

Chinese and Comparative Law Series

Towards a Chinese Civil Code

Comparative and
Historical Perspectives

*Edited by Lei Chen &
C.H. (Remco) van Rhee*

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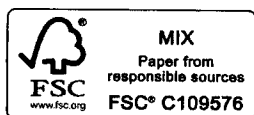
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INTRODUCTION

Lei Chen and C.H. (Remco) van Rhee

Outside of China, comparatively little is known about recent developments in China's civil law. Therefore, the editors of the present volume are proud to present the first book in English on the development of the Chinese Civil Code, including the Civil Procedure Law of the People's Republic of China.¹

The fact that this is the *first* book in English on the draft Chinese Civil Code may seem surprising given the importance of this topic in a jurisdiction which is the largest emerging market in the world and a top destination for investment. Despite the voluminous research outputs in the Chinese language on this topic, little has been done in a systematic way in English, which is essential in order for comparative lawyers worldwide to be kept updated. On the other hand, the absence of publications in English may not seem surprising given that it is a titanic task to publish a volume on a topic as broad as the Chinese Civil Code, especially a well-presented and well-structured volume. At the start of their project, the editors felt a little as if they were treading in the dark. They soon realised that covering every detail of the proposed Chinese Civil Code in a single volume is neither feasible nor necessary. They therefore decided to start by presenting some key topics of Chinese civil law in selected areas, and then comparing these topics with developments in some Western legal systems.

The present book is the product of a conference organised by the editors at the Centre of Chinese and Comparative Law of City University of Hong Kong. This conference had two purposes. First, when drafting its own Civil Code, the Chinese legal community adopted a process of learning or borrowing legislative ideas from other jurisdictions. It was hoped that the historical and comparative approaches provided at the conference and in

¹ Although there is a book titled *The Draft Civil Code of the People's Republic of China*, published by Brill in 2010, it is merely an English translation of the draft Civil Code resulting from an academic exercise by the Chinese Academy of Social Sciences headed by Huixing Liang. The present book is significantly different, in the sense that it provides an in-depth analysis of specific topics in Chinese civil law and civil procedure from historical and comparative perspectives.

this book would further illuminate the codification work. Second, the conference and this book are dedicated to commemorating the 100th anniversary of the first Western-influenced and civil law-oriented Civil Code in China, the *Da Qing Min Lü Cao An* of 1911. The book may help scholars and lawyers from outside of China to answer questions such as how China, a Socialist state, reconciles Socialist ideology primarily based on state ownership with a property law that enshrines the protection of private property interests. Will the future Chinese Civil Code be based on a European civil law model, a common law model or a mix of these models? And, more importantly, what can be said about how well the new Civil Code will function?

These and similar questions will be answered in this book from an historical and a comparative perspective. The book further discusses the particular 'Chinese characteristics' of Chinese civil law, both those that already have come into existence and those that are currently taking shape. Moreover, it endeavours to predict the prospects of the future development of Chinese civil law based on historical and comparative analyses.

The present introduction first explains why there is a need to introduce a Chinese Civil Code. Subsequently, it provides a general overview of the drafting of the Civil Code in the last three decades. Chapter synopses will conclude this introduction in order to identify some salient points in the various contributions to this book.

1. WHY IS A CHINESE CIVIL CODE NEEDED?

When it comes to the genesis of contemporary Chinese civil codes, *Da Qing Min Lü Cao An* of 1911 is the natural starting point. This draft code never came into use because the Qing Government collapsed in 1911 soon after the draft's publication. Nonetheless, its significance cannot be underestimated. It was the first attempt in Chinese legal history to establish a civil code separate from an all-encompassing feudal criminal code. Historically, the adoption of Western-style codes was a milestone; for the first time the country moved away from its customary Chinese traditions and Confucian values.² More significantly, this civil code laid the foundation for future Chinese codification attempts.³ Subsequently, more than eighty years ago, the Republic of China under the Kuomintang (*Guomindang*) Government

² Percy R. Luney, "Traditions and Foreign Influences: Systems of Law in China and Japan," *Law & Contemporary Problems*, 52 (1989): 131.

