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# European Union and Chinese environmental protection

## Some comparative elements

Claire JOACHIM<sup>1</sup>

China and the European Union (EU) are two of the three largest economies in the world<sup>2</sup>. China is the EU's second biggest trading partner behind the US, and the EU is China's biggest trading partner<sup>3</sup>. Both have tried, for years, to establish a framework for this cooperation. « Connecting EU and China »<sup>4</sup>: the political exchanges which occurred in march 2019 in Europe show a real will to further connections on both sides. The stakes are extremely high, but the differences between the two are equally phenomenal. In a Communication made famous by the European press, the European commission describes China as a « systemic rival promoting alternative models of governance »<sup>5</sup>. A main issue is established: the model of governance in China is profoundly different from that in Europe. In fact, the entire legal culture is truly distinct. This is a big challenge for the EU in its intention to be more connected to China. The cooperation between the two economic giants began in the 1970's, and revealed a large scope of issues, particularly in the area of governance.

For legal scholars, the European Union and China are usually seen as profoundly different legal systems. The European Union is considered a member of the continental legal system. China is a member of the socialist family, and, more widely, a member of non-western legal systems<sup>6</sup>. Some scholars in comparative law, such as authors from the relativist approach, refute this kind of comparison due to the significant differences between the backgrounds and characteristics of these two legal systems<sup>7</sup>. Indeed, the European legal basis is far removed from that of China, both in the aspects of the foundations of the state power or the role of legal rules in society. However, the central place of China in international exchanges and specifically in Europe creates a real need to learn more about the new first economy of the world. It appears as a main issue for comparatist scholars<sup>8</sup>.

Moreover, one legal field seems to bring these legal systems closer together: environmental protection. Despite profound differences in the foundations of these legal systems and a cultural interconnection between Society and Nature which is truly distinct, European and Chinese legal systems show some similarities. A common political objective is clear: the aim is to promote

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<sup>2</sup> European Commission, « EU-China – A Strategic Outlook », Joint Communication to the European Parliament, the European Council and the Council, Strasbourg, 12.3.2019, JOIN(2019) 5 final, p.1.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, p.19.

<sup>5</sup> *Ibid.*, p.1.

<sup>6</sup> R. David, *Les Grands Systèmes de Droit Contemporains*, Paris, Dalloz, 1964, 553 pages ; G. Cuniberti, *Grands Systèmes de Droit Contemporains*, Paris, L.G.D.J., 2011, 510 pages ; K. Zweigert, H. Kötz, *An Introduction to Comparative Law*, Oxford University Press, 1998, 714 pages.

<sup>7</sup> About comparability see M. Oderkerk, “The Importance of Context: Selecting Legal Systems in Comparative Legal Research”, in M. Adams, J. Husa, M. Oderkerk (Ed.), *Comparative Law Methodology*, Northampton (USA), E. Elgar Publishing, pp.169 & s.

<sup>8</sup> J.V. Feinerman, “Pioneering the Study of Chinese Law in the West”, *AJCL*, vol. 65, Issue 4, Dec. 2017, pp.739-744.

“business to business cooperation within the green sector”<sup>9</sup>. Thus, serious legal transplants of European instruments to Chinese regulations has occurred.

This paper proposes to compare environmental legal systems in the European Union and China in order to highlight some legal issues in the green sector. They both apply a multilevel governance in the field of environmental protection, as it is a shared power amongst different levels of government in both legal systems<sup>10</sup>. Moreover, the European Union and China both face serious environmental issues. Simultaneously, they must ensure economic development. Finally, European and Chinese officials have ratified several international conventions concerning environmental protection. As a result, international law is applied in both legal systems.

Legal culture<sup>11</sup> seems to have a strong impact on these issues and more widely on the entire environmental protection legal system. This analysis highlights the effect of certain elements of legal culture on environmental protection instruments and their effectivity. This issue is usually underestimated in the environmental field, despite its strong impact on green sector achievements. Several contributions on environmental law in China have used a Western reading grid, disregarding Chinese legal culture characteristics<sup>12</sup>. Chinese legal culture itself is subject to a lack of literature by both legal scholars and legal anthropology<sup>13</sup>. Misunderstandings are common in Western literature as well<sup>14</sup>.

