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Compensation of Personal Damages Caused by Environmental Pollution

Nadia Coggiola

1. INTRODUCTION

China is today facing very high levels of pollution and its associated large human and economic costs, because of the burden placed by environmental pollution on both natural resources and on the population's well-being and health.

Although the problem of environmental pollution has traditionally been largely neglected in China, even when the Chinese environmental situation sharply deteriorated as the consequence of the fast industrial development of the country at the end of the last century, it must be highlighted that that enduring attitude has recently undergone a profound change. Indeed, probably as a consequence of the increased general awareness of the dangers of environmental pollution and of the huge economic development enjoyed by the county, the new century has brought with it a different political approach to the issue.

That different approach started in 2014 with the declaration of war on pollution by Li Keqiang\(^1\) and was shortly after confirmed during the 19th National Congress of the Communist Party of China, in October 2017, when President Xi Jinping clearly reaffirmed China's commitment to sustainable development and a "beautiful China". On that occasion, in fact, President Xi Jinping affirmed that "[t]he modernization that we pursue is one characterized by harmonious coexistence between man and nature" and that "[i]n addition to creating more material and cultural wealth to meet people's ever-increasing

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needs for a better life, we need also to provide more quality ecological goods to meet people's ever-growing demands for a beautiful environment.\textsuperscript{2}

The seriousness of the government's intentions was soon revealed by the efforts dedicated to the task, the successes already acquired\textsuperscript{3} and the severe enforcement of administrative violations by central authorities.\textsuperscript{4} In practice, the actions of the central government aimed at reducing environmental pollution are apparently reaching their goals.

Unfortunately, the goal of compensating the victims of the same pollution have apparently not yet been attained, although the same central government enacted rules aimed at that purpose. It is interesting to observe that those rules are shaped on civil law models, following traditional paths of negligence and strict liability. Those rules have features that have proved to work well, or at least to be sufficiently satisfying, in many civil law countries, where they are routinely applied to compensate damages caused by environmental pollution. But, in truth, those rules have not provided the same level of protection to the persons harmed in cases of environmental personal damages occurring in China. Therefore, many Chinese victims of environmental pollution are left uncompensated.

The aim of this chapter is therefore to highlight the problems that may arise in transplanting civil law models of environmental damages compensation in China, even though two caveats are needed. The first is that the investigation of issues such as that of the compensation of personal damages caused by environmental pollution in China not only entails the scrutiny of judicial acts and scholarly writings, but also requires social, political and cultural factors to be taken into consideration. The second is that this limited research will not be able to highlight general trends on transplanting legal rules from civil law countries to China, although it can certainly provide some useful hints on the general picture.

This investigation will apply a comparative methodology. In this regard, although the author is perfectly conscious that the distinction between common law and civil law is mostly outdated for systematic purposes, she has decided to maintain that very distinction, as in her opinion it still retains all its relevance in cases of private law, such as the tortious cases under examination.

\textsuperscript{2} The translation of the words of President Xi Jinping could be found in the Government website, at http://english.gov.cn/news/top_news/2017/10/18/content_281475912455778.htm.


The first step will be a brief overview of the main theories on legal transplants. In the second step, the rules that were enacted in China to provide for the compensation of environmental personal damages will be illustrated, and it will be ascertained if they actually comply with their civil law model and the main features of civil liability, such as negligence, strict liability and burden of proof. The third step will be devoted to the ascertainment of the actual implementation of those rules by Chinese courts in cases of environmental personal damages compensation. Finally, we shall try to provide some conclusive remarks on the outcome of our findings. It must be emphasised that this investigation is aimed not only at understanding how the civil law rules are introduced in the Chinese system, enacting provisions and regulations under Chinese law, but also at how they are actually implemented in real cases by Chinese courts and, eventually, other social actors. As we shall see, in fact, the implementation of rules apparently inspired by civil law models may be hindered by many different obstacles, deeply rooted in Chinese culture and traditional political and social features.

2. THE THEORETICAL CONTEXT

As we all know, the concept of "legal transplant" is used to denote the phenomenon of borrowing legal rules and institutions from one legal system and transferring them into another. The metaphor of "legal transplant", taken from the world of anatomy and surgery, successfully conveys the idea that law and legal institutions can sometimes be transferred outside of their natural habitat, if some conditions are fulfilled.

The starting point of every academic discussion on the concept of a "legal transplant" begins with the famous quotation by Montesquieu: "Les lois politiques et civiles de chaque nation [...] doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un grand hasard si celles d'une nation peuvent convenir d'une autre." In Montesquieu's opinion, therefore, geographical, cultural, climatic and environmental differences among countries make legal transplants from one country to the other so difficult that it would be a huge coincidence if one of those transplants were to be successful. This sceptical approach earned him the label of founder of the culturist school.

The reference to Montesquieu was the starting point of Otto Kahn-Freund's theory on the subject, in which he proposed a context-sensitive approach to legal reform based on legal borrowings, which need to be very attentive when

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3 C.-Louis de Secondat Montesquieu, De l'esprit des lois, livre I, ch. 3, Des lois positives, 1748. "The political and civil laws of each nation [...] should be adapted in such a manner to the people for whom they are framed, that it is a great chance if those of one nation suit another". tr. Thomas Nugent, The Spirit of the Laws, J. Nourse & P. Vaillant, London, 1766.
taking into consideration the various groups of "environmental criteria", that is to say geographical, sociological, economic, cultural and political elements. In his opinion, the relevance of these different criteria was deemed to change over time, with geographical, cultural, religious, economic and sociological factors losing their importance at different speeds because of changes in technology, ways of living and communications, and with political and ideological factors seeing an increase in their significance. Therefore, particular attention should be paid to the necessity to take into account the socio-political context of the "donor" country and of the "recipient" country.

