Structures of Three Major Civil Code *Projets* in Today's China

Guodong Xu*

I. A BRIEF HISTORY OF CIVIL CODIFICATION IN CHINA

China is a country with a very long tradition of codification, but all the codes of various ancient dynasties were penal codes, so China effectively has no ancient tradition of civil codification.

Beginning with the Opium War of 1840, China came into contact with Western legal culture and was forced to introduce a Western-style civil code. In August 1911, Qing Dynasty officials completed their Civil Code *Projet*, but the dynasty collapsed soon after and the *projet* therefore never became law. The political successor of the Qing Dynasty, the Republic of China founded in 1911, established a Committee for Codification. It produced a civil code promulgated by stages from 1929 to 1933. This was the first civil code in Chinese legal history and is still in effect in Taiwan today.[1]

The Communist Party of China, after assuming political control over the country in October 1949, completely repealed this civil code and switched the country to a model based on Soviet Russian law. Since then the Chinese central authorities have attempted several times to draft a complete civil code. The first time occurred at the beginning of the 1950s and the second time at the beginning of the 1960s; both failed to

* Professor of Law, Xiamen University. The author would like to thank Alex Woods for his generous help in the preparation of this Article.

1. There is an English edition of this code: THE CIVIL CODE OF THE REPUBLIC OF CHINA (Ching-lin Hsia, James L.E. Chow, Yukon Chang trans., Kelly & Walsh Ltd., Shanghai, 1930).

produce a civil code because of the negative influence of legal nihilism and lack of sincerity on the part of authorities. After 1978, China entered the era of reform. The liberalization of the economy rendered it necessary to have a civil code, so the third draft of the Chinese Civil Code was developed in 1982. Because the country was in transition from a centralized planned economy to a free market economy, the instability of the socio-economic structure made the legislature change its working strategy and replace the "wholesale" policy with a "retail" or legislation by stages policy, namely, the legislature decided to temporarily abandon the program of total civil codification and devote itself instead to enacting a series of special regulations.[2] Legislators expected to be able to consolidate these pieces of legislation into a comprehensive civil code at some opportune moment in the future. As the first step of the new policy, the General Principles of Civil Law was promulgated in 1986 and came into effect on January 1st of the next year. After this, the Law of Copyright was enacted in 1990 (and amended in 2001), the Adoption Law in 1992, the Company Law in 1994, the Law of Warranty in 1995, the Law of Partnership Enterprise in 1997, and the Contract Law in 1999. Thus, with the exception of a Law of Things, these laws issued in the last two decades, together with the laws promulgated earlier, such as the Law of Trademarks (1983, and amended in 1993 and in 2001), the Patent Law (1984), the Marriage and Divorce Law (1980, amended in 2001), and the Succession Law (1985), have created a basically complete legal framework for China. But at the present time we still have no civil code in a proper sense. That is really a shame for a country within the Continental legal tradition.

In March 1998, as the vice chairman of the National People's Congress (NPC), Wang Hanbin, was preparing to retire, he decided to reinitiate the drafting of the civil code of the People's Republic of China (PRC) for the purpose of adding another feather to his cap before ending his career. Therefore, he hastily nominated a Group for the Redaction of the Civil Code (GRCC). Originally, it was composed of six professors, one retired judge, and two retired officials of the Commission of Legislative Affairs (the CLA). The six professors were Liang Huixing of the China Academy of Social Sciences, or CASS (fifty-nine years old); Jiang Ping of China University of Politics and Law, or CUPL (seventy-three years old); Wang Jiafu of CASS (seventy-two years old); Wang Liming of People's University (forty-two years old), Wang Baoshu of

2. *See* Liang Huixing, A lecture about the ongoing civil codification given at Fudan University, *at* http://text88.myrice.com/htfjz/fudanjiangxueneirong/000001.htm.

Qinghua University (sixty-two years old); and the retired professor Wei Zhenying of Beijing University (seventy-one years old). The one retired judge was Fei Zhongyi of the Supreme People's Court, while the two retired officials were Wei Yaorong and Xiao Xun of the Commission of Legislative Affairs of the NPC Standing Committee. As time went on, the real working core of the GRCC changed, because some members shifted the work onto their young colleagues and stood idly by. But we should note that almost one half of the nominated drafters were retired people. Therefore, we can say that there is a "civil codification of old men" in China just as there is a "politics of old men." In contrast, when the drafters of the Civil Code of Louisiana of 1808, James Brown and Louis Moreau-Lislet, began their work, they were respectively forty and thirty-six years old;[3] the drafter of the Swiss Civil Code, Eugen Huber was forty-three years old;[4] the drafter of the *Projet* of the Civil Code of Brazil, Augusto Teixeira de Freitas, was forty-four years old;[5] and the author of the Civil Code of Chile, Andres Bello was only thirty-one years old.[6]

After this group was formed, it set up a program for the compilation of the Chinese Civil Code, which divided the job into three steps. The first step was to enact a uniform contract law[7] to bring about the unification, perfection, and modernization of rules about commercial transactions. This step was slated to be accomplished by 1999. The second step was to perfect the basic norms concerning property relationships by codifying the Law of Things within five to six years. The third step was to codify a complete civil code by 2010. The promulgation of the Contract Law in 1999 accomplished the first step. As for the second step, one working group headed by Professor Liang Huixing offered a draft of the Law of Things in 1999 while another

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3. As for the date of birth of Moreau-Lislet, see ALAIN A. LEVASSEUR, LOUIS CASIMIR, ELISABETH MOREAU LISLET: FOSTER FATHER OF LOUISIANA CIVIL LAW 82 (1996). As for Brown's date of birth, see www.enlou.com/people/brownj-bio.htm.