The comparative study presented here is based on a combined method, including a contextualist approach and some elements from the multi-level governance theory. Some aspects of contextualism have been applied in order to take into account elements from legal traditions that influence the formation and implementation of each rule. In this field of research, the link between law and the society to which it is applied to is dominant<sup>15</sup>. The multi-level governance theory has complemented the analysis by shedding light on the articulation of rules within each legal order studied<sup>16</sup>. China is largely considered to be a unitary state subject to *de facto* federalism and the European Union a *sui generis* object with elements bordering on federalism. Both are analyzed in this contribution as multi-level legal systems. These are sets of organic and material elements that form part of a law applicable to a given society<sup>17</sup>, sharing powers between several political and legal levels<sup>18</sup>.

First, this contribution will highlight the significant differences between these legal systems, from both a cultural and an environmental perspective. The contrasting legal cultures between the European Union and China are well known of comparatist scholars. Studies concerning the legal culture in the field of environmental protection, however, are much rarer despite their value in understanding modern environmental law effectiveness. Then, this paper will analyze the rules dedicated to environmental protection in both the European Union and China. This comparison will highlight the differences but also the convergences that exist between Chinese and European environmental laws. It will analyze the scope of some legal transplants that have occurred from

<sup>9</sup> EU-China 2020 Strategic Agenda for Cooperation, p.12.

<sup>10</sup> See for example: 1996 Chinese Water Protection Act, art.4; and 2000 Chinese Air Protection Act, Art.4; as well as Treaty on the Functioning of the European Union, art.4; P. Thieffry, *Droit de L'environnement de l'Union Européenne – Éléments de Droit Comparé Américain, Chinois et Indien*, Bruxelles, Bruylant, 2008, p.95.

<sup>11</sup> D. Nelken, “Defining and Using the Concept of Legal Culture”, in M. Adams, J. Husa, M. Oderkerk (Ed.), *Comparative Law Methodology*, Northampton (USA), E. Elgar Publishing, pp.332 & s.

<sup>12</sup> P. Thieffry, *op.cit.*

<sup>13</sup> M. Chiba, “Droit Non-Occidental”, in W. Capeller, T. Kitamura, *Une Introduction aux Cultures Juridiques Non Occidentales – Autour de Masaji Chiba*, Bruxelles, Bruylant, 1998, p.42.

<sup>14</sup> T. Ruskola, “Legal Orientalism”, *Michigan Law Review*, 101 (1), Oct. 2002, pp.179-234.

<sup>15</sup> P. Legrand, “Comparer”, *R.I.D.C.*, vol. 48, n°2, avr.-juin 1996, p.289.

<sup>16</sup> I. Pernice, “The Treaty of Lisbon: Multilevel Constitutionalism in Action”, *Colum. J. Eur. L.*, vol. 15, 2008-2009, p.349-407; I. Pernice, “Multilevel Constitutionalism in the European Union”, *European Law Review*, 2002, 16 p.

<sup>17</sup> D. Alland, S. Rials (dir.), *Dictionnaire de la Culture Juridique*, Paris, Quadrige, Lamy, PUF, 2003, 1649 pages.

<sup>18</sup> I. Pernice, “The Treaty of Lisbon: Multilevel Constitutionalism in Action”, *Colum. J. Eur. L.*, vol. 15, 2008-2009, p.349.

European law to Chinese law in the sector of environmental protection. The link between law and culture will be studied from an environmental perspective as this link seems to have a significant impact on the success of such transplants.

## I. Background elements

Several factors have an impact on environmental protection. This study has chosen to describe two components of the legal tradition in each entity studied as these components reflect the dominant features having an impact on the field of environmental law. Thus, as described below, the role of law in governing life in society, and society's relationship to the environment.

### I.1 The role of law in regulating life in society

The main features of the genesis of a legal system are found in the history of the observed society. A fundamental factor comes into play, that of the foundation of power. It will determine the place of the rules of law in the life of a human community. This is particularly true in a comparison between European and Asian laws.

A dichotomy appears when one approaches the question of the power base: between the Western legal systems and the Oriental ones, the base of the power is decidedly different<sup>19</sup>. Western legal orders, to which the European Union belongs<sup>20</sup>, make power the basis of popular sovereignty. Oriental legal systems devote an alternative or concurrent legitimacy to this sovereignty of the people. In some cases, it may be a religion or an ideology that becomes either the sole basis of power or a rival foundation<sup>21</sup>. In China, it is the socialist ideology that is consecrated. It should be noted, however, that this follows a long tradition of alternative foundations of power<sup>22</sup>.

The substance of this first component has important consequences on the relationship between society and the law that governs it. European Union law, influenced by laws from all around Europe, is characterized by the rule of law. The Platonist and Greco-Roman approach is a central point to understand European law genesis. Latin conception irrigates all Western laws, and implies a certain point of view about law<sup>23</sup>: it is a categorical imperative for all, defining and regulating, in an abstract manner, the conditions and effects of social activity<sup>24</sup>.

