2018), 'Climate Change and Impact in Vietnam'. Retrieved from: https://data.vietnam.opendevelopmentmekong.net/vi/dataset/climate-change-and-impact-in-vietnam [accessed 10 Nov 2023].

including mitigating climate change through proceedings, specifically compensation for non-contractual damage. Section 2 of this article will analyze the methods that some countries apply in connection with compensation for non-contractual damage caused by climate change. To a narrower extent, Section 3 of this article will focus on discussing Vietnam's regulations on non-contractual compensation for environmental pollution (instead of covering a broader scope such as climate changes), thereby outlining the challenges and prospects of the non-contractual compensation regime to address the environment pollution issue in Vietnam.

1. Comparative analysis of non-contractual compensation for climate-related damages across various jurisdictions

In recent years, tort litigation has been used to address a variety of social problems.[9] However, tort law presents doctrinal barriers to plaintiffs seeking remedies for climate change harms in common law jurisdictions. Litigants are likely to persist in pursuing tortious causes of action in the absence of persuasive policy and regulatory alternatives. Regardless of its ultimate outcome, that litigation provides a valuable opportunity to integrate theoretical questions about the legitimacy of judicial lawmaking, and intersectional critical legal perspectives, into the teaching of torts.[10]

The primary role of tort law in climate change remains unclear. As Professor J.B. Ruhl has emphasized, tort law may also play a significant role in helping to establish standards of foresight and responsibility concerning climate change adaptation needs. Beyond such effects, however, tort law is unlikely to play a substantial role in the ultimate effort to reduce greenhouse gas emissions.[11] Few claims brought in tort have been successful, substantiating academic commentary that seemingly insurmountable doctrinal barriers will defeat potential plaintiffs.[12] Reactions to this use of tort litigation to influence regulatory policy, what scholars have termed "regulation through litigation", have been mixed. On one hand, commentators have argued that litigation can be an effective means of shaping public policy and improving the performance of other policy-making institutions. Lawsuits can frame issues in new ways, give them greater prominence on the agendas of regulatory institutions, uncover policy-relevant information, and mobilize reform advocates. On the other hand, commentators have cautioned that regulation through litigation can be inefficient and ineffective. Compared to

9 Lytton T. D. (2008), 'Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate- Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits', *Texas Law Review,* Vol. 86, No. 7, p. 1837.

10 Bonython W. (2021), 'Tort Law and Climate Change', *The University of Queensland Law Journal*, Vol. 40, No. 3, p. 421.

11 Kysar D. (2011), 'What Climate Change Can Do About Tort Law', *Yale Law School, Public Law Working Paper No. 215, Environmental Law,* Vol. 41, No. 1, p. 4.

12 Bonython W. (2021), *supra* note 10, p. 423.

other forms of regulation, litigation is often unnecessarily complex, protracted, costly, unpredictable, and inconsistent. Moreover, courts are generally less well-equipped than legislatures and administrative agencies to evaluate technical information, implement regulations, monitor results, and make adjustments. Policies resulting from litigation may involve less public input and accountability compared to government regulation, serving the private or political interests of the litigants rather than the public interest. Litigation can also be counterproductive to policy reform by generating a legislative backlash against regulation.[13]

The Dutch Supreme Court's decision in *The State of the Netherlands v. Urgenda* (*Urgenda*) has renewed interest in the use of tort law to address climate change, including as a pre-emptive measure to restrict further anthropogenic climate change-caused harm through the pursuit of injunctions and declarations, as well as for strategic purposes.[14] Climate change tort litigation need not entail the pursuit of compensatory damages for harm already sustained: future claims may be more like those in Urgenda, where the plaintiffs' sought declarations and injunctions to limit further emission of greenhouse gases and restrict or prevent future harm.[15] Kysar D., in his discussion of the complex interaction between tort law and climate change, observed that: "Tort law seems fundamentally ill-equipped to address the causes and impacts of climate change: diffuse and disparate in origin, lagged and latticed in effect, anthropogenic greenhouse gas emissions represent the paradigmatic anti-tort, a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible. Thus, courts will have ample reason, not to mention doctrinal weaponry,[16] to prevent climate change tort suits from reaching a jury."[17] As Bonython W. argues: "Ultimately, many of the benefits Kysar foresaw for tort law were not direct 'wins' for plaintiffs, but rather consequences of some of the 'indirect' strategic objectives. In the process of highlighting limitations of the tort-law system in responding to climate change, the system's limitations regarding other challenging types of claims may also be revealed."[18]

