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# *On China's Civil Law Codification and the Development of China's Civil Law Scholarship*

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**Abstract:** The development of the theoretical system of civil law scholarship and the codification of civil law are closely related and of promotional function to each other. The codification of civil law can promote the systematization of civil law scholarship, perfection of the value system, development and modernization of civil law studies, and the systematization of legal hermeneutics. The subjectivity of China's civil law scholarship, i.e., the notions of problem-orientation, nativeness, practice, the times and innovations, can be improved during China's civil law codification. The codification of civil law can promote the development of a theoretical system of civil law scholarship with Chinese characteristics, including the development of diversified elements such as values, content, system, hermeneutics and methods of civil law.

**Keywords:** the codification of civil law, the system of the civil law scholarship, the value system, subjectivity

The past 40 years of reform and opening up has witnessed China's booming economy and an all-round progress in society, especially the rapid development of civil law scholarship. Along with the process of reform and opening up since 1978, China's civil law doctrines have developed from a veritable wilderness into a thriving garden. China's civil code will be promulgated in 2020. Meanwhile, China's civil law scholarship will usher in a

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new era of development and prosperity. During the codification of civil law, it is necessary for every civil law scholar to consider the following: is it necessary to establish a socialist civil law system with Chinese characteristics and how can we construct this system? In this article, I put forward some ideas on these significant questions.

### **The Codification of Civil Law Needs Theoretical Support from Civil Law Scholarship**

The civil code is the encyclopedia of social activities, the basic law of a market economy, the basic code of conduct for civil activities and the fundamental basis for judgments in civil and commercial cases. Instead of being outcomes of legislators' subjective assumptions, legal codes are the results of the long-term development of legal science. As Alan Watson put it, "On the eve of codification, the heroes of the civil law system were jurists, not judges" (Watson, 2005, p. 236). In the era of Roman law, the doctrines of jurists comprised the major content of Roman law. For example, the *Digesta seu Pandectae* and the *Institutes of Justinian* are composed almost entirely of jurists' works. Since the revival of Roman law in the Middle Ages, the interpretations of Roman law by jurists have been the legal sources of binding forces in courts in many countries (Merryman, 2004, p. 59). During modern times of civil law codification, there was no existing civil code to reference, thus the civil codes of France and other countries commonly reference the doctrines of jurists. Scholars of various countries have systematized the scattered and contradictory rules by annotations and arrangements, which actually promoted research into, and construction of, the civil law system. For example, the three-part legislation style of the *French Civil Code* has undergone its development following the theories of Jean Domat, J. Pothier, Francois Bourjon and Jean Etienne Marie Portalis. Similarly, the five-part legislation style of the *German Civil Code*, which was started by the glossators and developed with the efforts of Friedrich Carl von Savign, G. H. Heise and Josef Hubert Bernhard Windscheid, is the wisdom crystallized by German civil law scholars over generations. When commenting on the *German Civil Code*, Frederic William Maitland, a British scholar said that he did not think there had ever been such a wealth of first-rate wisdom put into a legislative act (Zweigert & Kotz, 2017, p. 276). In addition, the first draft of the *Swiss civil code* (Schweizerisches Zivilgesetzbuch) was actually written by Eugen Hubel and even considered a personal work of Hubel (Zweigert & Kotz, 2017, p. 313).

The codification of China's civil law also needs the support of civil law doctrines and theories. The codification is certainly the work of the legislators, but the construction of the system of civil code depends largely on the efforts of scholars. The codification of civil law is not only the work of the legislators, it also requires the active participation and suggestions of civil law scholars, which reflects the positive interactions between legislation and legal doctrines. Bernhard Windscheid, the draftsman of the *German Civil Code*, once said that the thought of the legislators, like others, was not perfect, but just an attempt, thus, it needed people other than legislators to participate in the creation of the code. At the same time, others should be appointed to correctly understand and apply the contents