Of course, there are major differences as to the place of the law (an important criterion for qualifying a continental legal system), and the role of the judge (characteristic of rights belonging to the common law tradition). But nothing is so profoundly different as the Chinese legal situation.

One of the fundamental features of Chinese law is legal pluralism. There is a coexistence between state law and unofficial rules<sup>25</sup>. According to classical comparatist scholars, China has a weak legal tradition<sup>26</sup>, emphasizing social relations and related duties. The traditional Chinese civilization, whose influence is decisive despite the advent of communism, is supposed to be hostile to the

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<sup>19</sup> G. Cuniberti, *op.cit.*, p.195.

<sup>20</sup> R. David, *op.cit.*

<sup>21</sup> G. Cuniberti, *op. cit.*, p.195.

<sup>22</sup> *Ibid.*

<sup>23</sup> X. Li, "L'Esprit du Droit Chinois : Perspectives Comparatives", *RIDC*, vol.9, n°1, Jan.-Mar.1997, p.8.

<sup>24</sup> *Ibid.*, quoting J. Escarra theory.

<sup>25</sup> M. Chiba, *op.cit.*, p.42.

<sup>26</sup> R. Legeais, *Grands Systèmes de Droit Contemporains – Approche Comparative*, Paris, LexisNexis Litec, 2004, p.199.

rule of law, favoring dialogue above all else<sup>27</sup>. The traditional approach is based on the theory of government by Confucius which implies a different foundation of power. Men are governed by the *Li*, rules of conduct that men impose on themselves, and not by the *Fa*, rules imposed by the sovereign<sup>28</sup>. According to Confucius: "If the people are subject to the law and if uniformity is imposed by means of sanctions, people will seek to evade it and will not be ashamed, whereas if the people are ruled by virtue and uniformity is sought by means of '*Li* (virtue)', people will feel ashamed and therefore become righteous"<sup>29</sup>.

Chinese society is based on an extrajudicial and non-contractual moral conception of life in society. Recourse to the '*Fa*' (e.g. substantive law) is traditionally proof of social order collapse and lack of harmony between the state and said society. Substantive law is a terrorist intervention of the state and rights conferred to individuals threaten social harmony<sup>30</sup>. According to the first Minister of the Zheng State, in the third century BC: "I have to say that every State about to perish is characterized by the large number of its governmental regulations"<sup>31</sup>.

The study of Chinese society reveals a real distance between the law, as the Western approach defines it, and society. The regulation of social relations obeys standards other than legal norms, such as tradition, propriety, custom and consultation<sup>32</sup>. The Chinese system is based on social ethics, oriented towards a natural order (a pronounced sense of hierarchy, filial piety with a clan leader, family prevailing). It prioritizes mediation and compromise<sup>33</sup>. The legacy of Confucianism prevails: Chinese culture does not rely on the law to ensure social order and justice. Trials and the normative constraints are used only a last resort<sup>34</sup>. Recourse to courts was discouraged for more than 2000 years: it is the duty of the clan, the family, the corporation to resolve the conflicts born within them<sup>35</sup>. In the European approach, the role of the Courts is not only to apply the law, but very often to interpret it and sometimes to "tell" it, through the use of contradictory debates in which all interests are represented and, normally, defended<sup>36</sup>.

Initially, the communist regime did not break with the Chinese conception of law. At the time of its advent, it abolished all existing laws, decrees and tribunals. By relying on traditional practices, the central state and communist ideology became the main applicable standards.

In the late 1970's, however, legal certainty became an indispensable factor in attracting foreign investors and ensuring the Chinese Government's new priority: economic development<sup>37</sup>. It is a driven element that shouldn't be underestimated. It led to a legislative frenzy that began quickly, in 1978, which culminated in the establishment of a dense legal fabric with no real hierarchy, characterized by an entanglement of administrative authorities<sup>38</sup>. In this context, law and the Constitution, appear to be tools at the service of politics, but they are not a factor of stability. The apparent exaltation of the law seems to be destined to satisfy foreign investors.

Despite a wave of renewal, China appears today trapped between two different legal trends:

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<sup>27</sup> R. David, *op.cit.*, par.495; R. Legeais, *op.cit.*, p.261 & s. This point of view is criticized in comparatist doctrine, such as in J. Chen, "Chinese Law: Towards an Understanding of Chinese Law, its Nature and Developments", Partinus Nijhoff Publishers, July 1999, 414 pages.

