

# GOOD CUSTOM IN CHINA: TO WHAT EXTENT IS GENERAL APPLICABLE CUSTOM IN THE COMMERCIAL CONTEXT CONSISTENT ACROSS CHINESE LEGAL SYSTEMS?

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## Abstract

This article undertakes a comparative law analysis of “custom” and “good custom” in the Chinese legal systems of the People’s Republic of China (Mainland China) and the Republic of China (Taiwan), and situates them within the wider civil and common law contexts. Through an analysis of the language and jurisprudence of each Chinese legal system, the article explores the challenges of comparing their respective definitions and applications. In scoping the application of custom, this article notably proposes an alternative perspective on Socialist Core Values articulated from the perspective of “good custom”.

**Keywords:** custom; public order; good custom; Socialist Core Values; customary implied terms.

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## [A] INTRODUCTION

Whilst custom is widely considered inferior to law, its scope and authority are actually determined by the system of law itself. Civil law broadly provides for three categories of custom: (1) custom *secundum legem* (ie custom in accordance with the law); (2) custom *praeter legem* (ie custom beyond the law); and (3) custom *contra legem* (ie custom contrary to law). Custom can thus be considered a source of “living law” (*Lebendes Recht*) (Ehrlich 1936: 493) outside the Westphalian Duo (ie state and international law) necessary to understand the legal system and its development in the global context (Twining 2009: 357, 363-364).

A brief review of the respective Chinese Civil Codes indicates many parallels on the general treatment of custom (*xiguan*: 习惯) across the

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Chinese legal systems. On the one hand, both Chinese Civil Codes provide for the application of custom. Article 10 of the Civil Code of the People's Republic of China<sup>1</sup> (PRC Civil Code) provides for the application of custom in the absence of other legal provision, providing that the custom does not violate “public order and good custom” (*gongxuliangsu*: 公序良俗). Similarly, Articles 1 and 2 of the Civil Code of the Republic of China<sup>2</sup> (ROC Civil Code) permit the application of custom in the absence of an applicable provision, providing it is not contrary to “public order or good custom” (*gonggong zhixu huo shanliang fengsu*: 公共秩序或善良風俗). On the other hand, both Chinese Civil Codes also contain provisions invalidating acts contrary to “public order and good custom” (*gongxuliangsu*: 公序良俗) in Articles 8 and 153(2) PRC Civil Code<sup>3</sup>

<sup>1</sup> Civil Code of People's Republic of China (adopted Third Session of Thirteenth NPC on 28 May 2020), Book 1 (General Part), Chapter I (General Provisions), Article 10: “Civil disputes shall be resolved in accordance with law. Where the law does not specify, custom may be applied, provided that public order and good morals may not be offended.” (official translation) (*“zhonghua renmin gongheguo minfadian”* (2020 nian 5 yue 28 ri dishisanjie quanguo renmin daibiao dahui disanci huiyi tongguo) diyibian (zongze) diyizhang (jiben guiding) dishitiao: “chuli minshu jiu fen, yingdang yizhao falü; falü meiyou guiding de; keyi shiyong xiguan, danshi dude weibei gongxuliangsu.”: 《中华人民共和国民法典》(2020年5月28日第十三届全国人民代表大会第三次会议通过) 第一编(总则)第一章(基本规定)第十条: “处理民事纠纷,应当依照法律;法律没有规定的,可以适用习惯,但是不得违背公序良俗。”). NB: “public order and good morals” is elsewhere translated as “public order and good custom”.

<sup>2</sup> Civil Code of the Republic of China (26 June 2002), Part I (General Provisions), Chapter 1 (Legislation), Article 1: “If there is no applicable provision for a civil case, the case shall be decided according to customs. If there is no such custom, the case shall be decided according to the jurisprudence.” (*“minfa”* (minguo 91 nian 06 yue 26 ri) diyibian (zongze) diyizhang (fali) diyitiao: “minshi, falü suo weiguiding zhe, yixiguan; wu xiguan zhe, yifa li.”: 《民法》(民國91年06月26日) 第一編(總則)第一章(法例)第1條: 「民事,法律所未規定者,依習慣;無習慣者,依法理。」); Article 2: “Only those customs which are not against public order or good custom shall be applied to a civil case.” (*diertiao*: “minshu suo shiyong zhi xiguan, yi bu beiyu gonggong zhixu huo shanliang fengsu zhe wei xian.”: 第2條: 「民事所適用之習慣,以不背於公共秩序或善良風俗者為限。」).

<sup>3</sup> Civil Code of People's Republic of China (adopted Third Session of Thirteenth NPC on 28 May 2020), Book 1 (General Part), Chapter I (General Provisions), Article 8: “When conducting a civil activity, no person of the civil law may violate the law, or offend public order or good morals.” (official translation) (*“zhonghua renmin gongheguo minfadian”* (2020 nian 5 yue 28 ri dishisanjie quanguo renmin daibiao dahui disanci huiyi tongguo) diyibian (zongze) diyizhang (jiben guiding) dibatiao: “minshi zhuti congshi minshi huodong, bude weifan falü, bude weibei gongxuliangsu.”: 《中华人民共和国民法典》(2020年5月28日第十三届全国人民代表大会第三次会议通过) 第一编(总则)第一章(基本规定)第八条: “民事主体从事民事活动,不得违反法律,不得违背公序良俗。”); Book 1 (General Part), Chapter VI (Civil Juristic Acts), Section 3 (Effect of a Civil Juristic Act), Article 153(2): “A civil juristic act that offends the public order and good morals is void.” (official translation) (*diyibian (zongze) diliuzhang (minshi falü xingwei) disanjie (minshi falü xingwei de xiaoli) diyibaiwushisantiao dierkuan*: “weibei gongxuliangsu de minshi falü xingwei wuxiao.”: 第一编(总则)第六章(民事法律行为)第三节(民事法律行为的效力)第一百五十三条第二款: “违背公序良俗的民事法律行为无效。”) NB: “public order and good morals” is elsewhere translated as “public order and good custom”.

and Article 72 ROC Civil Code<sup>4</sup> respectively. As such, the legal architecture governing custom is broadly similar between the two Chinese Civil Codes, since both: (a) provide for the application of custom in absence of other legal provisions subject to “public order and good custom”, and (b) invalidate acts contrary to “public order and good custom”.

However, since the general clauses in civil law provide only the generalization of principles with the normative function of these embodied by a judgment (Yang 1999: 135; Yang 2021: 406), this analysis seeks to explore whether custom *secundum legem* aligns, custom *praeter legem* supplements, and custom *contra legem* overrides the respective Chinese Civil Codes in similar ways.

In order to explore these potential discrepancies, this analysis thus draws on specific socio-legal and comparative law theories where relevant to examine a particular issue (eg legal transplant, legal culture and legal pluralism), but is primarily driven by the functional method, given the “basic methodological principle of all comparative law is that of *functionality*” (Zweigert & Kötz 1998: 34). The functional method should be broadly sufficient given that the People’s Republic of China (PRC) and Republic of China (ROC) shared the same history until 1949, so this is not broadly a comparative law analysis across different legal cultures. However, in light of the political, social and economic divergences between the PRC and ROC since 1949, the analysis acknowledges that a pattern of law “requires a knowledge not only of the foreign law, but also of its social, and above all its political context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a purely legalistic spirit which ignores this context of the law” (Kahn-Freund 1974: 27).

