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OF OLD AND NEW CODES:
CHINESE LAW IN THE MIRROR OF WESTERN LAWS

I. THE ARRIVAL OF THE GREAT CIVIL LAW CODE MODELS IN LATE IMPERIAL CHINA AND THE DOOMED FATE OF THE QING CODE – II. IMPORTING A CIVIL CODE: NOT SIMPLY A TECHNICAL OPERATION – III. WRITING A CIVIL CODE: NOT SIMPLY A QUESTION OF DRAFTING – IV. ONE CIVIL CODE, SEVERAL LEGAL MODELS – V. BACK TO THE FUTURE

I. THE ARRIVAL OF THE GREAT CIVIL LAW CODE MODELS IN LATE IMPERIAL CHINA AND THE DOOMED FATE OF THE QING CODE

The word *code*, is a word that is flawed by polysemy, even in the context of legal discourses. We find it associated with a broad spectrum of meanings, ranging from the wider idea of the code as a *lex generalis*, aiming at providing for an entire section of the law (civil, penal, etc.), to more specific ideas, such as those expressed by the Latin word *codex* or the French word *code* (used to designate those compilations of laws made on the initiative of jurists or monarchs), or that of a legislative technique (again in French Law, as it is in the case of the “codification à droit constant”) to quote just a few.¹

As has been observed by a well-known legal historian, the term code covers, under a common denominator, i.e. the “stabilization of the unstable”,² realities that are profoundly different in their origins and functions. However, amongst these realities, there is one that is marked by absolute historical typicality, representing an epoch-making watershed in Western (and not only Western) legal history between the eighteenth and

1 For a more detailed examination of the several meanings of the word code see Antonio Gambaro, “Codici e diritto giurisprudenziale”, in *Codici. Una riflessione di fine millennio*, ed. Paolo Cappellini and Bernarndo Sordi (Milano: Giuffrè Editore, 2002), 513.

2 This definition was given by Paolo Grossi in his *Mitologie giuridiche della modernità* (Milano: Giuffrè Editore, 2007), 86.

nineteenth centuries: “This was the moment of great codification, when the State seized back private law, which until then had been left in the maternal embrace of custom and had been reduced to object of the first Code demanded by the Revolution and implemented by Napoleon, the Civil Code”.³

After this historical turning point, the Civil code became first a symbol, then a myth for legal modernity, and this was part of a epoch-making cultural process of simplification that had one of its most relevant expressions with regard to the issue of the sources of law: the enactment of the code subverted the highly particularistic structure of the sources of law prevailing in the late *ius commune* and “the reduction of the sources of the law to the law of the State was the hallmark of the new regime”.⁴ Civil law, with its two most representative expressions, the Napoleonic code and German legal science, became, between the nineteenth and the beginning of twentieth century, a prestigious, exemplary legal model to be followed by other countries in order to achieve modernity.⁵

On the other side of the world, in the *Far East*, these concepts found a breeding ground that appeared extremely fertile to Europeans. Qing China, where Western imperialistic powers landed in the middle of nineteenth century, appeared to European eyes a decadent Empire, blocked in a deeply stagnant phase of its history, from the legal point of view, too. Compared to the European codes, the capstone of the new edifice of modern law, the huge body of authoritative rules that were in force under the last Chinese imperial dynasties, i.e. the so called Qing code, was seen as the expression of a feeble legal tradition where written law was dominated by a severe penal perspective, while the rest of the system was diluted in a sort of social magma under the rule of customs.⁶

3 These are words by Paolo Grossi, “Constitutional Lawfulness in the History of Modern Law”, *Italian Journal of Public Law*, 2 (2012): 259-278, see 263.

4 Michele Graziadei, “Legal Cultures and Legal Transplants: Italian National Report”, *Isaidat Law Review*, 1, no. 1, special issue *Legal Culture And Legal Transplants: Reports to the XVIII^b International Congress of Comparative Law*, ed. Jorge A. Sánchez Cordero (2011), article 16: 1-47, see 12.

5 On prestige as a driving cause of legal imitations see Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)”, *American Journal of Comparative Law*, 39, no. 2 (1991): 343-401, see 398.

6 This interpretation, which was a fundamental part of the Orientalist tradition, found a first eloquent expression in Jean Escarra’s pioneering work: “The people of so-called occidental civilization all live, in varying degrees, according to a greco-roman conception of law [...] There, to a more or less elevated degree, the law is revered as sacrosanct [...] regulating, in abstract manner, the conditions and effects of every form of social activity. These characteristics tend to disappear in proportion as one advances toward the east. In the far places of Asia, China. In the mighty collection of spiritual and moral values which it has created and long projected on so many neighbouring nations – Korea, Japan, Annam, Siam, Burma – has given to law and justice an inferior place [...]. Uniquely penal in nature and very severe, the sanctions have had chiefly a role of intimidation. The state and its delegate, the judge, have seen their mediation dwindle before the competence of the chief of the clan, or the guild, the father of a family [...], resolving conflicts according to equity, usage,

This was the approach of the first generation of Orientalists – which has had continuing influence – who looked at the Chinese law, both the imperial and the modern, in the mirror of Western laws, Western laws being exemplary models to be carefully followed as a key to enter modernity.⁷

