

## Article

# Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution \*

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### ABSTRACT

*This paper is aimed to introduce the transplantation of western civil codes in Japan, Taiwan and China, with focus on influence of western law on traditional cultures in Asia and on the westernization of Asian laws. This paper points out some features of the process and outcome of the reception of western law in East Asia. First, the western laws were transplanted in Japan, Taiwan, and China to primarily accommodate for social and economic changes that occurred following the shift towards market economies. Second, reception of legal theories of western law played an important role in the westernization of East Asian legal systems. Third, after East Asian countries carried out market economic reforms and underwent a transformation of social change, their legal systems were further revised to embody the western concept of equality and individualism. Additionally, the traditional culture appears to be eroding following the implementation of western-style civil codes. East Asian civil codes are actually reinforcing these personal rights which are used to support economic development.*

**Keywords:** *Legal Evolution, Civil Code, Transplantation, Legal Culture, Japanese Civil Law, Taiwanese Civil Law, Chinese Civil Law*

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## I. INTRODUCTION

In 1898, Japan became the first Asian country to transplant western style civil code which continued to govern the country nearly unchanged for over a hundred years. During the process of drafting debates on the codification and on sources of law were fierce. The conflicts between traditional customs and legal traditions clashed with western ideologies creating a polarized society. Japanese government had to reconcile these conflicts in order to create a socially acceptable code and void the unfair treaties that mandated extraterritorial application of foreign laws. It demonstrated the pluralistic elements that affected the process of reception of western civil code in Asian countries.

After the passage of the Civil Code, Japanese scholars introduced a large number of western treatises so as to interpret the rules provided in the civil code. This made it possible for the officials to correctly apply the Code. Meanwhile, Japanese judges developed large volumes of judgments in order to cope with the emerging legal issues and ensure that the Code remains relevant in the changing society. Thus, Japanese legal scholars and courts contributed to the development of civil law in Japan and promotion of capitalist values.

The Japanese experience with western law could serve as a model for other Asian countries' underground legal reforms since the problems encountered by Japan are likely to be experienced by other Asian countries undergoing legal transition.

In Taiwan, a civil code was first introduced following the Japanese colonial occupation in 1895 (rather than following the Nationalist rule beginning in 1945). Since Taiwan's first Civil Code experience started in 1895, Taiwan was able to receive western civil law earlier than Mainland China. Following the return of Taiwan to the Nationalist Government of China in 1945 and subsequent democratization in the 1980s, Taiwan has enacted many special civil laws to deal with legal issues that emerged as a result of immense social and economic changes. Additionally, unlike Japan, Taiwan has continuously revised its Civil Code over the past 15 years. The Civil Code has been adapted to modern values such as the equal protection and status of men and women, and gradually deviated from traditional Chinese culture.

As for China, there have been four civil code drafts after 1949, following the establishment of the People's Republic of China (PRC). Three of these civil codes failed due to political chaos that plagued the Mainland in the subsequent years. However, many civil laws such as Contract Law and Property Law have been promulgated during the last fifteen years and further legal reforms are ongoing. Civil code debates are still ongoing in Mainland

since it is not clear whether a “civil code” should be enacted after all separate civil laws are completed and enacted.

This paper is aimed to introduce the process of transplantation of western civil codes in these three countries, with a focus on the influence of western law on traditional culture and westernization of Asian laws. It points out that traditional legal culture in East Asia has been eroding following the implementation of western-style civil codes, and that East Asian civil codes are unequivocally reinforcing the personal rights under individualism and are used to support economic development in a society.

## II. RECEPTION OF JAPANESE CIVIL CODE (1898-2009)

Between 1853 and 1867, the Tokugawa shogunate was forced to open Japan to the world, ending its isolationist foreign policy. It was forced to sign a number of unfair treaties with western countries, granting extraterritorial application of foreign laws within Japan. Western powers argued that the Japanese legal system was outdated and unfair to foreigners, thus foreign laws had to be applied in order to protect aliens residing in Japan. In order to abolish these unfair treaties and application of foreign laws, Japanese government started to modernizing and reforming its legal system.

### A. *Pre-Civil Code Reform*

The Meiji government began to compile its first civil code in 1870, with the assistance of “Bureau of Investigation to Systems” managed by the Ministry of Justice. This bureau was responsible for examining foreign legal systems. During that time, Minister of Justice, etō Shimpei (江藤新平), attempted to hastily promulgate a new civil code by simply translating a foreign civil code. He indicated that “it was still acceptable even if the code was wrongfully translated,”<sup>1</sup> and that “[Japan] can simply change the France into Empire or Japan in the French Code Civil.”<sup>2</sup> Minister’s desperation to implement a civil code was due to the strong nationalist desire to abolish unfair treaties passed by foreigners and, then, to seriously revise the existing Japanese laws. Tomii Masaakii (富井政章), one of the three drafters of Japanese Civil Code, noted that the motivation to draft the Code was based on (1) the need for state laws and (2) removal of unfair treaties, which were

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1. HOZUMI NOBUSHIGE, HOSOYAWA [NIGHT TALKS UNDER LAW WINDOW] 209 (1926), cited in Katou Masanobu, *Nihon Minpo Hyakunenshi* [The Japanese Civil Law History for One Hundred Years], in MINPOU GAKUSETSU HYAKUNENSHI [CIVIL LAW THEORIES FOR ONE HUNDRED YEARS] 2, 6 (Katou Masanobu et al. eds., 1999).

2. Isobe Shiro, *Minpou Hensan no Yurai ni Sakisuru Kiokudan* [The Memoirs Concerning the Codification Cause of Civil Law], 31(8) HOGAKU ZASSHI [L.J.] 149 (1913), cited in Masanobu, *supra* note 1, at 6.

based on “political reasons.”<sup>3</sup>

Prior to translation of the French Code Civil, Japan issued a series of separate civil laws to deal with legal issues occurring at that time. For instance, the “Rule of Documentary for the Mortgage on Lands 1873,” and the “Rule of Transfer for Lands 1880” were two examples of such laws. This process indicated that the enactment of individual civil laws could be the predecessors to compile a civil code.

It should be noted that many law schools were established after 1870 in order to teach comparative law, with focus on French and English law. However, German law was rarely taught at that time. According to the Rules of Civil Litigation, “the decision on civil litigation may rely on custom if no law existed and on legal principles if no custom existed.”<sup>4</sup> Due to the lack of positive law, most judges made their decisions based on these “legal principles.” Since judges were educated in either French laws or English law, court decisions reflected the educational training of judges.<sup>5</sup> Ume Kenjiro (梅謙次郎), one of the three drafters of Japanese Civil Code, described the style of judgments at the time: “Those who received traditional legal education resolved legal problems with traditional ideas in the name of legal principles; those who studied English law made their decisions based on English doctrines in the name of legal principles; those who studied French law would naturally follow French civil code to make decisions in the name of legal principles; and those who studied German law would naturally view German law as the guiding legal principles. This situation was remarkably intriguing.”<sup>6</sup> This comment suggested that legal education was significant in terms of legal development in a legally transplanted country.

#### B. “Old Civil Code” of 1890

Japan invited French law professor, Gustave Emile Boissonade, to teach law and help draft the new civil code, which was finished in 1890 and scheduled to take effect in 1893. This code, now referred to as the “Old Civil Code” in Japanese legal history, was eventually postponed and never implemented.

The Japanese Old Civil Code included three chapters of General

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3. TOMII MASAOKI, MINPO GENRON DAIICHIKAN [CIVIL CODE ORIGINS VOL. 1] 54, 61 (1910), cited in Masanobu, *supra* note 1, at 7.

4. TAO CHU, *Riben Minfa Bianzuan ji Xueshuo Jishou de Lishi* [The History on Japanese Civil Code Compilation and Reception of Legal Theories], in ZHONGRI MINSHANGFA YANJIU DIYIJYUAN [RESEARCH ON SINO-JAPANESE CIVIL AND COMMERCIAL LAW VOL. 1] 110-11 (Tao Chu ed., 2003).

5. *Id.*

6. Ume Kenjiro, *Itoko to Rippo Jigyo* [Itoko and Legislative Undertaking], 24(7) KOKKA GAKKAI ZASSHI [NATIONAL ACADEMIC ASSOCIATION JOURNAL], 967 (1910), cited in Masanobu, *supra* note 1, at 12.

Principles, Law of Things, and Law of Obligations, all of which were drawn up by Professor Boissonade. Two additional chapters on Law of Family and Law of Inheritance were drafted up by Japanese legal scholars. The structure of the Old Civil Code greatly mimicked French Code Civil, with some additions derived from newly passed French court decisions and doctrines. Take an example. This code envisaged the right to lease as a right of things, rather than a right of obligation, one adopted under French Code Civil.

Another interesting feature of the Old Civil Code was its intention to abolish the traditional familial system by removing privileges of the heads of households and removing the right of primogeniture, which was to be allowed only in a very limited context. The codification of family law and inheritance law implied the deviation from traditional culture, which brought about a heated debate over the codification.

Just as the famous debate over the civil code in Germany in the early 19<sup>th</sup> century, the Old Civil Code brought about a controversy in Japan in the late 19<sup>th</sup> century. In 1889, some graduates from the Imperial University and the Law and Politics University joined their forces founding an Association of Bachelors of Law, which issued a “commentary on the compilation of civil code from the Association of Bachelors of Law.” This alliance of university graduates was aimed to discourage the government from implementing the Old Civil Code.

The Association of Bachelors of Law was an academic group, mostly consisting of students who specialized in English law. They argued, similarly to Friedrich Carl von Savigny in Germany during the debates on the German Civil Code, that the law had to be grounded within history and nationalism, which might not be simply enacted by men. The group argued that that “as our country just left away from the feudal system and all of its affairs should be renovated, the society was transforming in an extreme way. If we want to formulate a code under normal rules and customs, it should not adhere to the old feudal system and, also, cannot follow European-American systems.”<sup>7</sup>

Following these statements, Japanese legal scholars diverged into two groups: those who specialized in the English law urged to postpone the civil code and those who studied the French law wished to immediately adopt a civil code. In terms of legal thoughts, French law scholars believed in the theory of natural law, which indicated that legal principles could be applied regardless of time and space and that every code should be drawn on the ground of the same fundamental principles that apply in any country and at

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7. Hogakushikai [Association of Bachelors of Law], *Hoten Hensan ni Kansuru Hogakushikai no Iken* [Commentary on the Compilation of Civil Code from the Association of Bachelors of Law], in MINPOTEN RONSO SHIRYOSHU [THE COLLECTION OF MATERIALS ON CIVIL CODE DEBATES] 15 (Hoshino Toru ed., 1969), cited in Masanobu, *supra* note 1, at 8.

any time. English law scholars disagreed and believed that a civil code should reflect citizenship and social situations since no civil code is eternal or universal.

The conflict between English law scholars and their French counterparts ended following a treatise published by hozumi Yatsuka (穂積八束), who declared that “the loyal and filial duty would die out if the civil code came out.” Shortly after, in 1892 the Japanese Empire decided to postpone the implementation of the Old Civil Code, effectively ending all prospects of its implementation.

