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**LEGAL CULTURE AND LEGAL TRANSPLANTS -
CONVERGENCE OF CIVIL LAW AND COMMON LAW
TRADITIONS IN CHINESE PRIVATE LAW**

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**LEGAL CULTURE AND LEGAL TRANSPLANTS -CONVERGENCE
OF CIVIL LAW AND COMMON LAW TRADITIONS IN CHINESE
PRIVATE LAW**

JOHN SHIJIAN MO *

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I. Introduction

“Legal culture” and “legal transplant”, although the term “legal culture” is sometime vague and arguable¹, are two of the essential concepts in the field of comparative law study or comparative jurisprudence, which is a creation of Western legal scholars.² The Chinese legal academics began to pay serious attention to the concept of legal culture in the middle of 1980s.³ They also began to study legal transplants probably at the same time as they noted seriously the subject of legal culture, although it is not possible to determine when the term is first time introduced into Chinese legal studies. This is probably due to the fact that by definition, legal transplant refers to a practice or fact concerning the development of legal system in a country,⁴ but legal culture

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¹ The term “legal culture” is considered to be a vague and uncertain concept. See John Gillespie, “Towards A Discursive Analysis Of Legal Transfers Into Developing East Asia”, (2008) 40 N.Y.U. J. Int'l L. & Pol. 657, at 676.

² Montesquieu is commonly believed to be the father of comparative law study. See Wikipedia at http://en.wikipedia.org/wiki/Comparative_law#cite_note-1.

³ For example, Guohua Sun, Basic Legal Theories, Tianjin, People's Press of Tianjin, 1988. (in Chinese). This book is considered to be one of earliest books since 1978 discussing legal culture in Chinese context.

⁴ The term “legal transplant” means “the transfer of legal norms and institutions from one legal system to another”, see Ralf Michaels, Comparative

itself is usually a subject of study.⁵ But both terms became significant to Chinese legal studies only after China began to build its present legal system since 1978, when the so-called “open door” policy was adopted in China.

In spite of the existing differences in the understanding of legal culture across the world, the history of Chinese legal culture is as rich as the Chinese history itself. But legal transplant, namely the introduction of foreign legal knowledge and ideas into China took place only around 1840s, when more and more foreign visitors and priests began to translate foreign treatises of international law into Chinese. The choice of international law treatises to be the first to translate was logical, because foreign visitors and priests expected to be treated in China with at least the basic international law standards accepted by their home countries. The need for China to know such standards was also obvious, because the then Qing Dynasty Government lacked basic knowledge and skills, which were packaged into a set of behavioral norms known as international law, in dealing with foreign powers juggling with the knife of war or club of trade, or alternatively the knife of trade or club of war often menacingly and un-expectantly. Legal transplant in such context had only minimal impact to the development of Chinese domestic law then, because the introduction of international law into China in such background at most resulting in the transplantation of no more than a set of special norms governing foreign-related activities which eventually led to the establishment of extra-territorial jurisdiction in the Chinese history. The real legal transplant took place in China in the end of 19th century and beginning of the 20th century, when China began to rewrite its laws by following the Japanese model of transplanting the Civil law from Europe. The impact of such legal transplant is visible today because China still claims to be a country of Civil law tradition, even though a strong convergence of both Civil law and

Law By Numbers? Legal Origins Thesis, Doing Business Reports, And The Silence Of Traditional Comparative Law”, (2009) 57 Am. J. Comp. L. 765, at 787.

⁵ The term “legal culture” can be understood as meaning a “specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts.” John Bell, *English and French Law--Not So Different?* (1995) 48 Current Legal Probs. 63.

Common law has been seen, as this paper argues, in the past 30-year history of legal developments in China.

Even the Chinese legal culture can be thousand year rich in history, the present Chinese legal system has not been influenced much by that part of legal culture. Or alternatively, the Chinese legal history before legal transplant taking place in China does not have significant impact to the present Chinese legal culture centered on the present legal system. Therefore, legal culture and legal transplant in this paper are two interactive concepts evolving with transplanting of Civil law into China since early 20th century and transplanting of Common law into China since 1978. In another word, the use of legal culture and legal transplant in this paper is qualified by the convergence of Civil law and Common law in China.

This paper consists of five parts. This present part is the first. The second part deals with briefly the understandings of legal culture and legal transplant, in particular the differences between the Chinese views and foreign views, if any, on the two essential concepts. The third part examines the transplant of Civil law in China, including a review of the early efforts in such transplant. The fourth part examines the concurrent transplant of Common law in China, which is arguably a new phenomenon. The last part is the conclusion, which summarizes major features of the convergence of Civil law and Common law in China.

