A COMMON LAW-LIKE CIVIL LAW AND A PUBLIC FACE FOR PRIVATE LAW: CHINA'S TORT LAW IN COMPARATIVE PERSPECTIVE

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ABSTRACT

China’s Tort Liability Law (2010), like contemporary Chinese tort law generally, is in the civil law tradition. But it resembles common law tort law (including that of the United States) in many respects more than it does typical civil law tort law. The Tort Liability Law, and Chinese tort law generally, is private law. But it has a significant ‘public law’ character: deep entanglement with conventional public law sources; substantive provisions that respond specifically to contemporary public policy issues, failures and controversies; an approach to damages that significantly serves regulatory and public welfare goals apart from full plaintiff compensation; and a highly positivist understanding of rights protected by tort law. Legal texts, official explanations and commentary by scholars involved in drafting China’s tort laws reveal aims and perspectives similar to those in U.S. tort law discourse (including law and economics and corrective justice analyses). This might, or might not, imply convergence.

Keywords: Chinese Tort Law, Tort Liability Law of China, Civil Law and Common Law Comparison, Public Law Elements in Private Law

The Tort Liability Law of the People’s Republic of China, adopted in late 2009 and effective in mid-2010, fills in one of the major previously missing pieces in China’s civil law and adds a key component of China’s future Civil Code. Despite its clear and consciously civil law character, China’s Tort Liability Law in some significant respects is at least as much common law-like as it is civilian. Despite its private law nature, Chinese tort law has major notably ‘public law’ characteristics. Much in China’s emergent tort law suggests the persistence of a more ‘statist’, ‘regulatory’ and ‘legislative-positivist’ cast than is the case (or than we generally think to be the case) with tort law in the foreign jurisdictions from which the shapers of Chinese tort law have drawn inspiration and examples. Still, in the Tort Liability Law and Chinese tort law more generally, we can also see signs of possible convergence and engagement with key conceptual debates that endur-
ingly frame discourse about tort law elsewhere, especially in the United States.

1. **Uniformity in Tort Law: Chinese Law and Common Law**

A search for significant similarities in Chinese tort law and American tort law is something of an acid test for any claim that there is an important degree of uniformity in tort law across legal systems, given the U.S.’s and China’s positions on opposite sides of many seemingly salient polarities: civil law vs. common law legal families; long-evolving vs. recently adopted tort laws; Western vs. East Asian civilizations; affluent market economy (with a recent bent toward deregulation) vs. rapidly developing and transforming economy (with a relatively recent and in some respects ongoing transition from state socialism); liberal-democratic ideology vs. residual socialism (or ‘socialism with Chinese characteristics’); highly independent courts in a litigious society vs. still-emerging judicial institutions in a social context of limited experience in suing to assert rights (and, some would claim, a cultural aversion to doing so); and so on. Nonetheless, China’s Tort Liability Law does look in some ways remarkably like its counterpart in American law. Much of the content and structure of the Tort Liability Law track what one finds in attempts to offer a structured presentation of American tort law (whether in the Restatements of the Law of Torts or less formal sources) or a hypothetical legislated version of U.S. jurisdictions’ largely judge-made tort law (something akin to codification when measured against the baseline of diffuse common law, although well short of the civil law meaning of folding much specialized legislation into a structured, formal Civil Code).

A few examples suggest the broader pattern. Much more than in the sparse provisions of the General Principles of Civil Law or the fragmented sources of tort law that had emerged over the twenty-plus years following the adoption of the General Principles, the Tort Liability Law adopts negligence (guocuo) as the basic, background principle of tort liability in Chinese law.1 Where the General Principles were largely silent, the Tort Liability Law adds a more specialized negligence regime for medical malpractice, emphasizing duties to disclose and informed consent, and adopting customary practice in the field as the principal standard for liability.

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