of the code (Jakobs, 2004, p. 111). In respect of the development history of the European civil codes, sufficient theoretical preparation should be made in the early stages of codification. For example, although the final draft of the *French Civil Code* took only four months, Jean-Jacques Cambacérés had already proposed several detailed drafts (Shi, 2015, p. 26). In the process of China's civil law codification, many scholars have put forward constructive opinions and suggestions, which are of great reference value to the formulation of China's civil code. It can be said that civil law scholars actively promoted the process of China's civil law codification by submitting experts-proposed drafts, opinions on revisions of the draft, and argumentation reports on major problems to the legislature. Every step and link of the legislation embodies the great efforts of the majority of China's civil law scholars, attracts the attention of countless civil law scholars, and provides many new subjects for civil law study. Especially since the codification of civil law was put forward during the Fourth Plenary Session of the 18th Central Committee of the CPC, China's civil law scholars have taken an active part in the theoretical study of the civil law codification. Based on the actual situations of China, these scholars, by referencing the laws of other jurisdictions and summarizing China's own experiences of legislation and judicial practice, proposed various realistic rule designs as options for China's civil law codification and improved the new civil code in its scientific nature and operability. Therefore, the development of the theoretical system of civil law scholarship and the codification of civil law are closely related and of promotional function to each other.

The civil code represents the level of civilization of the rule of law and it only emerges when the civilization of the rule of law reaches a certain stage of development. To a certain extent, the formulation of a high-quality civil code depends on the quality of civil law research; therefore, it needs the theoretical preparation and intellectual support of the majority of civil law scholars. During this process, civil law scholarship will surely be promoted. The necessary preparation for codification is the sufficient development of civil law scholarship, including a set of scientific and rational concepts along with terms and systems to guide the codification process. The theoretical system of civil law, the fruit of civil law studies, plays an important role in the construction of the civil code system in the following aspects.

The first is the construction of the system. Codification means systematization and the civil code system mainly includes two levels: one is the formal system, also known as the *Ausere Systematik*, which refers to the setting of sections and chapters and the arrangement of the basic system, i.e., "it is a strict logical-axiomatic deduction process from the simple sorting of letters or numbers to dogmatic abstraction according to the prescribed items, and finally to a perfect, complex and systematic order" (Bydlinski, 1996, pp. 9-17 & 64-65). The other is the substantial system, also known as the *Innere Systematik* (Wang, 2001, p. 225), including contents such as the value principles of law, which refers to the internal value system that runs through each individual legal system, and is often manifested as the principles, spirit and ideas of civil law. The distinction between the *Innere Systematik* and the *Ausere Systematik* was first proposed by Philipp Heck, a representative figure of the jurisprudence of interests, in the 1930s (Heck, 1932, p. 9). After that, it was recognized by many civil law scholars.

However, the legislative system is closely related to the theoretical system, for the legislative system is usually based on the mature theoretical system. The study of civil law provides a scientific theoretical system for the construction of the system of civil code. The works of jurists in ancient Rome, such as the *Digesta seu Pandectae* and the *Institutes of Justinian*, all made historic contributions to the formation of the civil code system. Particularly, the Pandektenwissenschaft sorted out the Roman law, abstracted the concepts of real rights and creditor's rights, and the concepts of legal actions from the expressions of intentions such as contracts and wills. On this basis, this German Pandectist School constructed the general principles of civil law, and then established a civil code system consisting of the general principles and specific rules of civil law. The key to formulating a scientific civil code that embodies the spirit and characteristics of the times is to establish a scientific and rational civil code system. During the formulation of China's civil code, civil law scholars have fully discussed the system construction of the civil code, especially the separate compilation of the personality rights law and the tort law, and whether the general provisions of the contract law can replace the general provisions of the creditor's rights law. These discussions have provided intellectual support for the codification of China's civil law.