4. *See* M. WALTER YUNG, EUGÈNE HUBER ET L'ESPIRIT DU CODE CIVIL SUISSE, Librairie de L'Université, Georg & Cie S.A., app., pp. 191s (1948).

5. *See* Jose Carlos Moreira Alves, A Formacao Romanistica de Teixeira de Freitas e Sue Espirito Inovador, In Sandro Schipani (a cura di), Augusto Teixeira de Freitas e il Diritto Latinoamericano, Cedam, Podova, 17, 23.

6. *See* Juan G. Matus Valencia, *The Centenary of the Chilean Civil Code*, 7 AM. J. COMP. L. 71 (1958).

7. There were three contract laws in China in the past, namely the Economic Contract Law (1981), the Foreign Economic Contract Law (1985), and the Technology Contract Law (1987). There are many conflicts between them because they represented the different interests of governmental departments (the Administrative Bureau of Industry and Commerce, the Ministry of Foreign Trade and the Commission of Science and Technology) that had enacted them. This situation rendered it necessary to enact a uniform contract law.

working group headed by Professor Wang Liming offered a different draft of the same law at the end of 2000. Taking these two drafts as groundwork, the CLA produced an official draft of the Law of Things in May of 2001 and distributed it nationally to various legal institutions asking for criticism.

But the three-step working program underwent a change at the end of 2001 due to two events. The first was the ascension of China to the WTO, which meant that China undertook more obligations to the international society in the legal field than she had in the past. To satisfy the demands of international society, the legislature of China decided to accelerate the process of civil codification. The second was the retirement of the Chairman of the Ninth NPC, Li Peng, in March 2003. He found inspiration in the well-known words of Napoleon: "My glory is not that I have won 40 battles, the battle of Waterloo has removed the memory of all of them, but my civil code will not be forgotten and it will be eternal."[8] Li Peng wanted to have the glory of being the initiator of the Civil Code of China and directly ordered the GRCC to complete the code by 2002 so that the *projet* could be finalized by the Standing Committee of the Ninth NPC before his retirement. Thus a connection between his name and the civil code of China could be established, even though he knew full well that he would be leaving an unfinished work to his successor.

Under these circumstances, the CLA held a working meeting with all the members of the GRCC on January 11, 2002, in which a division of labor was made so that every drafter could take responsibility for several parts of the *projet*. Professor Liang Huixing, one of the most active and relatively young members of the GRCC, was placed in charge of the drafting of the General Part of the whole code, the Law of Things, the General Part of the Law of Obligations, and Contract Law. Professor Wang Liming, another active member and the youngest on the GRCC, was put in charge of the book of Personality Rights (in which rights concerning name, image, honor of natural persons, etc., are set forth) and Torts. Professor Wu Changzhen, a newly nominated member of the GRCC, was put in charge of Family Law and Succession Law. The CLA set the end of March 2002 as the deadline for all drafters to finish their work. In fact, all the *projets* were finished that April and published

8. "Ma vraie gloire, ce n'est pas d'avoir gagné quarante batailles; Waterloo effacera le souvenir de tante de victoires. Ce que rien n'effacera, ce qui vivra eternellement, c'est mon Code Civil." *See* RENE ROBAYE, UNE HISTOIRE DU DROIT CIVIL 35 (1993).

(except for the books under the care of Professor Wu Changzhen) on the website for the Chinese Civil and Commercial Law[9] for public criticisms.

On September 16, 2002, the personnel of the CLA finished their reformulation of GRCC *projets* and transformed it into their own *projet*. As Li Peng expected, this *projet* was discussed at the thirty-first session of the Standing Committee of the NPC, the last session in his term, on December 23, 2002. This event symbolized that the *projet* of the Chinese Civil Code had officially entered into the law-making process.

It is notable that two novel legislative procedures were followed in the preparation of the civil code.

The first is the broad participation of scholars in making legislation. The CLA chose to entrust some scholars with Beijing household registration to draft the first *projet* of the law, so they began to share the power of drafting that had been the exclusive province of the CLA in the past. The power over final decisions was reserved by the CLA for itself and was shown by the fact that it could reformulate the scholars' *projet* into its own at the final stage of preparation. This meant that it was necessary to produce at least two drafts for each part of the code. It is interesting to compare them in order to discern whether there has been progression or regression as the draft moved from the hands of the scholars into those of the lawmakers.

