

Tsinghua Chinese Law Series

Introduction to Chinese Torts Law

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Dedicated to

Professors Jiang Ping and Robert J. Reinstein

Preface

After three decades of economic reform and the implementation of the opening-up policy, China has become much less mysterious than had previously been to the outside world. However, in many legal areas, the country is still undergoing significant development. One of these areas is the law of torts. Although China proclaimed in 2010 that the nation had officially formed a socialist legal system with Chinese characteristics, the merits of this legal system have not yet been tested in theory or in practice. The nation's pursuit of the Rule of Law, though vigorous, has a long way to go.

This book examines the law of torts in China. Based on the Tort Liability Law of China adopted in 2009 (Torts Law), the book intends to provide a comprehensive review of the modern Chinese tort system through an in-depth analysis of the Torts Law. For discussion purposes, the book follows the contours of the Torts Law and divides the subjects into two major parts: the torts in general and special torts. It is important to note that because of its civil law tradition, the Torts Law makes no separation between negligence and intentional torts. Instead it addresses both altogether and applies the same liability imposition rules. The difference between the two becomes relevant only when remedies are assessed.

Part One of the book focuses on the theories and doctrines of torts as provided in the Torts Law. It begins with the rudimental

concept of tort and principles of liability imputation. It then discusses how torts are determined under the Torts Law and how essential tort elements are applied in practice, followed by an explanation of the special liability rules for peculiar tortfeasors. Other relevant subjects in Part One include an examination of joint torts, defenses to torts liability, and remedies. A notable distinction of this book is that all discussions are issue-driven and in many aspects involve the comparison of China with other countries in regulating torts.

Part Two examines the provisions of special torts in the order addressed by the Torts Law. Since many of the areas in special torts either are relatively new and subject to further development, or lack a clear line determining liabilities, rules may appear unsettled and tangled with unsolved issues. Despite the considerable degree of uncertainty, the rules for special torts demonstrate the efforts China has made in keeping up with the mainstream tort legislations present in many developed countries around the world.

A translation of the Torts Law is provided in the appendix of this book. The translation is made with an effort to maintain as much accuracy as possible. It is hoped that the translation will provide an easy access to the full text of the Torts Law. A very common notion in civil law countries is that it would be impossible to apprehend the law without studying and examining the statutes. The vital importance of the black-letter rules in the civil law tradition is obvious.

I am indebted to many people who have made the publication of this book possible. My thanks first go to Temple University Beasley

School of Law and Tsinghua University Law School for their great support. Deans JoAnne Epps and Wang Zhenmin deserve special thanks for their guidance and inspiration. I am also grateful to Professor Wang Liming for sharing with me his great books on Chinese Torts Law and civil law in general. I, in particular, want to acknowledge the advice and support from Professors Jacques De Lisle, Laura Little and Wang Chenggang. In addition, I would like to thank Matthew Quan, my research assistant at Temple University, and Li Wenbin, the managing editor of Tsinghua University Press for their editorial assistance. All errors are mine. My appreciation is also extended to Louis Thompson and John Smagula, both of whom I have had the pleasure to work with for many years. Finally, I owe a great deal to my wife, Frances, who has done everything for me.

Mo Zhang

May 2013

Introduction

The law of torts in China is both an old law and a new piece of legislation. It is old because the regulation on torts can be found in the *Tang* Code (651 AD) and perhaps even earlier than that in the country. It is also new due to the fact that after the Communist Party of China (CPC) took over the power in 1949, China did not have a real torts law until 2009. Although the General Principles of Civil Law of China, which was adopted in 1986 (the 1986 Civil Law), contains a special section on torts, but it is widely considered inadequate and non-systematic. Finally in 2009, after a seven-year drafting,¹ China enacted its first Tort Liability Law (Torts Law) in the modern history.²

¹ The effort to draft the Torts Law was initiated in 2002. Although at that time, the Torts Law was considered as a chapter of the proposed civil code, the draft torts chapter laid the structural basis for the later drafting of the Tort Liability Law.

² *Tort Liability Law of the People's Republic of China* (promulgated by the Standing Committee of NPC, Dec. 26, 2009, effective July 1, 2010), available at http://www.gov.cn/flfg/2009-12/26/content_1497345.htm. A full text of the Torts Law in English translation is available at <http://www.cnnlaw.com/show.asp?id=663>.

