A Review of "Towards a Chinese Civil Code: Comparative and Historical Perspectives"

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Mao Ze Dong famously proclaimed that power grows out from the “barrel of a gun”, yet he also acknowledged the power of the pen.¹ This is nowhere more manifest than with regards to the pen that writes law. The power of a million guns is dwarfed by that of a single well-established law dutifully observed by a nation. Many have argued that with growing global economic ties, the importance of navies, gunships and soldiers has receded in the modern age.² If this is true, there is, by default, a rising power of the legislative pen. China is currently drafting a New Civil Code (NCC). The significance of this re-codification effort for scholars, lawyers, businesses (both Chinese and foreign) and, crucially, the Chinese people should not be underestimated. Given the enormous significance of China – as the world’s largest emerging market and a rising global power – the complexion of China’s NCC is of tremendous importance to not only China, but arguably to the entire world community. China’s drafting of its NCC is a massive project with far-reaching implications that may leave the casual observer overwhelmed. Cutting through this fog of complexity, however, is a highly-lucid treatment of the issue – Towards a Chinese Civil Code: Comparative and Historical Perspectives.

This book – a compilation of articles, written by highly-regarded Chinese and international scholars – is well-structured and deeply informative. The unique aspect of the book’s approach is captured in its title: it is not only a comparative examination of China’s reform efforts, but a historical one. The historical perspective offered by many of the book’s chapters gives the reader a fascinating vantage point from which to view China’s drafting of its NCC. The book offers a lot. As the book makes clear from its second page, in addition to providing an outstanding historical and comparative account of China’s current re-hauling of its civil code, the book tackles several key questions regarding this momentous undertaking.³ For instance, how are notions of private property being reconciled with the socialist ideology upon which the country was founded? Will the Chinese Civil Code follow the model

¹ Henry Yuhai He, Dictionary of the Political Thought of the People’s Republic of China (2001) 305. See also Mao Zedong, Selected Works of Mao Tse-Tung (Vol 2, 1954) 228.
² For an early argument along these lines, see Edward N Luttwak, “From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce” in Simon Dalby et al. (eds), The Geopolitics Reader (2003).
³ Towards a Chinese Civil Code, p 2.
of European civil law, the English common law, or a hybrid of these legal systems? And how will China’s new-and-improved civil code fare? China’s drafting of its new civil code is of great importance. Arguably, the absence of a “unified civil code, hamper[s] sustained economic development and potential political reform”. China’s reformation of its civil code is a complex subject, yet the book synthesises the topic into a highly-readable survey that any reader – the highly-informed or the casual – will find conceptually accessible. The book is compartmentalised into five sections: it begins by providing a general overview of the subject at hand, and then proceeds to look respectively at property law, contract law, tort law and civil procedure. This structure provides the reader with a practical digest of the broad range of issues confronting China’s NCC. Indeed, taken together, the rich selection of topics the chapters tackle provides an informative bird’s-eye view of the daunting task before China.

The first chapter of the general part of the book outlines the gradual, mishmash process of codification taking shape in China over the last few decades, such as the codification of contract law in 1999, property law in 2007 and tort liability law in 2009. The author in this chapter calls for a systematic approach to this disjointed codification process. The next chapter discusses problems plaguing the current way in which judicial interpretations of the law are made by the courts. The section then closes with a comparative and historical examination of the factors that, the author argues, contribute to successful codification projects, looking at the past codification projects of both Belgium and the Netherlands. The second part of the book explores codification efforts within the realm of property law. This section begins by discussing the evolution of property rights in China since the early twentieth century and the need for empirical work to assess “the extent to which black letter rules have been transformed into substantive rights”. The chapter that follows then suggests that China needs to create “a new system of property law” that properly embraces new phenomenon, such as intellectual property, credit property and enterprises such as aggregate property. The third chapter in this part of the volume then explores some of these new developments in property law. Adopting a European angle, the author in this chapter argues for the need to reassess the traditional “matrix’ of European property law” in light of these developments. The chapter

4 Ibid., p 3.
5 Ibid., p 87.
7 Ibid., p 153.
that follows discusses condominium law, concluding that current Chinese condominium laws, while well-suited to modern Chinese society, could still be improved upon. The section closes with an interesting discussion of civil law trusts. The author argues that civil law trusts are unique from its common law counterpart, and that in many respects Chinese trusts may in fact be particularly unique.

