

Liang Huixing, *The Draft Civil Code of the People's Republic of China: English Translation* (Prepared by the Legislative Research Group of the Chinese Academy of Social Sciences) (Martinus Nijhoff, 2010), ISBN 978-9-00419-042-9, 550 pages

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This book provides an English translation of a major drafting work carried out by Professor Liang Huixing and many distinguished colleagues from Chinese law schools. The work was commenced in 1998 and completed in 1999. The aim was to create a complete civil code ('the Draft Code') that would rewrite and replace various items of existing civil legislation, namely: the *General Principles of Civil Law* (GPCL) (1986); the *Security Law* (1995); the *Contract Law* (1999); the *Inheritance Law* (1985); the *Marriage Law* (1980, later amended in 2001); and the *Adoption Law* (1991). The Draft Code also covers two areas of law that were later enacted separately: the *Real Rights Law* (2007) and the *Tort Liability Law* (2009).

The Draft Code represents a major effort by an accomplished group of Chinese legal academics to clarify and consolidate China's civil law regime. The foreword by Liang Huixing sets out the progress of the work and an explanation of the structure that was adopted, including a summary of the sources (such as the Dutch Civil Code) on which the drafters relied. The final product is a major accomplishment. It was not, however, adopted by the National People's Congress. Initially, it was followed by a draft civil code prepared by the Legal Affairs Commission of the National People's Congress, which reorganised the chapter on family law and added a chapter on the application of laws to foreign related civil matters.¹ Han Shiyuan suggests that the reason for this was because the initial draft did not give sufficient attention to state-owned assets or collectively-owned assets. Indeed, the enactment of the *Real Rights Law* — sometimes referred to as the '*Property Law*' — did not take place until 2007 due to objections that it granted too much protection to private property at the expense of state-owned assets.²

The National People's Congress has not adopted either version of the complete civil code. Instead, the decision was taken to complete China's civil system by retaining existing laws, such as the *Contract Law*, the *Inheritance Law* and the *GPCL*, which were left in place untouched; and to add the *Real Rights Law*, the *Tort Liability Law* and the *Law on Application of Laws to Foreign related Civil Matters* (2010), which were enacted separately. There is clearly a

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¹ See summary in Han Shiyuan, 'Liabilities in Contract Law of China: Their Mechanism and Points in Dispute,' (2006) 1 *Frontiers of Law in China*, 121–52, 122.

² See 'Caught between right and left, town and country', *The Economist* (online), 8 March 2007 <<http://www.economist.com/node/8815195>>.

strong argument for the overhaul and re-enactment of pieces of legislation with a common theme which were passed over a sustained period of time, particularly in the case of laws such as the *GPCL*, which came into force at a time when the Chinese legal system operated at a considerably lower level of legal sophistication. All of these older laws continue to apply, however, although in some cases relatively minor amendments have been made to the text of the laws. The worse choice in terms of drafting policy was made in the case of the *Real Rights Law*, which overrides the *Guarantee Law* and changes its provisions in a number of significant respects, but does not contain textual amendments to the relevant provisions of the *Guarantee Law*, thus requiring that both texts be read together so that an assessment can be made of the scope of the amendments.

This is hardly a desirable position and it is, therefore, well worth examining what a complete code drafted for the purpose of harmonising and standardising the requirements of these various legal instruments, could look like.

The drafters took a comprehensive approach to reorganisation of the various laws, and did not confine their attentions to older laws — even the *Contract Law*, which was issued in 1999, received attention and the addition of a few additional chapters. The foreword states that the Draft Code was influenced by the Dutch *Civil Code*, as well as tracing the influences on the laws which preceded it. The final result, however, is clearly directed towards Chinese conditions and circumstances.

The drafters identified many problematic areas in the existing law and included provisions that would have dealt with a number of issues that still arise. In other areas, the attempt of the drafters either to deal with existing problems or to cover issues that they anticipated could arise, and the way in which the drafters chose to address these matters, present some interesting conceptual issues. In some cases, changes to the economic or regulatory environment mean that the solutions in the Draft Code are no longer appropriate; in many others, the drafters have addressed problems and provided possible solutions that are still highly relevant.