<sup>28</sup> J. Legge (trad.), *The Sacred Books of China: The Texts of Confucianism*, Delhi, Motilal Banarsidass, 1968, book IV, section I, part III; R. Legeais, *op.cit.*, p.262; P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, Oxford university press, 2014, p.335.

<sup>29</sup> A. Ehr-Soon Tay, "Culture juridique chinoise", in W. Capeller, T. Kitamura, *op.cit.*, p.206.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> O. Beydon, *Introduction à la Pensée Juridique Chinoise*, Bruxelles, Larcier, 2015, p.14.

<sup>33</sup> A. Ehr-Soon Tay, *op. cit.*, p.206.

<sup>34</sup> O. Beydon, *op. cit.*, p.14.

<sup>35</sup> A. Ehr-Soon Tay, *op. cit.*, p.207.

<sup>36</sup> X. Li, *op. cit.*, p.11.

<sup>37</sup> P.B. Potter, *China's Legal System*, Cambridge, Polity Press, 2014, p.4.

<sup>38</sup> M. Delmas-Marty, "La Construction d'un État de Droit dans la Chine d'Aujourd'hui. Avancées et Résistances", *Recueil Dalloz* 2002, p.2484 ; M. Delmas-Marty, "L'Etat de Droit en Chine", *Recueil Dalloz* 2008, p.2216.

Western legal formalism and a traditional resistance to this formalism. This ambiguity is cultivated, mostly in China's foreign relationships and has notable consequences on the importing of Western legal models, particularly through the rules of international law<sup>39</sup>. Environmental legislation and its enforcement are necessarily impacted. That is why particular precaution must be applied while studying the Chinese legal system, which must be interpreted in the light of these few elements<sup>40</sup>.

## I.2 The way society considers the environment

Environmental legislation is obviously influenced by the place accorded to law in society. The main issue is that of the effectiveness of the developed legal regime. In environmental matters, an additional factor comes into play: the relationship to nature maintained by society. It differs according to the origins of the law and it constitutes an important factor as to the effectiveness of the rules of environmental protection.

Firstly, Western legal systems in the area of environmental protection are structured by three main influences: custom, canon law and Roman law. Both Romano-Germanic and common law family legal systems are driven by these three sources, the conjugation of which produces a particular approach to the environment: a utilitarian approach. Christian and Romanist postulates, even in Common law, are major factors<sup>41</sup>. This implies that each component of the environment is broken down into a multitude of components for which a usage-based legal regime is established. A use therefore corresponds to a legal regime<sup>42</sup>. European Union law and European laws are globally structured according to this matrix. Thus, a real *maquis juridique* (legal maquis) characterizes European Union law in environmental protection, which is thus highly structured and complex.

Secondly, Chinese law differs from European Union law in that Asian culture considers the environment differently. Theories of Confucius are once again revealing: they historically ground the relationship of Man to his environment. This relationship is initially marked by a great unity: Man and Nature form a whole<sup>43</sup>. Nevertheless, an ambiguity appears around the definition of Nature in this context. If the Oriental approach, from a Western perspective, is often considered as truly ecological, reality is more nuanced<sup>44</sup>. According to Confucianism, the individual and the social order must be granted, in order to ensure the common good. The aim is traditionally to obtain harmony within the family, the village, China and humanity. An absolute value of Confucianism resides in unity between Man and the Cosmos<sup>45</sup>. Does it imply unity with the elements of Nature? Harmony has to remain in a natural order, but does it mean it is supposed to respect an ecological goal? R. David established the importance in China to take into account the seasonal cycles in private and public lives<sup>46</sup>. This could be considered as a mark of ecological intentions in Chinese tradition. Conversely, in geography doctrine, Chinese civilization is usually considered as a predator of Nature. For example, some scholars have suggested a Chinese dislike of trees: "Wherever the Chinese have established themselves, this hatred of the tree, which is

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<sup>39</sup> G. Cuniberti, *op.cit.*, p.196.

<sup>40</sup> P. Glenn, *op.cit.*, p.337 & s.

<sup>41</sup> D. Fisher, *The Law and Governance of Water Resources – The Challenge of Sustainability*, Cheltenham (UK), Edward Elgar Publishing Limited, 2009, p.168 & s.

<sup>42</sup> C. Joachim, *Protection de la Qualité des Eaux Douces au Canada et dans l'Union européenne – Partage des Compétences*, Paris, L'Harmattan, par.200 & s.

