

## On Ecological Damage Compensation Responsibilities in China

DUAN Xiaobing<sup>[a],\*</sup>

<sup>[a]</sup>School of Law, Southwest University, Chongqing, China.

\*Corresponding author.

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### Abstract

Ecological damage compensation responsibilities are a civil responsibility mixed with public law factor to deal with. Ecological damage emerging in the environmental crisis age. To perfect Chinese law of ecological damage compensation responsibilities, we should give priority to ecological benefit protection, adopt non-fault imputability, and identify the responsibility with the elements of conduct harmful to the environment, the fact of ecological damage as well as the causation between the conduct and the fact of ecological damage. China should be perfect environmental citizen suit law, set up relevant systems such as environmental reliability insurance system, environmental protection fund system and ecological damage evaluation system, so as to offer statutory guarantee for the construction of ecological civilization society.

**Key words:** Ecological damage; Compensation; Responsibilities

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### INTRODUCTION

The definition ecological damage. China's rapid economic growth in the past decades has come at a high price, especially concerning the environmental cost.

Thus, ecological damage is becoming a new type of damage to get legal remedy. This brings great challenge to traditional Chinese law system. How to define ecological damage and construct a suitable ecological damage legislation is of great importance.

What is ecological damage? In fact, environmental damage in a broad sense includes two types, that is, environmental damage in a narrow sense and ecological damage (pure environmental damage). The former means traditional individual harm of body and property, which can get remedy according to tort law. However, ecological damage is a new type of damage, the victim of which is the environment itself, that is the loss of the physical, chemical and biological value of the environment.

Ecological damage is rather different with traditional individual harm. Firstly, the content of interest differs from each other. Traditional individual harm refers to individual harm of body and property, while ecological damage means the loss of the environment itself. Secondly, traditional individual harm is a sort of damage to which only the suffered individual can get remedies, while ecological damage has no direct victim and the environment can't have remedies itself. Therefore, traditional individual harm stands for individual interest which is fully protected by traditional law, while ecological damage belongs to public interest which should be protected by new and special law.

This paper focus on legal remedies for ecological damage. Ecological damage is defined as the loss of physical, chemical and biological value of environment itself.

**The nature of ecological damage compensation responsibility.** What's the nature of ecological damage compensation responsibility? Does it belong to traditional civil liability or not? Strictly speaking, ecological damage compensation responsibility does not belong to the scope of traditional "civil liability". The reason lies in that the environment belongs to the country who manages it in the name of the people. The environment is public goods, so an individual has no right to claim for the damage of the environment for his own interest. Therefore, ecological damage compensation responsibility involves the protection of environment public interest, which is the mission of public law, thus is beyond the scope of traditional "civil liability". However, there still are some connections between them. Compensation responsibility is adopted in ecological damage compensation responsibility, which brings a basic responsibility form of private law. In a word, affected by public law favors, it is a new sort of extended "civil liability, different from pure liability of public law or of private law.

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## **1. RULE OF ECOLOGICAL DAMAGE COMPENSATION LIABILITY**

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### **1.1 Basis of Liability**

Until the promulgation of the TLL in December 2009, the basis of environmental liability could generally be found in the GPCL and in environmental protection

statutes. Chapter VIII of the TLL deals explicitly with environmental liability in a narrow sense. Article 65 of the TLL suggests that a strict liability rule applies. However, it does not cover the field of ecological damage. What should be the appropriate basis of liability? The fault principal or non-fault principal? There are two diverse legislative modes in comparative law perspective. Firstly, non-fault principal legislative modes. American law is an example, according to Clean Water Act, anyone can sue the polluter in his own name, no requirement for the polluter fault. The Portuguese law holds a familiar attitude. According to Article 41(1) of the Portuguese ELP, the obligation to compensate is possible, regardless of guilt, whenever a person has caused significant damage to the environment. Even if the party has complied with related regulations, he still is responsible. Secondly, fault principal legislative modes. Italy law is an example, according to Italian Environmental Act, negligence or wilful misconduct is one of the necessary requirements of ecological damage compensation liability. Also, in Italian law, obeying the regulative law is a necessary element to be responsible. The two legislative modes differ in basis of liability, that is fault principal or non-fault principal? Thus there is a different stress on benefit, either ecological benefit or economic benefit.

I argue that China's future legislation should adopt non-fault principal mode for ecological damage compensation liability to protect the environmental public interest powerfully. From a broad perspective, the developing tendency of liability basis is non-fault principal mode. Also, a few provision of China's citizen suit has adopted non-fault principal mode. Article 55 of the Civil Suit Act provides, "statutory agents and related organizations can bring a suit against misconducts which are detrimental to public interest, such as misconducts of environment pollution and tort against consumers, etc.." Article 58 of Environment Protection Act provides,

as for a organization can bring a suit against misconducts which are detrimental to public interest, such as misconducts of environment pollution and ecological damage, only when it is registered at a municipal civil affair bureau and has been engaged in environment protection for 5 years without any illegal act.

