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SPECIAL SECTION: THE CHINESE CIVIL CODE

Continuity and change: some reflections on the Chinese Civil Code

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ABSTRACT

This article aims to set out the historical and legislative backgrounds and introduce the synopsis of the articles included in this special issue addressing the Chinese Civil Code ('CCC'). It does so by first presenting the reasons for and against the introduction of the CCC. Subsequently, some notable rule changes have been highlighted to facilitate a clear understanding of the CCC. It further provides some evaluations on why the CCC was framed as such. Finally, it justifies the selection of the articles for three reasons. The selected articles represent a broad coverage of relevant backbone topics in the CCC. In addition, all the specific topics are chosen meticulously to explore some gaps in the current literature. It is hoped that the authors, through their critical analysis, may provide an insider's perspective into the discussion, thus enriching the literature on the CCC from a comparative perspective.

KEYWORDS

Property; tort; personality rights; marriage; civil code

I. Introduction

The promulgation of the Chinese Civil Code (the 'CCC') in May 2020 (effective in January 2021) generates profound social and political impacts and is a significant stimulant of economic growth. The aspiration of this special issue addressing the CCC is to inform and invite legal scholars and practitioners interested in CCC to enhance a deep understanding of this milestone legislation. The purpose of this editorial article is twofold. First, it provides a critical analysis of the CCC from historical and comparative perspectives. Second, it depicts and canvasses the articles included in this special issue. A caveat should be cautioned at the beginning that any general statement on the CCC solely concentrating on the paper rules would fail to capture a complex reality without paying regard to the underlying social, economic, and political contingencies. In addition, given the limited space, an editorial article can by no means do justice to the wide-ranging issues and topics involved in the CCC. For these reasons, instead of addressing every aspect of it, only some salient features of the CCC are singled out for analysis.

The first inquiry coming to the mind is – does it make sense to codify civil law in the twenty-first century? It has been argued that the codification of the nineteenth Century in

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France was a unique socio-historical phenomenon that emerged with the impulse of the French Revolution and the rise of philosophical doctrines such as legal naturalism, rationalism, and the Enlightenment.[1] Many other countries in Europe and Latin America followed suit after that. Nonetheless, Since Natalio Irti published his forcefully argued Article, L'eta della decodificazione (1978), many commentators have analysed the process of decodification under different perspectives with specific references to the civil codes.[2] The de-codification refers mainly to making special legislation out of the civil codes that cause fissures in their unit body. The question remains relevant– whether it is sensible to create a twenty-first Century Civil Code for China against the de-codification background. It seems that despite decodification theory, the Chinese legislature weighed in this discussion and decided to introduce a CCC.[3]

Unlike the sheer popularity among scholarly discussions throughout such a vast socialist-transitioning country, little is known about the CCC's features, style, and impacts outside of China due to the absence of in-depth critical analysis in the English language. Against this background, this special issue is introduced. This editorial is divided into three parts. It first provides some reasons for and against the making of CCC from a policy, technical and historical perspective. Second, it examines the historical development of the codification attempts in China, which underpins the civil law tradition embedded in the Chinese legal system. In this part, some notable changes in the CCC have been discussed concerning the specific Books. The third part examines the relevant factors affecting the promulgation of the CC. It demonstrates that among all the relevant factors, the political will plays the most crucial role in determining the success, timing, and style of the Code. The editorial then presents a synopsis of all the articles included in this special issue. Some justifications are provided for such a selection of pieces to form this special issue. Overall, the CCC is a milestone of Chinese legislative history towards rule-based governance. This is because the CCC is in line with legitimizing private interests and holding the public power on account.

II. Reasons for and against the making of the Chinese Civil Code

There are some compelling reasons for the introduction of the CCC. First, the long-held view of the Law and Development theory is that well-functioning legal institutions, which enforce private property rights and contractual remedies, are indispensable to the promotion of the development of markets, and hence economic growth.[4] The simplest but the most efficient way is still by legislation to provide the requisite legal protection. Nonetheless, it has been revealed that black-letter provisions without paying heed to the cultural underpinnings do not adequately capture the dynamics of the interplay between various factors – cultural or historical, social or moral – in public and private

[1]Maria Luisa Murillo, 'The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification' (2001) 11 J Transnat'l L & POL'y 163.

[2]Pierre Legrand, 'Strange Power of Words: Codification Situated' (1994) 9 Tul Eur & Civ LF 1; Miguel Acosta Romero, 'El fenomeno de la descodification en el derecho civil' (1989) 73 Revista de Derecho Privado 611; H Ishikawa, 'Codification, Decodification, and Recodification of the Japanese Civil Code' in J Rivera (eds), *The Scope and Structure of Civil Codes. Ius Gentium: Comparative Perspectives on Law and Justice*, vol 32 (Springer, 2013) <https://doi.org/10.1007/978-94-007-7942-6_12>.

[3]See detailed reasons for and against the introduction of CCC in the second section of this Article.

[4]H Demsetz, 'Toward a Theory of Property Rights' (1967) 57 The American Economic Review 347; H De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Civitas Books, 2000).

spheres.[5] However, recognizing cultural variations and informal factors does not deter legal formalization. At the heart of the issue in China is that at this transitional period towards a market economy, how the state, users, and right-holders use the legislation to ensure a smooth transition from fluid social norms to a law-oriented and well-coordinated legal system. It is, therefore, necessary to facilitate a legislative framework governing private law in China. This underlines that today, legislators, legal practitioners, and the citizens require more than existing governmental policies and a mish-mash of divergent local norms.[6] Against this backdrop, The CCC, with 1,260 articles in total, encompasses a broad spectrum of rights and interests ranging from general provisions, property rights, contracts, marriage, and family law, to succession, tort liability, and personality rights constituting seven Books in whole.

Second, the creation of the CCC relates to the emergence of China on the international stage and an increasingly globalized economy. Chinese economic growth has reached a stage where the codification of Chinese civil law will facilitate private sectors' and foreign investors' mobility by increasing their legal certainty and predictability. The making of a CCC can be seen as a steadfast step in this process of standardization. After the CCC is enacted, the next step would be to examine how legal institutions and legal consciousness were tightly woven into the fabric of everyday Chinese citizen's life in an authoritarian setting, thus fostering scholarly understandings of state-society relations in China.[7]

Third, technically, the CCC brings about a tangible benefit – making locating rules easier by tidying up all the exiting civil law rules in a comprehensive manner. It should be noted that even if the wording and phrasing of the pre-existing legal institutions stay the same, they might be construed and applied differently in a new context. In other words, under Chinese law, the judiciary will play a far-reaching role in fleshing out the concrete legal tests in case law.

Despite the reasons supporting the introduction of the CCC enunciated above, there are some perceived concerns about this legislative effort. First, there is a concern that once the Civil Code is enacted, its contained rules will become fixed and very difficult or costly to change. This concern is what I call a 'fossilization' issue. Once a Civil Code is in place, it becomes fossilized immediately. Any errors or later revisions will take a long while, if not years, to correct. Also, it will be more costly to disseminate, train and implement the civil code amendments instead of the changes on a particular statute. Law is evolving to reflect the changing economic, social, and cultural conditions.[8] This is particularly so in China, where society has been experiencing significant transformations and policy changes.

