COMMENTARIES

ON THE

CHINESE CIVIL CODE

BOOK 1....GENERAL PRINCIPLES

BY

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FOREWORD

Of all the works undertaken by the National Government since its definite formation in October 1928, the promulgation of the Chinese Civil Code is by far the most important and the one which will have the greatest influence on the future of China. It is the latest as well as the ablest expression of scientific law-making in so important a sphere as is the Corpus Juris Civilis of a great and law-loving people. "It follows in its theoretical portions the principles which the modern juridical science is spreading steadily all over the world and which are tending to constitute a sort of universal common law and to remove the discrepencies due to the dissimilarity of the various national legislations, thus facilitating the development of international relations. In this respect, its coming into force will strengthen the ties which link us with the friendly nations of the world and will foster our trade relations with them".[1]

This treatise is intended to be an introduction of the Chinese Civil Code to the English speaking public. It was undertaken in the first instance at the suggestion of Dr. John C. H. Wu, who pointed me to the Chinese Civil Code as a most useful field for research, not only because of its inherent interest for lawyers and politicians alike, but because so little, or practically none, had yet been published in English on the subject.

At first, I started with translating the Code into English; but later changed to writing this after having finished about one half. The motive which induced me to alter the scheme was similar to that by which Professor Ernest J. Schuster was motivated in compiling his "Principles of German Civil Law". Because "a translation with notes would have been unintelligible, and a translation with notes would have been unwieldy."[2] The language of the Cod

1. Hu Han-Min, Preface to The Civil Code of the Republic of China, p. 5. 1Ed. 1930, Kelly & Walsh, Shanghai.

2. Ernest J. Schuster, The Principles of German Civil Law, Preface, p. 7.

is so highly technical and its various parts are so inextricably interdependent, that it requires a most elaborate system of explanation and cross references to show the exact meaning of any particular provision. The different articles are mutually dependent rendering it difficult, if not impossible, fully to comprehend the meaning of one without reference to some other article or articles. Consequently, annotations and cross-references have, whenever necessary, been added as would conduce to a proper appreciation of the text, care having been taken not to make it unwieldy. On the other hand, I still retain the numerical order of the Articles and the arrangement which I have adopted has been mapped out with special reference to the wants of foreign readers. In fact, I have intended to render the Code understandable by means of exegetic treatment into a systemetic exposition of the law.

One of the chief hindrances which obstruct the path of the exponent consists in the difficulty of finding apt expressions for the reproduction of technical terms. Where an English equivalent expression was available, such expression has of course been used; and, correspondingly, English technical expressions have in most cases been avoided where the Chinese expression intended to be reproduced did not convey exactly the same meaning. I have, therefore, taken great pains to make the versions as faithful as possible, and have, in more than one instance, sacrificed style to accuracy.

The Code itself comprises of five Books—1/General Principles; 2/Obligations; 3/Rights over things; 4/Family; 5/Succession. The present treatise deals with the First Book only. It was my first intention to publish all the five books in one. But as it takes much more time to complete the whole, it seems fitting to make a beginning by publishing the First Book, as it is acknowledged to give an index to the true character of the body of law which it introduces, and at the same time, to furnish interesting problems in the science of Jurisprudence.

My heartiest thanks are due to my great master Dr. John C. H. Wu for his constant encouragements and most useful suggestions and his kind permission of my using his law library, which is the most complete one in Shang-

hai. I am also greatly indebted to Dr. Foo Ping Sheung, member of the Civil Codification Commission, for his criticisms and suggestions and his valuable introduction. To my brother, Dr. Arthur P. L. Tsu, I owe him a great deal for his useful assistances and to my father, Mr. K. D. Tsze, I really owe everything.

If this little work creates among the English speaking people an interest, however slight, in the study of Chinese Law, the labour which I have bestowed on it will be amply repaid.

Boyer P. H. Chu

Shanghai, June 10th. 1935.

INTRODUCTION

The Chinese Civil Code has already been in force for over four years. It is by far the most important piece of legislation enacted in China since the establishment of the Republic. It has been widely commented in Chinese. But few of our foreign educated lawyers have endeavored to make it better known to those who are not familiar with our language, although it is the very basis on which the legal relations of people of various nationalities residing in China are to be built. The history of modern Chinese diplomacy and of recent international relations of China has been made the subject of innumberable volumes published in English by Chinese law students. But very little has been written by them on Chinese law, whether ancient or modern. The achievements of the National Government in this respect have been insufficiently made known abroad. Again, many misconceptions regarding the true purport of a quantity of our legal provisions would be dispelled if the fundementals of our civil and commercial law are better known and better understood. Mr. Chu's work will undoubtedly serve these useful purposes.

