

# The codification of civil law in China: history, current situation and prospective

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**The codification of civil law in China:** history, current situation and prospective.

**ABSTRACT.** The codification of civil law in the traditional Chinese legal system (before 1907). The codification of Chinese civil law in the first part of 20<sup>th</sup> century (from 1907 to 1931). The codification of Chinese civil law in the PRC (from 1954-2003). The 2002 draft civil code; A. Structure; B. Content; C. Current debates on the codification of the Chinese civil law.

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## **1 - The codification of the civil law in the traditional Chinese legal system (before 1907)**

In *communis opinio*n, the compilation of the legal rules in the history of China began with *Fajin* (*Classics Of Law*), a legal work written by the legalist *Likui* (455-395 B. C.). However, the codification of the Chinese law in the sense of the systematic elaboration of a law code dated back to a historical event called “engraving the rules of punishment on Ding” (*Zhu Xing Shu Yu Ding*), which was

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realised by the famous legalist *Shang Yang* (390-338 B.C.)<sup>1</sup>. After this event, almost all the governors of China began composing and enacting some written legal codes, whose principal part was called “*Lü*” in the feudal history of China (4<sup>th</sup> B.C.- 1911)<sup>2</sup>. The traditional Chinese codification consists of an amalgam of criminal law and administrative law (*Zhu Fa He Ti*) while the civil law remains fundamentally in customary form until the promulgation of the civil code of the Republic of China in 1929<sup>3</sup>. The four most often cited reasons among experts for

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<sup>1</sup> *Ding* is an ancient cooking vessel. In the Period of Battling States (*Zhang Guo* Period, 475-221 B. C.), as a measure of punishment, the kings of China put the prisoners into *Ding* filled with boiled water or oil. See, Yong Zheng, *Cong Zhongguo Fa Dian Hua Chuan Tong Kan Zhong Guo Ming Fa Dian De Bi Yao Xing (The Need of the Codification of the Chinese Civil Code From Point of View of the Tradition of the Chinese Codification)*, in Luo Ma Fa, *Zhong Guo Fa, Ming Fa Fa Dian Hua Zai Zhong Guo (Roman Law, Chinese Law and Codification of Civil Law in China)*, Beijing, 1995, 162 p.; Fen Li Xia, *Fa Dian Bian Zhuan Lun (A comparative Study of Codification)*, Qing Hua University Press, Beijing, 2003, 42ss.

<sup>2</sup> It is well-known that the most important *lü* in the Chinese history is “*Tang lü*”, namely, *lü* of Dynasty Tang (618-907 A.C.), which provided to the later dynasties, even to the surrounding foreign countries such as Japan, a new and revolutionary model of code compilation. See, Liu Jun Wen (editor), *Tang Liu Shu Yu (Commentary on Tang Lü)*, Beijing, 1982, 1; Zhang Jun Fang, *Zhong Guo Fa Zhi Shi (History of the Chinese legal System)*, Beijing, 1983, 205ss.; Yong Zheng, *Cong Zhong Guo Fa Dian Hua Chuan Tong Kan Zhong Guo Ming Fa Dian De Bi Yao Xing*, cit., 163; Norio K, *Aspetti e problemi della storia giuridica del Giappone: la recezione del diritto cinese e del sistema romanista*, in *Index* 20, 1992, 365ss.; J. Gilissen, *Diritto cinese, Antichità e tradizione*, in *Enciclopedia giuridica*, XI, Roma, 1989, 7-8pp.

<sup>3</sup> In this sense, cfr. R. David, *Les grands systèmes de droit contemporain*<sup>8</sup>, Paris, 1982, 5; E. J. Epstein, *Codification of Civil Law in the People's*

the absence of the codification of the civil law in the Chinese traditional legal system are as follows<sup>4</sup>:

**a. *The strong influence of Confucianism in the Chinese politics***

From the Dynasty Western Han (206 B.C.- 9. A.C.), the Chinese emperors used Confucianism as a spiritual instrument to govern the country. The founder of Confucianism, Master Kong (K'ung, Confucius, 551-479 B.C.), believed that the basis of a stable, unified, and enduring social order was to be found in the religion of Dynasty Zhou (11th century B.C. - 771 B.C.), in its rituals (*li*)<sup>5</sup>. He interpreted these not as sacrifices asking for the

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*Republic of China: Form and Substance in the Reception of Concepts and Elements of Western Private Law*, in U.B.C. (*The University of British Columbia Law Review*), 32, 1998, 162.

On the history of the Chinese civil law, see Kong Qing Min/Hu Liu Yan/Sung Ji Ping, *Zhong Guo Min Fa Shi (History of the Civil Law in China)*, Ji Lin Ren Min Press, Chang Chun, 1996; Zhang Ju Fang, *Zhong Guo Min Fa Tong Shi (General History of the Civil Law in China)*, FuJiang People's Press, Fu Zhuo, 2003.

<sup>4</sup> Zhang Ju Fang, *Jun Di Ji (Selection of Zhang Ju Fang's Work)*, Beijing, 1990, 78ss.; Id., *Zhong Guo Min Fa Tong Shi (General History of the Civil Law in China)*, cit., 2003, 22ss.; Huai Xiao Feng, *Zhong Guo Ming Fa Mei You Fa Dian Hua De Yuan Yin (The Reasons of the Non-Codification of Chinese Civil Law)*, in Luo Ma Fa, *Zhong Guo Fa, Ming Fa Fa Dian Hua Zai Zhong Guo*, cit., 193ss.; Fen Li Xia, *Fa Dian Bian Zhuan Lun (A comparative Study of Codification)*, Qing Hua University Press, Beijing, 2003, 42ss.

<sup>5</sup> On the function of *Li* in the Chinese traditional legal system, see J. Gilissen, *Diritto cinese, Antichità e tradizione*, cit., 3ss. e 6ss.; Mi Jian, *Diritto cinese e diritto romano*, in *Index* 19, 1991, 344ss.; P. Corradini, *Diritto e commercio in Cina: la tradizione e la storia*, in *Diritto commerciale e arbitrato in Cina, tra continuità e riforma* (edited by G. Crespi Reghizzi e R. Cavalieri), Milano, 1991, 6; Yan Zhenshan, *La tradizione filosofica*

blessings of the gods, but as ceremonies performed by human agents and embodying the civilized and cultured patterns of behaviour developed through generations of human wisdom. Moreover, Confucius applied the term "ritual" (*li*) to actions beyond the formal sacrifices and religious ceremonies to embody the ethical core of Chinese society. According to a famous interpretation made by the famous philosopher *Dong Zhongshu* (179-104 B.C.), the "ritual" means mainly the observance of three Gang and five Chang. Three Gang indicate three most fundamental human relationships: that between a ruler and his subjects, between a husband and his wife; between a father and his sons. Five Chang is composed by five enduring ethical rules: a) benevolence towards others (*Ren*); b) righteousness (*Yi*); c) practise of the traditional ritual and propriety taught by the ancestry (*li*); d) wisdom (*zhi*); e) honesty and trustworthiness (*Xin*)<sup>6</sup>. In view of Confucius, the strict punishment of the thief is not a good way to struggle against the crime of the theft, but teaching every individual not to steal from others and to observe rigorously the social-ethical rules, seems decisively better. In order to realise and safeguard a peaceful and civilized

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*del diritto romano e del diritto cinese antico e l'influenza del diritto romano sul diritto cinese contemporaneo*, in *Rivista internazionale di filosofia del diritto*, IV serie, 69, 1992, 583pp.