The grounds for initiating climate change litigation following Urgenda include (i) the public nuisance claim; (ii) the negligence claim; (iii) the inchoate

13 Lytton T. D. (2008), *supra* note 9, p. 1837-1838.

14 *Urgenda Foundation v. State of the Netherlands* (2015). Retrieved from: https://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/ [accessed 10 Nov 2023].

15 Caution is required when predicting the outcomes of Urgenda-style claims translocated to other jurisdictions. Although the Urgenda claim was initially brought as a tort claim under the Dutch Civil Code, the Supreme Court judgment ultimately relied on the ECHR.

16 Kysar's 'doctrinal weaponry' includes the test for duty/proximate cause, breach, causation, and harm as stages at which plaintiffs might encounter challenges in US torts law. Plaintiffs in other jurisdictions — both non-US common law and civil law — encounter comparable doctrinal barriers. In non-US common law jurisdictions, plaintiffs may struggle to establish duty of care, breach, and causation.

17 Kysar D. (2011), *supra* note 11, pp. 3–4.

18 Bonython W. (2021), *supra* note 10, p. 427.

duty; and (iv) duty of care.

The first three elements are observed in *Smith v. Fonterra Co-Operative Group LTD [2020] NZHC 419, [2020] 2 NZLR 294* (*Smith v Fonterra)*. In this case, Mr. Smith has filed a claim against Fonterra and six other defendants who are involved in industries that emit greenhouse gases or supply products that release greenhouse gases. He alleges that the emitters are acting negligently or committing the tort of public nuisance in relation to their fossil fuel activities, and that those activities are causing damage to sites of cultural significance near Mahinepua in which he has a cultural and tikanga interest. Mr. Smith also seeks relief based on a novel tort arising from an inchoate duty owed by fossil fuel emitters to cease contributing to the damage to the climate system. Additionally, he claimed that the defendants breached their duty of care to not "operate their business in a way that will cause him loss by contributing to dangerous anthropogenic interference in the climate system", and that they knew or should reasonably have known of New Zealand's requirement to reduce their greenhouse gas emissions since 2007. As a final option, Smith also claimed: "The defendants owe him a duty, cognizable at law, to cease contributing to damage to the climate system, dangerous anthropogenic interference with the climate system and adverse effects of climate change through their emission of greenhouse gases". Smith sought declarations and an injunction requiring the defendants to achieve net zero greenhouse gas emissions by 2030 through linear reductions in net emissions until the 2030 deadline, and relief deemed appropriate to mitigate or adapt "to damage to climate systems said to be contributed to by the defendants". He did not specifically seek damages or costs.

The Court's decision addresses the defendants' application to strike out the claims. The defendants' application was successful in part: The Court struck out the claims in negligence and public nuisance. Justice Wylie considered that orthodox tort law principles created several hurdles to these causes of action, in particular:

(i) Mr. Smith could not demonstrate that the damage he would suffer was particular and direct, which is a requirement of the tort of public nuisance. The Court considered that the damage Mr. Smith would suffer was no different in scale to that suffered by the public generally.

(ii) It was not reasonably foreseeable that the emissions of any of the individual defendants would cause damage to Mr. Smith. The Court reasoned that if the defendants stopped emitting greenhouse gases, then the same damage would nonetheless eventuate. The emissions attributable to the defendants were miniscule in the context of global greenhouse gas emissions.