Starting from the point of similarity of the Chinese Civil Codes (ie law in books), this analysis draws comparisons between the function of “custom” and “good custom” in order to determine their comparative application in the private law commercial context (ie law in action). Whilst an examination of these theoretical concepts does not provide a wholistic understanding of the law of custom in each Chinese legal system, the comparison of the private law function of “custom” and “good custom” avoids being drawn into considerations of “public order”, which requires

<sup>4</sup> Civil Code of the Republic of China (26 June 2002), Part I (General Provisions), Chapter I (Legal Acts), Article 72: “A civil juristic act that offends public order and good custom is void.” (“*minfa*” (*mingguo 91 nian 06 yue 26 ri*) *diyibian* (*zongze*) *disizhang* (*falu xingwei*) *diyijie* (*tongze*) *diqishiertiao*: “*falu xingwei, you bei yu gonggong zhixu huo shanliang fengsu she, wuxiao*.”: 《民法》（民國91年06月26日）第一編（總則）第四章（法律行為）第一節（通則）第72條：「法律行為，有背於公共秩序或善良風俗者，無效。」）).

normative assessments of public policy and is identified as a specific area where judgement must be suspended (Zweigert & Kötz 1998: 40).

This analysis commences with a broad comparison of the respective treatment of “custom” to inform the respective treatment of “good custom” between the Chinese legal systems. The analysis then delves further into the application of “good custom” to draw comparisons over the application of “good custom” against the broad themes from the PRC cases, interpretation and guidance: (1) *Zhang v Liang*; (2) Ten Types of Behaviour; and (3) Socialist Core Values.

## [B] CUSTOM

In order to identify “good custom”, it is first necessary to identify the meaning of “custom”, which highlights various distinctions in the definition between the Chinese legal systems.

In the Interpretation of Several Issues Concerning the Application of the General Provisions of the Civil Code of the PRC (“Interpretation”), the Supreme People’s Court (SPC) defines “custom” in Article 10 PRC Civil Code as “folk customs generally observed by ordinary people engaging in civil activities for a long time within a certain region or the scope of an industry”.<sup>5</sup> The Interpretation thus resolves the prior debate over whether “custom” was to be interpreted according to: the Customary Law Theory (ie custom being restricted to customary law) (Peng 2017: 52-53); the Customary Theory (ie custom being only custom as a finding of fact) (Zhang 2019: 41); or the Double Institutionalization Theory (ie custom includes both a practical custom and customary law) (Gao 2020: 22). The notable lack of reference to customary law in the Interpretation endorses the Customary Theory, which thus supports the arguments made by various scholars that: (a) the law itself already includes customary law; and (b) there is no conceptual distinction between “good” and “bad” customary law without reference to comparative law (Zhang 2019: 41; Zhang 2024: 239). Since “custom” cannot become established by precedent, it needs

<sup>5</sup> Interpretation of Several Issues Concerning the Application of the General Provisions of the Civil Code of the People’s Republic of China (Fashi (2022), No 6), Chapter 1 (General Provisions), Article 2: “Folk customs generally observed by ordinary people engaging in civil activities for a long time within a certain region or industry extent can be identified as custom stipulated in Article 10 of the Civil Code.” (“zuigao renmin fayuan guanyu shiyong ‘zhonghua renmin gongheguo minfadian’ zongze bian ruogan wenti de jieshi” (fashi (2022) 6 hao) diyizhang (yiban guiding) diertiao: “zai yidian diyu, hangye fanwei nei chang qi wei yibanren congshi minshi huodong shi pubian zunshou de minjian xisu, guanchang zuofa deng, keyi rending wei minfadian dishitiao guiding de xiguan.”: 最高人民法院关于适用《中华人民共和国民法典》总则编若干问题的解释》〔法释〔2022〕6号〕第一章（一般规定）第二条：“在一定地域、行业范围内长期为一般人从事民事活动时普遍遵守的民间习俗、惯常做法等，可以认定为民法典第十条规定的习惯。”）。

to be proven in each case, which may create evidential challenges (Zhang 2024: 244).

In ROC law, the Supreme Court has similarly clarified that “custom” arises from customary law “based on the long-term practice and conviction of ordinary people”<sup>6</sup> (ie the Customary Theory). As such, the key distinction between the two Chinese Civil Codes is that “custom” in ROC law is restricted to: (a) customary law; and (b) *de facto* custom provided otherwise by the law. Notably, *de facto* custom does not otherwise have legal status and is not a source of law in its own right (Wang 2022: 68-69).

As such, the definitional divergence in “custom” between the Chinese legal systems produces divergent outcomes in the commercial context. Excluding consideration of limitation for “public order and good custom” (see below), the basic scope of “custom” under PRC law can potentially implicate commercial arrangements even more broadly than implied terms by custom under the common law (including the law of Hong Kong) which only applies to customs that are “certain, notorious, reasonable, recognised as legally binding and consistent with the express terms” of the contract (*Cunliffe-Owen v Teather & Greenwood* 1967: 1438-1439). By contrast, the approach to custom under ROC law is almost as restrictive as the law of Macau, which (in addition to limiting custom by doctrine of good faith) also contains the comparable requirement that custom be provided by the law itself.<sup>7</sup>

## [C] GOOD CUSTOM

### Definition

The starting point for comparing “good custom” between PRC and ROC Civil Codes is an analysis of the language of the original and translated legal texts.

<sup>6</sup> Supreme Court (Shang Zi No 613, 2006): “The establishment of Customary Law must be based on the fact of a long-term practice and conviction of ordinary people.” (*zuigao fayuan (17 nian shangzi di 613 hao)*: “*xiguanfa zhi chengli, xu yi duonian guanxing zhi shishi ji putong yibanren zhi quexin xin, wei qi jichu*.”: 最高法院 (17年上字第613號): 「習慣法之成立, 須以多年慣行之事實及普通一般人之確信心, 為其基礎。」).

<sup>7</sup> Civil Code of Macau (Decree No. 55/99/M), Volume 1 (General Provisions), Part 1 (Law, Legal Interpretation and Application), Chapter 1 (Sources of Law), Article 2 (Legal Value of Application): “Custom that does not violate doctrine of good faith is taken into consideration only to the extent when stipulated in law.” (“*minfadian*” (*aomen*) (*di 55/99/M hao faling*) *diyijuan (zongze) diyibian (falü, falü zhi jieshi ji shiyong) diyizhang (fazhi yuanyuan) diertiao (xiguan zhi falü jiazhi)*: “*bu weibei shanyi yuanze zhi xiguan, jin zai falüyou suo guiding shi, fang yu kaolü*.”: 《民法典》(澳門)(第55/99/M號法令)第一卷(總則)第一編(法律、法律之解釋及適用)第一章(法之淵源)第二條(習慣之法律價值): 「不違背善意原則之習慣, 僅在法律有所規定時, 方予考慮。」).



