

The Chinese Civil Code: a landmark law amid some great pitfalls in codification*

JIANFU CHEN

1. Introduction

Codification or re-codification swung back to life towards the end of the 20th century, but for different reasons in different countries.¹ In this ‘movement’,² if there is one, China is the latest to offer its story of successful codification:³ On 28 May 2020 at the Third Meeting of the 13th National People’s Congress, the Civil Code of the People’s Republic of China (hereinafter, the 2020 Civil Code or the Code) was adopted and the Code became effective on 1 January 2021.⁴ The 2020 Civil Code contains 1260 articles in seven Books, each is respectively entitled General Principles, Rights *in rem*, Contracts, Personality Rights, Marriage and Family, Succession, and Torts.

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¹ There is no shortage of literature on codification/re-codification. For a recent study on codification in the 20th and 21st centuries, see Michele Grazidei & Lihong Zhang (eds), *The Making of the Civil Codes: A Twenty-First Perspective* (Singapore: Springer, 2023); Gunther A. Weisst, ‘The Enchantment of Codification in the Common-Law World’, 2000 *The Yale Journal of International Law* 435–532; and Wen-Yeu Wang (ed), *Codification in East Asia: Selected Papers from the 2nd IACL Thematic Conference* (New York: Springer, 2014).

² See Wilhelm Brauner, ‘Codification Movements’, in European History Online (EGO), 2023, available at <http://ieg-ego.eu/en/threads/crossroads/legal-families/wilhelm-brauner-codification-movements> (last accessed 14/2/24).

³ It should be pointed out that the latest efforts to codify civil law was overwhelmingly but not universally supported in China. For further discussion on this point, see Lei Chen, ‘Continuity and Change: some reflections on the Chinese Civil Code’, 2021(29:2) *Asia Pacific Law Review* 287–305.

⁴ There are several slightly different versions of English translation of the Code now available on-line. This paper uses the translation provided by the National People’s Congress (NPC), with some changes that are deemed appropriate by the author. The NPC translation is available at https://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html (last accessed 15/1/24).

The overall structure of the Code presents no surprise from a Pandectist perspective. In form, it is largely influenced by classical civil codes, especially the German Civil Code. In substance, however, foreign sources that inform the Code are very diverse, including also international law (the UNIDROIT Principles 2016 and the CISG Convention on contracts),⁵ as well as American law (on torts).⁶ Further, this Pandectist product, as is the case in many other Chinese laws, contains its own political twists and some interesting Chinese home-grown innovations.

The 2020 Civil Code is most appropriately described as a result of 70 years of ‘struggle’⁷ that witnessed the often disrupted codification attempts, with the latest attempt starting from 2014 when the Central Committee of the Communist Party of China (CPC) – the (notionally) highest authority of political decision-making – decided that civil laws should be codified into a comprehensive code.⁸ On the surface, the latest efforts of codification were to systematically and rationally revise the existing laws and then to codify them into an internally consistent and coherent code under a scientific structure.⁹ In reality, the tasks were far more complicated and complex. Specifically, as explained by Professor Xianzhong Sun when he delivered a special seminar

⁵ See Jianfu Chen, *Chinese Law: Context and Transformation* (Leiden/Boston: Brill/Nijhoff, 2016), at 586–587.

⁶ See Jacques deLisle, ‘A Common Law-Like Civil Law and a Public Face for Private Law: China’s Tort Liability Law in Comparative Perspective’, in Lei Chen & C.H. (Remco) van Rhee (eds), *Towards a Chinese Civil Code: Comparative and Historical Perspectives* (Leiden/Boston: Martinus Nijhoff Publishers, 2012), 353–394.

⁷ Huixing Liang, *Struggling for China’s Civil Code (Wei Zhongguo Minfadian er Douzheng)* (Beijing: Law Press, 2002).

⁸ See para 2(4) of the Decision Concerning Certain Major Issues in Comprehensively Moving Forward Ruling the Country According to Law (the 2014 CPC Decision) (adopted at the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China in October 2014). A copy of the 2014 Party Decision in Chinese is available at http://news.xinhuanet.com/politics/2014-10/28/c_1113015330.htm (visited 28 October 2014), and an English translation is available at <http://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/> (last accessed 29 October 2014).

⁹ See [2016] Explanations on the Draft General Provisions of Civil Law of the PRC (delivered at the 21 st Session of the Standing Committee of the 12th National People’s Congress, June 2016), available at http://www.npc.gov.cn/npc/lfzt/rlyw/2016-07/05/content_1993422.htm (visited 5 April 2017); [2017] Explanations on the Draft General Provisions of Civil Law of the PRC (delivered at the Fifth Session of the 12th National People’s Congress, 8 March 2017), available at <http://lianghui.people.com.cn/2017/n1/2017/0309/c410899-29132776.html> (visited 9 March 2017).

to the Standing Committee of the NPC, the codification was to address the following fundamental issues: (1) the scope and structure of the code; (2) the principles that define private law and distinguish private law from public law; (3) features that would reflect Chinese characteristics; (4) features that reflect modern times; and (5) the relationship between civil law and other branches of law, including special commercial laws under the Code.¹⁰ Many others had also identified various theoretical issues that needed to be settled before civil codification could be successfully completed.¹¹ The final codification was thus an intense process of ‘struggle’ on the desired structure and contents of the proposed code, the fundamental values to be embedded in the Code, and re-conceptualisation of private law within the then prevailing politico-economic context. The result of such ‘struggles’ ultimately defines the fundamental features of the Chinese Civil Code as it stands today.

This paper starts with a brief review of the introduction of civil law into modern China. This is then followed by an examination of the debate on issues relating to the structure and scope of the Code. Finally, there will be an analysis of values that are now embedded in the Code. The focus of this paper is on the innovative features of the 2020 Civil Code as well as its pitfalls that were caused by re-ideologization of law that was being emphasised during the codification process.

2. Modern Foundations of Civil Law in China

Traditional state positive law in China was concerned mainly with state interests and the protection of a hierarchical order of social life.¹² In this historical context it is not surprising that civil law, as a distinct and sepa-

¹⁰ Xianzhong Sun, ‘Several Issues Concerning Our Civil Codification’ (An official seminar delivered at the SCNPC on 3 September 2016), available at http://www.npc.gov.cn/npc/xinwen/2016-09/13/content_1997392.htm (last accessed 22 April 2017).

¹¹ See ‘A Summary of the 1997 Civil and Economic Law Section of the China Law Society Annual Conference’ (1997) 6 *Legal Science in China (Zhongguo Faxue)* 118; ‘Several Thoughts on the Debate Concerning the Codification of Civil Law’, available at <http://www.phlawyer.com/studycontent.php?Id=68> (visited 14 March 2016); ‘A Collection of Papers Delivered at the 11th China Jurists Forum’ (Beijing, 28 August 2016); ‘A Collection of Papers Delivered at the Academic Forum on Civil Code in a Transitional Time’ (Organised by China Comparative Law Association, Chongqing, April 2016). For a compilation of the various draft codes, articles and summaries of views on the codification, see also China Private Law Net: <http://www.privatelaw.com.cn>.

¹² See Alice E.-S. Tay, ‘Law in Communist China – Part 1’, (1969) 6 *Sydney Law Review* 153, at 160.

rate branch of law, was underdeveloped, unsystematic and often difficult to distinguish from penal provisions. Despite the ‘rich sources’ of traditional rules and practice in civil relationships,¹³ civil law, as horizontal rules among equals, is not indigenous to Chinese culture, and its development has always relied on foreign models.¹⁴

In fact, the notion of ‘*Minfa*’ (civil law) has only a short history in China; and the term itself is, according to many Chinese jurists, a Japanese translation of the European Continental concept of civil law, introduced into China by Japanese scholars who served as advisers for legal reform to the Imperial Court of the *Qing* Dynasty (1644–1911) at the turn of the 20th century.¹⁵ These Japanese scholars also helped to draft the first ever distinct civil code (the Qing Draft) in Chinese history (though it was never promulgated). The first complete Civil Code (in five Books), distinct from criminal matters, was

¹³ There is no disagreement that there were many ‘rules’ concerning civil matters in traditional China. In an academic study (Li Zhimi, *Ancient Chinese Civil Law (Zhongguo Gudai Minfa)* (Beijing: Publishing House of Law, 1988)), the author has been able to identify ‘rich sources’ of traditional Chinese civil law, containing laws and rules governing the legal status of civil law subjects (social and economic organisations and individuals), marriage and family, rights *in rem*, contracts, torts and limitations of civil actions. However, the ‘rich sources’ referred to in the study are primarily Confucian classics and teachings and only secondarily such elementary provisions governing civil matters as were scattered in penal codes, penal statutes and customs. Professor Li also concedes that it was the concept of *li* (propriety), not law, which played a primary role in dealing with civil matters and that different rules were applied to persons of different political, social and family status. A more recent study on the history of civil law in China, a book runs into more than 1,300 pages, also contains all sorts of similar rules governing civil relationships. See Zhang Jinfan (ed), *A General History of the Chinese Civil Law (Zhongguo Minfa Tongshi)* (Fuzhou: Fujian People’s Press, 2003). See also Kong Qingming, Hu Liuyuan & Sun Jiping (eds), *A History of the Chinese Civil Law (Zhongguo Minfashi)* (Changchun: Jilin People’s Press, 1996); Li Xiandong, *The Transformation from Great Qing Code to Guomindang Civil Code (Cong Daqingluli Dao Minguominfadian De Zhuanxing)* (Beijing: Press of the China University of People’s Public Security, 2013); and Zhu Yong, ‘The Formation of [Ancient] Chinese Legal System and Its Features’, A special seminar delivered at the Standing Committee of the NPC, September 2022, available at http://www.npc.gov.cn/npc/c2/c30834/202209/t20220902_319185.html (last accessed 30/1/24).

¹⁴ For further discussions, see Chen (2016), *supra* note 5, at 38–40; and Tay, *supra* note 12, at 160–1.