Moreover, to ascertain which rules could actually be implemented, he ordered legal rules ranging from rules very close to "organic matter", as they are deeply rooted in the national context and therefore difficult to transplant, holding that in these cases it was actually appropriate to use the metaphor of "legal transplants", to rules close to "mechanical matter", in which case it was instead, in his opinion, generally possible to replace a "spare part" with another. An example of the first category of rules are constitutional laws, which may require broad public acceptance in order to be replaced, while an example of the second type of rules are certain commercial provisions that only apply to few stakeholders and therefore may require the acquiescence of only those same few stakeholders to be implemented. He also stressed that while the success of the first type requires a deep knowledge of the donor country's legal and political system, the same is not true where "mechanical" transplants are involved.

Of a contrary opinion was Alan Watson, one of the main supporters and the initiator of the "transferist school", who, with the historical support of the wide influence of Roman law even on present-day civil law systems in Europe and elsewhere – the so-called "reception of Roman law" – affirmed the possibility of "transplanting" laws without knowing or even caring about the context of the transplanted legal rules in the donor country. In his opinion, legal transplants could be successful despite the socio-political differences between donor and recipient countries, because of the autonomy of legal rules and institutions, and the need for authority, which encourage the members of the legal profession to refer to the authority and prestige of the foreign system's legal solutions, rather than forge their own legal rules.

It should be noted that Watson's legacy could be broken down into "strong Watson" and "weak Watson" writings. The former affirmed that law was an entirely freestanding and culturally independent phenomenon, while in the others he recognised that, although law was freestanding, it also had a cultural dimension. This latter position was the one generally adopted by other later

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7 A. Watson, Legal Transplants, Scottish Academic Press; University Press of Virginia, 1974, pp. 88 et seq.
Transplanting Civil Law Models in China

scholars, also because it is thought to be the more reasonable and analytically robust. It provides that the test to be used to ascertain the actual transplant of a certain law, concept or institution in a host country is to simply verify if it is socially useful in the recipient country.

These two different approaches to the question of legal transplants soon erupted into a heated debate, which mainly concentrated on the issue of the actual existence and spread of legal transplants, on their desirability, and on the assessment of their success.8

The existence of the concept of “legal transplants” was in fact denied by Pierre Legrand, who voiced their impossibility from a cultural perspective. In his opinion, it is impossible to transfer from one jurisdiction to another anything but “a meaningless form of words” and the support of legal transplants is that of “reducing law to rules and rules to bare propositional statements.”9 For a transplant to be deemed successful, the transplanted rules must function exactly in the same way in the host country and in the donor country.10

Scholars such as William Ewald supported Watson’s theory on the at least partial autonomy of law and its ability to evolve independently of social contexts,11 while others, such as legal sociologist Gunther Teubner, although in principle adhering to Watson’s thesis, called for a more conceptual debate on the issue, suggesting the use of the less misleading “legal irritants” metaphor, in place of that of “legal transplants”. He underlay that legal rules and institutions do not mirror society, but rather are linked to different discourses and fragments of society, with a different degree of proximity depending from the sector of law and the related social processes. Therefore, all the rules, even those that

10 Id. at pp. 115–117.
11 Ewald, supra, note 8.
Kahn-Freund classified as belonging to the category of "mechanical matter", may not remain unaffected by the new environment once they are transferred into a different national context. Moreover, those same transplanted rules will interact with the host legal system, sometimes triggering a change in some sectors, with effects different from, and sometimes even unpredictable compared to, those generated in the donor legal system.\textsuperscript{12}

More recently, new developments based on anthropological and sociological studies, underlining the complexities of the features of society and culture and of their relationship with the legal system, empowered the idea that transplants always entail a degree of cultural integration and offered a more articulated description of legal transplants whose meanings are intensified by local cultural and social influences.\textsuperscript{13}

It is also important to remember that the concept of "legal transplant" is not enclosed within the borders of legal theory, but was instead adopted by a number of development aid agencies and international organisations, such as the World Bank and the International Monetary Fund, to implement legal and institutional reforms especially in those countries that were under the Soviet Union sphere of influence before the collapse of communism in the late 1980s.

These reforms mainly concerned civil and commercial law, even if in some cases they also involved constitutional law, and consisted in an actual "exportation" of provisions and rules from developed countries to transitioning economies, with important effects even on other research fields, mainly economics.\textsuperscript{14} The transplant of models from Western countries into Eastern former socialist countries was probably motivated by the fact that the collapse of the communist systems of Eastern countries was generally interpreted as the demonstration of "the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government".\textsuperscript{15} But we should also not forget the urgency to undertake political and economic reforms in those countries, and therefore

\textsuperscript{12} Teubner, supra, note 8 at pp. 11–32.

\textsuperscript{13} See for example D. Nelken & J. Fest, Adapting Legal Cultures, Hart Publishing, 2001; A. Riles, Comparative Law and Socio-Legal Studies, in M. Reimann & R. Zimmermann (eds.), The Oxford Handbook of Comparative Law, Oxford University Press, 2007, p. 775; M. Grazia dei, Comparative Law as the Study of Transplants and Receptions, in id. at p. 441; R. Cotterrell, Comparative Law and Legal Culture, in id. at p. 709.