Second, related to the above, the quality of the civil Code would be questionable if it was made in a rush due to a political agenda. Having political support is a mixture of blessings and curses. The downside of the story would be that some of the current provisions have not been well-thought-out and, therefore, may not be satisfactory. For example, the first paragraph of Article 153 provides that 'a civil juridical act violating any mandatory

[5]John Gillespie, 'Commentary: Theorising Dialogical Property Rights in Socialist East Asia' (2011) 48(3) Urban Studies, 595, 596; Ann Seidman and Robert Seidman, *State Law in the Development Process* (McMillan Press, 1994) 5–22.
[6]Lei Chen, 'The Making of Chinese Condominium Law' (Intersentia, Cambridge, 2010) 2.
[7]Lei Chen and Mark D Kielsgard, 'Evolving Property Rights in China: Patterns and Dynamics of Condominium Governance' (2014) 2(1) The Chinese Journal of Comparative Law 21.
[8]Lei Chen, 'The Changing Landscape of Condominium Laws and Urban Governance in China' in *Private Communities and Urban Governance* (Springer, 2016) 1.

provision of law or administrative regulation is void unless the mandatory provision in question does not lead to the voidness of the civil juridical act'.[9] Taking this provision on its face value, it appears that violating certain mandatory provisions of law or administrative regulation will not invalidate the civil juridical act, including a contract. Nonetheless, without a clear-cut statutory definition of a mandatory provision of law or administrative regulation, which sets out what causes invalidity and what does not if violated, this Provision seems to be logically circular and unclear.

Ultimately, it is a legislative policy at the call of legislators and policy marker. While the concerns expressed above are not without good causes, after conducting a cost–benefit analysis, the Chinese legislature decided to introduce a Chinese Civil Code at this point.

III. Historical developments

China has a tradition of making codes following its ancient pearls of wisdom, for example, the Tang Code of AD 653[10] and the Ming Code.[11] Nonetheless, under the political movement at the end of the Qing Dynasty (1901–1910), China began to reform its legal system by drafting a modern civil code patterned after the German model as adopted by Japan. As a result, The Da Qing Min Lü Cao An (the Qing Civil Code Draft) was published shortly before the collapse of the Qing Dynasty.[12] Although this draft was never applied, it planted the seed of civil law tradition in the Chinese legal soil.[13] The blossoming of civil law occurred under the Kuomintang government. The Civil Code of the Republic of China ('RCC') primarily drew on the experience of civil law countries like Germany, Japan, and Switzerland to form its shape and was promulgated from 1929 to 1933.[14]

Since the founding of the PRC, the legislature has been repeatedly engaged in the codification of civil law to make it more systematic. After repealing the Republican legal system in 1949, the Chinese Communist Party implemented a portion of the 1950s Soviet legal system. In 1954, the National People's Congress ('NPC') Standing Committee formed a special working group charged with drafting the Civil Code but was eventually proved to be a failing attempt.[15] From 1962 to 1964, the second attempt to formulate a civil code was subsequently suspended due to the political turmoil caused by the Cultural Revolution.[16] In 1982, the working group had drafted a preliminary version of the Civil Code, also known as the Fourth Draft of Civil Code, which consisted of 8 parts and 465 articles.[17] Unfortunately, this draft failed to be enacted again under the then precarious social and economic conditions.

[9]Article 153 of the CCC.
[10]Karl Bünger, *Quellen zur Rechtsgeschichte der T'ang-Zeit* (Catholic University, 1946).
[11]Yonglin Jiang (tr), *The Great Ming Code/Da Ming lu* (University of Washington Press, 2012).
[12]L Percy, 'Traditional and Foreign Influences: Systems of Law in China and Japan' (1989) 52 Law and Contemporary Problems 131.
[13]Lei Chen, 'The Historical Development of the Civil Law Tradition in China: A Private Law Perspective' (2010) 78(1–2) Tijdschrift voor Rechtsgeschiedenis/Revue d'Histoire du Droit/The Legal History Review 159.
[14]G Keeton, 'The Progress of Law in China' (1937) 19 Journal of Comparative Legislation 209; Tien-His Cheng, 'The Development and Reform of Chinese Law' (1948) 1 Current Legal Problems 187.
[15]Tong Rou translated by J Ocko, 'The General Principles of Civil Law of the PRC: Its Birth, Characteristics, and Role' (1989) 52 Law and Contemporary Problems 152.
[16]J Quigley, 'Socialist Law and the Civil Law Tradition' (1989) 37 American Journal of Comparative Law 784.
[17]WC Jones, 'A Translation of the Fourth Draft Civil Code (June 1982) of the People's Republic of China' (1984) 10(1) Review of Socialist Law 193.

The wave of civil law codification attempts in the early 1980s did not generate a civil code, but merely the General Principles of Civil Law ('GPCL'), enacted in 1986, consisting of 156 provisions. The GPCL, a *de facto* mini-civil code noted as a landmark in China's private law reconstruction[18] was a piece of progressive legislation that covers such legal principles as the protection of private property, the freedom of contract, and the protection of human dignity and personal rights.[19] In 1988, the SPC issued a Judicial Opinion of GPCL 1988 to implement the GPCL effectively.[20] In China, the last three decades have witnessed tremendous changes in almost every aspect of society, and surging economic development and technological advancement have brought many challenges to the existing laws. Meanwhile, China's accession to the World Trade Organization (WTO) prompted the country to strengthen its legislative framework. As a result, the GPCL has gradually fallen behind the times. It was not until1998 did the NPC decided to resume the making process of the civil Code by setting up a civil law drafting workgroup. In January 2002, a draft of the Civil Code was deliberated by the NPC Standing Committee.[21] However, in June 2004, the legislature changed its legislative plan by adopting a piecemeal approach. In other words, the first step was to legislate the property law, followed by the tort law and others.[22]

IV. The notable changes in the Civil Code

A. Contract

From the end of the Cultural Revolution up to the 1990s, Chinese contract law adopted a model of 'specific statutes on specific contracts'.[23] In essence, all the specific contract laws were statutes created during the period of a planned economy. Yet, with China's continuing economic reform and increasing involvement in international trade, it became necessary to introduce a uniform contract law. The Contract Law ('CL') was adopted in 1999. The previous three pieces of legislation regarding specific contracts were invalidated simultaneously with the promulgation of the CL. Following the CL, the SPC issued three gap-filling judicial interpretations, which serve as a *de facto* part of Chinese contract law.[24] In the final version of the Civil Code, for most details, the pre-existing contract law provisions have been retained without significant changes. The CCC includes some rules initially contained in the Judicial Interpretations, such as the doctrine of change of circumstance.[25] Nonetheless, there are two notable, if not controversial, changes that merit further discussion.