<sup>43</sup> J. Legge (trad.), *op.cit.*; D. Fisher, *op.cit.*, p.164; J.R. McNeill, *Something New Under the Sun: An Environmental History of the Twentieth-Century World (The Global Century Series)*, New York, W.W. Norton & Company, 2001, p.159.

<sup>44</sup> J.M. Falcombello, "Bouddhisme", in D. Bourg, A. Papaux, *Dictionnaire de la Pensée Ecologique*, Paris, Presses Universitaires de France, 2015, pp.108-112.

<sup>45</sup> "Datong". X. Li, *op. cit.*, p.23.

<sup>46</sup> R. David, *op.cit.*, pp.403-405.

almost an ethnic trait, breaks out. Often the forest is destroyed”<sup>47</sup>. More globally, the traditional position concerning the Natural elements seems to be more characterized by a mixture of fear and detachment. The traditional relationship with Nature is still a source of debate, but it has evolved with the country’s modernization.

This modernization, begun in the late 1970’s, and the protection of the environment are intrinsically linked. There is a historical basis of human duties towards the environment, but the priorities of the Chinese government prevail: economic development is the foundation on which the protection of the environment is based<sup>48</sup>. It is in this context that Chinese environmental law has developed since the 1980’s, with several texts adopted. Nevertheless, the Chinese legislation in this area is particularly vague and written in a flexible way: its flexibility makes it possible to interpret the obligations prescribed in the sense of the objectives prevailing according to the conjuncture<sup>49</sup>.

Thus, the diversity of approaches prevails in terms of the substance of the law, which is as much about the traditional relationship maintained by society in regard to its legal system as the treatment of the environment.

The comparative study of the European and Chinese legal systems in this area reveals that we cannot apply a Western analysis grid to an Oriental law if we want to understand how this legal system really works. If there is perhaps a gap in Western laws between the existing rules of law and their application, the study of Chinese law falls outside this framework. It is all the more true since China has proceeded in realizing legal transplants from the West, and specifically from EU law.

## II. Rules dedicated to environmental protection : a convergence?

Environmental protection is highly developed in a Western perspective. We find some similarities between Chinese and EU laws, but also profound divergences, questioning the idea of a convergence in environmental law. The most important divergence appears between the existence of legislations in environmental law and its implementation, which is the result of differing legal traditions. Below, some similarities in environmental legislations as well as a number of divergences are described.

### II.1 Similarities in environmental legislations

Globally, the EU and China both developed environmental law in the 1970s with a similar structure, based on a Western matrix, which implies a utilitarian perspective. Chinese law is composed of nine environmental protection acts, fifteen natural resources protection acts, about fifty national regulations and more than 600 local regulations<sup>50</sup>. The EU has published several thousand texts in this domain<sup>51</sup>. The quantity is not the same, but similarities can be observed. Two groups of elements are particularly interesting: general principles of environmental law and natural resources protection.

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<sup>47</sup> M. Morin, P. Salomon, *Les Montagnes Tropicales : Identités, mutations, Développement*, Presses Universitaires de Bordeaux, 2001, p.34. Quoting J. Sion in 1928.

<sup>48</sup> *Ibid.*

<sup>49</sup> J. Legge (trad.), *op.cit.*; D. Fisher, *op.cit.*, p.164; J.R. McNeill, *op.cit.*, p.159.

<sup>50</sup> P. Thieffry, *op. cit.*, p.35.

<sup>51</sup> <https://eur-lex.europa.eu/>.

### II.1.1. General principles of environmental law

Some general principles of environmental law – mainly stemming from the 1992 Rio Declaration - appear in the Chinese legal system. With a Western reading grid, Chinese law is quite similar to the EU legal system.

First, the right to a healthy environment, stemming from the international declarations of Stockholm (1972) and Rio (1992), is protected in EU law under the Charter of Fundamental Rights of the European Union<sup>52</sup>. Although this right doesn't appear explicitly in Chinese law, its implementation principles, such as the right to information and public participation can be found. Public information appears in Chinese law as an instrument of environmental protection. The Act of 29 June 2002 concerning the promotion of cleaner production provides for the publication of business listings in the media. It is both a deterrent and an incentive tool<sup>53</sup>.

Second, the principle of integrating environmental protection requirements into other policies, established in Europe by the Treaty on the Functioning of the European Union<sup>54</sup>, has been developing in Chinese law since the 1980s. The main environmental protection laws provide, in similar terms, that the national public authorities "incorporate environmental protection" into national planning for economic and social development<sup>55</sup>. The concept of impact studies, deeply linked to the principle of integration, was already present in the Chinese Act of 11 May 1984 on the prevention and reduction of water pollution, the 1989 Act on the protection of the environment and the 2000 Act on air pollution.

