

Towards a Civil Code of the People's Republic of China

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Abstract:The attempting to draft a Chinese civil code has been lasted for over 100 years. During this period, China has turned to the way of following the structure and legal terminologies in the continental legal systems. The road of the implementation was long and tortuous, but the private law has achieved its goal of modernizing the legal system and meets the changes of social politics, economy and cultural life. To sum up its experience and lessons, Chinese civil law should go further on this way to complete a civil code in the near future.

Keywords: Civil Code, China

One hundred years ago, Chinese were at a critical moment that the country was almost carved up by foreign powers. To save the country from the extinction and for reviving the nation, the *Qing* government decided to reform its civil law system. Because of this choice, a new system of civil law was built. The private law concepts, principles, institutions and theories from the continental countries have taken root in current China. The civil law has also been part of the social culture.

1. The drafting of Civil Code at the end of *Qing* Dynasty

Some scholars, such as Zejian Wang, consider that every civil code, more or less, needs to deal with the political issues.¹ China is the same too. British had established a consular jurisdiction in the Chinese territory since 1843, the act of which damaged the independent jurisdiction of Chinese government. In 1902, the government altered the legal institutions after referring to

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¹Zejian Wang (ed.), *The theory and case study of civil law : The civil law's fifty years (min faxueshuoyu pan li yanjiu : min fawushinian)*, Beijing : Peking University Press (beijing da xue chu ban she), 2009, p. 3.

other countries' legal systems. In 1907, Jiaben Shen, Liansan Yu and Ruiying were appointed to be responsible for drafting the civil code and the criminal code. Through the assistant minister named Dong Kang, who once observed and studied in Japan, Shen invited some Japanese officials and scholars of Imperial Universities to assist in drafting the code and teaching in law schools.

Until 1910, the drafting of civil code was finally completed, naming the *Civil Draft of Qing Dynasty*, which includes five books. The concepts, systems and contents in the first three books were referred to the German Civil Code and Japanese Civil Code. But prior to the implementation of Civil Draft, the *Qing* Dynasty was overthrown in the Revolution of 1911. However, it is worthwhile to emphasize that under the influence of Japan, China chose continental legal system, exactly the German civil law, to be followed.² The reason to skip from the common law was mainly due to the legislative technique. It is difficult to say which is better, but it is worthwhile to emphasize that the common law is case law, which cannot be succeeded through short-time lawmaking process. As the German Civil Code is later than the French Civil Code, the legislators at that time thought the legislative technique and content in German Civil Code was more advanced than that of French Civil Code.³ As a result, Chinese legal system becomes more scientific. The true meaning of this succession was that the methods could exist forever, while systems may be shortly revised or even abandoned.⁴

2. The drafting of civil code in the Republic of China

At the beginning of the Republic of China, the government didn't have time to formulate the civil law, so the Ministry of Justice issued the interim regulations of private law, contents of which are

²Zejian Wang(ed.), *The theory and case study of civil law : The civil law's fifty years*(min faxueshuoyu pan li yanjiu : min fawushinian) , Beijing : Peking University Press(beijing da xuechu ban she) , 2009 , p . 4 .

³id, p . 9 .

⁴id .

nearly the same as the *Civil Draft of Qing Dynasty*. After the *Beiyang* government took power, it considered that there were three defects in the *Civil Draft of Qing Dynasty*. Firstly, the draft laid too much emphasis on personal interests, while the public advantages should be paid more attention to as the society changed. Secondly, as the draft succeeded from the foreign law, local custom was ignored. The third point was considered about the provisions of relatives. The provisions in the draft were far from the real life, leading to lots of difficulties about applying the law.⁵

Because of these factors cited above, the authority decided to issue a new civil draft. Those works were carried on from 1914 to 1925, making the draft named the Draft Bill of Civil Code, which contained 1522 articles. At that time, the parliament was dismissed due to the coup, which happened in Beijing. Consequently, the Draft Bill was not formally published. Compared to the *Civil Draft of Qing Dynasty*, the Draft Bill integrated some new rules. "Except for weakening the individualism and private right, there were also numerous articles about the foreign juristic person for meeting the need of international trade. Then the ground mortgage, a system imitated from Germany, was deleted while the traditional *vadium mortuum* was established in the Draft Bill. Furthermore, the draft bill accepted some feudal ideas, it extended the paternal power and strengthened the system of arranged marriages. In general, the regulations of relatives in the Draft Bill can be seen as a setback."⁶