(iii) To impose a duty of care would result in indeterminate liability, because each defendant could potentially be liable to anyone for damage associated with

climate change. There would potentially be an open-ended class of defendants liable to an equally broad class of plaintiffs.

(iv) Policy factors weighed against a duty of care. The duty could be inconsistent with Parliament's regulation of emissions through the New Zealand Emissions Trading Scheme and New Zealand's net zero target for 2050 in the Climate Change Response Act 2002.

However, the Court refused to strike out Mr. Smith's novel tort based on an inchoate duty. Justice Wylie recognized that the common law allows for the injection of new ideas and the creation of new responses to social issues. The judge expressed reluctance to dismiss the possibility of developing a new tort related to climate change, noting that there were evidential issues that would need to be examined at trial to determine whether and how the common law could evolve in this context.

The last crierion, "duty of care", is observed in *Sharma by her litigation representative Sister Marie Brigid Arthur v. Minister for the Environment [2021] FCA 560* (*Sharma*).[19] In *Sharma*, the child applicants contended that the Commonwealth Minister for the Environment is personally obligated, both to them individually and as representatives of children in general, to exercise statutory decision-making powers with "reasonable care" so as not to cause them harm in any decision related to the approval of the coal mine expansion. They sought declaratory and injunctive relief to prevent the Minister from approving the extension based on her inability to approve the expansion without breaching the contended duty of care. Vickery Coal – the second defendant in the application – is a wholly owned subsidiary of Whitehaven Coal, which had approval under New South Wales law to develop the mine. After obtaining that approval, the developers proposed to significantly expand the mine. This expansion necessitates approval from the Minister under the EPBC Act. The applicants asserted that there is an elevated risk of personal injury, encompassing both mental and physical harm, as well as the risk of property damage and pure economic loss due to heightened climatic hazards resulting from increased CO2 emissions. They limited the responsibility owed by the Minister to "children", anticipating that the most severe harm is likely to occur "towards the end of this century", at which point "today's children will be alive and will be the group most vulnerable to the anticipated harms". Using the salient features approach, which is the criteria used in Australia to evaluate novel duty of care claims, the applicants argued that the risk of harm was foreseeable, the children were in a vulnerable position, the Minister was aware of the risk and could mitigate it, and

19 *Sharma by her litigation representative Sister Marie Brigid Arthur v. Minister for the Environment* [2021] FCA 560. Retrieved from: https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/minister-for-the-environment-v-sharma/vid-389-of-2021-filed-documents/judgment-2021FCA560.pdf [accessed 10 Nov 2023].

the children held a special position to the Minister.

Just as earlier periods of unprecedented injury and loss of life contributed to significant changes in American tort doctrine and practice, an influx of climate change claims may force a reevaluation of the existing system for compensating and deterring harm. The current debate over whether courts are engaging in "regulation through litigation" may come to appear miscast in the face of suits that raise at once both an ordinary pollution nuisance and a challenge to the very foundations of modern industrial life. At long last, courts and commentators may come to view tort claims in degrees of polycentricity, rather than in crude binary terms of conventional civil disputes, on the one hand, and political or regulatory matters, on the other. Should these developments occur, they will be salutary, as they will help tort law to continue its role as backdrop and partner to environmental, health, and safety regulation. Gradually and unevenly, the administrative state is evolving in response to the complex, uncertain, and potentially catastrophic nature of twenty-first century threats to social welfare.[20] As regulatory law moves in response to these unprecedented challenges to the promotion of welfare (and new understandings of old challenges), tort law must move along with it to continue to serve as the administrative State's necessary backdrop. Given its classical liberal origins and its limited adjudicatory framework, tort law will always lag regulatory law in its embrace of a "systems view" of risk and harm. Nevertheless, the era of climate change will make certain trappings of classical liberalism – such as the presumed atomicity of private actors or the purely mechanistic depiction of causation – increasingly difficult to maintain and climate change will challenge prevailing conceptions of wrongdoing in the twenty-first century.[21] Put bluntly, tort law will be forced to adapt or perish, much like life itself in a warming world. And just as environmental economists are faced with a choice between reforming the underlying architecture of their discipline or failing to adequately characterize the climate change problem, courts will be forced to either radically alter existing features of tort law or deem notorious activities that nevertheless threaten core interest's tort law claims to protect.