For example, the *GPCL* was passed in 1986, before the *Company Law* (1993) and before the *Law on Industrial Enterprises Owned by the Whole People* (1988), which aimed to rationalise the legal position of state-owned enterprises. Thus, article 61, which sets out the requirements for establishment of a legal person, removes the circular definition in article 37 of the *GPCL*, which provided that in order to be a legal person an entity must 'have the ability independently to bear civil liability' and ties establishment of a legal person firmly to completion of the procedures required under the law pursuant to which it is established. The Draft Code is not, however, so satisfactory in relation to: the creation of a category of legal persons (or 'juristic persons') which are described as not-profit-making, or as social welfare organisations (the status of which is still relatively unclear); or in clarifying the circumstances in which government departments may be considered to be legal persons. The Draft Code is also less than successful where it ventures into areas which are covered in much greater detail in the *Company Law* — that is, establishment of a company and registration with the relevant authorities (arts 69–74) and the organs of a juristic person (arts 77–78). The issue that the drafters faced is still unresolved. Although corporations are adequately dealt with by the *Company Law*, the legal requirements surrounding such entities as social welfare organisations continue to be unclear. The move by the Central Government to require corporatisation of state-owned enterprises from 2002, and amendments to the *Company Law* in 2005, which made limited liability companies a much

more attractive option for small operators, have resolved this issue to a considerable extent — although the regulation of ‘social welfare organisations’ continues to be problematic.

Chapter 6 defines the problematic concept of agency in considerable detail. Agency is currently dealt with in the *GPCL* and the *Contract Law*, and the Supreme People’s Court has found it necessary to issue a number of Interpretations to deal with issues related to apparent or ostensible authority and estoppel. The Draft Code covers a number of important issues that are not dealt with elsewhere, such as the ‘undisclosed principal’, and provides a clearly organised structure for the application of agency principles. However, it is not a perfect answer to the problems of agency law and, in particular, it does not greatly improve on the current *Contract Law* provisions in relation to ostensible authority. Where the *Contract Law* provides some clarification on the important issue of the rights of a company where the legal representative of the company acts in excess of his authority, the Draft Code does not adequately cover this issue. Instead, the legal representative is dealt with separately, and not in the context of agency.³

The Draft Code also covers unincorporated associations (arts 89–94), and clarifies a number of issues about establishment and the activities of its legal representative. Interestingly, however, although article 52 of the *GPCL* provides that the members of an ‘economic association’ are jointly and severally liable for the debts and liabilities of such an association, the Draft Code defines an unincorporated association as one which has its own property and funds, which suggests that registration grants it some sort of legal personality. Under article 94, liabilities that exceed the assets are the responsibility of the person who set up the association. There is no reference to joint and several liability. This is a curious omission, since it seems unlikely that one individual would set up an unincorporated association. The allocation of liability among members, and the ability of a third party to enforce rights against both the association and its members is surely an important issue. Another oddity is the provision of article 94 that activities performed by an unincorporated association outside its scope of business are invalid, a result that might well put an innocent third party at risk. This contrasts with the ruling of the Supreme People’s Court in 1999 that acts of a company outside its approved scope of business are not invalid unless so provided by law.

The drafters also sought to expand the scope of the civil law in a number of significant respects. In relation to contract law, for example, they added in a number of additional chapters dealing with such matters as teaching and training contracts (pursuant to which the teacher guarantees the quality of instruction (art 1335)), medical service contracts, dining contracts, lodging contracts, travel service contracts and so on. While the choice of these topics is of interest, the inclusion of these specialist chapters does raise the same questions as were raised in relation to the choice and content of the specialist chapters to the *Contract Law* when it was passed in 1999. Is there is a justification for trying to split up

³ The ‘legal representative’ is a Chinese concept derived from state-owned enterprises, in which the General Manager could and did act for the enterprise without requiring specific authority from a board or other management committee. The *Company Law* does give the board of directors power over corporate management, but retains the position of legal representative, a conceptual problem that has not been adequately resolved, either legally or practically.

different kinds of contracts and giving them different legal treatment? Secondly, where the nature of the issues and legal treatment accorded to the different categories of contract fully thought through? Should leasing and financial leasing, for example, be handled in the *Contract Law* or under real property and financial institution laws?

The translation of the Draft Code is in clear and readable legal English and represents a major achievement by the team of translators. It would be helpful to have explanations for some of the translations that have been chosen, or perhaps a glossary of some of the original Chinese legal terms. There is, however, an excellent English index of terms used, which is of great assistance in trying to trace themes throughout the 1947 articles in the text.

Overall, the Draft Code represents a major body of work and an impressive production by the accomplished team of drafters. Even though an omnibus Civil Code has not been enacted, not all of the recommendations and policy in the Draft Code have been adopted into law, and some of the concepts have been superseded, the Draft Code is of both historical and current interest and its suggested reformulation of legislation such as the *GPCL* will prove useful for future generations of law reform in China.