\textsuperscript{15} P. Fukuyama, The End of History?, National Interest, 1989; this ideas were later detailed in P. Fukuyama, The End of History and the Last Man, Hamilton, 1992.
the need for efficient legal models, able to guarantee the functioning of the new market economy and at the same time the establishment of the rule of law and of democratic institutions. The transplants were so swift, and involved all the possible economic, social and legal fields, that they were described as “repairing the ship at sea”. Certainly, as some scholars stressed, there was not time to develop original legislation, able to cover so many aspects of the law, especially when some of the issues concerned legal institutions completely unknown in the host countries. Nonetheless, these rushed legal transplants did not please everyone and in fact some scholars pointed out the need for a greater awareness of local contexts and a wider involvement of local actors.

3. THE TORT LAW REFORM IN CHINA AND COMPENSATION OF ENVIRONMENTAL DAMAGES

To fully understand the rules providing for compensation for the damages caused by environmental exposure in China, it is certainly advisable to start from a general overview of the Chinese legal provisions concerning the compensation of tortious damage in general, and thereafter investigate the rules explicitly devoted to the compensation of environmental damages.

The first Chinese Civil Code (CCC) was enacted, book by book, from 1929 to 1930, and is still effective in Taiwan, although with many amendments and modifications. That code was largely inspired by the Swiss Civil Code,
(Zivilgesetzbuch, ZGB)\textsuperscript{21} and, similarly to the German Civil Code (Bürgerliches Gesetzbuch, BGB), only provided, in the three general clauses of Article 184, rules of tortious liability based on fault, without recognising strict liability as an independent ground of liability.\textsuperscript{22} Other rules were subsequently adopted to deal with the development of industrialisation and urbanisation, which potentially conflicted with the civil liability rules in the CCC.

The People's Republic of China abolished, on political grounds, all the laws from republican times, including the CCC, enacting in their place rules modelled on the Soviet Union's examples, which were strongly influenced by the denial of the need to govern horizontal social relations by means of civil law and of market transactions and personal freedom principles.

Nonetheless, three attempts,\textsuperscript{23} all of them unsuccessful, were made to draft a new Civil Code, until the promulgation of the General Principles of Civil Law (GPCL) in 1986. In the GPCL, non-contractual and contractual liability are integrated in a unified system of civil liability. Liability for fault is provided for by Article 106(2) GPCL, which was regarded as a copy of Article 1382 of the French Code Civil, and is the general liability rule, while strict liability is only provided for specific cases, such as liability for highly dangerous activities, traffic accidents and environmental liability.

Rules on tortious liability were also enacted in some economic laws, such as the Anti-Trust Law (2007) and the Unfair Competition Law (1993), and in administrative laws and regulations.\textsuperscript{24} Moreover, we should not forget to mention that the Chinese Supreme People's Court (SPC) also issued some Juridical Interpretations (sifaishisi), which in the Chinese legal system are considered to be even more important than laws and regulations, and the aim of which is to fill existing gaps in laws and regulations and direct court decisions concerning issues of civil liability.\textsuperscript{25}

\textsuperscript{21} Mei, supra, note 20 at p. 19; Pound, supra, note 20.

\textsuperscript{22} Art. 184 CCC: "(1) A person who, intentionally or negligently, has wrongfully damaged the rights of another is bound to compensate him for any injury arising therefrom. The same rule shall be applied when the injury is inflicted intentionally in a manner against the rules of morals. (2) A person who violates a statutory provision enacted for the protection of others and therefore prejudice to others is bound to compensate for the injury, unless no negligence in his act can be proved."

\textsuperscript{23} Respectively, from 1954 to 1956, from 1962 to 1964 and from 1979 to 1982.


\textsuperscript{25} SPC Opinions on the GPCL of 1988; Answer to Some Questions Concerning the Right of Reputation of 1993 and of 1998; Interpretation Concerning Personal Injury due to
Starting from 1993, the Chinese legislator attempted to enact a new Civil Code, equally inspired by civil law models. As it proved impossible to enact the Civil Code as a whole – in the opinion of some scholars due to the lack of theoretical preparation and of its political complexity – the path followed by the Chinese National People's Congress (NPC) was that of the adoption of a “step-by-step policy.” Therefore, after the enactment of the Contract Law in 1999 and a long series of drafts, the Tort Liability Law of the People's Republic of China (CTL) was finally adopted at the 12th Session of the Standing Committee of the 11th National Congress of the Communist Party on 26 December 2009, and came into effect on 1 July 2010.

The CTL only governs tortious liability cases and is subdivided into 12 chapters: general provisions; bases of liability and remedies; circumstances excluding or mitigating liability; special provisions on subjects of liability; product liability; liability for motor vehicle traffic accidents; liability for damage due to medical malpractice; liability for environmental pollution; liability for highly dangerous activities; liability for harm caused by domestic animals; liability for harm caused by objects; and supplementary provisions.

As far as we are concerned, the following articles of the CTL should be taken into consideration. In Article 1, the CTL stresses that its purpose is to protect legal rights and interests, in line with European tendencies, and points out its preventive function. However, it does not mention compensation among its purposes, which is conversely what is privileged in modern European legislation, favouring instead the aim of punishment and the purpose of

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27 Zhonghua Renmin Gongshe Qugaozui Zizhuyuan (中华人民共和国侵权责任法) [Tort Law of the People's Republic of China] (promulgated by the Standing Committee of the National People's Congress, 26 December 2009).


promoting "social harmony and stability". Article 2 provides that liability must be borne for any infringement of civil rights, and subsequently provides a list of examples of civil rights, that is to say personal and property rights and interests, which includes the right to live, the right to health and other personal and property rights and interests.