The second is the establishment of concepts and terms. The Pandektenwissenschaft emphasizes in the Begriff formalismu and advocates that a Begriff pyramide should be constructed in the civil code (Kaufmann & Hassemer, 2013, p. 162), which obviously overstates the importance of concepts. However, in the formal system of the civil code, the concepts, rules and systems of civil law are required to be constructed with consistent integrity without conflicts or contradictions. The concepts used in the code should be accurate, scientific, and consistent. A certain concept may have different expressions or connotations in different contexts, nevertheless its content has a relatively constant and definite core, and the same concept should not contradict itself in different contexts. According to the German scholar Dieter Schwab, the establishment of a coordinated conceptual system divided by levels of abstraction is the basic premise of codification (Schwab, 2006, p. 19). John Henry Merryman (2004) pointed out that civil code's degree of scientization determined the degree of uniformity of the concepts and principles used in the courses of substantive law, general jurisprudence and general principles of civil law" (p. 225). Jurists have created many concepts in civil law scholarship, combined these concepts into logical institutions, and integrated these institutions into a logical system. In addition to drawing on the common concepts and terms of civil law, China has also innovated some concepts and terms through absorbing the nutrition of doctrines and summarizing the judicial practice experience, such as civil rights and interests, the voluntary principle, the special legal person, and the unincorporated organization as provided in the *General Principles of the Civil Law of the People's Republic of China*; the construction engineering contract, the technical assistance contract, the technical consultancy contract, and the technical service contract as provided in the *Contract Law of the People's Republic of China*; and the rights holder, the collective ownership, the private ownership, the rights to use construction land, the rights of contractual land operations, and the rights to use residential land, as provided in the *Property Law of the People's Republic of China*. These concepts

were innovated based on China's actual situations, not fruits of legal transplantation, and should be absorbed into China's new civil code.

The third is the arrangement of the institution. The systematization of the civil code is also embodied as the systematization of the institution. Civil law study "first seeks for the decomposition of the legal system or the basic principle of the law, and improves the legal method through a variety of ways, thus, to rearrange the legal system and cause it to form the organic system" (Hakim, 2002, p. 156). Civil law scholarship provides a mature and concrete system for the construction of a civil code system. In the process of the systematization, it is necessary to use various approaches to study various norms and systems. Therefore, in addition to building a scientific and rational system, each specific legal institution needs to be designed and arranged in a reasonable way. Proper institutional arrangements should have the following characteristics. The first is comprehensiveness, i.e., the institutions regulating personal and property relations between subjects of equal status should be complete, and there should be no omissions of basic institutions (Shi, 2017, p. 133). The second is coherence, i.e., there is an internal logical connection but no conflicts or contradictions between various institutions. The code should eliminate loopholes, ambiguity and internal contradictions of law (Hesselink, 2001). A scientific and rational civil law system is helpful in reducing conflicts among various institutions and thus enhances the adaptability of the specific institution of civil law and the consistency of the civil code system (Chen, 2003). The third is scientificity, i.e., the various institutions of the civil code should be able to accurately reflect the objective laws of social life, then regulate the various relations in social life with abstract but logical institutional arrangements and establish general behavioral rules with rational value judgments. The fourth is conforming to the values of civil law, such as fairness and justice and protecting private rights. The institutional arrangement should pursue the goal of value, which is also the goal a legislator should pursue in legislation. For example, in order to enable the market to play a fundamental role in the allocation of resources, it is necessary to fully highlight the value of private law autonomy in designing the system, and to make modifications and adjustments to some regulations that are too restrictive, including those that too severely restrict individual rights; And, in order to fully embody the values of fairness and justice of civil law, the design of the system should also respond to the interests and demands of all parties and seek a balance between the interests of all parties (Xue, 2018, p. 30). Good system design is helpful to promote the development of individuality, freedom, creativity and humanism which is one of the core functions of a civil law system. Furthermore, a good and fair civil law system also helps to encourage trustworthiness, promote cooperation and reduce the cost of interpersonal communications (Zhou, 2012, p. 58). All of these need to be supported by the fruits of researches on civil law theory.

