

Comparative Tort Law

Global Perspectives

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17. Chinese tort law: Between tradition and transplants

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1. INTRODUCTION

When one examines a legal system or a particular area of law in a particular jurisdiction, it is difficult to truly appreciate the reality by only looking at the official laws. When dealing with a country as old and sophisticated as China, one can easily miss the whole picture by focusing only on the written statutes. Admittedly, a series of legal transplants have resulted in the enactments of major legislations and the establishment of legal institutions that are modeled on western systems. A westernized civil law system has been established in China after a century of legal modernization.

However, in a country that has been run by its own set of social norms that were guided by feudal law and Confucianism for thousands of years, the legitimacy of the foreign laws imposed by political elites cannot be earned overnight. Judge Charles Summer Lobingier of the United State Court for China from 1914 to 1924 observed that:

It is no easy task to restate a legal system, already more than four thousand years old, so as to meet the needs of a nation of 400 million. In fact the danger lies rather in haste than in deliberation. Jurists from Savigny down have pointed out the folly of imposing bodily upon any nation the laws of another. That folly becomes aggravated when each represents a totally diverse type of civilization. Importation of foreign codes into China will not solve the problem.¹

For western legal transplants to touch the lives of the vast majority of people, the people who are the subjects of these laws must consciously accept the borrowed law as preferable to pre-existing customary norms.² When it comes to tort law, people's deeply entrenched beliefs under feudal law about what can be complained of, against whom, and how, have to be transformed accordingly for the borrowed tort law to function. When the pre-existing social norms, philosophical foundations and moral values diverge from the judicial system and modern western tort law, the transplanted rules and procedures are likely to be bypassed or circumvented, since other mechanisms will be available to provide socially acceptable solutions that are more consistent with the traditional values rather than the positive laws.

¹ Gene T. Hsiao, *The Foreign Trade of China, Policy, Law and Practice* 5 (University of California Press 1977) (quoting Charles Summer Lobinger, *An Introduction to Chinese Law*, *China Law Review*, 4.5:121, 129 (1930)).

² See Pitman B. Potter, *The Economic Contract Law of China, Legitimation and Contract Autonomy in the PRC* 3 (University of Washington Press 1992).

Scholars of Chinese tort law have reached consensus that “Qinquan (Tort)” is an imported term in Chinese borrowed from the west.³ Also, traditional Chinese law was mainly criminal law and therefore did not distinguish tort law from criminal law because there was not a separate category of law that was dedicated to torts⁴ and developed based on the fault liability regime as its western counterpart⁵ (compared with either the common law’s law of particular torts or civil law’s unified concept of tort law).⁶ However, these facts do not mean that traditional Chinese society neither dealt with torts nor provided remedies for torts committed, as we will see in this chapter.

In light of the above, the goals of this chapter are twofold: the first is to produce a general account of the development of Chinese tort law; and the second is to describe how the system resolves the incompatibility between the pre-existing social norms and the imported law.

2. A SKETCH OF TORT LAW IN FEUDAL CHINA

A. *Li v. Law*

Although Chinese legal history can be traced back to law of customs from over four thousand years ago (21st century BC) when the first slavery state, Xia, was established, civil or private law played a relatively minor role.⁷ Criminal law, or law of punishment to be exact, was dominant in Chinese legal history, and civil activities were regulated basically by the customs or proprieties of appropriate social behaviors that reflected the moral and social values (known as “*Li*”) formed through the establishment of Confucianism as the state orthodoxy. Legalism was once an important philosophical school of thought that was popular in the Warring States period (476 BC–221 BC). This advocated that a state must be regulated through the use of law and the laws should apply to everyone in the society regardless of their social status. However, in Confucius’ view, legal punishments should not apply to people at the bureaucratic level of Dafu (senior official under the king) or above.⁸ As Emperor Wu, the fourth emperor of the Han Dynasty, reasserted the importance of Confucianism and made it a state orthodoxy, *Li* became the body of rules regulating civil conduct, which emphasized

³ See Mo Zhang, Tort Liabilities and Torts Law: The New Frontier of Chinese Legal Horizon, 10 Rich. J. Global L. & Bus. 415, 423 (2011). See also Yan Zhu, The Bases of Liability in Chinese Tort Liability Law – Historical and Comparative Perspectives, in Lei Chen and C.H. (Remco) van Rhee (eds.), *Towards a Chinese Civil Code: Comparative and Historical Perspectives* 335, 336 (Martinus Nijhoff 2012).

⁴ See Mo Zhang, *supra* note 3 at 423; See also Yan Zhu, *supra* note 3 at 336.

⁵ See Yan Zhu, *supra* note 3 at 336.

⁶ See James Gordley, *Foundations of Private Law* 159 (Oxford 2006).

⁷ See 曾宪义 [Zeng Xianyi], 《中国法制史》 [The Legal History of China], 1 (Peking University Press, Higher Education Press 2005). Some Western scholars argued that the Chinese legal tradition can only be traced back to the Shang Dynasty (17th century BC–11th century BC). See Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* 2 (Georgia U.P. 1996).

⁸ See Ch’ü, T’ung-tsu, *Law & Society in Traditional China* 243 (Mouton 1961).

morality as the foundation of society⁹ and imposed civil obligations among citizens according to their social status.¹⁰ The content of *Li* characteristically depended on the social status of the person to whom they applied, his status in his family, in his clan, in the neighborhood, in the official hierarchy and in the state.¹¹ The position a man possessed depended on his age, sex, career, family position, employment status and social prestige. The differences in status created relationships between people, and the society was structured on the basis of such relationships. Both Legalism and Confucianism agree that a well-ordered society consists in the relationships of three cardinal guides (三纲).¹² In such relationships, ruler guides ministers/subjects, father guides son, and husband guides wife. These are unequal relationships entailing mutual but different obligations.

The subject/minister was to be loyal to the ruler, rulers were to nourish their subjects and respect and listen to their remonstrance. The son was to be filial, but the father was to love and protect him. The wife was to be submissive and obedient, and the husband was to respect her position as wife.¹³

According to Confucius, a wise and noble man (Junzi) shall be aware of such a natural order and hierarchy rather than disturb the balanced harmony of the world. People are expected to follow the *Li* spontaneously through education. Thus, ideally, law and punishment are not needed if everyone in society is properly educated.¹⁴ Confucius refused to punish or kill people not properly educated.¹⁵ Ideally, tort law could be replaced by the proper teaching of morality and Confucianism.¹⁶ The next generation of Confucianist philosophers, Xun Zi (or Hsun Tzu) and Tung Chung-shu, held similar views, that when education is proper, every citizen will obey the law and not a single person will be in jail.¹⁷

Confucianism recognizes the differences between noble and humble and tries to implement different social proprieties (*Li*) according to a person's status ("When Statuses are different, *Li* is different accordingly").¹⁸ Law functioned as a regulatory tool applicable mostly to "barbarian" people¹⁹ and physical punishments became available only when *Li* was broken and conscience failed. The old Chinese saying "Chu Li Ru Xing" means "outside the *Li* are punishments."²⁰

⁹ See Daniel C.K. Chow, *Legal System of People's Republic of China* 40 (West 2009).

¹⁰ See Jianfu Chen, *Chinese Law: Context and Transformation* 12 (Martinus Nijhoff Publishers 2008).

¹¹ See Comments of Zuo 18th year of Zhuanggong [王命诸侯, 名位不同, 礼亦异数 《左传》 ● 庄公十八年]].

¹² See 韩非子 ● 忠孝 [Han Fei Zi, Royal and Filial] ; see also 董仲舒 [Tung Chung-shu] 《春秋繁露》 [Luxuriant Dew of the Spring and Autumn Annals].

¹³ See Geoffrey MacCormack, *supra* note 7 at 8.

¹⁴ See Ch'ü, T'ung-tsu, *supra* note 8 at 249–250.

¹⁵ Id.

¹⁶ See Id. Confucius advocated the use of good morals to change people [Yi De Hua Ren].

¹⁷ See Ch'ü, T'ung-tsu, *supra* note 8 at 250.

¹⁸ 左丘明 [Zuo Qiu Ming], 《左传》 [Zuo's Commentaries, 18th Year of Zhuan Gong].

¹⁹ See Ch'ü, T'ung-tsu, *supra* note 8 at 250.

²⁰ See 《汉书》 ● 陈宠传 [The Book of Han Dynasty, Biography of Chen Chong].

Other than regulating conducts outside the jurisdiction of law, *Li* also supplied the rigidity of written law with flexibilities and exceptions. *Li* was regarded as a source of authority in the court of law. Starting in the Han Dynasty, when there was no applicable law in the statutes, Confucianism classics were cited as authority in determining guilt and punishments.²¹

B. Distributive Justice v. Corrective Justice

As a result of Confucian teaching, a hierarchical distributive justice was established while the notion of corrective justice, upon which western tort law is based, was missing in feudal China.²² The correlativity, upon which the rectification of justice operates, and the horizontal relationship between the doer and sufferer are the bases of the corrective justice. However, neither concept played much of a role in feudal China.