The UNFCCC states unequivocally that "human activities have been substantially increasing the atmospheric concentrations of greenhouse gases (GHG), that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind."[22] The agreement further identifies its "ultimate objective" as the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would

20 Kysar D. (2011), *supra* note 11, pp. 4–5.

21 *Ibid*.

22 U.N. Framework Convention on Climate Change 1992.

prevent dangerous anthropogenic interference with the climate system."[23] Thus, taking the UNFCCC as a reliable indicator of when harmful consequences of greenhouse gas emissions became "reasonably probable and foreseeable," it might seem that a duty of ordinary care to avoid climate-induced harms arose sometime around 1992.

Fleshing out the contours of such a duty can appear surprisingly simple. Scientists believe that the planet can tolerate a certain level of annual greenhouse gas emissions without entertaining risks of drastic disruption to life-supporting systems. Oceans, forests, and other parts of the carbon cycle constitute something of a natural buffer, absorbing anthropogenic GHGs and potentially containing atmospheric warming below levels that would risk critical breakdowns in environmental and social systems. The German Advisory Council on Global Change has utilized this "guard rail" approach to estimate the total amount of greenhouse gases that can be emitted by humans between now and 2050 while still ensuring a sixty-seven percent chance of limiting the global mean temperature increase to 2°C. Divided equally among the world's people, this amount allows for an annual budget of roughly 2.7 tons of CO2 equivalent emissions per capita through 2050, falling to one ton per capita in steady state thereafter. The duty of reasonable care in respect of greenhouse gas emissions would thus be fixed according to these guidelines and anyone emitting above their annual equitable allocation would be considered in breach.[24]

In Cardozo's view, "negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right; accordingly, negligence in the air… will not do."[25] On Cardozo's account, then, antisocial conduct only triggers a duty of tort responsibility when its potentially harmful effects can be attached to identifiable victims. Critically, those victims must rely on foreseeable injurious pathways that are distinctive to them. It is not enough to cite the wrongfulness of defendant's behaviour in relation to others. The advantage of a tort duty is an individual's personal ownership or lack thereof. Concerning climate change, Cardozo's approach suggests that States, municipalities, tribes, and other aggregative entities might be the most appropriate plaintiffs for a climate change suit since the scope of the alleged victim would encompass a much larger, and therefore arguably more foreseeable, swath of climate change's adverse impacts. Public nuisance would then commend itself as the logical cause of action to pursue since it imports a duty to avoid injurious conduct to rights that are held by the public in common.[26]

Notwithstanding admirable scholarly attempts to encapsulate its intellectual essence, tort law does not exist in a vacuum as the pure unfolding

23 *Ibid*.
24 Kysar D. (2011), *supra* note 11, p. 11.
25 *Ibid*.
26 *Ibid*.

of internal logic. It has been suggested that judges may not grant damages or injunctions for climate-related harms, but they may still be influenced in other ways when dismissing such claims. As a result, the tort system may shift to keep in alignment with an administrative state that is increasingly pre-occupied by grander and more complicated challenges than the previous century posed. Even as climate change tort suits fail on their merits, they may yet change the air.