II. Explaining the Concepts of Legal Culture and Legal Transplant

It has been generally accepted that Prof Lawrence M. Friedman of the United States is the first one to use the term “legal culture” in his article “Legal Culture and Social Development”, published in 1969 *Legal and Social Review*.⁶ The combination of the words “legal” and “culture” creates a handy expression for scholars wishing to study legal issues from a much broad social, political, cultural, economic and historical perspective, and due to varying

⁶ David Nelkin, “Using the Concept of Legal Culture”, available from eScholarship at <http://escholarship.org/uc/item/7dk1j7hm>.

understandings on the values and cultures in any given society,⁷ there has been no uniformity in the use of the term “legal culture” in any given country even though the term has obtained enormous popularity in the world today.

“Legal culture”, and actually it is the Chinese translation of the term, has been popular in China since the 1980s, although understandings and definitions of legal culture vary among Chinese scholars. One of representative views on the meaning of legal culture is Mr Zhiping Liang’s understanding of legal culture. He defines legal culture from two alternative perspectives: the wide approach defines legal culture as being inclusive of all law-related elements, such as legal thoughts, legal conscience, legal acts, legal institutions, implementing mechanism, and the symbolic system consisting of codes, precedents, customary law and practices; but the narrow approach defines legal culture as a body consisting of law in formality (such as codes, legal institutions and facilities) and legal values (such as knowledge, beliefs, judgment and attitude), as well as human behaviors of those closed-related to law.⁸ Obviously, Chinese scholars have not only learnt the concept of legal culture from their Western counterparts, but also attempted to understand and apply the concept, which is expressed in Chinese language, by referring to their own cultural and legal backgrounds, in particular relying on their literal reading of the Chinese equivalent to (or Chinese translation of) legal culture.

The term “legal transplant” was created in the 1970’s by Prof Alan Watson of the United States to describe a situation where rules or laws of one legal system or country can be “moved” or “copied” to another legal system, country or culture.⁹ Scholars have since been divided on the meanings of legal transplant, in particular, to what extent and how a transplanted foreign law has to

⁷ Prof Friedman observes that cultural elements in a legal system “are the values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole”. Friedman. “Legal Culture and Social Development”, (Aug., 1969) Vol. 4, No. 1, *Law & Society Review*, pp. 29-44, at 34.

⁸ Zhiping Liang, *Debate on Law: the Past, Present and Future of Chinese Law*, Guizhou People’s Press, 1992, pp 12-13, (in Chinese).

⁹ A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1974.

be localized and modified to ensure the efficiency of legal transplant. In spite of the differences in the technical or theoretical understandings of legal transplant, legal transplant as a basic approach to the development of national law has been employed by many countries of the world for hundreds of years, and the present division of the Civil law family and Common law family in the world is a very good example for illustrating a process of copying, adopting, accepting or learning from a foreign legal system by any country or jurisdiction which to build or improve its own legal system. It is also a good example of spreading a legal tradition by way of legal transplant. The practice of legal transplant has also been evidenced in China since the beginning of 20th century, when China began to transplant Civil law tradition in China. But transplant is not copying in most cases. Foreign rules have to be modified to address local concerns and local values. It is in this sense, legal transplant is used in this paper.

In summary, it must be pointed out that legal culture in this paper is used in a broad sense, referring to all elements and values that represent and give distinguish characteristics to a particular legal system in a given society, and legal transplant in this paper refers to transplant of foreign rules with adequate and necessary modifications to meet the need of local society.

III. Transplanting Civil Law in China

1. Legal Transplant in the Qin Dynasty

Chinese legal system maintained its unique features of executive-enforced legal rules in the last Monarch of China, the Qin Dynasty. However, facing the increasing conflicts with foreign powers and the pressing danger of falling into a second class country in the warship-shaped new international order evolving since 1840 when the first Opium War broke out, the Qin Dynasty began to transplant Civil law model in China in a hope to improve its capacity to compete with Western countries. In early 20th century, the Qin Government decided to reform Chinese law by following the Japanese model of Civil law. In fact, not only the Japanese law, but also the German and French laws were also studied seriously by the then Qin Government. The reason for China to choose Civil law model in its legal reform was probably

threefold:¹⁰ first, China used to have a comprehensive law code of its own, which was often a combination of all behavioral rules, whether civil, criminal or administrative, and thus to adopt Civil-law style codes was much easier for China than to learn the logic of Common law case law; secondly, Japan was rather a successful model of transforming from an oriental-style country to a Western-style country politically, militarily and economically, which happened to have transplanted the Civil law and thus China could avoid considerable amount of risk of uncertainty in its reform if following the Japanese approach, and thirdly, most influential foreign advisors of the Qing Government were from Continental Europe and naturally Civil law influence should prevail in China. Consequently, China turns into a Civil law country, at least in its formality, slowly and intermittently since early 20th century.