Although its title is "Commentaries on the Chinese Civil Code" the present work constitutes in fact much more than a simple explanation of the Code. The method of the author has been for each point or principle embodied in the successive articles, to go through the very process which the compliers of the Code have followed when preparing their draft, that is to say making a full epitome of the foreign and Chinese law relating to the subject. In foreign laws, he goes back as far as the Roman law, the very fountain from which the occidental legal systems have sprung. As for Chinese precedents, he has collected and quoted from our ancient classics the paradigma which better express our traditional legal conceptions. Following then the successive developments of western law down

to the most recent times, with a fulness and an accuracy which reveal admirable care and precision, he has been able to expound on each of the numerous legal problems raised in the First Part of the Code, the various theories of the main juristic thinkers of England, France, Germany, etc, compared with the idiosycracy of the classical Chinese schools.

The reader is thus enabled to understand how the different problems presented themselves before the compliers of the Code, what were the different possible solutions of each of these problems, and why a particular solution was adopted by preference to the others. The inner significance of the articles of the Code becomes more apparant and their interpretation is placed in its proper light.

On two points however it seems that Mr. Chu's "Commentaries" could have been more exhaustive:

The Civil Code as a part of the legislation enacted by the Legislative Yuan since the inauguration of the National Government, is following in civil, commercial and family matters the principles of political reconstruction of China formulated by our late leader Dr. Sun Yat-Sen and embodied in the manifold declarations and programmes of the Kuomintang. Many of its provisions are directly derived from the San Min Chu I, and the Kuomintang doctrine has often been the prevalent factor which has guided the Commission and the Yuan in their choice among the various alternatives offered by foreign legislations or by local customs. The purport of some of the articles on which Mr. Chu has commented would have been better explained if the author has shown with more details how the subject of these articles is related to such or such portion of the Kuomintang programme.

More references to the interpretative decisions of the Judicial Yuan and to judgments of the Supreme Court would also have added to the usefulness of the work. They would have shown how the highest judicial authorities of the country do construe the provisions of the Code and how far their views as expressed in ruling cases correspond

to the deductions which Mr. Chu has shown his theoratical discussions of the legal sources.

Such additions might perhaps have made Mr. Chu's work too voluminous. But if he could bring them up to date in a future supplement to his commentaries he would add another valuable contribution to the Chinese legal literature.

FOO PING SHEUNG.

Nanking, March 1935.

To

My Great Master,

DR. JOHN C. H. WU

This Book is Dedicated

In Token of Esteem and Appreciation.

—P. H.

CHAPTER I

RULES FOR THE APPLICATION OF LAWS

Art. 1—Where no provision of law is applicable to a civil case, custom is to be applied. If no custom is applicable, the legal principles shall be followed.

Law is a body of juridical rules promulgated by the State authority in an established (legislative) manner to be applied to all cases falling within the range of its specifications. It is a means to (the end of) Justice, as Ulpian has boldly and verily suggested, because the art of law is the art of bringing about "that which is right and equitable"—such was the ideal of the Roman legal profession, and such should be the ideal of the lawyer of every age.[1]

Unlike Criminal law, the *Kernel* of Civil Law is not merely the Civil Code. The sources of Civil Law extend to customs and legal principles, as indicated by the present article. Heading the Code, this article lays down in broad outline what are to be sources of the Law within the Code.

The first and most important source is the Code itself. Unlike the Swiss Civil Code which heads with the Clause: "The Law must be applied in all cases which come within the letter or the spirit of any of its provisions", this self-evident rule has been omitted in this article in so far as it is to be implied that the Code shall be the primary source of the Law. The term 'Law' as embodied in this article shall be interpreted to include all laws regulating civil matters—commercial law, maritime law, insurance law etc.,—now in force and those to be enacted. In deciding a

1. C. P. Sherman, Roman Law in the Modern World, Second Ed., V, 2, p. 9, S. 420.

civil case, the judge shall then first find the law and to apply it whenever it is applicable. If the case before him can be held to fall within the letter or the spirit of any of its provisions, he must give effect to them. In so finding and administering the Law, there are two conflicting theories as to what shall be the functions of the judge. According to the classical theory, as enunciated by Montesquieu, the legal system of a country as set forth by legislation is complete in itself, therefore the judge has merely to apply it. Savigny compares the judge to a geometer, who is given the two sides of a triangle and the angle contained by them, and has MORE MATHEMATICO to construct the triangle from these data.[1] The modern legal freethinkers expound a new theory that the courts should be, and indeed are, free to apply Statute law or not as they please and to decide cases before them according to their personal convictions of justice and equity.[2] Now the present article steers a middle course between these two extreme theories. On the one hand, the judge, in deciding a case, is not to be merely the mouthpiece of the legislature, on the other, he must apply the Code and laws to the case before him if any provision in it can be applied to it. In functioning like this, the judge has to cope with the peculiar difficulty in that the Code is drawn in such brief and terse language that the judge is left with the duty of filling in the details that are required to complete it. He has to be satisfied with the outline provided for him and do the rest himself. It seems that *"the judges are being raised to the position of assistants, as it were, in the process of Codification, in order that the Code might by their interpretation be kept alive and capable of continuous growth."*[3]