<sup>6</sup> See J. A. Berling, *Confucianism*, in *Focus on Asian Studies*, Vol. II, No. 1 *Asian Religions*, 1988, 5-7; J. Gilissen, *Diritto cinese, Antichità e tradizione*, cit., 10ss.; P. Corradini, *Diritto e commercio in Cina: la tradizione e la storia*, in *Diritto commerciale e arbitrato in Cina, tra continuità e riforma* (edited by G. Crespi Reghizzi e R. Cavalieri), Milano, 1991, 6.

society, moral education plays a more important role than strict punishment by law<sup>7</sup>.

Furthermore, in conformity with the spirit of “ritual”, the parties were encouraged to resolve their disputes through the conciliation or arbitration conducted by third parties whom both parties trusted. The frequent settlement of disputes by means of conciliation and arbitration gave many opportunities for the application of the customary civil law<sup>8</sup>.

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<sup>7</sup> In light of the above, “the traditional Chinese conceptions of law thus equated law with punishment. Law was conceived as a political instrument in a vertically-orientated society, but this did not mean all relations were “public.” “law” was by definition “public” and “criminal” and the concept of “civil” or “private” law did not exist”. See, E. J. Epstein, *Codification of Civil Law*, cit., 162.

<sup>8</sup> As a matter of fact, *Mingshi*, the Chinese word for “civil”, considered as a “minor matter” and handled on the authority of the locale magistrates, is opposed to *Xingshi* “Punishment matters”, regarded as an important matters and reviewed by upper levels. See K. Bernhardt/P.C. Huang, *Civil Law in Qing and Republican China: the Issues*, in K. Bernhardt/P.C. Huang, *Civil Law in Qing and Republican China*, Stanford University Press, California, 1994, 1s; P. C. Huang, *Civil Justice in China, Representation and Practice in the Qing*, , Stanford University Press, California, 1996, 5.

As to the traditional system of the dispute resolution in Qing Danasty, see M. A. Macauley, *Civil and Uncivil Disputes in Southeast Coastal China, 1723-1820*, in K. Bernhardt/P.C. Huang, *Civil Law in Qing and Republican China*, cit., 85ss.; M.A. Allee, *Code, Culture and Custom: foundations of Civil Code Verdicts in Nineteenth-Centry County Court*, in K. Bernhardt/P.C. Huang, *Civil Law in Qing and Republican China*, cit., 122ss.; P.C. Huang, *Civil Justice in China, Representation and Practice in the Qing*, , cit., 1pp.

However, P. C. Huang, *Codified Law and Magisterial Adjudication in the Qing*, in K. Bernhardt/P.C. Huang, *Civil Law in Qing and Republican China*, cit., 142ss., urges that in civil matters, the courts in the traditional society of China, at least in the Qing Dynasty, “acted as judges upholding the written code”. See also P. C. Huang, *Code*,

### **b. Social structure and the centralisation of the political power**

The lack of a civil code in Chinese history was also a result of the pyramid structure of the society and the centralisation of the political power in the hand of the emperors. Before the takeover of the political power by the communists in China (1949), the Chinese society was structured according to the *gens* system (*Zong Zhu Zhi Du*)<sup>9</sup>. The smallest social unit was the family, the chief of family (*Jia Zhang*), similar to the *paterfamilias* in Roman Law, had powers to punish, almost without limitation or any prior consent from the government, any members of his family, even to kill them (something like the *ius vitae et necis* in the Roman Law). The chief was also free to run the whole property of his family as its sole owner. The family group, families originating from the same ancestors and living in the same territory, formed a *gens* (*Zhongzhu*). The chief of *gens* (*Zhu Zhang*) was elected directly by the different chief of the families pertaining to the same *gens* and held the identical powers over each chief of such families as that the latter possessed over the member of his own family. Above the chief of *gens* stood the mandarins, the administrative officials appointed by the

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*Custom and Legal Practice in China*, Stanford University Press, California, 2001, 7pp.

<sup>9</sup> For the details about the *Zhong Zhu*, see, Ch'ü T'ung-Tsu, *Law and Society in Traditional China*, Paris-La Haeye, 1961, 12ss.; J. Gilissen, *Diritto cinese, Antichità e tradizione*, cit., 24; Lihong Zhang, *Consuetudini cinesi e codificazione del diritto civil cinese*, in *Assocorce News*, Rome, 1998, 44; Gao Qicai, *Zhong Guo Xi Guang Fa (The Chinese Customary Law)*, Chang Sha, 1995, 13 and 20pp.

emperor, the highest figure on the social pyramid<sup>10</sup>. Obviously, such social structure did not respect the value of the individual and blocked the development of the individualism, which is the ethical and social basis of the civil law in light of the experience of the Roman Law<sup>11</sup>.

### c. *Economic Policy*

The economic policy pursued by the Chinese governors, so-called “the stimulus to the agriculture, the suppression to the commerce” (*Zhong Rong Yi Shang*) also led to the no-codification of the Chinese civil law. The Chinese emperors shared the same opinion as *Adam Smith*, believing that the property in the world could be created only through the agricultural activities and never commercial activities. Businessmen were seen to earn money by tricks, rather than by honest work, so commercial activities were to be suppressed. Due to the application of such economic policy, the commercial economy never developed fully during the entire history of China. Given that, as the history of Roman Law proved,

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<sup>10</sup> As result of such social structure, the chief of each family (*Jia Zhang*) decided the civil controversies between the members of his family. Accordingly, the chief of the *gens* (*Zhu Zhang*) used to resolve the civil conflicts between the different families among his *gens*. The pre-existing customs were applied to resolve all of such civil controversies. The Mandarins intervened only for the important controversies regarding to the civil matters, in particular, in the event that it was lack of the customary rules for the resolution of the controversies.

<sup>11</sup> The protection of individualism is a fundamental basis of the development of the Roman private law, even if the Roman Law attaches importance to the social ideas and the protection of the collective interests. See, F. De Martino, *Individualismo e diritto privato romano*, Torino, 1999, 51.

the development of the commercial economy is the prerequisite of the development of the civil law, such situation caused directly the no-codification of the Chinese civil law in the Chinese traditional legal history.