The analysis of the Mandarin original of the PRC Civil Code draws on a consideration of the legal culture to assist the interpretation of the Chinese definition of “good custom”, by referring broadly to “those parts of general culture—customs, opinion, ways of doing and thinking—that bend social forces toward or away from the law and in particular ways” (Friedman 1975: 15). In the Mandarin original of the PRC Civil Code, the terminology “public order and good custom” (*gongxuliangsu*: 公序良俗) is a fixed idiomatic expression (*chengyu*: 成语), which as a “collective name reflects a combination of social order and morality” (Deng 2024: 97). Whilst scholars generally consider that “public order and good custom” is composed of two concepts (ie “public order” and “good custom(s)”) (Zhang 2024: 241), Yang notes “choosing one concept or merging them into one concept is inappropriate”, so suggests using the two concepts simultaneously to account for the overlap despite having commonalities and differences (Yang 2021: 404-405). As such, the original Mandarin of the PRC Civil Code does not lend itself to extracting an independent category of “good custom”.

The analysis of the English translation of the PRC Civil Code situates “good custom” within the wider civil law context in order to consider the domestic legal transplant or influence from this legal context. In the English translation of the PRC Civil Code, the fusion and overlap of “public order” and “good custom” raises additional questions about the general scope of “good custom”. Namely, the equating of “public order and good custom” (*gongxuliangsu*: 公序良俗) respectively to not disrupting the “social (and) public interest” (*shehui gonggong liyi*: 社会公共利益) and respecting “social morality” (*shehui gongde*: 社会公德) under the previous Law of Contracts 1999<sup>8</sup> (Liang 2021: 51-52, 210-211) does not reflect the terminology used in the official English translation of the PRC Civil Code or the wider civil law context.

On the first limb, “good custom” is equated to “good morals” (*Gute Sitten*), which is a reference to public policy in German law (Herbots 2023: 52). This is not a reference strictly to social ethics, but conversely to the dominant moral and social behaviour recognized by most people in society (Yang 2021: 404). As such, whilst “good custom” is informed by

<sup>8</sup> Contract Law of the People’s Republic of China (adopted Second Session of NPC on 15 March 1999), Order No 15, Article 7 (Liability for Breach of Contract): “A party concluding or performing a contract shall comply with laws and administrative regulations, respect social morality, and must not disturb socio-economic order nor harm the public interest.” (“*zhonghua renmin gongheguo hetongfa*” (1999 nian 3 yue 15 ri dijiujie quanguo renmin daibiao dahui dierci huiyi tongguo) *zhonghua renmin gongheguo zhuxi ling (dishiwuhao) diqizhang (weiyue zeren)*: “*dangshiren dingli, lüxing hetong yingdang zunshou falü, xingzheng fagui, zunzhong shehui gongde bude, raoluan shehui jingji zhixu, sunhai shehui gonggong liyi*.”: 《中华人民共和国合同法》(1999年3月15日第九届全国人民代表大会第二次会议通过) 中华人民共和国主席令(第十五号)第七章(违约责任): “当事人订立、履行合同, 应当遵守法律、行政法规, 尊重社会公德, 不得扰乱社会经济秩序, 损害社会公共利益。”).

morality, it is semantically and legally distinct, as it does not inherently contain the civil law concepts of social morality (ie honesty, fairness and justice) (Yang 2021: 404).

On the second limb, “public order” (*gongxu*: 公序) in Article 10 likely refers to the same “public order” (*gonggong zhixu*: 公共秩序) in Article 8 PRC Civil Code, which Herbots equates being a much narrower and more internationally aligned concept than “social and public interests” that “opens the door to arbitrariness ... [and] allowed the People’s courts to take the concrete circumstance of the case into consideration to judge if the contract was void” (Herbots 2023: 52-53). The “public order” under the PRC Civil Code can thus be equated to the “public order and good morals” in French law (*ordre public et bonnes mœurs*), which is focused on reflecting and protecting national fundamental interests (Yin 1995: 170) and encompasses good custom within political public order (Yang 2021: 402, 404). Consequently, the notion of “public order” must overlap with “good custom” in the context of political public order.

As such, not only is there overlap for political public order, the English terminology used in the official translation of the PRC Civil Code does not indicate that “public order and good custom” corresponds perfectly to “social public interest” and “social morality” respectively. Namely, “public order” is definitionally *broad*er than “social public interest” and “good custom” is *narrow*er than “social morality”. Whilst the only authentic text is the Mandarin original, the official English translation is provided under the exclusive responsibility of the Legislative Affairs Commission of the Standing Committee of the National People’s Congress (ie the legislature), so “may have a value similar to that of an authoritative scholarly writing” (Herbots 2023: 54). Whilst borrowing has been widespread in the development of legal systems, a legal transplant may operate to different effect in a different country (Watson 1974: 20-21). As such, even if these underlying (Western) civil law concepts of “social morality” and “public order” were transplanted into the PRC Civil Code via the English translation, it would not necessarily lead to convergence in function or result between the Mandarin and English versions.

By contrast, the language in the ROC Civil Code for “public order or good custom” (*gonggong zhixu huo shanliang fengsu*: 公共秩序或善良風俗) expressly provides a separation of public order “or” (*huo*: 或) good custom. However, there is no need to delineate between these categories to extract a private law function of “good custom”, because both “public order” and “good custom” are combined into one concept (Liang 2021: 283) of “social appropriateness” (Yang 2021: 400), which is indicative of both limbs

being focused towards a private law function. Consequently, there is a discrepancy in the ease of extracting and defining a separate category of “good custom” between the two Chinese Civil Codes.

## Application

Despite the uncertain boundary between “good custom” and “public order” in the PRC Civil Code, it is nonetheless possible to make broad comparisons with the disapplication of custom and acts based on “good custom” between the two Chinese Civil Codes.

Notably, the two Chinese Civil Codes show a distinction in the respective treatment of the “custom” of traditional culture, potentially leading to a divergent application in the commercial context. Under the PRC Civil Code, the standard of “good custom” is based on the “goodness standard of the general public in society”, limiting customs that: are feudal superstitions (*fengjian mixin*: 封建迷信); breach the spirit of the law; are uncondusive to social stability or harmony; or damage the interests of the social group (Zhang 2024: 241). Consequently, a custom does not stand as “good custom” in PRC law merely because it is traditional Chinese culture. This context-specific nature of determining “good custom” can be seen in the judicial treatment of Feng Shui. Namely, Feng Shui was upheld as a “good custom” for obtaining a reduction in the construction fee for the contractor disrupting the owner’s Feng Shui by fabricating European-style lines that resembled a coffin (*Cheng v Yang*),<sup>9</sup> but not for the relocation of a grave in a cemetery with burials from different religions (*Li v Chen*).<sup>10</sup> Whilst the ROC law similarly considers “good custom” according to the “ethical requirements respected by a particular society” (Yang 2021: 404), it adopts a more deferential approach to traditional culture as consistent with “good custom”, which is a reflection of its legal status as customary law. For example, an agreement to provide living expenses to a concubine is unlikely to violate “good custom” because (even though the relationship is not recognized in the current ROC Civil Code) early precedents consider concubines as members of the family (Wang 2022: 302).