Effective on July 1, 2010,³ the new Torts Law has been acclaimed as a significant step in China's effort to move toward a sophisticated civil society governed by the law.⁴

In 2011, China officially declared that a socialist legal system with Chinese characteristics had been established in 2010, announcing the country's operation of a system of laws.⁵ Under Chinese interpretation, the system consists of seven major branches of law, including (1) the constitution and related law,

³ The passage of the law took an unusual step: instead of being adopted by the NPC full session, the Torts Liability Law took a short cut and was passed by the Standing Committee of the NPC – the permanent body of the NPC. Under Article 58 of the 1982 Chinese Constitution (as amended 2004), the National People's Congress and its Standing Committee exercise the legislative power of the State, see art. 52 of Chinese Constitution, available at <http://www.lawinfochina.com/law/display.asp?id=3437>. Pursuant to Article 62 of the Constitution and Article 7 of the Legislation Law of China, however, the legislative power of the Standing Committee is limited to the law other than the basic law of the nation (e.g. according to Article 7 of the Legislation Law, the NPC enacts and amends basic laws governing criminal offenses, civil affairs, the state organ and other matters, while the Standing Committee of the NPC enacts and amends laws other than the ones enacted by the NPC. See Legislative Law of China, adopted on March 15, 2000 and effective July 1, 2000, available at http://www.npc.gov.cn/pc/11_4/2007-12/11/content_1617613.htm.) Therefore, many questioned about the Standing Committee's authority to adopt such a law as the Torts Law that is considered the basic law related to the civil affairs. See Hou Guoyue, *The Standing Committee of the NPC Lacks the Power to Enact the Torts Law*, available at <http://www.civillaw.com.cn/article/default.asp?id=47528>. See also Xu Xianmin, *The Torts Law Should be Submitted to the NPC's National Conference for Review*, available at http://www.npc.gov.cn/nc/xnwen/tpbd/cwhhy/2009-12/23/content_1531743.htm.

⁴ See Wang Liming, *Textbook of the Tort Liability Law of China*, 1 (People's Court Press, 2010)(hereinafter TEXTBOOK).

⁵ See the Information Office of the State Council of China, *the White Paper of "the Socialist legal System with Chinese Characteristics"*, published on October 27, 2011. The English version of the White Paper is available at http://www.scio.gov.cn/zfbps/ndhf/2011/201110/t1036756_6.htm.

(2) civil and commercial law, (3) administrative law, (4) economic law, (5) social law, (6) criminal law, and (7) litigation and non-litigation procedural law. The Torts Law is considered an important component of the civil and commercial law. On the basis of their legal hierarchy, these branches of law are further divided into three layers, that is, the constitution, laws, and administrative regulations and local rules as well decrees. According to Chinese Legislation Law, Constitution, adopted by the general assembly of the NPC, is the supreme law of the country. Laws are the statutes promulgated by the NPC or its Standing Committee. Administration Regulations refer to the rules adopted by the State Council and other administrative agencies. Local rules and decrees are those enacted by local people's congresses and governments.

The past three decades after the country initiated its vast economic reforms in 1978 have witnessed China's massive legislative effort aimed at rebuilding its legal infrastructure. The achievement has been dramatic. An official statistics revealed that by the end of August, 2011, China promulgated 240 laws, 706 administrative regulations, and 8,600 local rules and decrees. Additionally, in an effort to avoid inconsistency among the statutes, China undertook a campaign to clean up the existing laws and regulations found to be obsolete or conflicting. As a result, about 8 laws, 7 administrative regulations and 455 local rules and decrees were repealed, and 59 laws, 107 administrative regulations and 1,417 local rules and decrees were amended.⁶

The enactment of the Torts Law was part of China's massive

⁶ See *id.*

legislative initiates. In fact, the passage of the Torts Law was a dramatic step closer toward the adoption of the much wanted comprehensive civil code in the country. More importantly, the Torts Law, together with the Contract Law (1999)⁷ and Property Law (2009),⁸ constitutes the basic legal framework that regulates and governs civil affairs in the country and further enhances the protection of private rights. The Torts Law lays a legal foundation to effectively offer redress for harms caused to person or property, and in the meantime to deter and prevent civil wrongful conduct. Such a foundation has long been missing from the modern Chinese legal system.

Like both Contract Law and Property Law, the Torts Law is an important piece of state legislation in China to regulate civil relations. In response to the increasingly urgent need for a unified torts law system, the Torts Law is purposed to provide the causes of action pertaining to torts and mechanisms to redress civil grievances in the courts.⁹ Again, along with the Contract Law and the Property Law, the Torts Law helps cement the legal ground to

⁷ *Contract Law of China* (promulgated March 15, 1999, effective October 1, 1999), available at http://www.foreignercn.com/index.php?option=com_content&view=article&id=1131:contract-law-of-the-peoples-republic-of-china&catid=55:chinese-law&Itemid=99.