II. IMPORTING A CIVIL CODE: NOT SIMPLY A TECHNICAL OPERATION

Thus, in the second half of the nineteenth century, a massive process of modernization by means of legal transplants started in China. In this process, the codification of civil law assumed a pivotal role:⁸ after a first and a second draft of the Civil code (1910 and 1926) which did not come into effect, due to the collapse of the Qing and the political chaos that subsequently plagued the country, the first Civil code was enacted in 1930, under the Republic of China.⁹ During this process, the most relevant models of reference were the German Bürgerliches Gesetzbuch (hereafter BGB), the Swiss Law of Obligations, French and Japanese laws.¹⁰ However, as comparative lawyers know well, “the shallow idea that when the code is written the work is done, is a mystification”.¹¹ This is true even if the transposition of the foreign model is perfectly accomplished from a technical point of view.

local custom [...]. ‘One does not read codes’ the great Sou Che once said”. Jean Escarra, *Le Droit Chinois* (Beijing, 1936), English edition, *Chinese Law: Conception and Evolution, Legislative and Judicial Institutions, Science and Teaching*, trans. Gertrude R. Browne (Seattle: University of Washington, 1961), 10 ff.

7 The long lasting temptation of “legal Orientalism”, i.e., according to the words by Tahirih Lee, “distorting what we see by imposing our own conception and categories on Chinese law” is still around the corner. See Tahirih V. Lee, “Series Introduction”, in *Chinese Law: Social, Political, Historical, and Economic Perspectives*, ed. Lee (New York & London: Garland Publishing, 1997), ix ff. See also, on this topic, the classic work by Teemu Ruskola, “Legal Orientalism”, *Michigan Law Review*, 101, no. 1 (2002): 179-234.

8 As has been reported by John Shijian Mo, “Legal Culture and Legal Transplants: Convergence of Civil Law and Common Law Traditions in Chinese Private Law”, *Isaidat Law Review*, 1, no. 1, special issue *Legal Culture And Legal Transplants: Reports to the XVIIIth International Congress of Comparative Law*, ed. Jorge A. Sánchez Cordero (2011), article 5: 1-21, see 6: “China turns into a Civil law country, at least in its formality, slowly and intermittently since early twentieth century. Private law is the first experimental field of China’s legal reform”.

9 The Republic of China had been established in 1912 and from 1949 onwards continued to operate in Taiwan.

10 Tsung-Fu Chen, “Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution”, *National Taiwan University Law Review*, 6 (2011): 398-432, see 398-403.

11 Graziadei, “Legal Cultures and Legal Transplants”, 22.

In the last few decades comparative lawyers and legal historians, going beyond simplifications and reductionist cultural approaches, have reconstructed legal frameworks in the perspective of the historic stratification and hybridization dynamics, of living history, revealing the complexities of the legal process, both in the Western and Eastern hemispheres, both in traditional and modern times. As for China, the Qing code has been deeply studied, in these perspectives, and it has revealed itself to be something very different from a mere collection of severe criminal rules. On the contrary, it has been described as the product of a great deal of thought, whose rules show much refinement.¹²

Thus, even in China, as elsewhere, legal transplants did and do not happen in a legal vacuum. They are deeply rooted in historical processes and interplay with several local factors that mould the legal transplant. When facing the process of codification in modern China, the key question for the comparative lawyer is not simply whether – and which – foreign elements are transplanted in the local law. It is rather how those elements embed themselves within the multiple dimensions of the legal system, and here a fundamental problem arose and still arises, i.e. that of rendering words and concepts native to the borrowed model in the language of the receiving system. As a matter of fact, it is often the case that “translations imposed by the legislator or adopted during a reception are artificial”.¹³

The story of legal transplants and legal translation for modern China has an exemplary value in this respect. Modern Chinese legal language is largely a translated language, as a result of the aforementioned massive process of modernization carried out by means of legal transplants in various law fields, which is intimately connected to the creation of new law taxonomies.¹⁴ This process was assisted by the medium of the work already done by the Japanese, who had created a new Western-style legal system and a new Japanese legal language during the Meiji period (1868-1914). The most relevant part of that process was represented by the practice of 義解 (*yijie*), which literally means “trans-

12 See, amongst the most recent works dealing with late imperial law, Kathryn Bernhardt and Philip C. Huang, eds., *Civil Law in Qing and Republican China* (Palo Alto: Stanford University Press, 1994), 1-348; William C. Jones, *The Great Qing Code* (New York: Oxford University Press, 1994), 1-236; Jérôme Bourgon, “Un Juriste nommé Yuan Mei. Son influence sur l'évolution du droit à la fin des Qing”, *Études chinoises*, XIV, no. 2 (1995): 43-151, see 109; Bourgon, “La coutume et le droit en Chine à la fin de l'empire”, *Annales. Histories, Sciences sociales*, 5 (1999): 1073-1107; Melissa Macauley, *Social Power and Legal Culture: Litigation Masters in Late Imperial China* (Stanford: Stanford University Press, 1998): 1-416.

13 See Sacco, “Legal Formants”, 19.

14 For a general overview of the legal transplant literature, with a focus on the Chinese legal modernization process, see Randall Peerenboom, “What Have We Learned About Law and Development? Describing, Predicting and Assessing Legal Reforms in China”, *Michigan Journal of International Law*, 27 (2006): 823-871, and Chen, “Transplant of Civil Code in Japan, Taiwan, and China”, 389-432.

lation and introduction or introduction through translation”,¹⁵ which was necessary instrumental in constructing modern Chinese Law.

