

RECENT DEVELOPMENTS

THE CODIFICATION OF CHINESE TORT LAW

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The General Principles of Civil Law (hereinafter referred to as the Civil Code) of the People's Republic of China was adopted by the Fourth Session of the Sixth National People's Congress on April 12, 1986.¹ When the Civil Code took effect on January 1, 1987, it codified for the first time the general principles of tort law in the People's Republic of China (PRC).² This recent development article describes the general state of tort law in China, examines the provisions in the new Civil Code relating to tort law and finally, discusses the probable impact that the new Civil Code is likely to have on settling tort-like disputes in the PRC.

The promulgation of the Civil Code stands as a clear and concrete example of the strong recent commitment on the part of the present regime of the PRC to formally establish and codify its law. Although sheer numbers can be deceiving, from 1979 to 1985, over 400 statutes and regulations were enacted.³ Many of these laws and regulations are the first of their kind in the Chinese legal system.⁴ Such results are impressive given the proposition that it was only a few years ago, during the "Cultural Revolution", that law in general was perceived as an instrument for class oppression.⁵ As a re-

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1. General Principles of Civil Law of the People's Republic of China, adopted by the Fourth Session of the Sixth National People's Congress on April 12, 1986, *reprinted in* RENMIN RIBAO [PEOPLE'S DAILY] April 18, 1986 at 2-3, *translated in* 34 AMER. J. COMP. L. 715 (1986) [hereinafter cited as Civil Code]. All citations are to the translated version.

2. Civil Code, *supra* note 1, art. 156.

3. Zheng, *China's New Civil Law*, 34 AMER. J. COMP. L. 669, 672 n.19 (1986).

4. Gan, *Open Policy Updates China's Legal System*, 3 CHINA L. REP. 163 (1986).

5. *See, e.g.,* Han & Kantner, *Legal Education in China*, 32 AMER. J. COMP. L. 543, 568-569 (1984) (describing the supposed use of law to manipulate workers in capitalist states).

sult, the vast majority of law schools were closed down,⁶ most lawyers vanished,⁷ and hundreds of law professors were sent out to the fields to do hard labor.⁸

Such mistrust of the law was a strong recurring theme in Chinese history even before the rise of Marxism.⁹ This strong cultural bias against laws, litigation and courtrooms has led the Chinese people to think more in terms of friendly settlement, negotiation, and mediation as ways to settle their disputes. Matters Americans normally would consider covered by a country's civil law were instead handled through the imposition of supposedly shared moral values, party policy and custom.¹⁰ As a result, due to the emphasis on mediation, conciliation and arbitration rather than adjudication, very little could be said about the general principles of Chinese tort law until the promulgation of the Civil Code.¹¹

Although it is true that provisions on tort law are found in various individual statutes adopted before the Civil Code, these provisions are piecemeal at best and rarely describe in detail the extent and type of liability which could have been imposed.¹² Moreover, the vast majority of these statutes have been adopted only in the

6. All law departments of universities were closed down, with the exception of Beijing University, where the law department "was nominally retained." Han, *supra* note 5, at 553.

7. One commentator estimates that 70% of all of China's lawyers disappeared. Seitz, *Hopes and Dilemmas of an Embryonic Legal System*, 54 FLA. B.J. 664, 665 (1980).

8. A number of law professors spent "ten or more years [working] in the fields of village communes." Murphy, *Legal Education in China: Some Impressions*, 2 CHINA L. REP. 50, 51 (1982).

9. "In [traditional] China, law was not regarded as a major social achievement and a symbol of rectitude, but rather as a regrettable necessity, principally an instrument to be used by the state to enforce its will upon subjects who had not submitted to other means of social control." J. COHEN & H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 17 (1974). See also Lee & Lai, *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, 29 HASTINGS L.J. 1307, 1308-10 (1978). See generally D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* (1967).

10. See, e.g., Gellhorn, *China's Quest for Legal Modernity*, 1 J. CHINESE L. 1, 2 (1987).

11. See, e.g., Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, in *HUMAN RIGHTS IN CONTEMPORARY CHINA* 46 (1986):

Because of the prevalence of mediation and conciliation, settlements in individual cases are usually ad hoc and do not serve as precedent. Like cases may be decided in myriad unlike ways, so that there is no official or unofficial consensus as to the meaning of constitutional and statutory rights. Instead of the clarity of definition that comes with judicial interpretation, mediation and conciliation contribute to lack of consensus as to the precise boundaries of rights and responsibilities.