³ Huixing Liang, *The General Part of Civil Law* (Beijing: Law Press China, 1996), 17.

promulgated the first Civil Code that came into operation in Chinese history. During the drafting of this Code, the Kuomintang Government conducted research on the German, Japanese, French and Swiss legislative models. In the end, the Kuomintang Civil Code did not follow the German, Japanese or French approach by promulgating a separate Commercial Code, but opted for an integrated model by adopting the Swiss approach. In this manner, various practical inconveniences were discarded. This approach was mainly chosen because the Chinese legislature saw the European distinction between civil law and commercial law as a historical anomaly, which was not suitable for China since the country never had a mature merchant class.

At the time these words are written (June 2012), the proclamation of the People's Republic of China (PRC) is more than sixty years ago. However, even today China does not have a civil code. It is widely believed that well-functioning legal institutions and a government bound by the rule of law are important to economic and political development.⁴ The Law and Development Movement advanced the view that a modern legal system, which enforces contracts and entrenches property rights, can promote the development of markets and hence encourage economic growth.⁵ Legal deficiencies in China, in particular the lack of a unified civil code, hamper sustained economic development and potential political reform.⁶ Today, citizens need more than governmental policies and a mish-mash of divergent local customs and norms to protect their interests. They need uniform laws that will provide them with legal certainty. Despite some efforts made in the 1960s to create a single comprehensive Chinese Civil Code, it was for various reasons that the Chinese legislature decided to adopt a piecemeal and incremental approach to compiling a new Chinese Civil Code.⁷ Drafting an acceptable single comprehensive Code in one go was deemed impossible. As such, the General Principles of Civil Law (GPCL), promulgated in 1986, became the foundation of the Chinese civil law system. Other

⁴ Harold Demsetz, "Toward a Theory of Property Rights," *American Economic Review* 57 (1967): 347-359; Chris M. Hann, "The Embeddedness of Property," in *Property Relations: Renewing the Anthropological Tradition*, ed. Chris M. Hann (Cambridge: Cambridge University Press, 1998), 18.

⁵ David M. Trubek, "Toward a Social Theory of Law: An Essay on the Study of Law and Development," *Yale Law Journal* 82 (1972): 46.

⁶ Huixing Liang, *Struggle for a Chinese Civil Code* (Beijing: Beijing Law Press, 2002), 10-15; Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University Press, 2002), 144-169.

⁷ Lei Chen, "The Historical Development of the Civil Law Tradition in China: A Private Law Perspective," *The Legal History Review* 78 (2010): 159-181.

important civil law legislation includes the Contract Law of 1999, the Property Law of 2007 and the Tort Liability Law of 2009. The current Marriage Law was enacted in 1980 and revised in 2001, while the Succession Law was enacted in 1985 and the Adoption Law in 1991 (revised in 1998). Most recently, the Law on the Application of Laws to Civil Relations with Foreign Aspects was adopted in October 2010 and came into effect on 1 April 2011. In the area of civil procedure, the 1991 Law on Civil Procedure should be mentioned here. The Law was revised in 2007 and 2012.

2. RECENT DEVELOPMENTS IN THE LEGISLATIVE PROCESS OF THE CHINESE CIVIL CODE

In the early 1980s, a new wave of civil law codification attempts did not generate a civil code but merely the GPCL that consists of 156 provisions. The GPCL, which was enacted in 1986, was a milestone in China's civil law reconstruction after the Cultural Revolution (1966-1976). The GPCL is widely considered to be the 'master statute' of civil law in China and is a piece of progressive legislation that reflects advanced legislative ideas. It covers such legal principles as the protection of private property, the freedom of contract and the protection of human dignity and personality rights. In China the last three decades have witnessed tremendous changes in almost every aspect of society, and surging economic development has challenged many areas of the law. In addition, China's accession to the World Trade Organization (WTO) prompted the country to strengthen its legislative framework. As a result, the GPCL has increasingly fallen behind the times and it is ripe for amendment in order to cater for the new social and economic conditions. It is envisaged that the GPCL will undergo dramatic amendments and will become the general part (or *allgemeiner Teil*) of the future Chinese Civil Code.