Corrective justice is “the idea that liability rectifies the injustice inflicted by one person on another.”²³ Corrective justice correlates the doer with the sufferer and considers the gain to the doer and loss to the sufferer as injustice, which should be undone by reversing the positive and negative poles and simultaneously eliminating the gain and the loss.²⁴

In a corrective justice system, liability is based upon the correlativity between the injustice and its rectification: “the defendant has committed the same injustice the plaintiff has suffered, and the plaintiff wins ought to be the same as the reason the defendant loses.”²⁵ Also, the defendant cannot be held liable without reference to the plaintiff “in whose favor the liability runs.”²⁶ Therefore, it is the horizontal and correlative legal relationship between the two parties that gives rise to duty of care and the “reasonable person” standard, the core theories of western tort law.

In Confucianism, a horizontal interpersonal relationship and correlativity between the parties are missing. Feudal China was a typical example of the vertical social integration in the vertical dimension. Distributive justice does not concern just two parties but the unlimited number of parties among whom benefit or burden might be shared. All the official laws were imposed from the state to individuals, and therefore did not regulate the correlativity between the two individuals. Also, different sets of rights and duties were applicable to people with different social statuses.²⁷ When an injustice arose between two individuals, all the sufferer had to do was to report the facts to the authorities (usually the district magistrate), and beg the government to undo

²¹ See Zeng Xianyi, *supra* note 7 at 117. One famous principle in determining guilt by Confucian classics is the “principle of Chun Qiu.” Chun Qiu is a Confucian classic.

²² See generally Deng Feng, *Corrective Justice in Confucian Legal Tradition: A Non-existent Concept*, working paper at Harvard-Yenching’s Confucianism Workshop in Cambridge, at ????????????????

²³ Ernest J. Weinrib, *Corrective Justice in a Nutshell* 52 U. Tor. L. J 4, 349 (2002).

²⁴ See *Id.* at 354.

²⁵ *Id.* at 351.

²⁶ *Id.*

²⁷ See *supra* note 11 (When statuses are different, *Li* is different).

the hatred or wrong (伸冤).²⁸ One was encouraged to repay a wrong with righteousness – no selfishness should be allowed.²⁹

Unlike the attention corrective justice pays to the equalization of gain and loss between the parties, Confucianism discourages litigation and suggests that minor gain or loss be neglected.³⁰ Those who enforce the law should follow the principles without bothering with details.³¹

Establishing legal rights through trial in an open court was never a favorable or noble solution favored by Confucianism. “A citizen who thought that rules of li were neglected by someone better seek an equitable solution by peaceful discussion than accentuate the existing discord by insisting on his rights or calling in a judge.”³² Confucius considered “the state of no litigation the ultimate end.”³³ In Confucius’ opinion, in trial, Confucius himself would behave no differently from anyone else.³⁴

Instead of advocating for the compensation of minor loss in an open court, Confucianism provided another approach to achieve financial success: avoiding litigation and seeking self-cultivation. The feudal system of proportional distribution of wealth was based on status. Confucius was of the opinion that self-cultivation would allow people to advance in the social hierarchy. Confucius also provided a road map for one to achieve his ideal social status. Another classic, the Great Learning, described the detailed steps a person could undertake to cultivate himself.³⁵

When one becomes a person of great virtue through self-cultivation, one will be awarded prestigious social status and appropriate property status. One of the Confucian Classics, the Doctrine of the Mean, provides that: “a great mind (or a mind with great virtue) shall get the status that he deserves, the wage that he deserves, the fame that he deserves, the longevity that he deserves.”³⁶ Again, such distribution was solely based on social status rather than through eliminating injustice by undoing wrongful gain or loss, as corrective justice would require.

C. Family Rather than Individual as the Basic Unit to Bear Legal Capacity

Monetary damage is a universal remedy for torts. However, what would happen in a society where the tortfeasor does not own property on his own? In feudal China, property was owned by the household and managed by the head of the household. The

²⁸ See Deng Feng, *supra* note 22 at 22.

²⁹ See Chu Hsi’s commentary on chapter 14 of the Analects.

³⁰ See Deng Feng, *supra* note 22 at 30. Maintaining the system or big principles should be at the cost of tolerating “minor conflicts or loss” in the law’s enforcement.

³¹ See *id.* at 31.

³² See Jianfu Chen, *supra* note 10 at 11.

³³ 《论语》 [The Analects] Chapter 12.

³⁴ *Id.*

³⁵ Such steps include to examine the things exhaustively, to allow knowledge to arrive at the highest point, to become true in one’s thoughts, to rectify one’s mind, to cultivate one’s person, to harmonize one’s household, to have the state well governed, to bring harmony to the world (格物, 致知, 正心, 修身, 齐家, 治国, 平天下。) See generally 《大学》 [the Great Learning].

³⁶ See generally the Doctrine of the Mean; see also Deng Feng, *supra* note 22 at 18.

parental authority over the child's property can be summarized as prohibitions against "bie ji yi cai" – establishing a separate household and alienating family property.³⁷

Chinese feudal law subordinated individual rights and interests to those of the family. Accordingly, family members bear legal responsibilities jointly and the head of household controls the personal and property rights of the members within the household on behalf of the family.

The concept of family was the fundamental concept in Confucianism and the concept of state was just an extension of that of family. Individuals were no more than members of a family or a social group; there was little significance for their separate existence, least of all the appreciation of liberty and individual rights.³⁸ As a result, the head of household, usually the husband, possessed absolute parental authority over children's property and civil liberty. Thus, children had virtually no rights before their elders and a subject could assert no rights against the emperor. Throughout Chinese history, children regardless of age were prohibited from being non-filial or disobedient to their parents and grandparents, alienating the property out of the household or having their own property, and getting married without both parents' approval and a marriage broker's official set-up.³⁹

D. Remedies for Property Damage and Personal Injury

When property was damaged, feudal Chinese codes universally provided remedies of restitution or monetary compensation.⁴⁰ The tortfeasor would also be responsible to the government for the amount of Zang (赃, property acquired through illicit activities that is to be returned) along with a tariff, a penalty calculated by statute given the type and degree of wrong committed, which sometimes came with physical punishments.⁴¹ Whether the physical punishment would be applicable depended on the ownership and social value of the property damaged. When the damage did not involve government, and the conduct was not intentional, no punishment was applicable. Civil remedies were applicable to torts such as accidental killing or wounding of a domestic animal, loss or damage of privately owned goods, trees or crops.⁴²

Feudal Chinese codes dealt with personal injuries arising out of "beating and fighting."⁴³ Unlike Roman law during the same period, in feudal China, physical punishment in most circumstances was the sole remedy and monetary remedies (to compensate for economic losses) were usually not allowed.⁴⁴ Liability for personal injuries from beating and fighting was determined by several factors, including the statuses of the offender and the victim, their relationship, the type of implement by

³⁷ See for example, article 155 of Tang Code [诸祖父母、父母在而子孙别籍异财者，徒三年]; see also article 87 of Great Qing Code.

³⁸ See Jianfu Chen, *supra* note 10 at 12.

³⁹ See Paul G. Von Mollendorff, *The Family Law of The Chinese* 42 (Kelly & Walsh 1896).

⁴⁰ See Geoffrey MacCormack, *Traditional Chinese Penal Law* 225 (Edinburgh University Press 1990).

⁴¹ See generally *id.*, 210–230.

⁴² See *id.* at 225.

⁴³ See Geoffrey MacCormack, *supra* note 40 at 196.

⁴⁴ See *id.* at 197.

which the injury was caused (hand or feet, other objects or military weapons), the nature and extent of the injury, and to what degree the injury worsened after a period of time.⁴⁵ Suitable penal and physical punishments and, in some circumstances, monetary damages were calculated according to these factors. Take the Tang Code, for instance: in inflicting the injury, the use of hand or feet would receive lesser punishment (40 blows with light bamboo sticks) than the attempted use of a military weapon (100 blows with heavy bamboo sticks).⁴⁶ In the latter case, if an injury was inflicted, the punishment would be increased to penal servitude for two years.⁴⁷

E. Fault Did Matter

Throughout feudal Chinese law, fault was not deemed an indispensable element in finding liability but it did matter in determining the appropriate punishment. When there was no fault, lesser punishment would be expected. When sentiments and reasons came into play, the degree of fault the wrongdoer possessed decided the degree of punishment associated with the wrong. Exonerations were rare.