Three issues can be noted in the controversy over the codification of Japanese Civil Code. Firstly, there was the conflict between traditional customs and western law. This tension is best noted by hozumi Yatsuka:

“We were a country that always respected the ancestor’s rules and underscored the familial system. All rights and laws are derived from the family.... Our new civil code, i.e., the Boissonade code, arose out of Christianity, which was not our inherent familial system....The civil code that adhered to extreme individualism would eliminate the beliefs prevailing for three thousand years in our country.”<sup>8</sup>

The strong opposition against the old civil code highlighted not only the conflicts between traditional law and western law, but also highlighted tensions among nationalists. Since the old civil code was designed to eliminate the unfair treaties imposed by western imperialism, nationalists argued that if the Code was to be drawn up by the westerners “it [would] shame the country.”<sup>9</sup>

Secondly, conflicts over the Old Civil Code were also a result of the competition within the legal profession. The English law scholars opposed the Code just because it was drafted under the leadership of a French professor. This created an impression that common law scholars would lose their influence on Japanese legal profession. In some sense, the reason why English law scholars opposed the civil code was to maintain their academic power in the civil law.<sup>10</sup>

Third, the controversy was resolved due to political considerations. On the one hand, the enactment of the Old Code was one way to void the unfair treaties, which endorsed the civil code to be carried out. As ume Kenjirō indicated that “the Civil Code at that time was not perfect. Nonetheless, the

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8. Hozumi Yatsuka, *Minpo Dete, Chuko Horobu* [*The Loyal and Filial Duty would Die Out as the Civil Code Came Out*], 5 SHINPO [NEW REPORT] 227 (1891), cited in Masanobu, *supra* note 1, at 10.

9. See Masanobu, *supra* note 1, at 11.

10. Masanobu, *supra* note 1, at 13.

legal scholars subscribed to schools of thought including the conservative group in addition to the English, German, and French groups. Once the Civil Code was postponed, its implementation became impossibility. Under the situation, my wish was that as long as no civil code was promulgated, it would not be able to revise the unfair treaties.”<sup>11</sup> On the other hand, the conservative scholars argued that since the civil code was designed to remove the unfair treaties, which was to encounter foreigners, it should not be drawn up by foreigners since this may hurt citizen’s nationalist aspirations. In order to balance the complex power struggle, the Japanese government made a decision to suspend implementation of old Civil Code.

C. “*Meiji Civil Code*” 1898

Although the Old Civil Code was suspended, Japan continued to draft its civil code. In 1898, a new civil code, so-called “Meiji Civil Code,” was finished. The Meiji Civil Code was modeled after the first draft of German Civil Code, which adopted Pandectist System.<sup>12</sup> Nonetheless, the code was based on the Old Civil Code, and was greatly influenced by the French law in terms of its substance.

Under the Meiji Civil Code, the Law of Obligation and Law of Property almost completely adopted the legal principles found in western legal systems - mainly the German and French laws. On the other hand, the Laws of Family and Inheritance were mostly based on Japanese traditions, which refused to recognize individual personalities in a families and did not grant equal status among family members.<sup>13</sup> This traditional Family Law was not revised until the end of the World War II.

After the implementation of the Meiji Civil Code, a debate over what constituted the “mother law” of Japanese civil code emerged within the academic circles. The popular opinion at that time argued that the Japanese Civil Code was a legacy of German law. However, a minority of experts argued that the Civil Code could be traced to French law. According to hozumi Nobushige (穂積陳重), one of the three drafters of Japanese Civil Code,

“Japanese Civil Code was a product of comparative law. At first

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11. IWATA SHIN, NIPPON MINPOU SHI—MINPOU OTSUJITE MITARU MEIJI TAISHOU SHISOU SHI [JAPANESE CIVIL HISTORY: MEIJI TAISHO INTELLECTUAL HISTORY THROUGH THE CIVIL CODE] 41 (1928), cited in Masanobu, *supra* note 1, at 17.

12. Pandectists were German legal scholars in the 19th century who studied and taught Roman law as a model of “conceptual jurisprudence” as codified in the Pandects of Justinian. Accordingly, the Pandectist system denotes a legal system under codification.

13. Huai-Chih Hsieh, *Dalufa Guojia Minfadian Yanjiu* [Research on Civil Codes of Continental Law Countries], 3 WAIGUOFA SHIPING [CASS J. OF FOREIGN LAW] 1, 2-3 (1995).

glance, the new Code seemed to adopt the style of German new Civil Code, which had been argued by many people. It cannot be denied that the drafters gained very significant inspirations from the first and the second drafts of the German Civil Code, which had great impact on the drafter's discussions. Nonetheless, when the principles and rules in the Civil Code were examined in greater detail, it was observed that this Civil Code had references to all civil codes around the world at that time. All the principles and rules that were valuable had been received and included in Japanese Civil Code."<sup>14</sup>

Nevertheless, kidagawa Zendalou (北川善太郎), professor at Kyoto University, insisted that although Japanese Civil Code included the laws of Germany, France, and other countries, thus making the civil code a mixture of foreign laws, its contemporary law had been overwhelmingly influenced by German law in the wake of tremendous reception of German legal theories. In terms of legal interpretation, Japanese Civil Code has become a genus of German Civil Code.<sup>15</sup>

In summary, Japanese Civil Code had its origins in both German and French laws, but it retained more features of German rather than French laws due to the acceptance of German legal theories.

#### D. *Civil Code 100 Years Later*

The Japanese Civil Code remained largely unchanged since its promulgation one hundred years ago, with the exception of Family Law and Inheritance Law, both of which were revised in the wake of World War II, ending the feudalist family system, the birthright inheritance, and the unequal relationship between husband and wife.

Three factors contributed to the longevity of the Japanese Civil Code for it to remain the same code over one hundred years.<sup>16</sup> One of the reasons was the general principles provided in the Code such as good faith, public policy, and the rule forbidding rights abuse. These principles allowed judges to expediently apply the Code so as to meet social needs of the changing Japanese society. The second reason was the culmination of legal theories

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14. N. HOZUMI, LECTURES ON THE NEW JAPANESE CIVIL CODE 22 (1912), *cited in* Masanobu, *supra* note 1, at 33.

15. See KITAGAWA ZENDAROU, MINPO NO RIRON TO TAIKEI [THEORIES AND SYSTEMS ON CIVIL CODE] 3, *cited in* Sen-Yan Sun, *Lun Minfa zhi Jishou* [Comment on Reception of Civil Code], 53(3) FALING YUEKAN [THE LAW MONTHLY] 3, 3 (2002).

16. The following three factors were indicated by Tao Chu. See Hui-Xing Liang, *Guanyu Zhongguo Minfa Dian Bianzuan* [Concerning the Compilation of Chinese Civil Code], in CHU, *supra* note 4, at 30-33.

and court decisions, which either complemented or revised the rules of the Civil Code. The third reason was the legislation of special civil laws such as the Manufacturer's Liability Act 1995 and the Consumer's Contract Act 2001 that further enhanced the scope of the Code.

The original intended function of the Japanese Civil Code was to void the unfair treaties and to establish a unified capitalist market - both of which were fulfilled in due course. Most importantly, Japanese experience with western law helped to spread it to other East Asia countries. For instance, both Qing Dynasty of China and Korea invited Japanese scholars and judges to help draft their civil codes in the late 19<sup>th</sup> century.<sup>17</sup> Indeed, Japanese codification and its transplantation of western law initiated and facilitated the westernization of East Asian law.

### III. RECEPTION OF CHINESE CIVIL CODE (1912-1949)

The introduction of western law in China began in the late period of Qing Dynasty. In this section, the paper discusses the introduction of western laws to the Chinese society and its impact on the future of Chinese legal system.

#### A. *Process of Reception of Western Law*

In the first half of 20<sup>th</sup> century China initiated three civil code drafts with the first two drafts pending and the third unsuccessful.

##### 1. *The First Draft of Civil Code 1910*

At about the same time as in Japan, the Qing Dynasty started to draft a Chinese Civil Code in order to abolish the unfair treaties allowing extraterritorial application of foreign laws in China. The Qing Dynasty signed a treaty with United Kingdom in 1842, Article 7 of which stated that in an event where English businessmen got involved in lawsuits due to dealings with local citizens, "English businessmen would be dealt with by England, and Chinese counterparts would be investigated by China." Similar articles were adopted by other colonial powers, forcing China to allow the application of foreign laws on its territory.<sup>18</sup>

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17. Zheng-Wu Shen, *Dongya Jindai Minfa Dian Qun de Xingcheng yu Wei Manzhou Guo de Minfa Dian—Ribenfazai Dongya Yizhi Xiou Jindaiifa Guocheng Zhong de Lishi Zuoyong* [The Formation of Civil Codes in Modern East Asia and the Mogolia Civil Code: The Historical Function of Japanese Law in the Process of Transplant of West European Modern Law in East Asia], in *ZHONGRI MINSHANGFA YANJIU DIERHJYUAN* [RESEARCH ON SINO-JAPANESE CIVIL AND COMMERCIAL LAW VOL. 2] 28, 41-47 (Tao Chu ed., 2004).

18. Tian-Hui Chen, *1912-1949 Nian Zhongguo Fazhi zhi Bianhua—yi Minfa zhi Zhiding ji*

In 1902, the Qing Dynasty extended its treaty with United Kingdom, Article 12 of which provided that “China was serious in its intention to perfect the state’s laws in order to conform to the other countries’ laws. The United Kingdom was willing to help in order to achieve this task. Once Chinese laws, litigation rules, and any other relevant affairs were made perfect, the United Kingdom promised to abandon the right to extraterritorial application of foreign laws.”<sup>19</sup> Based on this expectation, Qing Dynasty appointed legal scholars such as Shen Jia-ben and Wu Ting-fang to draft a new civil code. Japanese judges and scholars were also invited to help in the drafting process and contributed to the Civil Code that included five chapters: the General Principles, Law of Obligations, Law of Things, Law of Family, and Law of Inheritance. The first three chapters were drawn up by the Japanese and the last two chapters by Chinese scholars. “This Civil Code was basically modeled after German and Japanese civil codes.”<sup>20</sup>

The First Draft of Civil Code (1910) did not take effect due to the collapse of the Qing Dynasty in the same year of the draft of civil code. Nonetheless, it had a great influence on the future Chinese Civil Code draft in the years to come because the newly-drafted civil codes were based on Qing’s first draft of civil code.

## 2. *The Second Draft of Civil Code 1926*

After the Nationalist government was established in 1911, the representatives of foreign countries gathered in Peking to discuss the state of the Chinese laws and judicial systems. The failure of Civil Code was used as an example of backwardness of Chinese legal system, meaning that China could not abolish the extraterritorial application of foreign laws. The Nationalist government hence intended to resume the Civil Code drafting process in order to abolish these unfair treaties.

The Second Draft of Civil Code (1926) was based on the first draft of Civil Code 1910 and also adopted German law with some reference to Swiss Law of Obligations. In addition, this Civil Code included some civil law rules from Qing Dynasty laws and some Chinese court decisions.<sup>21</sup> The second draft revised the first draft with a large number of provisions added

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Shixing Wei Li [Legal Change in China 1921-1949: Take an Example of the Enactment and Complementation of Civil Code], in ZHONGGUO FAZHI XIANDAIHUA ZHI HUIGU YU QIANZHAN [REVIEW AND PROSPECT ON CHINESE LAW MODERNIZATION] 317, 319 (Chinese Legal History Association ed., 1993).