From a linguistic point of view, the assimilation of words coming from the vocabulary of different Western laws has followed, mainly, the strategy of semantic loans, creating neologisms in the Chinese legal language. Only a few words were handed down intact from the Imperial law to the Republic’s law, even their meaning was bound to change under the new regulatory framework and taxonomy. The creation of this new legal vocabulary, a preliminary issue in the drafting of the modern codes, mostly made giving a new meaning to an existing character or combination of characters, has clearly highlighted the limits and the dangers of a process of translation between languages and legal cultures which were extremely distant from each other.¹⁶ In this process, the outcome of the operation of the transfer of meaning could appear entirely inadequate, to the point of almost being non-sense, as in the case of the quadrisyllabic term 權利能力 (权利能力, *quanli nengli*), coined to translate the notion of legal capacity, whose literal translation reads: ‘power-interest-capacity-ability’.¹⁷

We could also face the danger of a radical transformation of meanings. In this regard, the most classic reference is to the neologism which has attracted the attention of those Western scholars who have dealt with the first phase of the modernization of the legal Chinese: that neologism was created to translate into Chinese the English word *right*, 權利 (权利, *quanli*), which is the first part of the aforementioned quadrisyllabic compound employed to translate the concept of legal capacity. The creation of the compound *quanli* is traced back to the Chinese translation of the well-known handbook by Henry Wheaton (1785-1848), *Elements of International Law*,¹⁸ published in 1864 in Beijing, in classical Chinese with the title 萬國公法 (*Wangguo gongfa*, literally ‘Public Law of ten-thousand countries’)¹⁹. The translator, William A. P. Martin (1827-1916),

15 Deborah Cao, *Chinese Law: A Language Perspective* (Aldershot: Ashgate Publishing, 2004), 162.

16 Cao, *Chinese Law*, 162. I made a first analysis of the translations of the concepts mentioned in the text in the essay, Marina Timoteo, “Contemporary Chinese Law: a Linguistic Perspective”, *Handbook of Communication in the Legal Sphere*, ed. Jacqueline Visconti, with the collaboration of Monika Rathert (Berlin: De Gruyter, forthcoming).

17 Hermes Pazzaglini, “La recezione del diritto civile nella Cina del nostro secolo”, *Mondo cinese* (1991): 49-66, see 53-54.

18 Henry Wheaton, *Elements of International Law: With a Sketch of the History of the Science* (Philadelphia: Carey, Lea & Blanchard, 1836). Published in 1836, and becoming one of the most popular manuals of International Law of the nineteenth century, it was translated into French, Spanish, Italian, as well as in the Chinese language.

19 At the time, the expression for “International Law” had been created with the term 万国公法, *wanguogongfa*, that would later be replaced with the word, derived from Japanese, and still in use, 国际法, *guojifa*.

an American missionary in charge of the translation commissioned by Prince Gong (1833-1898) and joined in this endeavour by four Chinese scholars, construed the word *quanli* from the combination of two compounds: 權力 (*quanli*, ‘authority’ and ‘power’) and 利益 (*liyi*, ‘profit’).²⁰ So the term *quanli* – destined to become a key term of the new Chinese legal vocabulary, forming, with the first part of the compound, *quan*, the words with which we call subjective rights²¹ – was semantically related to an idea of domination that seemed far removed from that associated with the original *right*.

However, we cannot say for sure if the translation was born due to a misunderstanding or, conversely, as a sign of clear understanding of reality. As Linda Liu observed:

This is not to say that the translators were incapable of comprehending the true meaning of ‘right’. On the contrary the ‘excess’ signification seems to heed the historical message of ‘rights’ discourse in the *practice* of international law only too well, because it registers the fact that the idea had been brought into China by the nineteenth-century representatives of European international law who asserted their ‘trade rights’ and the ‘right’ to invade, plunder, and attack the country.²²

III. WRITING A CIVIL CODE: NOT SIMPLY A QUESTION OF DRAFTING

Another fundamental issue that should be taken into consideration when we analyse processes of law drafting influenced by the imitation of foreign models, beyond the identification and the reconstruction of the imported foreign elements, is how the legal process of the receiving system affects the law-making activity.

Again, the history of the complex path that until now has characterised the making of the Civil code in contemporary China illustrates this well. This history is actually a long one, starting in the first years of the People’s Republic’s foundation and yet moving towards a still to be attained landing place. Up to now, the only Civil code enacted in modern China, remains that of the Nationalistic government, abrogated in 1949 with

20 Rune Svarverud, “The Notions of ‘Power’ and ‘Rights’ in Chinese Political Discourse”, in *New Terms for New Ideas: Western Knowledge and Lexical Change in Late Imperial China*, ed. Michael Lackner, Iwo Amelung and Joachim Kurtz (Leiden et al.: Koninklijke Brill, 2001): 125-144, identified a precedent with respect to the work of Martin, in the translation of Hugh Murray’s (1779-1846) *Cyclopedia of Geography*, carried out by Wei Yuan (魏源, 1794-1856), which to translate the word “right” into Chinese used the character 权, *quan*.