The second is a dynamic competition between many *projets* in the law-making process. The above-mentioned decentralization of drafting unleashed a tide of civil code *projets*. For example, there were two separate *projets* for the book on the Law of Things and for the book of Torts produced by the different members of the GRCC. The scholars empowered by the CLA would prepare different *projets* on the same topic of the civil code if they found themselves facing a discrepancy in opinions. They were prepared separately by the two most active members of the GRCC, Professor Liang Huixing and Professor Wang Liming, in order to express their different ideas. There are also two drafts of the Succession Law: one was prepared by the officially authorized scholar Professor Liang Huixing and his colleagues; another was prepared by nonauthorized scholar Professor Zhang Yumin and her colleagues. All these *projets* on the same topics represent a competition between different members of the GRCC and outsiders. As I mentioned earlier, Professor Liang Huixing and Professor Wang Liming are the soul and strongest members of the GRCC but there are some discrepancies in

9. Its electronic address on the Internet is http://www.civillaw.com.cn/elisor/legis/wqmore.asp.

their views, so they even produced respectively their own complete *projet* of the civil code after the completion of the GRCC's *projet*. Their differing approaches made it impossible to combine the books of the *projet* for which they were responsible and to publish them as a whole. Furthermore, Professor Liang Huixing obtained a grant in 2000 from the China Foundation for Social Sciences for his proposal *Study in the Civil Codification for China*, in recognition of all his work and the drafting of the General Part, the Law of Things, the General Part of the Law of Obligation, and the Contract Law, which were areas authorized by the CLA. He and his colleagues also drafted the books on Torts, Family Law, and Succession Law, which had not been officially authorized by the CLA. Thus, he was the first to produce a complete *projet* of the civil code, consisting of seven books and 1924 articles.[10] Under these circumstances, Professor Wang Liming decided to produce his own complementary *projet* of the civil code. It consists of books on Personality Rights (63 articles), Torts (248 articles), certain parts of the Law of Things relating to State ownership and collective ownership (GRCC *Projet* authorized by the CLA), together with books on the General Part (325 articles), Marriage and Family Law (124 articles), the General Part of Obligations (110 articles), Contract Law (466 articles), all of which was not officially authorized by the CLA. This complementary *projet* consisting of eight books and over 2054 articles is now finished and is in process of publication. The practice of the members of the GRCC to complete an integrated *projet* of the civil code by combining the books prepared by authorized and nonauthorized drafters gives me reason to call the latter draft a complementary *projet*. On the other hand, a group of scholars who had no direct connection to the CLA and lived in provincial cities also spontaneously drafted complete civil codes or parts thereof in defiance of the monopoly held by Beijing scholars. The *Projet* for Succession Law drafted by a group headed by Professor Zhang Yumin of Southwest University of Politics and Law (in Chongqing) is an example of a partial *projet* of this kind. My own green civil code *projet* is a complete civil code. There exist so many *projets* of the civil code in today's China that in a certain sense we can say that the drafting of the civil code has become a competitive, public undertaking there.

It is unfortunately obvious that while we may have witnessed the end of the CLA's monopoly over drafting, a monopoly by Beijing scholars followed closely on its heels. As I mentioned previously, this

10. THE AVANT-PROJET OF THE CIVIL CODE FOR CHINA (Liang Huixing ed., 2003).

monopoly caused great dissatisfaction among scholars, including me, who were disqualified by virtue of not holding a Beijing household registration. Furthermore, I thought that the CLA did not take the drafting of the civil code seriously because it left too great a role to retired personnel. The importance of this task cannot be overestimated and, in my opinion, it requires up-to-date knowledge about the experience of civilian codification in the contemporary world, as well as a great deal of physical energy. Furthermore, the retired scholars who made up the GRCC were relatively poorly-trained because they received their legal education during very tumultuous periods in the history of the PRC. For these reasons, I decided to organize an alternative group to draft a civil code for our country, aiming at bringing competition into the preparation of the civil code and giving more opportunity to young scholars in this undertaking. The members of this group are my young colleagues at Xiamen University and at Zhongnan University of Economics and Law (in Wuhan).[11] Thanks to the financial support of the Ministry of Justice of the PRC, my plan came to fruition. On September 3, 2002, my group completed our draft of the civil code for China, which was published in March this year by the Social Sciences Documents Publishing House of the Chinese Academy of Social Sciences.

So there are five complete *projets* for the civil code in China today. The first one is the *projet* of the GRCC; the second one is that of the CLA; the third one is my *projet*, the green civil code;[12] the fourth one is the complementary *projet* made by professor Liang Huixing's group; and the fifth one is the complementary *projet* produced by Professor Wang Liming's group. In my humble opinion, the basic structures and contents of the complementary *projet* of Professor Liang Huixing are almost the same as that of the *projet* of the GRCC, with the exception of the deletion of the book on International Private Law. So it is not worthy to be presented here separately. The basic structure of the complementary *projet* of Professor Wang Liming contains similar elements of the structure of the *projet* of the CLA, the only important difference between the structures of the two *projets* being that Professor Wang Liming divided the whole content of the civil law into two broad notions, persons

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11. I was a professor at Zhongnan University of Economics and Law before January 2000, at which point I transferred to Xiamen University. The major drafters of our *Projet* are Xu Guodong, Jiang Yue, Xu Diyu, Xue Jun, Pei Liping, Cao Xinming, and Chen Haibo.