Let us take non-filial battery cases, for example. Several cases can be found in the published case reports *Xing An Hui Lan* (*A Comprehensive Report of Criminal Cases*). In each of these cases, a son was sentenced to immediate beheading for beating his parents. In the first case, a father got angry with his son when he saw the son bringing home fish and liquor. The father grasped the braids of his son and beat him. The son took a knife to cut his braids in order to release himself. As a result, he cut his father's wrist.⁴⁸ In the second case, when the father tried to stop a fight between his son and daughter-in-law, he was mistakenly hurt by a pair of scissors that his son used to attack his cheating wife.⁴⁹ In the third case, a mother tried to stop a fight between brothers and was hurt by mistake as a result.⁵⁰ However, special consideration was given to the circumstance that the children did not intend to beat their parents and they were resentenced to beheading with reprieve in jail.⁵¹ As we can see, fault did matter and the absence of fault might reduce the sentence or punishment to a lesser degree. However, the absence of fault did not exonerate the wrongdoer.

⁴⁵ See *id.* at 194.

⁴⁶ See *id.*

⁴⁷ See the Tang Code, article 465.

⁴⁸ See *Xing An Hui Lan* 2 13a–14b (Quoting Ch'ü, T'ung-tsu *supra* note 8 at 44).

⁴⁹ See *id.* 2, 8a–11a.

⁵⁰ See *id.* 2, 11a–12a.

⁵¹ See Ch'ü T'ung-tsu, *supra* note 8 at 45.

3. LEGAL WESTERNIZATION IN CHINA AND TORT LAW IN THE REPUBLIC OF CHINA

A. Legal Westernization and its Battle with Pre-existing Social Norms

i. The codification process

The idea of westernizing Chinese law arose at the end of the Qing Dynasty (1644–1911). Immediately, the choice was made to adopt continental European civil law. Modernization of the law was deemed a last resort to save the Qing Dynasty, and at the same time forced by foreign powers in order to “achieve maximum protection for their citizens and property interests in China; and to make optimum use for their own benefit.”⁵² China had seen its neighbor Japan prosper by modernizing its legal system, modeling it on German law. Also, civil law was believed to be far more systematic and easier to navigate than common law. Moreover, since it was based on written texts (much more than on judicial rulings and reasonings), civil law fit China’s written law tradition of over a thousand years. In 1901, China started drafting the first civil code of China – the Draft of Civil Code of Great Qing (Da Qing Min Lv Cao An) and also a set of modern statutes like those commonly seen in civil law countries such as Germany, France and Japan.⁵³ The first three books of this code were General Principles, Law of Obligations (*obligatio*) and Law of Rights *in rem* drafted by Japanese jurists because these laws were largely civil law concepts that had never appeared in Chinese history. China had its own scholars draft the last two books (Family and Successions) that were mainly based on Chinese customs.⁵⁴ However, the Qing Dynasty came to an end in 1911 before the civil code was officially enacted. Still, the draft civil code produced was soon applied as official law by the modern courts established by the Qing Dynasty’s immediate successor, the Republic of China, before its own civil code was officially promulgated.

The Nationalist (Kuomintang) government of China promulgated the Civil Code of the Republic of China (ROC) in 1929, which was modeled on the BGB and the first Civil Code of China and included five books: General Principles, Obligations, Rights in rem, Family and Successions. This Civil Code is still being used in Taiwan.

⁵² See Gene T. Hsiao, *supra* note 1 at 4.

⁵³ Other major statutes that had been drafted include Draft of Commercial Code of Great Qing [Da Qing Shang Lv Cao An], Draft of Transaction Law [Jiao Yi Hang Lv Cao An], Draft of Law of Bankruptcy [Po Chan Lv Cao An], Draft of Insurance Rules [Bao Xian Gui Ze], Draft of Code of Civil Procedure [Min Shi Su Song Lv Cao An], Draft of Code of Criminal Procedure [Xing Shi Su Song Lv Cao An].

⁵⁴ See Zeng Xianyi, *supra* note 7 at 264–265.

ii. The battle between the customs, feudal law and the imposed foreign law

a. The effectiveness of the transplants: a conflicting picture Though all the official laws were westernized, the effectiveness of this dramatic legal transplant over Chinese society remains controversial. It has been said that:

owing to their alien concepts and their highly technical vocabularies, borrowed mainly from German and Japanese, these codes were neither relevant to the realities of Chinese life nor comprehensible to laymen. In consequence, they (the codes) had little effect on Chinese society; for all practical purposes their only use was to persuade the foreign powers to abrogate their extra-territorial rights.⁵⁵

On the other hand, with a class of “properly” western-educated lawyers in place, the new laws and doctrines were appreciated and carried out by the judiciary (as we can see from the published court opinions discussed below), which is contrary to the above observation that the imposed law was not relevant in reality.

These conflicting observations might both hold some truth. There must have been a fraction of society who were in a financial position to take advantage of the imported judicial system. It might also be explained by understanding the roles of customs and the previous feudal law, then known as “the law present in force” in the system.

b. The role of customs Long before the enactment of the Civil Code of the Republic of China, the Supreme Court discussed the possible sources of law, and the degree of their authority in civil cases, in a case decided in the first few years of the Republic (1912): “[c]ivil cases are decided first according to express provisions of law, in the absence of express provisions, then, according to customs, and, in the absence of customs, then according to legal principles.”⁵⁶ When it came to the application of the customs, the court held that “[i]f a party alleges certain customs and the court finds that they exist and are valid according to law, they shall be applied to the exclusion of ordinary principles.”⁵⁷

The validity of a custom was defined as:

the validity of a custom is of course based on immemorial usage and common acceptance, but the matter it concerns must also be one that has not been expressly provided for by law or the usage is at variance with the provisions of only a non-obligatory law. If however the usage coincides with the provisions of some law, such usage is nothing more or less than the observance of law and no custom can result therefrom.⁵⁸

Also, the rules determining the validity of a custom were summarized by the court as “four essentials”:

⁵⁵ See Gene T. Hsiao, *supra* note 1 at 5.

⁵⁶ (1) 2nd yr. A.C. 64 (quoting Joseph En-pao Wang (ed.), *Studies in Chinese Government and Law: Chinese Supreme Court Decisions regarding General Principles of Civil Law, Obligations and Commercial Law*) 1 The Commission on Extra-Territoriality (Beijing 1923).

⁵⁷ (2) 4th yr. A.C. 2354 (quoting *id.*).

⁵⁸ (7) 2nd yr. A.C. 3 (quoting *id.* at 2).

(1) It must have been observed by people generally and immemorially. (2) It must have been repeatedly observed by people as law. (3) The matter it concerns must be one for which there is no express provision and (4) it must not be contrary to public policy or interest.⁵⁹

The Supreme Court therefore held that “[t]hough customs prevail where express provisions of law are wanting, they are not *ipso facto* binding.”⁶⁰

c. Feudal law as law present in force Though Qing, the last feudal dynasty, came to an end during the Xinhai Revolution in 1911, its laws in civil and commercial areas were still valid before the enactment of the Civil Code of 1929. In 1914, the Supreme Court confirmed that

[u]ntil the Civil Code of the Republic is promulgated the “Law Present In Force” of the Qing Dynasty, except the penal part and those that are repugnant to the existing system of government, continues to be in force. Though it was called the Penal Code, its provisions relating to civil and commercial matters are numerous; it must not therefore merely on account of its appellation be taken to have been repealed.⁶¹

B. Tort Law in the Republic of China (1911–1949)

i. Familial to individualistic law

One of the most significant reforms in terms of tort law was the independence of the legal personality and the recognition of the individual as the subject of rights and duties.

In his introduction to the English translation of the ROC Civil Code, Foo Ping-shung, the chairperson of the civil codification commission of the legislature (Li Fa Yuan) cited Sun Yat Sen, the founder of ROC, to support the legislative transition from familial to individualistic.⁶² According to Sun Yat Sen, for China to become “a real state in the modern sense of the world,” it was necessary to “substitute for the primitive notion of unity of clan or family, the notion of the population formed by these clans or families.”⁶³ Sun Yat Sen predicted “the harmonious future of humanity lies in the combination of individual and family with individual taking precedency over family.”⁶⁴ “The individual must seek his own gratification in such development of his own natural abilities as is most likely to contribute to the general welfare.”⁶⁵ Therefore, “to enable the citizens to make use of their personal abilities to the best interest of their country, it was imperative that the excessive grip of the old familial ties over the individuals should be loosened.”⁶⁶ He also stressed the universal value of the individualism of law. In his opinion, “the views expressed on this subject [individualism] are not particular to

⁵⁹ (7) 2nd yr. A.C. 3 (quoting *id.* At 2).

⁶⁰ (9) 4th yr. A.C. 1276 (quoting *id.*).

⁶¹ (3) 3rd yr. A.C. 304 (quoting *id.* at 1).

⁶² See Ching-ling Hsia, *Civil Code of the Republic of China (English translation)* (1930) Foo Ping-Shueng, Introduction xx.