2. An examination of Vietnam's legal framework for non-contractual compensation due to environmental pollution

Vietnam follows a civil law system based on statutes and codes, primarily influenced by the French legal tradition. Vietnam's legal framework does not have the same breadth of tort concepts as common law systems. It tends to be more codified and specific in defining liability and compensation for non-contractual harm. Thus, non-contractual compensation and liability for environmental harm in Vietnam are governed by statutes and regulations. However, in Vietnam, there is currently no dedicated sectoral law specifically addressing climate change. Regulations on climate change are dispersed across various specialized laws, including the 2015 Civil Code, the 2020 Law on Environmental Protection, the 2019 Tax Management Law, and the 2013 Land Law (which is set to be revised in 2023). Vietnam has also implemented several notable policies, programs, and plans to address climate change. The first to mention is the Conclusion No. 56-KL/TW dated August 23rd, 2019, of the Politburo on continuing to implement Resolution 7 of the XI Party Central Committee on proactively responding to climate change, strengthening resource management and environmental protection. The conclusion provides groups of specific tasks and solutions moving forward, including: (i) raising awareness and responsibility for proactively preventing and tackling natural disasters, responding to climate change, and strengthening resource management and environment protection; (ii) enhancing the legal system, mechanisms and policies on climate change response, resource management and environment protection; (iii) improve capacity and efficiency of inspection, examination, and handling of violations and propose several urgent tasks. Furthermore, Vietnam has taken significant legislative and strategic steps to address climate change and promote environmental sustainability. These measures include Resolution No. 55/NQ-TW, dated February 11th, 2020, issued by the Politburo, outlining Vietnam's national energy development strategy up to 2030 and vision towards 2045, with a strong emphasis on the effective utilization of renewable, new, and clean energy sources. In addition to the aforementioned initiatives, on September 4th, 2019, the Government issued the Resolution No. 64/NQ-CP, which

approved the Kigali Amendment and Supplement to the Montreal Protocol on Substances that Deplete the Ozone Layer. A year later, the Prime Ministerial Decision No. 1055/QD-TTg has established the National Plan for responding to climate change for the period 2021-2030, with a vision extending to 2050.

Vietnam has further strengthened its commitment to environmental sustainability and climate change mitigation by the Law on Environment Protection, designated as No. 72/2020/QH14, passed by the National Assembly of the Socialist Republic of Vietnam on November 17th, 2020. This comprehensive law, consisting of 16 chapters and 171 articles, became effective on January 1st, 2022. It serves as a vital legal framework, reinforcing the nation's dedication to environmental preservation and sustainability. Chapter IV, titled "Climate Change", provides Vietnam with the chance to align its legal framework for climate change response. The response to climate change is established as a fundamental long-term objective within the planning and strategic frameworks, with due consideration for incorporating climate change impacts into socio-economic indicators.

Together with earlier resolutions and decisions, Vietnam's legislative efforts underscore its determination to address climate change, promote renewable energy, and protect the environment for future generations. Nevertheless, the absence of consolidated climate change regulations in Vietnam poses challenges in identifying a specific compensation framework for damages resulting from environmental pollution. Given that environmental pollution is a recognized contributor to climate change, the adoption of a compensation framework for damages caused by environmental pollution is considered a vital strategy that should be encouraged. The following section of the article will delve into this approach in more detail.

2.1. Legal framework of compensation for non-contractual damage caused by environmental pollution in Vietnamese law

Compensation for damage caused by environmental pollution is critical to the protection of the legitimate rights and interests of subjects damaged by violations of environmental laws. The method of requiring others to compensate for damage to property, health, life destruction or infringement of legitimate rights and interests of the relevant entities, with its characteristics, plays an essential role and is considered the most effective because it restores the status quo of the damaged subject.[27] Regulations on compensation for non-contractual damage due to acts of environmental pollution are stipulated

27 Vo T. T. (2020), *Nguyên tắc người gây ô nhiễm phải trả tiền theo pháp luật bảo vệ môi trường của Việt Nam* [trans: *The Polluter-Pays Principle in Vietnamese Environment Law*], Chinh tri Quoc gia Su that Publishing, p. 148.

in two basic laws: (i) the 2020 Law on Environment Protection 2020;[28] and (ii) the 2015 Civil Code.