¹⁵ See e.g. Tong Rou, *et al*, *Chinese Civil Law (Zhongguo Minfa)* (Beijing: Publishing House of Law, 1990), at 1–2; Wang Liming, Guo Minglei & Fang Liufang, *A New Approach to Civil Law (Minfa Xinlun)* (Beijing: Press of the China University of Political Science and Law, 1987), vol. 1, at 1–2; Liu Shiguo, *et al*, *An Outline of Chinese Civil Law (Zhongguo Minfa Yaolun)* (Shenyang: Liaoning University Press, 1992), vol. 1, at 7–8; and Liu Shiguo, ‘On Civil Matters and the Law Governing Civil Matters’, (no. 5, 1992) *Law Science (Falü Kexue)* at 45.

enacted by the Republican (*Guomintang*, KMT) government between 1929 and 1930.¹⁶ It was largely based on the Qing Draft, and primarily influenced by the Japanese Civil Code, and through it, by the German Civil Code.¹⁷ Although this Civil Code (together with all other KMT laws) was abolished by the PRC government in 1949, the general structure and divisions of the Code, its fusion of civil and commercial law, and a Pandectist approach to civil codification have rarely been questioned by scholars in the PRC. They indeed continued to serve as a foundation in the 2020 civil codification.¹⁸

Although no civil code was enacted until 2020, the conception of civil law, as reflected in the various individual legislation, had undergone some significant transformation before the final enactment of the code. Civil law was initially defined, following the footsteps of the former Soviet Union and other socialist countries, as a branch of socialist law regulating prop-

¹⁶ The Civil Code of the Republic of China, hereinafter referred to as the KMT Civil Code.

¹⁷ Foo Ping-sheung, 'Introduction', in *The Civil Code of the Republic of China* (Shanghai: Kelly & Walsh, Ltd, 1930), at xii. For a detailed analysis of the drafting history of the Qing Civil Code Draft and the KMT Civil Code, see Li Xiandong, *supra* note 13.

¹⁸ While the ideological foundations for legal development since 1949 have been radically altered, the various civil codification attempts were generally considered by many Chinese scholars to be a continuing process that started more than 100 years ago. See Zhiping Liang, 'The Sixth Civil Law Forum — Chinese Culture and Chinese Civil Code' (China University of Political Science and Law, 13 May 2004), available at <http://www.ccelaws.com/mjlt/default.asp> (visited 10 June 2004). As a result of increasing legislation and studies on company law, negotiable instruments and other aspects of commercial law, Chinese scholars have generally adopted the KMT theory, which treats commercial law as supplementary to civil legislation. See, eg, Xanfang Zhu and Fang Liang, 'Research into the System of Civil Law Science' (1991) 1 *Journal of Political and Legal Science (Zhengfa Xuekan)* 28–32; Liming Wang, 'The Fusion of Civil and Commercial Law — On the Relations between Our Civil and Commercial Law' in Rou Tong (ed), *Several Civil Law Issues Involved in Economic Structural Reform (Jingji Tizhi Gaige Zhong De Ruogan Minfa Wenti)* (Beijing: Press of Beijing Normal University, 1985) pp 38–53; Zhenshan Yang, 'Market Economy and Our Civil and Commercial Law' (1993) 4 *Journal of the China University of Political Science and Law (Zhengfa Luntan)* 1–8. More generally, ever since the Qing and KMT legal reforms which first introduced Western law and legal systems in China and broke down traditional systems, values and practices and separated private law from public law, civil law from criminal law and the legal system from the administrative hierarchy, Chinese law, especially its civil and commercial law, has been transformed into Western law in the form of a Continental civil law model. For more detailed study on the history of civil law in modern China and legislative efforts to enact a civil code in the PRC, see Jianfu Chen, *From Administrative Authorisation to Private Law: A Comparative Perspective of the Developing Civil Law in the PRC* (Martinus Nijhoff Publishers 1995); and Jianfu Chen, 'Re-Conceptualising Private Law: The Struggle for Civil Codification in China' (2018) 48(1) *Hong Kong Law Journal* 257.

erty and personal non-property relationships, with its main 'method of regulation assuming a commodity form'.¹⁹ This linking of civil law with the politico-economic concept of a 'commodity economy'²⁰ was soon found to be a fundamental barrier to the development of civil law in the PRC, as the existence of such a 'commodity economy' was not formally recognised until post-Mao time.²¹ Linking civil law with this concept also meant that the development of civil law in China depended on the Communist Party's emphasis on economic development and its tolerance of economic freedom, or, in contemporary Chinese terminology, on the direction and extent of 'politico-economic reforms'.²² More specifically, civil law in China, like that in other former socialist countries, found its development meeting a serious hurdle, that of the role of government in a socialist country's civil law relations. This question was directly reflected in the two interrelated debates on the nature and the scope of civil law. Specifically, the question was whether civil law was of the nature of public law or private law, and whether there was a branch of 'economic law' alongside 'civil law'.²³ Essentially, it was a debate between private autonomy and state intervention, and between the universality of private law and the *ad hoc* approach of administrative rule towards individual situations. In other words, it was 'a struggle between more administrative and more individualistic views of (private) law'.²⁴ Such debates only died down, but were not necessarily settled, after the adoption of the notion of a 'socialist market economy' in 1992. As such, the post-Mao civil law development could well be said to be a transformation 'from administrative authorization to private law' that occurred in the background where public law and public power dominated every sphere of social and economic life in China.²⁵

It is in the abovementioned politico-economic context that four attempts at civil codification were made, but failed, in China between 1954 and

¹⁹ See detailed discussions in Chen (1995), *supra* note 18, at 50–52. Although this definition of civil law is outdated now, it was, until recently, often seen as the foundation of Chinese civil law. See J L Hou, 'What Is Civil Law – A Review of Civil Law Theories and Doctrines' (February 2014) *Law & Politics Forum (Zhengfa Luntan)* 5.

²⁰ This term has, of course, now been replaced by that of a 'socialist market economy'.

²¹ There was occasional recognition of the existence of a 'commodity economy' in Mao's China and hence periodically a push towards the development of civil law.

²² See detailed analysis in Chen (1995), *supra* note 18, Chapter 3.

²³ See detailed discussion in Chen (1995), *supra* note 18, at 52–66.

²⁴ Alice Tay & Eugene Kamenka, 'Public Law – Private Law', in S. I. Benn & G.F. Gaus (eds.), *Public and Private in Social Life* (London: Croom Helm, 1993), at 81.

²⁵ Chen (1995), *supra* note 18.

2002.²⁶ While the first two attempts in the 1950s and 1960s produced drafts that followed closely the then Soviet model, they did not lead to any significant civil legislation. The post-Mao attempts, from 1979 onwards, were different. They not only produced many drafts — all of them were mostly in the German tradition with their socialist orientation — they also resulted in many individual laws that regulate civil and commercial relationships. Indeed, by 2010 when the Law on the Application of Law in Foreign-Related Relations was adopted, Chinese civil law had already covered all the traditional subjects of a civil code.²⁷ Most importantly, and until very recently, the struggle for civil codification and civil legislation has been, just as law in general, a struggle to throw off the ideological shackles that were introduced to China in the 1950s.²⁸

In short, the first 35 years (1978–2013) of reforms in post-Mao China was a de-ideologization process for civil law development that finally allows the pre-1949 conception of civil law to serve as a foundation for the civil codification in the PRC.

3. Consolidation, Codification, and the Chinese Innovation

As alluded to earlier, the final civil codification, with the exception of codifying personality rights into a separate book in the Code, is essentially a process of consolidation, by way of revision, updating and compilation, of the various existing laws on institutions of private law, on the basis of the fusion of civil and commercial law. Consolidation is therefore the key feature of the latest efforts in civil codification.

Consolidation as a method for codification does not, however, determine the scope of a civil code. Scholars and law makers in China, though agreeing on fusing civil and commercial law into one single civil code, disagree on which part of the commercial law should be treated separately and issued

²⁶ Chen (2018), *supra* note 18.

²⁷ These include the General Principles of Civil Law (GPCL 1986), the Marriage Law (1981), the Succession Law (1986), the Contract Law (1999), the Law on Rights *in rem* (2007), and the Law on Tort Liabilities (2009). In addition, there are separate commercial statutes: the Maritime Law (1992), the Company Law (1993), the Insurance Law (1995), the Securities Law (1998) and a whole range of laws on the protection of intellectual property rights.

²⁸ Chen (2016), *supra* note 5, Chapter 2.

as special laws of the civil code.²⁹ Thus, there were debates about whether intellectual property laws and private international law should be part of the civil code and if there should be a separate book or chapter on general principles of obligations.³⁰ While these questions about structure and scope seem to be technical, in reality, they were about defending existing interests of the various schools of intellectual thinking.³¹ At the end, none of the above was included in the new Code and, as such, this arrangement then gives much needed flexibility for future responses to potentially rapid development in areas such as intellectual property and private international law while maintaining universality and stability of a civil code as an autonomous private law.³²

Much more controversial was the debate – a debate eventually turned personal³³ – on the question whether there should be systematic codification

²⁹ See ‘A Summary of the 1997 Civil and Economic Law Section of the China Law Society Annual Conference’ (1997), *supra* note 11.

³⁰ See *ibid*; and ‘Several Thoughts on the Debate Concerning the Codification of Civil Law’, available at <http://www.phlawyer.com/studycontent.php?Id=68> (visited 14 March 2016).

³¹ It is not unusual that different schools of thought or groups of interest battle for ‘territory’ in law-making. For discussions of some of these issues, see Otto, J M, Polak, M V, Chen, J & Li, Y (eds), *Law-Making in the People’s Republic of China* (The Hague/London/Boston: Kluwer Law International, 2000).

³² As a result of contentions among legal scholars, the final decision on the actual scope of the civil code was not made until mid-2018, and the criteria used to make the decision include maintaining and supporting the principles of equality and voluntariness among parties, and universality and stability of the relevant provisions. See ‘[2018] Explanations on the Various Books of the Draft Civil Law’, delivered at the Standing Committee of the National People’s Congress on 27 August 2018 available at https://npcobserver.com/wp-content/uploads/2018/09/932018-solicitations-of-comments_explanations.pdf#page=1 (last accessed 12/1/24). The lack of a separate chapter on Obligations is not easily explained away by the above rationale though. Principally, Obligations only appeared as a separate book in one of the 1950s draft, and the well-developed Contracts and Torts would need some major revision in the final codification if Obligations are to be codified as a separate chapter. For a detailed study on this issue, see Zhu Qingyu, ‘The History of the Disappearing Obligations’, (2022) 4 *Studies in Law (Fanxue Yanjiu)* 52–72.