[18]Henry Zheng, 'China's New Civil Law' (1986) 34 American Journal of Comparative Law 672.
[19]Articles 73, 74 and 83 of the GPCL 1986.
[20]The Notice of the Supreme People's Court on Issuing the Opinions on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation), effective on 2 April 1988, and ceased to be effective on 1 January 2021.
[21]Guodong Xu, 'Structures of Three Major Civil Code Projects in Today's China' (2004) 19 Tul Eur & Civ LF 37.
[22]Lei Chen and CH Remco van Rhee, *Towards a Chinese Civil Code: Comparative and Historical Perspectives* (Brill, 2012) 16.
[23]The Economic Contract Law, the Law on Economic Contracts Involving Foreign Interests and the Technology Contract Law were enacted in 1981, 1985 and 1987, respectively.
[24]The Interpretations of the SPC on Certain Issues Concerning the Application of the Contract Law of the People's Republic of China (I) 1999; Interpretations of SPC on Certain Issues Concerning the Application of the Contract Law of the People's Republic of China (II) 2009; Interpretation of the SPC on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts 2012.
[25]Article 533, the CC; Lei Chen and Qiyu Wang, 'Demystifying the Doctrine of Change of Circumstances under Chinese Law – A Comparative Perspective from Singapore and English Common Law' (2021) Journal of Business Law.

There is no general part governing the law of obligations in the CCC, as contained in BGB and Dutch Civil Code.[26] It is worth noting that both the Qing Civil Code Draft and Kuomintang Civil Code, which are still used in Taiwan through numerous amendments, have a separate part in the general rules governing law of obligations.[27] However, the CCC dispenses with such provisions. It is believed that the CL has been a somewhat developed area of law with some 20 years of evolutionary judicial practice. Thus, the CL should not be overly modified. For lawmakers, systematic changes would be costly and unnecessary. As a result, the third part of the Contract Book is termed a quasi-contract, referred explicitly to unjust enrichment and *Negotiorum gestio*.

Nonetheless, one cannot ignore the fact that the Contract Book contains 526 articles (Article 463–Article 988), which occupies 41.7 per cent of the total 1260 articles, thus forming the most sizable Book of the Civil Code. It seems that whether to have a general part in the law of obligations matters more on form than substance. But this approach unquestionably saves time and effort.

Another controversy was recognizing the defaulting party's right to apply to the court for contract termination in cases where the breach is not wilful, and continuing performance would cause obvious unfairness to the defaulting party.[28] This provision appears to solve the contract deadlock problem, but it may cause many doctrinal and practical problems. It runs the risk of adversely affecting the contract equilibrium, which has long been entrenched in the Chinese contract law framework. Consequently, in such a circumstance, if the non-defaulting party refuses to terminate the contract, that would cause a high cost against the principle of good faith.[29]

B. Property

China, ruled by the Communist Party, has changed from largely eliminating private property to increasingly embracing it, from non-liberal authoritarianism to entrenching personal liberty arising from property rights.[30] China's property law and housing market have changed fundamentally over the past few decades and are a cornerstone of China's transitional economy. In 1994, China introduced a comprehensive privatized and commercialized national housing reform policy, which shifted development to the private sector and gradually relieved the government of its responsibilities for maintaining and managing buildings that were originally built to accommodate state employees.[31] In March 2007, the Property Law ('PL') was enacted to boost economic development by clarifying and protecting private property rights. In 2007, the PL came into effect with the intent of institutionalizing condominium owners' property rights.[32] The Civil Code has tinkered with the condominium rules contained in the PL on the

[26]Reiner Schulze, 'Changes in the Law of Obligations in Europe' in *The Law of Obligations in Europe*, Reiner Schulze and Fryderyk Zoll (eds) (Sellier European Law Publishers, 2013) 3.
[27]Articles 153–344 of the RCC in Taiwan.
[28]Bing Ling, 'The New Contract Law in the Chinese Civil Code' 2021 9(1) The Chinese Journal of Comparative Law.
[29]More critical analysis can be seen in the article of this special issue written by Shiyuan Han.
[30]Chen Lei, 'The Evolution of the Property System in China: Between the Socialist Heritage and Liberal Market' in *Socialist Law in Socialist East Asia* (Cambridge University Press, 2018).
[31]Lei Chen and Hanri Mostert, 'The Unavoidable Necessity of Formalizing Condominium Ownership in China: A Pilot Study' (2007) 2 Asian Journal of Comparative Law 1.
[32]Lei Chen and Mark Kielsgard, 'Evolving Property Rights in China: Patterns and Dynamics of Condominium Governance' (2014) 2(1) The Chinese Journal of Comparative Law 21.

collective decision-making procedures. Comparing the Civil Code with the PL, the voting procedure for owners to decide on matters concerning common property has changed. The owners of the exclusive area and two-thirds of the number of people must participate in the voting. The issue sets a preliminary threshold, which was not previously provided for in the PL.[33] Secondly, the voting procedures have been adjusted accordingly in terms of the voting ratio and base number. The number of decision-makers has been modified from double two-thirds to double three-quarters.[34]

While the right of contractual land management over the farmland in rural areas has been defined as a property right – usufructuary right by the PL, the provisions in the CC are still nebulous about the legal nature of the land management right carved out of the right of contractual land management. Whether the land management right is a property right or a contractual right seems to be unsettled. The CC only provides that the holder of land management right is entitled to possess the rural land within the time limit stipulated in the contract. Land management right with a term of more than five years is created when the underlying contract of grant becomes effective.[35] There is no strict need to get it registered to be effective. These are only two provisions in the CC specifically about the land management right. While these two Articles are included in the usufructuary rights part, it would be audacious to conclude that the land management right is a property right given its validity and registration rules. It seems that the Chinese lawmakers, through this compromised approach, produce a decidedly ambiguous strategy.[36]

C. Tort

In December 2009, the Tort Liability Law ('TLL'), a comprehensive piece of legislation comprising twelve chapters containing ninety-two provisions, was promulgated. The TLL is divided into three parts: General Principles, Specific Rules, and Miscellaneous Provisions.[37] The drafting of the TLL occurred in tandem with attempts aimed at harmonizing private laws in Europe, e.g. the Draft Common Framework of References (DCFR) project. Hence, a variety of European harmonization projects, the German tort law reform, and the revision of several civil codes in European countries have provided invaluable examples for Chinese lawmakers to take reference. It is notable that the US Restatement of the Law (Third) Torts also offered an excellent comparative reference.[38]

Drawing on the TLL, the CCC has fleshed out the tort liability rules in the following respects. First, the CC has established the 'self-contained risk' rule,[39] which governs

[33]Article 278, the CC.
[34]Ibid.
[35]Article 341, the Chinese CC.
[36]Peter Ho, 'Who Owns China's Housing? Endogeneity as a Lens to Understand Ambiguities of Urban and Rural Property' (2017) 65 Cities 66.
[37]The General Principles address the general issues of tort, the rules of liability attribution, multiple parties' joint liability, the formation of liability and remedies, and the situations that release a person from liability or mitigate the degree of liability. The Specific Rules concern the liable parties (e.g. guardian's liability, employer's liability) as well as five situations that trigger liability without a wrong being committed (strict liability). These five situations are products liability, motor accidents liability, liability for personal injury caused by domestic animals, liability for highly dangerous operations and liability for environmental pollution.
[38]Jacques deLisle, 'A Common Law-like Civil Law and a Public Face for Private Law: China's Tort Law in Comparative Perspective' in *Towards a Chinese Civil Code* (Brill, 2012).
[39]Article 1176, the CC.

situations where a person volunteers to participate in a recreational or sports activity that carries a specific risk. If another participant causes any damage, the victim shall not demand that the tortfeasor bear the tort liability unless its intention or gross negligence causes the damage.

