

The New Round of Civil Law Codification in China

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TABLE OF CONTENTS: 1. An Introduction; 2. Path of Civil Law Codification in China; 3. Political Difficulties; 4. Doctrinal Debates Over Civil Law Codification; 5. Further Implications of the Civil Law Codification; 6. Conclusion.

ABSTRACT: Despite a long unsuccessful history, civil law codification has entered into a new stage in China in 2014 when the Central Committee of the Communist Party (CCP) made its call for this compilation in its Decisions on Major Issues Concerning Comprehensively Moving Governing the Country According to the Law Forward (2014 Decisions) for the first time since the establishment of the People's Republic of China (PRC).¹ Although the political promotion may be welcomed as an encouraging sign of the Party-State's commitment to the rule of law development in China's social and market transition, the codification is still facing a wide range of challenges, ranging from political ideology to technical controversies. This article critically examines the background of the new round of codification, the progress made thus far and some major issues that have been heatedly debated. It is argued that in terms of the path for civil and private law development China may take no exception to other developed market economies with profound political and institutional reform.

KEYWORDS: *China; Civil Code; Institutional Reform; German Code; Commercial Law.*

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¹ The CCP Decision was adopted on 30 Oct. 2014 by the Fourth Plenary Session of the 18th Communist Party of China Central Committee. An English translation is available at <https://chinacopyrightandmedia.wordpress.com/2014/10/29/explanation-concerning-the-ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/>.

1. AN INTRODUCTION

A historical economic reform with an open-door policy began in China in the late 1970s and has changed the country significantly. China has become the second largest economy in the world and is expected to surpass the United States within a short period. With per capita GDP of \$8018 reached in 2015, China is entering into a middle class society. The rise of China has become a phenomenon in the new century and has had a profound implication on the entire world.²

Although today China is still a socialist country economic reform and opening policy have dramatically weakened and reduced the Party-State control, particularly in respect of growth and the quality of economic life. Since the Constitutional Amendment in 1993 where the traditional planned economy was officially replaced with the so-called “socialist market economy,”³ a legal status of private economy as its important part has eventually been recognized.⁴ China’s accession to the World Trade Organization (hereinafter WTO) in 2001 further improved the market access and competition conditions. In terms of business ownership structure, according to a recent statistical survey, by the end of 2013 private enterprises and commercial households reached 12.53 million and 44.36 million respectively making their contribution to more than 60% of the national GDP.⁵ On the contrary, the number of the state-owned enterprises (hereinafter SOEs) has dropped to approximately 155,000, although they are still very powerful in terms of scale and in holding their monopolistic positions in all the key business sectors of the country.⁶

Meanwhile, more and more private and civil rights have been recognized in legislation and judicial practice in rapid social and economic

² The World Bank [WBG], *China 2030: building a modern, harmonious and creative society*, (Washington,DC:WorldBank,2013);<http://www.worldbank.org/content/dam/Worldbank/document/China-2030-complete.pdf>; and Andrew Soergel, “America's Days Are Numbered as the World's Top Economy”, *US News and World Report*, (Dec. 28, 2015).

³ The Constitutional Amendments of 1993, Art. 7.

⁴ The Constitutional Amendments of 1999, Art. 16.

⁵ *Private Sector's Contribution to More Than 60% of the National GDP in 2013*, XINHUA SHE (Feb. 28, 2014).

⁶ *Disclosure of State Owned Enterprises: Less Than 1% in Number with More Than 30% of Total National Assets*, ZHONGGUO CHABING XINWEN BAO [INDUSTRIAL AND ECONOMIC JOURNAL OF CHINA], July 31, 2014.

developments. At the legislative level, the Chinese Government declared in 2011 that after the reform for more than 30 years a new legal system with Chinese characteristics had been established with civil and commercial law as one of its major components where more than 33 national laws and numerous government regulations had been adopted in this regard.⁷

With respect to the judicial practice beyond the traditional civil law, many new types of litigation have reached the People's Court even prior to the relevant laws being enacted or updated, such as disputes related to e-commerce, corporate social responsibility, shareholders' derivative actions, use of computer software, telecommunication services, right to education, damages to mental health and personality rights, employment discrimination, antimonopoly and consumer protection, land requisition, and production rights. In order to streamline handling of civil cases, the Supreme People's Court (hereinafter SPC) promulgated its first Provisions on Causes of Civil Actions (on trial basis) in 2000 with 300 types of civil cases stipulated in four categories. The Provisions were further revised and dramatically expanded in 2008. The current version promulgated in 2011 includes 424 causes of civil action classified into ten categories, which are further divided into forty-three sub-categories. Contract related disputes alone (which include intellectual property contracts) count for seventy-five different types of claims.⁸

Moreover, the SPC has issued a large number of judicial interpretations and policies in order to remedy the situations where the laws were either lacking, or not clear and detailed enough.⁹ Since 2011 the SPC has further developed its guiding case system, where cases with guiding value are selected by the SPC and promulgated for the lower courts to follow in

⁷ Info. Office of the State Council of the China, *The Socialist Legal System with Chinese Characteristics* (Oct. 27, 2011), http://www.china.org.cn/government/whitepaper/node_7137666.htm.

⁸ Ten major categories of the Provisions on Causes of Civil Actions of 2011 include cases related to personality rights, marriage and family rights, property rights, contract rights, intellectual property rights, labor rights, maritime disputes, enterprises disputes, tort claims, and civil capacity and litigation rights. See, for an English translation and comments, YILIANG DONG, HONGYAN LIU, KNUT B. PISLER, *THE 2011 REGULATION ON THE CAUSES OF CIVIL ACTION OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA* (2011).

⁹ See Law on Legislation (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2015, effective Mar. 15, 2015) (amending Law on Legislation (2000)), ch. 6, art. 104, 2015 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

their adjudications. By the end of 2015, fifty-six guiding cases have been adopted with more than half being civil or commercial decisions.¹⁰

To a large extent, such developments are much needed in order to respond to the rapid social and economic changes taking place in China and the increasingly intensified conflicts in this transition. As the largest developing and socialist country in the world, China's social and economic transition to a rule of law society and a market economy is susceptible to large scale and tempestuous clashes between different interest groups, social classes and old and new institutions. Such conflicts have not only made China become "one of the most litigious" societies in the world,¹¹ but produced a large number of "mass incidents" referring to planned or impromptu gatherings in forms of public speeches, demonstrations, public airings of grievances, or even violent attacks on government organs, factories or other property as means to protest against the abuse of power, corruption, an underdeveloped social welfare system, and a lack of applicable legal remedies that are seen as disrupting social stability and direct challenges to the current Party-State regime.¹² According to some academic surveys, the number of reported "mass incidents" rose from 8,700 in 1993 to more than 90,000 in 2006, and further up to 180,000 in 2010.¹³

From this reflection it has become evident that the existing laws and their enforcement cannot really keep up with the country's social and economic development and effectively prevent and settle the rapidly increasing number of civil disputes and social conflicts. Against this background, codification of civil law has become a hot topic in China again

¹⁰ For a detailed analysis of the guiding case practice see MEL GECHLIK, *China Guiding Cases Project*, Issue No. 4, CGC.LAW.STANFORD.EDU (May 1, 2015), <https://cgc.law.stanford.edu/guiding-cases-analytics/issue-4/>.

¹¹ Tom Phillips, *China Will Be 'One of the Most Litigious' Countries in the World*, INTELL. PROP. MAG., Dec. 6, 2013. According to the latest working report of the Supreme People's Court, the judiciary of China at all the levels received more than 15.51 million lawsuits in 2015, or more than 20% increase from the previous year, with over 75 % being civil and commercial cases. Report, Takeaways from the Supreme People's Court 2015 Work Report, *Supreme People's Court Monitor* (Mar. 15, 2016), <https://supremepeoplescourtmonitor.com/2016/03/15/takeaways-from-the-supreme-peoples-court-2015-work-report/>.

¹² Tao Ran, *China's Land Grab Is Undermining Grassroots Democracy*, THE GUARDIAN (London, Dec. 16, 2011) <https://www.theguardian.com/commentisfree/2011/dec/16/china-land-grab-undermining-democracy>; and Austin Strange, *Mass Incidents in Central China: Causes, Historical Factors, and Implications to the PAP*, 17 THE MONITOR 32 (2012).

¹³ Barbara Demick, *Protests in China over Local Grievances Surge, and Get a Hearing*, L.A. TIMES (Oct. 8, 2011) <http://articles.latimes.com/2011/oct/08/world/la-fg-china-protests-20111009>.

since 2014 due to the direct promotion of the CCP made for the first time in the history of the PRC. Although the political decision has provided the codification with new momentum, the enactment in China as a socialist market economy is still facing some major political challenges and doctrinal uncertainties.