19. HUNG-LIEH YANG, ZHONGGUO FALV FADA SHI [THE EVOLUTION HISTORY OF CHINESE LAW] 872 (1930).

20. CHEN-MING HSIEH, ZHONGHUA MINGUO LIFA SHI [REPUBLIC OF CHINA LEGISLATIVE HISTORY] 902 (1948).

21. WEI-HE PAN, ZHONGGUO LICI MINLV CAOAN JIAOSHI [COMMENTS ON CHINESE CIVIL CODE DRAFTS] 28-29 (1982).

in Law of Family (with 100 new articles) and the Law of Inheritance (with 115 new articles), without significant revisions to the Law of Obligations and Property.<sup>22</sup> The second draft also failed due to the political chaos that plagued the country.

### 3. *The Nationalist Civil Code 1930*

The Civil Code Draft Board was resumed again in 1929 and the Nationalist Civil Code was finished in less than two years. This Civil Code, however, was not implemented since the Nationalist government was defeated by the Chinese Communist Party in 1949 and retreated to Taiwan. As a result, the Nationalist Civil Code was only implemented in Taiwan and had no applicability in Mainland China.

The Nationalist Civil Code primarily adopted foreign laws with only small number of traditional laws. The legislator, Wu Jing-xiong, stated that “if you read the new Civil Code from Article one through Article 1225 carefully and compared them with German and Swiss civil codes, you would find that 95 percent these articles were either completely copied or slightly revised based on these foreign civil codes.”<sup>23</sup> Professor Mei Zhong-xie also noted that “the contemporary Civil Code consisted of 60-70 percent German law and 30-40 percent Swiss law, with small percentage of French, Japanese, and Soviet Russian laws.”<sup>24</sup> Professor Zhan Sen-Lin pointed out that “the Taiwan Civil Code mainly took reference to German Civil Code 1900, Swiss Law of Obligations 1861 and Swiss Civil Code 1912. In addition, the French Civil Code 1804 and Japanese Civil Code 1898 also influenced Taiwan’s Civil Code to receive. Accordingly, Taiwan Civil Code was a product of reception of European continental law.”<sup>25</sup>

The reliance on German law is revealed in, both the form and substance of the Taiwan’s Civil Code. As far as the form of the Code is concerned, the Nationalist civil code provided the chapter of General Principles with the subject, the object, and juridical act, which was the format of the German Civil Code. With regards to the substance of provisions, the General Principles of the Code and the Law of Obligations were almost the same as

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22. HSIEH, *supra* note 20, at 903-05.

23. JING-XIONG WU, *Xin Minfa he Minzu Zhuyi* [New Civil Code and Nationalism], in FALV ZHUXUE YANJIU [LEGAL PHILOSOPHY RESEARCH] 27, cited in WEI-HE Pan, ZHONGGUO JINDAI MINFA SHI [CHINESE MODERN CIVIL LAW HISTORY] 99 (1982).

24. ZHONG-XIE MEI, *Preface to the First Edition of Zhong-Xie Mei*, MINFA YAOYI [FUNDAMENTAL TENETS OF CIVIL CODE] 1 (1954).

25. Sen-Lin Zhan, *Taiwan Shehui Bianqian yu Minshi Caichanfa Fazhan* [Taiwanese Social Change and Development of Civil Property Law], in LIU CHUN-TANG, JIAOSHOU LIUZHONG HUADAN ZHUSHOU LUNWENJI—MINSHI FAXUE XIN SIWEI ZHI KAIZHAN [ESSAYS IN HONOR OF PROFESSOR CHUN-TANG LIU’S SIXTY YEARS OLD: DEVELOPMENT OF NEW LEGAL IDEAS ON CIVIL LAW] 789, 791-92 (Editorial Board of Essays in Honor of Professor Chun-Tang Liu’s Sixty Years Old ed., 2008).

those provided in the German Civil Code 1900. In addition, the Nationalist Civil Code followed the Swiss Civil Code in that it combined civil and commercial laws in one civil code without an addition of another commercial code.<sup>26</sup>

During the process of drafting a civil code in China, no legal disputes over codification or sources of law emerged as was the case in Japan. According to Professor Wang Tze-chien, “the reason was that it received the Continental law under the influence of Japan,” and “the issue of accepting foreign laws was decided by the government since most citizens were unaware of or indifferent to the reception, and that no strong legal profession existed to challenge the decision. As a consequence, draft process of the Civil Code did not encounter any strong opposition in China.”<sup>27</sup>

#### B. *Implications of Western Law in Early China*

Based on traditional Chinese legal culture, the law embodied Confucian ideology, which emphasized various hierarchical roles and responsibilities of one individual towards another. According to the ideology, the emperor was superior to officials who were his subjects and sons were subjected to the will of their father. Women occupied the lowest category and were subjected to all other members of the family. Based on this principle, parents received lighter sentences than other criminals when assaulting or killing their offspring as a result of children’s violation of social norms. In the cases of fights between husband and wife, the husband would receive a lighter sentence than the wife. Thus, the traditional Chinese law rejected equal legal rights of individuals and imposed various punishments based on Confucian ideology.<sup>28</sup>

Confucianism stressed moral duty of individuals as main legal obligation in the society. As long as individuals obeyed their moral duty, they have complied with the laws of land. In other words, the moral duty was equivalent to the legal duty and all rules were duty-oriented, rather than rights oriented as is the case in western law societies. As a result, the Chinese society did not have an understanding of “rights” and usually did not care about their legal rights or rights of others.<sup>29</sup>

The conflicts between the traditional law and western law emerged in

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26. Zhan, at 792.

27. TZE-CHIEN WANG, *Minfa Wushi Nian [The Five Decades for the Civil Code]*, in MINFA XUESHUO YU PANLI YANJIU DIWUTSE [RESEARCH ON CIVIL LAW THEORIES AND COURT DECISIONS VOL. 5] 1, 4 & 6 (1988).

28. HAN-BAO MA, *Geren zai Zhongguo Chuantong yu Xiandai Falv Shang zhi Diwei [The Individual’s Status under Chinese Tradition and Modern Law]*, in FALV YU ZHONGGUO SHEHUI ZHI BIANQIAN [LAW AND CHINESE SOCIAL CHANGE] 41, 47 (1999).

29. MA, at 47, 53.

the drafting stage of the civil code during Qing and, again, during the Nationalist rule in China. For instance, the speaker in the legislature of Nationalist controlled China, Hu Han-min, stressed the importance of society-oriented legal concepts. He argued that:

“Whether an individual enjoyed his competency and status depended upon whether he was beneficial or harmful to the society. An individual was not entitled to dispose his life, property or interests.... If we did not establish a society on the basis of social and public interests, but on the wrong way of individualism or endowed rights, people would be disloyal and a society would collapse.”<sup>30</sup>

After the Civil Code was officially passed, Hu continued to insist that “under our Civil Code, the individualism could not be completely eliminated and eradicated. Nonetheless, the living of groups was more important and thus the individualism was not allowed to hinder the process of socialism.”<sup>31</sup>

This tension between traditional laws and western concepts was reflected in the Civil Code drafts. For instance, under the Qing’s first draft of the Civil Code, the wife was not a person with full competency under the Qing’s First Draft of Civil Code. The wife had to gain consent from her husband in conducting business affairs. Her transactions with others could be voided if she did not obtain prior consent from her husband. These articles were not eliminated until the second draft of the Civil Code.

However, it is important to note that the Qing Civil Code and the Nationalist Civil Code were fundamentally based on fundamental principles of individualism, personal freedom and equality in a rights oriented legal system. For instance, the chapter on General Principles of the Civil Code provided common principles concerning the subject of rights, the object of rights, and the exchange and transfer of rights.

The traditional duty-oriented system was thus not adopted, and some of traditional custom was even clearly abandoned. For example, the transfer of real property was finished by the parties’ agreement with no need to register in government under Chinese custom. The civil code, however, adopted the German law, requiring real estate transfers to be registered with the government. Also, all types of property followed the western laws except for

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30. HAN-MIN HU, *Sanmin Zhuyi zhi Lifa Jingyi yu Lifa Fangzhen* [The Legislative Essence and Legislative Policy] & *Minfa Zhaipian de Jingshen* [The Spirit of Object of Obligations Civil Law], in HU HAN-MIN XIANSHENG WENJI DISZTSE [COLLECTIONS OF ESSAYS OF MR. HAN-MIN HU VOL. 4], cited in Chen, *supra* note 18, at 325.

31. Han-Min Hu, *Xin Minfa de Xin Jingshen* [The New Spirit under the New Civil Code], in HU HAN-MIN XIANSHENG WENJI DISZTSE [COLLECTIONS OF ESSAYS OF MR. HAN-MIN HU VOL. 4], cited in Chen, *supra* note 18, at 326.

the “dian” as the unique Chinese property right. In addition, step parents were viewed as natural parents under Chinese custom, while the civil code provided otherwise. The law of inheritance under the civil code also left behind the traditional system, under which the eldest son had privileges over the other family members.

All in all, the reception of western law established not only the legal rules in China, but also changed the Chinese culture and local customs. Although the new Civil Code was not implemented in mainland China, it did take a root in Taiwan and greatly transforming Taiwanese society.

#### IV. RECEPTION OF TAIWANESE CIVIL CODE (1895-2009)

##### A. *Process of Reception of Western Law*

As was noted previously, Taiwan’s first experience with western law could be traced back to Japanese colonial rule beginning in 1895, and not to 1945 when Nationalist government retreated from China. Japan occupied Taiwan after the Opium War with China. During the course of the Japanese rule, from 1895 through 1922, Taiwanese civil affairs were dealt with in accordance with Taiwanese customs under Article 2 of the “Order for Civil Litigation of Taiwan Residents” issued by Japanese government in 1895.<sup>32</sup> Although the Japanese Civil Code was extended to Taiwan in 1898, the island still applied local customs for solving civil affairs.

It was noteworthy, however, that in the wake of promulgation of the Japanese Civil Code, Japanese judges started to interpret Taiwanese customs in terms of western law, even though the Taiwanese were still governed by Taiwanese customs based on orders from the Japanese Imperial government. Thus, the Taiwanese customs were exposed to the westernization from 1898 on as a matter of fact, through which Taiwanese rules went under the “process of right-orientation” of western law.<sup>33</sup>

From 1923 on, the Japanese Civil Code was formally enforced in Taiwan. According to the government, Taiwanese civil affairs had to be governed by the Civil Code, except for affairs involving family and inheritance issues. Since Japan carried out a number of legal reforms in Taiwan, promoting rights-orientation of the legal system in previous two decades; the Taiwanese did not experience great difficulties in receiving and implementing the westernized Japanese Civil Code in the 1920s.

After the Second World War, Taiwan was handed back to Chinese

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32. See TAI-SHENG WANG, TAIWAN RIZHISHI DE FALVGAIGE [THE LEGAL REFORM DURING THE PERIOD OF JAPANESE RULE IN TAIWAN] 89 (1999).