Private law is the first experimental field of China's legal reform. With the assistance of Japanese scholars, the first Civil Code of Qing Dynasty was published in August 1911. But the Code did not have much practical effect at all, because the Qing Dynasty was overthrown soon by the Republicans in October 1911. However, the completion of this Code was significant, representing a fundamental change in Chinese legal culture and legal tradition. At the same time when the Civil Code was prepared, the Commercial Law Code was also drafted. This Code, which had not been completed by the time when the Qing Dynasty was overthrown, was said to contain sections on commercial activities, company law, shipping law and law of negotiable instruments.¹¹ The published Civil Code and the unpublished Commercial Law Code were two of the most important legal developments in the Chinese history of transplanting Civil law in China.

2. Legal Transplant before 1949

Since 1912, China entered into the so-called Republican period of its history. The Republic of China, which now continues

¹⁰ The author has accepted some of the views expressed in Jinxi Li and Guangzu Lin, *Study of Civil and Commercial Law in Taiwan*, Law Press, 1996, pp 4-5 (in Chinese).

¹¹ Jinfan Zhang, *Chinese Legal Tradition and Modern Transformation*, Law Press, 1997, pp 448-469 (in Chinese).

to operate in Taiwan, was established in 1912. Numerous internal wars and the anti-Japanese war were the main characteristics of this part of Chinese history. However, before the People's Republic of China was established in Beijing in 1949, the Republic of China was the official government of China for the period of 1912-1949. Legal transplants continued in the Republican period.

Chinese law began to take the shape of Civil law during the Republican period. On the basis of legal reforms conducted by the Qin Government, the second draft of Chinese Civil Code was completed in 1926, which consisted of rules on general principles, obligations, ownership, family and succession.¹² The second draft was further improved by the Chinese Government in Nanjing between 1929-1933 and many basic rules and systems of Civil law were modified according to commercial, political and social cultures of China.¹³

Although China began to transplant Civil law system in China since early 20th century, the codification of commercial law took place only in a flexible and pragmatic manner. The Qin Government did not complete the draft of commercial law code, nor did the Republican Government in an easy way. A number of law regulating commercial matters were published as individual or specific piece of legislation in 1920s and 1930s, including Law on Stock Exchange Market, Negotiable Instrument Law, Company Law, Maritime Law, Insurance Law, Law on Vessels, Banking Law and Bankruptcy Law.¹⁴ Coincidentally, such practice continued in China after 1978 when China began to develop its present legal system. The simple repetition, at least in the formality of legal development, in Chinese legislative history was the consequence of China reassuming the transplantation of Civil law in China after discontinuation of transplanting Civil law in China between 1949 and 1977 for more than 20 years.

Between 1912 and 1949, China did not have a stable political and economic system. The long lasting military struggle

¹² Jinfan Zhang, *Civilization of Rule of Law in Modern Chinese Society*, CUP Press, 2003, pp 335-338 (in Chinese).

¹³ *Ibid.*

¹⁴ Quanlai Cao, *Internationalization and Localization*, Beijing University Press, 2005, p 138 (in Chinese).

between the Communists and Nationalists, as well as the eight year long anti-Japanese War were the main events characterizing this part of Chinese history. Legal developments had to be limited against such turmoil background. However, the Republican Government (or Nationalist Government) did manage completing the so-called six Codes, including the Constitutional Code, the Civil Code, the Commercial Law Code, the Criminal Law Code, the Civil Procedure Code, and Criminal Procedure Code. The Government of the People's Republic of China denounced the legality of all these codes in 1949, but these codes continue to operate in Taiwan after 1949 because the Nationalist Government retreated to Taiwan with its political and legal establishments following its defeat in Mainland China by the Communist army.