Moreover, since arbitration cases are usually conducted in private, their results are rarely reported. Thus there is no body of case law on settlement. Ellis, *Foreign Commercial Dispute Settlement in the People's Republic of China*, 6 INT'L TRADE L.J. 155, 156 (1980-81).

12. Zheng, *supra* note 3, at 696.

recent past.¹³

The Civil Code consists of nine chapters of which Chapter Six describes the basic principles of Chinese tort law. It dictates that civil liability may be imposed in a variety of situations. The Civil Code imposes liability on those who: interfere with property rights;¹⁴ infringe on intellectual property rights;¹⁵ cause personal injury;¹⁶ infringe on another's name, likeness, reputation or honor;¹⁷ engage in activities which are highly dangerous to the surroundings, which result in damage to a party who did not help cause the loss;¹⁸ violate environmental protection laws and thereby cause loss to another;¹⁹ cause loss to another by excavating or repairing or installing underground facilities in public areas or roads without adopting safety measures;²⁰ are owners or in control of a facility and loss is caused to another because of faulty maintenance;²¹ and on those who are at fault in allowing a domestic animal to cause loss to another.²² In addition, liability is imposed on manufacturers or sellers when property damage or personal injury is caused by the substandard quality of their goods.²³ However, where transporters and bailors are responsible for this damage, the manufacturers and sellers have a right to demand compensation from them.²⁴ Finally, if a State agency or officials of a State agency, in the course of performing their official duties, violate the lawful rights and interests of citizens or legal persons, and damage results, civil liability will be imposed.²⁵

While the Civil Code appears to provide for two types of civil liability, strict liability and liability based on fault, the Code is not totally clear when which type will be applied.²⁶ Such distinctions will apparently have to be worked out through further legislation.²⁷ Almost all of the tort liability situations listed above, interpreted literally, could be found to impose liability without regard to fault.²⁸ Indeed, whenever fault is mentioned, it is usually in relation to the question of whether the injured parties' fault should mitigate

13. Gan, *supra* note 4.

14. Civil Code, *supra* note 1, art. 117.

15. *Id.* art. 118.

16. *Id.* art. 119.

17. *Id.* art. 120.

18. *Id.* art. 123.

19. *Id.* art. 124.

20. *Id.* art. 125.

21. *Id.* art. 126.

22. *Id.* art. 127.

23. *Id.* art. 122.

24. *Id.*

25. *Id.* art. 121.

26. *See, e.g., id.* arts. 126, 124.

27. Zheng, *supra* note 3, at 698.

28. *Id.*

the injuring parties' responsibility.²⁹

Still, it is difficult to believe that, at least with respect to some areas, fault will not generally be required before liability is imposed. Fault is typically defined by Chinese legal theorists as a state of mind including intent or negligence.³⁰ To impose strict liability on producers of products, for example, may be impractical at this early stage of industrial development.³¹

Several defenses for the infringing party are established in the Civil Code. In cases of *force majeure*, for example, there is no civil liability unless the law provides otherwise.³² *Force majeure* is defined in the Code as an objective situation that is unpredictable, unavoidable and irresistible.³³ Also provided for are the defenses of necessity (emergency avoidance of danger) and self-defense.³⁴ However, if in either of these circumstances unnecessary loss is caused, the person who took action to avoid injury or danger must bear the appropriate civil liability.³⁵ Finally, the Civil Code provides for a type of comparative negligence to reduce the liability of the person who caused the loss, if the injured party is also at fault.³⁶

Joint liability is also provided for under the Civil Code.³⁷ Thus, where two or more persons are guilty of jointly infringing the right of another, thereby causing loss, each liable person is obliged to satisfy the entire judgment.³⁸ If one of the persons satisfies the judgment, he has a right of contribution against other persons jointly liable for their share of the judgment.³⁹

Remedies provided under the Civil Code are diverse, and may be utilized separately or in combination.⁴⁰ If possession of property is interfered with, property must be returned, or, if this is impossible, its value compensated.⁴¹ If there is interference causing dam-

29. See Civil Code, *supra* note 1, arts. 123, 127.

30. ZHONGGUO ZHENGFA DAXUE MINFA JIAOYANSHI, ZHONG HUA REMMIN GONGHEGUO MINFA TONGZE JIANG HUA [A DISCUSSION OF THE GENERAL PRINCIPLES OF CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA] 195 (1986).