Several years later, the *Beiyang* government was overthrown. Then a new national government was founded in Nanjing. On the one hand, the authority decided to adopt the old rules, the judicial precedents and customs. On the other hand, a legal bureau was set up to draft and revise

⁵Guofu Zhang , *The legal history of the Republic of China(zhonghua min guofazhijianshi)* , Beijing : Peking University Press(Beijing da xue chu ban she) , 1986 , P . 161.

⁶Lixin Yang , *The Magnificent Turn-round and Development of Civil Law in China(bainian zhong de zhongguo min fahuali zhuan shenyu qu zhe fazhan)* , *Journal of Henan Administrative Institute of Politics and Law* , No. 121 , 2011.

the law, including drawing up the civil code. The book of relatives and succession were firstly completed and submitted to the national government in October 1928.⁷ The other books were republished during the later three years. For instance, the book of the general principles of civil law were made known to the public on 23th May, 1929, and the book of obligatory right was published on 22th November, 1929. Worth mentioning is that the draft civil code includes 1225 articles, which took 3 years for the drafting, and the legislature had been meeting for 250 times to elaborately discuss.⁸ During this process, the civil code referred to some civil law in the continental legal system including Germany, Switzerland, France, Japan and the former Soviet Union. Furthermore, the outcomes of previous legislative work had not been ignored. For example, the civil law retained some good traditional customs, especially in the regulations of family law.⁹

The Civil Code of Republic of China had succeeded the fundamental guideline, which was ascertained from the late *Qing* Dynasty, and it adopted the advanced methods to revise the Chinese conventional rules. There are several advantages of this draft civil code: First of all, it made a clear distinction between public law and private law, and confirmed that the civil law is a private law; in the next place, it ascertained the distinction between substantive law and procedural law, and believed that the civil law is the substantive law rather than procedural law; At last, it fully adopted *Pandektenwissenschaft*, making a code containing five books: general principles, property right, law of obligation, relatives and succession, which is in accordance with the German civil system.

Zhongxie Mei, a well-known expert in civil law, once set a high value on this civil code. He considered that the words in the civil code of the Republic of China were concise and avoided to

⁷Xiandong Li , The transition from " the Law of Qing Dynasty " to " the Civil Code of the Republic of China " (cong da qing lv li dao min guo min fadian de zhuanxing) , Beijing : Chinese People's Public Security University Press(zhongguo gong an da xuechu ban she) , 2003 , p . 204 .

⁸Huaishi Xie , The research on the civil codes of civil law countries(da lufa xi guojia min fadianyanjiu) , Beijing : China Legal Publishing House(zhongguofazhichu ban she) , 2004 , p . 109 .

⁹Yong Zhu , Chinese legal history(zhongguofazhi tong shi) , Beijing : law press(fa lv chu ban she) , 1999 , p . 639 .

be like the translation type. Elegant words also commonly existed through the code, which was regarded as the strength of Swiss civil law. The Japanese tone, which can be easily found in former civil drafts, was also disappeared. It is a great progress on the legislation technology.¹⁰It absorbed the quintessence and value of Chinese civil customs, which can be regarded as a commemorated career in Chinese legislative history.¹¹

3. Several drafting versions after the founding of the People's Republic of China

(1) From 1949 to 1977

A. The draft bill of Civil Code in 1956

The central committee of the Communist Party of China explicitly abolished the "Kuomintang Six Laws" in February 1949. Later in October 1949, the People's Republic of China was founded. One year later, the Marriage Law was issued. Until 1954, the work of drafting civil code was started. Two years later, the first draft bill of civil code was completed in December. Unfortunately, because of some political campaigns, such as rectification, this process failed to be continued.