2. PATH OF CIVIL LAW CODIFICATION IN CHINA

In terms of legal tradition China has long belonged to the civil law family with embodiment of legal principles and rules into codes as the most reliable sources of law. Historically, the practice to codify legal rules through a public way can be traceable to Spring and Autumn and the Warring States Periods (BC 770–221) and codification in Tang Dynasty was considered “the foundation on which the Chinese legal system was built from the 7th till the beginning of the twentieth century.”¹⁴ However, it should be noted that in the long feudal history almost all the laws were of public nature resulting in punishment if commercial activities were obstructed. As a result, “[t]he concept of ‘civil’ or ‘private’ law did not exist.”¹⁵

In the reformation period of Qing Dynasty some basic laws were introduced from the West and eventually became the first attempt of modern legislation in China, which included both Draft Civil Law and Commercial Law modeled after the codes of Germany and Japan. After the 1911 Revolution the Nationalist Government promulgated the first Civil Code in China’s history in 1930, which also followed the style of the German Civil Code (Bürgerliches Gesetzbuch, BGB) due to the influence from Japan. However, a controversy emerged in the legislative process on the system design of civil and commercial law codification. Finally, a decision was made by the Central Political Committee of Kuomintang (Chinese Nationalist Party) to combine general rules of civil and commercial laws into a unified code with

¹⁴ Ping-Sheung Foo, *Introduction to THE CIVIL CODE OF THE REPUBLIC OF CHINA*, at iv (Ching-Lin Hsia, James L. E. Chow, Yukon Chang trans., 1930).

¹⁵ Edward Epstein, *Codification of Civil Law in the People’s Republic of China: Form and Substance in the Reception of Concepts and Elements of Western Private Law*, 32 *U.B.C. L. REV.* 153, 162 (1998); and Max Weber, *Economy of Law or Sociology of Law*, in 2 *ECONOMY AND SOCIOLOGY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (Claus Wittich ed., 1978).

subordinate supplementary laws, such as Company Law, Commercial Paper Law, Insurance Law, and Bankruptcy Law, to deal with specific fields.¹⁶

The establishment of a socialist government in 1949 led to not only complete abolition of the legal system of the Nationalist Government, but also to a domination of the Soviet style planned economy for more than three decades. Since then although it has been a long desire of the top leaders and scholars to eventually develop a comprehensive civil code on a grand scale in China, four rounds of civil law codification have failed so far. The attempts to develop a civil code with some preliminary drafts in the 1950s (1954-1956) and 1960s (1962-1964) were short lived because of the political conditions at the time. The planned economy and class struggle apparently did not allow any chance for a civil code to come to fruition.¹⁷ Although the efforts produced some progress, including two drafts of Civil Law being completed in 1956 and 1964 modeled after the former Soviet Union Civil Code of 1922, legislative process was disrupted due to the hostile political movements and ideology against private rights and autonomy. Despite the political hostility, from an academic perspective Roman law and *Pandektenrecht* continued to be modeled in certain legal studies and legislation.¹⁸

The third round of codification was not initiated until the late 1970s after economic reform and open door policy were implemented. Although two drafts with more than 460 articles were worked out, the political uncertainties in the early years of reform and insufficient experience and theoretic preparation rendered the further progress impossible. As a result, the drafting group was dissolved by the Standing Committee of the National People's Congress (hereinafter NPC) as the top national legislature in 1981. Instead, the General Principles of Civil Law (hereinafter GPCL) was eventually promulgated in 1986 as an interim solution to meet the urgent needs of social and market development of the time. On the one hand, the GPCL laid down an important foundation for private law development in China with its explicit stipulation for the first time in the PRC history that

¹⁶ Tsung-Fu Chen, *Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution*, 6 NAT'L TAIWAN UNIV. L. REV. 389, 398-401 (2011).

¹⁷ Liming Wang, *The Systematization of the Chinese Civil Code*, in TOWARDS A CHINESE CIVIL CODE: COMPARATIVE AND HISTORICAL PERSPECTIVES 21, 24 (Lei Chen, Cornelis Hendrik Van Rhee eds., 2012).

¹⁸ *Id.* For some detailed discussion on the drafts made in this period see Epstein, *supra* note 15, at 153-198.

the law shall govern property relations among the subjects with equal legal status.¹⁹ It has not only provided the economic reform and market development with urgently needed rules and guidelines, but also laid a foundation to develop a civil and commercial law system in China. As Professor Wang Liming of the People's University pointed out, promulgation of the GPCL marked a new stage of developing and systematizing civil and commercial legislation in China.²⁰

On the other hand, it was an immature product where the drafting process was guided by the principle of "general rather than detailed" to deal with urgent practical demands without sufficient experience and doctrinal preparation immediately after the ten year disastrous "Cultural Revolution". As Peng Zhen, then Vice Chairman of the NPC, stated, "It is impossible to adopt a civil law within a short period. This is not because we are not working hard enough, but the issues concerned are so complicated and many problems have not been settled in the economic reform."²¹

As a result, the current civil and commercial system has been developed on the basis of the GPCL of 1986, which includes nine chapters and 156 articles covering the general principles, citizens (natural persons), legal persons, civil juristic acts and agency, civil rights, civil liability, statutory limitation, application of law in foreign related civil relations, and miscellaneous provisions. Two main features reflected in the structure and contents of the GPCL are that (1) it follows the German *Pandekten* or Roman Digest System, where general principles are set out first followed by separate provisions applicable to specific legal areas; and (2) it combines civil and commercial rules in a single legislation. In addition to general rules to deal with civil law matters, the GPCL stipulates provisions governing individual commercial households, enterprise legal persons, business joint operation, contract, intellectual property rights, civil liabilities including damages

¹⁹ General Principles of the Civil Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), ch. 1, art.2 (1986).

²⁰ Wang, *supra* note 17.

²¹ Quoted from Liang Hui Xing, Professor of Inst. of Law of Chinese Acad. of Soc. Sci., *Revisited Certain Issues in Civil Law Codification with Response to De-codification* (Mar. 24, 2015), <http://www.aisixiang.com/data/90909.html>.

arising from tortious conducts, product liability and breach of contract, and foreign related disputes.²²

Although from today's view the GPCL may not be considered consummate, as the first comprehensive private law enactment in the PRC its significance should not be underestimated. Thus far major civil/private laws adopted on the basis of the GPCL include Marriage Law (as amended in 2001), Tort Liability Law (2009), Contract Law (1999), Law on Right *in rem* (2007), Company Law (as amended in 2013), Partnership Enterprises Law (as amended in 2006), Sole-proprietor Enterprises Law (1999), Commercial Bank Law (as amended in 2015), Commercial Bank Supervision Law (2006); Security Law (1995), Securities Law (as amended in 2014), Securities Investment Fund Law (as amended in 2012), Trust Law (2001), Maritime Law (1992), Commercial Paper Law (as amended in 2004), Insurance Law (as amended in 2015), Patent Law (as amended in 2008), Trade Mark Law (as amended in 2013), Copyright Law (as amended in 2010), Enterprises Bankruptcy Law (2006), Sino-Foreign Equity Joint Venture Law (as amended in 2000), Sino-Foreign Cooperative Joint Venture Law (as amended in 2001), Wholly Foreign Owned Enterprises Laws (as amended in 2001), and Governing Law Applicable to Foreign Related Civil Relations (2010). Many laws have borrowed rules from international treaties and experiences of developed economies. Some of them have been amended two or three times since their first adoption in order to deal with the new developments and catch up with worldwide competition.²³ As such a legislative pattern to include civil and commercial laws in one category on the basis of the GPCL, have been followed in the past thirty years.

The fourth round of codification was resumed in late 1998 after the historical Constitutional Amendments where the planned economy was officially given up and replaced with the "socialist market economy" in 1993.²⁴ According to the working plan, a civil code would be developed by three steps: first, adopt a uniform contract law by 1999; second, adopt a

²² An English translation of the GPCL is available at the NPC's website, at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm.

²³ Shiyuan Han, *Civil Law Codification in China: Its Characteristics, Social Function and Future*, in CODIFICATION IN EAST ASIA 201, 210-211 (Wen-Yeu Wang ed., 2014).

²⁴ Art. 7 of the Constitutional Amendments of 1993.

uniform property law; and finally, complete enactment of the Civil Code by 2010. China's accession to the WTO in 2001 provided the legislative process with new momentum and pressure as the top leaders of the NPC asked the drafting group to accelerate its work and to complete its first draft Civil Code in 2002. Although the first draft indeed managed to be submitted to the national legislature for review on 17 December 2002 (2002 Draft Code),²⁵ the acceleration was apparently hindered with difficulties and poor draftsmanship.

The 2002 Draft Code included more than 1200 articles in nine parts, including the General Principles, Property Law, Contract Law, Rights of Personality, Marriage, Adoption, Succession, Tort Liabilities, and Governing Law Applicable to Foreign Related Civil Relations.²⁶ As some scholars observed, under the time pressure the 2002 Draft Code was not a fine work at all, but just a rough product to piece together existing legislations without decent digestion. Since the legislators could not find a good basis to carry out their deliberation to build up any legislative consensus, the first reading of the Draft Civil Code triggered extensive controversies, even among the key members of the drafting group.²⁷ Such premature promotion has left negative impacts on the legislative process. Since 2002 the drafting of the civil code fell to a standstill until a new call was made by the CCP recently.