#### **d. *The absence of the lawyers***

The absence of lawyers throughout this period of history is also a reason for the lack of a Chinese civil code.

#### **2. The codification of the Chinese civil law in the first part of 20<sup>th</sup> century (from 1907 to 1931)**

After its defeat by Japan in 1895 and the invasion of the eight foreign countries in 1900 with pretext of the putdown of the Boxer Rebellion, China became a semi-feudal and semi-colonised country. The emperor of the Dynasty Qing in that period, *Guanxu*, intended to learn from the Japanese experience and realise some legislative and political reform. In this historical context, the first tentative steps for the codification of the Chinese civil law began. In 1911, after four years of work, the first draft of the Chinese civil code was completed. It was named "Draft of Civil Code of the Great Dynasty Qing" (*Da Qin Ming Lü cao an*). It modelled itself on the Japanese civil code, in substance on the BGB, being composed of 1,569 articles and 5 parts: the General Part (*Allgemeinen Teil*), Obligations (*Schuldrecht*); the Rights Over Things (*Sachenrecht*), Family and Succession (*Erben*). Its first three parties were drafted directly by two Japanese jurists (*Shidakotaro* and *Matsuokamasayoshi*)<sup>12</sup> and the other two

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<sup>12</sup> China and Japan are neighbouring countries that share the same culture and origin. Japan was the nearest modernized and westernized country to China. So it was convenient for Chinese young men to go to Japan to study western modern sciences and knowledge, including law. After completing their studies in Japan, some of them came back and introduced Japanese laws and legal works to China.

parts by the most experienced Chinese jurist *Sheng Jiaben* in the beginning of 20th century<sup>13</sup>. Even if, due to the demolition of the Dynasty Qing in 1911 by the Republic of China the “Draft of Civil Code of the Great Dynasty Qing” (*Da Qin Ming Lü Cao An*) was not enacted, this draft constituted the basis of the further work of the codification, in particular, it was first to adopt some important civil law terms, such as *Zivalfähigkeit* and *Rechtsgeschäfte* etc.

In 1925, the government of the Republic of China completed its draft of the civil code on a basis of the “Draft of Civil Code of the Great Dynasty of Qing”. This “Draft of Civil Code of the Republic of China” contains 1,745 articles and its structure is identical to the “Draft of Civil Code of the Great Dynasty of Qing”<sup>14</sup>. It wasn’t promulgated, but upon the authority of the Ministry of

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Most of them were substantially involved in the legal reform campaign. Additionally when Qing government began its legal reform movement, it was decided to invite foreign legal experts to be the government counsels so as to help revise Chinese laws. However, all the invited lawyers came from Japan. These Japanese attorneys on the one hand helped Qing government to revise, draft and examine existing laws, and on the other taught law in both public and private schools. As a result, both Chinese legislation and legal theory were substantially influenced by Japan. Since modern Japanese law was introduced from Germany, Japanese law was indirectly derived from the Roman law tradition. Therefore, Chinese law followed the same path.

<sup>13</sup> Ye Xiao Xing, *Zhong Guo Fa Zhi Shi* ( *The History of the Chinese Legal System*), Beijing, 1992, 289-290.

<sup>14</sup> Zhang Junhao, *Ming Fa Xue Yuan Li* (*Fundamental Elements of Science of Civil Law*), Beijing, 1995, 82.

Justice of the Republic of China, it could be cited by the tribunals in their judgments<sup>15</sup>.

The third attempt to codify the civil law in China occurred from 1929 to 1931 and led to the promulgation of “the Civil Code of the Republic of China” by the government of the Chinese Nationalist Party Kuo Ming Dang. As its structure proves clearly<sup>16</sup>, this first Chinese civil code, consisting of 1,225 articles and 5 parts, modelled essentially the BGB, Japanese civil code and the Swiss Law of Obligations (1911). From the technical point of view, this code was well drafted and uses precise legal terms<sup>17</sup>. Although it was abrogated by the newly established Communist authorities in 1949, the Civil Code of the Republic of China remains in force in Taiwan today.

### 3. The codification of the Chinese civil law in the PRC (from 1954-2003)

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<sup>15</sup> Additionally, one of the principal members of this drafting committee is Mr. Wang Chonghui, an expert of law who translated the German Civil Code (BGB) from German into English in 1907. Till now, the translation made by him is considered as the most precise among all English versions of the BGB. See *The German Civil Code*, translated and annotated, with an Historical Introduction and Appendices, by Chunghui Wang, Steven and Sons Press, London, 1907. Till now, the translation made by him is still considered as the most precise among all English versions of the BGB.

<sup>16</sup> See the attachment about the structure of Civil Code of Republic of China (1929-1931).

<sup>17</sup> For an analysis about the Civil Code of Republic of China, see the article written by the most prominent civilist in Taiwan, Wang Che Chian, *Taiwan Ming Fa He Shi Chang Jin Ji (Civil Law in Taiwan and Market Economy)*, in *Fa Xue Yuan Ju (Studies on Law)*, 2/1993, 23ss. Also, see, Hsieh Ming Kuan, Wang Wen Chieh, Li Ch'ing T'an, *I rapporto tra il diritto civile di Taiwan e il diritto romano*, in *Index*, 24/1996, 471ss.

The first movement of the PRC to draft a code of socialist civil law began in 1954. In light of the Soviet codification experience, the drafting committee of the Chinese Communist government finished preparing a working paper in December 1956 with 4 parts featuring more than 500 articles: a) General provisions, b) Ownership, c) Obligations d) and Succession. Some political movements during 1956 to 1960 interrupted this first step toward codification.

In 1962, under the direct instruction of *Mao Zetong*, the PRC attempted for the second time to prepare a civil code. Completed in July 1964, the new draft was composed of three parts with 252 articles: General Provisions, Ownership and Transmission of the properties. This draft of civil code gave up almost completely the use of any legal terms and was filled with the political slogans. The draft de-emphasized the duties of the parties over their rights. For example, in this 1964 draft, references to obligations arising from torts (*Unerlaubte Handlung*), unjust enrichment and *negotiorum gestio* are completely omitted and the intellectual property rights were replaced by a system of encouragement and rewards. Due to the Culture Revolution (1965-1975), this draft was not promulgated<sup>18</sup>.

Together with the well-know economic reforms in 1979, the Chinese government launched legislative reforms. After the opening of PRC to the world, the first special civil law, *Law of Equity Joint Venture* was enacted on July 1, 1979, aiming at attracting international investment and introducing high technology to China.

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<sup>18</sup> For all, see, Zhang Junhao, *Ming Fa Xue Yuan Li*, cit., 82; E. J. Epstein, *Codification of Civil Law*, cit., 163.