There were four books in the draft manuscript consisting of general principles, ownership, law of obligations and law of successions with 525 articles. As it was the result of referring to the Soviet Union Civil Code, the family law was removed from the civil law and the draft used the "ownership" and "citizen" instead of "real right" and "natural person" respectively. Those changes showed that Chinese civil law preferred to study the Soviet Union civil law rather than the German civil law at that time. Faced with the all-round blockade by capitalist countries during the 1950s, the new China had to take the "leaning to one side" foreign policy. As a consequence, socialistic China began to do large-scale translations of Soviet legislations and legal writings. Also,

¹⁰Zhongxie Mei , The essence of civil law(min fayayoi) , Beijing : China University of Political Science and Law Press(zhongguozhengfa da xuechu ban she) , 1998 , p . 19 .

¹¹Changqing Hu , general rules of Chinese civil law(zhongguo min fazonglun) , Beijing : China University of Political Science and Law Press(zhongguozhengfa da xuechu ban she) , 1997 , p . 19 .

many Soviet experts were invited to China to introduce the experience in the civil law legislation and teach knowledge in various legal departments. In addition, lots of Chinese students were sent to the Soviet Union to study the law. It is safe to conclude that the Soviet civil law was transplanted due to the planned economy, which was also from Soviet Union.¹²

Whether following the Soviet Union civil law was depended on the relation between the two Sino Soviet countries. Therefore, once the relation deteriorated, the reception of legislation and theory would be immediately interrupted. This was really different from the former reception.

B. The draft bill of Civil Code in 1964

From 1959 to 1962, China had suffered from a serious natural disaster, and a new political campaign named "Great Leap Forward" also aggravated the financial difficulty. The government began to encourage producing and exchanging the commodities. In 1962, the second drafting project of civil law was started. Until July 1964, the draft manuscript was completed. In this version, there were only three books, which was apparently different from the German and Soviet civil law. Those parts were called "general principles", "ownership of property" and "transferring of property". But the relatives, succession and tort were removed from the code. The legal concepts like "right", "obligation", "debt", "ownership", "natural person" and "juridical person" cannot be found over through the code. It was obvious that this draft one aimed to get rid of the Soviet and Bourgeois civil law. Apparently, it is the result of the international and domestic political struggles, especially the Sino Soviet debate.

In 1964, a socialist education campaign, which announced to overhaul the political, economic,

¹²Qinhua He , Xiuqing Li , Foreign law and Chinese law : reflection about the transplantation of foreign law in twentieth century(waiguofayuzhongguofa : ershishijizhongguoyizhiwaiguofa fan si) , Beijing : China University of Political Science and Law Press(zhongguozhengfa da xuechu ban she) , 2003 , p . 323

organizational and ideological matters, was carried out throughout the country.¹³It certainly led to the pause of the second draft of civil law. Ultimately, this campaign upgraded to the “cultural revolution” in 1966. During this revolution, the people's courts, procuratorate and public security organs at all levels had been revoked. The whole nation went into anarchy. Moreover, all the law faculty and researchers were driven to accept the ideological remolding. Generally speaking, the legislation, judicature and education of Chinese civil law had been suspended for 10 years.¹⁴

(2) After the 1978 Chinese Reform and Opening-up

A. The third attempting version of Civil Code

After the ten years’ “cultural revolution”, the authority decided to reform and open up. As the planned economy gradually transits to the market economy system, the position and function of civil law began to be laid emphasis on.¹⁵The legislature agreed with the advice from Chinese Academy of Social Sciences institute of law about constituting the Chinese civil code. In November 1979, under the Law Committee of the National People's Congress, a group composed by some civil law scholars for drafting the civil code was founded, indicating the beginning of the third civil drafting of new China. Until May 1982, there were four draft versions of civil code.¹⁶Their styles and content mainly referred to the Soviet civil legislation outline in 1962, the Soviet civil code in

¹³Jiming Yi , three ideas to make the China Civil Law(zhongguo minfadianzhiding de santiaoluxian) , Private Law Review(sifa) , No.2 , 2011.