33. See TAI-SHENG WANG, TAIWAN FALVSHI GAILUN [THE INTRODUCTION OF TAIWANESE LEGAL HISTORY] 320-23 (2001).

government and the Nationalist Civil Code was implemented to Taiwan shortly afterwards. Thus, Taiwan experienced its second Civil Code, this time applied by the Nationalist government of Mainland. No controversies emerged in Taiwan over the new Civil Code, since it had almost the same contents as the Japanese Civil Code. As Professor Wang Tze-chien pointed out, “in Taiwanese area, due to the Japanese occupation with the implementation of its Civil Code for five decades, and Japanese civil code and our Civil Code had the same origin in German law, the Nationalist civil code could be implemented smoothly without any obstacles. This was a coincidence in legal history.”<sup>34</sup> Professor of Taiwanese legal history, Wang Tai-sheng, also noted that “both these two civil-commercial codes were primarily modeled after European continental law, especially the German law. This historical coincidence avoided the Taiwanese private law order from being destroyed in the wake of sovereign change and enabled Taiwan to further develop on the same bases. Accordingly, Taiwanese contemporary civil and commercial codes have had ‘historical fundamentals for over one hundred years’.”<sup>35</sup>

## B. *Legal Change after World War II*

### 1. *Enactment of Special Civil Laws*

The Taiwanese Civil Code has been governing Taiwan for over six decades, and during this time, Taiwanese society has changed dramatically from agricultural to an industrial society and underwent political transition from authoritarianism towards democratic rule. It should be noted that, Taiwan’s economy continued to expand consistently even under the authoritative rule, and private market economy prospered in the past decades. Following the democratization in the 1980s, the Taiwanese rights consciousness emerged with citizens eager to claim their rights. This is a radical departure from the traditional Taiwanese society that emphasized self-sacrifice and fulfillment of one’s own duties. In response to these social changes, a large number of special civil laws were enacted significantly revising the Civil Code. These civil laws were introduced in the following order.<sup>36</sup>

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34. WANG, *supra* note 27, at 8.

35. WANG, *supra* note 33, at 330.

36. The following comments, *see also* WANG, *supra* note 27, at 10-14; Yi-Nan Liao, *Jin Wushi Nian Lai Jingji Shehui zhi Bianqian yu Fazhi zhi Fazhan* [The Social, Economic Change and Legal Development for the Recent Five Decades], in ZHONGGUO FAZHI XIANDAIHUA ZHI HUIGU YU QIANZHAN [REVIEW AND PROSPECT ON CHINESE LAW MODERNIZATION], *supra* note 18, at 342-61.

(1) The 1950s: During this decade, the “37.5 Percent Rent of Farmland Act” was enacted to initiate land reform in Taiwan. This land reform act was tremendously important for Taiwan since it reduced rent prices and enabled the farmers to enjoy sustainable lives. It also deprived the landowners of their power to control the society through the farm holdings, thus eliminating potential opposition to the Nationalist government in Taiwan. This land reform was successful and the agricultural products rose dramatically in the coming years.

(2) The 1960s: During this decade, the United States ended its economic support for Taiwan, and Taiwanese small and middle businesses urgently needed capitals to fund their factories. In order to meet the businessmen’s need for cash flow, Taiwan adopted Article 9, Uniform Commercial Code (U.S.) to enact a law entitled the “Act for Transaction on Movable Property,” including chattel mortgages, conditional sales, and possession in trust in 1963.<sup>37</sup> It was the first American law to enter Taiwan. The reform resulted in a major breakthrough in limiting mortgages on immovable property set by the Civil Code.

(3) The 1970s: The Taiwanese economy thrived with rapid increase in citizen’s incomes during this decade. Nonetheless, the environment was suffered greatly as a result of industrialization, under which factories engendered huge amount of pollution. In response, some environmental laws were enacted such as the “Act for Prevention of Water Pollution 1974,” the “Act for Cleaning up of Dumping Wastes 1974,” and the “Act for Prevention of Air Pollution 1975.” In these environmental laws, a civil liability was imposed on the polluters. Unfortunately, it was not seriously enforced against the polluters since most citizens chose to boycott the polluters instead of suing them in courts.

(4) The 1980s: During this decade, Taiwan experienced democratization as government’s authority was unceasingly challenged by the people. As people’s rights consciousness increased, the state’s liability and the protection for the laborers became focal points in society. Therefore, the “State’s Liability Act 1981” and the “Labor’s Fundamental Act 1984” were issued. The state was liable for strict liability for any injury incurred as the result of defects in public facilities under the State’s Liability Act.

(5) The 1990s: During this period, Taiwan faced two troublesome

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37. The American Uniform Commercial Code-Article 9 governs the secured transactions, sales of accounts and chattel paper.

issues: disputes over the cluster housing in neighborhood in the wake of urbanization and the widespread harm caused by food and other unsafe consumer products. The civil code did not offer any rules over the legal issues concerning cluster housing. As a consequence, the “Management on Condominium Act 1994” was drawn up. In the same year, the “Consumer’s Protection Act” was enacted to regulate both the manufacturer’s liability and the enterprise’s services. This act was adopted in Taiwan from both the American law on product liability and German rules on standardized contracts.

(6) The 2000s: With the advanced development in biotechnology, assisted reproductive technology changed the way the children were conceived and born, thus confusing the parenthood authority under the existing family law. Taiwan enacted the “Assisted Reproduction Act 2007” to deal with this perplexing issue.

## 2. *Reception of Legal Theories and Development of Court Decisions*

The Taiwanese civil law was tremendously influenced by Japanese and European legal theories, especially the German law. In his book *Fundamental Tenets of Civil Code*, Professor Mei Zhong-xie stated that “the contemporary civil code ... collected the essences of the civil codes of many countries .... This author took reference to German, Swiss, French, Japanese, and Soviet Union’s court decisions and scholar’s theories, added with my own opinion to supplement [the civil code].”<sup>38</sup> Mr. Shi Shang-kuan, one of the drafters of the Civil Code, wrote in his book entitled “*Law of Obligations: General Principles*” that “[this book] took reference to German, French, and Japanese original works of civil code. It explored the civil code’s origins and did a comprehensive research.”<sup>39</sup> Ever since, Taiwanese books on Civil Code followed this model and devoted a number of chapters to the introduction of German, Japanese, and French legal theories.

Taiwanese scholars were greatly influenced by the legal theories they studied abroad. Among them, Professor Wang Tze-chien is the most influential legal scholar not only in Taiwan but also in Mainland China. He was seen as the number one scholar who influenced Chinese civil law during the past three decades in mainland China.<sup>40</sup> He has published over 15 books,

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38. MEI, *supra* note 24.

39. SHANG-KUAN SHI, *Preface to the First Edition of Shang-Kuan Shi, ZHAIFA ZONGLUN* [LAW OF OBLIGATIONS: GENERAL PRINCIPLES], at 1 (1954).

40. Xian-Zhong Sun & Jeng-Chang Chang, *Minfa Xue Sanshi Nian* [Civil Law for the Three Decades], in *ZHONGGUO FAXUE SANSHI NIAN* (1978-2008): HUIGU YU ZHANWANG [THIRTY YEARS OF STUDIES ON LAW IN CHINA (1978-2008): REVIEW AND PROSPECT] 203 (Lin Li ed., 2008).

eight of which were law articles examining and analyzing both foreign laws and Taiwanese court decisions. A large number of German legal theories were introduced to the Chinese society by him.

Professor Wang has made great contribution to establishing German legal theories in Taiwan. For example, in order to clarify the distinction between the juristic act of obligation and the juristic act of transferring titles of property, Professor Wang published three papers on this issue in 1981, 1983, and 1986, respectively.<sup>41</sup> Since then, the juristic act of transferring titles of property (*Verfügung*) was hence well established in Taiwanese legal discourse.

Another case was concerned about the scope of protection under the Tort Law. Article 184 of the Taiwan Civil Code required that the infringement on other's "right" was a condition to the cause of action of tort liability. This article basically followed Articles 823 and 826 of German Civil Code, except that Article 823 listed the categories of "rights" infringed upon. Thus, the scope of protection under Article 823 of German Civil Code was therefore limited to the absolute rights such as the lives, the body, the health, the liberty, and the ownership. Because of the different rules, it was controversial as to whether the infringement on the pure economic loss was a tort under Article 184 of Taiwan Civil Code. Professor Wang published a paper on the tortious liability for the infringement on the rights derived from contract in 1985, arguing that Article 184 para. 1 was limited to the absolute rights, which did not cover pure economic loss and the rights from contract.<sup>42</sup> This opinion has been adopted by a number of Taiwanese courts.

The above mentioned two cases demonstrated the degree to which German law impacted Taiwanese civil law development through the introduction of German legal theories and doctrines. As was the case in Japan, Taiwanese civil law is a genus of German laws.

In addition to the reception of foreign legal theories, the court decisions also played a great role in the development of Taiwanese civil law. Two cases are introduced here to highlight the significance of court decisions on the evolution of Taiwan's Civil Code.

Take the first example from the Law of Contract concerning the regulation of contracts. The Civil Code 1930 did not provide any regulation on the standardized contract, and the freedom to contract was the most fundamental principle of contract law. In the 1980s, many standardized

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41. See TZE-CHIEN WANG, *Chumai Taren zhi Wu yu Wuquan Chufen* [The Sales of Other's Property Without Entitlement], in MINFA XUESHUO YU PANLI YANJIU DISZTSE [RESEARCH ON CIVIL LAW THEORIES AND COURT DECISIONS VOL. 4] 129, 137 (1982).

42. TZE-CHIEN WANG, *Qinhai Taren Zhaiquan zhi Qinquan Zeren* [Tort Liability for Infringement on the Right from Contracts], in MINFA XUESHUO YU PANLI YANJIU DIWUTSE [RESEARCH ON CIVIL LAW THEORIES AND COURT DECISIONS VOL. 5] 209, 209-27 (1988).

contracts were produced in the labor market. Among them, the employment contract stated that female employee had to resign after getting married or giving birth to a baby. This standardized clause of a contract was eventually declared void by the court under article 72 of the Civil Code, providing that any juristic acts had to be void in violation of public policy and/or good morals.<sup>43</sup> The regulation on the standardized contract was not governed by the Civil Code until 1999. Nonetheless, the court made use of public policy clause to declare them void.

In addition, as Taiwanese businesses turned out to global markets, merchants introduced various commercial transactions into the Taiwanese market. Most of these commercial transactions involved new modern contracts developed in the United States such as financial leasing, franchise, factoring, and e-commerce transaction, etc, which were not governed by the Civil Code with most of them developed in the United States. It was left to the courts to interpret these contracts developed in common law system with the legal terms of the continental civil law. Therefore, these court decisions served a clarifying function on the legal relationships of the parties in these contracts.

Take the second example from the Law of Torts concerning the wrongful birth cases. In Taiwan, abortion was a crime and therefore the court did not recognize the “right to freedom of abortion” or “the right to autonomy of giving birth” in the wrongful birth cases prior to 2001.<sup>44</sup> Accordingly, the mothers always failed in such cases when she claimed damages from the physicians or the hospitals. The Supreme Court, however, changed its decision later by declaring that the pregnant women had the right to termination of pregnancy, as long as their baby might be defective.<sup>45</sup>

In the same vein, in the case involving noise pollution, the law did not have detailed regulations concerning the issue. People, however, often had to endure unceasing noises produced by machines such as air conditioners and bread manufacturing devices set up in the residential buildings. The victims who sustained various mental and physical injuries due to the unbearable noises had no cause of action until 2003. For the first time in 2003, the Supreme Court asserted for the first time that the victims were allowed to claim damages when the defendants produced noises that were intolerable for ordinary people living in residential areas. The production of intolerable

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43. See TZE-CHIEN WANG, *Laodong Qiyue Shang zhi Danshen Tiaokuan, Jiben Renquan yu Gongxu Liangsu* [The Single Clause under Employment Contract, Fundamental Rights, and Public Policy], in MIN A XUESHUO YU PANLI YANJIU DICHITSE [RESEARCH ON CIVIL LAW THEORIES AND COURT DECISIONS VOL. 7] 36, 46-47 (1993).