12. In our time, "green" has come to symbolize pursuing an equilibrium of relationships between humankind and resources; therefore, our civil code *projet* established the basic principle of saving resources and protecting the environment, and stipulated this as an obligation inherent in the right of ownership, incarnated in all other relevant institutions. For these reasons, we named our *projet* the green civil code.

and things, and located the first in the front of the *projet* and the second in the back of the *projet* while the *projet* of the CLA did not follow any particular logical order and located them at will. This idea of Professor Wang Liming is so similar to the idea embodied in the structural arrangement of our green civil code that it is also not worth going into separately. What is more worthy of note are the first three *projets*. But they are voluminous works and making a comprehensive presentation of them needs much time and length. So, in this short Article, I can only give an outline of their structures and try to elucidate the significance of these structural arrangements. In the context of Continental legal systems, the structural design of a civil code is very important, because reasonableness and harmony of structure characterize a comprehensive codification and distinguish it from a mere consolidation of laws.

II. AN INTRODUCTION TO THE STRUCTURE OF THE *PROJET* OF THE GRCC

The *Projet* of the GRCC was originally divided into eight books as follows: the General Part, the Law of Things, the General Part of the Law of Obligation, Contract Law, Torts, Family Law, Succession Law, and International Private Law. In the process of drafting, a book on Intellectual Property Law was added after the completion of the others. So the final number of books of the *Projet* is nine. The number of articles found in each book is as follows: the General Part (220), the Law of Things (423), the General Part of the Law of Obligation (193), Contract Law (1298), Torts (239), Family Law (about 101), Succession Law (about 37),[13] International Private Law (unknown), and Intellectual Property Law (84).[14] The total number of articles in all the books is difficult to calculate because of a lack of relatively accurate information about certain books, but I could estimate roughly that this number stands at 2511 (other than the book of International Private Law, which was also subsequently added to the *Projet*—unfortunately I do not know how many articles it contains also because of a lack of transparency of the

13. All the books of the *Projet* of the GRCC were published on the Web site http://www.civillaw.com.cn except the book on Family Law and the book on Succession Law drafted by Professor Wu Changzhen and the book on International Private Law drafted by ex-Justice Fei Zhongyi. As for the number of articles of the book on Family Law, I have questioned Professor Wu on August 8, 2003, and learned that it was drafted on the basis of the Marriage and Divorce Law in force (fifty-one articles), to which about fifty new articles were added. She told me that the book on Succession Law was also drafted on the basis of the Succession Law in force. The amendments are few.

14. The draft of this book, together with a long introduction by the author, was published in 1 FORUM OF POLITICS AND LAW (2003).

operation of the civil codification). Anyway, this makes for one of the most voluminous legislative *projets* in Chinese history.

After the completion of this *Projet*, a meeting of civil law experts was held in April, 2002 to examine it. The majority of experts insisted that Intellectual Property Law and International Private Law should be inserted into the *Projet* and stand as separate books within. The CLA accepted this suggestion. A new division of labor was arranged. Professor Zheng Chengsi of CASS (fifty-nine years old) , an expert on Intellectual Property law, was recruited as a new member of the GRCC in order to take charge of drafting this book, while ex-Justice Fei Zhongyi was put in charge of drafting the book on International Private Law.

From the point of view of structure, the *Projet* of the GRCC has the following characteristics:

The first is a dismantling of the Law of Obligation. In civil codes of the Continental tradition this law is usually contained in one book, but it is always the longest one and jeopardizes an equality in the length of the different books. Now we can see that this situation has been changed by the GRCC. The Law of Obligation was broken down into three books: a General Part, Contract Law, and Torts. According to the traditional theory of continental civil law, tort, like contract, is no more than a source of obligations. The independence of torts and contracts from the big compound of the Law of Obligation reflects the influence of the Anglo-American legal systems on Chinese law. Due to the lack of a wide concept of obligation in countries within this tradition, contract law and torts have no need to be unified under the umbrella of the law of obligation and can become two separate areas of law.

The second characteristic is the reinsertion of family law into the civil code as a separate book. In the system of Soviet civil law, which deeply influenced our civil law, family law has been an independent sector of law, divorced from the Civil Code. This practice is still followed by the Russian Federation and the majority of countries in the CIS. Thus the Russian legislature enacted not only a Civil Code of 1994-2001, but also a Family Code of 1998. China, however, has abandoned this tradition and has begun to view the family law as an indispensable part of the civil code. This change requires us to reassess the nature of the civil law. The civil law has been understood as a tool of economic exchange for a long time in China, but family law does not regulate market relationships. Therefore its reinsertion into the *projet* of the civil code posed a challenge to the materialistic conception of civil law.

The third characteristic feature is the union of civil and commercial law in one code. This has been the legislative tradition of our country

since the end of the Qing Dynasty when China received a Continental system. Beyond doubt this tradition is still followed in ongoing civilian codifications. The CLA has no intention to enact a separate code of commerce for our country.

III. AN INTRODUCTION TO THE STRUCTURE OF THE CLA *PROJET*

This *projet* is divided into nine books: the General Part, Law of Things, Contracts, Personality Rights, Marriage and Divorce, Adoptions, Successions, Tort Responsibility, and International Private Law. Contracts, Marriage and Divorce, Adoptions, and Successions are four ready-made legislations inserted in the *projet* without any amendment. The number of articles within each book is as follows: General Part (117), Law of Things (329), Personality Rights (29), Contracts (454), Marriage and Divorce (50), Adoptions (33), Successions (35), Tort Responsibility (68), and International Private Law (94). The total number of articles stands at 1209.