⁶³ *Id.* xxv.

⁶⁴ See *id.*

⁶⁵ *Id.*

⁶⁶ *Id.* xxv.

the Kuomintang. They may be found in the political programs of all the advanced democratic parties of the world.”⁶⁷ Also, in his opinion, the Kuomintang Party sought to “secure a better and more equitable distribution of wealth among the individuals” through the Civil Code.⁶⁸

Article 7 of the Constitution of the Republic of China provides that “[c]itizens of the Republic of China, are equal before the law regardless of the sex, age, race, religion, social class, and their association with any particular political parties.” Also, the Civil Code provides that the legal capacity of a person begins from the moment of birth and terminates at the moment of death. Moreover, such capacity cannot be waived by a person.⁶⁹ Therefore, only the tortfeasor himself is bound to compensate the victim for damage incurred.⁷⁰

Since this time, it has been the consensus that civil legal capacity lies in every natural and legal person rather than a family. For example, in a case decided in the third year of the ROC regime (1914), the Supreme Court stated the following principle:

[a] tortfeasor is of course bound to compensate the injured party, but this obligation belongs only to the tortfeasor himself. If his wife was not privy to his tort at the time and is not in possession of his property, she cannot be made to discharge his obligation with her own property.⁷¹

ii. Tort law as a source of the obligations

Part V of Book II of the Civil Code of the ROC is dedicated to torts. Tort is categorized as one of the causes that give rise to obligations, along with contract, unjust enrichment, management of affairs without mandate, and conferring of authority of agency.

The new tort law was structured on a fault liability regime and this was manifested in article 184 (§1), according to which “[a] person who, intentionally or by his own fault, wrongfully injures the rights of another is bound to compensate him for any damage arising therefrom. The same rule applies when the injury is done intentionally in a manner contrary to the rules of good morals.”⁷²

According to the Supreme Court, there are three conditions to establish a tort liability, including 1) willful conduct or negligence of the wrongdoer; 2) damage suffered by the injured party; and 3) the damage must have resulted from the willful conduct or negligence. The liability does not exist if any one of the three conditions is not satisfied.⁷³

The doctrine of negligence *per se* was introduced in article 184 (§2). It provides that “[a] person who violates a statutory provision enacted for the protection of others is presumed to have been at fault.”⁷⁴

⁶⁷ Id.

⁶⁸ Id. Xxi.

⁶⁹ See 1930 Civil Code of Republic of China article 6, article 16.

⁷⁰ See id. article 184.

⁷¹ (578) 3rd yr. A.C. 290 (quoting *supra* note 56 at 174).

⁷² 1930 Civil Code of Republic of China (ROC Civil Code) article 184 (§1).

⁷³ See (577) 5th yr. A.C. 4 (quoting *supra* note 56 at 174).

⁷⁴ See ROC Civil Code article 184.

When it came to issues that might be subject to strict liability regime in common law, and fault-based liability in German civil law, it was apparent that the Civil Code took the German side, where exercise of reasonable care can exempt defendants from liabilities that would be subject to strict liability regime in common law where absence of fault is irrelevant in determining liability.

Employers' vicarious liability is a useful example. An employer would be jointly liable for an employee's tort in the performance of the employee's duties; however, the Civil Code allowed the exercise of reasonable care to exempt the employer from the vicarious liability.⁷⁵ Nevertheless, as the deep pocket, the employer will not be completely immune from paying damages when the employee is poor, and the employer, though not at fault, has the means to pay.⁷⁶ Discretion is given to the court to give relief after evaluating the financial statuses of the employer and the injured party.⁷⁷ Also, an employer is not liable for torts committed by an independent contractor unless the employer was "at fault in regard to the work ordered or his instructions."⁷⁸

Likewise, exercise of reasonable care would exempt the possessor of an animal or owner of a premises from liabilities caused by the animal or the defective condition of the premises.⁷⁹

Another notable feature was the introduction of comparative negligence by the Supreme Court. The court held that "[w]henver damages are claimed for tort and the injured party has been guilty of contributory negligence, the court may reduce the amount of damages according to the degree of negligence."⁸⁰

As a legal transplant of BGB §830, article 185 of the Civil Code imposed joint liability for torts committed by multi tortfeasors.⁸¹ Also, if the tort was committed by an unknown tortfeasor within a group of participants, every member of the group would be held jointly liable.⁸²

4. TORT LAW IN THE COMMUNIST REGIME

A. Denial of Private Law

After World War II and the Chinese civil war, the Civil Code of the Republic of China was abolished along with other ROC codes and laws upon the founding of the People's Republic of China in 1949. No official law (neither statutes nor case law) was in place to deal with private law until the economic reform at the end of the 1970s. The first set of rules regulating torts appeared in the 1986 General Principles of Civil Law.

⁷⁵ See *id.* article 188.

⁷⁶ See *id.*

⁷⁷ See *d.*

⁷⁸ See *id.* article 189.

⁷⁹ See *id.* articles 190, 191.

⁸⁰ (587) 5th yr. A.C. 1012 (quoting *supra* note 56 at 176).

⁸¹ See ROC Civil Code article 185.

⁸² See *id.*

In the first three decades of the Communist regime, tort law was missing along with the private ownership of means of production and contractual transactions. Tort law lost its practical significance when private ownership and contractual freedom were deemed to be illegitimate, and when the protection of personal rights also had to give way to massive political changes taking place during political campaigns such as the anti-rightists campaign and the Cultural Revolution in those 30 years. Though there were civil rights protected by the 1954 and 1975 Constitutions, these bills of rights bore little practical significance, due to the lack of implementing legislation. As a result, the Constitutions were barely applicable in practice. In this period of time, tort law only existed in customs, with some special types of tort in special statutes such as the Environment Protection Law and the Patent Law.

B. Overview of Contemporary Chinese Tort Law

In the late 1970s, after the Cultural Revolution, upon the adoption of the reform and openness policy, China reintroduced private ownership in both rural and urban areas through the introduction of a land contract system and urban business households. Through such programs, farmers were allowed to retain the surpluses of grain above their assigned quotas and business households were allowed to operate small-scale businesses. Financial incentives and autonomy were introduced to improve the proficiency and profitability of state-owned enterprises. At the same time, China grew to become the world's second largest recipient of foreign direct investment. All these changes called for more protection of private ownership and personal liberty, which was essential to promote the business incentive and motivation that continued to stimulate economic growth. Private law was reintroduced as a result under the framework of European continental civil law. Thus, contemporary Chinese law recognizes four sources that give rise to an obligation: tort, contract, unjust enrichment and *negotiorum gestio*.⁸³

As noted above, the first piece of written law that introduced the general principles and rules of tort law was the General Principles of Civil Law (GPCL), which became effective on January 1, 1987. Though GPCL also provides the foundation of Chinese tort law, rules on various perspectives of the tort law were fragmentary and can be seen in various parts of the GPCL, which was therefore lacking an organized logical structure on tort law. After years of the drafting process, the Tort Liability Law (TLL), as the first post-1949 tort law code and part of China's continued effort in completing its own civil code, was enacted in 2009 and became effective on July 1, 2010. Other than these two major statutes, several of the Supreme Court's judicial interpretations (which are issued in a codification-like form and are not case specific), the Supreme Court's replies to lower courts' specific inquiries on the interpretations of particular points of law, and several special statutes also deal with tort law. The interpretations on tort law can be seen in: the Supreme Court's Opinions on the implementation of General Principles of Civil Law (1988); the Supreme Court's notice regarding several issues in the application of the Tort Liability Law (2010); the Supreme Court's

⁸³ See for example 魏振瀛 [Wei Zhengying], 民法 [Civil Law] 301 (Higher Education Press/Peking University Press 2000).

interpretations regarding issues arising in the adjudication of personal injury cases (2003); the Supreme Court's interpretations on adjudicating moral damage claims arising out of tort liability (2001); the Supreme Court's replies regarding whether a trademark owner can be sued as a defendant in a product liability litigation (2002); and the Supreme Court's replies regarding whether a victim's moral damage claim against a criminal defendant can be accepted by people's courts (2002). Statutes that regulate specific tort law issues include: the Trademark Law (1982); Patent Law (1984); Environment Protection Law (1989); Copyright Law (1990); Product Quality Law of the PRC (1993); Law on the Protection of Consumer Rights (1993); Marine Environment Protection Law (1999); and Right in rem Law (2007).