44. Taipei Shilin Difang Fayuan [Dist. Ct.], Civil Division, 84 Zhong-Su No. 147 (1995) (Taiwan).

45. Zuigao Fayuan [Sup. Ct.], Civil Division, 90 Tai-Shang No. 468 (2001) (Taiwan); Zuigao Fayuan [Sup. Ct.], Civil Division, 92 Tai-Shang No. 1057 (2003) (Taiwan).

noise was seen by the court as an “illegal infringement on the residential peace which was a kind of personality interests.”<sup>46</sup>

All in all, the Supreme Court created “the right to termination of pregnancy” so as to offer damages to the mothers in the wrongful birth cases and “the personal interests of residential peace” for the noise pollution cases. Both of these examples demonstrate the court functions in developing the civil law in Taiwan.

### 3. *Revision of Taiwan Civil Code*

The Taiwanese Civil Code was not frequently revised under the authoritative rule prior to the 1980s. Beginning in the 1980s, Taiwan experienced a wave of democratization, which forced the people to face dramatic social changes. The Civil Code was thus revised in order to meet the changing social needs.

#### (a) To Strengthen Gender Equality

The Taiwan Civil Code was first revised in the Chapter of Family in 1985. According to the Civil Code 1930, the father was entitled to make a final decision over his children’s affairs, and the mother’s decision could be overruled. This rule forced the mothers to give up their rights to custody over their children during the marriage, after divorce, and even in situations involving unmarried couples. This unequal relationship between the two genders was declared unconstitutional, paving a way for the revision of the Civil Code in 1996.<sup>47</sup> In addition, the rules over the spouse’s property discriminated against the wives. For example, following a marriage, property of the wife would automatically become part of her husband’s property. All these discriminating rules have been corrected over the past 14 years with ten revisions of the Law of Family in the Civil Code so as to accomplish the gender equality in Taiwan.

#### (b) To Cope with Social and Economic Change

The law of obligations in the Civil Code was revised in 1999, adopting the German legal theory on the “positive breach of contract” (Positive Vertrasverletzung) under Article 227 of the Code after the court applied this theory for many years without a formally codified rule. Also, this revision provided a new article on the liability connected to the exercise of dangerous activities under Article 191-3, which was based on Article 2050 of the Italian Civil Code. This newly added article on dangerous activities was designed to

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46. Zuigao Fayuan [Sup. Ct.], Civil Division, 92 Tai-Shang No. 164 (2003) (Taiwan). See TSUNG-FU CHEN, *Huanjing Wuran Zeren zhi Weifaxing Panduan* [Judgment on Wrongfulness of Liability of Pollution in Environment], in QINQUAN WEIFAXING YU SUNHAI PEICHANG [WRONGFULNESS FOR TORT LIABILITY AND DAMAGES] 73, 102-03 (2008).

47. See J.Y. Interpretation No. 365 (1994).

deal with the increasing occurrence of environmental pollution, mining explosions, firework explosion, and car race competition, etc. The article offered the judges with wide discretion to impose the liability on persons involving in dangerous activities.

In addition, the open-end mortgage was not provided in the Civil Code but has been recognized by the Supreme Court as one way of mortgage in society since 1962.<sup>48</sup> The Civil Code did not regulate the open-end mortgage until 2007 under its Chapter of Things. Thus, the civil code was revised to govern the open-end mortgage after it was enforced in practice for 45 years.

(c) To Eradicate Traditional Customs

In Chinese society, it was extremely important for a man to have a son in order to worship his ancestors. An old Chinese saying stressed that “three accidents might not be filial for a man, and the most serious one was having no son.” In order to worship their ancestors, men were allowed to divorce their wives if they failed to give birth to boys, or to even have a second wife so as to give birth to a son. Under this custom, a son had to follow his father’s surname since it was a symbol of maintaining the man’s generations to come. In some cases, a spouse would adopt male children when they had no son to worship the husband’s ancestors. For this purpose, the adopted-son had to change his surname to the surname held by his adoptive father. In other words, in most cases, the adoption of a son was not for the benefits of the adopted son, but for the maintaining of the father’s generations to come through ancestral worship.

Indeed, according to traditional customs, the Taiwanese Civil Code provided that the children had to follow their father’s surnames and the adopted-children had to change their surnames to the same as of their adopted fathers’. These rules, nonetheless, were completely changed in 2007. Children could now choose surnames of either parent and to even change their surnames under some circumstances when their fathers did not take care of them for at least two years, or in an event involving a divorce,<sup>49</sup> At the same time, adopted children were allowed to keep their original surnames after adoption, and could terminate their relationships with their adoptive parents if their adoptive parents died.<sup>50</sup> These revisions of civil code entirely eliminated Chinese tradition concerning the maintaining of the man’s generations to come.

(d) To Reinforce Individualism

Two revisions of the Civil Code can be used to demonstrate the

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48. TZAI-CHUAN HSIEH, *MINFA WUQUAN LUN CHUNG* [LAW OF THINGS VOL. 2] 371 (2d ed. 2003).

49. See *Minfa* [Civil Code], art. 1059, 1059-1 (amended 2007) (Taiwan).

50. See *Minfa* [Civil Code], art. 1078, 1080-1 (amended 2007) (Taiwan).

importance of individualism in Taiwanese civil code. The first was the expansion of the “right to personality.” Taiwanese Civil Code received the protection of the right to personality both from German and Swiss laws. Prior to 1999, the right to personality under protection of the civil code was limited to the rights to lives, body, health, freedom, and reputation. The scope of protection was expanded to the right to privacy, the right to sexual autonomy, and “other personal interests seriously infringed upon” after the revision of the Civil Code.<sup>51</sup> The expansion of protection to the right to privacy was significant, since traditional Chinese society did not recognize such right due to the prevalence of big closely knitted families.

The second example concerns inheritance. Under the Law of Inheritance of the civil code, the heirs principally had to inherit all the estates owned and the debts owed by the deceased, unless they chose otherwise. This rule was based on Chinese traditional customs, which viewed the property of a person as belongings to the family. Thus, based on tradition, the family members had to share their estates and debts. Accordingly, almost all the heirs in Taiwan had to pay the debts owed by the deceased. This rule was unfair to heirs, who generally were not aware of debts incurred by their parents. This rule, however, remained valid for over six decades in Taiwan. With the reform to the rule, heirs had more flexibility in handling debts of their parents.

As the financial market prospered and the competition among banks increased, a large number of people used the credit cards as a way to get loans from banks. When the economy went into a decline, credit card holders fell behind on their debts. As a result, they became the “slaves of credit cards,” only able to pay the interest of the loans but not the loans itself. In the end, the loans made them bankrupt. This phenomenon of “slaves of credit cards” was widespread in Taiwan during the past five years. A large number of individuals committed suicide because they could not keep up with mounting debt<sup>52</sup> This social turmoil forced the legislators to consider a way in which the loans borrowed as credit cards would not be imposed on heirs of the credit card holders, especially those individuals who were minors. Finally, the Civil Code was revised consecutively in 2008 and 2009 to abandon the unlimited inheritance of the debts owed by the deceased. Following the amendment, the heirs had to pay the debts only with the estates of the inheritance and were not liable for the amount of debts beyond the estates of the inheritance.<sup>53</sup> Accordingly, no liability would be imposed on the heirs if they did not acquire any estates from the deceased. This

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51. Minfa [Civil Code], art. 195 (amended 1999) (Taiwan).

52. See Tsung-fu Chen, *Shehui Wenti yu Qiyue Guanzhi de Jixian [Social Problems and the Limit of Contract Regulation]*, 134 YUEDAN FAXUE ZAZHI [THE TAIWAN L. R.] 82, 82-93 (2006).

53. Minfa [Civil Code], art. 1148 (amended 2009) (Taiwan).

revision abandoned the age old Chinese tradition that viewed the family property as a whole, and further reinforced the individualism in Taiwanese society.

## V. RECEPTION OF NEW CHINA'S CIVIL CODE (1949-2009)

### A. *Process of Reception of Western Law*

Since its establishment in 1949, the People's Republic of China ("PRC") had four drafts of the Civil Code, all of them failing in the end. The process of western law reception in the PRC can be divided in three periods.

#### 1. *New Sovereignty Period: 1949-1965*

Upon seizing power, the PRC announced its plan to annul all laws issued by the Nationalist government in 1949. The government attempted to enact its Civil Code but failed twice prior to the Cultural Revolution beginning in 1966.

##### (a) The First Draft of Civil Code 1956

The PRC began to draw up its first Civil Code in 1954 and finished it at the end of 1956. The code consisted of 525 articles divided in four chapters, i.e., general principles, ownership, obligations, and inheritance. This format of the civil code resembled the Soviet Union Civil Code 1922. Under the Soviet Union's law, the civil code was a kind of property law, which could not include the law of family. Besides, based on the planned economy, social productive materials had to be nationalized and therefore the law of things was removed with only the chapter of ownership being established. The Chinese law of marriage was separately enacted in 1950.

The first draft of Chinese civil code was set aside due to a series of political struggles within the Party such as the "anti-right wing movement." Chinese scholars noted on the failure of this Civil Code by saying that although this draft was modeled after Soviet Union's civil code, the Chinese Civil Code was not deviated from the path of German law since the Soviet Union Civil Code itself was based on the German Civil Code.<sup>54</sup>

##### (b) The Second Draft of Civil Code 1964

In 1962, the Chairman Mao requested Chinese legislature to draw up a civil code, which was finished in July 1964. The second draft of civil code was full of political slogans, aimed to promote the planned economy. This Civil Code did not model itself on foreign laws, including the Soviet Union

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54. Hui-Xing Liang, *Zhongguo Dui Waiguo Minfa de Jishou* [The Reception of Foreign Laws in China], Special Issue YUEDAN MINSHANGFA ZAZHI [CROSS-STRAIT LAW REVIEW] 4, 7 (2003).

code as both countries severed ties in 1959. Hence, China insisted on independence and autonomy as its ideology in order to fight against hegemonic powers. That is, the Chinese Communist Party asserted to be independent from both the Soviet Union and the United States. The foundations of the new civil code reflected this struggle for survival and took into account state's policy or the rules and experiences practically enforced by the government. Thus, the second draft of the Civil Code was a civil code without foreign laws.<sup>55</sup>

The second draft of the civil code illuminated public ownership strategy, which was pursued by the state. The code included 252 articles separated in three chapters, i.e., general principles, ownership of property, and transfer of property. This code excluded tort law, the law of family, and the law of inheritance, but included the relationship of budgets and that of taxation. It did not use the terminologies found in western civil codes such as 'rights,' 'obligations,' 'natural persons,' 'juristic persons,' 'right to thing,' 'right of creditor,' and 'right to ownership' etc., because Chinese leaders did not like them.<sup>56</sup>

This draft failed to take root in China due to the "Socialist Education Movement" and the "Four-clear Movement" that erupted in 1964, followed by the Cultural Revolution started in 1966. Commenting on this draft of civil code, a scholar pointed out that "for the legislation of civil code, it might not be impossible but absolutely undesirable to reject inclusion of foreign laws and foreign principles by blindly seeking a law with so-called Chinese characteristic."<sup>57</sup>

#### (c) Legal Education

After the Nationalist civil code was repelled and all existing legal resources abandoned, legal education in China followed the format set in the Soviet Union. The law schools used Soviet Union's books on civil code directly and invited Soviet Union's law experts to teach in the class. It was not until 1957 that the first Chinese civil law textbook was published, with its core legal theories derived from Soviet Union's legal theories. By and large, Chinese law was overwhelmingly influenced by socialist legal doctrines prior to the open and reform period in the late 1970s.