It is clear that this official reformulation made enormous changes to the GRCC's *projet*. First, it established the book Personality Rights; second, it eliminated the General Part of the Law of Obligation; third it added a book on International Private Law; fourth, it cancelled the book on intellectual property, which had been added; fifth, it converted four ready-made pieces of legislation into four books of the *projet*, thus collapsing Family Law into Marriage and Divorce and bizarrely making Adoptions into a separate book; sixth, it changed torts into the law of tort-responsibility; and finally, it transformed the relatively detailed *projet* of the GRCC, which included at least 2511 articles, into a much briefer version with only 1209 articles. That means that the modified draft will leave more lacunae to be filled by judges and more puzzles to be guessed at by parties to civil transactions.

Here I would like to analyze the reasons why the above changes happened.

As for the book on Personality Rights, the framers of the *projet*, by putting this book first, intended to stress the role of civil law as a tool to protect human rights, thus opposing the tendency of reducing civil law to a set of rules that only regulates property relationships. The latter tendency has prevailed in China for a long time, but it is a very lopsided view, because the objects of civil law include not only property

relationships, but also personal relationships in which Personality Rights are involved.[15]

As for the cancellation of the General Part of the Law of Obligation, it was originally conceived that this book contained the general provisions that could be commonly applied to various concrete types of obligations, such as contract, torts, management of the business of another, and unjust enrichment. But Professor Wang Liming challenged this conviction by arguing that the majority of norms in the General Part of the Law of Obligation in fact can only be applied to contracts. For example, the dispositions about the obligations with terms or conditions cannot be applied to the obligation of torts and other kinds of obligations. They constitute more a general part of contract law than a general part of all kinds of obligation.[16] Furthermore, scholars who have a pro-American law inclination, such as Professor Jiang Ping, who was a visiting scholar at Columbia Law School in 1996-1997, argued that the absence of a general concept of obligation in Anglo-American law countries does nothing harmful to the quality of life of peoples therein and insisted on cancelling the General Part of Obligations in the civil code.[17] Obviously his opinion prevailed.

As for the addition of the book on International Private Law, the leading scholars in this field originally did not accept an incorporation of this subject into the civil code and insisted on enacting an independent code for it. In fact, there was already a *projet* of a code of international private law organized by the China Society of International Private Law before the civil codification was underway. But in the legislative program of the NPC, there is no agenda for codifying international private law in the near future. In order to accelerate the codification of this sector of law, the CLA decided to incorporate it into the civil code as a separate book. People described this legislative strategy as "pick up."[18]

As for the addition and cancellation of the book on intellectual property, the reason why the decision to insert this law into the civil code as a separate book was made so late in the game is that there were too many debates on the feasibility of this arrangement among scholars. Some jurists think that it is not suitably a part of the civil code but should

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15. *See* Guodong Xu, *The Basic Structure of the Project of the Civil Code*, *in* 1 STUDIES IN LAW (2000).

16. *See* WANG LIMING, THE SYSTEM OF THE CHINESE CIVIL CODE, *at* http://www.cnlawschool.com/research/display 0303.asp?id=9.

17. *See* JIANG PING, LIANG HUIXING & WANG LIMING, THE THINKING LINE AND THE MODEL OF CHINESE CIVIL CODE, *at* http://www.law-thinker.com/detail.asp?id=1441.

18. *See* WANG JIAFU, ZHENG CHENGSI & FEI ZONGYI, THE LAW OF THINGS, THE IP LAW, AND THE CHINESE CIVIL CODE, *at* http://www.law-thinker.com/detail.asp?id=1481.

instead be a special regulation, because it contains many specific administrative law norms which are inherently unstable. Its insertion in the civil code would jeopardize the certainty and timelessness of the code. Meanwhile other scholars insisted that intellectual property is nothing but a special kind of right to things. The reason why it stands outside the civil codes of most countries is that this law was still immature when these civil codes were enacted. Now that intellectual property law is mature enough, it is time to incorporate it into the civil code.[19] So the CLA accepted this viewpoint and decided upon incorporation. But finally the incorporation was aborted for two reasons. The first is a lack of successful models in this field. Professore Zheng Chengsi said that excepting the failed experiment in the Italian Civil Code, none of world's influential civil codes has incorporated intellectual property law.[20] The second is the common opinion of experts around the world, expressed in a 1996 conference in Washington organized by the World Organization of Intellectual Property, that the incorporation of intellectual property law into a civil code is not feasible. This persuaded the CLA to abandon its decision.[21]

As for the incorporation of the four ready-made pieces of legislation into the *Projet* of the CLA, the cause here is that Li Peng left insufficient working time for the CLA to prepare new *projets* in those areas. As mentioned earlier, he demanded that the *projet* of the civil code be ready for discussion at the meeting of the Standing Committee of the NPC on December 23, 2002, before his retirement in March, 2003. In a short period of only four months (from April to August of 2002), compelled by the political needs of its supreme leader, the CLA had no choice but to make four ready-made laws concerning contract, marriage and divorce, adoption, and succession play the temporary role of four books of its draft. In this way four relatively simple and outdated pieces of legislation entered the *Projet* of the CLA. As a result, the broader category of Family Law degenerated into a narrower book on Marriage and Divorce, and the entire codification degenerated into a consolidation. Furthermore, giving the law of adoption the position of an independent book in the *Projet* greatly damaged its systematic consistency, because from the point of view of logic, adoption is no more than a source of filiations, and therefore is suitable to be a part of the Family Law and not an independent book on an equal footing with Family Law.