Contemporary Chinese tort law has adopted the fault liability regime with the supplements of strict liability and "liability in equity." Though tort law damage is still considered compensatory in nature, punitive damages are allowed in the areas of product liability if the producer's intention or knowledge of the defect can be proved.⁸⁴ The victim can also recover for moral damage arising out of torts to personal rights and interests that have caused her severe mental distress.⁸⁵ In addition, in contrast to the ROC Civil Code article 188, vicarious liability is based on non-fault liability following the Anglo-American and French traditions – an employer will be jointly liable for the tort committed by an employee during the course of employment even if the employer has exercised due care in the selection and control of the employee.⁸⁶

C. The Scope of Rights Protected under Chinese Tort Law

Every tort law system has to deal with a fundamental question – do all legal rights have to be protected by tort law? If one only looks at the wording of civil codes, one might be under the impression that there are tort law systems that protect all legal rights from being infringed while other systems might only protect a select list of rights enumerated in the civil code. These two representative positions can be drawn from the French and German civil codes. The French Civil Code provides that "[a]ny act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it."⁸⁷ On the other extreme, the German Civil Code is very specific about the scope of rights protected. Article 823 (§1) provides that "[a] person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this." The TLL adopts the German style but extends the list of rights protected. Article 2 (§2) of the TLL provides that:

[c]ivil rights and interests used in this Law shall include the right to life, the right to health, the right to name, the right to reputation, the right to honor, right to image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right,

⁸⁴ See TLL article 47.

⁸⁵ See TLL article 22.

⁸⁶ For example, see Supreme Court's Interpretations on Personal Injury Cases article 9.

⁸⁷ French Civil Code article 1382.

exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interest.⁸⁸

Does this mean that French civil law protects all possible legal rights without limitation, while the German and Chinese civil laws protect only the enumerated rights and ignore those rights that are not specified in the code? By examining actual cases in each jurisdiction, it appears that this is not the case. Let us take German tort law, for example.

According to the enumerated list set forth by article 823 (§1) of the German Civil Code, along with the wording of article 253 of the same code, a plaintiff was not supposed to recover for injuries to her dignity or privacy.⁸⁹ However, in a 1954 case the German Supreme Court protected one's right to privacy by declaring a newspaper had violated the "another right" under article 823 (§1) by publishing a letter written by a lawyer on his client's behalf.⁹⁰ Since such a right is supposed to be protected by the Constitution, the court reasoned that "arts. 1 and 2 of the German Constitution protect human dignity and personal freedom, and without a civil action, this protection would be incomplete."

Does Chinese law impose civil liability to protect rights granted by public law? One of the leading tort law textbooks in China has argued that only civil rights and interests should be protected by Chinese tort law; therefore, rights and interests protected by public law shall not fall within the scope of rights protected under article 2 (§2).⁹¹ One typical example listed in the book was the right to receive education, which, in the author's opinion, is a constitutional right that shall not be remedied by imposing tort liability.⁹²

Yet, in a most famous Chinese case that indicated the promise of the judicialization of the Chinese Constitution, the case of Qi Yuling, the Chinese Supreme Court imposed tort liability on the defendant's infringement of the right to receive education, which is a constitutional right.⁹³

In this case, the plaintiff, Qi, went to junior high school with the defendant, Chen. Both of them graduated in 1990 and took the same entrance exam in order to further their education at a vocational business school, with guaranteed job upon graduation provided that they graduate from this vocational business school.⁹⁴ Qi did well and was supposed to receive the notice of admission from the business school; however, Chen,

⁸⁸ TLL article 2.

⁸⁹ See James Gordley and Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law 254* (Cambridge University Press 2006).

⁹⁰ See *id.* 255.

⁹¹ 王利明, 周友军, 高圣平 [Wang Liming, Zhou Youjun, Gao Shengping], 《中国侵权行为法教程》 [Textbook on the Tort Liability Law of China] 61 (People's Court Press 2010).

⁹² *Id.*

⁹³ A large amount of scholarly attention has been devoted to this case, whose significance was compared to that of *Marbury v. Madison* in the U.S. Before this case, the Constitution was not cited as a source of authority in China. See generally Robert J. Morris, *China's Marbury: Qi Yuling v. Chen Xiaoqi – The Once and Future Trial of Both Education & Constitutionalization*, 2 *Tsinghua China Law Review* 273, 274 (2012).

⁹⁴ See Supreme Court Gazette No.5 2001 158–161.

who did not do well, conspired with her father along with the junior high school to intercept Qi's notice of admission without Qi knowing, and forged documents that would allow Chen to use Qi's name to attend the vocational school.⁹⁵ Chen subsequently attended this vocational business school under Qi's name. Chen graduated and started working at the Bank of China's local branch – the guaranteed employment.

The plaintiff did not realize the identity theft until 1998, when she immediately sued for torts that violate her right to name as well as the right to receive education. The trial court only recognized the tort towards her right to name because right to receive education was not a civil right. On appeal, the provincial high court petitioned to the Supreme Court to seek interpretation on whether violation of a constitutional right can be remedied by imposing civil liability since the right to receive education is not a listed right under the GPCL. The Supreme Court in its reply expressly stated that the infringement of the plaintiff's constitutional right to receive education had resulted in the damage. Therefore the defendant was obliged to bear civil liability.⁹⁶ As a result, not only did the plaintiff recover losses arising out of the damage to the right to name, which included the tuition to repeat the junior high and additional tuitions for another trade school; but she was also entitled to the consequential economic loss, which included all the money Chen earned under Qi's name along with the moral damage.⁹⁷

This case proved that Chinese courts were able to expand the protection of rights outside a seemingly definite list of rights to be protected by tort law. It should however be noted that the Supreme Court's interpretation mentioned above was abolished in 2008 by a Supreme Court notice stating that this 2001 interpretation "discontinued to be applicable."⁹⁸ It remains controversial whether the constitutional rights are to be protected by civil courts, but the chances are that courts will still remedy the loss without citing the Constitution.⁹⁹

D. The Liability Regimes

i. Overview

Chinese tort law's system of liability regimes was established by the GPCL, remained unchanged through the years and was reaffirmed by the Tort Liability Law in a more organized manner. Article 106 of the GPCL sets forth the two regimes where tort liability can be found: fault liability in general and strict liability when stipulated by law. This general statement has been rephrased by article 6 and article 7 of the TLL. Wherever fault is not present, and strict liability is not available under the law, courts have the discretion to find liability in equity and ask the victim and the tortfeasor to share the losses under the principle of fairness.¹⁰⁰

⁹⁵ See *id.*

⁹⁶ (2001) Supreme Court Interpretation No.25.

⁹⁷ See Supreme Court Gazette No.5 2001 158–161.

⁹⁸ See Supreme Court Judicial Interpretation No.15 (2008).

⁹⁹ See generally The abolition of the first case in the judicialization of Constitution, at
¹⁰⁰ See article 132 of the General Principles of Civil Law and article 24 of the Tort Liability Law.

ii. Fault liability regime

a. What does fault mean? Existence of fault is the general requirement for finding of tort liability. The second paragraph of GPCL article 106 provides that “[c]itizens and legal persons who through their fault infringed upon state or collective property or the property or person of other people shall bear civil liability.” Though bearing obvious Communist characteristics by emphasizing the priority of the protection of property interests of state and collective, article 106 of GPCL functions as article 823 (1) of the BGB and articles 1382–1383 of the French Civil Code in requiring the existence of fault or, in an interchangeable term, of an intentional or negligent act as a requisite for finding liability. Even closer to the western view, the first paragraph of article 6 of the TLL restates this principle in the pure private law context without an emphasis on the protection of state interest: “[o]ne who is at fault for infringement upon a civil right or interest of another person shall be subject to the tort liability.” The elements that constitute fault liability thus include infringement of a right or interest of another person, damage, the causation between the act and the damage, and fault.¹⁰¹

Does fault in Chinese law mean the same thing as that in French and German law? Virtually all leading treatises and textbooks on Chinese tort law will provide the same answer: fault entails acts that are intentional or negligent.

Intention means “the mental state of the actor who knows that his act will give rise to the consequence of damage, yet was willing to let it happen or was insensitive to the consequence.”¹⁰² The two requisites of intention are 1) the fact that the actor could foresee or should have foreseen the consequence; and 2) the mental state of the willingness to let it happen or insensitivity to the consequence.¹⁰³

Negligence means that “the actor should have foreseen the negative consequence, but failed to foresee it due to his neglect or foresaw it with the slack mindset and the belief that consequence could be avoided.”¹⁰⁴

On the determination of fault, the commentaries provide that fault is a subjective state of mind; however, the same texts emphasize that standards in evaluating fault have to be objective.¹⁰⁵ Such objective standards are to be drawn from: 1) the breach of statutes and administrative regulations; the fact that the actor breached a legal duty imposed by statutes or administrative regulations is sufficient to determine the mental fault of the actor; and 2) the breach of a reasonable person’s duty of care.¹⁰⁶

Though there was never major controversy in Chinese academia regarding the dichotomy of fault, in recent literature published in English, many scholars have tended

¹⁰¹ See Chen Fei, *supra* note 101 at 14–15; see also Wei Zhengying, *supra* note 83 at 686–692.