The third part of the book deals with contract law. The first chapter argues that China's 1999 Contract Law has a hybrid character having been influenced by a variety of foreign contract law regimes. As such, the author posits, Chinese scholars need to construct a unified theoretical interpretation of Chinese Contract Law. The chapter that follows argues that traditional codification methods in the area of contract law may not be optimal. The author suggests that alternative approaches may in fact prove superior. The following two chapters look at service contracts and the rights of third parties, respectively. The chapter on service contracts observes that, unlike European approaches, Chinese law codifies only a selection of this genus of contracts. As such, the author contends, China appears to be charting its own path in this respect. The chapter that follows conducts an interesting comparative analysis of third party rights in the common law and civil law traditions, concluding that the Chinese Civil Code would do well to include an explicit provision addressing third party rights.

The book then turns its sights on tort law (or the law of delict to use the civil law vernacular). The first chapter of this section provides a fascinating historical overview of modern Chinese tort law, tracing its origins to the Qing dynasty (1644–1911), and then proceeds to analyse strict and vicarious liability. Following on its heels, the second chapter highlights the similarities between Chinese tort law and common law tort law. The chapter that follows then explains and evaluates “the approach taken to uncertain (alternative) causes in the new Tort Liability Law (TLL) ...”. The next chapter performs an abrupt turn towards the specific and examines Chinese medical negligence law, outlining its various deficiencies. The final chapter of the section “concentrates on tort liability law in situations where mass claims for compensation may be brought”. The fourth and final part to the book provides an illuminating discussion of Chinese Civil Procedure. The first chapter examines the judge's position in civil litigation cases – specifically its transformation since the 1980s. The second chapter focuses on European civil procedure, discussing the influence of the Austrian Code of Civil Procedure of

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8 Ibid., p 395.
9 Ibid., p 13.
1895 on Dutch civil procedure. The volume closes maintaining its focus on European law. The chapter discusses current trends in French civil procedure viewed from “the perspective of a plural system of justice destined to respond to the democratic needs of a complex society”\(^{10}\). The author also explores the impact of modern computerised data processing methods and the effects of the “contractualisation” of civil procedure.

As the editors write, the Chinese Civil Code has “increasingly fallen behind the times and … is ripe for amendment in order to cater for the new social and economic conditions”\(^{11}\) that are emerging in China. The contributions in this book seem to support this bold assertion. For the prospective reader seeking a bottom line to this review, it is this: what Lei Chen and CH van Rhee have managed to achieve is impressive. The penetrating analyses of the scholars they have assembled in *Towards a Chinese Civil Code: Comparative and Historical Perspective* provide a relatively comprehensive\(^{12}\) overview of reforms to the Chinese civil code interlaced with a substantial degree of historical insight. Most of the Chinese contributors have in fact personally taken part in preparing the Chinese Draft Civil Code. The result is a 562-page treatment of the draft Chinese Civil Code that will be of enormous interest to specialists and casual readers with an interest in this rising global power. It is a foundational examination that, as Chen and Rhee remark, “is meant to be an invitation to further explorations into Chinese civil law from historical and comparative perspectives.”\(^{13}\) As such, I highly recommend this book for its thoroughness, range in topics, expert analysis, and most crucially, the rich comparative and historical perspective it brings to the table.

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\(^{10}\) *Ibid.*, p 541.


\(^{12}\) Given the titanic project before them, the editors readily admit that “covering every detail of the proposed Chinese Civil Code in a single volume is neither feasible nor necessary”.

\(^{13}\) *Towards a Chinese Civil Code*, p 16.

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