By contrast, the disapplication of acts contrary to “good custom” only has residual application in the commercial context in both Chinese Civil

<sup>9</sup> Dongtai District People’s Court, *Cheng v Yang* (*dongtaishi renmin fayuan, cheng mou su yang mou an*: 东台市人民法院, 程某诉杨某案).

<sup>10</sup> Gulou District People’s Court, *Li v Chen* (*gulouqu renmin fayuan, li mou su chen mou an*: 鼓楼区人民法院, 李某诉陈某案).



Codes. In the PRC Civil Code, Liang argues that the general principle of “good custom” operates in the area of family relationships, but not the commercial context (Liang 2021: 52, 283), with the developing economic context towards the protection of consumers and workers (Liang 2021: 211-212). This is likely due to the drive to regulate widespread behaviour previously regulated by “public order and good custom”. For example, a local requirement was introduced mandating that the sale price of land be higher than the market price, in order to account for the custom of informing relatives and neighbours, which can have a detrimental impact on the price (Yang 2021: 405-406). Similarly, “public order and good custom” (*gongxuliangsu*: 公序良俗) in the ROC Civil Code has the function of regulating standard contracts, but there have been no cases since consumer contracts were regulated separately (Wang 2022: 299-230). As such, the residual role in the contractual context for both Chinese Civil Codes means “good custom” is likely restricted between contracting business entities to the limited circumstances where one party is presented with unnegotiated or non-negotiable terms and conditions that are contrary to “good custom”.

### *Zhang v Liang*

The invalidation of acts contrary to “public order and good custom” is determined in PRC law on the basis the act harms the national interest (*guojia liyi*: 国家利益), social welfare (*shehui gongyi*: 社会公益) or social moral order (*shehui daode zhixu*: 社会道德秩序) (Liang 2021: 52), but the full extent of its application is demonstrated in *Zhang v Jiang* (the *Luzhou Bequest Case*).<sup>11</sup> In *Zhang v Jiang*, which concerned a will bequeathing property to the testator’s mistress, the People’s Court directly applied the requirement that an act must not violate “public order and good custom” to override the testator’s bequest to his mistress. This finding was reached on the basis that the relationship between the testator and his mistress was contrary to social morality, given the mistress was aware the testator was married. However, Deng made two notable observations on the application of “public order and good custom” in this judgment. First, “public order and good custom” was applied to override statutory provisions and legal instruments (ie the application of “public order and good custom” being in contravention of the provisions of both a validly executed will and the law of succession). Second, “public order and good custom”

<sup>11</sup> Luzhou Intermediate People’s Court, *Luzhou Bequest Case* ([2001] Lu Ming Yi Zhong, No 621) (*luzhoushi zhongji renmin fayuan “luzhou yizeng an” ((2001) lu min yi zhong zi diliubaiershiyihao)*: 泸州市中级人民法院《泸州遗赠案》(2001) 泸民一终字第621号).

was applied to the surrounding circumstances (ie the extramarital cohabitation) rather than the provisions of the will, in order to determine the effectiveness of the testamentary legal instrument itself.

As such, the judicial application of “public order and good custom” in PRC law is arguably neither standardized nor defined, but rather consists of “indeterminate concepts with a wide range of connotations and extensions” (Deng 2024: 98). However, the judicial application of “public order and good custom” can be broken down into the broad categories of the: “basic type” (ie invalidation of contract violating public order and good custom); “ill-gotten gains” (ie obtaining property in breach of public order and good custom), and disapplication of tort (ie exclusion of damages from acts violating public order and good custom) (Yang 2021: 409).

By contrast, whilst ROC law has a similar provision for the disapplication of tort (eg not finding liability for the destruction of a brothel in a residential area),<sup>12</sup> the Supreme Court has repeatedly emphasized that custom cannot override the law (Wang 2022: 67), unless it is otherwise provided specifically by the ROC Civil Code (eg Article 207(2) ROC Civil Code allows compound interest to apply if there is a trade custom).<sup>13</sup> Thus, the application of “good custom” under ROC law is more restricted than PRC law, and aligned with the position under Hong Kong law, where the applicable custom must be “recognised as legally binding and consistent with the express terms” of the contract (*Cunliffe-Owen v Teather & Greenwood* 1967: paragraphs 1438-1439). In the context of adultery, ROC law specifically requires the immorality be the subject of the contract itself, and draws a fine distinction between the validation of a contract where the relationship has terminated<sup>14</sup> and the invalidation of a contract where the relationship is ongoing.<sup>15</sup> Since the will in *Zhang v Jiang* was not the subject of the immorality and the adultery was no longer ongoing since the testator had passed away, it is likely this case would be decided differently under ROC law.

<sup>12</sup> Judicial Yuan (First Division), Compilation of Civil Law Issues 8 (1993), page 99. (*sifayuan (diyiting) “minshi falü wenti huibian” dibaji*, 1993 nian 6 yueban dijiushijiu ye: 司法院 (第一廳) 《民事法律問題彙編》第8輯, 1993年6月版, 第99頁).

<sup>13</sup> Supreme Court (Yu Shang Zi No 948, 1937) (最高法院 (1937年渝上字第948號)).

<sup>14</sup> Supreme Court (Tai Shang Zi No 2505, 1980) (最高法院 (1980年台上字第2505號)).

<sup>15</sup> Supreme Court (Tai Shang Zi No 2436, 1976) (最高法院 (1976年台上字第2436號)).

## The Ten Types of Behaviour

Despite not seeking to undertake an analysis over the specific application of “public order”, it is not possible to entirely exclude public law concerns, as “public order and good custom” still operates as a coordinator between public and private law in PRC law (Yang 2021: 406). In PRC law, the primary aim of “public order and good custom” is the sanctioning and eliminating of immoral behaviour, which reflects the close relationship between custom and politics in Chinese history (Yang 2021: 403). This approach is reflected in the Ten Types of Behaviour<sup>16</sup> as outlined by Liang (2021: 212-214) and adopted in the Trial Practice Guidelines (Deng 2024: 93), which (with the possible exception of grossly unconscionable behaviour) all broadly concern public policy issues (eg competition, consumer rights, labour rights, human rights, public order etc). This approach is also reflected in the PRC Civil Code, by separately providing a limitation of “public order and good custom” for both civil activity (Article 8) and civil juristic acts (Article 153(2)).

By contrast, although the prohibition of civil juristic acts violating “public order and good custom” in ROC law also functions as “hidden legislation” (*yincang lifa*: 隐藏立法) (Wang 2022: 294), there are two main distinctions between the Chinese Civil Codes. First, ROC law permits a greater role for contractual interpretation, given, for example, that the conclusion of contract under a borrowed name (*jieming*: 借名) is not a violation of “public order or good custom” (*gongxuliangsu*: 公序良俗) (Wang 2022: 373). Second, ROC law is also more focused on private law concerns, such as the prevention of profiteering or collusion with intent to defraud (eg harmful acts by agents against the principal) (Wang 2022: 307, 474).