Unlike the previous rounds where the enactment efforts were initiated by the legislature subject to the CCP's political approval, the current codification is directly launched by the CCP itself. The new leadership, after being appointed in late 2012, unleashed a campaign to deepen institutional reforms in order to deal with the country's economic upgrading and challenges in its transition toward a moderately prosperous society. On the 12th of November 2013 the CCP adopted its Decision on Major Issues Concerning Comprehensively Deepening Reforms with a pledge to "let the

²⁵ *China's First Draft Civil Code Submitted for Review*, PEOPLE'S DAILY (Beijing, Dec. 24, 2002) http://en.people.cn/200212/23/eng20021223_108978.shtml.

²⁶ An English translation of the draft code is available at THE LEGISLATIVE RESEARCH GROUP OF THE CHINESE ACADEMY OF SOCIAL SCIENCES, *THE DRAFT CIVIL CODE OF THE PEOPLE'S REPUBLIC OF CHINA* (Huixing Liang ed., 2010).

²⁷ Qingyu Zhu, *The Code Rationale and General Principles of Civil Law: Thoughts on Civil Law Codification in Mainland China*, 22 PEKING U. LAW J. 485 (2010).

market play a decisive role”.²⁸ Soon after the CCP promulgated the 2014 Decisions where civil law codification was explicitly called as part of efforts to better protect citizens’ rights and safeguard market development.²⁹

The Standing Committee of the NPC quickly made its response to the CCP assignment by including the civil law codification into its amended five year legislative plan for 2013-18.³⁰ Under the plan, the codification will be divided into two stages with the first one to formulate the general principles of the civil code, followed by comprehensive integration of all the civil/commercial legislations into the code.

According to a report published by the Hong Kong Commercial Daily a Draft of General Principles with 186 articles as the first book of the Civil Code (hereinafter Draft Principles) has been completed³¹ and submitted to the Standing Committee of the NPC for its first deliberation on 27 June 2016, followed by a public consultation period of one month. The target was set with the intention of adopting the General Principles in March 2017 and completing the entire compilation by March 2020.³²

3. POLITICAL DIFFICULTIES

The renewed efforts for civil law codification should certainly be welcome as a positive sign of further modernization of the national legal system. However, given China’s present political foundation, the legislation may have to first deal with some political obstacles.

In China the Constitution as the supreme law of the country does not stipulate a basis for the equal right entitlement because public ownership and the state economy have been provided with the constitutional guarantee

²⁸ An English translation of the Decision is available at http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm.

²⁹ CCP Decision (2014), *supra* note 1, part 2(4).

³⁰ *China Includes Civil Law Codification in Legislation Plan*, GLOBAL TIMES (Beijing, Aug. 5, 2015) <http://www.globaltimes.cn/content/935674.shtml>.

³¹ *China Drafting Civil Code: Spokeswoman*, XINHUA SHE (Mar. 4, 2016), http://news.xinhuanet.com/english/2016-03/04/c_135155512.htm. The Proposed Draft is available at <http://www.civillaw.com.cn/zt/t/?30198> (in Chinese).

³² *The Civil Code Is Taking Shape by 2020*, HONG KONG COM. DAILY, June 28, 2016.

for their sacred and inviolable status as the leading positions,³³ whereas the private sector may only be an important component of the socialist market economy subject to government administration and supervision.³⁴ Although the Constitution finally recognized private property inviolable in 2004 under strong demands, it has still refused to grant it the same legal status of sacredness.³⁵ As a result, codification of civil law may not advance equal right protection further unless some breakthroughs can be made at the Constitutional level.

Such a political environment has directly affected private law development. In 2005 the national legislature was stunned in its intended final round deliberation of the Law on Rights *in rem* by more than 11,000 submissions nationwide and in particular, an open letter from a constitutional law professor of Peking University with supports from 700 officials and scholars to question the constitutionality of the enactment in violation of the fundamental principles of socialism. The political debate rendered a long delay of the legislation until it was finally passed in March 2007 with an explicit provision for safeguarding the country's fundamental economic system.³⁶ In a more recent incident, the State-Owned Assets Supervision and Administration Commission (hereinafter SASAC) as a state department and the mega-shareholder in charge of SOEs' operation strongly opposed the further SOE reform proposals urged by the World Bank in its study report by accusing them of being in violation of the Constitutional principles on public ownership guarantee with an attempt to overturn the socialist system in China.³⁷ In the new round of SOE reform initiated by the CCP in 2013, the major theme has been changed from breaking the SOE

³³ See Art. 6,7 and 12 of the Constitution of PRC.

³⁴ *Id.* art. 11.

³⁵ See Art. 22 of the Constitutional Amendments of 2004.

³⁶ See Law on Rights *In Rem* (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), pt. I, ch. 1, art. 1, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China). For a more detailed discussion see JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 375-377 (2008).

³⁷ The World Bank [WBG], *supra* note 2. For a comment on the SASAC's behavior and approach see Barry Naughton, Leadership Transition and the 'Top-Level Design' of Economic Reform, *China Leadership Monitor*, (N. 2012-37, 2012), <http://www.hoover.org/sites/default/files/uploads/documents/CLM37BN.pdf>.

monopoly and improving the level playing field to making SOEs “larger and stronger”.³⁸

Such legal inequality has been widely reflected in practice. For instance, in recent years as many as 570,000 violent demolition cases were reported to the state authorities with many casualties in government-led real property development nationwide, even after the State Council tried to stop the violations with its regulation on land taking in 2011 mandating fair compensation and judicial intervention.³⁹

Against this backdrop, some scholars have raised the question whether the Civil Code should be established on the basis of the current Constitution. In a normal logic such legal hierarchy may not be ever doubted; but in China the linkage and reliance would mean the extension of the political ideology of the Constitution to the equal footing arena of civil law. Professor Long Weiqiu of Beijing Aviation University recently argued that according to legal history civil law was developed before the evolution of the constitution. Despite its higher status, the Constitution, in addition to political right stipulation, should also respect the civil law demands. This has been evident from the development of Civil Codes in France, Germany and Switzerland as the leading civil law jurisdictions where the Constitution is not necessarily relied on because the political and civil rights should be treated relatively separately.⁴⁰ Some scholars disagreed. For instance, Professor Wang Yi of the People’s University held that the Constitution should be the legal basis of the Civil Code, although it may not be the direct source of private law and adjudication. He further advocated reflection of the Marxist philosophy in the civil codification.⁴¹

³⁸ See WANG LAN, *What the Constitution Says about the SOE Reform*, ENGLISH.CAIXIN.COM (Sept. 21, 2015), <http://english.caixin.com/2015-09-21/100853814.html>; and EAST ASIA FORUM, *SOE Reforms in China Go the Communist Party's Way*, ECONOMYWATCH.ORG (Oct. 28, 2015), <http://www.economywatch.com/features/SOE-Reforms-in-China-Go-the-Communist-Partys-Way1028.html>.

³⁹ Fang Chen, Libin Wang, and Junhui Ling, *High Incidence of Land Disputes: Huge Profits behind Violent Demolition*, JINGHUA SHIBAO (BEIJING DAILY), Aug. 4, 2014.

⁴⁰ LONG WEI QIU, *Civil Codification Should Be Alert on the Trap to Base on the Constitution*, AISIXIANG.COM (Mar. 22, 2016), <http://www.aisixiang.com/data/98003.html>.

⁴¹ Wang Yi, Professor, Jinan Univ. Sch. of Law, *Talk on Civil Codification* (Jun. 5, 2015), <http://law.jnu.edu.cn/Show.asp?C-1-1309.html>.

Another serious debate reflecting the ideological struggle is on personality rights. One school led by Professor Wang Liming of People's University, a key member of the national legislature, has enthusiastically advocated for setting out a special book in the Civil Code to be developed for protection of such rights, including rights to life, health, name, fame, creditability, portraiture image, privacy, personal information and personal freedoms. The Civil Law Study Association of China as an academic group has completed its Draft Principles for consultation and discussion.⁴² According to Wang, the special book is needed for better protection of human rights and other fundamental citizens' rights, particularly in the electronic era as a reflection of the trend of civil law development to remedy the defective structure of traditional civil law with much more emphasis on property rights protection over personal rights.⁴³

This view has been met with strong opposition. For example, Professor Yin Tian of Peking University believes that such expansion of personality rights may lead to a lot of legal uncertainties whereas tort law should be able to provide sufficient legal remedies to personality right violations. As a result, the special book is of no practical value as long as the relevant rights are recognized in the general provisions of the Civil Code to be adopted.⁴⁴ Many more others have also raised their concerns from a technical perspective, such as optimal structural arrangement and rational coordination with other provisions of the civil code.⁴⁵

Thus far the fiercest criticism has come from Professor Liang Huixing of China Social Science Academy who took the debate to a political level. According to him, the Ukrainian civil codification in 2003 where personality rights was set out in a special book is the only case thus far worldwide. Besides the academic controversies, he further blamed the personality rights codification for country's color revolution, national division, and domestic

⁴² See XINHUA SHE, *supra* note 31.