³³ This is especially so between the two most prominent civil law scholars in China, Professors Wang Liming and Liang Huixing. See Liang Huixing, ‘On Several Problems in the Codification of and Theories for Civil Law General Principle’, being a seminar delivered at Sichuan University Law School on 15 October 2015, available at <http://www.aisixiang.com/data/93139.html> (4/8/20); Liang Huixing, ‘Major Disputes in the Civil Codification’, being a seminar given at Sichuan University on 9 April 2018, initially published in (no. 3, 20189) *Journal of Gansu Institute of Political Science and Law (Gansu Zhengfa Xueyuan Xuebao)*, now available at <http://www.iolaw.org.cn/showArticle.aspx?id=5570> (1/7/18); and Wang Liming, ‘On Several Major Disputes in the Civil Codification – Several Responses to Several Opinions by Professor Liang Huixing’, initially published in

of rights pertaining to legal personality, commonly referred to as personality rights, into a separate book of the Code.³⁴ To understand the Chinese debate, a brief comparative law context is necessary.

As a legal notion, personality rights, *albeit* often described by different terminologies, are not new. In both civil and common law systems, notions such as the right to honour, to bodily integrity, to life, to name etc are not unfamiliar concepts. However, as a general notion that is right-oriented and that encompasses a bundle of rights pertaining to being a person under law, it is a rather recent development of the civil law system, but principally of the German civil law.³⁵ This Civil Law approach to dealing with ‘personality rights’ can be seen as reflecting Civil Law’s general confidence on (rights-oriented) abstract principles, whereas Common Law’s emphasis is generally on (remedies-oriented) pragmatism.

Thus, in Common Law, this notion is closely related to and shaped by the development of torts law on defamation and the protection of privacy, among others. Essentially, Common Law does not have a general notion of personality rights; it protects specific rights in relation to personality (natural and legal), privacy and reputation under torts law as well as the more recently developed law protecting intellectual property.³⁶ On the other hand, the general notion of personality rights in the German legal system was developed by

(no 4, 2020) *Journal of Shanghai Institute of Political Science and Law (Shanghai Zhengfa Xueyuan Xuebao)*, now available at https://mp.weixin.qq.com/s/QtkmXnnNwJRjZ-Me9Gxh9_Q (27/6/20). In fact, an anonymous article, entitled ‘Secret War and Struggle: the Behind-the-Scene Stories of Civil Codification’, posted in August 2018 but has now been removed (it was available until May 2020 at <https://wemp.app/posts/bad4d556-aabf-490b-96dc-18ddf965ef2c>), characterised the debate as essentially a power struggle among prominent civil law scholars in China.

³⁴ For a detailed analysis of the debate, see Chen Lei, ‘Debating Personality Rights Protection in China: A Comparative Outlook’, (2018) 1 *European Review of Private Law* 31–56; and Liming Wang and Bingwan Xiong, ‘Personality Rights in China’s New Civil Code: A Response to Increasing Awareness of Rights in an Era of Evolving Technology’, (2020) *Modern China* 1–37.

³⁵ See J Basedow, K J Hopt, R Zimmermann, *The Max Planck Encyclopaedia of European Private Law*, Oxford, UK: Oxford University Press, 2012, pp. 1272–12767; Lei Chen, *id.*, at 37–42; and Lihong Zhang, ‘Civil Protection of Personality Rights and Its Historical Development – On Legislative Choices for Our Country’, (2018) 4 *Journal of China University of Political Science and Law (Zhongguo Zhengfa Daxue Xuebao)* 162–178.

³⁶ See Basedow, Hopt, and Zimmermann, *id.*, at 1273–1274; Lei Chen, *supra* note 34, at 39–40; and Ann Slater, ‘Personality Rights in Australia’, 2001 (20:1) *Communication Law Bulletin* 12–13.

the German courts.³⁷ Theoretically, a general notion on personality rights as so developed would allow an open-ended development for the protection of rights pertaining to personality.³⁸ There is however no reason to believe that a remedy-based development of specific rights would be of any inferior quality or difficult to expand in scope and protection. In fact, unless a law is carefully drafted, an *'ad hoc'* approach towards the development of the protection of rights pertaining to personality may in fact be preferable, in light of the rapid development of modern technologies.

In China, the initial development of personality rights took an *ad hoc* approach. Scholars advocating for legal protection of personality rights often cite Article 38 of the 1982 Constitution as the constitutional requirement for the protection of personal dignity that must be translated into civil law rights.³⁹ Article 38 provides that '[t]he personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited.' The first major civil legislation in the PRC, the General Principles of Civil Law 1986 (GPCL 1986, now repealed) further elaborates the protection of personal dignity and other rights associated with personality in Section 4, entitled Personal Rights, under Chapter 5 (Civil Law Rights)⁴⁰ of the GPCL 1986. This Section provided rights to life and health,⁴¹ to a name,⁴² and right of portrait,⁴³ right of reputation and right to dignity,⁴⁴ right to honour,⁴⁵ right to freedom of marriage,⁴⁶ the protection of marriage, the home, older people, mothers and children, and legitimate rights and interests of disabled persons,⁴⁷ and equal rights of men and women.⁴⁸ Thereafter, many other laws and judi-

³⁷ See Basedow, Hopt, and Zimmermann, *supra* note 35, at 1272–1273.

³⁸ Lei Chen, *supra* note 34, at 38.

³⁹ See Wang Liming, 'The Value for the Respect of Personal Dignity and Its Realisation Through the Law on Personality Rights', 2013 (7:5) *Tsinghua Law Journal (Qinghua Faxue)* 5–19.

⁴⁰ 'Minshi Quanli' is often translated into 'Civil Rights'. This translation is easily confused with the notion of civil rights in human rights law. To avoid such confusion, we opt for the phrase 'civil law rights' to suggest that these are private law rights under civil legislation, not those under human rights law.

⁴¹ Article 98 of the GPCL 1986.

⁴² Article 99 of the GPCL 1986.

⁴³ Article 100 of the GPCL 1986.

⁴⁴ Article 101 of the GPCL 1986.

⁴⁵ Article 102 of the GPCL 1986.

⁴⁶ Article 103 of the GPCL 1986.

⁴⁷ Article 104 of the GPCL 1986.

⁴⁸ Article 105 of the GPCL 1986.

cial interpretations provide protection and remedies for violation of various rights pertaining to legal personality, with the most important one being the Tort Liability Law of the People's Republic of China (2009, now repealed by the Civil Code).

With the *ad hoc* development of personality rights, it is not unreasonable for scholars to consider consolidating these rights that are spread in various laws and judicial interpretations into the civil code. The actual debate on such inclusion, however, went far beyond questions of codification techniques. Supporters for inclusion often claimed that a separate book on personality rights would represent a major development and innovation of the Chinese civil code, expressing the Chinese characteristics of the Code and reflecting the self-confidence on China's own systems and culture and, hence, it would be a landmark in Chinese law.⁴⁹ Still others suggested that the codification would offer the world a Chinese solution and experience to address the protection of personality rights in the 21st century of the Internet and high technologies.⁵⁰ To the opponents, it would be a greatest mistake in the codification, that wanting to collect unrelated rights in one place and to destroy the rational structure of a civil code.⁵¹ It is even warned that a separate Book on personality rights might even lead to a 'Colour Revolution' that would destroy socialism.⁵² Clearly, the debate was much more than a ques-

⁴⁹ See Chao Jianming (formerly the Chief Prosecutor of the Supreme People's Procuratorate and Vice Chairperson of the Standing Committee of the NPC), 'The Codification of the Civil Code: A Code of Chinese Design', originally published in *People's Court Daily*, 1 September 2018, at 5, available at <http://www.fcwlwz.gov.cn/e/action/ShowInfo.php?classid=118&id=98662> (8/7/20).

⁵⁰ Wang Liming, 'On the Comprehensiveness and Unique Method for the Protection of Personality Rights – An Analysis of the Book on Personality Rights in the Civil Code', (no. 4, 2020) *Financial Law (Caijing Faxue)* 3–13, at 3. See also Wang and Xiong, *supra* note 34, which provides some detailed and systematic justifications for codifying personality rights.

⁵¹ See Zhu Guangxin, 'Six Strange Phenomena of the (Draft) Book on Personality Rights in the Civil Code', Law Institute of the Chinese Academy of Social Sciences, available at <http://www.iolaw.org.cn/showArticle.aspx?id=5813> (8/7/20).

⁵² See Huixing Liang, 'One More Time to Urge the Abolition of a Separate Book on Personality Rights before the Enactment of the Civil Code', initially published in *Teatime for Jurists (faxue chaozuo)*, May 2020, available at https://mp.weixin.qq.com/s/PN9L1kpt-FdFk3E8CK_Cngw (24/5/20); Liu Kaixiang, 'Comments on Several Major Theoretical Issues Concerning Personality Rights of the Civil Code, (2020) 32 (4) *Peking University Law Journal (Zhongwai Faxue)* 883–915.

tion for legislative techniques, it is a question of political choice,⁵³ besides being intensely personal.⁵⁴

It is often said that the statement ‘to protect personal rights, property rights and personality rights’ as contained in the Party Report delivered at the CPC 19th National Congress in October 2017 was the deciding factor for codifying a separate book on personality rights.⁵⁵ In any case and as just mentioned above, by mid-2018 the Standing Committee of the NPC had finally resolved the question, deciding to codify a separate book on personality rights.