### 2. *Opening and Reform Period: 1978-1991*

After the Cultural Revolution ended in 1977, China indicated its

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55. Chen-Ying Wei et al., *Xin Zhongguo Minfa Qicao Wushih Nian Huigu* [Review the New China Civil Code Drafts for 50 years], in *ZHONGGUO MINFA DIAN LUNTAN* (2002-2005) [FORUM OF CHINESE CIVIL CODE: 2002-2005] 103, 109-10 (Wei-Guo Wang ed., 2006).

56. Wei et al., *id.* at 110.

57. Liang, *supra* note 54, at 7-8.

intention to open its doors to the outside world and end its political isolation. During this period, Chinese citizens remained intimidated by the regime and were afraid of more political struggles. Thus, there was no social movement in China that promoted the western civil law theories. Additionally, Chinese legal experts were not well educated in foreign languages and did not learn about the new developments in western law. Most civil law scholars learned law from Soviet Union. There was also a small group of scholars who specialized in the old Chinese civil code. Therefore, there were only two groups of scholars in China: one from Soviet Union's legal tradition, and the other from traditional continental law.<sup>58</sup> Important legislation on civil law during this period is discussed as follows:

(a) Economic Contract Law 1981

In the beginning of opening and reform period, it was necessary to establish new legal norms to create greater political stability and promote investment. The Economic Contract Law was established in 1981, in which drafters saw themselves as managers of planned economy. The purpose of this law was to ensure the enforcement of the state's strategy and its plans of promote Chinese modern economic structure under socialism. Article 4 of this law provided that "to establish an economic contract, parties have to obey the state's laws, conform to the state's strategy, and meet the state's needs."

This law stressed several times that in economic transactions involving products and items designed under the state's directives, the economic contracts had to be reached under the state's orders, and the party had to gain permission from the authorities before revising or terminating such contracts. In other words, the state's economic planning took precedence over private contracts,<sup>59</sup> demonstrating the influence of Soviet Union law on Chinese legal thinking.

(b) The Third Draft 1982

China set up a drafting committee for a new Civil Code in November 1979 and finished the third civil code draft in May 1982. The code borrowed heavily from Soviet Union's legislation outlines of civil law 1962, Soviet Union Civil Code 1964, and Hungarian Civil Code 1978.

The discussion on this draft continued in 1984. However, Chinese leaders decided temporarily to suspend the implementation of the Civil Code, and instead set up individual civil laws. This decision was pragmatic.

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58. Xian-Zhong Sun, *Zhongguo Jin Xiandai Jishou Xifang Minfa de Xiaoguo Pingshu* [Comment on the Effects of Reception of Western Law in Modern China], 2006(3) ZHONGGUO FAXUE [CHINESE LEGAL SCIENCE] 166, 171 (2006).

59. Wen-Jie Wang, *Dalu Hetong Falv Zhidu zhi Bianqian yu Fazhan—Jihua Dao Shichang de Guodu* [The Change and Development of Contract Law in Mainland China: Transition From Planned to Market Economy], in ZHONGGUO DALU FAZHI YANJIU DISHIHCHI [CHINESE LEGAL SYSTEM RESEARCH VOL. 10] 1, 13-14 (Judicial Executive Branch, Judicial Yuan ed., 2001).

Scholars argued that economic models in China were not finalized, the debate over the Law of Things remained unresolved, and market economy was still very weak.<sup>60</sup> After this policy decision, the drafting process of Chinese Civil Code was changed in a way “from wholesale to retail,” meaning that individual civil laws would replace a unified civil code in the near future.

According to one of the drafters, Yu Neng-bin, this draft of the Civil Code failed because the social, economic foundations for the civil code did not exist. The socialist economy was planned with all assets and labors distributed by government. Property privatization was not allowed and westernization forbidden. Second, some of the drafters of this civil code studied traditional civil law and were not familiar with contemporary foreign laws due to China’s long-term isolation from the outside world. Most of the drafters learned law from the Soviet Union and were greatly influenced by theories of planned economy. Third, ideology of the drafters made them more susceptible to socialist legal thoughts of Eastern Europe, rather than western law of non-socialist states.<sup>61</sup>

(c) Economic Contract with Foreigners Law 1985

The Economic Contract with Foreigners Law (“ECFL”) was designed to facilitate foreign investments in China, with domestic investments still administered through the Economic Contract Law. The ECFL used “economic contract,” which followed the Soviet Union’s law. Nonetheless, the structure and the substance of the ECFL were inspired by Anglo-American contract law and the United Nations Convention on Contract for the International Goods of Sales. Thus, the ECFL was the first Chinese law to adopt concepts from Anglo-American law and international conventions.<sup>62</sup>

(d) General Principles of Civil Code 1986

Between 1979 and 1986, a debate over the adoption of civil code or economic law was fought out among Chinese legal scholars. Economic law scholars argued that a civil code was not necessary and instead, China should focus on enacting economic laws. Others argued that China should adopt the legal system of Czechoslovak Socialist Republic to establish both a civil code and economic law. Another group called to abolish the term “civil

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60. Ping Jiang, *Dalu Minfa Dian Caoan Yanjiu—Jian Lun Dalu Sifa Gaige Xianzhuang* [Research on Mainland Chinese Civil Code Draft with Comment on the Contemporary Reform in Mainland China], in *ZHONGGUO DALU FAZHI YANJIU DISHIHERHCHI* [CHINESE LEGAL SYSTEM RESEARCH VOL. 12] 635, 636-37 (Judicial Executive Branch, Judicial Yuan ed., 2003).

61. Neng-Bin Yu et al., *Xin Zhongguo Minfa Qicao Wushih Nian Huigu* [Review the New China Civil Code Drafts for 50 years], in *ZHONGGUO MINFADIAN LUNTAN* (2002-2005) [FORUM OF CHINESE CIVIL CODE: 2002-2005], *supra* note 55, at 114-15.

62. Liang, *supra* note 54, at 9.

code” altogether and call it the “law of citizen’s rights.”<sup>63</sup> This debate came to an end with the enactment of Chinese “General Principles of Civil Code” in 1986.

The General Principles was based on the Chapter of General Principles in the draft of civil code 1982, which followed the Soviet Union’s law. The General Principles provided some guidelines for most of the civil law issues dealt with under western civil codes, but were short of detailed provisions. Under the General Principles, judges had to follow the state’s policy if rules provided by the General Principles were not sufficient. However, it is important to note that the General Principles were not viewed as a civil code in China.<sup>64</sup>

In conclusion, during the opening and reform period of China’s legal history, both the third draft of civil code and the General Principles were the products of Soviet Union legal theories with strong adherence to planned economy law. Western law and western legal theories did not enter into Chinese civil law system during that period.<sup>65</sup> On the other hand, the law governing foreign investments began to utilize Anglo-American law and international treaties, indicating the first example of westernization of Chinese law.

### 3. *Market Economy Period: 1992-2009*

Deng Xiaoping gave a historic address in southern part of China in 1992, arguing that the market economy was not equivalent to capitalism and socialism was not equivalent to the planned economy. According to Deng, mainland China could completely develop socialist market economy at the socialist rudimentary stage.<sup>66</sup> This address signaled China’s formal adoption of market economy and the abolition of planned economy. Since then, the market economy has created an additional need for development of civil

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63. LIANG HUI XING, *Tong-Dong Xiansheng yu Minfa Jingjifa Lunzheng* [The Contestation between Mr. Tong-Dong and the Civil Economic Law], in ZHONGGUO MINFA JINGJIFA ZHU WENTI [VARIOUS PROBLEMS OF THE CHINESE CIVIL ECONOMIC LAW] 329 (1999), cited in *supra* note 55, at 9.

64. Ping Jiang, *Minfa Tongze de Shiyong Fanwei ji Qi Xiaoli* [Application Scope and Effect of General Principles of Civil Code], 3 FAXUE YANJIU [CHINESE JOURNAL OF LAW] 1, 1-6 (1986).

65. Professor Wang Tze-chien indicated, however, that the General Principles of Civil Code was greatly influenced by the German civil code because of its adoption of juristic acts and its concepts and systems. See TZE-CHIEN WANG, *Zhonggong Minfa Tongze zhi Qinquan Zeren: Bijiaofa zhi Fenxi* [Tort Liability under Chinese General Principles of Civil Code: An Comparative Research], in MINFA XUESHUO YU PANLI YANJIU DILIUTSE [RESEARCH ON CIVIL LAW THEORIES AND COURT DECISIONS VOL. 6] 285, 286 (1989).

66. Albert H.Y. Chen, *Zhongguo Dalu Fazhi Liushi Nian: Huigu yu Fansi* [Legal System in Mainland China for the Six Decades: Review and Reflections], in DISANJIE MA HANBAO JIANGZUO LUNWEN HUIBIAN [ESSAY COMPILATION OF MA HAN-BAO FORUM: THE THIRD VOLUME] 129, 140 (College of Law, NTU & Ma Foundation for High Purpose eds., 2009).

code in China.

(a) Unified Contract Law 1999

Prior to 1999, there were a series of contract laws issued in China, including the Economic Contract Law 1981 (revised in 1993), the Economic Contract with Foreigners Law 1985, and Technology Contract Law 1987. Chinese legal scholars urged the government to create a unified contract law and replace the existing contract laws. The enactment of a unified contract law revealed Chinese shift towards market economy. The drafters of the contract law clearly indicated in their “Legislative Program for the Contract Law” in 1993 that “[we] will widely consider and use the successful legislative experiences, court decisions, and legal theories of countries and areas that have a well-developed market economy.”<sup>67</sup> This contract law was drafted from 1993 to 1999 and consisted of 428 articles. According to Professor Liang Hui-xing, one of the drafters, the unified contract law “adopted the concepts and systems of German Civil Code. Many principles, doctrines, and provisions could be traced to German, Japanese, and Taiwanese civil codes. The chapter on general principles and contract of sales included the Unidroit Principles of International Commercial Contracts, the United Nations Convention on Contracts for the International Sales of Goods, the Principles of European Contract Law, and Anglo-American law.”<sup>68</sup>

Professor Liang accurately asserted that China had changed its policy towards implementing foreign law during drafting of the contract law. He noted that “the reception [of laws] changed from the preference for civil codes of Soviet Union and East European socialist countries to preference for the civil codes of developed capitalist countries. The receptive law changed from mono-target to pluralistic targets.”<sup>69</sup> This transformation signified a new trend of the westernization of law in China, which made the unified contract law full of peculiar meanings.