Second, it provides the 'self-help remedy' rule to deal with situations where a person's rights and interests are infringed. Under such circumstances, the victim may take reasonable measures such as distraining the property of the tortfeasor to the extent necessary to protect the victim but shall immediately require the state organ to take action. In an emergency, they are unable to receive protection from the state organ promptly. As a result, the rights and interests would be irreparably damaged if the measures were not taken immediately.[40]

Third, it provides a specific liability rule in helping allocate the risks when a falling object causes an injury out of a high-rise building. Falling objects are a common menace in congested urban Chinese cities.[41] Often, the injured person cannot locate the tortfeasor in the circumstance. The CC tackles this issue by providing where it is difficult to determine the tortfeasor. All the building occupiers will be held liable to compensate the victim except those who can prove that they are not the tortfeasor.[42] After paying compensation, the occupiers of the building will be reimbursed by the tortfeasor, who is found later.[43] Property management companies or other building managers shall take necessary safety precautions to prevent the injury from happening. If not, tort liability will incur for the failing performance of the duty of safety protection.[44] This rule has the advantage of making the 'wrongdoers' liable for the damage caused to the injured party. But whether it is sensible to allocate the risk to all occupiers in the building is subject to debate. One possible impact of this 'socializing liability rule' is to remind apartment owners to get insured to avoid potential legal risks.

D. Personality rights

A notable surprise of the CC is the introduction of its standalone book of personality rights.[45] Enacting a separate book on personality rights in the CC is a unique arrangement that strikingly differs from the European approach. In the CC, personality rights refer to the rights to life, body, health, name, business name, portrait, reputation, honour, privacy, and so forth held by civil subjects.[46] Besides, a natural person has other personality rights and interests deriving from personal liberty and human dignity.[47] The following reasons can justify this unique arrangement. First, the PRC Constitution only provides somewhat sketchy and symbolic provisions on protecting personality rights; second, related to the above, even such skeletal Constitutional provisions cannot be directly applied when Chinese courts decide cases. Therefore, there is a dire need to grant

[40]Article 1177, the CC.
[41]Wall Street Journal, 'Beware of Falling Tofu: China Takes on High-Altitude Littering' (16 June 2020) <www.wsj.com/articles/beware-of-falling-tofu-china-takes-on-high-altitude-littering-11592317379>.
[42]Article 1254, the CC.
[43]Ibid.
[44]Ibid.
[45]Lei Chen, 'Debating Personality Rights Protection in China: A Comparative Outlook' (2018) 26(1) European Review of Private Law 31.
[46]Article 990 (1) the CC.
[47]Article 990 (2) the CC.

protection to personality rights by entrenching them in the private law sphere with their inclusion in the CC. More pointedly, the departure from conventional civil codes provides a new approach to cope with the unprecedented quantitative and qualitative challenges to personality protection posed by the technology explosion.[48] As the growth of rights consciousness and the evolution of technology is never-ending, a personality rights book in the CC may provide the opportunity to systemically address emerging claims in personal spheres against technological risks through high-level legislation.[49]

Nonetheless, it is too early to assess its impact shortly after its adoption. Much to be seen in judicial practice on how readily the Chinese judges would like to grant the corresponding remedies. A comparison with other jurisdictions shows that the development of protections on particular infringements usually evolves through a body of judicial decisions rather than legislation or academic literature. It is fair to say that the CC presents a salient feature of 'public law embedded in private law'.[50] Some constitutional rights have been placed into the private law sphere, such as personal information protection, data privacy protection, and the protection against violation of personality rights by the public institutions.[51] This is a private law reaction to a public law standard issue. By introducing a separate book on personality rights, one could argue that the distinction between public and private law is somewhat blurred.[52] This is partially attributable to the change of social and technological conditions in modern time and partially to the Chinese political system where there is a lack of a constitutional review found in the West. In other words, this is perhaps a defining feature of the Chinese CC, which provides adequate legal protection in the private law sphere. Nonetheless, it remains interesting to observe whether the existing tort remedies to redress and prevent personality rights violations and to assess the impact which digital technologies may bring to injuries of personality rights

E. Marriage and family and inheritance

The Marriage and Family Book is primarily based on a combination of the existing Marriage Law of 1980 (2001 amendment) and Adoption Law of 1991 (1998 amendment) while saving some minor changes. Similarly, the Inheritance Book is predominantly modelled after the Inheritance Law of 1985. Despite the continuity, there are a few notable changes made in these two Books. First, Article 1077 of the CC introduces a 30-day cooling-off period after the filing of divorce and before the official registration of a couple's divorce.[53] However, such a period does not apply to contested divorces arising from domestic abuse.

[48]Wang Liming and Xiong Bingwan, 'Personality Rights in China's New Civil Code: A Response to Increasing Awareness of Rights in an Era of Evolving Technology' *Modern China* (December 2020).
[49]Ibid.
[50]Ken Oliphant, Zhang Pinghua, and Chen Lei (eds), *The Legal Protection of Personality Rights: Chinese and European Perspectives* (BRILL, 2018).
[51]It should be noted that China is not unique to embed many principles of Civil Code with constitutional value. See French law at François Luchaire, 'Les fondements constitutionnels du droit civil' (1982) 245 Revue Trimestrielle de Droit Civil.
[52]G Teubner, 'Contracting Worlds: The Many Autonomies of Private Law' (2000) 9(3) Social & Legal Studies 399. It should be noted that Teubner's polycontextual theory does not disregard the public/private law divide.
[53]Article 1077, the CC.

Nonetheless, one may argue that the rising divorce rate found in China is possibly driven by social demand in the wake of the increasing awareness of individual freedom. The purpose of introducing the cool-off period is to bring down the divorce rate through public power. But, where there is a need, there is a way to divorce. The 30-day waiting period juggling between romance and reality may only raise time costs.[54] This rule arguably adds up the already unbearable emotional burdens for the person seeking divorce by dragging the situation longer than necessary.[55] The effectiveness of this rule remains to be seen.

Second, the characterization and ascertainment of joint debts of husband and wife are a thorny issue in many jurisdictions. The default rule draws upon a SPC's Judicial Interpretation issued in 2018.[56] However, the CCC lacks a rule on allocating the responsibility concerning the repayment of the community debts. Community debts refer to a debt incurred by both spouses through a joint manifestation of intent. Examples are a joint signature or an individual expression of intent by one person with subsequent ratification by the other or a debt incurred by a spouse in her name to provide the family daily necessities of life during the marriage.[57] A debt incurred by a spouse in her name beyond the daily necessities of life of the family during the marriage is not a community debt unless the creditor can prove that the debt is assumed to meet the joint needs of life or based on a joint manifestation of the intent.[58] While this legal test clarifies, ultimately, certain discretion is left to the court to exercise to make an informed and fair decision.