The second of the Sources of the Law is Customs. Custom is, in the broad sense, all the social rules which are observed by the bulk of the members of a society as

1. Ivy Williams, Sources of law of the Swiss Civil Code, P. 42, Oxford University Press, 1923.
2. Ibid, P. 42.
3. Ibid, P. 48.

well as the rules which pertain to a locality or to a trade.[1] Behind Customs are the instincts of men, interpreted by reasons, that is, by the analytic and sympathetic power of man's mind. Many jurists have tried to pierce through the customs of peoples to find their cause in some mental phenomenom, though not with success. Gustav Hugo 1768-1844) wrote LEHRBUCH DES NATURRECHTS ALS EINER PHILOSOPHIE DES POSITIVEN RECHTS (1809). Law, he declared, was formed in customs, outside legislation, both in Rome and in England. It arises from manners. The positive written law tried to make exact the order of customs which existed previous to the positive law. F. C. Von Savigny (1779-1861) was somewhat influenced by Hugo's work. He wrote VOM BERUF UNSER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (1814). In that, he said, "Custom is not a source of law, but evidence of it..... Custom is the badge and not a ground of the origin of positive law." According to him, law was gradually developed by the instincts in men's minds, as these were helped by reason to express themselves, and thence gradually customs arose. Dr. N. Falck (born 1784), a professor in Christiania, in his Encylopadie, declared that "Custom becomes a law through the common will. It only continues to exist by the will of the legislative power." The legislative power, as Dr. Falck showed, can alter the custom or abolish it. But more than that, that power can refuse to recognize a custom as law at all. Not all customs become laws. It only becomes a law if it attains certain marks by which it will be recognized by the State, or if it be already recognised. The marks as set out by the Decision of the Chinese Supreme Court, are: (1) it must have been observed by people generally and immemorially, (2) it must have been repeatedly observed by people as law (3) the matter it concerns must be one for which there is no express provision and (4) it must not be contrary to public policy or interest. (2nd. year A.C. 3)[2].

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1. Gilbert T. Sadler, Relation of Customs to Law. p. 2.
2. The Chinese Supreme Court Decisions, p. 2-Translated by Dr. F. T. Cheng, The Supreme Court, Peking, 1920.

The effect of a custom as a source of the Law has been hotly debated in Germany and also in Switzerland in the drawing up of the Civil Codes of the respective countries. "Advocates of maintaining Customs as a source of law were followers of Savigny who thought that Customary Law was the truest form of law because it directly expresses the mind of the people, whereas legislation does so only indirectly and imperfectly. Ihering was less favourable to it, holding that, though it necessarily had its place in early society, it must gradually be replaced by legislation: and that, whereas custom is more flexible legislation is more exact. When, then, after the long conflict in Germany between the advocates of codification and its opponents, Savigny's theory finally lost ground"[1] and no mention was made of Customary Law in the German Code. Oppositions similar in character were raised on the drawing of the Swiss Civil Code against the insertion of the clause that Customary Law should have the force of law. They contended that in allowing the Courts to apply Custom in default of a provision in the Code, they were but authorizing them to apply the old Cantonal law which it was sought to abolish. But Huber, the drafter of the Code, Maintained his position by explaining that the term 'General Customary Law' would include any general trade or professional usages common throughout Switzerland, though not usages which are merely implied in contracts; for these latter are merely circumstances which the courts must take into consideration in interpreting the contract, and not rules of law that may exist by the side of the Statute law. Local custom, he says, is not included under the term Customary Law; it is frequently referred to in other parts of the Code (Swiss Civil Code), not as Customary Law, but as custom or usage.[2] This is in harmony with what has provided hereunder. The term 'Custom' of the present article is in effect the same as the 'Customary Law' of the Swiss Civil Code; it is not to be interpreted as to mean any local usage or custom not complying with the specifications as laid down by the judgment

1. Ivy Williams, Sources of law of the Swiss Civil Code, p. 49.
2. Ivy Williams, Swiss Civil Code, Sources of law, p. 51.

of the Chinese Supreme Court (2nd. Yr. A. C. 3). In Chinese terminolgy the terms Customs and Customary Law may be used interchangeably because there is no Customary Law in China as yet. In the First Draft of the Chinese Civil Code the term 'Customary Law' was employed instead of 'Custom' which is now being used in order that it might not lead to a false conviction that there is a Customary Law in China aside from the Civil Code itself.