At the beginning of 1980, China was still a planned economy and Chinese scholars were influenced strongly by the Soviet School<sup>19</sup>. Under the influence of the famous Soviet theory of economic law (*Pashukanis*), the "*Law of PRC on Economic Contracts*" was enacted on December 13, 1981. The majority of the Chinese civil law scholars were opposed to such theory, saying that all commodity relationship are property relationship governed by civil law and that economic law is merely the study of the occasion when the administrative law affects the applications of civil law. In 1982, having realised with success the economic reform in the rural areas, Chinese legislator decided to draft a civil code. The debate between the civil law and the economic law schools of though had a great effect on the drafting. The civil law scholars wanted to draft a civil code applicable to all economic activities and including numerous and detailed provisions on contract and intellectual property. The proponents of economic law disagreed<sup>20</sup>.

While this debate continued, the Chinese legislature promulgated *Law of Marriage* (September 1, 1980), *Law of Trademark* (August 23, 1982), *Law of Patent* (March 12, 1984), *Law of Succession* (April 10, 1985) and *Law of PRC on Economic Contacts involving Foreign Interest* (March 21, 1985). In 1986, the Chinese legislature promulgated a very

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<sup>19</sup> Jiang Ping, *China's Economic Structural Reform and Legislation*, in *Chinesisches Wirtschaftsrecht, Internationale Tagung in Lausanne 5 und 6 1986* (edited by A. E. Von Overbeck), Lausanne, 1986, 9ss.; Münzel, *Allgemeine Grundsätze des Zivilrechts der VR China*, in *Wirtschaftrecht und Außenwirtschaftsverkehr der Volksrepublik China* (edited by Norbert Horn and Rolf A. Schütze), Berlin, 1987, 415ss.

<sup>20</sup> For all, see E. J. Epstein, *Codification of Civil Law*, cit., 165.

important law -“*The General Principles of Civil Law*”. With its 156 articles, it is not a civil code, but a code generally co-ordinating the civil provisions. Two principle reasons caused the enactment in 1986 of “*The General Principles of Civil Law*”, instead of a civil code<sup>21</sup>:

a) China needed urgently a law governing the civil relationships to guarantee in legislative form the principle results of the economic reform. However, the reform was not completed. A civil code with detailed provisions would risk future reform<sup>22</sup>.

b) The debated between the civil law and the economic law schools of thought seemed endless. The legal scholars were not qualified to draft a good civil code, due in part to China’s a so-called “nihilism of laws” period from 1958 to 1977, in which the legal research and teaching was completely interrupted<sup>23</sup>.

In conformity with the Chinese pragmatic method of *Deng Xiaoping* to deal with political matters<sup>24</sup>, the Chinese legislature decided finally to promulgate *The General Principles of Civil Law*, in order to meet urgent need of regulating the principal and most important civil law institutions. The GPCL is the origin of China’s current

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<sup>21</sup> For the general introduction of the GPCL, see, Zhu Yikun, *Concise Chinese Law*, Beijing, 2003, 86pp.

<sup>22</sup> E. J. Epstein, *Codification of Civil Law*, cit., 165.

<sup>23</sup> Jiang Ping, *Il diritto romano nella Repubblica Popolare Cinese*, in *Index*, 16, 1988, 367.

<sup>24</sup> Deng Xiao Ping says that “it is not important if a cat is black or white, it is a good cat that can grasp rats”.

civil legislation<sup>25</sup>. Limited by time that I have, I will just emphasise only the following three aspects of this law:

a) It defines the jurisdiction of the civil law in China, clarifying the distinction between the civil law and economic law. According to art. 2 of GPCL, the civil law principally governs property relationships between subjects of equal status, namely horizontal property and economic relationships. Economic management by government, economic or administrative management, vertical relationships between the state and enterprises, or within enterprises, etc. are not economic relations between subjects of equal status and are governed by economic law and administrative law, generally not by civil law.

b) It adopted many legal concepts and institutions of the Roman law and pandetistic law, such as legal person, juristic acts (*Rechtsgeschäft*), limitation of actions (*Verjährung*), civil liability (*Zivilhaftung*) and so on, and established some important principles of civil law, as its Article 4 states that “in civil activities, the principles of voluntariness, fairness, making compensation for equal value, honesty and credibility shall be observed”.

c) It is characterised by many Chinese-styled and socialist ideas. For example, the Article 7 states that: “civil activities shall have respect for social ethics and shall not harm the public interest, undermine state economic plans

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<sup>25</sup> In detail, see, Jiang Ping, *Grundzüge des chinesischen Vertragsrechts*, in *Wirtschaftsrecht und Außenwirtschaftsverkehr der Volksrepublik China* (edited by Norbert Horn and Rolf A. Schütze), Berlin, 1987, 33ss.; Ulrich Manthe, *Bürgerliches Recht und Bürgerliches Gesetzbuch in der VR China*, in *Jahrbuch für Ostrecht* 28/ 1987, 11ss.; Wang Yanfeng, *Die “Allgemeine Grundsätze des Zivilrechts der Volksrepublik China” vom 1.1.1987 und das Bürgerliche Gesetzbuch der Bundesrepublik Deutschland. Eine rechtsvergleichende Untersuchung* (Dissertation of Doctorate, Münster, 1989).

or disrupt social economic order"; its article 6 considers expressly the state police as one of sources of the civil law; The article 134 (9 and 10) indicates as the methods of bearing civil liability the elimination of ill effects and rehabilitation of reputation and extension of apology.

With the GPCL of 1986, China decided to enact many other special civil laws in place of a unified civil code. This legislative policy was carried out from 1986 to 2003. In this period, the Chinese legislator promulgate the following important civil laws:

*Law of Wholly Foreign Owned Enterprise* (April 12, 1986, mod. October 30, 2000)

*Law of Bankrupt* (December 2, 1986);

"*Law of PRC on Technology Contracts*" (June 23, 1987, applied to the technology contracts concluded between or among domestic legal persons or individuals);

*Law of Sino-Foreign Cooperative Joint Venture* (April 13, 1988 mod. October 31, 2000)

*Law of Copyright* (July 9, 1990, mod. Oct. 27, 2001);

*Law of Adoption* (Dec 29, 1991, mod. Nov. 4, 1998)

*Law of Company* (Dec 29, 1993, mod. Dec. 25, 1999);

*Law of Anti Unfair-Competition* (Sept. 2, 1993);

*Law of Negotiable Instruments* (May 10, 1995);

*Law of Guarantee of Obligations* (Jun 30, 1995)<sup>26</sup>;

*Law of Insurance* (Jun 30, 1995, mod. Feb. 20, 2003)

*Law of Partnership Enterprise* (Feb. 23, 1997)

*Law of Securities* (Dec. 29, 1998)

*Law of Contracts* (March 15, 1999)

*Law of Sole-personal Enterprise* (Aug 30, 1999)

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<sup>26</sup> Its Italian version "*Legge sulla garanzia della obbligazioni della R.P.C.*" is translated by Lihong Zhang and Aldo Petrucci and published in *Diritto commerciale internazionale*, n.3/1997.