The fourth is the regulation design. Not designed by the legislator out of thin air, every regulation shall have its theoretical and practical basis. How to systematically summarize the experience of social life and judicial practice and raise such experience to the level of civil regulations is an important task. Civil law scholarship can provide intellectual support for the scientific and rational regulation design of a civil code. The task of civil law is to study the internal law of the civil regulations, to summarize

and design good rules from social practice, and to establish general rules of conduct through rational value judgments in order to adjust the relations between social production and people's lives and to establish a corresponding legal order (Chen, 2015, p. 1). Of course, the civil code is not all-encompassing, but should be the guiding law expressing as much normative meaning as possible at the lowest language cost (Li, 2013, p. 5). In addition, the civil regulations extracted and designed through civil law study shall be scientific and rational. Since the function of civil law is to realize specific purposes and values through regulations (Rühl, 2005; Rùthers, Fischer & Birk, pp. 290 & 296), civil regulations shall also reflect and demonstrate the basic values of civil law, such as freedom, equality, fairness and the protection of rights in order to realize internal value rationality (Mi, 2013, p. 241). At the same time, civil regulations shall be of certainty and logic, with no conflicts between these regulations. Each regulation shall have a real meaning, attempting to eliminate vagueness, internal conflicts and contradictions in order to achieve external formal rationality (Hesselink, 2001, p. 11). In addition, the regulations that make up civil law should be studied as a complete system. Where the civil regulations lag behind the practice in social life, or there are other unreasonable circumstances, concrete suggestions for improvements should be put forward by civil law scholarship in order to ensure the scientific nature of civil regulations.

The codification of civil law is a huge project, involving many important theoretical and practical issues. The development of a market economy and the deepening of reform and opening up have put forward new requirements for civil legislation. Chinese civil law scholars have positively responded to these requirements. From the actual situations in China and by referring to laws of other jurisdictions, Chinese civil law scholars have summarized the experience of China's legislation and judicial practice, put forward various feasible plans for regulation design, provided theoretical and intellectual support for the codification of civil law and therefore enhanced the scientificity and operability of the new civil code.

### **China's Civil Law Codification Has Provided A Historical Opportunity for the Development and Promotion of China's Civil Law Scholarship**

The codification of China's civil law has provided an unprecedented historical opportunity for the development and promotion of China's civil law scholarship. Civil law codification is a major national strategy which needs to pool the wisdom of civil law scholars and mobilize them to participate in the codification. Scholars should conduct studies and explorations into every single link or process of the codification. The disputes over major problems emerging in the process will also promote the development of civil law doctrines as long as these problems are discussed on the platform of civil law scholarship. In this regard, China's civil law codification has provided a historical opportunity for the development of China's civil law scholarship. In addition, law is a systematic science, and the legislation process may affect the formation of a certain discipline (Yang, 2006, p. 23). The purpose of codification is to express a clear structure and the integral legal regulations and principles to promote

the internal harmony of the law and to provide a conceptual and institutional framework for the development of teaching, justice and legislation. Therefore, the promulgation and implementation of China's civil code will promote the development of China's civil law scholarship such that civil law scholarship can develop with the compilation and revisions of the civil code. Specifically, the impact of the codification on the theoretical system of civil law is mainly demonstrated in the following aspects.

First, the codification promoted the systematization of China's civil law. The separate parts of China's draft civil code that has been published are based on civil rights, i.e., the draft consists of the parts on rights in rem, on contracts and creditor's rights, on personality rights, on rights in marriage and families (rights of kinship), on rights of inheritance and on tort liability, the laws protecting rights. Civil law is in essence the law of rights, and by comprehensively guaranteeing civil rights, the separate parts of the civil code comprehensively embody and carry out the value of the rule of law. In addition, the construction of this system is also the summary of China's experience on civil legislation and judicial practice over the years. The enumeration of civil rights in the *General Principles of the Civil Law of the People's Republic of China* focuses on real rights, creditor's rights, and personality rights. The separate parts of China's civil code actually inherited and developed from China's civil legislation traditions formed since the *General Principles of the Civil Law of the People's Republic of China* was enacted. This system is a significant development of the five-part legislation system established by the Pandektenwissenschaft. Especially, the separate compilation of personality rights and tort liabilities is helpful to overcome the systematic defect of "zhongwu qingren" (attaching importance to substance while ignoring persons) in the Pandektenwissenschaft (Wang, 2011, p. 150). From the perspective of comparative law, the structure of a legal textbook is often influenced by the system of the corresponding legal code, typically, the system of the civil code usually directly determines the structure of the civil law textbooks (Shi, 2007, p. 67). Therefore, after the promulgation of the civil code, the system of the civil code will have a great impact on the system of civil law scholarship. For example, in the traditional civil law system, tort liability is placed in the part on obligations, and there is no separate part for personality rights; however, since China's civil code adopted a separate compilation of personality rights and the part on tort liability, this system will certainly affect the system of China's civil law system. In the future, China's civil law scholarship will consist of and develop through the following parts; the general principles of civil law, the law on rights in rem, the law on property rights, the law on creditor's rights and contracts, the law on marriage and families, the law on inheritance and the law on tort liability.