It has been suggested that Judical Usage might be included under the range of Customs. Gierke[1] had said that a series of judgments to the same effect were a kind of custom; Dernburg, Gény, Planiol, and others had put forward the same view.[2] This is caused by the fact that the effect of a succession of judgments which lay down the same rule on the same point seems to initiate a custom. In theory, however, it is not the judgments themselves that constitute the Source of Law, but the fact that a custom has become established in consequence of the constant and universal habit of acting in one particular way.

Another question may be raised whether a custom, within the meaning of the present article, could have the power of superseding a provision in the Code which is contrary to the Custom; in other words, whether 'Custom' has a derogatory force or not. German jurists were of opinion that the custom should have this power, because its very establishment would show that the statutory provision had become antiquated and should therefore be repealed or modified in accordance with the change in public opinion and usage.[3] Thus, in the German and the former Russian legislation, custom has been accorded the derogatory force—that is, custom is admitted in some cases where there is provision of law to the contrary.[4] Under the Ancient Roman Law, Custom may also supercede law. The reason-

1. Deutsches Privatrecht-Williams, Swiss Civil Code, Sources of law p. 52.
2. Ibid., p. 52.
3. Williams, Swiss Civil Code, Sources of law, p. 53.
4. V. A. Riasanovsky, The Modern Civil Law of China, p. 6, Harbin, 1927.

ing is that "for since Statutes themselves bind the people for no other reason than because they are received by the judgment of the people, properly also those things which the people have approved without any writing (will bind all); for what does it matter whether the people declare their will by votes or by their very acts or conduct?.... Wherefore also this principle is most rightly received, that statutes are abrogated not only by the vote of the legislator but also by the tacit consent of all through deseutude."—(Digest 1, 3, 32; Iulianus).[1] But according to Emperor Constantine, the power of custom to abrogate old statutes is denied with dry brevity: "The authority of ancient custom and usage is not to be despised, but it must not be carried so far that it overcomes either reason or Statute."....[2]. It is impossible to reconcile this unconditioned 'Yes' of Iulianus and this unlimited 'No' of Emperor Constantine, if one is not willing to do violence to the expressions.[3] Consequently, whether customs have the power to abrogate old statutes has been an old subject of controversy and legislations to that effect are varying. Thus Art. 5 of the Italian Civil Code (1866) expressly provides: "Laws are only abrogated by subsequent laws containing an express declaration of the legislator to that effect, or by incompatibility of the new provisions with preceding provisions, or because the new law governs completely a matter formerly governed by prior law."[4] So also the Spanish Civil Code has similar provisions, Art. 5 of the Code provides: "Laws are only derogated from by other posterior laws, and desuetude or custom or practice to the contrary shall not prevail against them."[5] But Erskine, in the principles of the Law of Scotland, holds otherwise, that 'Custom as it is equally founded in the will of the

1. Roscoe Pound, Readings in Roman law and the Civil Law & Modern Codes as development thereof, p. 8-9, Part. 1, second Ed., Cam., Harvard University Press, 1914.

2. Ibid., p. 9, Code, 8, 52, 2.

3. Ibid., p. 10, Dernberg, Pandekten, 1, Sec. 22, 2.

4. Roscoe Pound, Readings in Roman law, p. 10; Italian Civil Code (1866), Art. 5.

5. Ibid., p. 10, Note. 2. Scaevola, Derecho Civil, 1, 130-31.

lawgiver with written law, has therefore the same effects. Hence, as one statute may be repealed or explained by another, so a statute may be explained by the uniform practice of the community, and even go into disuse by a posterior or contrary custom.[1] Dernburg has the opinion that the "modern theory and practice recognizes the derogatory power of later customs against older statutes." He supported his saying by the Canon law, which, indeed, denies the power of customary law to overturn Natural law and Divine law, but not its power to supercede positive Statutes.[2] Anyway, whether custom has the power to supercede Statutory provisions or not, experiance tells us that statutes in time yield to the destructive influence of countrary customs. But the framers of the Swiss Civil Code and this Code alike undermine this process of natural selection and provided that customs shall have subsidiary force only in as much it may be invoked only when there is no law. It is the business of the Legislature to amend the law as need for amendment arises, and thereby keep it up to date; the Courts cannot prevent an enactment from falling into desuetude and let custom prevailing over it.