## Socialist Core Values

The relative impact of moralistic social norms through the application of “good custom” is also divergent between the two Chinese legal systems.

In the Interpretation, the SPC clarifies that custom must not be contrary to Socialist Core Values (SCVs) (*shehuizhuyi hexin jiazhi guan*: 社会主义

<sup>16</sup> The Ten Types of Behaviour (*shizhongxingwei leixing*: 十种行为类型) are: (1) endangering the national public order (*weihai guojia gongxu xing*: 危害国家公序型); (2) harming family relationships (*gonghai jiating guanxi xing*: 公害家庭关系型); (3) violating sexual morality (*weifan xingdaode xing*: 违反性道德型); (4) speculative behaviour (*shexing xingwei xing*: 射幸行为型); (5) violating human rights and respect for dignity (*weifan renquan he renge zunzhong xing*: 违反人权和人格尊严型); (6) restricting economic freedom (*xianzhi jingji ziyou xing*: 限制经济自由型); (7) violation of fair competition (*weifan gongpingjingzheng xing*: 违反公平竞争型); (8) violating consumer protections (*weifan xiaofeizhe baohu xing*: 违反消费者保护型); (9) violating labour protection (*weifan laodongzhe baohu xing*: 违反劳动者保护型); and (10) grossly unconscionable behaviour (*xianshi gongping xingwei xing*: 显失公平行为型).

核心价值观),<sup>17</sup> which consist of four national values, four social values, and four individual values.<sup>18</sup> These SCVs, which are considered more Confucian than socialist (Frank 2016: 24), both restrict custom (ie by limiting the application of custom contrary to SCVs) and expand custom (ie by broadening the effect of custom consistent with SCVs). The legal basis for custom complying with SCVs is not stated in the Interpretation, so could be an expansion of the general statement on the “carrying forward of Socialist Core Values” in Article 1 PRC Civil Code.<sup>19</sup> However, there are two reasons for believing the application of SCVs arises inherently from the “good custom” promulgated by the Chinese Communist Party (CCP). First, the SPC initially identified the cultivation and practice of the SCVs in pursuance of “public order and good custom”.<sup>20</sup> Second, the SCVs were used as justification in People’s Court judgments between 2012 and 2015 (Lin & Trevaskes 2019: 56), which is notably before: (1) the Guiding Opinion from the SPC in October 2015; and (2) the enactment

<sup>17</sup> Supreme People’s Court, Interpretation of Several Issues Concerning the Application of the General Provisions of the Civil Code of the People’s Republic of China (Fashu [2022], No 6), Article 2: “The application of custom must not violate the Socialist Core Values, and must not violate public order and good custom.” (zuigao renmin fayuan “guanyu shiyong ‘zhonghua renmin gongheguo minfadian’ zongze bian ruogan wenti de jieshi” (fashu (2022) 6 hao) diyizhang (fali) diertiao: “shiyong xiguan, bude weibei shehuizhuyi hexin jiazhi guan, bude weibei gongxuliangsu.”: 最高人民法院《关于适用〈中华人民共和国民法典〉总则编若干问题的解释》(法释〔2022〕6号)第一章(法例)第二條: “适用习惯,不得违背社会主义核心价值观,不得违背公序良俗。”).

<sup>18</sup> The twelve Socialist Core Values are the: national values of prosperity (*fuqiang*: 富强), democracy (*minzhu*: 民主), civility (*wenming*: 文明), harmony (*hexie*: 和谐); social values of freedom (*ziyou*: 自由), equality (*pingdeng*: 平等); justice (*gongzheng*: 公正), rule of law (*fazhi*: 法治); and individual values of patriotism (*aiguo*: 爱国), dedication (*jingye*: 敬业); integrity (*chengxin*: 诚信), and friendship (*youshan*: 友善).

<sup>19</sup> Civil Code of People’s Republic of China (adopted Third Session of Thirteenth NPC on 28 May 2020), Part I (General Provisions), Chapter 1 (Basic Provision), Article 1: “This Code is formulated in accordance with the Constitution of the People’s Republic of China for the purposes of protecting the lawful rights and interests of the persons of the civil law, regulating civil-law relations, maintaining social and economic order, meeting the needs for developing socialism with Chinese characteristics, and carrying forward the Socialist Core Values.” (*zhonghua renmin gongheguo minfadian* (2020 nian 5 yue 28 ri dishisanjie quanguo renmin daibiao dahui disanci huiyi tongguo) diyibian (zongze) diyizhang (jiben guiding) diyitiao: “weile baohu minshi zhuti de hefa quanyi, tiaozheng minshi guanxi, hongyang shehuizhuyi hexin jiazhi guan, genju xianfa, zhiding ben fa.”: 《中华人民共和国民法典》(2020年5月28日第十三届全国人民代表大会第三次会议通过)第一编(总则)第一章(基本规定)第一条: “为了保护民事主体的合法权益,调整民事关系,维护社会和经济秩序,适应中国特色社会主义发展要求,弘扬社会主义核心价值观,根据宪法,制定本法。”).

<sup>20</sup> Supreme People’s Court, Several Opinions on Cultivating and Practising Socialist Core Values (Fafa [2015], No 14), Section XI (Upholding Public Order and Good Custom): “All levels of People’s Court shall be based on the actual operation of local courts, innovate the form to cultivate and practice robustly the Socialist Core Values. (*zhonghua renmin fayuan “guanyu zai renmin fayuan gongzuo zhong peiyu he jianxing shehuizhuyi hexin jiazhi guan de ruogan yijian”* (fafa (2015) 14 hao) dishiyizhang (weihu gongxuliangsu): “geji renmin fayuan yao lizu bendi ben yuan gongzuo shiji, jianchi yindizhiyi, jianchi yi fa wei mei, buduan chuangxin xingshi, zhazhashishi di peiyu he jianxing shehuizhuyi hexin jiazhi guan.”: 最高人民法院《关于在人民法院工作中培育和践行社会主义核心价值观的若干意见》(法发〔2015〕14号)第十一章(维护公序良俗): “各级人民法院要立足本地本院工作实际,坚持因地制宜,坚持以法为媒,不断创新形式,扎扎实实地培育和践行社会主义核心价值观。”).



of the PRC Civil Code in 2020. As such, the most likely legal source for the application of the SCVs is the application of “good custom” by reference to the: (1) CPP’s declaration at the 18th National Congress in November 2012 stating the SCVs to be the “soul of the Chinese Nation;”<sup>21</sup> and (2) the CPP Central Committee entitled Opinions on Cultivating and Practising Socialist Core Values in 2013, asserting the implementation of SVCs “using the authority of the law to cultivate and practice the self-consciousness of the Socialist Core Values”.<sup>22</sup>

The substantival implications of these SCVs can be determined from the direction given by the SPC in the (a) Guiding Opinion<sup>23</sup> and (b) Guiding Cases.<sup>24</sup>

<sup>21</sup> Hu Jintao’s Report at the 18th National Congress of the Chinese Communist Party: “The system of Socialist Core Values are the invigorating soul of the Country, and determining the direction of Socialism with Chinese characteristics.” (*hujintao zai zhongguo gongchangdang dishibaci quanguo daibiao dahui shang de baogao* (2012 nian 11 yue 8 ri): “*shehuizhuyi hexin jiazhi tixi shi xingguo zhi hun, juedingzhe zhongguo tese shehuizhuyi fazhan fangxiang*.”: 胡锦涛在中国共产党第十八次全国代表大会上的报告 (2012年11月8日): “社会主义核心价值体系是兴国之魂, 决定着中国特色社会主义发展方向。”).