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19. *See generally* Xu, *supra* note 15.

20. *See* Zheng Chengsi, *The Projet of Civil Code and the Draft of the Book on IP Law of the GRCC*, *in* 1 FORUM OF POLITICS AND LAW (2003).

21. *See id.*

As for the change of torts into the law of tort responsibility, I should say that torts are different than responsibility. The former is a kind of obligation and principally is a relationship between private individuals. It is a first-level relation while the latter consists in sanctions imposed on the wrongdoer by the state. Responsibility is second-level: a guarantee to obligations. So there is a tendency to transform traditional torts into responsibility in Continental countries. For example, Italian civil law theory has changed torts into extra-contractual responsibility.[22] Meanwhile, Chapter 6 of the *General Principles of the Civil Law of China* has also established the institution of civil responsibility that bears on both torts and breaches of contract. So there are two understandings about the nature of torts; some scholars understand it as a source of obligations while others understand it as a responsibility. The binominal title of torts-responsibility in the *Projet* of the CLA represents a compromise between these two conceptions. Nevertheless, this change shook further the traditional institution of obligation, because now torts are not only being understood as a kind of obligation, but also as a responsibility. The responsibility is different from the obligation.

As for the diminution of the number of articles in the CLA *Projet* compared to the GRCC, it has two causes. The first is that the "big leap forward" of legislation produced necessarily a less deliberate and less detailed *Projet*. The second is the difference of thinking between scholars and officials. The former pay more attention to diminishing or eliminating lacunae in legislation while the latter pay more attentions to simplifying the civil code draft in order to make it easier to be approved. They know that the voluminosity of the *Projet* could jeopardize its chances of being approved by the leaders of the Communist Party and by the NPC. So the CLA prefers a draft that will be approved smoothly at the expense of the quality of the legislation.

The CLA draft has so many obvious defects that it has been subject to extensive and severe criticisms, even abuse. It has been called the misfortune of Chinese law, and many scholars believe that its existence is worse than its nonexistence.

IV. AN INTRODUCTION TO THE STRUCTURE OF OUR GREEN CIVIL CODE

Its structure is as follows:

Preliminary title ("brief general part")
Book I: Law of Personal Relationships

22. *See* Franco Cordopatri's entry *Resposabilita' extracontrattuale*, *in* XXXIX ENCICLOPEDIA DEL DIRITTO 1099ss (Giuffré ed., 1988).

First Sub-book: Natural Persons
Second Sub-book: Legal Persons
Third Sub-book: Family Law
Fourth Sub-book: Succession Law
Book II: Law of Property Relationships
Fifth Sub-book: Law of Things
Sixth Sub-book: Intellectual Property Law
Seventh Sub-book: Law of Obligations (general part)
Eighth Sub-book: Law of Obligations (special part)
Accessory Title: International Private Law

Our *Projet* is divided into two parts and three levels: the fundamental part includes two books and eight sub books; the secondary part includes a preliminary title and an accessory title. The two books belong to the first level, the eight sub books belong to the second level, and the preliminary title and the accessory title belong to the third level.

The number of articles of each unit of the *Projet* is as follows: the preliminary title (284), the law of natural persons (532), the law of legal persons (480), the family law (299), the succession law (539), the law of things (667), the intellectual property law (363), the law of obligations (general part) (353), the law of obligations (special part) (1677), the accessory title (138). The total number of articles of the whole draft is 5332 and it is the most voluminous of the five *Projets*. Perhaps it also is the most voluminous *Projet* in Chinese legal history. The voluminosity of the draft represents the desire of the drafters to pursue legal certainty; therefore, it is a significant arrangement.

Compared to the other two *projets*, our *Projet* has the following characteristics:

First, it has an extra structural level: the sub-book. With the structural level of book, we divided all the norms of civil law into two groups of rules, respectively the law of personal relationships and the law of property relationships, underlining the importance of the law of personal relationship by putting it in a primary position. This is a typical structure of the Institute system, which reflects the understanding of ancient Roman law as to the object of civil law. The Institute system formulated a juxtaposition of persons and things and supposed actions as the logical result of the interaction of these two elements. From this formula we can draw much interesting information. From the point of view of philosophy, this contraposition is like that between subject and object or between spirit and matter. In the Institute system, the subject or spirit was put in a primary position; in the terms of modern Chinese

philosophy, this vision represents an idealist tendency. From the point of view of civil law, this reflects the tense relationship which exists between human beings (persons) and economic resources (things), as well as a tense relationship among individuals caused by the first relationship; actions, namely the juridical form which competition takes for limited resources by many individuals, is the logical result of this tension. That means that the civil code must address the following premises: (1) things cannot sufficiently satisfy the desires of humanity, otherwise remedial actions by public authorities for the resolution of controversies would not take place; (2) even though things cannot satisfy the desires of humanity, if everyone were altruistic or modestly renounced his own desires, it would again be impossible for actions to take place. But in real life, actions take place often. Therefore the structure of the Institute system not only implies a pessimistic viewpoint of the relationship of persons to things, but pessimism also about human nature.[23] Our motive for adoption of the Institute system on the level of books in our *Projet* is to inherit all the ideas contained in this structural arrangement.