V. The relevant factors affecting the codification

A. State commitment and political will

Technically, codification is a titanic undertaking by tidying up the fragmented existing rules and introducing new norms to provide a systemic and coherent set of rules. It would be a futile exercise by legal scholars in making the Code without the requisite political will of the Chinese government or the ruling Chinese Communist Party ('CCP'). We learn from history that political stress often plays a decisive role in ensuring a code's success. It has been said that the vital element in the success of the Napoleonic Civil Code was Napoleon himself.[59] Likewise, the same can be said true in Allard's 1879 project in Belgium and the Dutch proposals to reform civil procedural law in the second half of the nineteenth century and the twentieth century.[60] Politicians delegate others with writing codes, but in the end, they, who are no academic drafters, have the final say.

[54]Wang Xinyu, 'Keeping Cool Over China's New Divorce "Cool-Off Period"' <www.sixthtone.com/news/1006631/keeping-cool-over-chinas-new-divorce-cool-off-period>.
[55]Ibid.
[56]The Interpretation of the SPC on Issues concerning the Application of Law in the Trial of Cases Involving Marital Debt Disputes, effective on 18 January 2018 and subsequently repealed on 1 January 2020.
[57]Article 1064 (1), the CC.
[58]Article 1064 (2) of the CC.
[59]D Heirbaut, 'Factors Ensuring the Success or Failure of Draft Codifications: Some European Experience' in *Towards a Chinese Civil Code* (Brill Nijhoff, 2012) 63.
[60]CH van Rhee, 'Ons tegenwoordig sukkelproces. Nederlandse opvattingen over de toekomst van het burgerlijk procesrecht' (2000) Legal History Review 333.

In October 2014, the 4th plenary session of the 18th CCP Congress decided to enact a civil code.[61] As such, the NPC Legal Working Commission has commenced the codification preparatory work. Subsequently, Xi Jinping, Secretary-general of CCP, has himself instructed in writing to enact the Chinese CC in June 2016 at a CCP politburo standing committee meeting.[62] This helps secure the political support of the Civil Code's enactment. To trade in this political support, one can see numerous socialist value-laden provisions in the final product. For example, Article 1 of the Civil Code highlights that the Code is enacted in accordance with the Constitution by upholding the core socialist values.[63] Article 185 provides that one is liable for infringing upon the name, image, reputation, honour of a hero or a martyr since such acts harm the public interest.[64] When pushing through the Civil Code, the ruling party foresees no contradictions in equipping citizens with legal knowledge while asserting the importance of the one-party state's authority. If the CC is promulgated to realize the CCP agendas, educating the public to comply with the new CC facilitates the public governance.[65] Yet, popularizing the CC among the citizens can be tricky for the ruling party as the relationship between the state and society has never been lopsided, even in China.

Understandably, it is in the state's interest to respond to the social demands engineered by the growing middle classes towards law-based governance. The implications for the development of contract law and property law in the PRC are profound. In the last three decades, there has been an expansive legislative approach to formalize certain contract rules and property rights. China has never conducted radical privatization in a rush. These experiential laws have led to the development of a market economy and a growing middle class. Thus, the growth of the 'market economy' becomes the overarching aspiration, and policy must be reviewed in a prism adhering to the needs of market forces.[66] The establishment of a market economy drives the level of protection over fundamental rights, like heightened government sensitivity to nuisances affecting market value in cases of land taking or expropriation.[67] A market economy would remain structurally insecure without building in these heightened private property rights. If a view is taken that free-market economics is serving China's economic aspirations, at the same time, it fosters an emerging rights regime to blossom. Evolving societal expectations drive market efficiencies and reduce transaction costs despite relatively minor yet persistent corruption and other temporary structural defects. While the existence of local government interference with farmers' property rights, unsatisfactory implementation of legislation, and lack of procedural transparency cut against the market, it is hoped that these defects are subject to reform and will eventually relent in the face of market forces.

Nonetheless, how can political will or state dominance be sustained when market reform has groomed non-state actors and growing middle class who now have access

[61]'Decision of the Central Committee of the Communist Party of China on Several Major Issues of Comprehensively Promoting the Rule of Law', in the 4th session of the 18th CCP Congress Report.
[62]<www.qstheory.cn/zhuanqu/2020-06/16/c_1126121016.htm>.
[63]Article 1, the CC.
[64]Article 185, the CC.
[65]Xi Jinping, 'Fully Understand the Significance of the Promulgation of the Civil Code, and Better Protect the Legitimate Rights and Interests of the People in Accordance with the Law' (2020) 12 Qiushi 1.
[66]Mark Kielsgard and Lei Chen, 'The Emergence of Private Property Law in China and Its Impact on Human Rights' (2014) 15 APLPJ 94.
[67]Hanri Mostert and Chen Lei, 'The Dynamics of Constitutional Property Clauses in the Developing World: China and South Africa' (2010) 17(4) Maastricht Journal of European and Comparative Law 377.

to alternative sources of income, status, and life style? Given the market economy gradually taking shape and the growing number of the middle class who begin to assert the legal protection of their rights, the Chinese state power needs to address this social demand to maintain and enhance its ruling legitimacy. Therefore, a well-received civil code is on the legislative agenda.

B. Systematization and coherence

It is often said that one chief mission of a codification project is to pursue systematization and coherence. Ideally, any code should structure all the topics for reasons of unity, coherence, and consistency. Many provisions in various laws and regulations before the Civil Code are abstract and hortatory. Sometimes they appear tautological. Therefore, there is a pressing need to tackle the discrepancy among different rules. Indeed, systemization has the benefit of making it easier to locate and interpret the rules. It is natural for the Chinese lawmakers to refer to the German Pandectist system for inspiration for its long tradition of heavily influencing Chinese private law. However, with closer scrutiny, various German legal ideas and concepts have not taken root on Chinese soil. For instance, the abstraction principle or Abstraktionsprinzip has not been implanted. The abstraction principle implies that the transfer of ownership is considered to be an abstract juristic act. It separates the underlying cause (iusta causa) or contractual basis from the transaction that executes the transfer of ownership.

Consequently, the abstraction principle implicitly favours the transferee by effectuating a transfer of ownership based on a genuine agreement and conveyance, regardless of the contract's validity. Nonetheless, the PL has adopted the causal system which favours the original owner by disallowing transfer in the case of an invalid contract. Thus, it is a process of contextualizing the legal transplant leaning over expediency.

Perfect systemization and coherence are worth pursuing, but they may cause delay, thus risk losing the political will when eventually ready. Therefore, it is necessary to keep many expected-to-change topics out of the scope of the Civil Code. This way allows the legislator to enact since they are convinced that the faster a draft is ready, the more likely it becomes a Code faster.