21 For example “credit right” is translated into 债权, *zhaiquan*, “property right” into 所有权, *suoyouquan*.

22 See Lydia H. Liu, *The Clash of Empires: The Invention of China in Modern World Making* (Cambridge: Harvard University Press, 2004), 131.

the plan of drafting a new Civil code following the Soviet Union model, as a socialist milestone along the road to legal modernisation. However, this plan was never implemented: after a first and a second attempt made between the end of the 1950s and the beginning of the 1960s,²³ both suddenly aborted, a new project for a Civil code started in 1979, at the very beginning of the economic reform. Once again, the project was abandoned and replaced by the enactment of the General Principles of Civil Law²⁴ – that have been defined as a “truncated Civil code”²⁵ – and by the subsequent enactment of separate pieces of legislation to be consolidated into a Civil code in the future.

A more systematic drafting effort was carried out in March 1998, when the vice chairman of the National People’s Congress (全国人民代表大会, *Quanguo renmin daibiao dahui*, hereafter NPC), Wang Hanbin, re-started the process of codification appointing a Group for the Redaction of the Civil code, mainly composed by well-known civil law scholars.²⁶ While the group was working on the project, a new acceleration of the process occurred after the Chinese accession to the World Trade Organization,

23 For a description of the context and the works for the drafting of the code until the enactment of the GPCL see Tong Rou, “The General Principles of Civil Law: Its Birth, Characteristics, and Role”, *Law and Contemporary Problems*, 52, no. 2 (1989): 151-175, see 152-154.

24 Here, again, we can follow Tong’s description for this development: “At the very beginning of the economic reform in 1978, a new plan to adopt a comprehensive civil code was announced. However, also this time, “[...] in October 1979, the Law Committee of the Standing Committee of the NPC specially organized the Civil code small drafting group to begin the work of drafting a Civil code for the third time. After three years of diligent labour, the group produced a fourth draft of the Civil code in 1982. Because of the breadth of the civil law’s scope and the complexity of its contents, and also because the economic reforms were still new and concrete social experience was relatively meagre, conditions for working out a complete civil code were not yet ripe. Under these circumstances, the NPC Standing Committee resolved, on the basis of what was needed and what was possible, first to take from the Civil code those parts that were more urgent and relatively more mature and make them separate laws”. Tong, “The General Principles of Civil Law”, 155.

25 Stanley Lubman, “Bird in a Cage: Chinese Law Reform after Twenty Years”, *Northwestern Journal of International Law & Business*, 20, no. 3 (1999): 383-424, see 386.

26 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 Qinghua University (sixty-two years old); 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. According to Guodong Xu, “An Introduction to the Structures of the Three Major Civil code Projects in Nowadays China”, *Tulane European and Civil Law Forum*, 27 (2004): 633-653, see 635. Accessed March 25, 2017, biblio.juridicas.unam.mx/libros/4/1943/33.pdf: “As time went on, the real working staff of the GRCC changed, because some members shifted the burden of work onto their young colleagues and some stood idly by”.

which led China to undertake new obligations towards the international community in the law field. The Project for a civil code fell thus under the supervision of the Commission of Legislative Affairs of the NPC Standing Committee (全国人大常委会法制工作委员会, *Quanguo renda changwei hui fazhi gongzuo weiyuanhui*, hereafter CLA) which set the end of March 2002 as the deadline for the drafting work. This work was finished in April, published for public comments, reformulated by the CLA in September and finally discussed during the thirty-first session of the Standing Committee of the NPC on December 23, 2002.

The Project presented by the CLA, divided into nine books,²⁷ has undergone extensive and severe criticisms by several Chinese scholars – including some of those who took part in the working group – that lamented that CLA ignored most of the proposals submitted by the scholars and realized a code-compilation, merely putting together pre-existing laws and law drafts.²⁸ As a matter of fact, the CLA's project suddenly disappeared from the scene: after its presentation to the Standing Committee of the NPC on December 2002, no official steps followed. In the 2003 legislative plan of NPC there was no mention of the Civil code, while the drafting work of the Real Rights Law was highlighted. This law was approved in 2007 and then the Tort Law and the Law on the Applications of Laws to Civil Relations with Foreign elements followed in 2009 and 2010.²⁹ These acts, combined with the General Principles of Civil Law (1986), the Contract Law (1999), the Marriage Law (1980, revised 2001), the Succession Law (1985), the Adoption Law (1991, revised 1998), and the Civil Procedure Law (1991, revised in 2007 and 2012) completed the overall framework of private law.

The history of the 2002 project sheds light on a legal environment that, in the last few decades of the reforms, within the ever-increasing juridification of the Chinese legal system, has become more complex, with the emergence of new features affecting the legal process of codification: the widespread involvement of scholars in the legislative process, the difficulties in the dialogue between scholars and law-making institutions, the creation of a climate of competition between scholars. Amongst the most active schol-

27 I.e., General principles, Law of Things, Contracts, Personality Rights, Marriage and Divorce, Adoptions, Successions, Tort Responsibility, and International Private Law; the total number of articles is standing at 1209. On this project see 梁慧星 (Liang Huixing), “中国民法典编纂的几个问题” (“Some Problems of the Codification of Civil Law in China”), 《山西大学学报：哲学社会科学版》 (*Journal of Shanxi University*), 26 (2003): 13-19.

28 易继明 (Yi Jiming), “学问人生与人生的学问—访著名民法学家梁慧星教授” (“Interview with the famous civil law research scientist professor Liang Huixing”), 《私法》 (*Private Law*), 6 (2004): 1-52; 河山 (He Shan), “物权法制定之焦点” (“Focus on the Drafting of Real Right Law”), 《私法》 (*Private Law*), 9 (2005): 1-26, see 26.