Above all, the Environmental Impact Assessment Act of 2002 takes up large parts of the European system by laying down substantive rules. To this end, the assessments conducted "should be objective, transparent and equitable and take into consideration all possible environmental impacts of planning and construction projects to provide a scientific basis for the decision-making process"<sup>56</sup>.

Third, the principle of prevention, present in the entire EU law, is implicitly laid down in the Chinese Constitution when it states that "the State protects [...] the human environment and the ecological environment" and more directly when it creates the obligation to "prevent and control pollution and other public nuisances"<sup>57</sup>. It also appears in the main environmental legislation. Thus, the term "prevention" is included in the laws relating to water, waste and air<sup>58</sup>, as well as in the 1989 Environmental Protection Act<sup>59</sup>. This Environmental Protection Act includes an entire chapter on the prevention and control of pollution and other hazards to the public, the content of which is very similar to that of the European IPPC Directive<sup>60</sup>. Indeed, this chapter encompasses the most diverse sources (production, construction etc.) of various types of pollution (gaseous waste, wastewater, residual waste, etc.) as well as European classifications<sup>61</sup>.

Fourth, the precautionary principle has tiptoed into Chinese law. It underlies the "precautionary measures" imposed by the Regulation of 23 May 2001 on the safety of genetically modified agricultural organisms. The adoption of these measures is one of the conditions for issuing an

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<sup>52</sup> Art.37.

<sup>53</sup> 2002 Act on the Promotion of Cleaner Production, art.17 & 31.

<sup>54</sup> Treaty on the Functioning of the European Union, art.11.

<sup>55</sup> 1989 Act about Environmental Protection, art.4; 2000 Act about Prevention and Atmospheric Pollution Reduction, art.2; 1996 Act about Prevention and Reduction of Water Pollution, art.3.

<sup>56</sup> Environmental Impact Assessment Act of 2002, art.4.

<sup>57</sup> Constitution of the People's Republic of China, art.26.

<sup>58</sup> 1996 Act about Prevention and Reduction of Water Pollution; 2000 act about Prevention and Atmospheric Pollution Reduction, 2004 act about Prevention of Waste Pollution.

<sup>59</sup> 1989 Act about Environmental Protection, art.1.

<sup>60</sup> 2008/1/CE Directive, replaced by 2010/75/UE IED Directive.

<sup>61</sup> P. Thieffry, *op. cit.*, p.499.



authorization to produce, market or import such organisms<sup>62</sup>. The precautionary principle is mentioned in Article 191 of the Treaty on the Functioning of the European Union. It aims to ensure a high level of environmental protection through preventive decision-making in case of risk.

Finally, the ‘polluter pays’ principle appears in a number of Chinese legal texts, such as the law on pollution caused by waste<sup>63</sup>. It is included in Article 191 (2) of the Treaty on the Functioning of the European Union as one of the guiding principles of the Union's environmental policy. It manifests itself in several secondary legislation concerning waste and water.

### II.1.2 Natural resources protection

Several areas of environmental protection show great similarities, and in some cases, apparent legal transplants<sup>64</sup>. These transplants appear to be a direct application in Chinese law from European instruments.

First, is the case in the fight against atmospheric pollution. A five-year plan for the prevention and control of air pollution in key Chinese regions was established, as well as a major law in the year 2000 on the prevention and control of atmospheric pollution. Like EU instruments, it focuses on coordinating efforts between national and local levels. The national standards are those from the European Union: the national department of environmental protection refers expressly to the European Regulations, especially those of 2007 and 2008<sup>65</sup>.

Also, the battle against water pollution in China follows the Western matrix based on uses of natural resources. It stems from a 1964 French Act<sup>66</sup>, which established an innovative way of managing and protecting water resources. This French framework, the French School of Water, inspired the whole European law system in this domain as it is applied in the water protection legal system in the EU<sup>67</sup>. It implied water management based on hydrographic basins instead of administrative circumscriptions. The aim is to manage each ecosystem with its uses and its specificities. China adopted this innovative system in the 1980's to insure water protection<sup>68</sup>.