Book Four (Personality Rights) of the 2020 Civil Code, being the second shortest Book with 51 articles in six chapters (Arts 989–1039) of the Code,⁵⁶ is in fact a Book contains most new contents, in addition to a collection of provisions contained in the previous laws and judicial interpretations that were revised and updated before being incorporated into Book Four.⁵⁷ It starts with general principles governing personality rights, which are followed by chapters on the right to life, to body integrity and to health; the right to name and to entity name; the right to likeness (portrait); the right to reputation and to honour; the right to privacy and the protection of personal information respectively. Personality rights are defined as including the above rights enjoyed by a ‘person’ under civil law.⁵⁸ Importantly, Para 2 of

⁵³ Chinese scholars began their systematic discussion on personality rights from mid-1990s and the first draft of the Civil Code in 2002 contained a separate book on these rights (Wang Liming, *supra* note 39), The idea to have a separate Book on these rights seemed to have been killed off once the Standing Committee of the NPC decided the two-steps strategy in 2016 (Liang Huixing, ‘Major Disputes in the Civil Codification’, being a seminar given at Sichuan University on 9 April 2018, initially published in (no. 3, 2018) *Journal of Gansu Institute of Political Science and Law (Gansu Zhengfa Xueyuan Xuebao)*, now available at <http://www.iolaw.org.cn/showArticle.aspx?id=5570> (1/7/18)). See also Lei Chen, *supra* note 34, at 44.

⁵⁴ See *supra* note 33.

⁵⁵ See Zhang Huilang, ‘The Codification of Personality Rights in the Civil Code – 20 Years of Drafting and Many Years of Debating’, *Beijing News (Xin Jing Bao)*, 28 May 2020, available at [http://www.bjnews.com.cn/feature/2020/05/28/732426.html_1\(8/7/2020\)](http://www.bjnews.com.cn/feature/2020/05/28/732426.html_1(8/7/2020)).

⁵⁶ Book Six on Inheritance is slightly shorter, containing 45 articles in four chapters.

⁵⁷ There are two very useful sources that publish the full text of the 2020 Civil Code that also trace the previous laws and judicial interpretation as well as annotations of revisions and update. One is Peking University Law Database (available at: <https://mfd.pkulaw.com/?hmsr=v6top&chmpl=&hmcu=&hmkw=&hmci=#/index>, last accessed 15/01/24); and the other by iCourt Law Institution (available at <https://zhuanlan.zhihu.com/p/390991281>, last accessed 15/01/24).

⁵⁸ See Art 990 of the 2020 Civil Code.

Art 990 adds a provision that states that personality rights include other personality rights and interests arising from personal liberty and human dignity that are enjoyed by a natural person. On its face value, this is undoubtedly an open-ended, all-inclusive provision, but its effect or potential is yet to be tested in practice.⁵⁹

The inclusion of Book Four (Personality Rights) in the 2020 Civil Code is rather unique and innovative in civil codification, in that these rights now occupy a distinct Book in the Code and it is probably the only civil code of a major economic power in the world that contains a separate book that collects all kinds of rights pertaining to legal personality.⁶⁰ It is now said that Book Four represents the brightest spot in the whole Civil Code.⁶¹ However, the above brief comparison of Civil and Common law approaches to personality rights suggest that the 2020 Civil Code may not necessarily provide stronger protection to these rights in China.

4. Value Choice or Politicisation of Law

Civil codification in any country, it is said, is hardly ever a mere value-free exercise.⁶² Indeed, a sentiment often found in Civil Law countries is that a civil code is an emblem of nationalist unity and, as such, an important symbol of nationalism.⁶³

Similarly, the SCNPC once declared that, in addition to being ‘one of the most important measures to realise the modernisation of state governance

⁵⁹ The Supreme People’s Court has issued several sets of judicial interpretations on various aspects of the Civil Code, but none on personality rights. On 11 April 2022, it also issued nine typical cases on personality rights decided by courts in China since the implementation of the Code, but none of the judgements was based on Para 2 of Art 990 of the 2020 Civil Code. It is once again important to stress that these are civil law rights, not civil rights under human rights law.

⁶⁰ Civil Code of Ukraine, enacted in 2003, does contain a separate book, Book II (Arts 269–315) entitled Personal Non-Property Rights of Natural Persons. In the Chinese debate, this Ukraine Code is referred to as the only civil code in the world that contains a separate book on personality rights. See Wang and Xiong, *supra* note 34.

⁶¹ See Wang Liming, ‘The Book on Personality Rights Is the Brightest Spot in the Civil Code that Supplement the Pitfalls in Traditional Civil Law’, *Pengbai News*, 19 May 2020, available at https://www.thepaper.cn/newsDetail_forward_7448320 (8/7/20).

⁶² Marco Haase, ‘What Does It Mean to Codify Law?’ 2011, available at <https://www.scribd.com/document/261130449/Haase-What-Does-It-Mean-to-Codify-Law> (last accessed 12 September 2016).

⁶³ Heikki Pihlajamäki, ‘Private Law Codification, Modernisation and Nationalism: A View from Critical Legal History’, (2015) 2(1) *Critical Analysis of Law* 135, 145.

and governance capacity', the resulting civil code 'would be the legislative expression of the spirit of the nation and values of the time'.⁶⁴ Some members of the SCNPC further asserted that a civil code is a symbol of legislative civilisation, a national monument to the maturity of a legal system and is fundamentally important for the renewal of the Chinese nation.⁶⁵ Reflecting the early 'civilian' idea of private law being the constitution of a civil society,⁶⁶ many Chinese scholars have also declared that a civil code is to be a 'declaration of rights'.⁶⁷ For many of them, a civil code must translate the constitutional rights into enforceable civil law rights, as the Chinese constitution cannot be directly enforced by a court of law.⁶⁸ The significance of codifying civil law, besides the systematisation of private law, is 'to have a progressive, perfect, and scientific civil code that reflects democracy, rule of law and human rights as a textbook for the whole nation'.⁶⁹ Like the French and German Civil Codes that embody and represent the values and spirit of these nations at the time,⁷⁰ the Chinese civil code is to establish values, basic societal ideals and fundamental spirit and legal principles for the future of China.⁷¹

In short, civil codification is seen as a process of value-judgement and value choice. But, in a country that insists on socialism as its basic political

⁶⁴ See [2016] Explanations on the Draft General Provisions of Civil Law of the PRC, *supra* note 9.

⁶⁵ "First Examination of the General Provisions of Civil Law: Innovation and Inheritance", available at http://www.npc.gov.cn/npc/zgrdzz/2016-08/03/content_1994730.htm (last accessed 5/9/16).

⁶⁶ H Patrick Glenn, 'The Grounding of Codification', (Spring 1998) 31 *UC Davis Law Review* 765, 699.

⁶⁷ Huixing Liang, 'Comments on and Suggestion for Improvement of the Draft General Provisions of Civil Law of the PRC', available at <http://www.iolaw.org.cn/showArticle.aspx?id=4736> (visited 4 August 2016).

⁶⁸ 'The Civil Code Should Translate the Constitutional Rights into Civil Law Rights', available at <http://m.china.caixin.com/m/2016-06-29/100960337.html?from=group-message&isappinstalled=0> (visited 30 June 2016); 'Several Thoughts on the Debate Concerning the Codification of Civil Law', *supra* note 11. On difficulties in enforcing constitutional rights in China, see Jianfu Chen, 'Constitutional Judicialization and Popular Constitutionalism in China: Are We There Yet?' in Guanghua Yu (ed), *The Development of the Chinese Legal System: Change and Challenges* (London and New York: Routledge, 2011), at 3–25.

⁶⁹ Xiaolei Pu, 'The Codification of Civil Code Is Speeding Up', *Legal Daily (Fazhi Ribao)* (28 June 2016), available at http://www.npc.gov.cn/npc/xinwen/lfgz/2016-06/28/content_1992357.htm (last accessed 28 June 2016).

⁷⁰ Haase, *supra* note 62.

⁷¹ Pu, *supra* note 69.

system and the Communist Party to have control over all political, economic and social life, the codification was inevitably a political, in the name of legislative, process that was to incorporate political values and the so-called national characters, as defined by the Party, into the resulting Code. In this context, the Chinese codification occurred at a less than desirable time, as it coincided with the re-politicisation of law in post-Mao China.⁷²

In this heavily ideologically-driven environment, codification became a challenging process that has to accommodate several sets of inherently contradictory demands.

(1) Political Values and Re-ideologization of Private Law

One of the fundamental reasons for China to separate, and continues to separate, civil and commercial laws is that the latter is often *ad hoc* and changes fast while the former is meant to be abstract, autonomous, and universal in application.⁷³ When civil law is enacted as individual laws, as was the case before the codification in 2020, abstraction, autonomy, and universality were not particularly strong features of these laws except in the case of the General Principles of Civil Law (GPCL 1986, and later General Provisions of Civil Law 2017). One of the principal aims of the codification then was to ensure that the Code would only include the most basic, universal and abstract provisions that would be commonly applicable to all civil and commercial activities.⁷⁴ The recognition of these fundamental features of civil law does not, however, prevent the exercise of value judgments nor the establishment of national characters. However, it is important to recognise that value choice is not the same as imposition of political ideologies, as political ideologies are by definition not universal nor constant in any society nor do they reflect national characters. This distinction between value choice and imposition of ideologies is particularly important in China whose history

⁷² On politization of law in China, see Jianfu Chen, 'Out of the Shadows and Back to the Future: CPC and Law in China' (2016) 24(2) *Asia Pacific Law Review* 176; Jianfu Chen, 'Chinese Law & Legal Reform: Where to from here', 2020 (50:1) *Hong Kong Law Journal* 243–273.

⁷³ Chen (1995), *supra* note 18.

⁷⁴ On this legislative objective, see Liming Wang, 'The Epoch-Making Significance of the General Provisions of Civil Law' (23 March 2017, China Civil and Commercial Law Net), available at <http://www.civillaw.com.cn/bo/t/?id=32388> (last accessed 20 April 2017).

from 1949 onwards has been a history of ideological struggle and constant change of ideologies.⁷⁵

Post-Mao China, as a country and as a polity, was transformed by reforms in the first 35 years from 1978, and that transformation, in its nature, was a process of de-ideologization. However, by the time when Xi Jinping took power in 2012, the transformation was incomplete and continuing reforms were expected. It did not take long for Xi to issue his blueprints for reforms through two CPC Decisions of 2013 and 2014.⁷⁶ These two Decisions effectively relaunched legal ‘reforms’ in China,⁷⁷ but such reforms would be of a very different nature. It is a very strictly controlled process oriented towards consolidating Party leadership in all spheres of the State.⁷⁸ For this purpose, constitutionalism (including separation of powers, checks and balances, and judicial independence) was officially rejected, and the demand for direct and absolute Party leadership, strict control over political ideologies and safeguard of the Party’s core leadership were (and still are) all made a non-negotiable part of State governance in the ‘New Era’.⁷⁹ Not surprisingly, by the time the decision to codify civil law was made in 2014, the political landscape had

⁷⁵ For detailed analysis on this point, see Chen (2016), *supra* note 5, Chapter 2.

