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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 Keqiang¹ 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

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."^2

The seriousness of the government's intentions was soon revealed by the efforts dedicated to the task, the successes already acquired^3 and the severe enforcement of administrative violations by central authorities.^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.

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^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.


Transplanting Civil Law Models in China

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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2 C. Louis de Secondat Montesquieu, De l'esprit des lois, livre 1, 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.
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

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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.12

More recently, new developments based on anthropological and sociological studies, underlying 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.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.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".15 But we should also not forget the urgency to undertake political and economic reforms in those countries, and therefore

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12 Teubner, supra, note 8 at pp. 11–32.
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,

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(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 (sifa\textit{feshi}), 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 Zhōngguó Rénmín Gōngghédù Qinquán Zérén fǎ (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).


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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. 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.

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. 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 supporting the theory that strict liability is based on a general idea, 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.


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...