

OVERVIEW OF THE DRAFT CIVIL CODE OF CHINA¹

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I. Historical overview of the drafting of the Civil Code in China

Since the founding of the People's Republic of China, the country has experienced the framing of four civil codes. The first attempt occurred in 1956, but failed due to political reasons; the second one failed in the early 1960s for the same reasons. The third attempt took place in the early 1980s, when China's attempt to reform the economic system was still in its infancy. This was not the right time for the country to draft a completely new Civil Code, since it was in a state of transition from a planned to a market economy. Nevertheless, as the economic reforms deepened, it became urgent for China to frame a civil law to regulate the economy. Thus, the General Rules of Civil Law were adopted and the law came into effect on January 1, 1987.

The General Rules of Civil Law consist of the following sections: fundamental principles; natural and legal persons; legal acts; agency; civil rights; liability; the law of international civil relations and the appendix (156 articles in total). The rules remain extremely general, but they remain the fundamental law to this very day. In addition, there are some special civil law statutes, such as the Law of Contracts, which entered into effect on October 1, 1999, the Law on Guarantees, which entered into effect on October 1, 1995, and the Law on Marriage, which came into effect on January 1, 1981, and was amended on April 28, 2001.

The most recent draft of the Civil Code was completed in April 2002, by a group of legal experts. On December 23, 2002, the draft was submitted to the Ninth National People's Congress for debate. This proves that the fourth draft of the Civil Code achieved a certain degree of success, since this is the only civil code draft that was submitted to the legislative body in the history of the People's Republic of China.

¹ China in this article refers to the People's Republic of China.

II. The structure of the new draft

The draft submitted to the National People's Congress consists of nine parts.

Part one: General Rules; Part two: Property Law; Part three: Law of Contracts; Part four: Law of Persons; Part five: Law of Marriage; Part six: Law of Adoption; Part seven: Law of Succession; Part eight: Law of Torts; Part nine: Application of the Law on Foreign Related Civil Relations.

Many experts have criticized this structure for being unscientific and lacking a certain degree of logic. In reality, however, it represents no more than a simple modification of China's current law. This is why another law was drafted by experts, who share the opinion that the German Civil Code should be taken into consideration. If the German Civil Code is followed, China's civil code will consist of the following seven parts: Part one: General Rules; Part two: Property Law; Part three: General Rules of Obligation; Part four: Law of Contracts; Part five: Law of Torts; Part six: Family Law; Part Seven: Law of Succession.

III. The fundamental principles of the new Civil Code

The draft of the Civil Code is intended to follow the fundamental principles established by the General Rules of Civil Law.

- 1.** The parties concerned are to be equal.
- 2.** Civil law should be guided by the principles of freedom of choice, equality, fair compensation and good faith.
- 3.** Rights and interests of every natural or legal person should be protected by law, and cannot be infringed upon by any individual or organization.
- 4.** Activities in civil law should be in accordance with the law or the policy of the state, should no concrete rule be applicable in the Civil Code.
- 5.** Activities in civil law should meet the morality requirements and cannot harm the public interest.

IV. The characteristics of the new draft

- 1.** China is a civil law country, which will typically follow the German way. The traditional system of legal activities, the separation of property rights from obligations, and the separation of the general provisions from the specific ones, can be found in China's civil law. The new draft on the Civil Code follows this method as well.
- 2.** The draft follows the monist principle, which means that there is no distinction between civil law and commercial law. Companies, business partnerships, negotiable instruments and securities are not stipulated therein. These fall into the category of commercial subjects and commercial activities, and should be regulated by special legislation.
- 3.** The law of intellectual property rights is not regulated in the draft, because it differs in many respects from fundamental civil rights, for example taking the duration of the protection, the way of protection into consideration.
- 4.** International private law is regulated in the draft version of the Civil Code. Many experts agree on that it should be regulated by the Civil Code.