<sup>22</sup> Central People’s Government (General Office of the Chinese Communist Party), Opinion on the Cultivation and Practice of the Socialist Core Values (23 December 2013), Section 3 (Implementing the Cultivation and Practice of the Socialist Core Values in Economic Development Practice and Social Governance), Clause 8: “It is necessary to implement Socialist Core Values into the practice of ruling the country, governance and administration in accordance with the law, as well as all aspects of practically legislation, enforcement, judicial findings, and lawful governance, and using the authority of the law to increase people’s self-consciousness in cultivating and practicing the Socialist Core Values.” (*zhongyang renmin zhengfu (zhonggong gongyang bangong ting) “guanyu peiyu he jianxing shehuizhuyi hexin jiazhi guan de yijian” disanzhang (ba peiyu he jianxing shehuizhuyi hexin jiazhi guan luoshi dao jingyi fazhan shijian he shehui zhili zhong) dibatiao: yao ba shehuizhuyi hexin jiazhi guan guanche dao yifazhiguo, yifa zhizheng, yifa xingzheng shijian zhong, luoshi dao lifa, zhifa, sifa, pufa he yifa zhili gege fangmian, yong falü de quanwei lai zengqiang renmen peiyu he jianxing shehuizhuyi hexin jiazhi guan de zijuexing*.”: 中央人民政府 (中共中央办公厅) 《关于培育和践行社会主义核心价值观的意见》第三章 (把培育和践行社会主义核心价值观落实到经济发展实践和社会治理中) 第八条: “要把社会主义核心价值观贯彻到依法治国、依法执政、依法行政实践中, 落实到立法、执法、司法、普法和依法治理各个方面, 用法律的权威来增强人们培育和践行社会主义核心价值观的自觉性。”).

<sup>23</sup> Supreme People’s Court, Notice on the Guiding Opinion on Deeply Promoting the Integration of Socialist Core Values into the Analysis and Reasoning of Adjudicative Instruments (Fa [2021], No 21) (*zuigao renmin fayuan “guanyu shenru tuijin shehuizhuyi hexin jiazhi guan rongru caipan wenshu shifa shuoli de zhidao yijian” de tongzhi (fa (2021) 21 hao)*: 最高人民法院《关于深入推进社会主义核心价值观融入裁判文书释法说理的指导意见》的通知 (法 (2021) 21号)).

<sup>24</sup> Supreme People’s Court, The Supreme People’s Court Announced 10 Typical Cases of Promoting Socialist Core Values (10 March 2016) (*zuigao renmin fayuan “renmin fayuan dali hongyang shehuizhuyi hexin jiazhi guan shi da dianxing minshi anli”* (2016 nian 02 yue 10 ri): 最高人民法院《人民法院大力弘扬社会主义核心价值观十大典型民事案例》 (2016年02月10日)); A Typical Case of the Supreme People’s Courts on Promoting Socialist Core Values (23 August 2016) (*“guanyu hongyang shehuizhuyi hexing jiazhi guan dianxing anli”* (2016 nian 08 yue 23 ri): 《关于弘扬社会主义核心价值观典型案例》 (2016年08月23日)); Top Ten Typical Civil Cases of the People’s Courts Vigorously Promoting Socialist Core Values” (13 May 2020) (*“renmin fayuan dali hongyang shehuizhuyi hexin jiazhi guan shi da dianxing minshi anli”* (2020 nian 05 yue 13 ri): 《人民法院大力弘扬社会主义核心价值观十大典型民事案例》 (2020年05月13日)); The Second Batch of Typical Civil Cases of People’s Courts Vigorously Promote Socialist Core Values (23 February 2022). (*“dierpi renmin fayuan dali hongyang shehuizhuyi hexin jiazhi guan dianxing minshi anli”* (2022 nian 02 yue 23 ri): 《第二批人民法院大力弘扬社会主义核心价值观典型案例》 (2022年02月23日)).



### Guiding Opinion

The Guiding Opinion outlines the higher People's Court's theoretical understanding of the use of the SCVs within the framework of the law. Despite the SPC's explicit rejection of the SCVs overriding the law,<sup>25</sup> as with "good custom" generally, the application of SCVs has also exceeded the limits of the law in certain cases (eg *Jiang v Liu*).<sup>26</sup> This is consistent with the argument by Yun that Confucian moral law (*rujia lunli fa*: 儒家伦理法) has a "strong tendency toward Pan-moralism—that is, in its willingness to accord supremacy above law to prescribed moral principles" (Yun 1990; Lin & Trevaskes 2019: 49). Following the conception of Pan-moralism of "a certain 'overwhelming' or exaggeration of the claim of the moral standpoint ... even into areas which ought to be governed by particular standard rules deriving from the given legal system" (Hála 1994: 89), Liao and Wang identify four problematic techniques of implementing the SCVs into PRC law: (1) quoting SCVs without substance; (2) exaggerating moral and political standpoint to avoid the legal application; (3) losing the underlying legal principles to avoid a violation of the SCVs; and (4) implementing the SCV only for low-level cases without resolving the complex legal issues (Liao & Wang 2019; Lin & Trevaskes 2019: 56). In the commercial context, it is therefore likely that placing dual emphasis on law and morality likely falls into the "balance trap" of undermining the legal reasoning with an ever-expanding and ever-changing process of bargaining, negotiation and mediation to reach a suitable balance point (Ji 2014; Lin & Trevaskes 2019: 50).