⁸ *Property Rights Law* (promulgated on March 16, 2007, effective October 1, 2007), available at <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/property-rights-law-of-the-peoples-republic-of-china.html>.

⁹ In 2007, the tort cases brought to the people's courts reached 830,000, and in 2008, this number increased to 992,000. See Wang Shengming, *Explanations to the Tort Liability Law of the People's Republic of China*, 2 (China Law Press, 2010); see also Peter Neumann & Calvin Ding, *China's New Torts Law: Dawn of the Product Liability Era*, in *The China Business Review Online*, <http://chinabusinessreview.net/public/1003/neumann.html>.

build a civil society that China would need to develop in its commitment to the rule of law.¹⁰

1. Torts in Chinese Legal History

It seems without dispute that tort, as a legal concept, does not have a Chinese origin. Nevertheless, as a social phenomenon, torts became to gain the legislative attention in the country as early as in the *Qin* Dynasty (221 B.C.) when China became a unified country. But it was not until *Tang* Dynasty that the tortious conducts were formally regulated in the state legislation, as represented by the *Tang* Code (651 A.C.). The *Tang* Code was the first systematically codified law in China and it was in essence a synthesis of the legal ideologies of the legalism and *Confucianism*, the two most influential classic legal philosophies of the nation. The importance of the *Tang* Code rests with the fact that it eventually became the basis for later dynastic codes in China.

Like all other codes in Chinese legal history, the *Tang* Code was primarily a penal code that contained certain civil statutes and regulations. The *Tang* Code consisted of 12 parts with over 500 articles, enhanced with a commentary (the *Tánglǐ shūyì*). It is commonly held in China that the *Tang* Code contained about 12 articles that dealt with or related to torts. At that time, however, there was no definition or conceptual description of torts. Instead, the provisions that resembled tort law were simply seen as a way of compensating the harm inflicted upon thing or person. For example, in the *Tang* Code, there was a compensation scheme

¹⁰ See Wang Liming, *Textbook*, *supra* note 4, at 1-3.

called “residual value exclusion” for property damage, meaning that the proper amount of compensation shall be the original price of the damaged property minus its residual value. This scheme was then adopted in almost all major succeeding codes and thus became a common rule and mechanism for civil compensation in Chinese legal history.¹¹

However it is important to note that the tort provisions as provided in Chinese dynastic codes were mainly concerned with the protection of government property. In addition, these provisions were all closely tied with criminal offenses, especially when personal injury was involved. This scenario typically reflects the unique character of traditional Chinese legal system, which was based entirely on criminal law. The most noticeable feature of this traditional system was that every code contained both criminal and civil law with a focus on criminal punishment.

Historically, although the traditional Chinese legal system finally collapsed with the fall of the Qing Dynasty in 1911, it actually started to fade in 1840 when the Opium War knocked down the door of China that was closed to all westerners. As a consequence, China’s traditional self-sufficiency policy was replaced with an emerging movement of learning from the West. Thus the Chinese legal tradition began to incorporate civil law literature and ultimately became a member of the civil law system.¹²

¹¹ The Residual value exclusion rule was provided in the *Song*, *Ming* and *Qing* Code respectively.

¹² See Mo Zhang, *the Socialist Legal System with Chinese Characteristics: China’s Discourse for the Rule of Law and A Bitter Experience*, 24 Temple Int’l & Comp. L.J., 1, 27-32 (2010).

The first civil law legislation in the contemporary history of China was the Civil Code of Republic of China, promulgated by the Nationalist government in 1929 (1929 Civil Code). Before that, however, there had been at least two attempts to adopt a civil code.¹³ The first attempt was the drafting of the *Qing* Civil Code. In 1907, in response to the national outcry for legal reform, Emperor *Guangxu* was persuaded to revise the existing code. One of the revision efforts was to adopt a civil code. After nearly four year of drafting, the code was completed in 1911. However, the code that was finally developed never came into effect due to the death of the *Qing* Dynasty later that same year (1911 draft Civil Code). Although the 1911 draft aborted, the drafting itself was significant because it marked the beginning of the separation of civil law from criminal law in the Chinese legal system.

The second attempt was the draft civil code that was initiated in 1914 and finished in 1925 during the period of the Northern Warlords government (1925 draft Civil Code). The code was drafted by incorporating the 1911 draft Civil Code and incorporating the customary rules that existed in various provinces. In the 1911 draft civil code, 33 articles dealt with torts, covering general torts, fault liability, special torts, damages, joint torts, and statute of limitations. The 1925 draft civil code contained 27 torts articles but all of them basically followed the blueprint of the 1911 draft civil. Unfortunately, due to the political turmoil, the 1925 draft civil code never passed the legislature.