⁷⁶ Decision on Certain Major Issues in Comprehensively Deepening Reform, adopted at the Third Plenary Meeting of the 18th Central Committee of the CPC on 12 November 2013 (the 2013 CPC Decision), and Decision concerning Certain Major Issues in Comprehensively Moving Forward Ruling the Country according to Law, *supra* note 8). The 2013 CPC Decision is available at http://news.xinhuanet.com/politics/2013-11/15/c_118164235.htm (last accessed 20/9/15). An unofficial English translation is available at http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm (last accessed 20/9/15).

⁷⁷ For detailed discussions, see Jianfu Chen, ‘The Transformation of Chinese Law: Mark II’, (2015) 45(3) *HKLJ* 911; Special Issue, *ChinaBrief*, Issue 22 (2014), 20 November 2014; and Randall Peerenboom, ‘Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! What Does the 4th Plenum Decision Mean for Legal Reforms in China?’ (2015) 7 *Hague Journal on the Rule of Law* 49–74.

⁷⁸ See Chen, *id.*

⁷⁹ Delivering his Party Report at the 19th National Congress of the CPC on 18 October 2017, Xi Jinping declared that ‘Socialism with Chinese Characteristics has now entered into a New Era’. He did not, however, explain what that ‘New Era’ means in theory or practice. As usual, this latter task is left for ‘scholars’ to explain, and so far we have seen the use of this term but not much explanation of its meaning. See ‘Why the Socialism with Chinese Characteristics Is Now Entering into a New Era’, *People’s Daily (Renmin Ribao)* 19 January 2018, available at <http://theory.people.com.cn/n1/2018/0119/c40531-29775433.html> (visited 20 January 2018).

changed dramatically,⁸⁰ and now the official rhetoric heavily demanded that civil codification be guided to a correct political direction and the so-called ‘core socialist values’ be incorporated into the future code.⁸¹

‘Core socialist values’ is not a new term, but its meaning has evolved in the PRC as CPC leadership changes.⁸² The present version was first summarised by the Political Report to the 18th CPC Congress in mid-November 2012 (when Xi took over CPC leadership) in 12 Chinese terms: Prosperity, democracy, civility, harmony, freedom, equality, justice, rule of law, patriotism, dedication, integrity and friendship. None of them is defined nor its value should be taken at its face and all must be qualified by the word ‘socialist’.⁸³ In other words, the meaning of each is to be interpreted by the Communist Party as it sees fit.

Lack of definition, a constant feature of CPC policies, does not mean that they won’t be implemented. However, the impact on law was limited, more rhetoric than actual, before 2012. When Xi took over, the CPC wasted no time in issuing the Opinions on Cultivating and Implementing the Core Socialist Values’.⁸⁴ These Opinions demand that the core socialist values

⁸⁰ In fact, as mentioned earlier, the decision was in fact made by the Party not by a legislative authority – the NPC or its Standing Committee.

⁸¹ See legislative explanations referred to in *supra* note 9.

⁸² Post-Mao China has always had periodical campaigns for ‘Construction of Spiritual Civilisation’, and the construction of ‘Core Socialist Values’ evolves from the ‘Spiritual Civilisation’ Movement, with the term ‘Construction of Core Socialist Values’ being first used in 2006 at the Sixth Session of the 16th CPC Congress and its specific contents having evolved with the changes of CPC leadership. See Li Yunlu, Xu Xiaoqing & Hai Mingwei, ‘[The Notion of] Core Socialist Values First Raised by the Chinese Communist Party to Absorb Common Achievements of Human Civilisation’, 14 Nov 2012, available at http://www.npc.gov.cn/zgrdw/npc/zggcdsbcqgdbdh/2012-11/14/content_1742947.htm (24/1/24); and Liu Shuling, ‘The Origin and Developing Trends of Core Socialist Values’, 2016 (2:1) *Studies on Core Socialist Values (Shehui Zuyi Kexing Jiazhiguang Yanjiu)* 3–11, available at <http://scsv.tsinghuajournals.com/article/2016/2096-1189/101350D-2016-1-001.shtml> (24/1/24). For an analysis in English, see Ying Miao, ‘Romanticising the Past: Core Socialist Values and the China Dream as Legitimation Strategy’, 21 (49:2) *Journal of Current Chinese Affairs* 162–184; and Lifang Song ‘Construction of Socialist Core Values from the Perspective of Chinese Traditional Culture’, 2021 (3: 12) *International Journal of Frontiers in Sociology* 69–76.

⁸³ See ‘Towards a deep understanding of the nature and spirit of the core socialist values’, originally published in *Guangming Daily (Guangming Ribao)*, 10 September 2015, now available at http://www.xinhuanet.com/politics/2015-09/10/c_128215924.htm (22/1/24).

⁸⁴ Issued by the General Office of the Central CPC Committee on 23 December 2013. A Chinese version is available at https://www.gov.cn/zhengce/2013-12/23/content_5407875.htm (22/1/24).

must be implemented thoroughly throughout the whole legal process, from law-making to implementation of law.⁸⁵ More specific implementation was further developed. Thus, the General Office of the CPC Central Committee and the General Office of the State Council jointly issued, in December 2016, the Guiding Opinions on Further Incorporating the Core Socialist Values into the Processes of Rule of Law.⁸⁶ These Opinions were then followed by the Plans to Embed the Core Socialist Values into the Process of Rule of Law, Law-making and Revision of Law.⁸⁷ Though many more documents, including one that establishes a coordination mechanism to implement the incorporation of core socialist values in law and regulations,⁸⁸ were issued later by various government and Party authorities,⁸⁹ the above mentioned three central-level documents not only set the tone but also provide specific measures to incorporate the core socialist values into Chinese law and, as such, effectively re-ideologizing Chinese law.

In civil law, such an emphasis has the potential to cast doubt on the nature of civil law and, hence re-ignite the debate on the nature of private law, the existence of ‘economic law’ (dealing with vertical economic relationships among participants of unequal status) and the role(s) of governments in civil and commercial relations.⁹⁰ While no serious scholars in China would now argue that civil law is public law, many of the private law principles (such as freedom of contract) were yet to be explicitly and fully incorporated into Chinese civil law, many of the public law features (such as heavy state intervention in Tort Liability Law) had been built into civil law and many specific civil laws (such as Law on the Rights *in rem*) were no more than the codification of political compromises that were reached at the specific time

⁸⁵ See especially Point 3 (8) of the Opinions.

⁸⁶ A copy of these Opinions is available at https://www.gov.cn/gongbao/content/2017/content_5160214.htm (last accessed 23/1/24).

⁸⁷ Issued in May 2018. Full texts are not available to the public, but a detailed introduction is available at https://www.gov.cn/zhengce/2018-05/07/content_5288843.htm (23/1/24).

⁸⁸ See Central Propaganda Department, Central Political Legal Committee, General Office of the Standing Committee of the NPC, and the Ministry of Justice issued Opinions on Establishing a Coordination Mechanism for the Incorporation of socialist Core Values into Law and Regulations, September 2021, available at https://www.gov.cn/xinwen/2021-09/27/content_5639649.htm (23/1/24).

⁸⁹ Clearly, the repeated issuing of such documents at different levels is to ensure that incorporating the core socialist values into law would not just be rhetorical or lip service, but with practical results.

⁹⁰ See Chen (1995) *supra* note 18, at 66–68.

of codification.⁹¹ These and many other issues require rectification during codification, but such a task could hardly be facilitated by the imposition of the core socialist values.

Further, the emphasis on incorporating the core socialist values into a civil code also ignited another debate, that is, the relationship between the 1982 Constitution and the future civil code, or more precisely, should the civil code be enacted in accordance with the current constitution?⁹² Although it sounds like a rather strange question, as all laws must, by definition, comply with the Constitution, the essential issues were about the roles of state and its status in economic activities and the role of political ideologies in guiding the development of private law.⁹³

Obviously, the core socialist values, as an undefined and constantly changing notion, do not sit comfortably with private law principles, such as autonomy of parties and universality of application. Thus, it was a considerable challenge for Chinese scholars and law makers to explicitly incorporate the fundamental private law principles into the code while still coherently upholds the core socialist values as binding principles rather than rhetoric.⁹⁴

⁹¹ Chen (2016), *supra* note 5, Chapters 10, 12 and 13.

⁹² The initial debate occurred during the enactment of the Law on Rights *in rem*. See Zhiwei Tong, 'Vision and Illusion in the Relationship between the Constitution and Civil Law', (2006) 2 *Legal Science in China (Zhongguo Faxue)*, available at <http://www.xueshu.com/zgfx/200606/22531042.html> (last accessed 22 April 2017). For the current debate, see a Special Issue of *Journal of the National Prosecutors College*, November 2016, which includes the following major articles: Weiqiu Long, 'The Unique Foundation of Civil Law: On the Relationship between Civil Law and the Constitution', available at <http://mp.weixin.qq.com/s/nWvHLrBemzROnQoLF9NkgQ> (visited 8 December 2016); Qianhong Qin, 'Difficult Constitutional Issues Involved in Civil Codification', available at <http://mp.weixin.qq.com/s/fl0a9CMGKJBYMXA7pa81oQ> (visited 8 December 2016). See also Dongxu Zhou, 'When Constitution Meets Civil Codification', (4 December 2016), available at <http://zhoudongxu.blog.caixin.com/archives/155053?from=singlemessage&isappinstalled=0> (visited 8 December 2016); Dayuan Han, 'The Evolving Relationship between the Constitution and Civil Law', initially published in (2016) 6 *Tsinghua Law Review*, available at <http://www.calaw.cn/article/default.asp?id=11910> (visited 22 April 2017).

⁹³ These issues were brought about most sharply during the enactment of the Law on Rights *in rem* in 2005–2006. See Chen (2016), *supra* note 5, at 509–510.