¹⁰² See 王胜明 [Wang Shengming], 《中华人民共和国侵权责任法释义（第2版）》 Interpretations on Tort Liability Law of PRC (2nd Edition) 45 (Official Interpretations by National People’s Congress) (Law Press 2013); see also Fei Cheng, *Interpretations on Tort Liability Law of People’s Republic of China* 14 (Law Press 2012); Wei Zhengying, *supra* note 83 at 692.

¹⁰³ See Wei Zhengying, *supra* note 83 at 692. See also Wang Shengming, *supra* note 102 at 45.

¹⁰⁴ See Wei Zhengying, *supra* note 83 at 692. See also Cheng Fei, *supra* note 101 at 14.

¹⁰⁵ See Wei Zhengying, *supra* note 83 at 692. See also Cheng Fei, *supra* note 101 at 14.

¹⁰⁶ See Wei Zhengying, *supra* note 83 at 692.

to investigate the real meaning of fault in Chinese tort law and to understand what it entails, given the lack of definitions in the relevant statutes. It has been argued that fault (*guocuo*) in Chinese means negligence (*guoshi*) and, therefore, negligence is the basic tort liability regime according to article 6.¹⁰⁷ Another position is that negligence is only an indication of fault rather than what gives rise to a tort cause of action.¹⁰⁸ A third view denies the intention and negligence dichotomy because of the lack of definitions of fault and negligence in the TLL.¹⁰⁹ In the latter view, the difference between intention and negligence may not matter given the fact that fault only refers to “the breach of the duty of care to which a reasonable person must adhere.”¹¹⁰

In plain Chinese, the term *guocuo* simply means “having committed wrong or made a mistake.”¹¹¹ When defining *guocuo*, intention is irrelevant. *Guoshi* means “careless mistakes.”¹¹² When defining *guoshi*, the absence of intention is the essential.

Admittedly, the absence of clear definitions or doctrines regarding the main concepts in the GPCL, TLL and Supreme Court interpretations does create difficulties for the judiciary, who lack the power to define these concepts and create doctrines. In practice, judges usually can only quote the written laws word for word as authority, without revealing their reasoning to the readers. The courts’ indifferent use of the term “fault” is consistent with the practice of literal application of statutes among all Chinese courts. In fact, omission of reasoning and explanation in judicial opinions is an effective way to avoid reversal or career setback in the Chinese judiciary. However, the clear and widely accepted jurisprudence within the legal circle does provide judges with a clear road map when there is nowhere to look. After an examination of cases decided after the promulgation of the TLL, it is reasonable for one to infer that courts often use the term “at fault” without specifying whether the act was intentional or negligent. However, this does not mean that fault is interchangeable with negligence or that there is no distinction between intention and negligence.

Probably, the reality is that courts do distinguish intention from negligence but when they write their official opinions they want to make sure the final outcome comes exactly from the wording of the statutes. In circumstances where the TLL provides terms such as intention or negligence, courts do distinguish negligence from intention. For example, in a case where the plaintiff was injured by a dog, a domestic animal, and sued the animal’s owners for damage in a strict liability case, the court specifically

¹⁰⁷ See Jacques Delisle, *A Common Law-Like Civil Law and a Public Face for Private Law: China’s Tort Law in Comparative Perspective*, in Lei Chen and C.H. (Remco) van Rhee (eds), *supra* note 3 at 354.

¹⁰⁸ See Mo Zhang, *supra* note 3 at 435. It means that the existence of negligence only indicates the existence of fault, while it is the existence of fault that gives rise to a cause of action.

¹⁰⁹ See Yan Zhu, *supra* note 3 at 342.

¹¹⁰ See *Id.*

¹¹¹ See 古代汉语词典 [Dictionary of Classical Chinese] 526 商务印书馆 [Commercial Press] (2010).

¹¹² *Guoshi* means wrong committed carelessly and without intention [不意误犯, 谓之过失]: Book of Punishment History of Jin [《晋书》●刑法志].

found the plaintiff's conduct to be grossly negligent and therefore that the liability should be mitigated.¹¹³ According to article 78 of the TLL:

where a domestic animal causes any harm to another person, the keeper or manager of the animal shall assume the tort liability, but may assume no liability or assume mitigated liability, if it can prove that the harm is caused by the victim intentionally or by the gross negligence of the victim.

In this case, the plaintiff came to the house of one of the defendants to confront him regarding whether his cow ate her grass.¹¹⁴ After being told that the defendant she was looking for was not home, she refused to leave.¹¹⁵ She decided to sit on the ground right outside the house and wait for the person to come home.¹¹⁶ Since she firmly grasped the door frame and refused to leave, the dog bit her.¹¹⁷ The court held that the plaintiff's behavior here was neither prudent nor reasonable. Since she knew of the existence of the dog and should have foreseen that grasping the door created a risk of being bitten by the dog, her conduct was grossly negligent.¹¹⁸ The court held that the plaintiff should, therefore, be primarily responsible for the injury.¹¹⁹ This finding allowed the court to mitigate the liability and to find that the defendants should be liable for part of the damage only. There are many similar cases where courts do specify whether a conduct is intentional or negligent. Of course, courts are more inclined to clarify their findings when the wording of the statutes themselves specifies such a distinction.

The distinction also matters in product liability claims brought under article 47 of the TLL. Under this article, knowledge of a defect before selling needs to be satisfied for the punitive damage to be applicable.¹²⁰ Therefore, intention needs to be proved by the plaintiff.

b. Presumption of fault The presumption of fault is a supplement to the general fault liability principle that, in certain circumstances stipulated in the statutes, shifts the burden of proof of fault to the defendants, requiring them to prove that they were not at fault so as to exempt themselves from liability. This shifted burden of proof is for the purpose of balancing the interests between the parties and protecting the weaker ones by imposing a heavier burden on those in better positions.

Article 6 (§2) of the TLL states that “[w]here the actor who is presumed to be at fault under the law shall bear tort liabilities unless he can prove he is not at fault.” The presumption of fault is not a unique creation of Chinese law and similar rules can be

¹¹³ (2014) 康民初字第39号 (2014) [Kang Min Chu Zi No.39].

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See TLL article 47.

found under the German and French Civil Codes as well.¹²¹ Unlike the Civil Code of the ROC, the TLL established strict liability regime with regard to several special torts, namely in the case of vicarious liability and of the liability of persons with a duty of supervision.

Among the many illustrations of the application of article 6 TLL, there is the case of facility managers, who are presumed to be at fault for not fulfilling the management duty when a manhole or underground facility causes harm.¹²² The burden of proof is also shifted in the case of harms caused by objects falling off buildings or other constructions.¹²³ Moreover, article 58 of the TLL provides three circumstances where harm is sustained in medical treatments where fault is presumed:

1. violating a law, administrative regulation or rule, or any other provision on the procedures and standards for diagnosis and treatment;
2. concealing or refusing to provide the medical history data related to a dispute;
3. forging, tampering with or destroying any medical history data.¹²⁴

iii. Strict liability

Strict liability is a liability regime that does not require the existence of fault – fault is irrelevant in finding liability. Departing from the pure fault liability regime adopted by the ROC Civil Code, strict liability has been established as a regime of liability since the adoption of the GPCL in 1986.

The general provision that established strict liability is article 106 (§2) of the GPCL, which states that “[c]ivil liability shall still be borne in the absence of fault, if the law so stipulates.” The basis of strict liability is restated in article 7 of the TLL: “[o]ne who shall assume the tort liability for harming a civil right or interest of another person, whether at fault or not, if provided for by law.”¹²⁵

Under contemporary Chinese tort law, torts that are subject to strict liability include product liability,¹²⁶ liability for motor vehicle traffic accidents,¹²⁷ liability for environmental pollution,¹²⁸ liability for ultra-hazardous activities¹²⁹ and harm caused by domesticated animals.¹³⁰

There are two theories regarding whether strict liability under Chinese law is equivalent to liability without fault. The first position is that strict liability is liability without fault as article 7 of the TLL provides that fault is irrelevant.¹³¹ The second position distinguishes strict liability from liability without fault by looking at the

¹²¹ For example, French Civil Code article 1384, German Civil Code articles 831, 832, 833, 834.

¹²² See TLL article 91 (2).

¹²³ See TLL articles 85–87.

¹²⁴ TLL article 58.

¹²⁵ TLL article 7.

¹²⁶ See TLL article 41.

¹²⁷ See TLL article 48.

¹²⁸ See TLL article 65.

¹²⁹ See TLL article 69.

¹³⁰ See TLL article 78.