Second, there is no general part in our *Projet*, but there is a preliminary title and an accessory title.

The most obvious characteristic of the Institute system is the presence therein of a law of persons, which otherwise is overshadowed in the general part of the German Civil Code, and therefore has been seldom considered by the scholars of countries, including China, which have received German law. Since the formation of the Pandect School in Germany at the beginning of the nineteenth century, the law of persons in the tradition of Roman law has been reduced to the relatively smaller unit of "subject" in the general part of this system. As a result, the law of personal relationships was gradually reduced to the status of a vassal to the law of property relationships. Meanwhile the civil law, as a whole, becomes gradually understood as an economic law which regulates only property relationships. So our return to the Institute system on the book level for the structure of our *Projet* serves to avoid the errors of the Pandect system and to stress the independent position of the law of persons.

As for the establishment of the preliminary title in our *Projet*, it is a substitution for the general part of the Pandect system. Because it does not contain any norms of the law of persons but only focuses on the

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23. *See* Guodong Xu, *La struttura basilare del progetto di codice civile per la RPC dell'Università del Centro-Sud di Scienze Politiche e Giurisprudenza di Wuhan e le Istituzioni di Gaio*, *in* RIVISTA DI SCIENZE GIURIDICHE 17 (2000).

institution of juridical acts which can be applied universally to all areas of the civil code, it is equivalent to a brief general part.

As for the establishment of the accessory title in our *Projet*, we considered that the norms of international private law regarding both the law of persons and the law of things could not be included in the books either of the law of persons or the law of things, so we created an accessory title to contain them in order to maintain the purity of the structure of person-thing in our *Projet*.

V. THE INFLUENCES OF AMERICAN LAW ON THE CHINESE CIVIL CODIFICATION

This topic is a little bit outside the theme of this Article, but because it is being published in the United States, I should say a few words about it.

First of all, I should say that the Chinese legislature had already adopted some legal institutions shared by the United States and the United Kingdom before the ongoing civil codification. For example, the Contract Law, now included as a book in the CLA draft, adopted the concept of anticipatory breach in its article 108 and the concept of indirect agency in its article 402. These two institutions are very different from their counterparts on the Continent.

Second, I would like to point out that there are important members of the GRCC who have studied in the United States as visiting scholars. As mentioned earlier, Professor Jiang Ping was a visiting scholar at Columbia Law School in the 1990s as a grantee of CLEEC (China Legal Education Exchange Committee) program. Since then he has become a champion of U.S. law and a destroyer of the Chinese civil law tradition. Professor Wang Liming, who was a visiting scholar both at Michigan Law School (1989-1990) and Harvard Law School (1998-1999, as a Fulbright scholar), is the most vigorous supporter of the independence of Torts from the Law of Obligations. The major drafter of the book of torts in Professor Liang Huixing's complementary *Projet*, Professor Zhang Xinbao, was a visiting scholar at Syracuse Law School (1991-1993) also under the auspices of the CLEEC program. All these professors have brought their experience with U.S. law into the drafting of the Chinese Civil Code.

Third, I should also emphasize that, while generally speaking the United States is a country within the common law tradition, she also has some territories that follow the Continental tradition. Thus, there are several civil codes, among which only the Civil Code of the State of

Louisiana and the Civil Code of the State of California achieved the glory of having an impact on the Chinese Civil Codification.

In the process of drafting our green civil code, we have taken the Civil Code of Louisiana, which is available in major legal libraries in China, as a model in some respects. We invoked this code twenty-three times in all and cited twenty-six articles thereof, namely articles 488, 489, 499, 501, 513, 515, 520, 523, 528, 624, 625, 656, 666, 674, 675, 676, 681, 683, 684, 688, 689, 690, 691, 694, 696, and 749. They all belong to Book II, *Things and the Different Modifications of Ownership*, of this code. Because we used an earlier edition, from before 1981, we did not know that article 520 had already been repealed.[24]

We also invoked ten articles of the Civil Code of California. They are articles 1638, 1641, 1642, 1643, 1644, 1646, 1647, 1648, 1649, and 1654. They are all regarding the interpretation of contracts.

Fourth, I should say that not only the statutes, but also some precedent from the United States has given us inspiration in drafting our *Projet* of the green civil code. As in article 1429a of the Peruvian Civil Code, in the eighth sub-book of our *Projet*, article 108 stipulates the principle of substantial performance, which was invented by Justice Cardozo in *Jacob & Youngs Inc. v. Kent*, 230 N.Y. 23 (Court of Appeals of New York, 1921).