*Law of Trust*<sup>27</sup> (April 28, 2001)

Here, we need spend more time on the 1988 and 1993 amendments of the Chinese 1982 constitution, as well as on their important impact to the development of the Chinese civil law. In 1988, the Chinese parliament modified the art. 11 of the constitutional law of PRC. Before this event, no private person or body could use land, because its was owned exclusively by the State or Collective units. After this reform, even if State or the Collective units continue to own the land, the non-state juristic subject has been permitted to use the land, transfer this right of use and even to give it in mortgage. So, in this way, the right of use of stated-owned lands qualified as an *ius in re aliena* and this land institution became a new basis for the further development of Chinese civil law.

At the beginning of 1992, the Chinese political leaders decided to abandon the planned economy and to gradually set up a market economy. Accordingly, China modified its Constitution in 1993, replacing the words “planned economy” with “market economy”. Consequently, the majority of the abovementioned laws after 1993 are produced in the spirit of a socialist market economy. In particular, the Chinese parliament adopted in 1999 an unified “*Law of Contracts*”<sup>28</sup>, in place of the

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<sup>27</sup> See, W. Hutchens, *The PRC's First Trust Law: Trusts without Chinese Characteristics?* in *China Law and Practice*, June 2001, 18; R. Cavalieri, *Le leggi sui trust della Repubblica Popolare Cinese*, in *Trust*, II, 2002, 187ss.

<sup>28</sup> Its Italian version, *La legge sui contratti di R.P.C.*, translated by L. Formichella e E. Toti, is published in *Roma e America. Diritto romano comune*, vol. 7, 1999, 324ss. and its special part appears in the same journal, vol. 11, 2001, 191ss.

As to a concise analysis of the Law of Contract of P.R.C., see P. Rescigno, *Appunti sulla legge della Repubblica Popolare Cinese sui contratti*, in *Roma e America. Diritto romano comune*, 8, 1999, 219ss.; S.

previous three contractual laws: "Law of PRC on Economic Contracts" (1981), "Law of PRC on Economic Contracts involving Foreign Interests" (1985), "Law of PRC on Technology Contracts" (1987). While the western industrialised countries are emphasising the social function of contract<sup>29</sup>, China moves to the opposed direction, providing greater guarantees for the freedom of contract and the protection of the rights of individuals. The new law recognised the freedom of contract for the first time (the Article 4: Any party is entitled to enter into a contract voluntarily under the law, and no entity or individual may unlawfully interfere with such right).

In drafting the new Contract Law, the Chinese legislators referred extensively to the BGB, the Italian civil code and the UNIDROIT Principles of International Commercial Contracts<sup>30</sup>. Moreover, for its entrance to the WTO, China emended on a large scale the laws regarding the protection of IP and Foreign investment at the

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Schipani, *La nuova legge cinese sui contratti e il diritto romano come base di essa e della comunicazione con i codici del sistema romanistico*, in *Roma e America. Diritto romano comune*, 8, 1999, 225ss.; Zhu Yikun, *Concise Chinese Law*, cit., 144ss.

As to the preparation of the *Law of Contracts*, see Jiang Ping, *Un progetto di una legge contrattuale unitaria della Repubblica Popolare Cinese*, translated by Lihong Zhang, in *Rivista del diritto civile*, 1, 1998, 92ss., (the Spanish version of this article appears in *Roma e America. Diritto romano comune*, 5, 1998, 244ss).

<sup>29</sup> D. Medicus, *Abschied von der Privatautonomie im Schuldrecht?* München, 1994.

<sup>30</sup> Zhang Yunqing/Huang Danhan, *The New Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts: A Brief Comparison*, in *Rev. dr. unif.*, 3/2003, 429ss.

beginning of the third millennium, in accordance with TRIPS and TRIMS of WTO.

From 1986 to 2002, many of these special laws were modified for in order to adapt to the changing social and economic environment, (even the Law of Marriage of 1981 was emended fundamentally in 2001).

Due to these rapid changes in the laws and the huge volume of interpretations and rules of implementation, China needed to safeguard the correct and coherent implementation of the laws as well as the transparency of its domestic laws. This need became more urgent after the introduction of the Constitutional principle "Rule of the law" in the 1999 reform of the Constitutional Law of PRC of 1982 (art. 5) and after China's entrance to WTO at the end of 2001.

However, many provisions of the GPCL and most of the said special laws are very abstract. In order to make them applicable to resolve concrete cases, the legislative and jurisdictional bodies made hundreds of the detailed interpretations about them by establishing the regulations for their implementations. Such interpretation takes the form of a systematic comment, almost article per article. Perhaps, no legislative or jurisdictional body in Western countries has such power. For example, GPCL is composed only of 156 articles but its interpretation made by the Supreme Court in 1987 consists of more than 200 articles. So far, China has no body, like the constitutional court, to control the constitutional legitimacy of laws and their interpretations. So, the conflict, even the contradiction, among the Chinese laws and their related regulations or interpretations is frequent occurrence and such conflicts serve as serious obstacles to the realisation of the Rule of Law in China.

## 4 - The 2002 draft of civil code

Considering that the development and deepening of reform and opening-up has laid the most solid social groundwork for the civil code, the Chinese legislature decided to draft a civil code at the beginning of 2002. The intent was to harmonise the existing civil laws and their interpretations, as well as to guarantee their correct and efficient application. This new project of codification of the Chinese Civil law was to take five years. On December 23, 2002, the Chinese parliament adopted its first draft.

According to this draft (1209 articles), the Chinese civil code is divided into 9 parts: 1: General part (117 art.); 2. Rights over the things(330 art.); 3. Contract (428 art.); 4. Personal Rights (29 art.) (*Persönlichkeitsrecht*); 5. Marriage (51 art.); 6. Adoption(34 art.); 7. Succession (37 art.); 8; Torts (*Delikte*) (68 art.); 9. Application of law in civil relations with foreigner (95 art.).

In view of the legislator and the majority of the scholars and, this code will be an unified code not only for the civil law but also for the commercial law.

### A. Structure

As far as its structure concerned, the draft has three noticeable characters.

a. This draft is just a preliminary and provisory working paper. The nine parts have been prepared separately and no part refers to the other parts. The general part comes directly from the GPCL with some slight amendments. The Law of Contract (1999) constitutes the third part of draft "Contract"; the Law of Marriage modified in 2001 is incorporated into the draft as the part "Marriage" without any change; the same thing has

happened to the Law of Adoption (1991) and the Law of Succession (1985). In a word, in this moment, the draft can be regarded as the mechanical assembly of its nine parts.

b. It has no “Obligations” section but rather two parts: contract and torts. The Chinese scholars justify this choice with three reasons<sup>31</sup>:

Firstly, the obligation results frequently and principally from the contractual relationship and acts of torts, and occasionally and accidentally from *negotio gestorum* and the unjustified enrichment. The first two kind of relationship are much more complicated than the two latter, justifying the dedication of a single part in our code to each one. The provisions of *negotio gestorum* and the unjustified enrichment can be set forth in the general part.