⁴³ See Wang, *supra* note 17, at 25-26.

⁴⁴ Tian Yin, *More Criticism to a Special Section on Personality Rights in Civil Codification of Personality Rights in Civil Codification: Scope of Civil Law Protection*, *BIJIAOFA YANJIU* [J. OF COMP. LAW], no. 6, 2015, at 1-7.

⁴⁵ Discussion Summary of the Conference on Civil Codification of Personality Rights at Zhongnan University of Economics and Law (Aug. 2, 2015), http://www.privatelaw.com.cn/Web_P/N_Show/?PID=10619.

disorder by allowing too much civil rights. He even made a call for not following the Ukrainian experience for more social liberalization.⁴⁶ The latest incidents with significant impacts on the civil codification and challenges to the current legal regime are the renewal of land use right after the original term has expired. In China, since all the urban lands are owned by the state, housing owners may only be entitled to the right to use the land concerned for a certain period of time.⁴⁷ However, the existing laws conflict on the renewal of land use rights. According to the Law on Rights *in rem* of 2007 as the later legislation with higher legal authority, “the right of land use shall be automatically renewed upon the expiration of the original term.”⁴⁸ However, Art. 22 of the Urban Real Estate Administration Law, which was originally adopted in 1994 by the Standing Committee of the NPC, stipulates that an application must be filed at least one year before the term expiration for the government approval with payment of new fees, if the user wants to continue to use the land; otherwise the land use right shall be returned to the State without any compensation. In April 2016 some local governments’ demand for payments of high fees to renew the land use rights by the land rights holders has triggered a fierce debate nationwide. Some scholars argue that “automatic renewal” not only means renewal without any conditions from legal interpretation, but more importantly matters with citizens’ basic rights guaranteed by the law.⁴⁹ Apparently this type of problems may not be settled soon and may complicate the civil codification with both legal and political implications.

Directly related to these political controversies, scholars are further divided on the progress of the codification. Some experts held their opinions

⁴⁶ Liang H. X., Professor, Inst. of Law of Chinese Acad. of Soc. Sci., *Certain Legislative and Theoretical Issues Concerning General Principles of Civil Law* (Oct. 15, 2015), <http://m.aisixiang.com/data/93139.html>.

⁴⁷ See Art. 10 of the Constitution of the PRC. See also Urban Real Estate Administration Law (promulgated by the Standing Comm. Nat’l People’s Cong., Sep. 23, 2012, effective Sep. 23, 2012) (amending Urban Real Estate Administration Law (1994)), ch. 2.1, art. 8, 2012 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (China).

⁴⁸ See Law on Rights *in rem* (promulgated by the Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007), pt. III, ch. 12, art. 149, 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (China). The Law has higher legal authority because it is one of the basic laws of the country adopted the full session of the NPC rather than its Standing Committee as its executive organ.

⁴⁹ Yu Ji , Yuan Bo, *Any More Fees to Pay by Residents upon the Term Expiration?*, RENMIN WANG [PEOPLE’S DAILY ONLINE], (Beijing, Apr. 19, 2016), <http://politics.people.com.cn/n1/2016/0419/c1001-28288644.html>.

firmly to idolize civil code and advocated for avoiding “unnecessary debates” in order to complete the codification within a time not too long” because civil code represents the highest level of legislative achievement and maturity of a legal system. To them, the CCP’s decision has provided the course with “a strong political guarantee.”⁵⁰ Other scholars took a much more cautious view by pointing to the lessons from the previous failed attempts and the fact that half of the 156 provisions of the current GPCL alone have been either outdated, or replaced by other legislations. As a result, the institutional evolution to be needed will inevitably make “the codification a very difficult process.” To them, whether the legislative condition is ripe remains a question.⁵¹ Some even predicted the need of at least from five to eight years to complete the compilation.⁵² Long further pointed out, in a sense civil codification is a political process; but thus far unlike the civil codifications in rise of Germany and France with unambiguous political aspiration to build up a civil society, the CCP has not clearly defined the political ideal of the legislation, except just one sentence call.⁵³

4. DOCTRINAL DEBATES OVER CIVIL LAW CODIFICATION

Against the political complexity reflected above, the limited space of this article would not be a suitable place to examine all the issues that have been raised and debated in the course of civil codification in China. Instead, some major concerns will be summarized and reflected in a sketch way.

(1) Path of civil law codification. In general, there are four major schools debating on the path of civil codification. Liang holds that China should stick to the traditional style and structure of the BGB with necessary adaptation according to the Chinese conditions. He places great emphasis on China’s civil law development path to follow the German BGB and its logic

⁵⁰ Jingwei Liu, *Discussion on Certain Issues Concerning the Civil Codification in China*, ZHONGGUO GAOXIAO SHEHUI KEXUE [SOCIAL SCIENCE OF HIGHER EDUCATION OF CHINA], no. 2, 2015, at 145-155.

⁵¹ Wei Xiao, *Is the Civil Codification Ready This Time?*, BEIJING SHANGABAO [BEIJING BUSINESS TODAY], Dec.19, 2014.

⁵² *The General Principles Shall Not Miss ‘The Objects of Rights’*, FAZHI RIBAO [LEGAL DAILY], Mar. 22, 2016.

⁵³ LONG W. Q., Dean & Professor, Beihang Univ. Law Sch., *Key Issues in Civil Codification in China* (Oct. 26, 2015), <http://www.cnchinese.com/html/redian/201510265824.html>.

system.⁵⁴ Other scholars even claimed that the German style had become a tradition of Chinese civil law jurisprudence and thus “we have to adopt the system of German Civil Code.”⁵⁵ Professor Jiang Ping of China University of Political Science and Law, a leading authority of civil and commercial law in China, prefers a more liberal and pragmatic approach. According to him, legal relations today have been rapidly developed to a level so complex that it would be impossible to effectively regulate them by the traditional civil law. As a result, civil law codification should not be exclusively based on the German Code and others’ good experiences, including common law jurisdictions, should also be accommodated as much as possible. He argues for a breakthrough of China’s traditional path with heavy reliance on the German model.⁵⁶

A school led by Wang seems to try to find a midway but with a higher goal. He agreed with Professor Jiang on the breakthrough position, but has advocated for an approach to codify civil laws principally on the basis of the structure and experience of BGB with structural modifications to reflect Chinese characteristics and to develop a Chinese civil law with important impacts on the world, or even surpass the BGB and Code Napoléon.⁵⁷ In this regard, Wang has vigorously advocated for enhancement of protection of personality rights in China’s civil codification by proposing a new book on personality rights in addition to the BGB structure.⁵⁸ In addition to the BGB-centered debates Professor Xu Guodong of Xiamen University advocates for a more French style codification with a primary stress on person and personal relations in the code to be adopted. He even labels his legislative approach

⁵⁴ Huixing Liang, *Three Thinking Paths on Civil Codification*, LVSHI SHIJIE [LAWYERS’ WORLD], no. 4, 2003, at 4-5.

⁵⁵ Jing-Wei Liu, *Two Basic Problems Need to Be Settled in Civil Law Codification*, in MAIRU 21 SHIJI DE LIANGAN SIFA [APPROACHING TO CROSS STRAIT PRIVATE LAW IN THE 21ST CENTURY] 125-146 (2004).

⁵⁶ Ping Jiang, *Adopting An Open Civil Code*, ZHENGFA LUNTAN [TRIBUNE OF POLITICAL SCIENCE AND LAW], no. 2, 2003, at 115-116); and Ping Jiang, *Civil Law: Retrospective and Prospective*, BIJIAOFA YANJIU [JOURNAL OF COMPARATIVE LAW], no. 2, 2006, at 1.

⁵⁷ Lihong Zhang, *The Latest Developments in the Codification of Chinese Civil Law*, 83 TULANE L. REV., 999, 1015 (2009).

⁵⁸ Wang, *supra* note 17, at 25-29.

“the new humanism” as opposed to the property centered German tradition.⁵⁹

(2) The degree of codification. The global trend of de-codification in recent years has been noticed and discussed among Chinese scholars. In an extreme end, some scholars believed that by taking the de-codification trend in Europe into consideration China would not need a comprehensive civil code and the process should be abandoned.⁶⁰ With a more modest approach Jiang and some other drafters held that the civil code to be adopted does not have to be “big and complete” and a “loosely structured code” would serve China the best.⁶¹ In April 2005 an international conference on codification and de-codification was held in Shanghai where Professor Natalino Irti, a leading advocator for de-codification, with an open letter cautioned Chinese colleagues to adopt a civil code with a limited scope in line with the recent developments of civil law legislation in the world. According to him, the practice in China to develop detailed rules in subordinate special laws under some general abstract principles might represent a legislative trend in the civil law jurisdictions.⁶² Some Chinese scholars also argue that it is still premature now to adopt a very comprehensive code with strict logic of the German style and such formulation may even seriously hinder the development of civil law in China. Thus, a moderate degree of civil law codification would be more appropriate.⁶³ But some scholars apparently want to pursue different approaches. For example, Wang argues that civil legislative system must be code-centered, which will not only ensure the unity of the system, but also exclude other sources. As such, civil law codification must first surmount the development of many self-developed

⁵⁹ Guodong Xu, *The Basic Structure of the Draft Civil Code*, FAXUE YANJIU [CASS J. OF L.], no.1, 2000, at 37-55; see also GUODONG XU, MINFA DE RENWEN JINGSHEN (HUMANISM SPIRITS OF CIVIL LAW) (2008).