Second, the codification improved the value system of civil law. From the perspective of comparative law, after the enactment of the civil code, the changes of the social, political and cultural backgrounds and the economic conditions will cause scholars to re-examine and discuss the value and rationality of corresponding regulations. Alan Watson pointed out that the value rationality of the civil code is the ultimate concern for people (Watson, 2005, p. 269). In essence, civil law is the law for people, and strengthening the concern for humanism is an important trend in contemporary civil law.

China's civil legislation reflects the concern for humanism and the innovation of ideas. Traditional civil law is concerned only with abstract individuals, not with the interests of special groups (Radbruch, 1997, p. 66).<sup>①</sup> From an abstract concept to a specific person, "it is closer to the essence of private law to improve the status of the weak in the market and enhance their ability to realize their will." The concern of humanism has been sufficiently demonstrated in China's civil code. For example, the *General Principles of the Civil Law of the People's Republic of China* has stated protections for the interests of vulnerable groups (Article 128) and strengthened the protections for the interests of fetuses (Article 16) and the protections of wards (Article 33), all of which embody the concern for humanism. Moreover, the *Tort Law of the People's Republic of China* fully embodies the spirit of humanism, for its basic system and regulations were constructed by "focusing on protecting the victim", which demonstrates that caring for persons is the utmost. China's draft civil code compiles personality rights as a separate part, which fully embodies the protection of human dignity. As pointed out by the legislature, "Personality rights are the rights of civil subjects to enjoy their specific personality interests, which are related to everyone's dignity and are the most basic and important rights of civil subjects. It is a major task of China's construction of the rule of law to protect the personality rights and guarantee human dignity" (Shen, 2018). This requires civil law scholars to pay more attention to human dignity while maintaining the concerns for property rights, and to promote the concern of humanism while paying attention to the autonomy of private law so that civil law can return to its original orientation of protecting and caring for persons.

Third, codification promoted the deepening of the theoretical study of civil law. During the process of the codification of civil law, the directions and approaches of civil law research may develop into systematic theories and doctrines (Feng, 2002, p. 248). In the course of comprehensively deepening the reform, China's civil law codification raises many major issues that need to be addressed, e.g., the transfer of residential land use rights, the mortgage of land contractual management rights, the exploration of the "three rights separation system" (measures for separating rural land ownership rights, contract rights, and management rights) for rural land, the reform of the rural collectively-owned commercial construction land marketization system, and the rules for the automatic renewal of residential construction land use rights upon expiry. These issues have put forward new tasks for and promoted the development of civil law research. The civil code and civil law have always interacted with each other. The contents of the civil code are numerous and complicated and each part, chapter, and section of the code, even the design of each specific regulation, may raise research tasks for civil law scholars. Generally, with the development of the theory that supports a corresponding civil law article, the article will be more scientific and more effective when solving disputes in practice. Therefore, civil law codification not only needs the cooperation of civil law scholars, but also raises questions and provides a broad space and stage for the development of the civil law scholarship.

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<sup>①</sup> According to Gustav Radbruch (1997), the civil code is not concerned with the differences between farmers, craftsmen, manufacturers, entrepreneurs, and workers. A person in private law exists as an abstract individual only with human and financial resources (p. 66).

Even in terms of research approaches, civil law codification will promote the development of systematization, an important research method of law, and provide material and impetus for the development of civil law scholarship.