From the end of the Cultural Revolution up to the 1990s, Chinese contract law adopted a model of 'specific statutes on specific contracts'. The Economic Contract Law, the Law on Economic Contracts Involving Foreign Interests and the Technology Contract Law were enacted in 1981, 1985 and 1987, respectively. In essence, all these specific contract laws were statutes created during the transitional period from a planned economy to a market economy. Yet, with China's continuing economic reform and increasing involvement in international trade, it became necessary to introduce a

uniform contract law.⁸ The 'specific statute' model was widely regarded as unsatisfactory since the specific statutes were vague, ideologically conservative and not concrete enough to be applied in practice. In order to attract more international investment, China needed to provide a conducive legal environment by establishing a modern, business-friendly and systematic contract law.

Against this backdrop, with six years' joint efforts by lawmakers, academics and the Judiciary, the Uniform Contract Law (UCL) was adopted at the Second Session of the Ninth National People's Congress (NPC) in 1999. The UCL is the result of a codification and harmonisation process of all regulations on contracts. The previous three pieces of legislation regarding specific contracts were invalidated simultaneously with the promulgation of the UCL.⁹ Following this promulgation, two judicial interpretations were issued by the PRC Supreme People's Court (SPC), which serve as part of Chinese contract law.¹⁰ It is worth noting that the SPC has recently published its Judicial Interpretation on Adjudicating Sale Contracts Disputes which further resolves such long-standing issues as unauthorised disposition.¹¹ Over the last thirteen years, the UCL has proved to be a success. Yet, some commentators critically pointed out that the UCL deals primarily with the traditional conventional trade relations while paying little attention to regulating virtual/online transactions.¹² Nevertheless, it is generally acknowledged that with minor changes, the UCL can function well and be incorporated into the future Chinese Civil Code as a part of the law of obligations.

In March 2007, the long-awaited Property Law was enacted to boost economic development by clarifying and better protecting private property rights. Property law was put on the legislative agenda of the National People's Congress (NPC) to further complete the Chinese Civil Code.¹³ It

⁸ Huaishi Xie, "The Contract Law of Modern China," in *International Encyclopedia of Comparative Law*, Volume VII (Contracts in General), ed. Arthur T. von Mehren (Tübingen: J.C.B. Mohr (Paul Siebeck), 1992), 46-48.

⁹ Art. 428 of the UCL of the People's Republic of China.

¹⁰ Technically, the SPC is not an organ of legislation. As a result, judicial interpretations cannot be regarded as statutory instruments but only as 'judicial explanations'. For the court's power to interpret black letter law and to issue judicial interpretations, see Chapter 2 in the present volume.

¹¹ Fashi no. 8 (2012). The Supreme People's Court's Judicial Interpretation was published on 10 May 2012 and came into effect on 1 July 2012.

¹² Xinbao Zhang, "Civil Law in China and its Current Situation," *Wuhan University Law Review* 3 (2011): 102-108.

¹³ Liming Wang, "Selected Important Issues on Personality Rights Legislation," *Bulletin of the China Civil Law Society* (2012): 11.

has not been plain sailing for the legislative process of the Property Law. Fourteen years have passed from the time it was first put on the parliamentary agenda. The legislative body, NPC, used two model drafts prepared by two academic drafting teams and put together a draft of its own.¹⁴ The Standing Committee of the NPC deliberated and pruned its legislative draft seven times. This set a record for parliamentary readings on a particular draft bill. At each reading, many debates arose. This is an indication of just how controversial the Property Law was.¹⁵ It can be seen, however, that China, ruled by the Communist Party, has changed from largely eliminating private property to increasingly embracing it, from non-liberal authoritarianism to entrenching personality rights.