⁶⁰ Xue Lu Xu & Peng Liang, *On Decodification*, SHIDAI FAXUE [PRESENT DAY LEGAL SCIENCE], no.4, 2005, at 71.

⁶¹ Jiang, *supra* note 56.

⁶² Natalino Irti, *De-codification in Europe and the Future of Civil Code of China: To Our Chinese Colleagues.*, in INTERNATIONAL CONFERENCE PAPER COLLECTION ON CODIFICATION AND DE-CODIFICATION, Vol. 2, 43 (2005); see also Zhang, *supra* note 57, at 1017.

⁶³ Lihong Zhang, *The Phenomenon of Civil De-codification and Formulation of Chinese Civil Law Code*, FAXUE [LEGAL SCIENCE], 2006, at 48-60; see also Xianchu Zhang, *Civil De-codification and Sensible Choice of China's Civil Legislation: Modest Degree Codification*, TANSUO YU ZHENGMING [EXPLORATION AND CONTENTION], no. 5, 2011, at 85-89.

“micro-systems” within the current framework and avoid chaos caused by de-codification.⁶⁴

(3) Based on the positions and approaches taken by different schools different structures and contents of the Civil Code have been put forward, which has become a major source of controversy. For instance, Liang has proposed his seven parts structure, including General Principles, Real Rights, General Provision on Obligations, Contract, Torts, Family Law, and Succession;⁶⁵ whereas Wang has insisted on the addition of a separate part on personality rights.⁶⁶ Some other experts have also developed a code draft with only four major component parts, including General Provisions, Personal Relationships, Property relations, and Supplementary Provisions.⁶⁷

Rights of Intellectual property (hereinafter IP) are another battle field, since the 2002 Draft Code did not include IP rights, some scholars advocated for their inclusion in order to ensure a thorough and complete legal system of property rights for equal protection, although the legal sources, right contents and liability basis of IP law may be quite different from the traditional civil law.⁶⁸ However, Professor Wu Handong of Zhongnan University of Economics and Law disagreed. He questioned whether the paradigm for such inclusion had been established in civil enactments in major European countries. According to him, the Civil Code may just set out a couple of general provisions, leaving IP law relatively independent from civil law legislations for the sake of its own jurisprudence.⁶⁹

A newly emerged controversy is on objects of civil rights. Although thus far, a consensus seems reached to include some provisions in this regard in the codification as a necessary measure to correct the ignorance of the Soviet ideology to the civil rights and the overconcentration of the BGB on properties rights. However, with respect to how to define and stipulate

⁶⁴ Liming Wang, *The Code Centered Approach and Systemizing Civil Legislation in China*, YUNNAN DAXUE XUEBAO [JOURNAL OF YUNNAN UNIVERSITY - LAW EDITION], no. 2, 2009, at 2–9.

⁶⁵ THE LEGISLATIVE RESEARCH GROUP OF THE CHINESE ACADEMY OF SOCIAL SCIENCES, *supra* note 26.

⁶⁶ Wang, *supra* note 17, at 25–29.

⁶⁷ Guodong Xu, *The Basic Structure of the Future Chinese Civil Code*, FAXUE YANJIU (CHINESE JOURNAL OF LAW), no. 2, 2000, at 45.

⁶⁸ Qiyang Wang, *Thoughts on Inclusion of Intellectual Property Rights into the Civil Code*, ZHISHI CHANQUAN [INTELLECTUAL PROPERTY], no. 2, 2000, at 45.

⁶⁹ Handong Wu, *Inclusion of IP Law into the Civil Code and General Provisions on Property Rights*, FAZHI YU SHEHUI FAZHAN [LAW AND SOCIAL DEVELOPMENT], 2015, at 58–67.

these provisions, Professor Sun Xianzhong of the Social Academy of China insists to set them in the General Principles as a special chapter, as a deviation from the focus of the BGB General Principles merely *in rem*, to cover, inter alia, environment, animal, innovation protections.⁷⁰ However, Professor Yin is of the opinion that these rights should not be provided in the General Principles, but just subordinate chapters concerned to avoid confusion simply because the nature of these rights and their protection means are varied and different. He took enterprise rights as an example to question whether they should be provided as object of rights or subject of rights.⁷¹

(4) Civil codification and commercial legislation. As reflected above, by following the European tradition since the 1920s commercial law has been treated as a special part of civil law in China. After the formation of the PRC in 1949 the practice of the planned economy and rigid political ideology for three decades did not allow any room for market development as well as commercial law making. Once the GPCL was adopted as the first batch of comprehensive private law enactments in 1986, the model of combining civil and commercial rule enactment came back and has since been followed.

However, rapid development of a market economy in China has never stopped its demands for a separate set of commercial law rules.⁷² Some scholars argue for the merits of such separation simply because commercial acts have their own characteristics, such as status of merchants, their business operation for profit and special concerns for formalities and safety of transactions. Moreover, unlike civil law, commercial law is an area subject to more public law intervention and regulation. Thus, as far as the civil and commercial law relation is concerned, commercial law should be applied first in practice due to its specialty.⁷³ On this basis some experts take Uniform

⁷⁰ FAZHI RIBAO [LEGAL DAILY], *supra* note 52.

⁷¹ Tian Yin, *On the Structure of the General Principles of Chinese Civil Code*, BIJIAOFA YANJIU [JOURNAL OF COMPARATIVE LAW], no. 3, 2007, at 44-54.

⁷² Kaixiang Liu, "On Nature, Basis and Characters of Commercial Law", *Zhongping Wang [China Review Net]*, (March 2009), at <http://www.china-review.com/sao.asp?id=21255>; see also Xue Lu Xu, *On Integration of Commercial Law*, GUOJIA JIANCHAGUAN XUEYUAN XUEBAO [J. OF NATIONAL PROCURATORATE COLLEGE], no. 4, 2004, at 77-82; see also SHAOXIA SHI, SHANGFA SIKAO DE YINJI [MARKING OF COMMERCIAL LAW CONSIDERATIONS] (2008).

⁷³ BAOSHU WANG, SHANGFA ZONGLUN [GENERAL PRINCIPLES OF COMMERCIAL LAW] 27,28 (2007).

Commercial Code of the United States (UCC) as an example to support their position.⁷⁴

In recent years an alternative way has been advocated by some scholars led by Jiang and the late Professor Wang Baohu of Tsinghua University.⁷⁵ As a practical approach to deal with the dominant civil law tradition, the new strategy no longer insists on a separate commercial code, but a separate set of general principles within the current legal framework to govern commercial conducts and transactions, commercial subjects and their rights and to coordinate the existing commercial legislations. In this way, the controversy of civil-commercial law combination or separation could be avoided to a large extent.⁷⁶

On this basis, some versions of general principles of commercial law have been worked out.⁷⁷ The most noticeable one among them is the Draft General Principles of Commercial Law developed by the Commercial Law Society of China in 2004–2009 with ten chapters on general principles, merchants, commercial conducts, commercial registration, commercial establishment, business transfer, commercial accounts, management and employee, agency and miscellaneous provisions.⁷⁸ However, the civil law school has openly disagreed with this approach. Professor Yang Lixin of the People's University, for example, states that under a civil code it is

⁷⁴ Xinrong Guan, *Exploring the New Open Path towards Enactment of General Principles of Commercial Law*, FAXUE [LEGAL SCIENCE], no. 8, 2010, at 27–28.

⁷⁵ Ping Jiang, *Some Macro-considerations on Civil Codification*, FAXUE [LEGAL SCIENCE], no. 2, 2002, at 41–42; see also Baoshu Wang, *Commercial Law Principles: Beyond Civil-Commercial Combination and Civil-Commercial Separation*, FAXUE YANJU [CASS J. OF L.], no. 1, 2005, at 32.

⁷⁶ As a matter of fact, with Wang as the leading drafter Shenzhen as a Special Economic Zone and a trial field of reform measures in China, promulgated its Commercial Ordinance in 1999 and further amended in 2004 with 65 articles in eight chapters. However, it was repealed in Dec. 2014 due to its limited use after the national legal framework has been established. An English translation of this Ordinance can be available at <http://www.lawinfochina.com/display.aspx?lib=law&id=1658>.

⁷⁷ YAN BO MIAO, SHANGFA TONGZE LIFA YANJIU [LEGISLATIVE STUDY ON GENERAL COMMERCIAL PRINCIPLES] 249–260 (2008); see also TAO FAN ET AL., SHANGSHI ZEREN YU ZHUISU JIZHI YANJIU [ON COMMERCIAL RESPONSIBILITY AND PROSECUTION MECHANISM] 177–188 (2008).