3. Legal Transplants Since 1949

1) Influence of Soviet Law

After the Second World War, as an inevitable consequence of emerging as a Communist power. China joined the Soviet Block. The Civil law system established by the Republican Government in China between 1912 and 1949 had to be entirely destroyed together with everything else claimed by the Republican Government. But the newly established People's Government had neither expertise nor resources to develop its own legal system. Turning to the Soviet Republic for assistance was a natural option for developing its own legal system of new China. Legal transplant still continued in the new China, but the influence was from the Soviet law which was once regarded as one of the world's major legal families by scholars studying comparative law.

Since the establishment of the People's Republic of China, the new Government did try to build a new legal system of its own. In 1949, when the New China denounced all laws promulgated by the Government of the Republic of China (Nationalist Government), it published a constitutional document known as the Common Programs, which consisted of 60 provisions, to provide guiding principles for China's new political and economic system. In 1950 when the legislative, executive and judicial powers were not clearly divided in China, the Marriage Law of China was passed by the central Government, which was largely an administrative

authority. This was the first written law ever passed by the new Government of China. Choosing the Marriage Law as the first written law to pass is understandable, probably for three reasons: first, policy and value tendency in marriage matters was easy to determine because the new Government believed strongly that marriage between a man and a woman must be the basic social unit of the society; secondly, the technical requirements for drafting the Marriage Law to reflect the basic value of the society were fairly simple; and thirdly, China urgently needed social stability after so many years of internal and external wars and protection of the basic family structure would provide such stability. The first National People's Congress was held in 1954, which passed the first Chinese Constitution to replace the Common Program made in 1949. The 1950 Marriage Law and the 1954 Constitution remained to be the only Chinese written laws till 1978, when China opened its door to the outside world.

Although China had not managed to complete any code of private law by transplanting the Soviet law before it turned to Civil law tradition again in 1978, China did accept the Soviet influence in its published Constitution and in its preparation for drafting the Civil law code. Soviets legal experts were the only foreign legal advisors working in China in the 1950s. In fact, many well-known Chinese legal scholars today around age of eighty were educated in the Soviet Unions in their youth years, and their contributions to the development of Chinese law after 1978 have inevitably shown some marks of Soviet legal theory, or alternatively demonstrated some of the Soviet understanding of Civil law principles.

It is generally believed that the influence of Soviet law is seen in the present General Principles of Civil Law Code, which was passed in 1986. Different from the general divisions adopted in the French Civil Code (which is divided into three major parts, ie, law on person, law on property and law on obtainment of property) or German Civil Code (which is divided into five parts, ie, general principles, property, obligations, family and succession), the Chinese Civil Code has adopted a different approach to the regulation of civil activities and civil matter, including general principles, capacity, legal persons, civil acts and agency, civil rights, civil obligations, time limitation and private international law rules.

Accordingly, the prevailing views of Chinese civil law divide civil law issues into nine large groups, such as general principles, property, obligations, family, succession, intellectual property, personal rights, tort and private international law rules. Such variations in Chinese civil law may be considered to have reflected in some way the influence of Soviet law in the past years.¹⁵

Another evidence of Soviet law influence is the change in the Chinese views on property or proprietary rights. For a long time after 1949, there were only state and collective ownership in China. Thus, the Chinese understanding of ownership was very basic and Soviet like,¹⁶ excluding the right to possess, to benefit, to mortgage and to set security on the property, etc. This was because in the absence of wide private ownership in China, all these rights associated with or deriving from ownership were not meaningful, at least in law. All of these have changed after 1978. Now, not only the Chinese Constitution expressly protects private ownership in its Article 13. But also the Chinese Property Law came into effect in July 2007. The Chinese views on property have undertaken tremendous changes in past 30 years, but the Soviet influence on property law has been visible in the development of Chinese law after 1949.

In summary, it can be concluded that Soviet law did have some influence on Chinese law, in particular in the period between 1949 and 1977, when China did not have any other sources to turn to for legal transplantation. Although the legal development in China after 1978 has demonstrated some considerable influence from both the Civil law and Common law tradition upon Chinese law, the Soviet law as it stands in the 1950s has affected the development of Chinese law in 1950s and 1960s. Such influence will inevitably leaves some marks in the on-going process of shaping of Chinese law with Chinese characteristics in China, resulting in something unique in China known as legal culture.

¹⁵ Xiuqing Li, Study of Chinese Transplant of Soviet Civil Law Model, (2002) No. 5 Social Science of China, pp 126-141 (in Chinese).

¹⁶ Ibid.