<sup>25</sup> Person in Charge of Reform at Supreme People's Court Answering Reporter's Questions, Deeply Promote the Integration of Socialist Core Values into the Judgment Document Interpretation and Reason to Lead the Social Trend with Fair Judgment (18 February 2021): "The thing that needs to be emphasised, is this Guiding Opinion clarifies the basic position that judges use Socialist Core Values within the legal framework to interpret the law, to avoid misunderstanding and doubts that the use of Court Judgments Socialist Core Values substitute or take precedent over the law, they will lodge the Socialist Core Values in concrete legal rules and principles and further organise the intrinsic unity of the Socialist Core Values with legal regulation." (*zuigao renmin fayuan si gaiban fuzeren da jizhe wen "shenru tuijin shehuizhuyi hexin jiazhi guan rongru caipan wenshu shifa shuoli yi gongzheng caipan yinling shehui fengshang"* (2021 nian 02 yue 18 ri): "xuyao qiangdiao de shi, zhege zhidao yijian" mingque "faguan zai falu kuangjia nei yunyong shehuizhuyi hexin jiazhi guan shifa shuoli" zhe yi jiben dingwei, jiushi bimian yinfa "yi shehuizhuyi hexin jiazhi guan tidai huozhe youxian falu jinxing sifa caipan" de wu duhe yili, jiang shehuizhuyi hexin jiazhi guan "luo jiao" yu juti de falu guize he falu yuanze, jinyibu lishun shehuizhuyi hexin jiazhi guan yu falu guize de neizai tongyi guanxi". 最高人民法院司改办负责人答记者问《深入推进社会主义核心价值观融入裁判文书释法说理以公正裁判引领社会风尚》(2021年02月18日): "需要强调的是, 这个《指导意见》明确"法官在法律框架内运用社会主义核心价值观释法说理"这一基本定位, 就是避免引发"以社会主义核心价值观替代或者优先法律进行司法裁判"的误读和疑虑, 将社会主义核心价值观"落脚"于具体的法律规则和法律原则, 进一步理顺社会主义核心价值观与法律规则的内在统一关系。")

<sup>26</sup> Chengyang District People's Court, *Jiang v Liu: Dispute Over Rights to Life*. (*chengyangqu renmin fayuan, "jiang qiulian su liu nuanxi shengming jiu fen an"*: 城阳区人民法院《江秋莲诉刘暖曦生命纠纷案》).

### Guiding Cases

The Guiding Cases demonstrate the practical application of the SCVs, by providing the “parallel reasoning” alongside the legal basis (Liu 2024: 236-239). The first batch of Guiding Cases were all selected from the district level (ie the lowest level of local People’s Court), and it is clear that the SCVs have had a disproportionate influence on lower-level judgments, given Liao and Wang’s review of 352 cases between 2012-2017 showing that: 255 were from local People’s Courts; 72 were from intermediate People’s Courts; 25 were provincial level People’s Courts; and none were from the SPC (Liao & Wang 2019; Lin & Trevaskes 2019: 55). Given the SCVs are recent and more prominent in the lower People’s Courts, we have “not yet seen ‘extraordinary’ cases with strong political sensitivities being decided under this new norm” (Liu 2024: 255). This “parallel reasoning” might be interpreted as a type of a “weak” (ie subordinate) or “strong” (ie coexistent) legal order of legal pluralism (Griffiths 1986: 4-6) in pursuance of managing customary norms and transnational legal interactions (Berman 2012: 10). However, Zhang argues these Guiding Cases nonetheless go beyond the higher courts giving mere guidance to lower courts and establish authoritative legal principles across all People’s Courts (Zhang 2010; Lin & Trevaskes 2019: 506).

This “parallel reasoning” from the incorporation of the SCVs has several legal implications in the commercial context. First, it has created an open category of liability (Zhao 2022), akin to the breach of a two-limbed “proximity of relationship” under common law (*Anns v Merton London Borough Council* 1977; *Caparo v Dickman* 1990). However, despite comparisons with common law by legal commentators (Gao 2022) and practitioners (Chen 2022), PRC judges do not create precedent, but merely exercise an expanded discretion to incorporate the SCVs (Liu 2024: 241). This expanded discretion is likely to create open categories of liability in two main commercial areas. On the one hand, the SPC has notably identified concerns with personal gain at the expense of others

(*sunrenliji*: 损人利己),<sup>27</sup> which may implicate sharp business practices. On the other hand, the limitation of “common sense and reason based on the requirements of the era, culture, and conditions of the country”<sup>28</sup> may implicate high-level commercial and board decisions on “cases covering issues such as national interests, public concerns, and societal order”.<sup>29</sup>

Second, the parallel reasoning empowers PRC judges to find or refute liability. When the second batch of Guiding Cases was released, Yang Wangming (Vice-President of SPC) stated “we always intend to distinguish between right and wrong, punishing evil and promoting good, settling disputes and resolutely say no to ‘smoothing things over’ [ie settling out of court]” (Zhang 2023). On the one hand, the “parallel reasoning” empowers

<sup>27</sup> Supreme People’s Court, Several Opinions on Cultivating and Practicing Socialist Core Values (Fafa [2015], No 14), Section XI (Upholding Public Order and Good Custom): “It is necessary to deeply understand and accurately grasp public order and good custom to establish the important points, to respond to the prominent problems existing at the present time, such as seeing others dying but not save them, being killed but not helping, personal gain at the expense of others, unfilial heartlessness, etc., as well as vigorously advocating for the notably conduct of: serving others, valuing harmony, forgiveness and mutual accommodation, respect for the elderly and cherishing the young, pleasure from helping others, and being a brave and selfless Samaritan, etc.” (*zuigao renmin fayuan “guanyu zai renmin fayuan gongzuo zhong peiyu he jianxing shehuizhuyi hexin jiazhi guan de ruogan yijian” (fafa (2015) 14 hao) dishiyishang (weihu gongxuliangsu): “yao shenke lijie, zhunque bawo gonggong zhixu he shanliang fengsu de shidai neihan he jianshe zhongdian, zhendui dangqian cunzai de jiansibujiu, yunan bu zhu, surenliji, buxiao burendeng tuchu wenti dali changdao “yurenweishan” “yiheweigui” “kuanrong hurang” “zunlaoaiyou” “zhurenweile” “jianyiyongwei” deng gaoshang xingwei.”*: 最高人民法院《关于在人民法院工作中培育和践行社会主义核心价值观的若干意见》（法发〔2015〕14号）第十一章（维护公序良俗）：“要深刻理解和准确把握公共秩序和善良风俗的时代内涵和建设重点，针对当前存在的见死不救、遇难不助、损人利己、不孝不仁等突出问题大力倡导“与人为善”“以和为贵”“宽容互让”“尊老爱幼”“助人为乐”“见义勇为”等高尚行为。”).

<sup>28</sup> Supreme People’s Court, Notice of the Guiding Opinion on Deeply Promoting the Integration of Socialist Core Values into the Analysis and Reasoning of Adjudicative Instruments (Fa [2021], No 21): “Comprehensively consider factors such as law reason and emotion based on the era, state of the country and culture; enhance the guiding function of the Socialist Core Values; and unceasingly promote the legal, social and emotional common sense of judgments. (*zuigao renmin fayuan “guanyu shenru tuijin shehuizhuyi hexin jiazhi guan rongru caipan wenshu shifa shuo zhidao yijian” de tongzhi (fa (2021) 21 hao) disantiao: “lizu shidai, guoqing wenhua zonghe kaoliang fa, li, qing deng yinsu, jiaqiang shehuizhuyi hexin jiazhi guan de daoxiang zuoyong buduan tisheng sifa caipan de falu rentong, shehui rentong he qingli rentong.”*: 最高人民法院《关于深入推进社会主义核心价值观融入裁判文书释法说指导意见》的通知（法〔2021〕21号）第三条：“立足时代、国情、文化，综合考量法、理、情等因素，加强社会主义核心价值观的导向作用，不断提升司法裁判的法律认同、社会认同和情理认同。”).