2.1.1. Compensation for non-contractual damage caused by environmental pollution according to the 2020 Law on Environment Protection

Currently, there is no direct and official definition of compensation for damage caused by environmental pollution. However, Article 3.12 of the 2020 Law on Environment Protection stipulates that: "Environment pollution is the change in physical, chemical, and biological properties of environmental components that are inconsistent with environmental technical regulations and environmental standards which causes negative impacts on human health, animals and nature". "Environmental pollution" means any change in the physical, chemical or biological properties of an environmental component in breach of a technical regulation on the environment or environmental standard resulting in adverse impacts on humans, creatures and nature. According to Vo, T. T.: "Liability for compensation for damage caused by environment pollution can be understood as a civil law relationship, whereby the person who causes damage under the conditions prescribed by law must be liable for compensating for all damage caused by their violations of environmental laws".[29]

Environmental damage[30] in the 2020 Environmental Protection Law includes damage caused by pollution and environmental degradation.[31] *First,* degradation of function and usefulness of the environment: including damage to the land, water, ecosystem, animals, and plants. According to the author, this regulation is qualitative because it is difficult to determine the level of "degradation". While Article 135 of this Law has regulations on the assessment of damage due to the degradation of function and environmental usefulness and is guided by Section 4 Chapter IX Decree 08/2022/ND-CP, these regulations are also purely technical and difficult to quantify.

Second, damage to human health, property, loss of life, infringement upon the legitimate interests of organizations and individuals resulting from the deterioration of environmental function and utility are more prevalent types of harm, which are addressed in the 2015 Civil Code. A claim seeking compensation for harm to life, health, or property resulting from environmental degradation faces significant limitations. The author identifies two key factors contributing to these limitations: *first*, the plaintiff is

28 The 2020 Law on Environmental Protection akes effect from January 1st, 2022, which is to replace the 2014 Law on Environmental Protection, with the expectation of providing a strong and positive regulations on compensation liability for damages as a means of protecting the environment (public property) as well as the property and health of civil law subjects (private property).

29 Vo T. T. (2020), *supra* note 27, p. 155.

30 Section 2, Chapter X of the 2020 Law on Environmental Protection.

31 Article 130 of the 2020 Law on Environmental Protection.

responsible for providing evidence of damage, and *second*, polluters often opt for mediation as a solution, making it challenging to examine legal precedents related to non-contractual damage compensation in this context.

In addition, organizations and individuals that cause environmental damage shall compensate for all the damage they cause and pay all costs for evaluating the damage and carrying out procedures to claim compensation for the damage according to the law.[32] Compensation for environmental damage[33] is resolved first of all through negotiation between the parties.[34] In case of failure to negotiate, the parties can choose either of the following alternatives: (i) mediation; (ii) resolving disputes by arbitration; and (iii) resolving disputes by court.[35]

Overall, while Articles 130 to 135 of the 2020 Law on Environment Protection show certain progress, the author believes that the comprehensive mechanisms for liability and compensation for environmental damage are not yet fully developed in the legal provisions. While this law offers a classification of damages, it does not use this as a criterion for categorizing liability for compensation. As a result, it lacks specific regulations for each type of liability, including conditions that establish liability, legal consequences, and the exemption mechanism. Additionally, the law does not explicitly illustrate how the principles of liability for compensation in private law are applied to administrative regulations concerning environmental damage, which involves public property. In general, while there are some positive aspects to consider, the issues concerning liability for damage still heavily rely on the relatively limited regulations outlined in the 2015 Civil Code.[36]

2.1.2. Compensation for non-contractual damage due to acts of environmental pollution according to the 2020 Civil Code

Article 584.1 of the 2015 Civil Code stipulates that: "Whoever commits an act of infringing the life, health, honour, dignity, reputation, property, rights, or other

32 Clause 2, Article 130 of the 2020 Law on Environmental Protection.

33 Article 133 of the 2020 Law on Environmental Protection.

34 The author believes that negotiation is a mandatory step for the parties to carry out, and normally the parties will reach an agreement at this stage, and as previously noted, environmental litigation (compensation for non-contractual damages) is extremely infrequent.