¹³ In 1915, the Northern Warlords government drafted a special chapter of the civil code, named Chapter of Family Relations. Some in China considered this draft one of the civil code attempts. See Yang Lixin, *On the Law of Torts*, 108 (Jilin People's Press, 1998).

The 1930 Civil Code was promulgated by part during 1929 and 1930. The final version of the 1930 code, which was completed in December of that year, consisted of 5 parts, namely General Principles, Obligations, Property, Family Relations and Succession.¹⁴ The Part II, Obligations, which had a total of 604 articles, was adopted on November 22, 1929 and went into effect on May 5, 1930. There were two chapters in the part of Obligations: general provisions and various obligations. The law of torts was provided from article 184 to article 198. Under the civil law tradition, obligation may occur either under an agreement or by the operation of law, and a tort, like a contract, is major cause of obligation. Following the German model, the law of torts in the 1930 code was further divided into the categories of general torts and special torts. Since then the modern concept of torts became a functional part of Chinese civil law.

In addition to the 1930 Civil Code, five other major codes were enacted between 1928 and 1937.¹⁵ Together, these codes were compiled in a corpus of law and collectively called “The Six Codes” or “The Code of Six Laws” (*Liu Fa Quan Shu*). However, when the CPC took the reign over China in 1949, the Six Codes, along with all other legislation adopted under the Nationalist government were abolished in an effort to remove the capitalist dregs and influence, and to establish a new socialist legal system. The abolishment eventually left China with no law for decades,

¹⁴ The first part of the 1930 Civil Code was promulgated in May 1929 and last two parts (Family Relations and Succession) in December 1930.

¹⁵ The other five codes were the Constitution, the Criminal Code, the Code of Civil Procedure, the Code of Criminal Procedure and the Administrative Code.

especially in the areas of civil law legislation.

The 1986 Civil Law was the first piece of major civil law legislation after 1949. However, the drafting work of the civil code in China actually began in 1954. The first draft was modeled on the law of the former Soviet Union and was completed in 1956. As a piece of ambitious civil law legislation, the first draft of the civil code had 4 parts and a total of 525 articles.¹⁶ The second draft was made in 1957, but soon was aborted as a result of the nationwide anti-rightist movement. During the ten-year chaos of the Cultural Revolution, the legal system of China was almost entirely destroyed. Not until 1979, did the legal drafting work resume again. In 1982, the new draft of the civil code was introduced, which later became blueprints for the 1986 Civil Law.

Unlike the comprehensive civil code that was envisioned during the drafting, the 1986 Civil Law is actually a simplified version, containing only 156 articles. The major reason for the hesitation to adopt a civil code on a comprehensive basis was that no consensus could be reached among scholars and legislators on the substance and structure of the code. One highly debated issue, for example, is whether the civil law and commercial law should be included in one code. Another issue is whether the civil code shall separate general and specific provisions. Therefore, because of the difficulty in reach an agreement, the attention turned to adoption of separate law based on each chapter of the proposed civil code. It was hoped that at a later time, the separately adopted laws may be compiled to become a comprehensive code.

¹⁶ The four parts included the General Provisions, Ownership, Obligations and Succession.

The 1986 Civil Law consists of nine chapters. Chapter 6 deals with civil liabilities and Section III of Chapter 6, which contains 17 articles, covers torts. The 17 articles of Chapter 6 formed basic regime of torts regulation in China before the Torts Law was enacted. Once again, the Torts Law was supposed to be a part of the attempted comprehensive civil code, but was adopted separately to avoid further delay caused by the heated debates and disagreements on the enactment of the civil code. The promulgation of the Torts Law marks the beginning of era of an independent regulatory scheme of tort laws.

2. Issues Facing the Torts Legislation

The currently enacted Torts Law was first drafted in 2002. Again, at the initial stage of drafting, the Torts Law was considered as part of a general legislative plan for a comprehensive civil code, together with the other major areas such as property, contract, right of personality, family relations and succession. But for the reasons stated above, the Torts Law later was taken out as an individual and independent piece of legislation. Interestingly, although the drafting work lasted for some seven years, the promulgation of the Torts Law seemed to be hasty. Instead of being adopted by the NPC full session, the Torts Law took a short cut and was passed by the Standing Committee of the NPC – the permanent body of the NPC. The expedited adoption of the Torts Law raised a legitimate question about whether the Standing Committee has stepped over its boundary to pass such major legislation as the Torts Law. Under the Legislation Law of China,