¹³¹ See Wang Liming, *supra* note 91 at 153.

availability of defenses.¹³² This view emphasizes that, under a strict liability rule, the defendant may still be exempted from liability when the damage is caused by the victim's intention and gross negligence. According to such a position, only "liability without fault" is an absolute liability with no defense available.¹³³ In this perspective, the tort liabilities regarding harm caused by dangerous animals or the failure to take safety measures against an animal in violation of management rules, as regulated under articles 79 and 80 of the TLL, are for instance liability without fault because the tortfeasor would be liable even when the victim was intentional in causing the harm.¹³⁴

5. THE ROLE OF PREVIOUS SOCIAL NORMS IN THE MODERNIZED TORT LAW

A. Liability in Equity – a Compromise between Distributive Justice and Corrective Justice

i. Overview of liability in equity

The fault liability regime is a reflection of corrective justice,¹³⁵ while liability in equity is a liability based on distributive justice¹³⁶ – the foundation of the traditional Chinese legal system. Where a harm that is not subject to strict liability is suffered but neither party was at fault, there would be no recovery under western tort laws. However, letting a victim bear the entire damage has never been the solution preferred by the distributive justice system which China embraces. Distributive justice promotes the even distribution of losses. Therefore, liability in equity became a liability regime that reflects traditional Chinese values and supplements the fault liability regime that is borrowed from the west.

This principle first appeared in article 132 of the GPCL, which provides that "[w]here no party was at fault in resulting in the harm, civil liability can be, according to the actual situations, shared among the parties."¹³⁷ This rule is rephrased in article 24 of the TLL, which provides that "[w]here neither the victim nor the actor is at fault for the occurrence of a damage, both of them may share the damage based on the actual situation."¹³⁸ The allocation of damage here is an allocation based on the property statuses of the parties. The rule, in part a legal transplant from article 406 of the 1922 Russian Civil Code, adheres to the traditional Chinese philosophy of distributive justice.¹³⁹

¹³² Id.

¹³³ Id.

¹³⁴ Id.

¹³⁵ Id. at 171.

¹³⁶ Id.

¹³⁷ GPCL article 132.

¹³⁸ TLL article 24.

¹³⁹ See Wang Liming, *supra* note 91 at 171.

ii. Social status as the determining factor in finding liability in feudal China

Throughout Chinese history, distributive justice rather than corrective justice has been the core standard in Chinese tort law.¹⁴⁰

On the one hand, without the introduction of corrective justice, which relies on the objective, reasonable person standard and duty of care, tort liability functioned to determine the property status and provide restitution when there was damage to another's property.¹⁴¹ The idea was to share the loss evenly. As a result, negligence and fault became irrelevant in determining liability.

On the other hand, parties' social statuses became a factor in determining liability. To aid the weak and suppress the strong has always been the sound governance policy in both governing the country and adjudicating cases. Even for robbers, robbing the rich to aid the needy (劫富济贫) was heroic and commendable behavior for outlaws.¹⁴² In the chapter on the law of punishment of Han Shu (汉书), a leading historical account of the West Han Dynasty, it was pointed out that a sound governance policy should support the weak and suppress the strong (扶弱抑强).¹⁴³ Hai Rui (海瑞), perhaps the most well-known judge in feudal China, commented on this philosophy in adjudicating indeterminable cases:

I suggest that in returning verdicts to those cases it is better to rule against the younger brother rather than the older brother, against the nephew rather than the uncle, against the rich rather than the poor, and against the stubbornly cunning rather than against the clumsily honest. If the case involves a property dispute, it is better to rule against a member of the gentry rather than the commoner so as to provide relief to the weaker side. But if the case has to do with courtesy and status, it is better to rule against the commoner rather than against the gentry: the purpose is to maintain our order and system.¹⁴⁴

All of these efforts were made to help realize distributive justice. What will be the policy benefits in advancing distributive justice? Confucius gave a strong argument: "the head of the state or family shall not be concerned about poverty as much as they should be concerned about uneven distribution (不患贫，而患不均) ... there is no poverty in even distribution of wealth (均无贫)."¹⁴⁵

iii. Financial status as the determining factor in finding liability under liability in equity

Though liability in equity is a rule largely unknown to the West and consistent with traditional Chinese philosophy, it is not a complete innovation by the drafters of the GPCL and TLL. Similarities can be drawn from Russian civil law. Article 406 of the Russian Civil Code of 1922 provided that: "[i]n situations where, in accordance with Arts. 403–405, the person causing the injury is not under a legal duty to recover, the

¹⁴⁰ See Deng, *supra* note 22 at 25.

¹⁴¹ See *id.* at 28.

¹⁴² See Xinhua Dictionary of Chinese. It is considered a positive term. Other similar variations of the phrase include "kill the wealthy to aid the needy" (杀富济贫).

¹⁴³ See Book of Han Dynasty, Chapter of Punishment [汉书●刑罰志].

¹⁴⁴ Ray Huang, 1587: A Year of No Significance: The Ming Dynasty in Decline, 131 (Yale University Press 1981).

¹⁴⁵ See 《论语●季氏》 [Analects, Chapter of Ji Shi].

court may nevertheless compel him to recover the injury, depending on his property status and that of the person injured.” Here, articles 403–405 of the Russian Civil Code of 1922 respectively dealt with fault liability; presumption of fault for ultra-hazardous activities, wild animal keepers and building constructors; and liability for people with limited or no civil capacity. Liability in equity was also a supplement to fault liability where the determining factor in finding liability outside fault was the relatively superior property status.

In China, there are a few unstated rules regarding how liability in equity should be applied. Scholars emphasize that the loss shall be fairly allocated.¹⁴⁶ The wording “actual situations” of articles 132 GPCL and 24 TLL, according to the interpretation of the commentary published by the Supreme Court, refers to the comparison between the financial statuses of the victim and the alleged tortfeasor.¹⁴⁷ The allocation of liability is thus based upon the property status of the parties,¹⁴⁸ and directly related to their respective “ability to shoulder the loss.”¹⁴⁹ Yet losses that can be compensated under a fault liability regime – such as moral and punitive damages – cannot be recoverable under a rule of liability in equity.¹⁵⁰

Though civil liability can be imposed through liability in equity, it is controversial as to whether this liability is the outcome of a legal obligation or of a moral one.¹⁵¹ It has been argued that this form of liability is a “moral aid”¹⁵² that is “based on the charitable moral sentiment of certain people.”¹⁵³ According to this view, liability in equity cannot be imposed by law, but should be the result of a voluntary negotiation between the parties.¹⁵⁴ Under the leading opinion, however, liability in equity is still a liability imposed by law with a socialist moral foundation.¹⁵⁵ It is argued that the obligation to assume this liability is mandated by law rather than based upon the parties’ agreement – judges have the discretion to enforce this liability when the situation warrants its application.¹⁵⁶ Also, the scope of application of such liability shall be limited to the circumstances expressly stipulated by law.¹⁵⁷ Such circumstances include harms caused by people with limited or no civil capacity where such persons have property,¹⁵⁸ or harms caused by people with full civil capacity but under

¹⁴⁶ See Wang, Liming et al., *supra* note 91 at 168.

¹⁴⁷ 奚晓明 [Xi, Xiaoming], 《中华人民共和国侵权责任法条文理解与适用》 [Interpretation and Application of the Tort Liability Law of People’s Republic of China] 185 (People’s Court Press).

¹⁴⁸ Wang Liming, *supra* note 91 at 168.

¹⁴⁹ *Id.* at 169.

¹⁵⁰ See *Id.* at 174.

¹⁵¹ *Id.* at 167.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See TLL article 32.

temporary loss of consciousness,¹⁵⁹ or harms caused by objects thrown out of a building or construction by an unknown person.¹⁶⁰

However, in China's judicial practice, the application of liability in equity is not limited to the above circumstances.¹⁶¹ Rather, the application is extensive and with very few limitations. It seems that, when there is a loss and a deep pocket, damage is often awarded in the absence of fault in adherence of distributive justice and principles of fairness. In a 2011 case, the seller of an electronic car received 20 percent of damage for his personal injury, which was reduced from the trial court's 50 percent award, without proof of either causation or fault on the part of the defendant.¹⁶² After the completion of delivery, without the knowledge or consent of the buyer (a factory), the seller volunteered to carry a part of an electronic car on the factory's premises to facilitate assembly.¹⁶³ The part dropped and hit the plaintiff, when he sustained injury.¹⁶⁴ The appellate court held that neither party was at fault, nor did the defendant cause the injury.¹⁶⁵ Nevertheless, the court awarded 20 percent of the damages applying article 24 of the TLL after taking into account the parties' "actual situations."¹⁶⁶ The unstated reason behind the decision was simple – the defendant had a deep pocket and losses needed to be distributed.