This provision covers the field of ecological damage compensation and does not adopt the fault principal mode. Article 90 of Marine Protection Act provides, "A person should be liable for and compensate for the damage of marine environment pollution which he causes." This provision about marine ecological damage liability is also not based on fault principal. Therefore, there is an obvious tendency of adopting non-fault principal mode for the liability basis of ecological damage compensation liability in China law.

## 1.2 Requirements

Other Requirements should apply to ecological damage compensation liability.

Firstly, illegal misconduct is necessary. It's the most important requirement, which leads to ecological damage. It can be categorized into two misconducts,

including misconducts of environment pollution and ecological damage. How to judge an illegal misconduct? We should adopt a result perspective, that is, there is an illegal misconduct, as long as pollution leads to ecological damage, taking no consideration of a tort against an individual's traditional right and interest.

Secondly, the fact of ecological damage is required. Ecological damage means the loss of ecological function, differ with traditional individual hurt. Ecological damage is hard to measure accurately, thus some scientific standards should be set to estimate the sum of ecological damage. Thirdly, the causation is important. The reliable party should only be liable for ecological damage he made. However, the causation between illegal misconduct and ecological damage emerges after a long time and is rather complex. The causation is hard to prove too. Who should have the proof burden of the causation between illegal misconduct and ecological damage? The plaintiff or the accused? Whether it's fully posed on the plaintiff or the accused, there are many values to consider. I insist that the proof burden of the causation between illegal misconduct and ecological damage should mostly be posed on the accused, because of the weak group status for the plaintiff and lack of specialized information.

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## **2. SUGGESTIONS FOR LEGISLATION**

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### **2.1 The Present Legislation**

The TLL promulgated in December 2009 is the basic act of all sorts of tort. There is possibly a complex relationship between TLL and ecological damage liability. Can TLL be resorted directly to resolve ecological damage disputes? Here needs a profound analysis of the legislative purpose of TLL. TLL aims at set a basic law for the protection of individuals' right and interest, therefore public interest protection is not its mainly focus. Article 2 of TLL provides,

Those who infringe upon others' civil right and interest shall be subject to the tort liability according to this law. Civil right and interest used in this law shall includes the right to life, the right to health, the right to name, the right to imputation, the right to honor, right to self image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, trademark right, right to discovery, right of succession, and other personal and property rights and interest.

Article 2 of TLL covers merely traditional individual civil right and interest, so ecological damage is beyond the scope of this act. Article 65 of TLL provides, "Where any harm is caused by environmental pollution, the polluter shall assume the tort liability." Does the term "harm" includes ecological damage? That is, can this provision be applied directly to disputes of ecological damage? In my opinion, the answer is not, since TLL protects merely the traditional individual civil right and interest according to Article 2 of TLL. Thus, TLL should not be applied directly to ecological damage liability. At the same time, special law such as Civil Suit Act, Environment Protection Act and the Marine Protection Act can be applied directly

to ecological damage liability. Other scholars hold a familiar point of view like me when analyzing Article 15 of TLL, which provides 9 types of specific tort liabilities. Professor Faure and Doctor Liu point out,

As discussed earlier, the environmental liability rules in the TLL do not explicitly recognize ecological damage as compensable. Therefore, claims are usually limited to require compensation for direct losses suffered. Claims for pure ecological damage are allowed only when specific legislation has explicit provisions, and such provisions are usually limited to preventive measures or restoration measures.

This part mainly focusses on the perfection of citizen suit system of China. China's Civil Suit Act, Environment Protection Act and Marine Protection Act together set up citizen suit system. According to the Article 55 of Civil Suit Act, the statutory agents and related organizations are the proper plaintiff of ecological damage compensation liability. However, which are "the statutory agents and related organizations" are not expressed clearly, bringing a serious difficulty to apply this clause to practice. Individuals are deprived of the plaintiff qualification too, making the act too conservative.

According to Article 58 of Environment Protection Act, an organization can sue the polluter only when it is registered as a municipal civil affair bureau and has been engaged in environment protection for 5 years without any illegal act. Also, the organization is forbidden to gain any profit. The Article makes progress in the standing of related organizations, which make the suit brought by a NGO possible. However, the Article is too strict to permit organizations to have the plaintiff qualification of citizen suit, which is a serious defect of the system. This can be explained from a few reasons followed as: the hardship of getting registered at a municipal civil affair bureau in China, few pure environmental protection NGO exists for 5 years in China, few environmental protection NGO has no subtle illegal act, such as a fine. In extreme cases, an administrative bureau can give a fine to a NGO preparing or having bringing a citizen suit to make the plaintiff standing become valid to avoid the suit and related liability, which will lead to an injustice result. Therefore, Article 58 of Environment Protection Act has serious defect to restrict too much for the citizen suit standing. Also, the expression of "the organization are forbidden to gain any profit" is not reasonable, makes gaining a award from the fee ascertained impossible, which ignores the difficult financial situation of NGOs and leads to lack of incentive to bring a citizen suit for NGOs. According to Marine Protection Act, only marine environment protection bureau has the plaintiff qualification of a citizen suit in marine pollution cases. In addition, Article 58 of Environment Protection Act does not take reducing the fees to bring citizen suit into consideration, which is obviously a deep defect of the provision, since the universal difficult financial situation of environmental protection NGOs in China, etc..