⁷⁸ A report of the drafting process is available at <http://www.bhtlaw.cn/Introduction/Discussion/2009-12-16/287.html> (in Chinese); and XR Guan, *New Path to Decoding the Puzzle of General Commercial Principles*, FAXUE [LEGAL SCIENCE], no. 8, 2010, at 23–30.

unnecessary to adopt either a separate commercial code or general principles of commercial law.⁷⁹

Although the Commercial law school suffered a heavy loss after Professor Wang passed away in 2015, more scholars stood up to express their support for the separation arrangement in the new round of civil law codification with even stronger tones. Professor Wang Yong of China University of Political Science and Law argued for “making a civil code with commercial law characters”.⁸⁰ Professor Shi Tiantao of Tsinghua University even stated that it would be “ignorant and presumptuous” to attempt to include all civil and commercial laws into a uniform code.⁸¹

(5) Redefining the boundary of public and private law. Unlike capitalist countries, China today is still a socialist country practicing a “socialist market economy” with public ownership and state economy being guaranteed as the foundation of the economic system and the leading force of the country.⁸² As such despite the dynamic marketization the notion made by Vladimir Lenin, the paramount leader of the former Soviet Union while adopting its Civil Code of 1922, that everything in economic areas should belong to governance of public law rather than private law⁸³ still sees its influences on civil and commercial legislation in China today. For instance, although equal protection has been stipulated as a basic principle of the Law on Rights *in rem*,⁸⁴ the existing enactments apparently provide the government with strong power to demolish houses and relocate the inhabitants with compulsory measures since unclearly defined “public interest” and government power have enjoyed superiority over private rights almost all the time. The right of private parties to challenge the government

⁷⁹ *The Debates between Civil and Commercial Law Circles on Adoption of General Principles of Commercial Law Comes Back*, SHIJI JINGJI BAODAO [21ST CENTURY BUSINESS HEALD] (Guangdong, Jan. 13, 2009) <http://finance.sina.com.cn/roll/20090113/02585751273.shtml>.

⁸⁰ Yong Wang, *China Needs a Civil Code with Commercial Characters*, ZHONGGUO FALV PINGLUN [CHINA L. REV.], no. 4, 2015, at 30.

⁸¹ Tiantao Shi, *Can Civil Codification Achieve Civil-Commercial Law Unification?*, ZHONGGUO FALV PINGLUN [CHINA L. REV.] no. 4, 2015, at 33.

⁸² See Art. 7 of the Constitutional Amendments of 1993 and Art. 6 and 7 of the Constitutional amendments in 2004.

⁸³ Quoted from Yimei Wu, *Exploring the Different Legislative Paths of Civil Codification in China and Russia*, QUSHI [SEEKING TRUTH], no. 2, 2010, at 66; see also Epstein, *supra* note 15, at 162.

⁸⁴ See Law on Rights *in rem* (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), pt. I, ch. 1, art. 3-4, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

demolition decisions in the People's Court was not allowed until early 2011 under the pressure of a large number of fatal incidents in brutal demolitions nationwide.⁸⁵ Even under the new Regulation the rights and interest of lessee/tenants of the land to be taken is virtually ignored and the judicial remedy may be allowed only against the government decision concerning demolition and monetary compensation for the premises concerned, but not available for any equity claims for the land use right. According to a recent survey based on the government statistics, in 2010-2014, approximately 800,000 cases were filed against the government with more than 46% of which were land property related, and with only a 10% success rate.⁸⁶

Apparently the codification may not progress well unless the boundary of public and private laws can be better defined. In current legislations, to a large extent the political ideology and public policy are still intermingled with private laws. For instance, the Law on State-Owned Assets of Enterprises sets out a legal duty to make the value of state investment "maintained and increasing" and to obtain the government approval of major company decisions before the shareholders' meeting.⁸⁷ Other similar examples may include legal mandates for not only establishment of grass-root organizations of the Communist Party in companies, but also provision of "necessary conditions" for their activities;⁸⁸ different standards to vitiate contracts against private and public interests in favor of state protection;⁸⁹ and prohibition of state owned enterprises from becoming a general partner of a partner firm.⁹⁰ In the most recent SOE reform, the Party-State demanded

⁸⁵ The State Council promulgated the Regulation on the Expropriation of Buildings on State-owned Land and Compensation on Jan 21, 2011 to replace the previous regulation adopted in 2001.

⁸⁶ Report, 800000 Lawsuits against the Government in Five Years with Only 10% Winning Rate, *Wangyi [Net Ease]* (Jan. 21, 2016).

⁸⁷ See Law on State-Owned Assets of Enterprises (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2008, effective May 1, 2009), ch. 1, art. 8 and ch. 5.1, art. 34, 2008 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

⁸⁸ See Company Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2013, effective Mar. 1, 2014) (originally adopted as Company Law of the PRC (1993)), ch. 1, art. 19, 2013 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

⁸⁹ See Contract Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), ch. 3, arts. 52, 54, 1999 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

⁹⁰ See Partnership Enterprise Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective Jun. 1, 2007) (amending Partnership Enterprise Law (1997)), ch. 1, art. 3, 2006 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

to clarify the legal status of the Party leadership in companies and incorporate it into corporate governance in Chinese enterprises system.⁹¹

In more recent years a new debate has emerged on the legislative goal of civil and commercial laws. Some scholars, following the political policy of the CCP argue that “(development) efficiency first with attention to social justice” should still be the guiding principle in China’s civil legislation;⁹² whereas some others believe that in the legal field, the right goal should be social justice first with adequate attention to efficiency of the economic development.⁹³ In this regard, apparently the private law will lose its entire value if it becomes subordinate to the government policy, regardless of its political attraction and pride.

Despite the heated debates and innovative suggestions, the Draft Principles of the Civil Code submitted to the national legislature in June 2016 have apparently achieved limited doctrinal success. In terms of structure they have still followed the GPCL and maintained the chapters on contract, properties, torts, family relations and succession. Although some notable changes have occurred, such as to include the stipulation of entitlements of unborn fetus, reduction of limited civil capacity age from ten to six, recognition of virtual property, introduction of ecological restoration as a new civil liability and extension of statutory limitation from two to three years, were made, the Draft Principles are far from being adoptable. For instance, the failure to stipulate the principle of “absence of legal prohibition meaning freedom” in civil activities, omission of the personal information rights and unclear distinction of business and non-profitable juridical persons are pointed by the scholars as apparent defects.⁹⁴

⁹¹ See The CCP and the State Council, The Guiding Opinions on Deepening the SOE Reform, para. 24 (Aug. 24, 2015).

⁹² The view was endorsed by the Central Committee of the Communist Party of China in 1994 in its Decision on Certain Issues to Establish a Socialist Market Economy in China. For a recent article that continues to support the goal: see Li Li, *Conflicts and Choices of Value Goals in China’s Civil Legislation*, FAXUE LUNTAN [LEGAL FORUM], no. 3, 2010, at 82.

⁹³ See QIU BEN, *Scientific Development and Legal System Construction*, IOLAW.ORG.CN (2005), <http://www.iolaw.org.cn/showArticle.asp?id=1395>.

⁹⁴ Report, “Consultation of the Draft Principles of Civil Law”, Canxin Net, 6 July 2016, at <http://china.caixin.com/2016-07-06/100962883.html> (in Chinese).

5. FURTHER IMPLICATIONS OF THE CIVIL LAW CODIFICATION

The new round of codification, although is an encouraging move on the right direction, will also be a serious test to the Party-State's commitment to private right protection and development of the rule of law and civil society, or more specifically, as the first step to eliminate the ideology of the Leninism against private rights for a long time. Even after reform of almost forty years, "private" in many circles is still a dirty word. For instance, in all the official documents "non-public economy" has been used in order to avoid the term of private economy. The top leaders have routinely made their declaration firmly against privatization.⁹⁵ This in fact is just a reflection of the continued influence of the Soviet ideology where the term "private property" could not be used in the Soviet Constitution.⁹⁶

In this context, given that freedom and civil society are the very foundations of civil law the codification itself will inevitably be a process to liberalize the people and the market from government control. In other words, to what extent the spirits of civil society embodied in civil law, such as individuals' freedom and autonomy, equal entitlement and protection, and empowering citizens to fight against the government intrusion, can be recognized in the codification will pose sensitive political challenges first to the Party-State and the test to measure the success of the codification.⁹⁷ This is echoed in the thesis of Professor Lawrence Friedman of Stanford University that codification may have great political meaning in a society.⁹⁸ Professor Yeong-Chin Su, a leading legal authority and Vice President of Judicial Yuan of Taiwan, also pointed out that civil legislation in mainland China has to compromise with the political ideology and as a result, whether

⁹⁵ See *China Says Western-style democracy impossible for CCP Dynasty*, CHINA DAILY MAIL (Beijing, Mar. 13, 2013) <https://chinadaily.com/2013/03/13/china-says-western-style-democracy-impossible-for-ccp-dynasty/>.