Article 5 CTL states that, if other laws provide special provisions on tort liability, those provisions should prevail. This rule leaves a wide scope for special provisions to come into action.

The general liability rule is provided for by Article 6 CTL, which states in its first section that a person shall bear liability for the infringement of other people's rights when that infringement was with fault. The second section allows the fault to be declared, if the law so provides, on the basis of presumption, where the liable person is not able to prove otherwise.\(^{30}\) This double system of liability for fault, which distinguishes between cases where the fault must be proved and cases where it can instead be presumed, generally depending on the degree of dangerousness of the act of the tortfeasor, is not uncommon in European civil liability systems.\(^{31}\)

Strict liability is instead provided for by Article 7 CTL, which states that liability may be established, when the law so provides, even when the tortfeasor is not at fault.

The Chinese system is therefore not different from most European civil codes, which consider fault the pre-eminent basis of liability, and other bases of liability as more or less secondary.\(^{32}\) It is interesting to point out that the adoption of such a general rule on strict liability was backed by some Chinese scholars, on the basis of a comparative analysis\(^{33}\) supporting the theory that strict liability is based on a general idea,\(^{34}\) and that the provision of a strict liability rule covering only part of the whole area would have made the system inconsistent.

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\(^{30}\) It is unclear if this presumed fault should be considered as a variant of general fault liability, because of the reversal of the burden of proof – see X. Zhang, Tort Law, Renmin University Press, 2005, p. 33; M. Zhang, A Study of Fault Liability, China University of Political Science and Law Press, 2002, p. 689 – or if it should be considered as equidistant between general fault liability and strict liability – L. Wang, A Study of the Principles of Attribution in Tort Law, China University of Political Science and Law Press 1991, p. 30; L. Yang, Tort Law, People Court Press, 2nd ed., 2004, p. 129.

\(^{31}\) For some examples, B.A. Koch, Liability Based on Fault, in European Group on Tort Law, Principles of European Tort Law, Text and Commentary, 2005, Art. 4:201 no. 8 et seq.

\(^{32}\) See for a first introduction on the subject P. Widmer, Liability Based on Fault, in European Group on Tort Law, Principles of European Tort Law, Text and Commentary, 2005, Art. 4:101 no. 6.


In any case, it should be observed that the special section of the law, devoted to different occasions of liability, does not distinguish between fault and non-fault liability, but rather mixes the provisions related to the two different kinds of liability.

Regarding causation, although the CTL does not provide a definition of it, nonetheless it details the rules to be applied to cases of alternative (Article 10) and concurrent (Article 11) causes, providing for the joint and several liability of all the actors.

Compensable forms of damage include, among other things: the costs and expenses of treatment and rehabilitation; lost wages; the costs of disability assistance and disability indemnity; death (Article 16); serious mental distress suffered by the victim; and damage to property rights (Articles 19, 20, and 22). If the victim dies, the tortfeasor shall pay the medical expenses, the funeral service fee and death compensation to close relatives.

As mentioned before, the CTL also provides special rules for individual sectors of liability, among them liability for environmental pollution, governed by Chapter VIII, entitled Environmental Pollution Liability, Articles 65 and 66 of which respectively provide that "[f]or damage caused by pollution of the environment, the polluter shall bear tort liability" and that "[f]or disputes arising from pollution of the environment, the polluter shall bear the burden of proving non-liability or diminished liability in accordance with the provisions of the law and the non-existence of a causal relationship between their actions and the damage." In substance, the CTL provides for strict liability of the tortfeasors in cases of damage caused by environmental pollution, when this damage is to legal rights and interests of persons, that is to say in cases of bodily harm, death or damage to property rights.

These rules replaced the former Article 41 of the Environmental Protection Law of 1989, which provided that the unit that caused environmental pollution damage was obliged to eliminate it and to compensate the unit or individual that

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36 Zhonghu Renmin Gongheguo Huojingsheng Bozhuhu Fa (中华人民共和国环境保护法) [Environmental Protection Law of the People's Republic of China] (promulgated by the Standing Committee of the National People's Congress, Dec. 26, 1989). That article was cancelled by the revised version of the Environmental Protection Law, which entered into force on 1 January 2015.
suffered direct losses as a consequence of the pollution. That rule also provided for strict liability of the tortfeasor, as the only chance for the polluter to exempt himself from liability was to prove that the environmental pollution losses were the consequence of natural disasters that could not be averted even after the prompt adoption of reasonable measures.

Liability for environmental pollution was in any case already provided for by other rules, such as Article 124 GPCL, for damages caused to others in violation of state provisions for environmental protection and the prevention of pollution, and by some special laws, such as the 1984 Law of the People's Republic of China on the Prevention and Control of Water Pollution, the 1995 Law on Prevention and Control of Environmental Pollution by Solid Waste, and the 2000 Law on Prevention and Control of Atmospheric Pollution.

Although all the rules mentioned above follow paths that are familiar to civil law scholars, it should be noted that nonetheless those paths sometimes significantly diverge on important issues, as in the case of Article 67 of the CTL, which states that “[i]f the environment is polluted by two or more persons, the degree of liability shall be determined by factors including, inter alia, the type of pollutants and the quantity emitted.” Therefore, the special rules on environmental damage of the CTL provide that where harm is caused by environmental pollution, if it is caused by multiple tortfeasors, each of them shall be severally liable for the damages caused, proportionally to their share of liability.