⁹⁴ Chinese courts indeed apply these vague principles to interpret legal provisions. See Supreme People's Court Issues Model Cases Decided by Chinese Courts to Implement Justice and Efficiency and to Practice Core Socialist Values, 2 August 2023, available at https://www.sohu.com/a/708411304_117927 (23/1/24). 15 such civil and commercial cases were included to show how core socialist values might be applied in judicial decision-making.

Difficult that task might be, Article 1 (Book 1 General Provisions) of the 2020 Civil Code now declares:

This Law [the Civil Code] is formulated in accordance with the Constitution of the People's Republic of China for the purposes of protecting the lawful rights and interests of persons of civil law, regulating civil-law relations, maintaining social and economic order, meeting the needs for developing socialism with Chinese characteristics, and promoting the core socialist values.⁹⁵

The promotion of core socialist values is not just a vague principle of civil law; the 2020 Civil Code now contains some rather odd provisions: On the one hand, Art 207 (in Book I on Rights *in rem*) provides that 'the rights *in rem* of the State, collectives, private individuals, and the other right-holders are to be protected equally by law, and no organisations or individual may infringe upon these rights'. On the other hand, Art 206 directly incorporates the constitutional provisions on the politico-economic notion of ownership systems and declares that the State consolidates and develops the economy under public ownership, and encourages, supports, and guides the development of the economy under other non-public ownership. Art 206 then continues to state that the State implements a socialist market economy and protects the equal legal status and development rights of all market participants.⁹⁶ Here, not only the politico-economic notion of ownership system is confused with the notion of property rights, it wants equal protection as well as differentiation of status under civil law when such differentiation should be properly addressed by the Constitution and administrative laws (or economic law as is the case in China), not by or in civil law.

Another example relates to the treatment of civil law subjects. The general approach to this issue is the division between natural persons and legal persons,⁹⁷ a typical abstract approach through the notion of legal personality commonly adopted in both Civil and Common law systems. This approach finally rids of the ideologically stricken notion of 'citizens' in the Chinese

⁹⁵ This provision was first established in the General Principles of Civil Law 2017.

⁹⁶ Art 206 is adapted from Art 3 of Law on Rights *in rem* (2007), the latter was a result of last stage debate on socialist nature (Chen 2016, 509–510).

⁹⁷ Like all legal systems, there is another notion that sits between natural person and legal person, that is, partnership which may conduct its civil law activities in its own name but not qualified as a legal person. The 2017 General Provisions of Civil Law (GPCL) creates a new category, 'non-legal person organisations', which includes sole-investment enterprises, partnership enterprises and professional service organisations that do not qualify as legal persons. See Art 102 of the 2017 GPCL.

civil law.⁹⁸ However, the similarity in the Chinese law ends here:⁹⁹ Legal personality is meant to be an abstract legal institution in which all natural persons and legal entities are treated as ‘legal persons’ with certain capacities and incapacities in conducting civil acts regardless of their social positions, political background and geographical locations.¹⁰⁰ The 2020 Civil Code is, however, driven by prevailing policy considerations towards *ad hoc* situations, such as the treatment of the so-called Individual Households (*Getihu*) (ie, Individual Industrial and Commercial Households and Rural Contracting Households)¹⁰¹ when these sole proprietors could easily be absorbed into the regulation by the Chinese Individual Sole-Investment Enterprise Law (1999) or Partnership Law (2006). Similarly, the 2020 Civil Code includes provisions on ‘special legal persons’ which include institutional legal persons, rural collective economic entities, rural township cooperative economic entities and basic level self-regulation social legal persons (such as village committees, neighbourhood committees).¹⁰² While the provisions on the two ‘Individual Households’ are inherited from the 2017 GPCL (which in turn inherited from the 1986 GPCL), the rationale for creating the ‘special legal persons’ is hard to understand other than to say that it responds to the prevailing socialist politico-economic arrangements in China.

A final example would be Art 185, which originally was Art 185 that was only inserted into the GPCL during the full session of the NPC in March 2017 when the 2017 GPCL was finally adopted. Article 185 provides protection to the name, portrait, reputation and honour of a hero or martyr if the infringement of such rights would harm social and public interests. It is an extremely ambiguous provision, providing protection to deceased individuals without any clear definitions as to who are the heroes, who may have the

⁹⁸ This only occurred when the GPCL was adopted in 2017.

⁹⁹ Indeed, according to Chinese scholars who participated in drafting the 2017 GPCL, the final arrangement for natural and legal persons was one of the most contentious issues in the final enactment of the 2017 GPCL. See ‘The Most Contentious Issue in the Enactment of the General Provisions of Civil Law’, CASS Institute of Law, available at <http://www.iolaw.org.cn/showArticle.aspx?id=5126> (last visited 7 April 2017).

¹⁰⁰ On legal personality, see David P Derham, ‘Theories of Legal Personality’, in Leicester C Webb (ed), *Legal Personality and Political Pluralism* (Melbourne: Melbourne University Press, 1958), at 1–19; Alice E-S Tay and Conita SC Leung (eds), *Legal Persons and Legal Personality in Common Law, Civil Law and Socialist Law* (being a special issue of the *Indian Socio-Legal Journal*, Sydney: The University of Sydney, 1992).

¹⁰¹ Articles 54–56 of the 2020 Civil Code.

¹⁰² Articles 96–101 of the 2020 Civil Code.

standing to sue and how may social and public interests be established.¹⁰³ It is plainly a political statement made in the prevailing political environment, representing a worrying sign of mistaking the prevailing political considerations as Chinese characteristics. On this point, Art 184 provides an even sharper example: this article declares that anyone who voluntarily assists another person in emergency needs shall not be liable for damages caused to the person receiving such assistance. This provision was originally enacted in the 2017 GPCL in response to the situation in which many people have become indifferent to such an emergency, fearing for liability and damages that might be claimed by the aided person as had happened from time to time, including cases where the aided person falsely claimed such liability.¹⁰⁴

It can be safely said that, without the recent re-ideologization of law, these provisions would not have been in the Civil Code and the Code would have a much more formal and coherent structure.

(2) *National Characters and Chinese Customary Law & Practices*

As mentioned earlier,¹⁰⁵ Chinese scholars have increasingly asserted that there were ‘rich sources’ of a civil law nature in traditional Chinese law, regulating marriage and family, property, contracts, torts and limitations of civil actions. However, other than an historically unprecedented and massive survey of customary law, which lasted for more than three decades during the Qing and KMT reforms and produced nearly 1,000 volumes of reports,¹⁰⁶ modern China has rarely undertaken any serious studies of customary law and, especially, its status in contemporary society.¹⁰⁷

With the CPC’s call for renewal of China as a nation and as a civilisation, as well as the increasing confidence on the so-called ‘China model’,

¹⁰³ See Donald Clarke, ‘Random Comments on China’s New Civil Code’, available at http://lawprofessors.typepad.com/china_law_prof_blog/ (visited 17 April 2017).

¹⁰⁴ *Ibid.* See ‘Good Samaritans Will Be Exempted from Liability’, *Xinhua* (10 March 2017), available at http://news.xinhuanet.com/politics/2017lh/2017-03/10/c_129506028.htm (visited 16 April 2017).

¹⁰⁵ See *supra* note 13.

¹⁰⁶ For a comprehensive study of this survey, see Hongming Gui, *A Study of the Civil and Commercial Customary Law Survey during the Late Qing and Early KMT (Qingmo Minchu Minshangshi Xiguan Diaocha Zhi Yanjiu)* (Beijing: Law Press, 2005).

¹⁰⁷ See Liu Zuoxiang, ‘The Continuation of Traditions: The Status and Functions of Customs in Modern Chinese Legal System’, 2011 (1) *Studies in Law (Faxue Yanjiu)* 50–57; and Li Jingguo, ‘On Issues concerning Customary Law in Civil Codification’, 2017 (3) *SJTU Law Review (JiaoDa Faxue)* 70–77.

the Party and law makers began, when final codification started, to demand that ‘national characters’ must be incorporated into the future civil code.¹⁰⁸ However, there was and still is no consensus as to what constitutes ‘national characters’ and how they might be reflected in a civil code. What was clearly needed then and now is that Chinese civil law should have a more sensitive approach towards Chinese customary law and local practices. The challenges for the Chinese scholars and law makers then were, how will the Chinese customary law and local practices, both of which have long been rejected as backward ‘feudalist’ practices, reconcile with the largely undefined notion of socialist morality. Equally challenging was the treatment of customary law and practice among ethnic minorities living either in minority autonomous regions or scattered among Han Chinese in the various parts of China.¹⁰⁹

By common sense, we would expect that a defining feature of its ‘national characters’ would be the respect of customary law and practice in a country as large and diverse as China. It however took more than 30 years for the Chinese civil law to even make a declaration on respect for customary law: In 1986 when the GPCL was enacted, Art 6 of the GPCL stated that civil

¹⁰⁸ More recently, there has been a campaign, initiated by the CPC and the Central Government, for establishing a distinct Chinese legal knowledge system. See Opinions on Strengthening Legal Education and the Study of Legal Theories in the New Era, jointly issued by the General Office of the CPC Central Committee and the General Office of the State Council on 26 February 2023. A Chinese copy of the Opinions is available at http://paper.people.com.cn/rmrb/html/2023-02/27/nw.D110000renmrb_20230227_2-01.htm (25/1/24). While these Opinions do talk about combining the practice of Marxist legal theories in China with the Chinese traditional legal culture, the essential tasks are to re-politicise law with ‘Xi Jinping Thoughts’ in the name of establishing a China’s own Model. See also Yu Zhong, ‘On the Establishment of a distinct Chinese Legal Knowledge System’, 2023 (45:4) *Modern Law Science (Xiandai Faxue)* 3–16.