Finally, forest resources protection is very interesting in this context. Article 26 of the Chinese Constitution states: "The State organizes and encourages the planting of trees and reforestation and protects trees and forests". The 1984 Forestry Act provides the major legislation, completed by the 1986 Implementation of Forest Act, revised in 1998. It has significant provisions on a complete set of uses: the right to use forestland, the requisition of forest woods, the compensation of forests' ecological effects, etc.<sup>69</sup>. In 1998, an integrated approach was established, implying specific uses of the forest to protect other resources (water, soil, air etc.). The rationale behind forest protection is similar to what is applied in European law: protection is based on forest uses. About 90% of EU funding for forests comes from the European Agricultural Fund for Rural Development (EAFRD), and is integrated in the Common Agricultural Policy. Moreover, the marketing of forest reproductive material is regulated at the European level by the Directive 1999/105/EC. The European phytosanitary regime aims to control the spread of harmful organisms to forests (Directive 2000/29/EC).

<sup>62</sup> Regulation of 23 May 2001, art. 19, 21, 26, 31 & 33; and see *Ibid*.

<sup>63</sup> 2004 Act about Prevention of Waste Pollution, art.5.

<sup>64</sup> A. Watson, "Introduction to Legal Transplants", in *Legal Transplants: An Approach to Comparative Law*, Chapter 4, Charlottesville (USA), University Press of Virginia, pp.21-30.

<sup>65</sup> <http://www.chinacsmap.org/>

<sup>66</sup> Loi n° 64-1245 du 16 décembre 1964.

<sup>67</sup> See 2000/60/CE Framework Directive.

<sup>68</sup> P. Thieffry, *op. cit.*, p.242.

<sup>69</sup> Z. Shijun, "Forest Resources Law", in Q. Tianbao (Ed.), *Research Handbook on Chinese Environmental Law*, Northampton (USA), E. Elgar Publishing, p. 260.

Thus, the rationale is similar concerning natural resources protection as it is based on uses in both cases. If convergence appears in positive law and form, does it mean legal systems are truly similar? The implementation of environmental law shows a discrepancy gap, a materialization of Chinese law ambiguity: the legal system exists, but there are resistances to use it.

## II.2 Divergences

According to several studies by the State Environmental Protection Agency (SEPA) (2004, in particular), the general environmental situation in China is a serious concern. More than 70% of the water in 5 of the 7 main river basins is "unsuitable for human contact". Only 20% of waste is treated appropriately, and the air quality does not meet the standards of the World Health Organization in 2/3 of the three hundred major Chinese cities. However, environmental declarations are raising awareness at the highest level, in response to growing pressure from the public and to some degree, from international sources. The environmental legal research is rich, and the central administration regularly emphasizes that the Chinese government attaches great importance to the protection of the environment, considering that it relates to the modernization of the country as a whole and to its development in the long term<sup>70</sup>.

The situation in Europe is not necessarily ideal, but why does there exist such a discrepancy in China between an apparently rich legal system and these alarming environmental results?

The relative completeness of Chinese environmental law does not mask the traditional ambiguity. It does not appear to be sufficiently emphasized and translated into concrete and measurable actions. There is an important feature in Chinese legal culture, from a Western point of view: an attraction for the relatively weak law. Thus, Chinese legislation is vague and loosely written. It has a flexibility that allows it to be interpreted in the sense of the prevailing political objectives of the moment. One can observe this trend with the following examples.

### II.2.1. General principles implementation

General principles in environmental law appear in both legal systems, but their application can be a source of ambiguity.

The right to a healthy environment is an individual right, not present in traditional Chinese culture, which is more focused on the common good and a collective approach. This is the reason why this right is difficult to find in Chinese legislation. Nevertheless, implementation principles appear, namely: public information and public participation. These implementations are quite far from their European counterparts. Public information in European law implies a right to access to information on environmental quality, and not just on information concerning the virtuous activities of European companies<sup>71</sup>. The implementing of public participation in China adopts a particular modality. Indeed, the main environmental protection laws provide, in similar terms, that "all entities and individuals [...] shall have the right to report entities or individuals causing pollution or harm to the environment or to lodge a complaint against them". This is a corollary to the imposed obligation to protect the environment<sup>72</sup>. This implies that by principle, it is not required to have a specific interest to file a complaint under Chinese law and thus everyone has a right of action in environmental protection. Conversely, European laws, such

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<sup>70</sup> P. Thieffry, *op. cit.*, p.37.

<sup>71</sup> See 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

<sup>72</sup> 1989 Act about Environmental Protection, art.6; 2004 Act about Prevention of Waste Pollution, art.9; 2000 Act about Prevention and Atmospheric Pollution Reduction, art.5; 1996 Act about Prevention and Reduction of Water Pollution, art.5.

as French law, impose that there must be a direct and personal interest to file a complaint<sup>73</sup>. This could appear to represent an important difference in the two systems. Chinese procedure, however, reveals that barriers about this issue as the quality for action is assorted with very strict conditions<sup>74</sup>. Does this imply the existence of a convergence? The answer would seem to be no. Also, European laws, such as French law, have opened their legislation to pure ecological harm<sup>75</sup>, potentially lightening the standing condition in environmental actions. Here again, the trends seem to be opposed.