29 Liu, *The Clash of Empires*, 140.

ars we find Professor Liang Huixing (from the Chinese Academy of Social Sciences, 中国社会科学院, *Zhongguo shehui kexueyuan*, hereafter CASS) and Professor Wang Liming (from the People's University) who, in addition to contribute, in their respective sections,³⁰ to the work of the Group for the redaction of the Civil code, drafted their own Projects of the Civil code, respectively consisting of seven books and 1,924 articles and eight books and over 2,056 articles.³¹ Moreover, other projects were drafted, such as the Project for Succession Law drafted by a group headed by Professor Zhang Yumin of Southwest University of Politics and Law (in Chongqing) and the Green Civil code, drafted, under the leadership of Professor Guodong Xu, by a group of scholars working at Xiamen University and at Zhongnan University of Economics and Law (in Wuhan).³²

After more than ten years in which the topic of the Civil code remained in the wings, under the new leadership of Xi Jinping and Li Keqiang, a new strong emphasis has been put on legal reforms with the approval of the Resolution of the CPC Central Committee on Certain Major Issues Concerning Comprehensively Advancing the Law-Based Governance of China³³ (中共中央关于全面推进依法治国若干重大问题的决定, *Zhonggong zhongyang guanyu quanmian tuijin yifa zhiguo ruogan zhongda wenti de jueding*), at the end of the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China (中国共产党中央委员会, *Zhongguo gongchandang zhongyang weiyuanhui*, hereafter CPC), held in Beijing from October 20 to 23, 2014. According to this document, the Civil code once again became a fundamental part of the political agenda, in connection with efforts to strengthen the rule of law and bring forwards the economic reforms.

30 As the CLA divided the work between the main scholars, assigning the drafting of specific parts of civil law to each one.

31 梁慧星 (Liang Huixing), 中国民法典草案建议稿 (*The Draft of Chinese Civil Code*) (Beijing: 法律出版社, Falu Cubanshe, 2003), 56; 王利明 (Wang Liming), 中国民法典草案建议稿及说明 (*Introduction to the Draft of Chinese Civil Code*) (Beijing: 中国法制出版社, Zhongguo Fazhi Chubanshe, 2004), 49.

32 Guodong Xu strongly criticises the choice of CLA appointing only scholars with Beijing household registration led to criticism. "It is unfortunately obvious that while we may have witnessed the end of the CLA's monopoly on drafting power, a monopoly by Beijing scholars followed closely on its heels. As I mentioned previously, this monopoly caused great dissatisfaction among scholars, including me, who were disqualified by virtue of not holding a Beijing household registration". Guodong Xu, "An Introduction to the Structures", 639.

33 "Zhonggong zhongyang guanyu quanmian tuijin yifa zhiguo ruogan zhongda wenti de jueding" (Resolution of the CPC Central Committee on Certain Major Issues Concerning Comprehensively Advancing the Law-Based Governance of China), *News.xinhuanet.com*, October 30, 2014, accessed October 17, 2015, http://news.xinhuanet.com/ziliao/2014-10/30/c_127159908.htm.

The Party's decision was immediately followed by several official initiatives, which, again, raise a problem of coordinating the actors involved in the drafting work. The five-year legislation plan of the 12th NPC was updated, on August 6, 2015, with a reference to the work to be carried out for the elaboration of Civil code.³⁴ On May 12, 2015, the Supreme People's Court (最高人民法院, *Zuigao Renmin Fayuan*, hereafter SPC) announced the establishment of a research group for the Chinese Civil code.³⁵ Moreover, according to CASS a network of scholars, experts and legal institutions has been organized to work on the draft. In this network the Supreme People's Court (hereafter SPC) the Supreme People's Procuratorate (hereafter SPP) (最高人民检察院, *Zuigao Renmin Jianchayuan*), the Legislative Affairs Office of the State Council (hereafter LAO) (国务院法制办公室, *Guo Wuyuan Fazhi bangongshi*), the Chinese Academy of Social Sciences and the China Law Society are involved and work under the direction of CLA.³⁶

In the meanwhile, scholars that were already protagonists of the works for the draft of the Civil code reappeared on the scene. Some of them, after the critics to the CLA's project, had went on with their drafting work. Liang Huixing, with his working group at CASS, published a second version of his Civil code in 2010³⁷ and then a third version in 2012-2014. This last version, composed of five books, i.e. general principles, contracts, inheritance, torts, family, real rights, and obligations, was published in 2014.³⁸ In order to open a discussion on this project, the first book of general principles, has been published on the website of the CASS on January 18, 2015.³⁹ One year later Professor

34 “增加编纂民法典等34件立法项目” (The Compilation of the Civil Code and Other 34 Legislative Project Have Been Expanded), 人民日报 (*People's Daily*), August 4, 2015, accessed October 16, 2016, <http://cpc.people.com.cn/n/2015/0806/c64387-27419988.html>.

35 “民法典编纂研究小组成立” (A Research Group for the Compilation of the Civil Code Has Been Established), *Legal.people.com.cn*, May 13, 2015, accessed October 16, 2016, <http://legal.people.com.cn/n/2015/0513/c188502-26991009.html>.

36 “《中国民法典草案建议稿附理由》成果发布” (The Draft Civil Code of the People Republic of China: Released the Results), 中国社会科学院法学研究所 (*Institute of Law, CASS*), January 13, 2015, accessed October 14, 2016, <http://www.iolaw.org.cn/web/special/2015/minfadian.aspx?id=174>.