¹⁰⁹ A recent local practice (but apparently endorsed by the central law-making authorities) gives us little confidence: on 29 March 2017, the Xinjiang Uygur Autonomous Region issued its Regulations on Eliminating Extremism. These Regulations, a most draconian law on religious practices in China that became effective from 1 April 2017, effectively outlaws many religious practices among the Muslim Uygur minorities. See ‘Ban on Beards and Veils — China’s Xinjiang Passes Law to Curb “Religious Extremism”’, *South China Morning Post* (30 March 2017), available at <http://www.scmp.com/news/china/policies-politics/article/2083479/ban-beards-and-veils-chinas-xinjiang-passes-regulation> (last accessed 23 April 2017). A full text of these Regulations is published in *Xinjiang Legal Daily* and available at <http://www.xjfb.com/contents/225/125834.html> (last accessed 31 March 2017). On the background of the Regulations and endorsement from central government and central law-making authorities, see ‘Understanding the Xinjiang Uygur Autonomous Region Regulations on Eliminating Extremism’, *Legal Daily (Fazhi Ribao)* (6 April 2017), available at http://www.legaldaily.com.cn/rdlf/content/2017-04/06/content_7081730.htm?node=33048 (last accessed 14 April 2017).

activities must abide by the law and, in the absence of law, by state policies. Art 7 then provided that social public morals should be respected during civil activities, and social public interests, state planning and social economic orders must not be breached. Obviously, the so-called ‘social public morals’ meant socialist morals that are to be defined by the government. In 2009, the GPCL was revised and the phrase ‘state planning’ was removed from Art 7. In 2017, the General Provisions of Civil Law, which were to become Book One of the Civil Code, finally provides that, in civil activities, no one shall violate the law, or offend public order or good morals (Art 8), and civil disputes shall be resolved in accordance with law and, where there is no relevant law, customs may be applied provided that public order and good morals are not offended (Art 10). These two articles remain exactly the same in the 2020 Civil Code and, thus, customs are finally recognised by Chinese civil law. According to the Supreme People’s Court, local customs or common practice that are complied with by ordinary people within a certain area or a trade are recognised as ‘customs’ under Art 10 of the Civil Code. In addition to the Code requirement that such customs must not violate public order and good moral, these customs must not violate the core socialist values.¹¹⁰ Here it is most unfortunate that the Supreme People’s Court further limits the application of customs by imposing the core socialist values as limiting factors. It is yet another example of re-ideologization of law in China, suggesting ‘Chinese characters’ are meant to be of a ‘socialist’ nature.

Indeed, some provisions in the Code are more ‘socialist’ than ‘Chinese’. Thus, under Article 1043 of the Code, families are required to establish good family values, promote family virtues, and enhance family civility, and husband and wife shall be loyal to each other. Further, in divorce caused by certain events such as bigamy (or cohabitating with another person), domestic violence or maltreatment or serious faults, the no-fault spouse has the right to claim compensation (Article 1091 of the Civil Code). And finally, following a long practice in socialist China and in the name of equality, the Civil Code continues to bundle women, minors, the elderly, and persons with disabilities¹¹¹ together for the protection of their legitimate rights and

¹¹⁰ See Article 2 of Interpretation on Certain Issues concerning the Application of the General Provisions of the Civil Code of the PRC, adopted by the Supreme People’s Court on 30 December 2021, and effective from 1 March 2022.

¹¹¹ ‘Persons with disabilities’ were inserted at the last minutes in the codification process. See ‘What Changes (from May 2020 Draft) Were Made in the Final Code’, available at <https://mp.weixin.qq.com/s/3q0w2P99Lz6NAr5tj1Utjw> (last accessed 3/6/20).

interests (Article 1041 of the Civil Code), as if women were by definition lacking capacity in law or in practice.

On the whole, the treatment of customs is disappointing and the search for ‘Chinese characters’ is far from complete and far from shaking off the shackles of socialist ideology.

(3) A Contribution to Updating the Classic Codes?

As mentioned at the beginning of this paper, Chinese civil laws are influenced by many different foreign and international sources and, through the process of consolidation, the influences by the classical codes continued in the final codification of the Civil Code.¹¹² In academic study, references have frequently been made to the German or French civil code and, to a lesser degree, the Italian civil code. However, little can be found concerning more recent achievements in civil codification such as the Dutch Civil Code, and even fewer references were made to scholarly analyses of civil codes in Civil Law countries, at least not to the more recent scholarship.¹¹³

This inevitably leads to the question: how might legal issues brought about by modern technologies and climate change, such as virtual property and easier invasion of privacy as well as the need for environment protection, be addressed by a code whose original models were largely based on the 18th and 19th century ideologies without fracturing the inherent quality and the coherent structure?¹¹⁴ Similarly, with the development of welfare societies,

¹¹² There are at least three different versions of the draft civil code that have been published, with two of them claimed to be drafted on behalf of the Legislative Committee of the SCNPC and one as a scholars’ proposed draft: Liming Wang (ed), *A Proposed Draft Civil Code and Its Explanations (Zhongguo Minfadian Caoan Jianyigao Ji Shuoming)* (Beijing: Press of the Chinese Legal System, 2004); Huixing Liang (ed), *A Proposed Draft Civil Code and Its Justifications (Zhongguo Minfadian Caoan Jianyigao Fu Liyou)* (seven volumes in total) (Beijing: Law Press, 2004) (this proposed draft, without the justifications, has now been translated into English: Huixing Liang, *The Draft Civil Code of the People’s Republic of China: English Translation* (Leiden/Boston: Martinus Nijhoff Publishers, 2010)); Liming Wang (ed), *A Scholars’ Proposed Draft of the Civil Code and Its Legislative Justifications (Zhongguo Minfadian Xueze Jianyigao Ji Lifaliyou)* (five volumes) (Beijing: Law Press, 2005). These scholars are both active and very influential in the codification process, and their drafts contain explanations on foreign sources which are mostly the classical codes.

¹¹³ Language is perhaps a major barrier to the study of civil science in these countries, as few Chinese scholars have mastered language other than English (and Russian among scholars trained in the 1950s).

¹¹⁴ Chinese scholars are well aware of this issue that needs to be addressed in the process of codification. See ie Xie Hongfeng, ‘Modern Complex Society and the System of a Civil

private law has increasingly been subjected to intervention by public interest considerations, such as unconscionability in contract law and public interest test in torts. While it was largely agreed that these new developments should be incorporated into the future civil code, there were debates as to what extent such development should be taken on board in civil codification.¹¹⁵ Importantly, interference in private law by public law principles (such as public interest test in torts) can be easily influenced by the prevailing political considerations and, as such, can be rather *ad hoc*. Such interference then does not sit comfortably with the fundamental private law principles of universality, autonomy and abstraction. It is particularly challenging in a transitional society where political control is tight but in a constant state of perpetual change.

Here then comes in some interesting Chinese development, besides the codification of personality rights in a separate book.¹¹⁶ In addition to codifying the traditional principles guiding the conduct of civil activities, such as equality among parties, voluntariness, fairness, good faith etc,¹¹⁷ Article 9 of the Civil Code now requires that, when engaging in civil law activities, such activities shall be beneficial to the conservation of energies and the protection of ecological environment. While the law makers insist that such a provision incorporates the Chinese traditional idea of harmony between nature and human activities and further develops the new idea of a new development model since the 18th CPC Congress,¹¹⁸ it is entirely unclear what is the binding nature of this new provision and how it might actually be applied and enforced in practice.¹¹⁹ Surely, an energy company, by its

Code', March 2016, *People's Rule of Law (Renmin Fazhi)*, available at <http://www.iolaw.org.cn/showArticle.aspx?id=4931> (last accessed 29/10/16).

¹¹⁵ See *supra* note 11.

¹¹⁶ Codifying personality rights is also seen as a response to the development of modern technologies. See Wang and Xiong, *supra* note 34.

¹¹⁷ See Articles 4–7 of the 2020 Civil Code, which inherit these provisions from the General Provisions of Civil Law 2017.

¹¹⁸ See [2017] Explanations on the Draft General Provisions of Civil Law of the PRC (*supra* note 9). Article 9 of the 2020 Civil Code is exactly the same as Article 9 of the 2017 General Provisions of Civil Law.

¹¹⁹ Chinese law and regulations have long required that investment projects must undertake a feasibility study and assessment on environmental impact, but civil law activities are far wider in scope than investment. An environmental law professor, who is also a deputy to the NPC and who has forcefully advocated the inclusion of this principle, has insisted that a court of law can always treat this 'green' principle as one of the objectives of civil law in deciding any civil law disputes. See 'The Inclusion of a "Green Principle" as a Basic Civil Law Principle Is a Response to the Need of Our Time', *Legal Daily (Fazhi Ribao)* (19 April

nature, would encourage its consumers to use as much energy as possible through lower pricing. Is such a consumer contract invalid? Similarly, Article 509 requires, on the one hand, full performance of contract and, on the other hand, demands that parties shall avoid wasting the resources, polluting the environment, or damaging the ecology in the course of performance of the contract.¹²⁰ Once again, public law requirement (for environmental protection) enters into private law domain without thinking through the different nature of the laws (and hence different methods of regulation and enforcement).

The overall results in efforts to update the classical code are mixed. On the one hand, there have been some quiet achievements in terms of torts remedies. In most areas of Chinese civil law, punitive damages are generally not allowed, with only very limited exceptions.¹²¹ The 2009 Tort Liability Law made some conceptual advances by allowing explicit, though limited, punitive damages in relation to liability for deaths or serious health problems caused by defective products that are manufactured or sold knowingly by the tortfeasor.¹²² Article 179 of the 2020 Civil Code,¹²³ which provides civil law remedies, now states that when a law provides punitive remedies that law should be followed. This effectively opens the door for law makers to establish punitive damages for civil wrongs and, as such, that simple sentence in Art 179 (of the Civil Code) is perhaps revolutionary in nature in terms of legal development in China.

2017), available at http://www.legaldaily.com.cn/index_article/content/2017-04/19/content_7114971.htm?node=5955 (last accessed 20 April 2017). See also Mingzhe Zhu, 'The Ecologization of the Chinese Civil Code', (2020) 64 *Pravovedenie Journal* 511–525.

¹²⁰ In an effort to ensure that Art 9 is not just rhetoric, conservation of resources and protection of ecological environment were in various degree inserted into Art 286 (use of real property); Art 326 (exercise of usufructuary rights); and Art 619 (packaging of goods). See 'What Changes (from May 2020 Draft) Were Made in the Final Code', *supra* note 111. All these provisions would face similar difficulties for actual implementation.