35 The settlement at Court is carried out in accordance with the provisions on non-contractual compensation for civil damages and the law on civil procedures, except for the provisions on proving the cause-and-effect relationship between unlawful acts and damages occurred. Proving the cause-and-effect relationship between a violation of environmental laws and the damage that occurs is the responsibility of the violating organization or individual causing environmental pollution.

36 Nguyen T. P. C. & Nguyen M. C. (2021), 'Bồi thường thiệt hại do ô nhiễm môi trường - từ góc nhìn lý thuyết đến luật thực định của Việt Nam', *Tạp chí Nghiên cứu lập pháp* [trans: 'Compensation for damage caused by environmental pollution - from a theoretical perspective to practical law of Vietnam', *Journal of Legislative Studies*]. Retrieved from: http://www.lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid=210922 [accessed 10 Nov 2023].

legitimate interests of another person, causing damage or loss shall compensate the damage, unless this Code or other relevant laws provide otherwise." Accordingly, the basis of the liability to compensate for damage is the human's conduct. As long as there is an act that causes damage, the liability to compensate for damages would arise, regardless of whether such conduct is illegal or lawful.[37] Thus, the grounds for claiming compensation for non-contractual damage include: (i) There is conduct that infringes life, health, honour, dignity, reputation, property, rights, and other legitimate interests of other persons; (ii) There is physical damage or mental damage;[38] (iii) There is a cause-and-effect relationship between the damage and the act of infringement.[39] In addition, Article 584 of the 2015 Civil Code also stipulates that the person who causes damage is not liable for compensation in cases where the damage arises due to a force majeure event or is entirely due to the fault of the damaged party unless otherwise agreed or otherwise provided by law.

Regarding damage caused by environmental pollution, Article 602 of the 2015 Civil Code stipulates that "the subject who pollutes the environment and causes damage must compensate in accordance with the provisions of law, even if that subject is faultless". Subsequently, based on Article 584 and Article 602 of the 2015 Civil Code, three grounds of liability for compensation for damage caused by environmental pollution include:

First, the subject causing the damage must have committed an act of polluting the environment: The act of polluting the environment can be expressed in the form of action or inaction and the "illegality" of the act shall be based on the principles and legal basis specified by law, the parties do not know and cannot have an agreement on this matter.[40] Some typical violations leading to environmental pollution include discharge of waste into the environment, oil spills, cutting/burning of forests,...

37 The liability to compensate for damage is typically contingent on the presence of certain basic conditions, including the occurrence of damage, the commission of acts causing damage, a causal relationship between the act and the damage, and fault on the part of the person responsible for the damaging act. However, it's important to note that not all of these conditions need to be met in every case, and there are situations where liability for compensation may arise even in the absence of fault. *See more* at: Nguyen V. C. & Tran T. H. (2017), *Bình luận về Bộ luật Dân sự 2015* [trans: *Scientific commentary on the Civil Code in 2015*], Cong an Nhan dan Publisher, p. 871.

38 According to Clause 1, Article 2 of the Resolution 02/2022/NQ-HDTP dated September 6, 2022 of the Judges Council of the Supreme People's Court guiding the application of a number of provisions of the Civil Code on liability for compensation for non-contractual damage: "Material damage is the actual, identifiable physical loss of the infringed subject, including irreparable property loss; reasonable costs to prevent, limit and remedy damage; actual income which is lost or reduced because property, health, life, honor, dignity, reputation, rights and other legitimate interests are violated"; "Mental damage is the mental loss caused by violation of life, health, honor, dignity, reputation, rights and other personal interests that the subject of the violation or their relatives must suffer and need to be compensated an amount of money to compensate for that loss".

39 The damage must be the inevitable result of the act of infringement, and conversely, the act of infringement must be the cause of the damage.