Familiar defects exist in Marine Protection Act provisions. Article 90 of Marine Protection Act provides,

A person should be reliable for and compensate for the damage of marine environment pollution which he causes. He shall remove the obstruction and compensate for the loss. A third party shall remove the obstruction and compensate for the loss where the marine pollution is caused fully by his negligence or wilful misconduct. The marine bureau managing the marine in name of the country can bring a suit to claim for compensation according to this act was serious damage of marine environment or resource happens.

This provision authorizes marine bureau the plaintiff of bringing a citizen suit to claim for ecological compensation, thus deprives NGOs of a plaintiff standing, detrimental to a broad public participation in marine protection.

## **2.2 The Suggestions**

In my opinion, German Code of Environment Protection and Italian Environment Protection Act are samples valuable for China to refer to. Under article 118 of German Code of Environment Protection, whoever obeys the duty of protecting the natural environment stated in the public law seriously and causes the damage of environment, shall be liable for the local environmental bureau to recover the environment or compensate for the ecological damage, except for the land owner's claim for restitution or compensation. The features of this provision can be summarized as follows: Firstly, the claim for ecological damage can co-exist with the private victim's claims, such as the land owner's claim for restitution or compensation; secondly, the conduct of the wrongdoer must constitute a violation of public law duty; thirdly, the qualified plaintiff is authorized to the local environmental bureau. Under article 18 of Italian Environment Protection Act,

whoever causes ecological damage by a willful or negligent violation of a legal provision, or in an order issued on the basis of a legal provision, shall be liable for damage to the state. If the ecological damage can not be determined accurately, the judge shall take into consideration the following favors: The remediation costs, the profit earned by the polluter as a result of its misconduct.

The features of this provision can be summarized as follows: Firstly, a willful or negligent misconduct is required; Secondly, the conduct of the reliable party must have violated a law; Thirdly, the qualified plaintiff is authorized to the state and related local authorities. Article 118 of German Code of Environment Protection and Article 18 of Italian Environment Protection Act has something in common, that is, a willful or negligent misconduct or obey to a public law duty is required, the qualified plaintiff is authorized to the state and related local environmental bureau, etc.. These are reasonable provisions valuable for China's legislation to refer to. Also, Article 18 of Italian Environment Protection Act set a standard to determine the sum of ecological damage scientifically, which is rather practical in cases. However, the two provisions have the same defect, that is, a person or NGO is not qualified for bringing a citizen suit, which seems rather conservative compared with American law. Thus, a related (claims to be effected by the ecological damage) person or local organization can be given by the plaintiff of a citizen suit in the future legislation.



Referring to Article 118 of German Code of Environment Protection and Article 18 of Italian Environment Protection Act, I offer some suggestions to perfect China's citizen suit system. This clause can be added to the Environment Protection Act, provides as follows:

Whoever causes damage to the environment should be responsible for the country. The local environment protection bureau where the ecological damage occurs is authorized to bring suit to recover the ecological damage or claim compensation for the environment in the name of the country. Related persons and local organizations can have the same right. The ecological damage should be measured scientifically by the judge considering the remediation fees and the profit earned by the polluter as a result of its misconduct. The compensation sum shall be sentenced to be used to restore the environment.

In addition, there are still other specific problems about citizen suit to research. For instance, how to cope with repeated suit? Can the plaintiff withdraw his suit? Can the plaintiff reconciliation with the polluter? Should the plaintiff of a citizen suit have some discount on suitable fees or even be free from suit fees? These are problems not resolved in present China law.

Also, some relevant systems, such as environmental reliability insurance system, environmental protection fund system and ecological damage evaluation system, should be set up to coordinate with the citizen suit system.

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## CONCLUSION

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Ecological damage compensation responsibilities are a civil responsibility mixed with public law factor to deal with. Ecological damage emerging in the environmental crisis age. To perfect Chinese law of ecological damage compensation responsibilities, we should give priority to ecological benefit protection, adopt non-fault imputability, and identify the responsibility with the elements of conduct harmful to the environment, the fact of ecological damage as well as the causation between the conduct and the fact of ecological damage. China should be perfect environmental citizen suit law, set up relevant systems such as environmental reliability insurance system, environmental protection fund system and ecological damage evaluation system, so as to offer statutory guarantee for the construction of ecological civilization society.

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