It is worth noting that while Chinese private law is heavily influenced by the German *Pandectist* system, various German legal ideas and concepts have not taken root in Chinese soil. For instance, the abstraction principle or *Abstraktionsprinzip* has not been implanted. The abstraction principle implies that the transfer of ownership is considered to be an abstract juristic act. It separates the underlying cause (*iusta causa*) or contractual basis from the transaction that executes the transfer of ownership. As a consequence, the abstraction principle implicitly favours the transferee by effectuating a transfer of ownership on the basis of a valid real agreement and conveyance, regardless of the validity of the contract. Nonetheless, Chinese property law has adopted the causal system which favours the original owner by disallowing transfer in the case of an invalid contract.

In December 2009, after seven years of preparation, the Tort Liability Law was promulgated. The Law is a comprehensive piece of legislation comprising twelve chapters containing ninety-two provisions. The Tort Liability Law is divided into three parts: General Principles, Specific Rules and Miscellaneous Provisions. The General Principles address the general issues of tort, the rules of liability attribution, multiple parties' joint liability, the formation of liability and remedies, and the situations that release a person from liability or mitigate the degree of liability. The Specific Rules concern the liable parties (e.g. guardian's liability, employer's liability) as well as five situations that trigger liability without a wrong being committed (strict liability). These five situations are products liability, motor ac-

¹⁴ In October 1999, the drafting group under the auspices of the Institute of Law in the Chinese Academy of Social Sciences (CASS) first completed a model draft consisting of twelve chapters containing 435 articles. In 2000, a drafting group headed by the Research Institute of Civil and Commercial Law in the School of Law at Renmin University also completed a model property law draft. It was divided into five chapters with 575 articles.

¹⁵ For more detail refer to chapter 4 in this book.

cidents liability, liability for personal injury caused by domestic animals, liability for highly dangerous operations and liability for environmental pollution. The drafting of the Tort Liability Law occurred in tandem with attempts aimed at the harmonisation of private laws in Europe. Hence, a variety of European harmonisation projects and the reform of the German tort law as well as the revision of several civil codes in European countries have provided invaluable examples for Chinese lawmakers to refer to. It is notable that the U.S. Restatement of the Law (Third) Torts also provided a good comparative reference.

The Law on Civil Procedure of China was introduced in 1991.¹⁶ It was based on the 1982 'Test Code'. During the 1990s, China witnessed the so-called Civil Trial Mode Reform, which placed great emphasis on adjudication instead of traditional mediation as a way of settling civil disputes. However, in the meantime, due to increasing caseloads, the emphasis has (again) come to be placed on mediation, a development that is criticised by some.

There is currently a dire need for China to have a systematic code dealing with the conflict of laws, particularly in view of China's entry into the WTO in 2001. As a matter of fact, due to the GPCL's scattered and inadequate provisions, the 2002 Draft Civil Code prepared by the Institute of Law of the Chinese Academy of Social Sciences has a special book on conflict of laws. Eventually, this academic pursuit matured into a formal statute in 2010 after numerous revisions. It is notable that by contrast to property law, the legislative process of the Law on the Application of Laws to Civil Relations with Foreign Aspects has been smooth.

The same cannot be said of the question whether to incorporate a special law on personality rights into a future Chinese Civil Code. Enacting a law on personality rights under the Civil Code's umbrella is a unique arrangement, different from the European approach to this matter. In China, personality rights refer to the right to life, the right to health, the right to reputation and the right to privacy. Admittedly, the Chinese concept of personality rights is very different from that of the classic European civil codes. Whether there should be a separate book on personality rights in the future Chinese Civil Code is still under debate. It has been argued that the protection of personality rights should be dealt with in the General

¹⁶ An English translation is available at several websites, e.g. at <http://www.Lehmanlaw.com/resource-centre/laws-and-regulations/civil-proceedings/law-of-civil-procedure-of-the-peoples-republic-of-china-1991.html> (accessed on 20 June 2012).