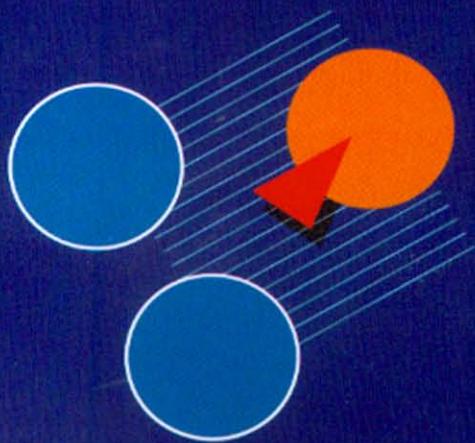


Comparative Study on Third Party's Contractual Right

第三人合同权利比较研究

陈 任 著



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作 者 陈 任

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Abstract

The common traditional legal concept is that privity doctrine is a basic principle in the contract law, which was also introduced into the Chinese contract law. This doctrine has, however, been put under pressure as a result of the tendency towards the reform of third parties' rights. The idea behind this development is that the third parties' rights to get benefits from the contract and obtain contractual remedies should be recognized by the law if it is the contracting parties' intention. As a result of this, a lot of countries have accepted the third parties' rights by creating exceptions to the privity or establishing specific legal provisions. This thesis reviews the many countries' laws on third parties' rights, and compares various theories and decisions of the cases. Based on the discussion of the Chinese historical legal development and existing legal status, an attempt is made to explain that the third parties' rule should also be reformed in China. The central question to be discussed is what the existing problems in other countries are and what rules are better to be adopted in China.

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CHAPTER 1

INTRODUCTION TO CHINESE

CONTRACT LAW

1.1 Historical review of the Chinese Contract Law

1.1.1 From 1840 to 1950

In the 19th century, Chinese Law was strongly influenced by the Civil Law systems. A lot of new legal concepts and principles, especially those about private laws, were introduced directly or indirectly from countries such as Germany, France and Japan which itself was much affected by French and German Law. Following the same method of these countries' laws to regulate the business activities, Chinese laws and rules gradually changed from criminal-regulation^① to multi-regulation. This emerged during the process of

① Punishments for a person who fails to do economic business with others according to customs and regulations were corporal punishment and pecuniary penalty.

establishment of the Chinese private law system.

In 1840, during the late Qing Dynasty, the Opium War broke out. From then on western countries' culture was introduced into China and a lot of Chinese scholars began to learn from Western legal systems. In 1862, the government of the Qing Dynasty established an education institute, Tong Wen Bureau, which was in charge of cultivating Chinese people to learn foreign languages. An American, William Alexander Parsons Martin^① who was the chief instructor of Tong Wen Bureau translated *Elements of International Law*^② into Chinese in 1867. In 1880, a French instructor, Billequin Anatole Adrien^③, translated French Civil Code into Chinese which was named *The French Regulations*. The Chinese version of the French Regulations was the first integrated version of foreign law in Chinese history, and in the late 19th Century, it was put into use as a textbook in education.^④ During this period, Tong Wen Bureau published many works on introduction of western countries' laws such as *Introduction to the Study of International Law*^⑤ and *A Treatise on International Law*.^⑥

① (1827 – 1916), Missionary of American Presbyterians North.

② Henry Wheaton, *Elements of International Law*, (1836).

③ (1837 – 1894)

④ Tian Tao & Lizhuhuan, 'Study on versions foreign law books during the end of Qing Dynasty', *Periodical of Chinese and Foreign laws*, no3 2000.

⑤ Wrote by T. D. Woolsey. Translated by William Alexander Parsons Martin, Wang Fengyi, Wang Fengzao (1877).

⑥ Wrote by W. E. Hall. Translated by William Alexander Parsons Martin (1880).

One of the most famous scholars, Shen Jiaben^①, the Minister of the Qing Dynasty who was in charge of legal reform at that time contributed a lot to introducing foreign laws. He proposed that the Qing government should reform the laws by learning experiences from western countries' laws. In his works, he compared different culture between China and western countries, pointed out that the Chinese legal system was in a backward state, explained why it prevented development of the country, and discussed advantages of introducing the foreign laws.^② Shen Jiaben also did a lot of work for compilation of foreign laws. He encouraged Chinese people to study laws abroad, and also invited scholars from abroad to translate foreign laws. In the late 19th century, a lot of Chinese scholars who studied in Japan and other countries came back and contributed to the Chinese legislative reform.

During the period from the 1890s till the 1910s, more foreign laws were introduced into China and their Chinese versions became the reference books when the laws were modified or new laws were enacted. The Government of Qing established the Commerce Bureau, one of the leading legislative bodies, to promulgate commercial laws and other related laws. One of its functions was to translate other countries' commercial laws and treaties into Chinese versions. According to the records and statistics made by Shen Jiaben in 1909, the versions of the foreign laws included German

① (1840 - 1913), Shen Jiaben is regarded as the first person who contributed to Comparative law in Chinese history.

② Shen Jiaben expressed the opinions in his books: Study on Legal Theory, Comments on Statutes of Qing, General Legal Concepts and Principles of Legislation.

Civil Law, German Marine Law, German Bankrupt Law, French Civil Law, Austrian Civil Law, Japanese Civil Law Japanese Commercial Law, Japanese Commercial Instrument Law and American Bankrupt Law.^① In addition, there were also many periodicals about studying foreign laws appearing in the meantime, such as *Journal of Law and Politics* (JiaoTong Press) and *Journal of European and American Law Studies*. Both official organs and the civilian organizations focused on studying German Law and Japanese Law at that time^② because (i) they realized great success of Japan in establishing a satisfying legal system through following the German experience in legislation; (ii) a lot of scholars went to Japan to study law and they were good at both Chinese and Japanese. This made it possible for them to make a deeper research on Japanese laws.

In 1907, Shen Jiaben, Yu Liansan and Yin Rui were appointed by the government to take charge of law reform. An organization, the Law Revision Office was set up. Shen Jiaben invited Japanese experts and scholars to join for the preparation of drafting a civil code. The draft work formally began in 1908, and a new Civil Code, entitled *the Draft Civil Code of the Great Qing*, was completed in 1910. This code had not been put into force before Qing Dynasty ended in 1911. However, it was the first comprehensive civil law in the Chinese history. The code was

① Li Huilian, 'About Shenjiaben' p. 210-211, Law Press 2000.

② He Tiechuan, 'Oversea Chinese Students and legal System in 20th Century' Law Study, no6 1997.