(b) Fourth Draft 2002

In March 1998, the Chinese National Assembly of Representatives Standing Committee appointed nine scholars to draft a new civil code. The plan of this drafting group was to promulgate the contract law in 1999, the law of things in the next 5 years, and a final Civil Code before 2010.

The fourth draft of the Civil Code was finished in December 2002 and included eight chapters: the Law of Things, the Law of Contract, the Right to Personality, the Law of Marriage, the Law of Adoption, the Law of Inheritance, Tort Law, and the Conflict Law. No unified chapter on Law of

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67. See Liang, *supra* note 54, at 10.

68. Liang, *supra* note 54, at 9.

69. Liang, *supra* note 54, at 10.

Obligations was provided in this version.<sup>70</sup> This draft version of Civil Code ignited many debates among law scholars. For example, it became an issue as to whether the Tort Law and the Right to Personality should occupy independent chapters. What models of law, i.e., Continental law or Anglo-American law should be adopted for the Law of Tort, and should the intellectual property law should be included in the civil code?<sup>71</sup> Due to these debates, the fourth draft of the Civil Code was suspended.

(c) Law of Things 2007

The passage of the “Law of Things” (law of property) in 2007 was the most remarkable achievement of civil code legislation in modern Chinese legal history. The legislation of the “Law of Things” concerned about the dispute over the choice between socialism and capitalism. This law includes 247 articles divided in 5 chapters, i.e., General Principles, Ownership, Usufructuary Right, Mortgages and Pledges, and Possession. This Act followed the structure and concepts of the German Civil Code; however, it maintained three distinctions of ownership: collective ownership and private ownership, with a special protection given to state ownership, which was the vestige of the General Principles of Civil Code 1986. The passage of the Law of Things further demonstrates movement toward the westernization of China’s Civil Code.

All in all, China has almost all chapters of western civil codes, including the Law of Contract, the Law of Things, the Law of Family and the Law of Inheritance. The draft version of the Law of Tort had been finished and discussed for a long time, and eventually was passed in December 2009. The remaining issue about the civil law in China is whether a unified Civil Code should be enacted.

B. *Debates on Mother Law*

As this paper demonstrated, modern Chinese civil law has been greatly influenced by European continental law, especially the German Civil Code, since the Nationalist civil code. After the new China was established, the Contract Law 1999 changed its preference of sources of law from Soviet

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70. Yung-Chin Su, *Minfa Dian de Shidai Yiyi—Dui Zhongguo Dalu Minfa Dian Caoan de Da Fangxiang Ti Ji Dian Kanfa* [The Epoch Meaning of Civil Code: Some Comments on the Policies of the Draft of Mainland Chinese Civil Code], in MAIRU 21 SHIJI DE LIANGAN SIFA: SUN SEN-YAN JIAOSHOU QISHI HUADAN ZHUSHOU LUNWEN JI [APPROACHING THE 21ST CENTURY OF CROSS STRAIT PRIVATE LAW: IN HONOR OF PROFESSOR SUN SEN-YAN’S SEVENTY YEARS OLD] 57, 82 (Editorial Board of Essays in Honor of Professor Sun Sen-Yan’s Seventy Years Old ed., 2004).

71. Liang, *supra* note 16, at 10-14; Hui-Xing Liang, *Zhongguo Minfa Dian Bianzuan de Jincheng yu Zhenglun Dian* [The Process of and Debates over the Compilation of Chinese Civil Code], in ZHONGRI MINSHANGFA YANJIU DIERHJYUAN [RESEARCH ON SINO-JAPANESE CIVIL AND COMMERCIAL LAW VOL. 2], *supra* note 17, at 6-7.

Union and East European law to western capitalist law. In the wake of this change, Chinese scholars are divided over choice of law in the future Chinese civil code.

The prominent Chinese scholar, Jiang ping, argued that “the Civil Code was mainly based on the continental law, but also had to include Anglo-American law.” “In addition to continental law, especially German legal system, Chinese civil code had to include some good things from Anglo-American law.”<sup>72</sup> Another famous civil law professor, Wang Li-ming, also pointed out that “I strongly agreed with Teacher Jiang’s words: ‘in the process of enactment, the Civil Code had to break through the German law model.’ Our scholars nowadays were fully infatuated with German civil code model in some degree. What we wanted to do today was to enact Chinese Civil Code, which should play an important role around the world.... We must have to draw up our own civil code, which should not be a copy of German Civil Code. If we just copied German Civil Code, it implied that we did nothing for our civil code.”<sup>73</sup>

Nonetheless, most Chinese civil code scholars argued that there were no other alternatives to study from German law. Professor Liu Jing-wei, head of department of law at Xiamen University, recognized that Chinese civil law theories were influenced by German law both in Nationalist China and in Communist China. According to him:

“The civil code modeled in German style has become a ‘tradition’ of Chinese civil law theory. I might not be able to find any textbooks on civil codes published in China not to follow German style but choose French, Anglo-American, or any other styles.... Therefore, in my opinion, with respect to the compilation of civil code, we had to adopt the system of German Civil Code, which was an integral code that included General Principles and specific chapters.... What must be pointed out was that to adopt German law system was not to completely copy German Civil Code, since it was necessary to pay attention to the shortages *found in* German law. For instance, German Civil Code did not provide rules for some important rights to personality.”<sup>74</sup>

72. Jiang Ping et al., *Zhongguo Minfa Dian de Lifa Silu he Lifa Tili* [Legislative way of thinking and model of Chinese Civil Code], in ZHONGGUO MINFADIAN LUNTAN (2002-2005) [FORUM OF CHINESE CIVIL CODE: 2002-2005] 1, 4-5 (Wei-Guo Wang ed., 2006).

73. Li-Ming Wang et al., *Zhongguo Minfa Dian de Lifa Silu he Lifa Tili* [Legislative way of thinking and Law System of Chinese Civil Code], in ZHONGGUO MINFADIAN LUNTAN (2002-2005) [FORUM OF CHINESE CIVIL CODE: 2002-2005], *supra* note 72, at 11-12.

74. Jing-Wei Liu, *Zhiding Minfa Dian Xu Jiejue de Liangge Jiben Wenti* [Two Basic Problems Necessary to be Resolved in the Enactment of Civil Code], in MAIRU 21 SHIJI DE LIANGAN SIFA: SUN SEN-YAN JIAOSHOU QISHI HUADAN ZHUSHOU LUNWEN JI [APPROACHING THE 21ST CENTURY OF CROSS STRAIT PRIVATE LAW: IN HONOR OF PROFESSOR SUN SEN-YAN’S SEVENTY YEARS OLD] 125,

Professor Shao Jian-dong of Nanjing University agreed with the legal “tradition” argument stating that “the Soviet Union’s law adopted in the 1950s and the 1960s in China was substantially German law. After the late 1970s, the General Principles of Civil Code, the Law of Guarantees, and the Law of Contract were typical Chinese civil laws, all of which belonged to German law model. In light of these experiences, China has automatically made its decision to receive German law since the late century, and hence the German legislative model, concepts and systems, fundamental principles, major institutions, and legal methods have become a component of the tradition and culture of Chinese civil law.”<sup>75</sup>

Indeed, even though Professor Wang Li-ming opposed to the idea of copying the German Civil Code, he agreed that “although we might not completely copy German law model, I still opined that we should use German model for reference, adopting juristic relationships to establish the civil code system. The great contribution of Pandectist theories was to establish a framework of general system of civil code, which could be used to set up a systemic structure of civil code.”<sup>76</sup>

In light of these opinions, it could be asserted that the Chinese civil code would receive German civil code in terms of its concepts, systems, and structure. Some legal doctrines such as the right to personality and tort law might become individual chapters, using French law and Anglo-American law. As Professor Liang Hui Xing concluded for the enactment of the unified contract law that “the unified contract law demonstrated that Chinese reception of foreign civil codes has manifested the phenomenon of ‘pluralistic targets;’ that is, on the basis of continental German civil law’s concepts and systems, it widely took reference to the legislative experience, court decisions, and theories in the developed countries and areas, with adopting flexible Anglo-American laws and comprising with international treaties and international custom.”<sup>77</sup> This comment might also be suitable to predict the future direction of western law in Chinese civil code.

It was worth noting that Japanese scholars played a significant role in

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141 (Editorial Board of Essays in Honor of Professor Sun Sen-Yan’s Seventy Years Old ed., 2004).

75. Jian-Dong Shao, *Dalu Xuexi Jiejian Deguo Minfa Jingyan zhi Wo Jian* [My Opinion on the Experience of Learning German Civil Code in Mainland], Special Issue YUEDAN MINSHANGFA ZAZHI [CROSS-STRAIT LAW REVIEW] 141, 142 (2003).

76. Li-Ming Wang, *Guanyu Woguo Minfa Dian de Tixi de Zai Sikao* [Re-considering the System of Our Civil Code], in MAIRU 21 SHIJI DE LIANGAN SIFA: SUN SEN-YAN JIAOSHOU QISHI HUADAN ZHUSHOU LUNWEN JI [APPROACHING THE 21ST CENTURY OF CROSS STRAIT PRIVATE LAW: IN HONOR OF PROFESSOR SUN SEN-YAN’S SEVENTY YEARS OLD] 15, 18, 23 (Editorial Board of Essays in Honor of Professor Sun Sen-Yan’s Seventy Years Old ed., 2004).

77. Hui-Xing Liang, *Wuquanfa Zhiding Zhong Youguan Yishi Xingtai de Zhenglun* [The Debates over Ideology in the Enactment of the Law of Property], in ZHONGRI MINSHANGFA YANJIU DILIUYUAN [SINO-CHINESE CIVIL-COMMERCIAL LAW RESEARCH VOL. 6] 46, 64 (Tao Chu ed., 2007).

the westernization of Chinese civil law. Japanese scholars went to China not only in the 1930s but also in the 1980s and 1990s to support the development of Chinese scholars' legal knowledge and broaden their knowledge of western law. They even took part in the enactment of the unified contract law. With the help of these scholars, the Contract Law 1999 was promoted to a great extent. Not surprisingly, Japanese law was also introduced into China, following these exchanges between Chinese and Japanese scholars. For instance, China adopted French law under Japanese influence regarding transfer of real estates, instead of relying on German law.<sup>78</sup>

### C. *Social Implications of Reception of Western Law in China*

The reception of western law in China was not only an issue of legal change but also an issue of cultural and ideological change. Two cases could be illuminated to demonstrate the depth of this issue:

#### 1. *The Right to Personality*

The first draft of civil code 1956 did not recognize the "natural person," and instead referred to individuals as "citizens" who are subjects of legal relationships, indicating the state's control of society.<sup>79</sup> During the second draft of civil code 1964, the law was designed to adjust the relationship between the state, the collectives, and the citizens. Both of these two drafts did not mention the protection of the right to individual personality.<sup>80</sup>

In the third draft of civil code 1982, for the first time some protection of individual right to personality was provided. Article 16 of the draft of civil code stated that "the citizen's right to lives, health, physical freedom, name, reputation, honor, and personal profile, as well as copyright, discovery right, inventing right, and any other personal rights were all protected by law."<sup>81</sup> These provisions remained in the General Principles of Civil Code 1986, with an addition of "legal protection for the citizen's human dignity."<sup>82</sup>

In the fourth draft of the civil code 2002, the issue was not concerned with whether the law should protect the right to personality, but whether the right to personality should be stated in an individual chapter in order to demonstrate its significance in China. This debate was widespread among

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78. Sun, *supra* note 58.