31. Ma Ling, *Tantan Jianli Wo Guo de Xiandai Chanpin Zeren Zhidu [Establishment of the Modern Product Liability System of our Country]*, FAXUE YANJIU [LEGAL STUDY] No. 2 at 51 (1985).

32. Civil Code, *supra* note 1, art. 107.

33. *Id.* art. 153.

34. *Id.* arts. 129, 128.

35. *Id.*

36. *Id.* art. 131.

37. *Id.* art. 130.

38. *Id.* art. 87.

39. *Id.*

40. *Id.* art. 134, which lists the ten principle forms of civil liability: cessation of infringement; elimination of obstructions; elimination of danger; return of property; restoration of the original condition; repair, reconstruction, or replacement; payment of compensation; payment of [agreed] contract breach money; elimination of effects and restoration of reputation; and apology.

41. *Id.* art. 117.

age to property, that property must be restored to its original condition or compensation equal to the property's value must be paid.⁴² Regarding infringement of intellectual property rights, there is a right to demand that infringement cease, its effects be eliminated and all losses be compensated.⁴³ When a citizen's name, likeness, reputation or honor is infringed, one may ask for a cessation of the infringement, that the effects on his reputation be eliminated, that compensation be given for loss, and even that an apology be made.⁴⁴ Finally, where personal injury is caused, requests for medical expenses, lost wages and compensation for the increased expense of living as a disabled person is appropriate.⁴⁵ If death results, funeral expenses and payment of compensation to help maintain the deceased's dependents may be awarded.⁴⁶

In addition, the Civil Code allows the court to issue warnings and, in accordance with law, impose fines or detention.⁴⁷ Furthermore, the court may confiscate property derived illegally.⁴⁸

With the adoption of the Civil Code, the theoretical and statutory groundwork for further development of Chinese tort law has been laid. However, many questions remain to be answered. First, no one knows how definitive the general principles will be. This proposition can only be answered by the passage of time and future legislative and judicial decisions. Second, it is unclear at this point how much independence the judiciary will be granted and, just as importantly, be willing to exhibit in applying the new Civil Code.

Highly placed Communist Party cadres and local Party organizations have in the past directly influenced, if not altogether determined, the outcome of many judicial matters, regardless of what the law dictated.⁴⁹ Their decisions many times consisted of a moral or political statement, rather than a carefully reasoned legal opinion based on the law.⁵⁰ The justification for such intrusions was that only the Party "knew" the true political situation and thus could be trusted to understand the relationship between "enemies" and the people.⁵¹

Theoretically such intrusions are no longer supposed to take

42. *Id.*

43. *Id.* art. 118.

44. *Id.* art. 120.

45. *Id.* art. 119.

46. *Id.*

47. *Id.* art. 134.

48. *Id.*

49. See, e.g., Han & Kanter, *supra* note 5, at 577 (noting that the People's Courts usually submitted their law cases to the Party committee for examination and approval).

50. Edwards, *supra* note 11, at 46.

51. See Tay, *Law in Communist China—Part II*, 6 SYDNEY L. REV. 335, 369 (1971).

place. Article 126 of the 1982 Constitution of the PRC states that the courts are to exercise judicial power independently. In addition, current policy prohibits individual Party members from interfering in judicial affairs.⁵² Nonetheless, it has been predicted by one scholar of Chinese law that such ingrained habits will die hard, and that "the shortage of judicial personnel means pervasive Party involvement in legal affairs is likely to continue for some time."⁵³ Yet some change appears to be on the horizon. With the adoption of the Civil Code, any deviation from the letter of the law forced upon the judiciary by individual Party members will be more readily apparent.

52. Edwards, *supra* note 11, at 46.

53. *Id.* See also Gelatt & Snyder, *Legal Education in China: Training for a New Era*, 1 CHINA L. REP. 41, 54 (1980) (reporting that in 1980 only about 5% of members of the court system had received formal legal training).