Though sharing the same rule, the Russian courts have been much more cautious in applying this liability regime. One Russian commentator observed: "[w]e know of many cases where the Supreme Court refused to apply Article 406 and know of none where they would have applied it."¹⁶⁷ Article 406 of the Russian Civil Code of 1922, as the Russian textbook just mentioned describes, might have applied only in exceptional cases, where, given the disparity between the parties' financial statuses, it would have appeared extremely unjust to let the victim bear the entire damages.¹⁶⁸ In such cases, courts might have imposed part or full damage upon the defendant.¹⁶⁹ In imposing this liability, the Russian Supreme Court held that causation was essential¹⁷⁰ and exempted

¹⁵⁹ See TLL Article 33.

¹⁶⁰ See TLL Article 87.

¹⁶¹ It has been argued that liability in equity is more about sharing the liabilities and losses than about establishing liabilities. So the application of the principle of liability in equity shall not only be limited to the circumstances stipulated by law. See Wang Liming, *supra* note 91 at 177.

¹⁶² See *Hu v. Guanshan Huifu Brick Factory*, (2011) 衡中法民一终字第 403 号 [Heng Zhong Fa Min Yi Zhong Zi No. 403 (2011)]

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Gsovski, *Soviet Civil Law*, 527 (University of Michigan Press 1946) (quoting Varshavsky, *Obligations arising from injury* 170).

¹⁶⁸ See *id.* at 527.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

the government from the application of the rule,¹⁷¹ for the obvious reason that the government is always the deeper pocket.¹⁷²

The deeper resonance of the liability in equity principle with traditional Chinese culture, as compared with the Russian one, may explain why the principle has enjoyed a wider recognition in China.

B. The Case of Peng Yu – the Battle between Traditional Moral Values and the Law

What happens when a judicial opinion that is fully in compliance with the law results in an unacceptable moral outcome? This question is recurrent in any legal system, but the Chinese one has its own way of dealing with this incompatibility, that is, government-monitored mediation to avoid offending traditional values.

The case of Peng Yu is well known to every Chinese thanks to the judge's elaborate factual and legal reasoning finding liability in equity, in a way which offended the traditional moral values of respecting the old and being a good Samaritan when needed.

In 2006, Ms. Xu, a senior, was knocked down by someone getting off a bus while trying to board the bus.¹⁷³ It was alleged that she was lying on the ground until Peng Yu, a 26-year-old man who had just got off the bus, helped her up and took her to the hospital along with her family. At the hospital Mr. Peng gave Ms. Xu RMB 200 yuan.¹⁷⁴ Ms. Xu was diagnosed with a fracture in the cervix of the left thigh bone and hospitalized. She underwent hip replacement surgery.¹⁷⁵ Later, Xu sued Peng for her personal injury and asked recovery for the losses arising out of the medical expenses, nursing fees and nutrition fees along with moral damages for her mental distress.¹⁷⁶ She alleged that Mr. Peng was the person who knocked her down.¹⁷⁷ Media attention was not drawn to the case until the end of the second session of the trial when Mr. Peng contacted the media arguing that he was a Good Samaritan who voluntarily helped Ms. Xu.¹⁷⁸ The court noted that Peng Yu did not mention this fact as defense until that moment. However, the trial drew national attention and widespread criticism. The existence of the litigation itself offended the traditional Chinese virtue of being a Good Samaritan when help is needed, of respecting old members of society and of aiding the needy. The public feared that, if the rescued was allowed to sue the rescuer for damages, nobody would assist others when in need. A second wave of public anger was triggered when the presiding judge, in applying the liability in equity, awarded Ms. Xu, 40 percent of the physical injury.¹⁷⁹ Moral damages were denied as they could not be claimed under liability in equity. Commentators were of the view that this “single most

¹⁷¹ *Id.* (quoting R.S.F.S.R Supreme Court, Civil Division, Report for 1926, Collection of rulings, 3d, 1932).

¹⁷² *Id.*

¹⁷³ See *Xu v. Peng* (2007) Gu Min Yi Chu Zi No.212 (2007) 鼓民一初字第 212 号.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

idiotic opinion in history written by the judge sabotaged the moral virtues and civilization that have been upheld in China for five thousand years and led the good human nature to evilness.”¹⁸⁰

The popular rejection of the result derived mainly from the fact that the judge applied common sense to exclude the possibility that the defendant sent the victim to the hospital and paid her medical expenses without having been involved in the accident. According to the judge, in contemporary Chinese society, no person of good heart would have sent an injured person whom he did not know to the hospital and paid the medical expenses out of his own pocket without having caused the injury. The judge reasoned that:

[a]ccording to [the] defendant’s statement, he was the first getting off the bus; as a matter of common sense, it is more likely that he was the one who collided with the defendant. If the defendant was simply being a Good Samaritan, he should have caught the actual tortfeasor rather than just helped the defendant up. Also, the defendant should have let the plaintiff’s family take her to the hospital. It was not necessary for him to go to the hospital with the victim. What the defendant did was not consistent with the common sense of being a Good Samaritan.¹⁸¹

It was this “common sense” judgment by the judge that triggered the anger of the public.. Even though the socio-economic situation has changed significantly from the time of the feudal dynasties, the public chose to believe that in modern Chinese society there are still helpers who adhere to Confucian teaching and are willing to go out of their way to help those in need.

The opinion correctly stated that none of the parties was at fault.¹⁸² It also held that Peng caused the fall of Xu and therefore should be responsible for 40 percent of the damage according to the principle of liability in equity.¹⁸³

In passing judgment over the collision between the two, the court applied the preponderance of evidence standard and denied the Good Samaritan argument.¹⁸⁴ Among the facts the court considered were a previous police statement of Peng admitting the collision between the two and denying that he knocked Xu down; the undisputed fact that Peng gave Xu RMB 200 yuan; and the fact that Peng did not bring the Good Samaritan defense until the second session of the trial. Peng’s statement to the police and the fact that he gave her RMB 200 yuan were clearly more persuasive and reliable indicators of the collision between the two than the Good Samaritan defense that was not brought up in the first place. Whenever there is preponderance of evidence in proving the causation of the loss in the absence of fault, the liability in equity under the fairness principle is the appropriate forum to remedy such damage

¹⁸⁰ Shi Hanbing, *Single Most Idiotic Judgment led The Human Nature To Evilness*, at <http://shihb.blog.sohu.com/62983452.html>.

¹⁸¹ See *Xu v. Peng*, *supra* note 173.

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ Article 73 Supreme Court Numerous Rules on Evidence in Civil Litigation.

under the law. It was well within the judge's wide discretion in awarding damage in liability in equity cases according to the property statuses of the parties.¹⁸⁵

Both parties appealed the decision and an angry public demanded a re-trial.¹⁸⁶ As a result, some high-ranking provincial government officials were said to be concerned and got involved in the case, and eventually the case was settled under mediation in the appeal.¹⁸⁷ The government reported to the public that this case had been peacefully resolved.¹⁸⁸ The mediation mechanism promoted in the province was praised by government for its role in the promotion of a harmonious society.¹⁸⁹ It has been said that the settlement was paid by a mysterious third party.¹⁹⁰ At the end of the day, the trial judge lost his judgeship over a legally perfectly written judicial opinion.¹⁹¹

6. CONCLUSION

As early as China adopted the ROC Civil Code, Roscoe Pound made a prediction regarding how the Chinese people would reconcile with the borrowed civil law. He stated: "[i]t is more likely that the people will make over the law imposed upon them than that the people will be made over."¹⁹²

This prediction still holds true half a century later. Law has to gain social recognition to be really enforceable, otherwise it will only apply to a small fraction of the society without touching most people's lives. When this happens, there will always be another set of rules, customary or unofficial, that are recognized by everyone in the community. The narrow application of the 1929 Civil Code in the Republic of China and the persisting vast usage of the customs are prime examples.

In the private law arena, in its codification efforts in the first half of the 20th century China adopted European continental laws on contract, property and torts. After 1949, the Communist ideology seriously challenged the legality of private law, and resulted in the abolishment of the ROC Civil Code and official private laws as a whole. Unlike contract law and property law that were most in conflict between the preservation of Communist ideologies' denial of private ownership and the urgent need to protect private ownership and establish market economy in order to maintain economic growth. With fewer ideological hurdles to jump, the main challenge that Chinese tort law is facing is for the borrowed foreign laws to earn social recognition, especially where they are incompatible with the pre-existing social norms. This often has to be accomplished through a reconciliation between Western rules and rules that are unique to China, such as liability in equity, which reflects the long-standing philosophical foundation of law in Chinese history, and is still well accepted in contemporary Chinese society.

¹⁸⁵ See Wang Liming, *supra* note 91 at 175.

¹⁸⁶ Shi Hanbing, *supra* note 182.

¹⁸⁷ Harmonious resolution of the case of Peng Yu, <http://club.kdnet.net/disppbbs.asp?id=3236035&boardid=1&read=1>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Roscoe Pound 61 *Harv. L.Rev.* 749, 750 (1947–1948).