2) *Recent Legal Developments after 1978*

China entered into a new era since 1978 when it official adopted the “open door” policy, symbolizing the commencement of still on-going economic reform. The economic reform has been very successful so far. With a continuation of high rate of growth in past 30 years, China is becoming the second largest economy by single country and became the number one exporting power by single country in the world in 2009.¹⁷ It is impossible for China to have achieved all of these without the support of an efficient, but yet imperfect, legal system. Therefore, it is necessary to read and understand the Chinese legal system in an objective and sympathetic way.

In 1978, when China began to rebuild its legal system, China had to start afresh. The legal developments achieved by the Nationalist Government (in Mainland China before 1949 and in Taiwan after 1949) had to be denounced totally because that was the only politically correct option for the People’s Government to take. The Soviet law model did not offer much assistance because not only China-Soviet relations had never been recovered since the breaking up in 1950s, but also the Soviet Union itself was facing political and economic crisis in 1970s. In 1978, the only known written laws in China were the 1975 Constitution, which succeeded the 1954 Constitution, and the 1950 Marriage Law. In balancing all likely choices and also taking into account the strong influence of the Chinese legal culture, whether acknowledged or not, which has affected the unconscious thinking of Chinese legal scholars in past 30 years, China again turned to Civil law tradition for assistance. But this time the Civil law model adopted in China has been influenced strongly by the Civil law model adopted by the early Nationalist Government in the first half of the 20th century and now practiced in Taiwan. Cultural connection and language convenience are the major reasons for the Chinese scholars and governmental experts, who did not possess sufficient knowledge of either Civil law in Europe or Common law in other Western

¹⁷ China’s export reached 1201 billion in US dollars and was the number one exporting country of the world in 2009. The information is available at <http://finance.sina.com.cn/j/20100209/20287397050.shtml>.

countries, to rely heavily on Taiwan's experiences in transplanting Civil law for the purpose of rebuilding a legal system in China.

Chinese legal system has developed rapidly since 1978. Now China has passed the General Principles of Civil Law, which is meant to be the first half of a comprehensive Civil Code yet to be accomplished, the Criminal Law Code, the Criminal Procedure Code, the Civil Procedure Code, the Contract Law, the Maritime Law, the Insurance Law and many other laws. It has been estimated that since 1978, nearly 400 pieces of laws and more than dozen of legal interpretations have been passed by the National People's Congress and its Standing Committee.¹⁸ In addition, more than 1000 administrative rules and regulations have been made by the State Council since 1978.¹⁹ The statistics along have suggested that a comprehensive legal system based mainly on written laws has been established in China in past 30 years.

IV. Convergence of Civil Law and Common Law since 1978

1. Civil Law Features in Chinese Private Law

Under the Civil law tradition, laws can be divided into two broad categories: public and private. The two terms, "public law" and "private law" lack uniform understandings, but the term "private law" is generally understood as referring mainly to a body of laws regulating personal rights, relations, and property. According to this general understanding, private law in China mainly refers to the laws of civil and commercial nature, such as the General Principles of Civil Code, the Contract Law, the Insurance Law, the Maritime Law, the Labor Contract Law, the Marriage Law, the Civil Procedure Code, and etc. Most Chinese laws fall under the category of private law, which is the major concern of this paper.

There are a number of reasons to explain why China has by definition transplanted the Civil law model. First, in 1978 when China began to rebuild its legal system, in view of Chinese legal

¹⁸ See news report on 25 September 2008 by Xinhua News Agency (in Chinese), available at http://news.ifeng.com/mainland/200809/0925_17_804940.shtml.

¹⁹ Ibid.

culture and tradition, legal scholars and law-makers unanimously agreed that China should establish a legal system by transplanting the Civil law models as those established in Germany, France, Japan and Chinese Taiwan. Secondly, codification of laws has taken place in China although China has not been able to produce the same-style codes as many Civil law tradition countries have done. Thirdly, the Chinese legal tradition and culture in 1978 had been developed on the basis of many Civil law legal concepts and principles, which have consequently not only affected the drafting of laws, but also judicial practices of the court. Lastly, the Chinese judiciary is largely Civil law style in terms of the judge's qualification, appointment and operation of the court. It must be pointed out, however, that the procuratorate in China is part of the judiciary, whose establishment is not only influenced by the Civil law tradition, but also by the Soviet practices concerning the procuratorate. Some of these reasons are further explained in the following paragraphs.