Fourth, codification promoted the modernization of civil law scholarship. In the process of compiling the civil code, we must try our best to respond to China's actual demands and highlight the spirit and characteristics of the times. This requires civil scholars to research the methods of how the civil code can respond to these actual demands, which will promote the modernization of civil law scholarship. If we say, the *French Civil Code* of 1804 is the representative civil code in the 19th century, an era of windmills and watermills, and the *German Civil Code* of 1990 is the representative civil code in the 20th century, an era of industry, then China's civil code would be the representative civil code of the 21st century, an era of information and big data. Therefore, instead of copying the *French Civil Code* or the *German Civil Code*, China's civil code should respond to the actual demands of the 21st century, an era of high-tech and internet, and hence the challenges emerging in this information society. China's civil law codification has positively responded to the demands of the 21st century, demonstrated the characteristics of the times, embodied a consensus on values, further expanded research objects and tools, focused on the interactions between the regulations of the civil code and China's actual demands, paid attention to the problem-centered multi-dimensional comprehensive governance mechanisms, discovered the unique value of civil law and its interactions with other governance tools, and promoted the further concretization, deepening and systematization of civil law scholarship.

Fifth, codification promoted the development of civil law hermeneutics. "A law cannot be applied without interpretation." After the promulgation of China's civil code, the construction of the civil code system will no longer be the priority for civil law study. At that time, the main task of civil law scholars will be solving the problems emerging in the application of law, i.e., the interpretation of the civil code, in order to provide theoretical basis for judges to apply the law and for people to follow the law. We should shift from the research of legislation to the research of interpretation. Specifically, the legal interpretations should focus on the system and regulations of the civil code, instead of being subject to the pure and hollow interpretation and argumentation that are not related to the civil code. Therefore, China's civil law codification has not only pointed out the direction for the development of legal interpretation, but also put forward specific requirements for its future development. This has undoubtedly provided abundant research materials and a powerful motive force for the development of civil law scholarship. The enactment of the civil code will temporarily put an end to some academic controversies, nevertheless it will bring new vitality to the development of legal hermeneutics, which will also point out the direction for legal research.

China's civil law codification is a huge project that has attracted worldwide attention. The development of civil law scholarship and the compilation and revision of the civil code should always be of mutual complement and promotion. With the progress of civil law codification, China's civil law scholarship should be further improved in its content and system and should take this opportunity

and actively respond to the major theoretical and actual problems emerging from the codification, and should strive to build a socialist civil law scholarship system with Chinese characteristics while drawing on the outstanding achievements of human civilizations.

### **Raising the Subjectivity of China's Civil Law Scholarship in the Civil Law Codification**

In the 40-year development of China's civil law scholarship, we have always adhered to the subjectivity. We must address ourselves to China's problems. China's laws are used to deal with China's problems and these laws must be fit and proper with regard to China's national conditions. Basically, the theoretical system designed by foreign scholars is based on the situations of their countries and may not adapt to the situations of China. Hence, in the codification of civil law, it is necessary to adhere to subjectivity while building a socialist civil law system with Chinese characteristics.

The subjectivity means responding to the major social concerns, actual problems and value orientations of our country at this time. There is no ready-made solution from abroad and we should solve these problems using our own wisdom. For example, the liability for throwing objects from heights, as provided in the tort law, is rare in the West, but it happens frequently in China and cannot be included in the scope of state liability. In this case, there is an important issue that cannot be avoided in *Tort Law of the People's Republic of China*, i.e., how to properly coordinate the interests of victims, owners, property service providers, and the State. As provided in Article 87 of *China's Tort Law*, where any object thrown out of a building or falling down from a building causes any harm to another person and it is hard to determine the specific tortfeasor, all the users of the building who possibly commit the tort but those who can prove that they are not the tortfeasor shall make indemnity. This regulation is a concrete reflection of an actual Chinese situation. Another example is about real estate registration, a typical local problem of China. Due to the differences in the following aspects between different times and regions, i.e., the transaction objects, the transaction frequencies, the accuracy of initial registrations, and the consistence between the subsequent registrations and the real status of the corresponding right, China has to formulate a registration system based on national conditions. The subjectivity of China's civil law scholarship is reflected in the choice of value judgments. The regulations and systems of other jurisdictions may be referenced or transplanted but the choice of values cannot be solved effectively and precisely by system transplantation. To effectively solve the problem of value judgments, there must be an associated regulation system, and moreover this system should accurately respond to the demands of society and fully reflect the social consensus. The codification of China's civil law should adhere to the principle of embodying Chinese national character and solving China's actual problems and respond to new problems raised by the times. Civil law scholarship which takes the civil code as the research object should also pay attention to the national practice when responding to the major problems in this era. All of these are based on

