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**CHILEAN BLOG OF COMPARATIVE LAW****Not Only Climate is Changing:  
Transformations of the Notion of Responsibility**

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The recent technical report released by the United Nations regarding climate change and its consequences for our planet was grueling (IPCC, 2021).<sup>1</sup> But it was, undeniably, the revelation of what cannot be swept under the rug any longer. Global warming forces us to urgently think not only of new systems of social, economic, and cultural development, but also new or renewed legal mechanisms that can effectively respond to the maelstrom of risks linked to that development.

Today, the idea of “taking responsibility” of climate change is a banal expression. Beyond the euphemism that phrase implies, in legal terms “taking responsibility” implies attributing legal consequences to the breach of certain obligations or other duties of conduct. Attributing responsibility is riddled with institutional complexities and faced with the seriousness of the challenges that climate change poses, it must be rethought both in theory and in practice.

In comparative law, particularly in the common law tradition, several legal systems have explored the option of using tort liability suits against greenhouse gas emitters, promoted by the victims of the damage caused by these emitters. It is not uncommon for cases, by way of these suits, to attribute civil liability for damages to greenhouse gas emitters. Similarly, there are also suits where the civil liability has been denied for the same actions or facts. Cases of this type have been widely studied given the public policy effects they entail (United Nations, 2020).<sup>2</sup>

Beyond looking at the advantages and disadvantages of that model, it is a fact that the context given by accelerated climate change challenges some of the theoretical and practical foundations tort liability is structured on. Although this kind of liability keeps its core on compensation and deterrence as its main ends, today some scholars also assign it other important roles. For example, they have given it “regulatory” functions, which are those that seek to systematically model the behavior of agents towards the prevention of harm. These functions were not so openly studied during the 70’s and 80’s, when the classic tort theory and tort law doctrine were being forged in the common law tradition (Kysar, 2018);<sup>3</sup> that understanding of tort law has also permeated our understanding of tort liability. Given this, it has become necessary to study civil liability within the framework of other mechanisms to govern harm in society, which include those under the scope of action of the administering State, such as the implementation of safety standards and preventive mechanisms overseen by administrative agencies. Such mechanisms would have to respond to the complexities, uncertainties, and catastrophes linked to the social reality of the XXI century. Problems such as climate change, terrorism, outbreaks of infectious diseases, and the instability of the financial markets cannot be taken on under

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<sup>1</sup> IPCC (2021).

<sup>2</sup> NACIONES UNIDAS (2020).

<sup>3</sup> KYSAR (2018).

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the traditional schemes of legal liability, as we can no longer identify only one “responsible” agent or one agent “in charge” of the problem.

As with the rise of industrialization risks in the XIX century, which forced us to rethink the role of compensation and deterrence linked to tort liability, climate change – as the largest expression of collective action problems<sup>4</sup> (Krakoff, 2007) – forces us to rethink certain elements that are part of the legal practice around this institution today. I will refer specifically to changes in the notion of harm, causation, and the relation between the law, science, and ethics. Rethinking these elements and relationships allows us to envisage that certain topics that were alien to tort liability a few decades ago are not so foreign anymore. This is because the changes society has experienced, and the variable understanding of the multiple domestic mechanisms of public and private governance of harm, which should interact in a coordinated way in order to face a problem that has a worldwide scale.

First, regarding harm, climate change allows us to see how diffused and tangled this element can be at first. The production of anthropogenic greenhouse gasses is the opposite of the classic example of tort liability, given by a traffic accident where it is not difficult to identify the author and victim of harm. Thus, in comparative law, one of the greatest challenges in climate change litigation has been the identification of the parties involved, and how onerous that burden can be for the victims. Notwithstanding this initial obstacle, tort liability suits have proved to help refine concepts such as tolerable harm or the foreseeability of harm. When carrying out such a task, tort liability does not operate in a vacuum as there are countless statutes and administrative regulations that contribute to the precision of these concepts (Ruhl, 2010).<sup>5</sup>

Second, regarding causation, the atomicity of its classic mechanistic view does not account for the systemic origins of the kind of harm caused to the environment and the consequences it has on human health. If the industrialization, workplace accidents, or the invention of the automobile created a theoretical, legal, and doctrinal view of causation that has prevailed since the mid XIX century and throughout the XX century, today climate change propels us toward reformulating the idea of causation in law. It is therefore necessary to incorporate the multifactorial dimension in the causation of harm to this concept. This renewed notion of causation certainly brings additional complexities to the identification of potential defendants, but it does not seem convenient to continue to function with ideas about causation that no longer answer to the social phenomena around us. The main lesson that ecology has left us is precisely that: everything is connected, and the causes and effects of things answer to a complex tangle of events. Therefore, notions of share or joint liability should be studied in more depth and not as exceptional situations of liability. (Kysar, 2011).<sup>6</sup>

Finally, climate change forces us to re-think the relationship between the law, science, and ethics. From now on, judges shall increasingly face expert knowledge, which requires much more than statistic understanding of the reality that underlies the causation of harm. It is true that expert reports shall have to be looked upon with greater deference, but this also allows us to pay attention to the ethical control that the scientific community carries out around the technical evidence that is presented as evidence in tort liability suits, and – more broadly – as evidence for legislative change. The law shall have to

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<sup>4</sup> KRAKOFF (2007).

<sup>5</sup> RUHL (2010).

<sup>6</sup> KYSAR (2011).

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become familiar with this knowledge and appreciate that it exists – along with ethical principles studied in other disciplines – as an important source of the value system linked to the promotion of scientific and technological progress, progress that today is also a source of various events of harm (Kysar, 2011).<sup>7</sup>

All in all, although tort liability in itself has not proved to be a tool that substantially contributes to reduce the greenhouse gas emissions that cause global warming, it can be seen as a second-best option – after the measures implemented by the administrating State – when dealing with the negative consequences that follow harm. However, it is clear that global warming allows us to appreciate the changes and transformations that the theory and practice of tort liability will experience in the upcoming years. Legal institutions such as liability, taxes, and the administrative intervention do not exist in a vacuum; they tend to reflect the most relevant social changes, as well as the set of values that underlie them. Therefore, it seems that not only our climate is changing.

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<sup>7</sup> KYSAR (2011).

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