Secondly, contractual obligations are quite different from those of tort: a) the existence of the contractual liability requires the breach of the contractual duties. Generally speaking, such duties shall be performed towards a determinate juristic subject, not to every person and its content shall be fixed by the parties by the expression of their *consensus*. On the other hand, no tort liability exists without a prior infringement of an absolute right, whose content is defined by law not by the parties. The bearing of tort liability has character of punishment, but that of the contractual liability aims generally to

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<sup>31</sup> Jiang Ping, *Zhi Ding Yi Bu Kai Fang Xing De Ming Fa Dian (Establishment of an Open-Style Chinese Civil Code)*, in Zheng Fa Lun Tang (*Forum on Politics and Law*), 2003/1; Wang Liming, *Lun Zhong Guo Min Fa Dian De Ti Xi (On The Structure of the Chinese Civil Code)*, in *Zhong Guo Ming Fa Dian Qi Chao Shi Lu Lun Zhang (Discussion About The Current Ideas On The Future Civil Code)*, edited by Xu Guo Dong, Beijing, 2001, 120p.

compensate only the damages resulting from the breach of the contract. Otherwise, some institutions, such as the set-off, the right of subrogation cannot be applied to the tort obligations. Due to the freedom of contract, the contractual parties can discharge consensually the contractual liability prior to the performance of the obligations. However, it is impossible in case of the tort obligations.

c. The fifth part called "Personal rights" is a pure Chinese invention, no other civil code in the world provides personal rights as an independent part. According to some Chinese scholars, the civil codes in Europe, even the Napoleon's civil code and BGB, has not protected sufficiently personal rights, thus the future Chinese civil code can correct this defect and exceed the European model by dedicating an independent part of the code to them.

## **B. Content**

A summary of the draft is as follows:

a. The general part derives from GPCL, with the following significant amendments.

a) All provisions in GPCL, on the basis of which, the state policy is the source of civil law and civil activities shall respect the state plans, have been cancelled.

b) The age of having limited *Zivilfähigkeit* in GPCL was defined as 10 years. In this draft, it becomes 7 years.

c) The draft establishes the institution "*usucapio*" (*Ersitzung*). Its article 105 says that: in the case that due to the non use of a right by its owner, the person, who has possessed an immovable thing of the others for 5 years, with the intention to be its owner publicly and continuously, acquires the ownership of such thing.

Accordingly, Article 106 provides that the term of the acquisition of the movable thing by means of *usucapio* is 2 years. It is first time that the P.R.C. recognise legislatively the institution *usucapio*.

b. The Chinese legislator began drafting a special law on the rights over things (*ius in re*) from 1995. The 7 years work of the drafting committee constitutes the second part of the 2002 civil code draft "rights over the things". The most important and interesting points in this part are:

a) It provides that the establishment, modification, alienation and termination of an *ius in re* over an immovable thing (*Grundstück*) produces its effects from the moment that such event is written on the register of the immovable things (art. 15). As to the movable thing (*bewegliche Sache*), differently, its article 25 provides that "the transfer of the ownership of a movable thing and the establishment of a pledge produces effects from the moment of the transfer of the thing, providing that the law has established or the parties have agreed in a different way".

b) Similar to the GPCL, the draft insists the classification of the ownership between the public ownership and that private. However, it advances a new concept so-called "the divisible ownership on the building". According to this concept, the holder of such ownership has the right to own exclusively his dwelling, but can share only the ownership of the part for the common use, together with the owners of the other apartments in the same building and manage with the latter the maintenance of the building and its premises (art. 66).

c) The draft contains many provisions described in the 1995 Law of the Guarantee of Obligations. Besides the traditional methods of guarantees of the obligations, such as, mortgage, pledge and retention, the draft sets out a new method, so-called the guarantee by the transfer (*Ranyu Tangbao, Verkehrsgewähr*) (art. 312-319). This guarantee institution permits the possessor of thing given in guarantee of obligations to use such thing and own its fruit, unless the parties have agreed or the law has established in a different way.

d) The one-year limitation period of action established in the article 136 of GPCL is extended to 3 years in this draft.

c. In the part regarding torts, in principle, the draft qualifies fault as the factor for the attribution of the tort liability. Moreover, according to the draft, objective liability exists in case of damages resulting from the highly dangerous work or objects and the conversion of proving burden shall be applicable in case of the damage to the environment. Many Chinese scholars argue that the fact that “torts” became an independent part in its draft proves the strong influence of common law.

d. The parts about the marriage, adoption and succession are identical to the respective laws, so nothing new has been introduced<sup>32</sup>. The part about the applicable

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<sup>32</sup> Their versions in English are available in Their versions in English are available in <<http://www.international-divorce.com/chinadivorcelaw>>. (The Marriage Law of PRC with a short articles written by Chen Zhen and entited “On the Modification of the Marriage Law of P.R.C., visited on March 19, 2004); <<http://www.qis.net/chinalaw/prclaw38.htm>> (The Adoption Law of the People's Republic of China, visited on March 19, 2004).

laws in civil relations with foreigners involves more international private law than civil law.

The part about the personal rights deserves greater attention given that it is the first time that the provisions about personal rights have become an independent part in a civil.

Structurally, this part is divided into 7 chapters: 1. general provisions(7 articles.); 2. rights of life and health(5 articles); 3. Rights of name and denomination(4 articles); 4. right of portrait(2 articles); 5. right of honor and reputation(4 articles), 6. right of credibility (*Kreditfähigkeit, Xing Yong Quan*)<sup>33</sup> (4 articles); 7. Privacy(4 articles). Pursuant to art. 1 of this part, the personal rights pertaining to a natural person are the following: a) rights of life and health; b). Rights of name; c). right of portrait; d). right of honor and reputation; e). right of credibility (*Kreditfähigkeit*); f). Privacy.

The legal persons have different personal rights with respect to the natural persons. They have only three kinds of personal rights: right of denomination, right of honor and reputation, right of credibility. It means that the legal persons have not the right of privacy.