One of the salient features of the CC is it adopts a legislative model combining civil and commercials as the GPCL and CL do. Indeed, Chinese lawmakers tend to make statutes that deal with civil and commercial matters in single legislation. For example, the CL governs both civil and commercial contracts.[68] The CC follows this approach by adding guaranty contracts,[69] property service contracts,[70] factoring contracts,[71] and partnership contracts in addition to the 15 specific contracts contained in the CL.[72] But this by no means suggests that there is no separate statute on commercial law outside the CC, nor has a jurisprudence differentiating between civil and commercial disputes in

[68]Specifically, in the typical contracts contained in the Contract Law 1999, apart from gift contract, all the other 14 typical contracts are either purely commercial contracts, including financial lease contracts, warehousing contracts and construction contracts, or contracts for either civil or commercial purposes, including but not limited to contracts for sale, lease contracts, transportation contracts, and mandate contracts.
[69]Articles 681–702 the CC.
[70]Articles 937–50 the CC.
[71]Articles 761–69 the CC.
[72]Articles 967–78 the CC.

court's reasoning. For example, in tandem with the CC, many special commercial statutes remain effective such as the Maritime Law,[73] the Insurance Law,[74] the Trust Law,[75] and the Securities Law.[76]

The courts have developed legal tests distinguishing civil from commercial contexts for those statutory provisions that govern either civil activities or commercial transactions. For example, in the case of mandate contracts, Article 410 of the CL provides that the principal or the agent may terminate the entrustment contract at any time. If the termination of the contract by a party causes losses to the other party, the party who terminates shall compensate for the losses. Here the law itself does not distinguish between civil and commercial contexts in ascertaining the loss. In practice, however, it is rare for the Chinese courts to permit a party in a commercial mandate contract to terminate at any time and only bear the liability for the direct loss caused to the other party. For this reason, the CC provides a more nuanced approach by distinguishing between a gratuitous mandate contract and a remunerative mandate contract.[77]

Another issue is concerned about whether to include the Law on the Application of Laws to Foreign-related Civil Relations ('LAL'), enacted in October 2010 into the Civil Code. Essentially, this branch of civil law is the conflict of law rules governing civil and commercial matters. This law deals with various property and personal issues with foreign aspects arising from cross-border settings. These civil relations include civil subjects, property, marriage, inheritance, intellectual property, contracts, and tort liability. The international experiences reveal that the conflict of law rules have been incorporated into the CC in some jurisdictions.[78] Moreover, Chapter 8 of the GPCL has several articles specifically dealing with conflict of laws rules, which serves as a testimony to illustrate a preference for incorporation.

Nonetheless, the final product of the CC waives the conflict of laws rules for conciseness and efficiency consideration. In hindsight, this approach makes sense by keeping China's conflict of laws rules as a standalone statute. This is mainly because this special statute is plagued with outdated rules and needs to be amended in the foreseeable future.

Next, the preferred practical language style is adopted in the Civil Code to disseminate to law persons, judges, and legal practitioners. Nonetheless, some law professors, especially those who received legal education from Germany, prefer the German model. Again, if the timely passage of the CC is an overarching factor, then any efforts to pursue perfectionism by refining the scholastic terminologies would be counterproductive. After all, a Civil Code is not intended to become a showpiece of law professors but a text for practitioners and users. Clarity and convenience are of paramount importance than anything else. As it turns out, except where the drafters wish to amend the

[73]PRC Maritime Law enacted in 1992.
[74]PRC Insurance Law, enacted in 1995 amended in 2002, 2009, 2014.
[75]PRC Trust Law enacted in 2001.
[76]PRC Securities Law, enacted in 1998, amended in 2004, 2014, 2019.
[77]Article 933 the CC. 'The mandator or mandatory may terminate the mandate contract at any time. Where termination leads to loss to the other party, unless for reasons not attributable to the terminating party, the terminating party under a gratuitous mandate contract shall be liable in damages for direct losses caused by the inappropriately timed termination, and the terminating party under a remunerative mandate contract shall be liable in damages for direct losses sustained and benefits to be obtained by the other party'.
[78]Article 990, the CC.

rules or introduce some new rules, the CC essentially keeps the rules unchanged contained in the pre-existing laws, such as the CL, the PL, and the TLL.

C. Stasis and change

The Chinese civil law comprises a crystallized expression of values, liabilities, and ideologies, and all shape the landscape of the Civil Code. The branches of civil law, particularly civil judicial acts, property law, and family law, often seem to have a durable quality. Therefore, these laws are said to be static and context-specific. Furthermore, Dirk Heirbaut explained that in the academic world, plagiarism is a felony; in the history of codification, it is a virtue.[79] Law drafters could just borrow the pre-existing codes in other experienced jurisdictions, and this phenomenon enjoys an elegant name: legal transplant.[80]

However, it cannot be presumed the narrative of Chinese civil law is a history of stasis. Radical changes have been introduced in developing Chinese civil law in the last three decades since the enactment of the GPCL. Social values, economic strength, and legal directions change, and the impact of such transformation inevitably shapes civil law as fast-moving as any other area of contemporary Chinese law. During the last three decades, there has been an explosion of legislation, further supplemented by a plethora of statutory amendments, judicial interpretations issued by SPC, fragmented departmental rules, and local regulations.

Many of the familiar features of the GPCL have now been removed, side-lined, or transformed beyond recognition. For example, heavy-handed regulatory approval over the contract validity[81] and policies being a source of law.[82] To be specific, before the CC, the Chinese courts showed inconsistency over disputes concerning a contract pending regulatory approval.[83] The CL states that where contracts are subject to approval stipulated by law, such approval procedure shall be followed.[84] The law does not specify any legal consequence about non-compliance with this regulatory approval. Under the CC, concerning contracts subject to approval as stipulated by law, the pending approval procedure will not affect the effectiveness of clauses requiring the fulfilment of the obligations to apply for approval and other relevant contract clauses. If the party owing a duty to seek approval fails to fulfil such obligation, the other party may request it to be liable for non-compliance.[85] Hence, Article 502 of the CC not only fills the statutory gap but also marks a clear transition from a heavy-handed regulatory approach to a market-oriented one.

Another notable change is seen in the source of civil law. Before, civil activities must abide by the law, and in the absence of provisions in the law, they shall comply with national policies.[86] This has long been criticized for two reasons. First, making national policies a source of law blurs the difference between legislation and policy. It is an anathema to the spirit of the rule of law as the policies change over time without certainty and

[79]Heirbaut (n 59) 63.
[80]A Watson, 'From Legal Transplants to Legal Formants' (1995) 43 Am J Comp L 469.
[81]Article 44 (2) of the Contract Law 1999, repealed on 1 January 2021.
[82]Article 6 of the GPCL of 1986, repealed on 1 January 2021.
[83]See more analysis at Xiong and Durovic's article in this special issue.
[84]Article 44, the Contract Law 1999.
[85]Article 502 (2) the CC.
[86]Article 6, the GPCL 1986.

predictability. Second, it excludes civil customs, which have long been established in many rural areas, particularly in the ethnic minority group areas. To tackle this problem, the CC replaced national policies with civil customs as a source of civil law.[87]

While this change is commendable, a question exists about how to identify and ascertain the applicable civil customs. There is a lack of guidance from the CC itself. China has a long history with many ethnic minority groups living in the territory. Over time these groups have developed their local customs, some of which are still functioning today. These local customs have been disregarded and overlooked, as they were external to China's unitary national statutory system. With time pressure to complete codification on time, the much-needed surveys on local customs have not been conducted. Therefore, the Chinese courts are left with significant discretion to characterize and ascertain the widely recognized civil custom. In a sense, this amounts to law-making. Remarkably, the courts located in the ethnic minority communities need to strategize for customs to interact well with the state laws in judicial proceedings.