In terms of formality, the Chinese law is largely code-based. However, instead of adopting six or more general codes such as what has happened in Germany and Chinese Taiwan, China has completed only three basic codes, including the Criminal Law Code, the Criminal Procedure Code and Civil Procedure Code, and half of the Civil Code (the General Principles of Civil Law), whilst passing hundred of specific laws of civil and commercial nature as individual laws of their own rights. There could be a complex of reasons for this. For example, many codes in Civil law counties or jurisdictions are old and many principles are thus no longer suitable for transplanting in the modern Chinese society. Another possible reason is that Chinese cultural, political, social and economic backgrounds are different from many of the European Civil law countries, and therefore their laws cannot be transplanted directly in China. In addition, China is a transitional economy both economically and politically, and therefore, it must develop legal rules of its own to satisfy the special needs of such transitional economy. All of these reasons may explain one way or another why China has published many individual laws to provide solutions to its social and economic problems. However, such case-by-case approach to written legislation happens to be one of the essential features of Common law tradition practiced in many Common law

jurisdictions. Thus this is one of the instances where the present Chinese legal system has also been influenced by the Common law tradition.

There are many examples of basic Civil law principles guiding Chinese legal developments. The Property Law entering into force in 2007 is one of such examples. In this law, the concept of ownership or property, principles affecting acquisition of property, right to benefit, right of liens and etc are essentially from German law. In addition, the legal theories concerning obligations in China are also largely of German legal principles as we see in the German Civil Code, such as the nature or basis of contract, and unjustified profits. The same can also be said about a number of principles in the Chinese Contract Law concerning performance and termination of contract, which have been formulated in a Civil law manner.

The Chinese court is structured in a manner similar to courts in many Civil law jurisdictions. Judges are essentially governmental employees with some special status. They enjoy relatively wide judicial discretion in the interpretation and enforcement of law, and usually write short judgments without giving sufficient details of either the facts or their reasoning. Although the National Supreme Court and a number of Provincial Supreme Courts have on occasions attempted to improve the quality of the judgments and the basic skills of judgment writing, the efforts have not yielded any significant improvements so far. However, as a general tendency, the quality of judgments and reasoning appears to have improved a bit in recent years along with the improvement of the general quality of judges in China. This is particularly true in the judgments delivered by the National Supreme Court, which naturally represents the highest quality of Chinese judges. The simple and unreasoned judgment is not necessarily of a modern Civil law characteristic, given that Civil law judges in many traditional Civil law jurisdictions have begun to produce detailed and reasoned judgments in an effort to improve the transparency and consistency in law enforcement. However, the present problem in China is rather historical caused by a lack of training and skills in legal reasoning and relative poor quality of majority judges in interpreting laws. The situation will certainly be improved along with the capacity-building of judges in China.

In summary, China turned to Civil law tradition for developing its modern legal system about hundred years ago and the legal culture formed against such background led to the transplantation of Civil law again in 1978 when the present Chinese Government decided to rebuild its legal system to provide structural support for its efforts of modernization. Since 1978, the Civil law concepts, principles and practices have been the major influence in the development of Chinese legal system. This has been seen in the code system adopted in China, and the legal principles underlying many Chinese written law, as well as the judicial system and judicial practices in China. However, China has not turned into a real Civil law country because many of the specific laws passed to offer solutions to many economical, political, social, cultural and legal problems also bear influence of Common law tradition, suggesting a convergence of both Civil law and Common law in modern China.

2. Common Law Features in Chinese Private Law

When examining the issue of legal transplant, we have to turn to both the formality and substance of law for an answer. The foundation of Chinese law is Civil law. However, influence of Common law can be seen in a number of aspects of Chinese private law. For example, making of specific laws for specific issues is a Common law practices developed to supplement deficiency in the case law made by the court. China has adopted such practices in providing solutions to many problems in the absence of basic law codes. Similarly, many Common law principles can be seen in Chinese laws, such as contract law, consumer protection and product liability laws. Precedential effect of cases has also been emphasized by the National Supreme Court in a hope to reduce radical discrepancy and to ensure reasonable consistency in the exercise of discretionary interpretation power by the Chinese court in discharging its law enforcement function. Some of these features are to be discussed further in the following paragraphs.