⁹⁶ See Epstein, *supra* note 15, at 168.

⁹⁷ See Xianchu Zhang, *Level Playing Field as an Institutional Challenge to China as a Socialist Market Economy*, in FINANCE, RULE OF LAW AND DEVELOPMENT IN ASIA 76 (Jiaxing Hu, Matthias Vanhullebush, Andrew Harding eds., 2016).

⁹⁸ Cf. LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM* 271 (1975).

the legislation will lead to more institutional reform or enhanced instrumentalism need to be observed with uncertainty for a longer time.⁹⁹

Despite heated debate on the direction, structure and content of civil law codification, it has been generally agreed that research and study on the fundamental theories and rules of civil/commercial laws and local conditions of transplantation of foreign institutions are still far from sufficient and thorough.¹⁰⁰ Particularly, some scholars argue that civil codification in China needs to break the yoke of not only political ideology, but also technical logic and structural patterns, otherwise the rules borrowed from the western world may not be effectively used to deal with the problems facing China as a transitional economy, such as equal competition, business autonomy and private property right protection. They have further criticized the codification movement to pursue more in form than the real spirit of civil law.¹⁰¹

Indeed, although currently all of the major components of civil law codification, including the Contract Law, the Law of Rights *in rem*, the Tort Liability Law and the Governing Law Applicable to Foreign Related Civil Relations, have been promulgated given the intense academic controversies reflected above the enactment progress is still facing a great deal of uncertainties. Moreover, the approach taken in the past 30 years to give way to comprehensive codification with a piecemeal enactment in order to deal with dynamic and rapid market developments in China has in turn significantly increased the difficulty to sort out the conflicts and inconsistencies in the existing legislation and digest them in a rational structure.

Although there have been serious debate on civil law codification and diversified transplantation of legal rules, fundamentally speaking, China has

⁹⁹ Compare Yeong-Chin Su, *System Orientation and Construction Rules of Modern Civil Code—Suggestions to Civil Codification of Mainland China*, JIAODA FAXUE [L. J. OF JIAOTONG U.], no. 1, 2010, at 92.

¹⁰⁰ See Zuo Zuo Shen & Xiao Geng Zhao, *Ten Academic Years of Civil Codification: 1997-2007*, HENAN ZHENGFA GANBU GUANLI XUEYUAN XUEBAO [JOURNAL OF HENAN ADMINISTRATIVE INSTITUTE OF POLITICS AND LAW], no. 4, 2011, at 116; and Jiang Yu, *Centenary Notes on Civil Codification in China Since 1911*, ZHENGFA LUNTAN [TRIBUNE OF POL. SCIENCE AND L.], no. 4, 2011, at 116.

¹⁰¹ See Yiyong Su, *Form at the Expenses of True Significance: From the Tang Lu Complex to Civil Code Complex*, ZHONGGUO SHEHUI KEXUE [SOC. SCIENCES IN CHINA], Summer 2005, at 123.

maintained its civil law tradition. As Professor Christiane C. Wendehorst of Vienna University observed, “I have never seen any scholars who support the *Pandekten* system as strong as I saw in China. Many of them favor the German law even more than myself.”¹⁰² Codification in China has long been viewed as a crucial benchmark of maturity of a legal system, the highest stage of legal systematization and the full display of institutional civilization.¹⁰³ As such, despite uncertainties and difficulties civil law codification will continue to be the goal of the national legislature.

As reflected above, the relationship between civil and commercial legislation must be further sorted out in the course of civil law codification. In fact, the approach to combine civil and commercial legislation has led to some irrational results in dealing with civil and commercial disputes. For instance, Art. 121 of Contract Law of 1999 has introduced strict liability to deal with any breach regardless of civil or commercial contracts. This is considered an example of “over-commercialized legislation”.¹⁰⁴ By the same token, Art. 410 of the Contract Law provides that both the principal and the agent may terminate a mandate contract any time without differentiating the nature of contracts concerned, which is identified an example of “under-commercialized legislation”.¹⁰⁵

Despite the enthusiasm on the German *Pandekten* system, the legislation with the piecemeal, pragmatic and extensive transplanting approach since the 1970s have also made the legal system suffer from lack of internal coordinated synergy. Rationalization and harmonization of the entire system are further complicated with the transplantation of many private law rules from not only civil, but also common law jurisdictions extensively for many years, such as floating charge,¹⁰⁶ business

¹⁰² Christiane Wendehorst, *Exploring Uniformed Civil Code: A Comparative Study of EU and China*, QINGHUA FAXUE [TSINGHUA L. J.], no. 4, 2010, at 13.

¹⁰³ See Liming Wong, *Formulation of Civil Code in China: Review and Prospective*, FAXUE LUNTAN [LEGAL FORUM], no. 5, 2008, at 5); and Tian Yin, *On Civil Law Codification in China*, ZHENGZHI YU FALV [POL. SCIENCE AND L.], no. 2, 2006, at 60-66.

¹⁰⁴ Gu Zhang, *Commercial Law as a Hermit Crab – on Independence and Special Characteristics of Commercial Law*, QINGHUA FAZHI LUNHENG [TSINGHUA J. OF RULE OF L.], 2005, at 25.

¹⁰⁵ Yan Chuan Wang, *Types of Commercial Conducts and Diversified Legislation*, DANGDAI FAXUE [CONTEMPORARY L. REV.], no. 4, 2011, at 67, 74.

¹⁰⁶ See Law on Rights *in rem* (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), pt. IV, ch. 17.2, art. 223, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

reorganization with debtor in possession,¹⁰⁷ derivative action,¹⁰⁸ independent directors,¹⁰⁹ punitive damages,¹¹⁰ limited liability partnership¹¹¹ and a trust system.¹¹² It seems the trend now that although the civil law tradition may still dominate legislation on civil matters, commercial enactments are increasingly subject to heavy influence of common law rules and doctrines.

Heated academic debate will no doubt deepen understanding of the key issues concerned and facilitate progress of the civil law codification, however, the irrational division of teaching and research work leading to a variety of schools and study associations with sectarian bias has complicated the situation. Thus far the national Civil Law Association and Commercial Law Association as well as Economic Law Association have been established separately with their annual conferences and research agendas. In the debate over how to define the borderline of different subjects, some scholars have even denied the necessity to have any separate department of commercial law. According to them, combination of civil and commercial laws and expansion of public law into private areas have left no basis for independence of commercial law.¹¹³ Such quarrel seems to aim more at increasing influence of certain schools than at promoting academic comprehension.

Civil and commercial law enactments in China offer some interesting experiences not only to diversification of law, but also comparative law theories on legal transplantation or transformation. According to Professor Pitman Potter of University of British Columbia, China has taken a dynamic

¹⁰⁷ See Enterprise Bankruptcy Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective Jun. 1, 2007), ch. 8.1, art. 73, 2006 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

(See Art. 73 of the Enterprise Bankruptcy Law of 2006.)

¹⁰⁸ See Company Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2013, effective Mar. 1, 2014) (originally adopted as Company Law of the PRC (1993)), ch. 6, art. 151, 2013 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

¹⁰⁹ *Id.* ch. 4.5, art. 122.

¹¹⁰ See Tort Liability Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective Jul. 1, 2010), Ch.5, art. 47, 2009 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

¹¹¹ See Partnership Enterprise Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective Jun. 1, 2007) (amending Partnership Enterprise Law (1997)), ch. 2.6, 2006 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

¹¹² See Trust Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 2001, effective Oct. 1, 2001), 2001 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

¹¹³ See Jichun Shi & Yueqin Chen, *On Commercial Law*, ZHONGGUO FAXUE [CHINESE LEGAL SCIENCE], no. 4, 2001, at 91-104 (2001); see also Jichun Shi & Haifang Yao, *On Commercial Law Again*, BEIJING SHIFAN DAXUE XUEBAO [J. OF BEIJING NORMAL U. - SOC. SCIENCE EDITION], no.1,2003, at 45-48.

strategy of selective adaptation to balance local needs with external conditions.¹¹⁴ Although the important role of civil and commercial legislations in promoting China's opening and modernization should be fully recognized, certain side-effects should also be noted. However, a jigsaw puzzle situation of the Chinese private laws with the combination of the Party-State ideology, international borrowing from both civil and common law jurisdictions, the transitional needs and local characteristics have thus far rendered the system confusing, inconsistent, and poorly functioned. It has been openly admitted that "The vitality of laws lies in their enforcement" is a challenge facing China's rule of law development.¹¹⁵ From this perspective, the new round of codification should be best used as an opportunity to not only systemize, but more importantly rationalize and harmonize the current legislations.