V. Some problems associated with the new draft

Though the new draft can be characterized as progressive, we must recognize that there are some problems with it as well. The time allocated for the actual drafting process was limited, we can even say that it was finished in a hurry. On the other hand, the procedure by which the drafters were appointed was simple, since no process was required in order to regulate the appointments. The drafting group was comprised of six professors, one retired judge and two officials. By comparison, in France, the civil code drafting committee is typically comprised of three law professors, three judges and three lawyers (including notaries). This is also referred to as the „three-three rule”.

In addition, since China still does not have property laws, many experts and drafters have recommended that the Civil Code should be shaped on the basis of property law, which should be adopted first.

VI. Dissensions in drafting

1. Subjects of civil law

The General Rules of Civil Law of 1987 state that there are two kinds of subjects of civil law, i.e. natural persons and corporations. China has already enacted the Law on Partnerships, and this is why many experts share the opinion that partnerships should also be taken into consideration as the subjects of civil law.

2. Collective ownership

Some of the current questions are notably how to define the ownership of collective property, who is the owner, and whether this right is tenancy in common or condominium according to the share.

3. Transfer of the rural land usage right

Rural land can be land for building and land for farming. On this basis, naturally, the right to use rural land includes the right of usage for building and farming. The transfer of the former is forbidden, in order to prevent rural land from entering the market. This will bear an impact on the real estate market. Some experts think that the transfer of the right of usage for the purposes of building should be permitted in order to prevent damage to collectives and peasants. The latter right of usage is also referred to as a management right. In the meantime, the Law on Contracts Concerning Rural Land has come into effect, and this law provides that the peasants can re-contract, rent, exchange, or assign the right on the agricultural land. However, the law does not contain any regulations on mortgages. This is why experts suggest that the transfer of the land usage rights (including mortgages) should be regarded as an issue, which needs to be regulated in the Civil Code.

4. Should there be a general section on obligations?

There is no law of obligations in common law. Austria, Germany and Switzerland have a system of law of obligations, as well as Russia and the Netherlands. The law of obligations is at the heart of the German legal system. In China, most experts believe that the general rules of obligations should guide contracts and torts, but also general rules on contracts should be stressed. Those, who do not share this opinion, think that because the general rules of the Civil Code already govern contract law, there is no need for separate general rules of obligations. These critics have stated that the drafters should not have blind faith in the German legal system.

5. Should the right to privacy be regulated separately?

Firstly, let us examine the manner by which some other countries regulate the issue. Switzerland was the first to secure the right to privacy. Germany regulated the right to privacy in 1945, and consequently the law stipulated that he or she who suffers injury has the right to claim compensation in case of infringement of his right to privacy. Greece provided this right in 1964, and France adopted it in 1970. In China, people regarded civil law for a long time as the law of property, and even nowadays many people pay more attention to property law relations, than issues relating to personality rights. Many experts share the opinion that the right to privacy cannot be regulated in the Law of Persons section of civil law, and that the Law of Torts is not the appropriate place to regulate this problem either. This is why the right to privacy should be regulated by a separate section of civil law.

The right to privacy is a substantial right in civil law, and for the time being a separate paragraph refers to it in the General Rules of Civil Law. Nevertheless, many experts think that there are too many inherent difficulties related to the way in which the right to privacy is regulated. For example, only a few rules exist, which are capable of providing answers to problems related to this right, and many issues are hard to distinguish from tort-related problems.

6. Should torts be regulated separately from obligations?

In some countries, such as France, Germany, Japan and Switzerland, torts are not treated separately. Chinese experts think that there are many differences between contracts and torts, their rules relating to liability, for example, differ completely, just to name one important difference. This is why torts should be regulated separately from contracts, since otherwise the structure of the law of obligations would be damaged.

7. Should foreign-related civil relations be regulated in the Civil Code?

Most experts think that foreign-related cases are special, and that they should be regulated separately by international private law.