It is easy to understand the content of all the abovementioned *Persönlichkeitsrecht*. However, the right of

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<sup>33</sup> See. BGB § 824 Kreditgefährdung: (1) Wer der Wahrheit zuwider eine Tatsache behauptet oder verbreitet, die geeignet ist, den Kredit eines anderen zu gefährden oder sonstige Nachteile für dessen Erwerb oder Fortkommen herbeizuführen, hat dem anderen den daraus entstehenden Schaden auch dann zu ersetzen, wenn er die Unwahrheit zwar nicht kennt, aber kennen muss. (2) Durch eine Mitteilung, deren Unwahrheit dem Mitteilenden unbekannt ist, wird dieser nicht zum Schadensersatz verpflichtet, wenn er oder der Empfänger der Mitteilung an ihr ein berechtigtes Interesse hat.

credibility in the draft doesn't seem so familiar for us. Perhaps, it is the first time that such right has been set out in a civil code draft. According to the Chinese, every person is presumably credible in the society, otherwise, it is impossible for the human being to live together in peace. Consequently, the credibility of a juristic subject shall be considered as a personal right. The draft has not given a definition about this right of credibility. According to the prevalent opinion, such right shall be understood as a right belonging duly to any individual and with corresponding economic interests deriving from his (her) capacity evaluated by the *Gemeinschaft*<sup>34</sup>.

The draft sets out three measures to safeguard the right of credibility. Firstly, the institutes in charge of the collections of the proves about credibility shall collect them impartially and objectively. Such institute, for example, KPMG, shall make public such materials under the relevant laws (art. 22). Secondly, the tribunals, the financial institutes, the administrative institutes on the industrial and commercial activities, the institutes of

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<sup>34</sup> Yang Li Xing, *Ren Sheng Quan Fa Lun (On The Law Of The Personal Rights)*, Beijing, 2001, 698; Wang Li Ming, *Min Fa Qing Quan Xing Wei Fa (The Civil Law. The Law Of Torts)*, Beijing, 1993, 299. In reality, this opinion was already expressed more than fifty years ago by Prof. Shi Shang Kuang, the drafter of the Civil Code of Republic of China (1929-1931) and the most prominent civilist in the legal history of China. See, Shi Shang Kuan, *Zai Fa Zhong Lun (On The General Part Of The Law Of Obligations)*, Taipei, 1978 (8<sup>th</sup> ed.), 147.

In my opinion, the right of credibility refers to the general guarantee that a person can offer to the others in relation with his (or her) real capacity of doing something or of abstaining from doing it. Theoretically, it shall be in some way in concomitance with Gaius's concept of the *obligatio*, according to which the object of *obligatio* is not only *dare* and *facere*, but also *prestar*.

quality control of products can (*non must*) file respectively their documents about legal decisions, financial information, business activities and the quality of products (art. 23.) At last, the natural and legal persons have right to examine and copy the materials regarding themselves produced by the institutions in charge of the collection of the proves about the *Kreditfähigkeit*, and to modify the part that is in error.

As the above text mentions, some Chinese civil law scholars are very proud of this part “right of credibility”, considering it as a surpassing point with respect to all modern civil codes<sup>35</sup>. In addition, some scholars suggest to define in the future civil code the right of keeping virgin and that of preventing oneself from the sex harassment as the *Persönlichkeitsrechte*<sup>36</sup>.

### ***C. Current debates on the codification of the Chinese civil law***

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<sup>35</sup> Wang Jiafu, *Er Shi Yi Shi Ji Zhong Guo Ming Fa De Fa Zhang (The Development Of 21<sup>st</sup> Centry of The Chinese Civil Law)*, in *Fa Xue Jia (Jurists)*, 3/2004; Wang Liming, *Lun Zhong Guo Ming Fa Dian De Ti Xi (On The Structure Of The Chinese Civil Code)*, in *Zhong Guo Ming Fa Dian Qi Chao Shi Lu Lun Zhang (Discussion About The Current Ideas On The Future Civil Code)*, edited by Xu Guo Dong, Beijing, 2001, 118ss.; Id., *Shi Lun Wo Guo Ming Fa Dian Ti Xi (On The Structure of the Future Chinese Civil Code)*, in *Zheng Fa Lun Tang (Forum on Politics and Law)*, 2003/1.

<sup>36</sup> See Wang Liming, *Lun Zhong Guo Ming Fa Dian De Ti Xi (On The Structure Of The Chinese Civil Code)*, cit., 120; Long Yi Fei, 2003 *Nian Hun Yin Jia Ting Fa Xue Xue Shu Yan Jiu Hui Gu (Outlook About The Research On The Law Of Family In 2003)*, in *Fa Xue Jia (Jurists)*, 1/2004.

Currently, the debate on the 2002 draft of civil code is very intense in China<sup>37</sup>. In the *communis opinio*, the codification of the civil code is urgently needed and will have an immense impact on the country's transformation from a planned economy to a market economy and to the rule of law<sup>38</sup>.

However, some scholars argue that the codification of the civil code is not necessary in today's China, considering the strong influence of common law in the Chinese civil law, the expansive role of the jurisdictional interpretation (*Rechtsprechung*), the tendency of the decodification in the world and China's non developed research level on the civil law<sup>39</sup>. The discussion among the

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<sup>37</sup> See Xu Guo Dong (edit.), *Zhong Guo Ming Fa Dian Qi Chao Shi Lu Lun Zhang* (Discussion About The Current Ideas On The Future Civil Code), Beijing, 2001, 3-366 pp.

See also many articles published from November of 2002 till now in <http://www.civillaw.com.cn> organised by Forum On The Chinese Civil Law.

<sup>38</sup> Some days ago, on March 14, 2004, the Chinese parliament modified again the Constitution of the PRC (1982). One of the most important highlight of such modifies consists in setting out in art. 13 that "the lawful private property of citizens is inviolable. The government shall protect under the law the private property of citizens and their right of succession". By recognising and protecting expressly and constitutionally the private right of property for the first time in the history of the PRC, such constitutional reform will accelerate significantly the development of the Chinese civil law.

<sup>39</sup> For all, see, Ma Junju, *Mantan Min Fa Zhou Shi He Wo Guo Ming Fa Dian De Zhi Ding* (General Speech About The Tendency of the Civil Law And The Codification of The Chinese Civil Law) in <http://www.civillaw.com.cn/elisor/content.asp> (visited on Jan 30, 2004); Xia Meiyong, *Cong "Wu Quang Fa" Yu "Cai Chang Fa" De Zheng Lun Kan Wo Guo Wei Lai Ming Fa Dian* (Some Views About The Future Chinese Civil Code

proponents of the codification is also very intensive. Prof. Jiang Ping, one of the most famous law scholars in China, asserts that due to the complication of the legal relationships that today's civil law shall govern, it is impossible to regulate all of these legal relationships by a civil code, so the future civil code shall be a small code governing in an abstract way the principals and the most important institution about the civil and commercial law and under this civil code with a few articles, there shall be many special civil laws and *Rechtsprechung*<sup>40</sup>. However, such idea is opposed strongly by the other prominent professor of civil law, Prof. Liang Huixing. In Liang's opinion, the future civil code shall adopt the BGB's structure and set out the many provisions governing in detail the civil juristic relationships, since that the Chinese legislation, research and education on the civil law has been using the legal concept and principles of the German law and the BGB is the fruit of the highest level research on the modern civil law, as well as China need a code with many and detailed articles considering the low level of the

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*Under The Discussion About The Difference Between "Law On Rights Over things" And "Law of Properties", in <http://www.civillaw.com.cn/elisor/content.asp> (visited on Jan 30, 2004). The latter is strongly against the unification between the civil law and the commercial law, which is adopted by the current legislature and agreed by the majority of the law scholars.*

<sup>40</sup> Jiang Ping, *Zhi Ding Yi Bu Kai Fang Xing De Ming Fa Dian (Drafting of an Open-Style Chinese Civil Code)*, in *Zheng Fa Lun Tang (Forum on Politics and Law)*, 2003/1.