As has already been noted above the Code is not the complete enunuciation of the law that governs all possible or conceivable cases within its scope; it does not purport to be so, and there must necessarily be gaps, intentional or unintentional. Like the Swiss Civil Code, it only purports to be complete as a system, in the sense that it contains a place for every rule that fits into that system.[3] When the provisions of the Code as well as a Custom to the effect are both failing, the judge is to look for his Source in his own convictions, or, in other words, he must create for the particular case his own source of law, to be guided, however, by legal principles or general jurisprudence. Careful search among these sources of inspiration

1. Roscoe Pound, Readings in Roman Law, P., 10, Erskine, Principles of the law of Scotland, Bk. 1, tit. 1, Sec. 16.

2. Ibid., P. 10, Dernberg Pandekten, 1, Sec. 22, 2.

3. Huber, Erlauterungen Zum Vorentwurf, quoted by Wms., Swiss Civil Code, Sources of law, P. 34.

will prevent arbitrary judgments and enable him to carry into effect the spirit of the legislator himself by continuing and completing his work for the establishment of order and justice.

The Swiss Civil Code was inspired by Aristotle's saying that the judge must supplement the silence of the legislator by deciding as he would have done if the legislator had been present and improved on the vague Roman law maxim: "Si quid lege praetermissum fuerit, id ex bono et aequo debet praestari".[1] Art. 1 of the Swiss Code provides: "....and in default thereof (i.e. Customary Law) according to the rules which he would lay down if he had himself to act as legislator." This is a direct answer to the old question, viz. how a judge shall proceed when he is confronted with a case which does not appear to him to fall directly under any existing enactment or custom. Some of the answers given at different times are that the judge is to look for the necessary principles in common law, the general law of reason, general legal principles, principles of equity, natural law, or his own mind and conscience. But these answers were regarded by Huber, the drafter of the Swiss Code, as vague and unsatisfactory, theoretical rather than practical.[2] It is not often indeed that the judge need to find a principle solely in his own convictions and outside the Code altogether, but he will have to choose between two or more conflicting principles in order to decide the case before him, or he will have to extend the application of a clause to cases to which it does not prima facie apply. In all these instances he is filling up gaps in the Code and is acting as if he were legislating. For he chooses the rule that should decide the case not by logical argument, nor by judicial construction, but on considerations of expediency. The Swiss Civil Code sets this down clearly and definitely, that the judge must set up his own rules just as if he were taking the place of the legislator. Where necessary the

1. See, Wms., Swiss Civil Code, Sources of law, P. 73.
2. Huber, Recht Und Rechtsverwirklichung, quoted by Wms., Swiss Civil Code, P. 58.

Judiciary is to assume legislative functions.[1] In this way, the Swiss Civil Code has shown its advancement to the extreme just opposite to the extreme held by the French Civil Code. When the Code Napoleon was drawn up.[2] Picot says, mathematical and exact sciences were supreme, and it was considered possible to deduce every principle that might be required from the Code with quasi-geometrical accuracy and ease Man, he says, was conceived as an abstraction, the same yesterday, to-day, and through all time, and therefore not liable to change. The French Judge, then, was during the first quarter or more of the nineteenth century merely the interpreter of the will of the Legislature. 'I do not know what Common Law is,' said a Commentator, 'I teach only Codified Law.' In the words of Robespierre there was henceforth to be no more JURISPRUDENCE.[3]

The Chinese Civil Code, as has already been remarked, takes a middle course between the extreme theories. On the one hand, the Code does not recognize the completeness of legislation and the subsequent subordination of the judge to it, on the other hand the Code does not confer the absolute independence of the judge of statutory enactments nor give the judge the right to apply what he seems to be the highest principles of justice and equity. But in both these respects the judge is given a difficult task. The fact that the Code is incomplete requires him to fill up gaps; the fact that he must apply legislation according to its spirit demands careful interpretation made more difficult still by the brevity of the legislative provisions. Herein the Code directs the judge to seek aid in referring to legal principles and theories that have been worked out by experts in the law. The term *'Legal principles'* is rather vague and gives the judge a wide range of discretion in deciding upon the principle which is to govern the case. They are nothing else than principles of the doctrine or science of law, from which, the medium of judicial decisions, legal rules are

1. See, Wms., Swiss Civil Code, Sources of law, P. 58.
2. Interpretation du Code Napoleon: Schweiz. Jurist,-Z., V, P. 243.
3. Wms., Swiss Civil Code, Sources of law, P. 79.