37 梁慧星 (Liang Huixing), 中国民法典草案建议稿, 2nd version (The Draft of Chinese Civil Code, Beijing: Falv Chubanshe, 2011). This version was also published in English, *The Draft Civil Code of the People's Republic of China* (Leiden and Boston: Martinus Nijhoff Publishers, 2010).

38 Liang Huixing, 中国 民法典草案建议稿附理由 (The Draft of Chinese Civil Code and Its Introduction, Beijing: Falv Chuabanshe, 2014).

39 中国民法典草案建议稿宗泽便 (The Draft of Chinese Civil Code-General Principles), 中国社会科学院法学研究所 (*Institute of Law, CASS*), January 1, 2015, accessed October 14, 2016; 编者按 (Editor's Note), 中国社会科学院法学研究所 (*Institute of Law, CASS*), January 13, 2015, accessed October 14, 2016, <http://www.iolaw.org.cn/web/special/2015/new.aspx?id=44839>.

Sun Xianzhong assumed the direction of the working group at CASS, and published, to receive public comments, a new draft of the first part of Civil code.⁴⁰

The second front where the drafting work initiative has been taken up is that of the China Law Society (hereafter CLS) that has organized a group of civil law scholars, called 民法典编纂项目领导小组 (*Minfa dian bianzuan xiangmu lingdao xiaozu*), in which the President of the CLS, Zhang Mingqi, has been appointed director and the vice-president of the CLS, Professor Wang Liming, has been appointed vice director. At the first plenum meeting of this team, Wang Liming proposed the discussion of a draft of the first part of the Civil code that was prepared on the basis of his 2004 project of the Civil code. Wang Liming's draft has been approved and published on April, 20 2015 by the China Law Society.⁴¹ After having received public comments this draft has been submitted to the Commission of Legislative Affairs of NPC Standing.⁴²

A third draft of the first book of the Civil code, titled General principles, has been made by the Civil and Commercial Law Sciences Research Centre directed by Professor Yang Lixin from Renmin University.⁴³ This draft, composed by 265 articles divided in 12 chapters, has been published in the Journal of Henan University of Economics and Law.⁴⁴

In June 2016, in its turn, the CLA duly reappeared on the scene, too, publishing for public comments its own draft of the first book of the Civil code, titled 民法总则 (*Minfa zongze*, 'general civil code')⁴⁵ and divided in 11 chapters.

Following the history of the process that has affected the making of the Civil code in contemporary China, we observe that the number of factors influencing the shaping

40 See Sun Xianzhong, “民法典编纂的若干问题” (Issues on Codification of Civil Law), seminar held at Zhongnan University of Economics and Law, May 24, 2015; full text available in 中国社会科学院法学研究所 (*Institute of Law, CASS*), accessed March 26, 2017, <http://www.iolaw.org.cn/web/special/2015/new.aspx?id=47354>.

41 “中华人民共和国民法典民法总则专家建议稿 – 征求意见稿” (The Civil Code Draft of the People's Republic of China – General Principles), *Lawinnovation.com*, April 20, 2015, accessed October 15, 2016 <http://www.lawinnovation.com/html/xjdt/13723.shtml>.

42 The news on 24th February 2016 and the full text of this submitted draft are accessible at *China Civil and Commercial Law*, <http://www.civillaw.com.cn/zt/t/?30198>.

43 “中华人民共和国民法总则(草案)” (General Principles of Civil Law of the People's Republic of China – Draft), *Renmin Law School*, April 24, 2015, accessed October 15, 2016, <http://www.law.ruc.edu.cn/article/?49038.html>.

44 Yang Lixin, “中国民法典草案”按” (The Draft of Chinese Civil Code), *Journal of Henan University of Economics and Law*, 2 (2015): 24-51.

45 “中华人民共和国民法总则(草案)” (General Principles of Civil Law of the People's Republic of China – Draft), *National People's Congress of the People's Republic of China*, accessed October 15, 2016, http://www.npc.gov.cn/npc/lfzt/rlyw/2016-07/05/content_1993427.htm.

of the law in civil matters has greatly increased and that therefore emerged an issue concerning their coordination. The impression is that the players of this game, first of all legislator and professors, do not always look in the same directions and that the drafting of the Civil code is highly influenced by dynamics of interaction and competition between these legal formants.⁴⁶ Confronted with these dynamics, the key question for the comparative lawyer, again, is not simply whether foreign elements were – and will be – transplanted in the local law in order to elaborate the new code. It is rather who in the local legal process controls the law and is able to influence, favouring or resisting, processes of legal change involving the transplants.

IV. ONE CIVIL CODE, SEVERAL LEGAL MODELS

Thus, the long-lasting project of the codification of private law still embraces the Chinese legal development process, placing the German model in a leading role: even the current stage of code drafting, as we have seen, is concentrated on the General principles of the Civil code, patterned after the first book of BGB. However the history summarized in the previous paragraph outlines a picture of growing complexity of the Chinese contemporary legal system, in a context of rise in the number of norm-creating actors and of sources of law. Within this context, we observe the dramatic change in the practices of legal transplants, that have been taking on a different guise since the very beginning of the Chinese legal reforms started in 1978. During this stage Chinese legal texts and discourses have been enriched (and made more complicated) by a huge circulation of foreign legal models and an increasingly complex amalgam of patterns coming from other systems. In this context a first source of complexity has derived from the contamination between civil law and common law models. While in the first stage of modernization European civil law systems offered the main reference models, in the last few decades a growing number of scholars had their foreign education in the United States and, given also the central role of common law legal models in the setting of contemporary global law, one of the most relevant facts of the last decades of reform has been the arrival in the Chinese legal system of common law models.⁴⁷ For example, in the making of the 2009 Tort law, the drafting group worked on the basis of

⁴⁶ On these dynamics see Sacco, “Legal Formants”, 398.