<sup>29</sup> Supreme People’s Court, Notice of the Guiding Opinion on Deeply Promoting the Integration of Socialist Core Values into the Analysis and Reasoning of Adjudicative Instruments (Fa [2021], No 21), Article 4(1): “(The judgments of the following cases should intensify the use of Socialist Core Values to interpret the law) cases concerning country national interest, great public interest, concerning wide society”. (*zuigao renmin fayuan “guanyu shenru tuijin shehuizhuyi hexin jiazhi guan rongru caipan wenshu shifa shuo zhidao yijian” de tongzhi (fa (2021) 21 hao) disitiao diyikuan: “(xialie anjian de caipan wenshu, yingdang qianghua yunyong shehuizhuyi hexin jiazhi guan shifa shuoli) sheji guojia liyi, zhongda gonggong liyi, shehui guangfan guanzhu de anjian”*: 最高人民法院《关于深入推进社会主义核心价值观融入裁判文书释法说指导意见》的通知（法〔2021〕21号）第四条第一款：“〔下列案件的裁判文书，应当强化运用社会主义核心价值观释法说理〕涉及国家利益、重大公共利益，社会广泛关注的案件” ).

the People's Courts to find absence of liability (*Wu v Hongshan*)<sup>30</sup> or causation (*Sun v Guo*).<sup>31</sup> On the other hand, it also empowers the People's Courts to make an explicit finding of fault, instead of spreading liability between parties by ignoring or stretching legal rules in order to avoid controversy (Liebman 2020: 198-199).

By contrast, the impact of moralistic values is significantly softer in ROC law. Whilst justification is one of the four main functions of custom in ROC law (Wang 2022: 305-306), civil law judges have very limited discretion beyond the statutory code to construct new rules (Maclean 1982: 239-240). Whilst the SCVs may have a soft influence on ROC law given that Chinese peoples "share a broadly accepted, common sense understanding of Confucian values" (Gow 2017: 25-26), this is unlikely to impact the definition of "good custom" in PRC law for two reasons. First, whilst "good custom" is informed by morality, it is broader than morality itself as it is imbued with social factors. Second, whilst goodness contains ethical and moral values, custom is based on "a real living conditions and relatively specific behavior pattern which are available for reference" (Yang 2021: 404). Consequently, ROC judges cannot turn a moral obligation into a legal obligation (Wang 2022: 294) by applying Confucian values to create a "new model of authoritarian legality" (Liu 2024) or a "virtuous Leviathan" (Lin & Trevaskes 2019).

## [D] CONCLUSION

Comparing the two Chinese Civil Codes, "custom" and "good custom" are more bluntly applied in PRC law, with a wider notion of "custom", but an even wider disapplying notion of (not) "good custom".

In particular, the comparable application of "good custom" highlights a significant discrepancy in the jurisprudence between the two Chinese legal systems, notwithstanding either its limitation to the private law sphere or the cultural alignment between the PRC and ROC. Whilst both Chinese legal systems recognize the disapplication of acts in violation of "good custom" (including the disapplication of tort), PRC law has significantly broader reach into ancillary acts in violation of "good

<sup>30</sup> Supreme People's Court, Top Ten Typical Civil Cases of the People's Courts Vigorously Promoting Socialist Core Values" (13 May 2020), Case 3 (Compensation case for climbing a tree to pick fruit without permission and falling to one's death). (*zuigao renmin fayuan "renmin fayuan dali hongyang shehuizhuyi hexin jiazhi guan shi da dianxing minshi anli" (2020 nian 5 yue 13 ri) anli san (cunmin sizi shang shu zhaiguo zhuiwang suopei an)*: 最高人民法院《人民法院大力弘扬社会主义核心价值观十大典型民事案例》(2020年05月13日) 案例三(村民私自上树摘果坠亡索赔案)).

<sup>31</sup> Ibid. Case 4 (Compensation case for being hindered departing from bumping into child and dying suddenly). (*anli si (zhuangshang ertong likai bei zu cusi suopei an)*: 案例四(撞伤儿童离开被阻猝死索赔案)).

custom”, implicating both liability and causation. This disapplication of acts on the basis of (not) “good custom” notably includes acts contrary to: (1) broad public policy concerns (the Ten Types of Behaviour) and (2) mandatory moralistic social norms (SCVs). Furthermore, PRC law has also created an inverse application of (not) “good custom” to establish a basis of liability *per se* (*Jiang v Liu*). The creation of this (not) “good custom” liability indicates that Article 10 (applying custom in absence of the law) is being overrun by Article 8 PRC Civil Code (disapplying civil acts violating good custom). As such, whilst “custom” applies *praeter legem*, the disapplying category of (not) “good custom” traverses between custom *praeter legem* and custom *contra legem*. Indeed, the cause of action for acts and disapplication of ancillary acts contrary to good custom *contra legem* is positively controversial, in that it is contrary to legal positivism and poses the question whether (not) “good custom” in PRC law is even compatible with civil law jurisprudence generally.

By contrast, ROC law only recognizes “custom” and “good custom” *secundum legem* (ie there is no application of custom or good custom *contra legem* or *praeter legem*). ROC law notably has no equivalence of Article 8 PRC Civil Code because only civil *juristic* acts can be disappplied for being contrary to “good custom” under Article 72 ROC Civil Code (ie not civil acts or activity generally). Consequently, the respective boundaries between Articles 1 and Article 72 ROC Civil Code are delineated and restrained against the creation of new legal effects, so function more like a (Western) civil law system.

Global businesses would likely benefit from the broader PRC definition of “custom”. Indeed, the burden of demonstrating the existence of custom would likely favour the commercial context because the associated costs of evidencing a trade custom are unlikely to be prohibitive for a widely recognized trade custom, with the evidential discretion weighted proportionately (ie the more implausible the custom, the greater the evidential burden to discharge). However, the definition of “custom” being that of “ordinary people” has likely informed the contention that “good custom” does not operate in the commercial context (Liang 2021: 52). This contention is likely an overstatement given that custom itself has been clarified to apply “within the scope of an industry” (*hanye fanwei nei*: 行业范围内) by the SPC and held subject to “good custom” in the commercial context by the lower People’s Courts (eg the dispute between homeowner and builder in *Cheng v Yang*). However, it is unclear whether or how (not) “good custom” might be applied to non-Chinese or international customs, particularly where the extent that a contract is negotiable (or otherwise dictated by relative bargaining power) is highly debatable.



Conversely, the same global businesses are likely to consider that the broader application of (not) “good custom” in PRC law creates uncertain legal risk, particularly given the broad scope of the: (1) public policy concerns (ie the Ten Types of Behaviour); and (2) moralistic social norms (ie SCVs). The possibility of establishing liability based solely on (not) “good custom” provides a legal basis for bringing a moral claim under PRC law. In the commercial context, this notably facilitates actions by companies against counterparties for sharp business practices, and by shareholders against senior management for decisions lacking common sense or sufficient moral or societal concern. However, because there is no precedent in PRC law, the legal risk remains, as the initial finding rests on the discretion of a People’s Court, which is then also vulnerable to being overruled by a higher People’s Court.

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