79. XIN ZHONGGUO MINFA DIAN CAOAN ZONGLAN SHANGJYUAN [COMPREHENSIVE VIEWS ON THE DRAFTS OF CIVIL CODE IN NEW CHINA VOL. 1] 26 (Qin-Hua He et al. eds., 2003).

80. XIN ZHONGGUO MINFA DIAN CAOAN ZONGLAN SHIAJYUAN [COMPREHENSIVE VIEWS ON THE DRAFTS OF CIVIL CODE IN NEW CHINA VOL. 3] 99 (Qin-Hua He et al. eds., 2003).

81. *Id.* at 562-63.

82. Minfa Tongze [General Principles of Civil Code], art. 98-105 (1986) (China).

Chinese legal scholars.

Professor Wang Li-Ming suggested creation of a separate chapter for the right to personality. He argued that the right to personality was a counterpart of the right to property. Since the right to property was outlined in a separate chapter within the Law of Obligations and the Law of Things, it would be inconsistent not to include clearly defined rules of personality. The reason why an individual chapter for personality right was needed was that it demonstrated personality right as a fundamental civil right. The chapter would establish an integral system of personality rights with full contents of those rights, within a general framework of personality right so as to meet the evolution of personality right in the future.<sup>83</sup>

Professor Wang further noted that China was a feudal country that did not respect personality right for thousands of years. Thus, development and protection of these rights was particularly important in Chinese context. An individual chapter for the right to personality would recognize a new perspective on value of human beings; that is, human interests were more important than property interests, and must receive appropriate protections over the latter when the two are in conflict. A reinforced right to personality would give a weapon to people to fight for their rights when they were injured as a result of illegal behaviors that “underestimated persons, humiliated persons, or drove persons to be inhuman.” This change, according to Professor Wang, would have great impact on Chinese establishment of democracy and rule of law.<sup>84</sup>

On the other hand, Professor Liang Hui-xing opposed this view. He contended that there was no precedent found to design an individual chapter for the right to personality in civil codes around the world. The right to personality was put together with the natural persons under either French law or German law. The reason was that the personality right had the same nature as the person’s enjoyment of private rights, the competency, birth and death all of which belonged to subjects and were different from relationships involving injured and injuring parties. Adopting individual chapter for the right of personality would arrange that right in parallel with relationships of obligations, things, family, and inheritance and seriously violate the legal logic and civil law theories.<sup>85</sup>

Regardless the future outcome of this debate, it is clear that the right to personality and respect for human dignity have become an important aspect of Chinese legal discourse, indicating a great change in traditional Chinese culture and a desire to correct the wrongs done during the Cultural Revolution.

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83. Wang, *supra* note 76, at 28-31.

84. *Id.*

85. Liang, *supra* note 16, at 13.

## 2. *The Law of Things*

In 1950, the Chinese government re-distributed all land to farmers as part of the national land reform. In 1952, all private property (including the property held by foreigners and officials) became property of the state. This “reform of socialism” was finished in 1956 and eliminated all private property in China. The Chinese Constitution of 1975 and 1978 provided that “the major ownership of productive materials was divided into types during this stage of socialism: socialist people’s ownership and socialist laborer’s collective ownership.”<sup>86</sup> During these turbulent times, a farmer could be punished for merely raising a sheep in his home.<sup>87</sup>

Under the Soviet Union’s law, property was divided into three types: state owned property, collective property and private property, which was governed under a different set of legal principles. State owned property was the highest form of productive relationships in socialism and enjoyed supremacy that conferred it with preferable legal protection. Collective ownership was considered as elementary form of public ownership in socialism and its status was inferior to state ownership. However, it was still considered to be sacred and received a number of legal protections. On the other hand, private ownership was considered to be the debris of a capitalist right to private ownership, which should be suppressed.<sup>88</sup>

Following this ideology, the Chinese Communist Party made efforts to eradicate the system of “people exploiting another people.”<sup>89</sup> The Party promoted state and collective property and completely eliminated private ownership. The state law only recognized the ownership, but not rights to ownership.<sup>90</sup>

Article 6 of the current Chinese Constitution (1982) provides that “the foundation of socialist economic system in People’s Republic of China is the socialist ownership of productive materials, i.e., the whole people’s ownership and the mass laborer’s collective ownership.” Article 12 of the Constitution provided that “the socialist public property is divine, not subject

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86. Hui-You Hu & Dung-Bi Chen, *Dalu Suoyouzi Gaige de Shijian yu Lilun* [The Practice and Theory of Ownership in Mainland], in ZHONGGUO FAZHI XIANDAIHUA ZHI HUIGU YU QIANZHAN [REVIEW AND PROSPECT ON CHINESE LAW MODERNIZATION], *supra* note 18, at 603-04.

87. Xian-Zhong Sun, *Zhongguo Dalu Wuquan Fa Zhiding de Ruogan Wenti* [Some Problems on the Enactment of Mainland Chinese Law of Property], 2 YUEDAN MINSHANGFA ZAZHI [CROSS-STRAIT LAW REVIEW] 32, 35 (2003).

88. *Id.* at 35; Sun, *supra* note 58, at 169-70.

89. Both article 12 of Chinese Constitution 1982 and article 14 of Chinese Constitution Amendment 1999 provided that “the socialist public ownership system eradicated the system of people exploiting another people and carried out the principle of doing what you could and distributing in accordance with the labor.”

90. Wei-Chiou Lung, *Zhongguo Wuquan Fazhi de Bianqian yu Zhanwang—Yi Lifa Jiantao Wei Shijiao* [The Transformation and Prospect of Chinese Law of Property: In Perspective of Legislature], 16 YUEDAN MINSHANGFA ZAZHI [CROSS-STRAIT L. R.] 5, 7 (2007).

to infringement.” Accordingly, the General Principles of Civil Code 1986 followed this principle without using the “right of things,” and instead utilizing the concept of ownership. In order to promote economic reform, the General Principles established the “separation of two rights”: the ownership belonging to the state or the collective and the right to use or to manage given to private individuals. Its purpose was to reinforce the state and collective ownership and to focus on the control over the private property. Accordingly, the General Principles reinforced the peculiar status of legal protection given to state and collective properties and at the same time gave limited legal recognition to private property.<sup>91</sup>

Although the Chinese “Law of Things” 2007 maintained the three categories (state, collective, and private ownership), two phenomena should be noted in the passage of this law.

First, the “Law of Things” 2007 represents the first case in modern Chinese legal history where western legal terminology replaces Marxist terms. The “right to things” and “the law of things” denote individual autonomy of property and its independence, which emphasize market and property liberty - a product of western legal concept of property rights. This indicates that Chinese law of property begin to deviate from socialist legal ideology.

Second, article 4 of the Chinese Law of Things set up an equal protection for all rights of things, recognizing equal protection of the state, collective, and private property. This article was designed to outline protections for the private property has in a socialist country that in reality was carrying out capitalist reforms. Undoubtedly, this article directly challenged Article 12 of the Constitution that clearly indicated the discriminating preference to the protection of public property over private property with a divine status of socialist public property.

When the Law of Things was under legislative debates in 2005, a professor of jurisprudence at Peking University published a letter in the mass media entitled “a law of things that violated the constitution and defied the socialist fundamental principles,” strongly criticizing the principle of equal protection. This letter successfully postponed passage of the Law of Things. In March 2007 when the draft Law of Things once again entered the legislation, hundreds of people gathered to protest its passage, declaring that the law was unconstitutional, creating “the most dangerous situation” for the future of China. The main problem was, they argued, that “article 12 of the Constitution was not written down in the law of things.”<sup>92</sup>

As a response to these concerns, Chinese civil law scholars

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91. *Id.* at 7-8.

92. Lung, *supra* note 90, at 10.

unequivocally contended that the defining characteristic of the Law of Things was a desire to establish equal protection principle. Any opposition to the equal protection of private property was not in conformity with the Communist Party's and the state's policy to develop the non-public economy.<sup>93</sup>

Against the background of these political and ideological struggles, the Law of Things was finally passed in 2007. The fact that civil law professors won the equal protection of private property principle demonstrates that Chinese civil law has discarded Soviet Union socialist legal theories. Instead, it referred to western capitalist legal doctrines, further reinforcing the presence of transplantation of western law in China.

## VI. CONCLUSION

Based on the process of westernization of Asian laws and reception of western legal theories, a number of concluding observations may be noted.

First, both Japan and China began to transplant western law in the late 19<sup>th</sup> century primarily due to political considerations. Both countries attempted to void the unfair treaties that allowed extraterritorial application of foreign laws.

Second, western law was overwhelmingly transplanted in Japan, Taiwan, and China to accommodate social and economic changes that resulted in a shift towards market economies. Continental law, especially German law, was the most predominant legal system to take root in East Asian civil codes, while Angle-American law gradually entered their legal systems through special civil laws involving commercial transactions.

Third, in the three cases discussed, the reception of western legal theories served an important role in westernization of domestic legal systems. Both Japanese and Taiwanese civil codes adopted various legal systems from western countries, with German law as main preference due to positive reception of German legal theories.

Fourth, the initial reception of western law in both Japan and China resulted in conflicts between supporters of traditional customs and western ideas. The tradition in East Asia emphasized duties of individuals belonging in groups and reinforced unequal social status between individuals. Comparatively, western law was rights-oriented with emphasis on equality and individualism. After East Asian countries launched market economic reforms and underwent immense social change, their legal systems were further revised to embody western concepts of equality and individualism. Protection of these values further re-enforced market economic reforms.

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93. Liang, *supra* note 77, at 58.

Fifth, during the introduction of western law, Japan, Taiwan, and China transformed their traditional cultures and ideologies to resemble western, capitalist cultures. In Taiwan, Chinese tradition of maintaining surnames of fathers was eliminated under the Civil Code reform. Respect and protection of the right to personality in both Taiwan and China demonstrate that Chinese society has transformed its traditional culture of collective communities into a new world of individualism. In particular, the recent deviation from socialist legal theories under Chinese civil law clearly demonstrates China's desire to westernize its legal system and this trend will likely to have a great impact on China's future development of rule of law.

Finally, social stability was important for the successful westernization of law in East Asia. Many drafts of Chinese civil code failed in the early stage of legislation due to social turmoil in China. By contrast, Japan and Taiwan were more efficient in passing civil codes due to their stable social and economic situations.

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# 日本、臺灣與中國的民法移植 ——以法律演化為中心

陳 聰 富

## 摘 要

本文旨在介紹西方民法移植入日本、臺灣與中國的過程，以西方法律對傳統文化，以及亞洲法律的西方化為討論焦點。本文指出該移植過程的幾項特色，以及東亞在接受西方法律後的結果。第一，為符合市場經濟導向的社會與經濟變遷，西方法律被大量移植入日本、臺灣與中國。第二，西方的法律概念在東亞的法律體系西方化的過程中，扮演重要的角色。第三，在東亞國家開展市場經濟，並經歷社會轉型之後，西方的平等與個人主義概念更加內化於東亞國家法律體系之中。最後，在西方式的民法實踐下，傳統文化被嚴重侵蝕；同時，東亞民法明確地實施個人主義式的個人權利，且被用以支持社會經濟發展。

關鍵詞：法律演化、民法、移植、法律文化、日本民法、臺灣民法、中國民法