Finally, the scope of the ‘polluter pays’ principle is still very limited in China because of the low amount of taxes and fees charged<sup>76</sup>. Moreover, the Chinese financial incentive system is the opposite to that of the Europeans. It is more of a reward system in the event of remarkable achievements in the protection and improvement of the environment<sup>77</sup>. The European system is more marked by a logic of sanction.

### II.1.2 Natural resources protection implementation

The Chinese standards concerning atmospheric protection are those from 2007 and 2008 European regulations. Nevertheless, at the reading of the Chinese text, the characteristics of the Chinese law stand out. Article 7 of the 2000 Act on the Prevention and Control of Atmospheric Pollution states that national emission standards are set by the Department of Environmental Protection. Paragraph 2 specifies that provinces, autonomous regions and municipalities can set local standards that may be stricter. But all of this is accompanied by conditions such as the systematic approval of the National Council and the necessity that these standards be set in accordance with the economic and technological conditions of the country<sup>78</sup>.

A great deal of appreciation is allowed for the competent authorities and the courts responsible for their implementation and execution<sup>79</sup>. The work of the courts here is very revealing of the still strong imprint of traditional Chinese elements. It should be noted that it is only as a last resort, and citizens or companies rarely go to court<sup>80</sup>. The treatment of Forest Act infringement cases is particularly noteworthy.

In case of violation of this law, beforehand a conciliation phase (by an administrator at his level of competence) has to be conducted, and in certain situations, administrative reconsideration is possible. It is only as a last resort that action in a court is possible. Before the courts, compensation is in kind. In case of illegal cutting of a tree, there is a civil obligation to compensate for this loss. The competent department orders to replant the corresponding number of trees felled. Moreover, if an error occurs by a member of the government administration and this causes a destruction of wood<sup>81</sup>, the competent department orders to replant ten times the corresponding number of trees felled or to pay the cost of the plantation<sup>82</sup>. This is a first mark of the vivacity of the Chinese tradition. Criminal courts offer a second marker in this area. Damage to the environment is not in itself subject to conviction, judges do not seize

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<sup>73</sup> French Civil Procedure Code, art.31.

<sup>74</sup> P. Thieffry, *op. cit.*, p.648

<sup>75</sup> French Civil Code, art.1249.

<sup>76</sup> P. Thieffry, *op. cit.*, p.127.

<sup>77</sup> P. Thieffry, *op. cit.*, p.579.

<sup>78</sup> 2000 Act on the Prevention and Control of Atmospheric Pollution, art.7.

<sup>79</sup> P. Thieffry, *op. cit.*, p.38.

<sup>80</sup> R.E. Stern, “The political logic of China’s new environmental courts”, *The China Journal*, n°72, July 2014, pp. 53-74.

<sup>81</sup> 1984 Forest Act, art.39.

<sup>82</sup> Z. Shijun, *op.cit.*, pp.272 & s.

it<sup>83</sup>. Chinese criminal law implementation (highly developed and old) pays more attention to protecting the property and consequential personal injury more than the environment itself<sup>84</sup>.

## Conclusion

As Pr. Legeais wrote, Chinese environmental law seems to have established “a modern law tackled on a society that gives it effectiveness albeit slowly”<sup>85</sup>. This modest contribution demonstrates the importance of the impact of legal culture on the effectiveness of environmental protection in China. It offers only reflections as the task seems immense. Where we see legal transplants in texts, it doesn’t have effect in reality. The legal texts do not in themselves seem important. The Chinese example shows how the reading grid for analyzing a legal system is fundamental. With a Western positivist reading grid, Chinese environmental law seems to be complete and well-constructed. But the Chinese legal culture is an uncommon legal system, leaving considerable room for maneuver with regards to self-regulation or a parallel mode of regulation that Westerners have difficulty in grasping the contours and asperities. Regarding the impact of legal culture on the effectiveness of environmental protection, it may imply to include legal cultures issues in each project of legal transplant, and more widely in each project of international agreement in this field.

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<sup>83</sup> *Ibid.*

<sup>84</sup> Z. Shijun, *op.cit.*, p.275.

<sup>85</sup> R. Legeais, *op.cit.*, p.2.