¹²¹ Huixing Liang, 'An Examination of the Tort Liability Law (Parts 1 & 2)', available at http://www.360doc.com/content/11/04/17/16/4653562_110299959.shtml (last accessed 21 August 2013). According to Liang, Art 49 of the 1993 Consumer Protection Law (most recently revised in October 2013) was the first legal stipulation to provide punitive damages (damages could be awarded at twice the contract value), which was followed by Art 96 of the Food Safe Law (enacted immediately after the *Sanlu* contaminated baby milk powder incident), allowing damages to be awarded at 10 times the product price.

¹²² Art 47 of the 2009 Tort Liability Law, For further analysis, see deLisle, *supra* note 6, at 372: deLisle asserts that this is the first general and unequivocal authorisation of punitive damages in Chinese Tort Law.

¹²³ Originally Article 179 of the 2017 GPCL.

On the other hand, however, the Article 467 of the Civil Code continues to stipulate that Chinese laws shall apply, as applicable law, for contracts of Sino-foreign equity joint venture, contracts of Sino-foreign contractual joint venture, or contracts of Sino-foreign cooperation in the exploration and exploitation of natural resources, that are to be performed within the territory of the People's Republic of China. This was the requirement imposed in the early 1980s when China just began its 'Open Door' policies and it was not in the draft code when the draft was presented to the NPC for deliberation;¹²⁴ it now sits very uncomfortably in Book Three on Contracts which emphasises that a contract is an agreement on the establishment, modification, or termination of a civil juristic relationship between persons of the civil law.¹²⁵

The selection of typical contracts singled out for special treatment is also odd in light of the development of a market economy in China. In the first contract law in the PRC, the Economic Contract Law (ECL) of 1981, special provisions were made for some selected special categories of contracts. The reason for creating special categories in the ECL was, however, quite unique. It was said to be that each of them was a special concern of a different central government ministry.¹²⁶ This simply means that such an arrangement in the ECL reflected the departmentalised and compartmentalised interests of the Chinese bureaucracy, inherent in a planned politico-economic system.¹²⁷ This arrangement could thus be seen as a major flaw in the ECL. The Contract Law of 1999 continued the practice; Part II on Specific Provisions (Articles 130–427) of the Law regulated 15 specific types of contract, namely, sale and purchase of goods; the supply of electricity, water, gas and heating; gifts; loans; leasing; lease financing; hiring of work; construction projects; transportation; technology; storage; warehousing; trusts; commissioning agencies; and brokerage. The continuation of such an arrangement in the 1999 Contract Law requires some justification at a time when China was emphasising its orientation towards a market economy; otherwise it undermines the universality of the contract law and continues to fragment the legal framework on contractual relationships. However, such a justification for

¹²⁴ Meaning, it was only inserted into the Code at the last minute of the codification process. See 'What Changes (from May 2020 Draft) Were Made in the Final Code', *supra* note 111.

¹²⁵ Article 464 of the 2020 Civil Code.

¹²⁶ Lucie Cheng & Arthur Rosett, 'Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market, 1978–1989', (no. 2, 1991) 5 *J. of Chinese Law* 143, at 206.

¹²⁷ On this politico-economic system, see Chen (1995), *supra* note 18.

singling out these 15 specific types of contract for particular treatment were not forthcoming.¹²⁸ Unfortunately, such *ad hoc* selection continued in the Civil Code. In fact, in addition to retaining the above 15 special contracts, further four categories were added: Suretyship, Factoring, Property Management Service, and Partnership. The practice of selecting specific contracts for special treatment *per se* is not an issue,¹²⁹ but selecting these without reconsidering the need after some 40 years of movement towards market economy is problematic, and this is especially so when the historical context of selecting such in the ECL is taken into consideration.

5. Conclusion

By all logic, one could argue, in a political environment where the Communist Party had asserted aggressive leadership over all state affairs and strict political and ideological control had been imposed, it was not a most conducive time for China to enact such an important law as a civil code. One could also, however, consider this matter from a perspective of historical evolution of Chinese law and the study of law: when the 1986 GPCL was adopted, there was practically no civil law in China other than the early drafts of civil codes which were all under strong influences of the former Soviet Union and its socialist jurisprudence. Further, those in charge of drafting the 1986 GPCL were principally trained in the former Soviet Union; legal research, legal education and training, foreign and international influences, etc were yet to emerge in China. In strong contrast, scholars and practitioners involved in the drafting of the 2020 Civil Code are those trained in post-Mao China, and many of them are in fact trained in Western countries, and all of them are very aware of international development. They often disagree with each other, but not so much on ideological grounds. They understand the need for compromise, not only with scholars sharing the common desire to have a

¹²⁸ Each of the three different drafts of the uniform contract law on my own personal file covers different individual types of contract. Most notably the May 1997 draft of the SCNPC covered additional contracts on consultancy, services, tourism, partnership, and employment. The draft prepared by academics has the widest coverage of specific contracts (24 types in total), including contracts on the sale of houses, transfer and assignment of land use rights, business operations, banking transactions, publications, entertainment, guarantees, and insurance.

¹²⁹ The Specific Provisions on particular contracts chosen on a seemingly *ad hoc* basis follow a similar approach to that in the KMT Civil Code.

modern and technically sound code but also with those who are ideologically driven or driven by populism. In this sense, China was ready for codification.

While the 2020 Civil Code is disappointing in many aspects as a piece of legislation in the 21st century, it is also a piece of law that remains true, largely, to a German civil code style that strives to be scientific and technical and hence ideologically neutral (that is, as neutral as possible in the prevailing political environment) under the influence of the Pandectist system.¹³⁰ Importantly, some of the provisions are revolutionary in nature. Thus, the declaration, by Article 990 of the Civil Code, that a person enjoys all personality rights and interests arising from personal liberty and human dignity perhaps exceeds anyone's expectation of Chinese law which is weak in the protection of human rights (even though personality rights are those under civil law, not human rights law). Equally, the all-embracing provision on the protection of personal privacy, as provided by Article 1032 of the Code, is inspiring, though its actual implementation is far from being a reality in China.

In conclusion, the 2020 Civil Code is not a great or perfect one — and indeed far from it — but a code with practical details and necessary compromises, representing what could be achieved under the political circumstance of the time during codification.

Några ord om Common Core of European Private Law

Filippo Valguarnera

Den föregående texten av Jianfu Chen har presenterats vid den årliga konferensen (General Meeting) för projektet Common Core of European Private Law, känt även som Trento-projektet. Projektet grundades för 60 år sedan vid Cornell Law School av Rudolf Schlesinger som ett försök att ”kartlägga” Europas civilrättsliga landskap. Common Core bidrar därför indirekt till den europeiska rättsharmoniseringen och lägger grunden för att utveckla en gemensam europeisk rättskultur. Idag omfattar Common Core över 200 forskare. Projektet har genom åren utvidgats till Östeuropa och vissa icke-europeiska rättsordningar (exempelvis Sydafrika, USA och Latinamerika). Projektet har, fram till idag, producerat ett trettioital volymer publicerade av Cambridge University Press, Stämpfli-Carolina Academic Press och Inter-

¹³⁰ On this German civil code style, see Maria Luisa Murillo, “The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification” (Fall 2001) 11(1) *J Transnational Law & Policy* 1, at 6.

sentia. Böckerna berör rättsområdena avtalsrätt, skadeståndsrätt, sakrätt, trust, konkurrensrätt och miljö rätt.

Den rättsvetenskapliga metoden som utvecklades av Schlesinger på 1960-talet innebär att ett rättsområde bryts ner till ett antal hypotetiska konflikter som rättsordningen behöver hantera. Uppgifter om de olika rättsordningarna samlas därför in genom rättsfallsbaserade frågeenkäter som förbereds vid Common Cores årliga möte. Nationella rapportörer strukturerar sina svar på tre nivåer: 1) lösningen på rättsfallet, 2) hur den nationella rättsordningen rättfärdigar lösningen, 3) institutionella faktorer som påverkar lösningen. Resultatet är en ”karta” över hur olika rättssystem hanterar konkreta frågor och på vilken nivå (så kallad ”rättsformant”) likheterna och skillnaderna faktiskt ligger. Denna metod beaktar alltså inte bara den formella rätten, utan även informella faktorer som påverkar den rättsliga analysen.

Stockholm Center for Commercial Law har varit medarrangör för Common Cores konferenser år 2022 och 2024. Centret (Kelly Chen, Johan Sandstedt och Filippo Valguarnera) arrangerar dessutom konferensen som kommer att äga rum den 15–16 maj 2025 med titeln *Serving Future Generations Through Legal Culture – Thirty Years of Common Core Research*.

Valet av tema tar avstamp i konstaterandet att den moderna västerländska rätten, och i synnerhet privaträtten, fokuserar på fördelningen av rättigheter och skyldigheter i nuet. De rättsliga kategorier som befolkar våra rättssystem är, med få undantag, dåligt rustade för att hantera intressen som rör flera generationer i en osäker framtid. Det kan hävdas att detta är en logisk följd av de sociala och kulturella krafter som var förhärskande under 1800-talet, då en stor del av vår juridiska grammatik fick sin nuvarande utformning. Industrialisering och resursutvinning var prioriterade mål medan insikten om miljöproblemen som exploateringen skulle orsaka låg fortfarande i framtiden. Dessutom innebär juridikens självrefererande karaktär att våra juridiska kategorier är långsamma att anpassa sig till förändrade omständigheter.

Även den sega rättskulturen har dock börjat inse vikten av ett flergenerationsperspektiv. Välkända exempel på denna trend är *State of the Netherlands v. Urgenda Foundation* (2019), som avgjordes till kärandenas fördel av Nederländernas högsta domstol, och *Europadomstolens dom i Verein KlimaSeniorinnen Schweiz v. Switzerland* (2024). 2025 års konferens kommer därför att belysa privaträttens potential som verktyg för att hantera framtida generationers rättigheter. Tillfället kommer också att användas för att se tillbaka på trettio år av Common Core-forskning och reflektera över dess resultat samt dess betydelse för framtida generationer. Årets tema kom-

Jianfu Chen

mer att analyseras av bland andra Róbert Spanó, före detta ordförande för Europadomstolen, Chantal Mak (Amsterdam), Fons Coomans (Maastricht) och Justin Jütte (Dublin).