the establishment of subjectivity. When providing theoretical support for the system and regulation designs for the new civil code, civil law scholarship should also proceed from China's national conditions, focus on solving China's actual problems, and provide the Chinese vision and Chinese approach for designing a scientific, rational and 21st-century-oriented civil code. Only in this way can China's civil code be an outstanding work among the civil codes of the world (Zhu, 2018).

In the codification of civil law, it is necessary to keep the subjectivity of civil law scholarship in both the formulation process of the civil code and the construction of China's own civil law system. Specifically, this subjectivity includes the following contents.

The first is the notion of problem-orientation. Civil law scholarship in China is not an abstract endeavor like a castle in the air. Instead, it seeks to solve China's actual problems. Developing a market economy under the conditions of socialism is an unprecedented feat. In the process of the development of China's socialist market economy, there have emerged new situations and new problems that have never appeared in other countries or regions. "Problems are the voice of the times," and civil law scholarship has been developing step by step in the direction of solving these problems, which is a major reflection of the subjectivity of China's civil law scholarship. For example, China implements public ownership of land and therefore land ownership cannot be traded in the market, but in order to introduce land, the most important means of production, to the market some concepts have been created such as the rights to use construction land and the rights of contractual land operations, which properly solved this problem. The actual problems emerging in China's socialist construction are both challenges and opportunities for the development of civil law scholarship.

The second is the notion of nativeness. Civil law is of certain universality, nevertheless it is still rooted in the social and economic conditions and cultural traditions of different countries. As Savigny (2001) put it, "There is no such thing as a self-consistency existence in law. On the contrary, the essence of law is human life itself." Civil law is not only the reflection of social and economic life in law, but also the summary and embodiment of the country's lifestyle. Therefore, civil law scholarship is inevitably of a strong local character which is manifested especially in the systems of civil subjects, property rights, rights in rem, marriage and inheritance (Su, 2002, p. 48). Only by adhering to the notion of nativeness, can China's civil law really take root in China, and hence become the "jie diqi"(down-to-earth) construction of the rule of law. In accordance with the notion of nativeness, when determining whether and to what extent to introduce foreign systems and regulations, the decision should be based on China's actual situations, designed to solve actual problems, and it is required to pay attention to the summary of China's civil legislation and judicial experiences, reflect the demands of reform and the development of a market economy, absorb the cream of China's traditional culture and promote core socialist values.

The third is the notion of practice. This means the development of civil law scholarship should be based on China's practice, i.e., using the experience obtained from practice to deal with the problems in practice, and deeming practice as the orientation and purpose of civil law scholarship. As Ronald Dworkin (1986) noted, "Law is an ever-improving practice" (p. 44). China's civil law

scholarship should always aim at serving domestic practice. “Daowu dingti, xuegui shiyong” (the way of studying has no fixed form but had better be practical), civil law scholarship should be a practical and functional science for governing the country, benefiting the people and serving society. When referencing foreign legislation, China adheres to the principle of “in China’s control and for China’s benefit”, and has combined various foreign legislations with domestic practice and innovated quite a few regulations that meet the demands in practice. For example, the rule of automatic renewal of the right to use construction land for residences specified in Article 149 of the *Property Law of the People’s Republic of China*, exceeds the restriction of the right to use construction land for residences for a period of 70 years, i.e., automatic renewal upon expiry, which effectively guarantees reasonable expectations of individuals on housing rights, and provides an institutional guarantee for the realization of “those with properties have perseverance”. To develop civil law scholarship, we must start from the reality of China and draw nutrition from the practice of the rule of law. Completely copying the doctrines of other jurisdictions is of no help to explain and solve the practical problems in China. Moreover, China’s civil law scholarship will lose its fundamental sources for development, just like a river without a source and a tree without roots. By saying that civil law scholarship should adhere to the notion of practice, it means civil law scholars should write civil law articles based on the reality of China, i.e., root them in the social and economic practice of China, pay close attention to and link them with the practice of reform and opening up and the development of a market economy, sum up the experience of legislation and judicial practice and summarize and apply the customs in social life. Only on the basis of practice can civil law scholarship be of vitality, pertinence and have the power to be interpreted in specific cases.