⁴⁷ In this regard China has been following a general trend: “The widespread cross-diffusion of French and German patterns within the civil law and the modern influence of American models shape a similar legal landscape all across the world, with a wilderness of local variances.”. These are words by Pier Giuseppe Monateri, “The “Weak Law”: Contaminations and Legal Cultures (Borrowing of Legal and Political Forms)”, *Transnational Law & Contemporary Problems*, 13 (2003): 575-592, see 591.

‘大陆法为体，英美法为用’ (*Dalu fa wei ti, yingmei fa wei yong*), which means “grounding on civil law while absorbing common law”.⁴⁸ In this law, common law concepts such as that of punitive damages were actually inserted within a taxonomy based on civil law models. The same happened in the 1999 Contract Law, which has been influenced by common law, civil law and uniform law.

Other elements of complexity were added to this strategy, which led to the coexistence of concepts originating from different traditions, due to the further influence of the legal language and taxonomies which made their appearance during the Republic of China. The outcome was the arising of recurring problems in working with the terms expressing legal concepts. An illustrative example of this can be found in the evolution of one of the core concepts of civil law, i.e. the concept of fault for tortious liability. It was rendered in the Nationalistic Civil code with the compound 过失 (*guoshi*), denoting negligent wrongdoing. This concept, in the code, was distinguished by 故意 (*guyi*), denoting intentional wrongdoing (Nationalistic code, Article 184). In the post 1978 legal reforms, the element of wrongfulness found expression in the unique concept of 过错 (*guocuo*), which denoted both negligent and intentional wrongdoing without any distinction 过错 (*guocuo*) featured in the provisions of Article 106 of the General Principles of Civil Law as the subjective element of liability.⁴⁹ In the 2009 Tort Law (侵权责任法, *Qinquan zeren fa*), under Article 6, the 过错 (*guocuo*) principle was confirmed.⁵⁰ However, in the last few decades the influence of Taiwanese scholars resulted in the reintroduction, in scholars’ writings, of 过失 (*guoshi*). Thus, when, with the progression of the reforms, the common law concept of *comparative fault* entered Chinese legal discourses and had to be translated into Chinese, some scholars would use 过失 (*guoshi*), while others resorted to 过错 (*guocuo*). The result of this was the overlapping of different expressions, used in an interchangeable way, giving rise to linguistic and legal uncertainties.⁵¹

48 Yang Lixin, *侵权法论* (A Study on Tort Law, Beijing: Press of People’s Court, 2011), 144.

49 According to Article 106, GPCL: “公民、法人由于过错侵害国家的、集体的财产，侵害他人财产、人身的，应当承担民事责任”，*Gongmin, faren youyu guocuo qinhai guojia de, jiti de caichan, qinhai taren caichan, renshen de, yingdang chengdan minshi zeren*, “Citizens and legal persons who through their fault violate state or collective property or the property or person of other people shall bear civil liability”.

50 Article 6 of Tort Law reads as follows: “行为人因过错侵害他人民事权益，应当承担侵权责任”，*Xingwei ren yin guocuo qinhai taren minshi quanyi, yingdang chengdan qinquan zeren*, “Who is at fault for infringement upon a civil right or interest of another person shall be subject to the tort liability”.

51 See Xu Chuanxi, “中国侵权法现状: 考察与评论” (The Current Situation of Chinese Tort Law: Observation and Comment), *China Civil and Commercial Law Network* (2013), accessed October 15, 2015, <http://www.civillaw.com.cn/article/default.asp?id=7789>.

V. BACK TO THE FUTURE

In the course of more than a century, the process of modernization of the Chinese legal system, which has seen the enactment of the Civil code as a major (mythical) milestone, has had to face the reality that lies beyond the myths: processes of legal translation, the dynamics of competition and coordination between legal formants, the growing complexity of the scene and practices of legal transplants affected the history of civil codification in the PR of China, that is still moving towards a yet to be attained landing place.

History revealed that substituting the old with the new in the field of law is not simply a political choice, and that copying an exemplary legal model is not just a technical endeavour.

Neither the *old* Qing code, expression of the Chinese legal tradition, nor the *new* Civil code patterned after the Western models, have value in themselves, as they are part of the fabric of history, where several players, factors, models go into the making of the law, taking it beyond abstract labels.