First, in terms of legislative formality, China has wisely suspended the impossible task of codification in the private law areas, and chosen to follow the Common law practice of passing specific laws for specific issues. The fact that China has only

completed half of the Civil Law Code since 1986 and passed many specific laws or codes in the private law areas, which may otherwise be part of the Civil Law Code, is a good illustration of transplanting Common law practices in China to provide specific solutions to those specific problems which cannot be resolved by transplanting Civil law style codes in China. It is possible that sometime in the future when China has accumulated enough experiences in the regulation of various matters in the private law areas, it will incorporate all the relevant rules into one or two comprehensive law codes and thus to complete its journey of Civil law transplantation symbolically. However, it is also equally possible China will never consolidate everything into the Civil law style law codes in the private law areas because of the technical difficulties and costs in ensuring continuous uniformity and consistency in any comprehensive law codes in the private law areas, which are meant to provide efficient solutions to many fast-changing commercial and social practices that are often controversial and inter-connected. Codification of laws is challenging both jurisprudentially and technically. Given the variety and individuality of many practical and legal problems, whether codification of private laws is a perfect answer to the imperfect world we live in is doubtful. Accordingly, the author of this paper believes that whether the codification of private laws is a must in the development of Chinese legal system is an unsettled issue yet to be thoroughly debated and tested in China. There is nothing wrong if China adopts a modified Civil law system which can provide efficient, constructive and innovative solutions to unique problems faced by China in years to come. After all, formality of law-making is meaningful only if can it provide efficient and fair answers to practical issues.

Secondly, many Common law principles have been incorporated into Chinese law and practices. This can be seen specifically in the Chinese Contract Law which has borrowed ideas from Common law in regulating offer and acceptance, foreseeability and liability for damages, and certain rules concerning sale of goods contract, such as delivery and passing of property and risks, as well as installment delivery. Similarly, in the company law area, China has developed a system of independent director with its own characteristics, but the basic notion is of Common law nature.

In addition, the consumer and product liability law in China has been influenced strongly by Common law tort law principles concerning consumer protection. The most recent influence of Common law principles upon Chinese law can be seen in the Draft of Tort Liability, published in November 2009 for public comments. This Draft has formulated many rules by transplanting Common law tort law principles. For example, Article 6 of the Draft has adopted a fault-based liability, whilst Article 7 adopting a strict liability, both being practices of Common law. Chapter 4 of the Draft stipulates special categories, such as employer and employee relations, occupier's liability (administrator or manager of hotels, shopping centre, banks, train or bus stations, parks, entertainment venues and other public facilities), organizer of public event, kindergarten, schools and universities, where tort liabilities have been imposed. Other special categories, such as traffic accidents (Chapter 6), doctor and patient relations (Chapter 7), high risk activities (Chapter 9), owner or controller of animals (Chapter 10) and injuries caused by physical items (Chapter 11) are also regulated in the Draft. Producer's liability to consumers is restated clearly in Chapter 5. Many rules in the Draft have reflected the torts law rules developed in Common jurisdictions. However, it must also be pointed out that these Common law principles or practices have been modified, either consciously or unconsciously, according to the understanding of the drafting persons who are able to apply these principles only to the extent they consider to be adequate and correct. This is also how the law of China characteristic has been developed.

Thirdly, the notion of case law has been introduced into China with some modification reflecting Chinese understanding of case law. As a legal tradition of Civil law nature, the court and judge enjoy wide judicial discretion in the interpretation and application of written law, even though the official power of interpreting law lies in the hands of the Standing Committee of the National People's Congress. For many years, discrepancy and inconsistency in judicial practices has been an issue troubling the National Supreme Court, which appears to be powerless in a situation where local courts in different areas giving different or even conflicting interpretations or understandings on the same rule in a statute and no one has asked the National Supreme Court to

offer an opinion on the discrepancy.²⁰ Probably for the purpose of unifying as much as possible judicial interpretations in China, the National Supreme Court began to publish the *National Supreme Court Gazette* in 1985, which selects an average of 4-5 cases for each issue. The *Gazette* is so far the only official case reporter published regularly in China besides those cases reported by various courts in their official websites. Some of the cases in the *Gazette* are selected from decisions of lower courts. These cases are not law in the same sense as the case law in Common law jurisdictions, but the intention to give some guidance to uniformity and consistency to lower courts exercising judicial interpretation power is obvious in promoting these representative cases. A number of lower courts have also adopted similar practices in publishing representative cases as guidance or reference for late decisions.²¹ Besides these official efforts in developing a case law system in China, many case books have been published in China. However, most of these books serve as examples or illustrations for possible judicial interpretation of laws, and do not possess any binding force of case law as understood in Common law jurisdictions. Such use of cases in China may perhaps be considered to be one of the characteristics of Chinese cases law today.