¹⁴Limin Wang , The Review and Prospect of Making China Civil Code(zhongguo minfadianzhiding de huiguyuzhanwang) , LegalForum , Sep. 2008 , No.5 (Vol .23, Ser.No.119).

¹⁵Lixin Yang , The Magnificent Turn-round and Development of Civil Law in China(bainianzhong de zhongguo min fahuali zhuanshenyuquzhefazhan) , Journal of Henan Administrative Institute of Politics and Law , No. 121 , 2011.

¹⁶Jiming Yi , three ideas to make the China Civil Law(zhongguo minfadianzhiding de santiaoluxian) , Private Law Review(sifa) , No.2 , 2011.

1964 and the Hungarian civil code, which was once revised in 1978. Then the legislature believes that the economic reform was just started, and it is difficult to make a perfect civil code as the society was dramatically changing. The legislature decided to dissolve the drafting group and suspended the drafting of the civil code. In its opinion, China should firstly formulate separate parts of private law, and the civil code would be issued when the conditions are suitable.

Under these circumstances, China issued the Economic Contract Law in 1981. To meet the need of opening-up and international business, the Law on the Foreign Economic Contract was published in 1981. While the draft of this law was under the organization of the Ministry of Foreign Trade, the special nature of foreign trade relations determined that the theory from Soviet economic law cannot be the basis of the law. Even though the name of the law remained the concept "economic law", which was from the Soviet Union, both the structure and contents through the whole law mainly referred to the Anglo-American Contract Law and the CISG (United Nations Convention on Contracts for the International Sale of Goods). Until 1986, the General Principles of the Civil Law was passed. As it was based on the first series of the Draft of Civil Law, it was also affected by the Soviet civil legislation and Hungarian Civil Code.¹⁷ To summarize, due to the political taboos, the laws during this time were mainly based on the theories of the Soviet Union and socialist countries of Eastern Europe.

B. Reorganizing of Civil Code drafting since 1998

In 1997, the 15th National Congress of the CPC was successfully held in Beijing. On the conference, the CPC proposed to rule the country by law and raise China to a state ruled by law. Consequently, the legislature promised to build a socialist legal system before 2010. With such a target, a group for drafting civil law was set up again. This time the group put forward a plan that the drafting

¹⁷Liming Wang, Youjun Zhou, the development of civil law during the reform and opening-up (yugaige kaifang tongxing de min faxue), Jilin University Journal Social Sciences Edition, Vol.49, No.1, Jan, 2009.

process was divided into three steps.¹⁸The first step was to formulate a unified contract law instead of the three separated contract laws before 1999. Then it would take five years to complete the Real Right Law. After that, a civil code may be prepared. In fact, in spite of some disputes emerging, the Contract Law was passed in March 1999 as planned. However, according to the instruction accelerating the process from Peng Li, the chairman of NPC Standing Committee at that time, the drafting group was required to submit a civil draft before the end of 2002. Subsequently, a civil draft was delivered and examined for the first time in December 2002. In June 2004, the legislative plan was modified once again. The work to draft the civil code was suspended again. After overcoming a great deal of obstacles, including persuading many NPC members to accept it, having been discussed 8 times, the Real Right Law of the People's Republic of China was published in March 2007.¹⁹Two years later, Tort Liability Law of People's Republic of China was completed and come into force.

4. Conclusion

The science of civil law of China just likes a river flowing for one hundred years on the Chinese land. Though the path was twisty, rough and once suspended, this river has never change its direction. Under these circumstances, many civil drafts were proposed while most of them had never been effective. Owing to the reform and open-up, the science of Chinese civil law has achieved great progress and outstanding success in recent thirty years. The way to a new civil code may be expected in the next one or two decades.

¹⁸Jiming Yi, three ideas to make the China Civil Law(zhongguo minfadianzhiding de santiaoluxian), Private Law Review(sifa), No.2, 2011.

¹⁹Limin Wang, The Review and Prospect of Making China Civil Code(zhongguo minfadianzhiding de huiguyuzhanwang), LegalForum, Sep. 2008, No.5(Vol.23, Ser.No.119).