It is important to underline that this rule not only differs from the general joint and several liability of multiple tortfeasors provided for cases of damages by environmental pollution in civil law systems, but that it also contradicts the same Chinese general rules, as the provisions from Article 8 onwards of the CTL explicitly provide, in cases of multiple tortfeasors, for their joint and

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several liability, and this rule already applied before by virtue of the general rule of Article 130 GPCL. 42

This different, more favourable treatment of those multiple tortfeasors who engaged in polluting activities, who are only asked to pay for their share of damages, while all other multiple tortfeasors are obliged to pay for the whole of the damages, coupled with the less advantageous treatment of victims of environmental damages, who may be left uncompensated or undercompensated, when some of the polluters are unable to pay the compensation or no longer exist, may be interpreted as a signal of the actual intentions of the Chinese legislator.

On the other hand, it should also not be forgotten that the new version of the above-mentioned Environmental Protection Law, which came into force in 2015, not only strengthens companies' and individuals' liability for preventing and controlling pollution, provides for more severe punishments in cases of violation and gives more responsibilities to local governments in the control and enforcement of environmental protection rules, but also tries to empower the victims of environmental damages, providing, at Article 58, that registered groups engaged in environmental protection can qualify as plaintiffs in public interest litigation against polluting activities. That rule, at first sight, appears to be a duplicate of the provisions contained in Article 55 of the Code of Civil Procedure of 2012, which already set out the possibility of making use of public interest litigation, inter alia, in cases of environmental pollution.

The will of the Chinese government to make the best use of those procedural rules was reaffirmed with the enactment, on 6 January 2015, of the Supreme People's Court Interpretation on Several Issues Regarding the Application of Law in Public Interest Environmental Civil Litigation, which tries to facilitate access to public interest litigation in environmental civil cases, permitting certain NGOs to file a case in a court different from the local court where the pollution occurred; enabling injured private parties to take advantage of the NGO's action and reducing the costs of the litigation; providing that the damages paid by the polluters are to be put in a pool of money, which should be used to compensate all the injured parties; requiring the control of the settlements of the cases, to avoid that the settlement is the consequence of intimidation of the petitioners by the polluter or the local government; and, lastly, putting the onus on the polluter to prove all the information concerning the pollution and providing that the same courts can investigate the facts of the case and allow the hearing of experts. 43


43 For some preliminary information on the issue, see Y. Zhao, Innovative measures to improve environmental law enforcement in China, China-EU Law J. 2015 (4), p. 155.
Taking into account all this febrile legislative activity, we can certainly affirm that the Chinese legal system is endowed with every useful tool, as long as it concerns positive rules, inspired by civil law models and institutions, to provide satisfying compensation to the victims of the damages caused by environmental pollution. The issue is whether and how those rules are actually transplanted into Chinese legal system.

4. APPLICATION OF THE RULES ON THE COMPENSATION OF ENVIRONMENTAL DAMAGE

Although China's legal system possesses all the necessary laws, written following civil law models, on the compensation of damages caused by environmental pollution, the application of those rules to actual cases is unfortunately not so straightforward and successful as the Chinese legislator certainly would have wished. In truth, the compensation of damage caused by environmental pollution, which represents a major problem in the Chinese fight against pollution, may represent a good example that the road of legal transplants may be paved with many cultural and social obstacles.

First of all, it cannot be denied that, compared to the large volume of polluting activities in China, and therefore the very likely large number of cases of damages resulting from environmental pollution, the glittering legal rules are seldom put in action, although there has been some increase in the number of cases that have come before the courts.

The reason for this limited number of cases apparently has its roots in the Chinese society and the anthropocentric Confucian belief that man should exploit nature to his own advantage. This attitude has entailed a tradition of an antagonistic relationship between man and nature, which was more recently also adopted by Mao and still permeates Chinese society. For this reason, in China environmental damage is often probably not considered compensable damage.44


Moreover, Chinese people traditionally prefer to have recourse to non-judicial methods of resolution, rather than to judicial procedures. Therefore, positive legal rules are rarely applied to cases of damage caused by environmental pollution, because in these cases the compensation to the victims of the environmental pollution, if any, is generally acknowledged on the basis of extra-legal rules. The wide popularity of non-judicial methods of resolution in China is coupled with the array of different procedures, as we can distinguish between conciliation, mediation and xinfang procedures.

Conciliation may occur between the litigants before or during administrative or judicial proceedings. The first kind is considered extra-judicial, and therefore the agreement does not need to be approved by any authority, whereas an agreement reached during the administrative or judicial proceedings does need to be approved by the same administrative or judicial body. Some scholars have underlined that the lack of external bindings on the outcome of the conciliation and the disparities in the bargaining powers of the parties are often the cause of the unfavourable results of conciliation procedures for the victims of environmental damages.

Conciliation procedures are in any case very much surpassed in numerical terms by the widespread traditional system of mediation, which is led by mediators, whose task is to help the parties to freely achieve a reasonable settlement. As the mediation procedures are endowed with authority, the final settlement is enforceable on the parties. Three types of mediation can be distinguished – people’s mediation, administrative mediation and judicial mediation – depending on the authority charged with the mediator role.

A large number of mediation procedures are so-called “people’s mediations”, led by persons without administrative or judicial functions, generally the People’s Mediation Committees of the Residents’ Committees in urban areas or of the Villager’s Committees in rural areas. The outcome of these mediation procedures cannot be modified or repudiated, but can only be disputed in court, and performance can be enforced by the People’s Courts.