40 Vo T. T. (2020), *supra* note 27, p. 156-157.

Second, the act of polluting the environment must cause damage to another subject*:* As our analysis of the 2020 Environmental Protection Law above, there will be two types of damage that may occur: (i) degradation of the function and usefulness of the environment; (ii) damage to human life, health, property and legitimate interests of organizations and individuals caused by the degradation of the function and usefulness of the environment. However, due to the extended timeline for the occurrence of damage, it becomes challenging for the affected party to substantiate the specific harm resulting from the actions of the party responsible for environmental pollution.

Third, the author argues that establishing a causal link between unlawful activities and resulting damage is a complex task, as environmental harm can often remain hidden and requires time for a thorough assessment of its consequences. Furthermore, challenges related to scientific and technological expertise and deficiencies in the environmental legal framework for assessing damage are common issues in present-day Vietnam.

2.2. Shortcomings of the legal framework

Overall, the existing legal framework for compensating non-contractual damage resulting from environmental pollution in Vietnam is largely inadequate, despite some legislative efforts. The author highlights various deficiencies in this framework, as outlined below:

First, a unified law on climate change in Vietnam including the compensation for non-contractual damage due to climate change is absent. The author firmly believes that this is the most significant issue within Vietnam's legal framework concerning climate change, particularly given the global nature of climate change and the urgent need for adaptation measures worldwide.

Second, the current legal framework on compensation for non-contractual damage caused by environmental pollution is too general and fundamentally does not solve the problem. The 2020 Environment Protection Law has made some advancements in addressing this issue, but the 2015 Civil Code continues to play a pivotal role in regulating compensation for non-contractual damage caused by pollution, even though the provisions in the 2015 Civil Code on this matter are relatively limited in scope.

Third, the problem of determining damage and the cause-and-effect relationship between pollution and damage is a serious challenge for the legal system. This does not only exist in Vietnam, even the worldwide legal system has certain drawbacks. The key distinction between the global context and Vietnam is that the affected parties in Vietnam are more "engaged" in the litigation process, as they believe that legal action can influence judges' long-term perspectives and potentially lead to the improvement of regulations addressing existing deficiencies in the system.

4. Conclusions and recommendations

On the current general trend in climate change, countries need to take practical actions to contribute to mitigating climate change for the common purpose of humanity and need to achieve national commitments when participating in international treaties on climate change. This article underscores the critical role of legal frameworks in addressing climate change impacts. The exploration of non-contractual damage compensation as a tool for climate change mitigation highlights the intersection of environmental policy and legal accountability. While such provisions can incentivize responsible environmental practices and offer relief to victims of climate-related damages, they also face limitations in scope and effectiveness. The need for comprehensive legal mechanisms that not only address the consequences but also prevent environmental harm is evident.

Given Vietnam's significant vulnerability to the impact of climate change, it is imperative to address this challenge through effective policy measures. Recognizing the current limitations of the national legal framework in this area, the author proposes two strategic solutions to strengthen the country's response to climate change:

First, the recommendation to promulgate a unified general law dedicated to climate change in Vietnam is a strategic approach. This strategy would not only consolidate various climate-related regulations but also ensure that Vietnam's legal framework is aligned with global trends. Such a law could effectively integrate international commitments and adapt them to the local context. A comprehensive legal framework would also provide clarity and consistency, which are crucial for effective implementation and enforcement.

Second, the suggestion to supplement existing legal frameworks with guidelines specifically for non-contractual damage due to environmental pollution addresses an immediate need. This temporary measure can serve as a stopgap, helping to mitigate the current limitations of Vietnam's legal system. By tightening loopholes and providing clear guidance, these guidelines can lay the groundwork for more robust and detailed legislation in the future. This approach reflects a pragmatic balance between immediate action and long-term legal development.

Overall, these recommendations highlight the need for a proactive and structured legal response to climate change in Vietnam. The emphasis on creating a unified law and improving current regulations underscores the urgency and complexity of climate issues, requiring a coordinated and comprehensive approach. These steps can significantly contribute to Vietnam's resilience to climate change impacts and its role in global efforts to mitigate these changes. ●

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The author solely contributed to the study conception and design. The author read and approved the final manuscript.

Declarations

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