In addition to the compilation of legal rules, the new round of civil codification will inevitably have implications on reorientation of legal culture in China. As some experts pointed out, unlike Roman private law with a formally rational system of applying law to factual problems,¹¹⁶ the German pandectists are more difficult to borrow since a part of general principles for the whole system is added. As a result, transplantation may have to be made on a wholesale basis.¹¹⁷ However, this approach has not worked coherently with other cultural force in China, such as the Confucianism with emphasis on social norms and the former Soviet Union ideology subordinating private rights to the Party-State interest. For example, some scholars have argued for shifting the paradigm from Western analyzing approach to Eastern synthesizing approach with due attention to not only the system of civil law, but also internal logic relations of the rules and the inner structure as well as relations of different values.¹¹⁸

The legislative and academic debates have also reflected in the judicial practice. The first independent unit within the People's Court responsible for

¹¹⁴ See Pitman B. Potter, *Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices*, 2 WASH. U. GLOBAL STUD. L. REV. 119 (2013).

¹¹⁵ Info. Office of the State Council, China, *The Socialist System of Laws with Chinese Characteristics* (Oct., 2011), <http://www.scio.gov.cn/zfbps/ndhf/2011/Document/1036756/1036756.htm>.

¹¹⁶ See Weber, *supra* note 15.

¹¹⁷ See Epstein, *supra* note 15.

¹¹⁸ See Han, *supra* note 23, at 210.

handling cases of commercial nature was named “economic trial division” and first established at the local level in 1979, parallel with the division of civil trials. Such practice was soon expanded to the entire judicial system, including the Supreme People’s Court. Under the Preliminary Opinion of the Supreme People’s Court on the Scope of Jurisdiction of Economic Trial Division of 1980, the newly established division was empowered to hear disputes concerning contract, finance, insurance and intellectual property rights between enterprises. In 1980s jurisdiction of the economic trial division was further expanded to hear disputes on trade, transportation, bankruptcy, commercial paper, financial lease, competition, securities and tort liabilities concerning enterprises.¹¹⁹ Such development clearly reflected a practice to separate economic/commercial case handling from traditional civil trials.

The direction, however, was changed in 2000 when the entire people’s court system was restructured as part of preparation work for China’s accession to the WTO. With the approval of the CCP, a larger civil trial division was established with commercial trial as one of the subdivision. The new civil trial division includes four sub-divisions with roughly divided jurisdiction to deal with traditional civil cases, commercial cases, intellectual property right cases and foreign related cases respectively.¹²⁰ However, the division of the jurisdiction seemed to be based on an irrational foundation. For instance, the first trial division is empowered to hear not only family and tort cases, but also labor, real property development and security, and construction disputes. As a result, although the reform in a sense further promoted private rights protection with more judicial attention and resource and streamlined the functions of judicial branches, inclusion of the commercial trials into the larger civil law system has been pretty controversial since the philosophical age and valued to settle commercial cases, such as market efficiency, safety of transaction, and business autonomy, may be different from those of civil cases handling and such blending may hinder development of commercial trials according to its own

¹¹⁹ See Supreme People’s Court, National Conference of Economic Trials (May 6, 1993) (transcript available in China Investment Website).

¹²⁰ See *The SPC Implements at the Full Scale Institutional Reform*, RENMIN RIBAO HAIWAI BAN [PEOPLE’S DAILY-OVERSEAS EDITION], (Beijing, Aug. 9, 2000).

norms and logics. Such difference is well illustrated in a recent case study survey conducted by two Beijing judges. While facing a dispute concerning the enforcement of a liquidated damage provision of a contract, most of the thirty civil judges involved in the study opined that excessive freedom of contract has led to an unfair result, whereas almost all of the thirty commercial judges held that the parties' autonomy and bargain should be respected.¹²¹

Furthermore, as indicated above, in the past forty years a very large number of judicial circulars and interpretations have been promulgated to guide the judicial practice with the legal weight as the law.¹²² Most of these rules have been adopted according to the practical needs with a pragmatic approach with the judicial activism, such as an insurance company being held to have effectively waived its rights to deny the validity of an insurance contract where it was entered with the company's knowledge that the insured failed to carry out her duty of full disclosure.¹²³ Sometimes these judicial rules may not be even read together with the enactments concerned. For example, Art. 51 of the Contract Law provides that a contract concluded by a party without disposition right shall be invalid (e.g. the contract not formed), unless the transaction is ratified by the right owner, or the contracting party obtained the right after the conclusion of the contract concerned; but Art. 3 of the SPC Interpretation on Dealing with Sales Contract Disputes dated 10 May 2012 stipulates that the People's Court shall not support the claim to invalidate a contract made by a buyer on the ground that the seller does not have the ownership or disposition right over the subject matter at the time of contracting, although he may be entitled to damages and rescission (e.g. the contract formed already).¹²⁴

¹²¹ See Chun Peng & Guorong Sun, *Considerations and Practice of Commercial Trials under the Larger Civil Division Framework*, FAOV SHIYONG [J. OF THE NAT'L JUDGES COLLEGE OF THE SPC], no. 12, 2012, at 68-69.

¹²² See Law on Legislation (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2015, effective Mar. 15, 2015) (amending Law on Legislation (2000)), ch. 6, art. 104, 2015 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

¹²³ See *He Lihong v. Shunde Sub-branch and Foshan Branch of China Life Insurance Co.*, decided by the Intermediate People's Court of Foshan on 10 Jan. 2006; see also endorsed by the SPC, in *Zuigao Renmin Fayuan Gongbao* [*The SPC Gazette*], vol. 2008, at 142 (in Chinese).

¹²⁴ See Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts, Supreme People's Court (2012), <http://lawinfochina.com/display.aspx?lib=law&id=10976&EncodingName=gb2312>.

Apparently, as compared with the courts in Germany where precedents may just play a limited role for persuasion and treated as a “source of soft law”,¹²⁵ the Supreme People’s Court has been playing a much more active role in law-making. However, thus far not much attention has been paid to sorting out and incorporating the judicial contributions to civil/commercial law developments in the civil codification as a crucial part of the legislation. As a result, its legal status, relationship with the civil code and necessary consolidation to a large extent are still left untouched. Professor Xue Jun of Peking University has warned that the civil law codification has strayed from the right path to rationalize the legal rules, sources and structures. Without necessary correction, the codification will have no substantial sense, but add more disarray in the legal practice.¹²⁶

Last, but not least, increasing influence of legal experts and scholars in civil and commercial law codification should be recognized as an important contribution to the rule of law development in China. For a long time, legislative process has been dominated by government departments and officials, where rules are often adopted not for promoting social justice, but safeguarding bureaucrats’ interest and power. Such practice has become a source of social conflicts.¹²⁷ In civil law codification and enactment of other basic civil and commercial laws, the academic complexity and professional technicality have to a large extent prevented bureaucrats from overstepping into the legislative process. As reflected above, it has become a practice that the top national legislature would entrust the drafting of these laws to a jurist group to set out the legislative basis. This has been praised as not only a better way to improve legislative quality, but also an important means to develop democratic enactment.¹²⁸

¹²⁵ Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 INTL. REV. OF L. AND ECON. 519 (2006).

¹²⁶ See Jun Xue, *How Judicial Interpretation Be Treated in Civil Law Codification?*, ZHONGGUO FAÒV PINGLUN [CHINA L. REV.], no. 4, 2015, at 48.

¹²⁷ See LI YIA BIAO , *Interest Expansion Behind Bureaucratic Legislation: Respecting People’s Will or Bureaucrat’s Interest?*, NEWS.XINHUANET.COM (Mar. 12, 2006), http://news.xinhuanet.com/misc/2006-03/12/content_4294131.htm. See also Qiu, F, *Towards Democratic Legislation*, Zhongguo Xinwen Zhoukan [China News Weekly] (Mar. 7, 2005), <http://finance.qq.com/a/20050307/000105.htm>.

¹²⁸ See Jihong Mo, “Expert Participation in Law-Making: An Important Way of Democratic Legislation”, Zhongguo Zhengxie Bao [Journal of China Political Consultative Conference], 9 Nov. 2009.

6. CONCLUSION

Economic reform and opening the door for almost forty years have changed China greatly and prepared conditions for its development toward a civil society with basic civil and commercial laws having been promulgated on the basis of the GPCL. On this basis, the new round of civil law codification will certainly provide new momentum with China's market development and legal modernization. However, the codification is still facing great uncertainties from political, cultural, doctrinal aspects known as Chinese characteristics. As Professor Hein Kötz of Max-Planck-Institute pointed out, "In language, method, structure and concept the Draft (Civil) Code (of China) is a 'learned' code clearly based on what is sometimes called the civil law tradition."¹²⁹ However, amongst all the challenges, changing of the traditional political ideology and transferring powers from the Party-State to more respect private rights and the rule of law will be the most daunting one. In this regard the development path of China may be no exception to those of other market oriented jurisdictions.¹³⁰

¹²⁹ See Hein Kötz, *Foreword to THE LEGISLATIVE RESEARCH GROUP OF THE CHINESE ACADEMY OF SOCIAL SCIENCES*, *supra* note 26, at XXVI.

¹³⁰ See Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 L. & Soc'y R. 829; and Chenggang Xu, *China's Political Economic Institutions and Development*, 35 CATO. J. 525 (2015).