Recourse to people’s mediation is common in certain environmental damages compensation cases – such as nuisance caused by manufacturers, small or communal enterprises, solely owned workshops and stalls – and is mainly confined to poor and less educated people in the countryside and

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45 Under Article 51 of the Civil Procedure Law: Zhonghua Renmin Gongheguo Minshu Sishang Fa (Shixing) (中华人民共和国民事诉讼法(试行)) (Civil Procedure Law of the People's Republic of China (For Trial Implementation)) (promulgated by the Standing Committee of the National People's Congress, 8 March 1982).
46 Supreme People's Court interpretation of the Civil Procedure Law (1992), Article 191.
small towns. Although the mediators should in theory resolve civil disputes in accordance with the law, that is not always the case, and in many cases the agreement may reflect the limited legal abilities of the mediator, the application of highly sensitive criteria, the existence of incentives to mediate the case instead of fighting it before a court and sometimes even the personal power and social position of the litigants. Notwithstanding their legal shortcomings, the Chinese government apparently strongly supports the use of people’s mediations, because they may reinforce its power and control over the people and reduce litigation costs.

Administrative mediation is instead performed by administrative bodies, and is generally very efficient and respectful of the legal reasons of the parties, because administrative bodies usually have good knowledge of and expertise in the subject of the dispute.

Lastly, judicial mediation has a long tradition in China, as it has been practiced in Chinese civil courts since the late 1930s and was finally formally institutionalised in 1982 in the Civil Procedure Law of the People’s Republic of China. Judicial mediation consists in the settlement of cases by voluntary agreements between the parties, before or during the trial; these agreements must comply with the law.

Today judicial mediation is often used by the parties in a dispute, also because the policies of the Chinese Supreme Court place great emphasis on its use, even evaluating judges on the basis of the percentage of mediations they conduct in comparison with their overall caseload. Moreover, apparently, the same judges believe that mediation is their primary duty before adjudication, encouraging

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49 Civil Procedure Law: Zhonghua Renmin Gongsheguo Minshi Siaolong Fa (Shixing) (中华人民共和国民事诉讼法(试行)) [Civil Procedure Law of the People’s Republic of China (For Trial Implementation)] (promulgated by the Standing Committee of the National People’s Congress, 8 March 1982), Article 16.

50 Zhao, supra, note 47 at pp. 162–164.


52 B.L. Read & E. Michelson, Mediating the Mediation Debate, J. Conflict Resol. 2008 (52/5), pp. 737, 755.


55 Civil Procedure Law: Zhonghua Renmin Gongsheguo Minshi Siaolong Fa (Shixing) (中华人民共和国民事诉讼法(试行)) [Civil Procedure Law of the People’s Republic of China (For Trial Implementation)] (promulgated by the Standing Committee of the National People’s Congress, 8 March 1982).
its use by the parties, when not actually imposing it. Unfortunately, the superimposition of the role of mediator and judge in the same person is often troubling, as it may entail substantial injustices and be used by lay judges to avoid applying to difficult cases rules they do not know well enough, such as those on the damage caused by environmental exposure.

The Chinese government is certainly conscious of these problems, as well as of the fact that the widespread recourse to judicial mediation may easily interfere with the application of positive laws on the compensation of environmental pollution. For that reason, the Chinese government, for a short period following the Court Reform Five-Year Plan commencing in 1999, successfully limited the number of judicial mediation cases, especially in large coastal cities and urban courts, promoting judicial efficiency and justice by improving judges’ professionalism and carrying out procedural justice reform. Unfortunately, for reasons still debated by scholars, soon afterwards the Chinese government promptly reversed this attitude, and since the early 2000s, the number of judicial mediation procedures has risen again, with the inevitable negative consequences. It cannot in fact be denied that judicial mediations may affect judges’ decisions and their handling of cases, and therefore the implementation of positive rules, including those providing the compensation of environmental damages.

Lastly, we should not forget to mention the extensive recourse to another procedure, namely xinfāng, equally widely used in China. Xinfāng is a traditional instrument of redress, consisting in a petition in front of petition-level bodies, called xinfāng bureaus, which exist outside formal legal institutions but at the same time are formally established. Xinfāng bureaus can be found in almost all Chinese government bodies, including courts, local government offices, and Party committees. It is very important to underline that these bureaus are empowered by the Chinese Communist Party and its individual officials, and can take decisions even against court decisions, which are therefore delegitimised by the use of xinfāng. In some cases, judges are obliged, by provincial regulations to hear xinfāng petitions, overlapping their functions.

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57 Zhao, supra, note 47 at pp. 170–175.
58 For the different opinions of the scholars on the issue, see Minzer, supra, note 56 at p. 397; Cullen & Hua, supra, note 54 at pp. 39–40; R. Liehman, A Populist Threat to China’s Courts?, M.Y.K. Woo & M.E. Gallagher (eds.), Civil Dispute Resolution in Contemporary China, Cambridge University Press, 2011, pp. 269, 303–306.
The Chinese government makes extensive use of xinfāng as a multipurpose political governance tool, even in cases of environmental damage, because it is extremely sensitive to populist pressure as a consequence of the political concerns about social stability.62 For their part, Chinese people equally very often make use of xinfāng petitions, either because they have no confidence in the independence and impartiality of the judicial system or because they want to influence it since, as we said above, xinfāng petitions can be filed even against court decisions. In truth, scholars have pointed out that courts may also be extremely sensitive to populist pressures because of the strain put on them by the government and the fears of social stability. Therefore, it is apparently not uncommon for the courts to agree to change their decisions, rehear the case, ignore the letter of the law or consider cases without any legal basis, because of the significant pressures put on judges.63