In the new awareness of the processes that affect legal change it has not only become clear that the “deceptively simple dichotomy between what is new and what is old”,⁵² is too simplistic both to effect and to study legal change, but also that it is fundamental to work, beyond labels and representations, on the relations between old and new. Think, for example, of the crucial role of language, which I have repeatedly called into question in this study. Language is part of the Chinese cultural heritage and civilization, a constant link between the past and the present,⁵³ representing a focal point of the legal modernization process. With regard to this topic, on which the comparative lawyers insist as a preliminary issue in the analysis of legal development processes,⁵⁴ I would here like to quote the case of a key concept in the legal language that continues to draw the attention of Chinese law scholars, i.e. the concept of duty. Different authors have dealt with this issue, working on the comparability of the Chinese legal expressions of duty with the English words *shall*, *must*, *should*, *ought to*. Among the most debated questions is that of translating with *shall* two compounds: 必须 (*bixu*) and 应当 (*yindang*). The latter is regularly used to describe situations of duty at the legislative level, although in the common language, the sense of duty that it expresses appears less strong than that expressed by 必须 (*bixu*). In English, 必须 (*bixu*)

52 These are words by Graziadei, “Legal Cultures and Legal Transplants”, 12.

53 Cao, *Chinese Law*, 1.

54 After the lesson of Rodolfo Sacco: see Sacco, “Legal Formants”, 19.

and 应当 (*yindang*) are usually respectively translated with *must* or *shall*, the former, and *ought to* or *should*, the latter.

The extensive use of the predicate that appears characterized by a less binding force can be observed in all the fundamental laws enacted in the last two decades in the civil laws filed, starting from the 1987 General Principles of Civil Law and 1999 Contract Law, the first great law of China's reforms in the field of civil law.⁵⁵

Faced with this phenomenon, which seems to bring us back to the constantly latent argument, described at the beginning of this study, that recognizes the signs of “weakness” in the Chinese legal tradition, compared to the Western legal tradition,⁵⁶ are the linguistic studies that provide us with a clue to these fundamental expressions of contemporary Chinese law. In the Chinese language 应当 (*yindang*) and 必须 (*bixu*) are two modal verbs belonging to two distinct classes and living within a semantic domain that extends between two poles: deontic and anankastic. The latter refers to situations in which duty is the expression of a necessity dictated by facts: the accomplishment of duty is instrumental to achieving a certain goal, while the former concerns those duties which find their source in common principles and standards. These principles and standards are connected, by Chinese linguists, to concepts that are central to the Chinese legal tradition, primarily the concept of reasonableness (情理, *qingli*).⁵⁷ The reference of the verb 必须 (*bixu*) is, on the contrary, that of the factual reality (事实, *shishi*). The deontic mode is, therefore, an expression of a moral duty (道德上的必然, *daode shang de biran*), based on well rooted principles of Chinese cultural history, while the anankastic mode is linked to a duty that we could call ‘procedural’, a duty which is a necessary condition to the implementation of a certain state of affairs. The cogency expressed by 应当 (*yindang*) is, therefore, not inferior to that expressed by 必须 (*bixu*).⁵⁸ The se-

55 In the Contract law there is only one article (Article 272, paragraph 3) that uses 必须 (*bixu*) while 应当 (*yindang*) is to be found a staggering three hundred nineteen times.

56 As it is illustrated by the comments of Ross: “a Chinese weak obligation is translated by an English word of strong obligation” “[...] an exaggerated representation of the strength of the Chinese obligation”. Claudia Ross and Lester Ross, “Language and Law: Sources of Systematic Vagueness and Ambiguous Authority in Chinese Statutory Language”, in *The Rule of Law in China*, ed. Karen G. Turner, James V. Feinerman, and R. Kent Guy (Seattle: University of Washington Press, 2000), 221-270, see 239.

57 For an introduction to these criteria in Imperial law see Isabelle Thireau and Wang Hansheng, “Introduction”, in *Disputes au village chinois. Formes du juste et recompositions locales des espaces normatifs*, ed. Thireau and Hansheng (Paris: Éditions de la Maison des Sciences de l’Homme, 2001), 13-38, see 25; Paola Paderni, “Recenti studi sull’amministrazione della giustizia e sul diritto nella Cina del XVIII e XIX secolo”, *Mondo cinese*, 97 (1998): 3-14, see 10; Jérôme Bourgon, “Uncivil Dialogue: Law and Custom did not Merge into Civil Law under the Qing”, *Law Imperial China*, 23 (2002): 50-90, see 60.

58 For an exhaustive reconstruction of both role and uses of the two modal verbs, see Magda Abbiati, *La grammatica di cinese moderno* (Venezia: Libreria Editrice Cafoscarina, 2003), 216; Viviane Alleton, *Les*

semantic and prescriptive significance of the two expressions is simply very different, and their use by Chinese lawmakers is framed within a precise legal pattern that has deep cultural roots.

Hence the dichotomy between old and new is put to the test: according to Deborah Cao, who deeply studied this issue, also examining imperial Chinese statutes, *yingdang*, not only in legal philosophical terms, but in actual linguistic usage, “is a residual word inherited from the imperial Chinese legal language of the distant past”.⁵⁹

Notwithstanding modernity, notwithstanding globalization, the past, the old, are still around the corner. Thus, facing the question of what is old and what is new in legal change processes, we should be able to look far away, beyond the surface of the representations, we should be able, also, to look... back to the future.

auxiliaires de mode en chinois contemporain (Paris: Editions de la Maison des sciences de l’homme, 1984), 214; Carlotta Sparvoli, “Deontico e anankastico: proposta di ampliamento della tassonomia modale basata sull’analisi dei tratti distintivi dei modali cinesi inerenti dovere e necessità”, Ph.D. diss., Università Ca’ Foscari Venezia, 2012.

⁵⁹ Deborah Cao, “Illocutionary Acts of Chinese Legislative Language”, *Journal of Pragmatics*, 41 (2009): 1329-1340, see 1335.