Nonetheless, it is worth noting that some rules seem to be neglected by the Chinese legislature when converting the GPCL1986 into the first Book of the CC. Specifically, whether the ratified international treaties and the international customary practice are the sources of Chinese civil law remains an interesting question. The GPCL provided an affirmative answer. Suppose any international treaty ratified by China contains provisions differing from the Chinese law. In that case, the international treaty provisions shall apply unless China has expressly reserved the provisions.[88] The international customary practice may be applied on matters for which neither the Chinese law nor any ratified international treaty by China could provide adequate resolutions.[89] This has long been regarded as a statutory basis for recognizing the ratified international treaties and international customary practice as the sources of the Chinese civil law. In a similar vein, the Negotiable Instruments Law,[90] the Maritime Law,[91] the Civil Aviation Law,[92] and the Marine Environmental Protection Law[93] have adopted similar provisions of the GPCL.

Surprisingly, when the CC was promulgated, Article 142 of the GPCL was abolished without being replaced with similar provisions. This gap may be explicable as the LAL, enacted in 2010, could touch upon this issue as a special statute concerning all foreign-related civil disputes. Interestingly, the LAL does not include Article 142 of the GPCL. The reason seems to be that this is a 'legislative, technical issue, especially considering the complexity of the application of international treaties'.[94] As such, the SPC has issued a Judicial Interpretation to fill this legislative gap.

In consequence, the CC waives all provisions governing the international treaties and international customary practice. So does the LAL. Whether the international treaties or international customary practice are a source of Chinese civil law appears to be only

[87]Article 10, the Chinese CC: 'Civil disputes shall be resolved in accordance with law; or if law remains silent, custom may apply, but not in a way contrary to public order and good morals'.
[88]Article 142 (2), the GPCL 1986.
[89]Article 142 (3), the GPCL 1986.
[90]Article 95 paragraph 1 of the Negotiable Instruments Law (amended in 2004).
[91]Article 268, the Maritime Law (1992).
[92]Article 184 (1), the Civil Aviation Law (Amended in 2015).
[93]Article 97, the Marine Environmental Protection Law (amended in 2013).
[94]Yao Hui and Liang Zhanxin, 'Sources and Types of Law in General Provisions of Civil Law 2017' (2016) 7 Journal of Law Application (Fa Xue Lun Tan) 55.

answered by an SPC Judicial Interpretation.[95] It is hoped that this issue can be solved when the LAL is amended.

VI. The synopsis of the articles

Since the 1980s, there has been a veritable boom in Western research on Chinese private laws. Many Western scholars have committed themselves to and made significant contributions to introducing new legal institutions, rebuilding the legal profession, and borrowing international norms into domestic laws. They have investigated how Chinese citizens employ new laws to assert their 'rights' even under the one-party state. Nonetheless, despite this scholarly effloresce, the volume of research on civil law in China by native Chinese scholars in English has been relatively modest. What is unique about this special issue is that all six articles are authored or co-authored by a native Chinese legal scholar. Most of them have been involved in the public consultation of the CC draft or have been teaching or practising Chinese civil law in China. On the other hand, in China, the shelve-straining literature on the Chinese CC has been published in the Chinese language without much referring to the updated Western literature. Therefore, it is hoped that this humble collection will keep the Western audience informed and updated about heated debates in Chinese legal scholarship.

Out of 6 articles in this special issue, there are two articles on contract, one Article on unjust enrichment, one Article on the property, one Article on tort, and one Article on personality rights. In addition to their qualities, the justifications for the selection of these papers are three-fold. First, it represents a broad coverage of relevant backbone topics in the CCC. There are two articles on contract law because the CCC does not have a general part of the law of obligations. The Contract book has to function in some ways akin to a general part of obligations. As a consequence, the Contract Book amounts to more than 40 per cent of the total provisions. Second, all the specific topics are meticulously selected to explore some gaps in the current literature. The issues addressed in these articles are either unexplored or underexplored. For example, how does the CCP seek to exercise control over the application and interpretation of laws? How do the governmental regulators interplay with the Chinese courts to deal with the aftermath of contract voidness? And how would Chinese judges play a gap-filling role where the legislation is short in details on non-monetary reliefs when a contract is not duly performed? These articles have exploited multiple research methods ranging from doctrinal, comparative to empirical and law and economics approaches. Third, the Chinese authors, being fine scholars from the leading law schools in China, have been involved in the drafting and deliberation process of the CCC in one way or the other. Therefore, they may provide an insider's perspective into the discussion, thus enriching the current literature.

Specifically, Xiong and Durovic conducted their study on contract validity tainted by illegality by focusing on illegal lottery sales in China. How do the Chinese courts respond when one party argues for the voidness of the contract due to its violation of the mandatory provisions (often intentionally)? One view is that not every contract

[95]This is despite that the Article 260 of the PRC Civil Procedure Law addresses the applicability of the international treaties. However, it is argued that given the scope of the Civil Procedure Law, this Article only addresses the ratified international treaties governing procedural rules. See Hui and Zhanxin (n 94) 56.

breaching mandatory rules is worthy of invalidation because regulatory institutions could impose sanctions instead of the court. In the past, Chinese courts usually held illegal contracts void. The SPC issued a judicial interpretation that divides mandatory rules into mandatory rules on validity and mandatory rules on the administration to reverse the trend. Where the former rules are violated, the contract is void or voidable. Yet the contract is still valid subject to a condition making it good when a violation is of mandatory rules on administration. This dichotomy expects courts and regulatory agencies to play their respective roles, one in judgment and the other in administrative enforcement. As a result, Chinese courts have gradually shifted towards upholding the validity of disputed contracts. However, this study reveals that judges only concentrate on judicial issues and count on administrative organs to resolve the rest outside the court due to the lack of coordination. Xiong and Durovic contend that there is an information asymmetry between the judicial and regulatory agencies. The relevant information discovered during litigation is not made known to regulatory agencies after that. According to the findings, this is due to the court's heavy workloads, internal administrative control, and lack of motivation. Also, they investigate how frequently the regulatory agencies access the information, but very few of the consulting agencies provide reliable sources. Finally, the authors suggest that a more orchestrated coordination between the courts and regulatory agencies is warranted. Information sharing should be promoted through institutional reforms or technological changes, as well as some suggested incentives. If these ideas are implemented, the enforcement of mandatory rules could become more effective than the current situation.