Finally, I should say that academic doctrine from the United States also influenced Chinese civil codification efforts. For example, article 385 of the first sub-book of our *Projet* adopted the definition of privacy of Professor Alan Westin;[25] meanwhile article 70 of the seventh sub-book of our *Projet* adopted the theory of successive assignment of obligations of Professor Arthur Corbin.[26]

VI. CONCLUSION

The preparation of the civil code of China has been a slow and intermittent process in the half-century since the 1949 foundation of the PRC. Now this work has entered an accelerated stage owing to the entry of China into the WTO, the desire of leaders to link their names to legislative achievements, and the progress of the study of civil law achieved over the past two decades in China. No matter how many negative phenomena accompany this process, we cannot help but

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24. *See* LOUISIANA CIVIL CODE 109 (A.N. Yiannopoulos ed., 2003).

25. "Individuals, groups, or institutions have the right to control, edit, manage, and delete information about themselves and decide when, how, and to what extent that information is communicated to others." *See* ALAN WESTIN, PRIVACY AND FREEDOM 7 (1970).

26. *See* ARTHUR L. CORBIN, CORBIN ON CONTRACTS 851ss (1950).

recognize that it is a progressive process and a manifestation of the determination of Chinese government to make the shift to a society ruled by law. Therefore, I myself am willing to be an activist for this process.

We also should observe that the legislative procedure of the NPC has become more democratic. This tendency is evidenced by the broad participation of scholars in the production of legislation. In today's China, it is a measure of the popularization of the legislative power that there exist different *projets* or drafts for the same law. Thanks to the awakening consciousness of a legislative role among Chinese jurists and their newfound enthusiasm for law-making, four comprehensive and nonofficial competing *projets* for the civil code have come into being. This has resulted in the pooling of the wisdom of many people and offered many more alternatives to the CLA as it develops its own draft. This has a positive significance for the quality of legislation. The legislative participation of scholars also resulted in the formation of new legislative practices.

The influences of U.S. law on the civil code *projets* in China is proven by the cancellation of the general part of the law of obligation and the exclusion of torts from the special part of the law of obligation in the CLA draft. It is very interesting that the law of a country within the Anglo-Saxon tradition has had such an influence on the civil codification of a country within the Continental tradition. In a certain sense, that is a reward to the United States for the CLEEC program that existed for many years at Columbia Law School and other legal educational institutions of the United States. As I mentioned earlier, some drafters of important parts of the *projet* of the civil code studied in the United States and profited greatly from their experiences there. Leaving aside the exchange of scholars, the exchange of legal books such as the Civil Code of the State of Louisiana has also played its role in Chinese civil codification, especially in the drafting of our green civil code. The recent impact of U.S. law on the civil codification of China has changed forever the relationship between Chinese law and Western law. Since the end of the Qing Dynasty, China has for a long time received exclusively German law. Recently, the stance of China towards Western law has become much more pluralistic. The influences of German law continues, perhaps still in a primary position. Four of the five *Projets*, namely the GRCC, the CLA drafts, the complementary *Projet* of Professor Liang Huixing and the *Projet* of Professor Wang Liming are no more than variants of the Pandect system, with some new elements such as the book on Personality Rights and the book on Intellectual Property law and the dismantling of the law of obligation. On the other hand, the drafters of

our *Projet* looked to another branch of the Continental tradition and preferred to absorb more from the legal experiences of countries within the Latin tradition. All these belong to an interaction among countries within the Continental tradition. But the entry of U.S. law in the Chinese civil codification means that China decided to go beyond the boundary of legal traditions and to bring about a convergence of the two major legal systems in her most important legislation.

However, there are some problems in the ongoing civil codification. The first is the tension between politicians and scholars who take part in the legislative activity. In the last decade, we unfortunately discovered that there is always a connection between the ongoing codification effort and the retirement of leaders and of drafters. We could say that some leaders on the brink of retirement ordered a group of semi-retired experts to draft a civil code to satisfy their political needs. As for the connection between civil codification and the retirement of leaders, it created a discrepancy between two groups. The politicians require faster and shorter *projets* while the scholars require the opposite. As for the connection between civil codification and the retirement of drafters, it created a tension between young and old scholars in the making of the civil code. The second problem is the difficulty of coordination between the officials of the CLA and the scholars involved in civil code drafting; the former acting according to the protocols of official circles while the latter acting on the basis of the rules of academic discourse. These two kinds of behavior are so different that it is hard to find a common language between these two groups. But the problem is that the lower qualified personnel of the CLA have the power to decide the fate of the work product of much more highly qualified scholars. The third problem lies in the misunderstanding of the nature of civil law. The majority of scholars in China still view this law as something like economic law, so they undervalue the importance of the law of personal relationships and sustain the imbalance between the norms of personal law and those of property law.

Although the official *Projet* for the Chinese civil code was offered for discussion to the Standing Committee of the NPC last December and the desire of Chairman Li Peng to be the initiator of the civil code was satisfied, this ugly *Projet* is still far from becoming law. The original working program of the GRCC set 2010 as the time for finishing the civil codification and so far we have not heard of a new timetable for this undertaking but heard that a new strategy of drafting in stages was adopted recently by the CLA, so we still have a relatively long period to

improve, even to reshape the *Projet*. I hope that some of the above problems will be resolved in this period.