Moreover, it should not be forgotten that traditionally Chinese people are more accustomed to petitioning practices and xinfāng bureaus than to pleading before a court, even if today simultaneous recourse to both remedies is not uncommon. The inevitable consequence of this situation is the limitation of the number of cases, included those related to the compensation of environmental damage, that are brought before the courts.64

The second problem in the application of the rules provided for cases of environmental damages is equally linked to another cultural and social factor, related to the interpretation and application of the provisions of the law. In fact, contrary to civil law systems, where the provisions of the law generally have an immediate prescriptive meaning, in China laws are generally considered to be policy statements and declarations of intents that need to be implemented by other legal rules and regulations.65 Furthermore, definitions of the legal terms can sometimes be not as clear as they should,66 causing difficulties in the application of some legal terms. This situation is probably rooted in tradition, as the Chinese guidelines for legislative drafters, approved by Mao in the 1950s, dictate that primary legislation should be both "general" and "flexible", following the idea that general and flexible national legislation can best be implemented throughout the country and be adapted to local conditions.67 In truth, it should

62 Id. at p. 107; Liebman, supra, note 58 at p. 306.
also not be forgotten that general and flexible legislation also best enables political control, leaving a wide scope for policy in the hands of the Chinese Communist Party. In any case, the direct consequence of these characteristics of generality and flexibility is an actual lack of independence of the laws from political directives and Chinese bureaucracy.68

Good examples of these issues can be found in some cases of compensation of environmental pollution.69

A first example is that of the application of the rule of strict liability, clearly provided for, as mentioned above, by Article 41 of the former version of the Environmental Protection Law. Under that rule, polluters could be held liable for damages when (even lawfully) they discharged wastewater or emitted air pollutants or caused other environmental pollution, if it was proved that such (even lawful) acts caused any harm.70 That rule, in fact, was not interpreted and applied as a strict liability rule by some courts and administrative bodies, which instead preferred to support the idea that the discharge of pollutants in compliance with the permit limits or state standards was not a basis for civil liability, even where environmental harm was caused.71

In the end, that same provisions of that rule were reaffirmed by several different legal acts72 and lastly by Articles 65 and 66 of the new version of the CTL, over the course of 20 years. That proves to us the difficulties in implementing concepts such as strict liability for environmental damage.

In fact, it is still quite common for Chinese courts in environmental liability cases to require the petitioners to prove the liability of the defendants, with the inevitable and frequent consequence of the claimants’ petition being dismissed because of the impossibility of proving the defendants’ responsibility, either

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under the negligence or the causal profile. In these cases, to prove the liability of the defendants is therefore almost impossible, especially considering the difficulties in showing the existence of a causal link between the pollution and the damage, because of the costs of doing so and in some cases the practical impossibility.

Nevertheless, on some occasions the Chinese courts have applied the strict liability rule to cases of damages caused by environmental pollution. Apparently, in fact, the principle of strict liability of the defendants in cases of environmental damages is slowly creeping into Chinese courts, as we can see from the reports of some Chinese cases. Probably one of the first was Sun Youli et al. v. Qianan Diyi Zaozhichang et al., which concerned damages to 18 fish and shellfish farmers caused by the death of fish and shellfish as a consequence of the discharge of an excessive amount of wastewater from nine pulp factories and chemical plants. In that case, all the tortfeasors were held liable for the compensation of the damages, including the one that had complied with the legal limits on waste, although this latter was not held jointly and severally liable with the other defendants for the damage.

That brings us to the point of the joint and several liability of the tortfeasors in cases of environmental damages. The principle of joint and several liability is usually adopted by civil law systems in cases of damage caused by environmental pollution consequent to the illicit actions of multiple tortfeasors, because it clearly offers better protection to the victims, granting compensation for the damage suffered even when one or more of the tortfeasors no longer exist or cannot pay for their share of compensation. In my opinion, it is really interesting that the principle of joint and several liability of multiple tortfeasors was adopted by Chinese law as a general principle, with Article 130 GPCL, but not for cases of environmental damage, since Article 67 CTL explicitly provides for several liability of multiple defendants. Although that choice may have its rationale in the presumption that the polluters do not have a joint intent and that the pollution is caused by independent acts, certainly the choice does not favour the victims of environmental pollution. In any case, that same rule may certainly please Chinese judges who, before the enactment of the new Article 67 CTL, and therefore under the general rule of joint and several liability, have held, in cases of environmental damages, with different reasoning, multiple tortfeasors to be severally liable.

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73 See for example the cases Zhang Changjian et al. v. Pingnan Rongping Chemical Plant (Pingnan Intern. People’s Court, April 2005); Zhang Changjian et al. v. Pingnan Rongping Chemical Plant (Fujian Provincial High People’s Court, November 2005); on these decisions see A. Wang, The Role of Law in Environmental Protection in China: Recent Developments, Vt. J. Env’t. L. 2006–2007 (8), pp. 192, 214. On the issue Wang, supra, note 61 at p. 205, Stern, supra, note 69.
75 Zhao, supra, note 47 at pp. 179–185.
5. FINAL REMARKS

The reason the author has chosen to use the word "remarks" instead of the word "conclusion" clearly lies in the fact that we do not think to have at our disposal enough sources – especially cases but also scholarly writing – to enable us to express a clear opinion on the actual impact of the transplant in China of civil law rules concerning the liability for the compensation of personal damages caused by environmental pollution.

Therefore, the author’s observations are to be considered tentative, as they are only supported by a limited amount of research materials and only concern the narrow boundaries of the present field of research.