Ray and Chen investigate under the new CC how readily the Chinese judges should award non-monetary reliefs given the prevalence of monetary damages. When monetary damages and non-monetary reliefs are available when a contract is breached, how do these two forms of compensation relate to each other; does one form of compensation take precedence over another, or is there a choice between these two forms of compensation? Based on a comparative analysis with the European legal systems, the authors first identify a need for compensation in a form other than the payment of a sum of money. Subsequently, when non-monetary compensation is available, it could fit into a legal system under which legal test. Ray and Chen argue that in the twenty-first century, when sustainability is increasingly pursued as a matter of a guiding principle, the contract law needs to be re-gigged up to reflect this trend. However, non-monetary reliefs as an alternative form of compensation have remained, to a certain extent, underexplored.[96] Drawing upon the recent European experiences, the wide availability of non-monetary reliefs seems to be a sensible approach forward, but many implementation details are left to the Chinese courts.

Janssen and Wang investigate why punitive damages have been increasingly popular in non-common law jurisdictions such as China. They scrutinize whether it is viable for a jurisdiction with a civilian legal system to adopt punitive damages in the realm of tort law. It argues that societal development has brought unprecedented challenges to tort law where merely compensatory damages can no longer provide sufficient remedies to victims. The authors reveal that Chinese courts have been very progressive in introducing punitive damages into various areas of private law in the past decades and recently codified it in its new *CCC*. Chinese law is discussed compared to German law, a civilian

[96]Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in *Studies in the Contract Laws of Asia I: Remedies for Breach of Contract* (Oxford University Press, 2016) 24.

legal system that dramatically influences the Chinese legal framework. Nevertheless, persistent challenges reflected by a gap between the enthusiastic claimants filing punitive damages claims and the 'reserved' judges in granting them have not been fully addressed by the *CC*. For example, does the prohibition on punitive damages in contract law encourage efficient breach?

Moreover, with the advancement of information technologies, a more nuanced approach is needed in dealing with the infringements of ubiquitous and intangible rights like IP and personality rights, distinct from traditional torts. With a comparative study, the authors find that the German private law emphasizes disgorgement damages, while the Chinese legislator put his trust in punitive damages. German disgorgement damages and Chinese punitive damages focus on avoiding efficient breaches of ubiquitous individual legal rights, such as IP and personality rights. Still, the Chinese legislator renders punitive damages also available in several other legal situations. In the end, recommendations for the future implementation of the Chinese punitive damages law are provided to balance efficient protection for claimants and sanctions on wrongdoers.

Ge and Chen argue that in an era of the platform economy, protecting virtual reputation should be regarded as a standalone right instead of an ancillary to a person's real-life persona. In a digital society, it is no surprise that the people we meet in our daily lives live a second life online through their digital character and virtual presence within the cyber community. This may be in the form of online shop owners, TikTok video-makers, gamers, influencers, or well-established bloggers with a substantial number of followers, and the list goes on. Whether the rights of these online presences constitute standalone rights subject to legal protection is an unsettled area of law. According to the prevailing practice in China, when a virtual character is insulted or defamed in the cyber world, the question as to the controller's entitlement to compensation or other remedies depends on whether its 'social estimation' in real life suffered harm. Absent such harm, no remedy based on personality rights law or tort law is available. This was the position adopted in the 2001 SPC gazetted case of *Jing Zhang v Lingfeng Yu*. However, given the revolutionary transformation and development of current trends in the digital platform's usage today, the true identity of the person or organization behind the virtual presence and their rights and interests may be separate and distinct from those of the virtual presence itself. In other words, the traditional prevalent Chinese approach in pegging the remedy for any harm caused to the virtual presence with that suffered by its real-life estimation is becoming less increasingly relevant. Hence, contrary to the widely accepted view, this article argues that even though there is no diminution of realistic social estimation and only the digital character in the cyber world is insulted or defamed, the controller's right to reputation should nevertheless be protected. It analyses the rationale for the protection of virtual representation as a standalone right. Under the current Chinese legal framework, such protection can be achieved through the sound interpretation and application of Article 1024(2) of the new CC. This article takes the view that Article 1024(2) has taken a significant step forward in creating a clear definition of reputation that is broad enough to capture virtual reputation. Finally, this Article suggests a four-step guideline to help provide a framework for applying this newly enacted provision to protect virtual reputation.

Jian He's Paper deals with one of the most controversial issues under Chinese law –the right of recourse, or right of contribution between co-sureties and between other

providers of security in the absence of any agreement. This paper is crucial in the context of CC and much thought-provoking from the perspective of comparative law and is even of great help to the theory and practice of other jurisdictions on this issue. The thesis of this paper may be summarized as follows: (1) the widely spread argument for the right of recourse, including fairness, equity, natural justice, corrective justice, or similar ideas, is not persuasive since it will make the recourse rules unpredictable; (2) in contrast, efficiency is a powerful, much stronger argument for the right of recourse. It can justify a broad, uniform right of recourse between security providers of any type and solve the calculation problem of the internal recourse between security providers. Based on a beautiful cost–benefit analysis, it comes out that the traditional proportional internal liability rule (or, more accurately, the ex-ante proportional internal liability) is the most efficient calculation rule. Despite all these concrete insights on the issue itself, this article aims to prove. The significance of this Article goes beyond the doctrinal or comparative property law. And it also addresses some fundamental issues discussed in the field of law and economics.

Wu and Swadling analyse unjustified enrichment in the Chinese CC through the lens of common law, particularly the English law of unjust enrichment. Compared to Chinese contract and tort law, the Chinese rule of unjustified enrichment has been a considerably less illuminated area for the Western audience. This Article hopes to fill this gap by forcefully arguing that one does not need to take the heading 'quasi-contract' used in the Code seriously; it is merely contractual in name, not substance. There seems to be a divergence between academics and law on the relationship between unjustified enrichment and restitution. The academia generally prefers the Wilburg/von Caemmerer taxonomy, whereas the law takes a dichotomy of 'restitution for unjustified enrichment and 'restitutionary damages for tort or breach of contract'. They suggest that while the Chinese CC remains silent, pre-existing legislation and administrative and judicial opinions assume that the Code should have established a starting point against restitution of the use-value. The Chinese position regarding the 'at the expense of' element is to recognize indirect causation leniently. However, the courts can use standard views of ordinary people in society to avoid absurdity in atypical cases. The 'without legal basis' element in Chinese law should be interpreted as covering cases of impaired consent and those of qualified consent. They find that the change of position defense is based on a value judgment also embraced by property law, that where both the claimant and the defendant are innocent, the claimant should bear the risk of loss of enrichment. A reverse interpretation demonstrates the existence of the *bona fide* purchase defense to unjustified enrichment claims in the Code. Another unique point of the Chinese law of unjustified enrichment is that there is a court-led tendency to take an 'apportionment' approach instead of the pervasively adopted 'all-or-nothing' approach. Overall, given that the Chinese legislature recognizes many provisions of the Code for the first time, it might be worthwhile for those interested in this field of law to wait to see post-codification cases over the next few years to see the practical application of these provisions by Chinese courts.

In light of the above synopsis, I hope you enjoy reading them as much as I do.

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