These are the examples of transplanting Common law in the development of Chinese legal system today.

V. Conclusion: A Convergent Legal System of Chinese Characteristics

China has established a convergent legal system with its own characteristics. By definition, especially if we have to choose between the Civil law and Common law, China is largely a Civil law country. At least, this is how China started its journey of rebuilding its legal system after 1978. However, a simple legal transplant has

²⁰ For example, the author has studied judicial decisions concerning anonymous investors in China and found certain discrepancy in many court decisions concerning foreign investment law, contract law and company law. See John Shijian Mo, "Legal Problems Arising from Anonymous Investments by Taiwanese Investors" Volume 7:6 (2009) *Modern Law* 16-28 (in Chinese).

²¹ For example, see the official website of Jiangsu Provincial Supreme Court and the official website of Zhongyuan Basic Court of Zhengzhou Municipality.

proven to be impossible because of the unique features of China for what it is. Wisely China has not simply copied or transplanted any specific model of Civil law in China entirely. Instead it has modified, either successfully or unsuccessfully, many principles of Civil law according to its perceived political, economic, social and cultural values. Political consciousness or the political will to maintain the Chinese Socialistic characteristics is the true reason and power resisting unqualified transplant of Civil law, and thus pushing China towards a modified version of Civil law, which must be able to preserve the political values upheld by the Communist Party whilst offering motivation, protection and efficiency to the economic developments of China. So far, China has been rather successful at least as far as the economic development is concerned, in developing a modified model of Civil law.

As a result of resisting a total transplant of any existing model of Civil law, China must find feasible solutions to many practical problems unaddressed by the modified version of Civil law as being established in China. Turning to Common law for some feasible solutions is a logical option for China to take. This option has been reinforced by the training of many legal scholars in Common law jurisdictions, continuous legal exchanges between China and Common law jurisdictions and prevailing US influence both politically and economically. Consequently, many Common law principles and practices, which are able to offer solutions to Chinese problems, have found their way to settle comfortably or uncomfortably, often with some modification of Chinese characteristic, in a legal system which is presumably to be Civil law based. This is how convergence of Civil law and Common law has taken place in China.

No one knows how long China will maintain a convergent system of both the Civil law tradition and Common law tradition, although most people still believe that at some stage in the future, China shall incorporate many specific laws of private nature into the relevant codes, such as the Civil Code, Company Law Code, Commercial Law Code or Economic Law Code, if any. But the author of this paper maintains some doubt on the rationale and practicability of forcing specific laws into such large compartments of law known codes. Is the Civil law tradition or Common law tradition as we have seen today a religion or a solution-based

achievement of human intelligence and knowledge developed in different, but yet incidental, historical and cultural backgrounds? Even though we can argue endlessly about the nature of Civil law tradition or Common law tradition, one thing we are sure of is that the legal tradition is not religion. Therefore, we are only bound by the reasons and rationale that justifies the very existence as well as the substance of any legal model we call legal tradition. Accordingly, China is not bound to take any plastic surgery to its legal system merely for the purpose of making it look similar to the existing model of Civil law unless the codification of laws will result in a logical model what is more efficient, reasonable and friendly to the future developments of China. This is something yet to be determined in the future.

The author of this paper argues that China should develop a new model of legal system which is based convergent transplant of both Civil law and Common law in China. China has a unique history, unique culture and unique status in the world, and thus it needs a unique legal system of Chinese characteristics. At the age of globalization, many legal principles of Civil and Common law are compatible, and in fact both the Civil law tradition and the Common law tradition have learnt from and been influence by each other the past years. This is why often China could successfully incorporate Common law principles into its legal framework developed presumably on the basis of Civil law. China has also contributed to the globalization of law by creatively combining Civil law and Common law principles for the purpose of resolving practical problems arising from a transitional economy like China, whilst maintaining the political values which contradict in a number of ways to the Western domestic system where both the Civil law and Common law are originated. The author believes that if China can create a political model of Chinese characteristics, which is neither conventional Western democracy nor conventional Socialism, it can also create a legal model of its own characteristics, which is based on the convergence of both the Civil law and the Common law. The future success of the two models is closely related to and dependent upon each other. We need to keep an open mind on the possible success of a convergent model of Civil law and Common law in the future, although we have to overcome many theoretically and practical challenges arising from the

development of such model in the future, if such a convergent model will ever succeed.