In the author’s opinion it cannot be denied that the “mechanical” transplant into Chinese laws of provisions aimed at compensating the damages caused by environmental pollution that are modelled on civil law rules was successful. In fact, the existing Chinese laws provide all the necessary tools to compensate the victims of environmental damage, tools which have already proved to be generally suitable for their purpose in civil law countries.

By contrast, if we measure the success of the same transplants in terms of their capacity to shape the Chinese legal system according to civil law legal principles and therefore actually being able to compensate the victims of environmental damage, on the basis of the shortcomings that emerged from this research, the judgment cannot be very positive.

First of all, this is because the outcome of the effects of applying the rules providing for the legal compensation of environmental damages certainly suffers from the limited number of cases where these rules have actually been applied. In fact, the wide recourse to non-judicial remedies by Chinese victims largely hinders the efficacy of the legislative tools, reducing the number of legal decisions and therefore their capacity to affirm the legal principles and influence other cases. As long as judicial cases on the compensation of environmental damages are far and few between, their influence not only on the legal system, but also on the industrial system and society in general, will be hugely limited. Moreover, the authority of the courts will be restricted by their limited influence capacities. This is not to mention the fact that non-judicial decisions do not generally apply legal rules, and are easily influenced by the often significantly different bargaining powers of the parties.

Secondly, the uncertainties and reluctance in the application of the provisions of the laws on the compensation of environmental damages certainly undermine the authority of Chinese judges. In the author’s opinion, in fact, only when the courts are able to independently pronounce and interpret – without any temptation to accommodate the words of the laws to the needs of one of the parties, generally the defendants, or to continue to pay deference to legal traditions that are contrary to the laws’ aims – will the victims of environmental damages be able to trust them and will the courts be able to establish strong and
uniform case law. Unfortunately, the attachment to traditional attitudes, which often entails a disregard for the victims of environmental damages in favour of the tortfeasors, also sometimes shapes the choices of the legislator.

From what has been presented above, it is easy to infer that the impairments in the transplantation of civil law models of compensation of environmental damages in China probably mostly depends on the attitude of the government toward those issues. This attitude may perhaps be better described as "swinging", as the Chinese government at the same time enacts strict rules on the compensation of environmental damages and does not give the courts all the powers they need to implement these rules, or affirms that it wants all the victims to be restored regarding the damage they suffered and then provides for the several liability of the multiple tortfeasors of environmental pollution.

Certainly, we should never forget that the Chinese government is constantly fighting against local governments and the fear of social unrest. The powerful local governments, which generally directly finance local courts and therefore easily influence their decisions, may in fact often be opposed to the policies of the central government, because they may be shareholders of the polluting industries, or those same polluting industries may be their principal taxpayers.76 And the fear of social unrest may lead the central government to favour non-judicial systems of dispute resolution, because they are easier to accommodate to political needs than court decisions and the central government probably fears the possible outcomes of an independent judicial system in certain sensitive fields.77

On the other hand, the fight for a "beautiful China" undertaken by President Xi Jinping should not be undervalued. Indeed, we may consider that the enactment of the revised version of the Environmental Protection Law, which entered into force from 1 January 2015, was probably a first step towards a new approach by the government to Chinese environmental problems, environmental damages compensation among them. Apart from strengthening companies' and individuals' liabilities for preventing and controlling pollution


and providing for more severe punishments in the case of violations, the new rules in fact give more responsibilities to local governments regarding the control and enforcement of environmental protection rules and empower the courts to establish a system of environmental public interest litigation.\textsuperscript{78}

As mentioned above, the importance of this latter point was shortly afterwards emphasised by the issuing of the Interpretation on Several Issues Regarding the Application of Law in Public Interest Environmental Civil Litigation\textsuperscript{79} by the Supreme People's Court on 6 January 2015. The facilitation of the access to court decisions in environmental damages compensation cases using the tool of public litigation could in fact provide a viable solution to some of the issues highlighted above, as the new rules allow NGOs to file cases in a court different from the local court where the pollution occurred, enable the victims of the pollution to take advantage of the NGO's actions without costs, clearly state that the polluter must provide all the required evidence, permit the courts to investigate the facts and hear experts, and require the control of the settlements of the cases, with the purpose of avoiding that the decisions of the courts being the consequence of the intimidation of the petitioners by the polluter or the local government.

The Chinese Supreme Court also published, on 3 July 2017, a document called "Ten Model Cases regarding Environmental Public Interest Litigation",\textsuperscript{80} with the clear intent of showing the achievements of the public interest litigation tool in cases of environmental damage, while providing examples of successful cases and promoting its usage in other cases.

The aim pursued by the Chinese government is today, therefore, clear: there is certainly a strong political will to actually implement liability rules modelled on civil law for cases of damage caused by environmental pollution. As the efforts needed to successfully implement those rules mainly concern, in the author's opinion, cultural and political factors, considering the recent attempts of the Chinese government we will most probably soon be able to judge whether "beautiful China" will also be populated by "compensated victims".

\textsuperscript{78} For a critical approach to the 2015 changes, see T. Liu, China's Revision to the Environmental Protection Law: Challenges to Public Interest Litigation and Solutions for Increasing Public Participation and Transparency, J. Energy & Environ. L. Spring 2015 (60).


\textsuperscript{80} Chinese Supreme Court, Ten Model Cases regarding Environmental Public Interest Litigation, http://en.pkulaw.cn/display.aspx?cgid=49e669106365f7a4bd6b&db=law.