Agreeing in principle on this idea, I think that today's model of the Chinese legislation on the civil law represents probably the tendency of the codification of the civil law in the world.

legal education that its judges have received<sup>41</sup>. Moreover, some other civil law scholars suggest that the future Chinese civil code shall emphasize more the importance of the personal rights, establishing in itself a separate part called Personal Relationship and putting such part before the provisions about property law<sup>42</sup>. Even if such discrepancy, the majority of scholars think that the future Chinese civil code shall surpass the Napoleon's civil code and BGB and use many legal institutions and concepts of

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<sup>41</sup> Liang Huixing, *Dan Qiang Guan Yu Ming Fa Dian Bian Zhuang De Shang Tiao Shi Lu (The Current Ideas About The Codification Of The Chinese Civil Law)*, in *Zhong Wai Fa Xue (The Science Of Chines And Foreign Law)*, 2001/1, 1pp.; *Guang Yu Zhong Guo Mingfa Dian Zhiding de Shikao (Thoughts About The Drafting Of The Chinese Civil Code)*, see, <http://law-thinker.com/detail.asp?id=34> (visited on March 2, 2004).

<sup>42</sup> According to such project, the future Chinese civil code shall consist of four parts: I. General Provisions; II. Personal Relationship (with four chapters: Individual, Domestic relations, Legal Person and Succession); III. Property Relationship (with four chapters: Rights Over Things, Rights of Obligations, Contract and Intellectual Property) and IV. Supplementary Provisions (including the applicable laws in civil relations with foreigners). See Xu Guodong, *Ming Fa Dian De Ji Ben Jie Guo (The Principles Of The Structure Of The Future Chinese Civil Code)*, in *Fa Xue yang Jiu (Studies on Law)*, 1/2001.

Similarly, the other Chinese civil scholars think that the future code shall be structured in a different four parts: I. Preface; II. Law of Person (with four chapters: General Provisions, Individual, Legal Person and Other Juristic Subjects); III. Law of Rights (with six chapters: Personal Rights, Rights Regarding Domestic relations, Right of Succession, Intellectual Property, Rights of Obligations, Rights Over Things) and IV Law of Torts. See Ma Changhua/Qing Youtu, *Lun Wo Guo Min Fa Dian De Ti Xi Jie Gou (On The Structure Of The Chinese Civil Code)*, in *Fa Xue (Legal Science)*, 2/2004, 54ss.

the common law<sup>43</sup>. In summary, the current debates about the future Chinese civil code among the Chinese scholars relate principally not to the detailed provisions of the code but its structure.

Finally, it is worth noting a factor almost forgotten completely by the proponents of the codification: the effect of long-existing customs on the effectiveness of a code<sup>44</sup>. China shall avoid the codification experience of some countries of the South-America, where even if the codification of civil code was completed almost 200 years ago, the population complies more with the customs than with the civil code.

## 5. Conclusion

In conclusion, even if the influence of the common law has become noticeable in the Chinese legal system, the fundamental concepts and principals of the Chinese civil law originate from the tradition of Roman law and the German paradigm. However, Chinese legal scholars and the legislature is trying to exceed the Pandectic system

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<sup>43</sup> For instance, the anticipated breach of the contract and the disclosed agency etc.,. See the speeches on the codification of the Chinese civil law made by Prof. Jiang Ping and Prof. Liang Huixing on November 8, 2002 at China University of Political Science and Law (Beijing), in [www.civillaw.com.cn/elisor/content.asp](http://www.civillaw.com.cn/elisor/content.asp) (visited on February 19,2004).

Other important issues include the necessity of keeping the concept "right of obligations" in civil code and that of giving up the concepts of *Rechtsgeschäft*. As to them, see Liang Huixing, *Dan Qiang Guan Yu Ming Fa Dian Bian Zhuang De Shang Tiao Shi Lu (The Current Ideas About The Codification Of The Chinese Civil Law)*, cit., 1pp.

<sup>44</sup> See, Ma Junju, *Mantan Min Fa Zhou Shi He Wo Guo Ming Fa Dian De Zhi Ding (General Speech About The Tendency of the Civil Law And The Codification of The Chinese Civil Law)*, cit.,; Zhang Lihong, *Consuetudini cinesi e codificazione del diritto civil cinese*, in *Assorce News*, Rome, 1998, 44ss.

and include some legal institutions and concepts of the common law in the future Chinese civil code.

Chinese civil law scholars are very interested in the other important activities of codification in the world, such as the 1992 Holland's civil code, the 2002 Brazilian civil code, the current process of the unification of the European Private Law ( in particular, Gandolfi and Lando projects, "common cores" ideas supported by Sacco, Mattei, Graziadei and Monateri and the activities of *Secola* directed by Bianca and Grundmman), as well as the review and modify of the historically important civil codes in Europe, for instance, the recently completed reform of the German law of obligations and the discussion on the modify of the civil codes of France and Italy.

The experience of codification in foreign countries is extremely important for the Chinese legislature. I would like to cite hereby an ancient Chinese poem, written by Shu Shi of Dynasty Song, to prove such importance as the conclusion of my speech.

"A ridge viewed horizontally become a peak, if we see the same mountain vertically"

"The height of the mountain seems changeable according to its distance from us"

"I don't know the real figure of Mountain Lu"

"Because I stay in it!"

So has my presence today outside China been useful for me to understand better the history and future of Chinese civil law.

**A codificação do código civil na China; história, situação atual e perspectiva.**

RESUMO. A codificação do Código Civil no tradicional sistema legal chinês (antes de 1907). A codificação do Direito Civil chinês na primeira parte do século 20 (de 1907 a 1931). A codificação do Código Civil no PRC (de 1954-2003). A minuta do código civil de 2002; A. Estrutura; B. Conteúdo; C. Debates atuais sobre a codificação do Direito Civil chinês.

*Palavras-chave:* Direito civil. Direito civil chinês. História do Direito chinês.

## **Civil Code of the Republic of China - Summary**

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Section 1- General Provisions

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