The fourth is the notion of times. The notion of times means that the development of civil law scholarship should adapt to the changes in social patterns, pay attention to future development trends, grasp the law of social development, and conform to the trends of social development. If the law develops in accordance with the current situation, the rule of law will be achieved. The changes in our social and economic conditions has challenged the traditional paradigm of the civil code and new missions have been set up, which require the civil code to constantly renew its paradigm and produce new discourse and knowledge systems from the traditional system in order to deal with new problems. In the contemporary world, the fourth industrial revolution represented by biomedical and information technology has impacted the traditional civil law to a certain extent. The rise of technologies such as artificial intelligence, big data and driverless cars has brought challenges to the systems of civil subjects, the personality right and the property right. For example, as a material thing, whether a robot can exist as a subject, whether a robot enjoys rights and interests and whether the works created by a robot are protected by law. In addition, the high-tech “explosion” poses a serious threat to the protection of privacy, hence, some American scholars even proposed the concept of “Zero Privacy” (Froomkin, 2000, p. 1461), saying that we have no place to hide in the high-tech era and the violations of personality rights such as privacy exposure are inevitable. There are other challenges as follows: the protection of personal information raised by data sharing and the data property rights

raised by big data. With the development of trade in human organs and surrogate technologies the status of humans as the subject of legal relations may become the object of legal relations. The buying and selling of personal information, an essential factor of personality, poses a great threat to the subjective status and dignity of humans. The application of big data technology makes it possible to combine all kinds of fragmented information, hence, the protection of personal privacy will face great challenges. With the development of gene technology, it is possible to customize and replicate people, which is also a great challenge to the protection of dignity. With the development of modern science and technology, the traditional civil law paradigms of subject, object and right are facing a profound transformation.

The fifth is the notion of innovation. This means civil law scholarship should adapt to the changing demands of social life and keep innovating. We are in a great era of reform, an era that may produce a great civil code and civil law theories. In this era, society is in transformation, economic life continues to change, and science and technology are growing fast. Therefore, we will face many new situations and new problems and the civil rules that adjust social life have to be constantly adjusted and changed. When dealing with these problems, we have no precedent to follow, and therefore need to face and answer these problems, need to make our own voice and tell our own stories, and need to continue to innovate the concepts and theories of civil law scholarship. In addition, civil law scholarship can better serve the needs of social life only with continuous innovation. With the development of reform, comprehensively continuing the reform needs to rely on the rule of law, and the improvement of the rule of law also depends on the reform. China's civil code should reflect the results of reform and lead the development of reform. This requires civil law scholars to enhance the notion of innovation in civil law research. China's civil law scholars should be the innovators of Chinese academics and contributors to the world's academics, not merely the porters of Western doctrines.

Insisting on subjectivity in civil law research is of no conflict when drawing on the experience of other jurisdictions. There is no doubt that civil law scholarship needs to learn from the advanced civil law cultures of other jurisdictions, as the Chinese idiom saying that "Jade can be polished by stones from other hills" (to improve oneself by accepting criticism from outside); however, learning does not mean copying. Most of the contents of the former Chinese civil law were copied from the *German Civil Code*. For example, Mei Zhongxie (1998) pointed out, "In every ten regulations of the current civil law, six to seven are copied from German legislation, and three to four are copied from Swiss legislation. Also, several legislation of France, Japan and the Soviet Union were selected." Such a reference promotes the establishment of a civil law system and the development of civil law scholarship. Nevertheless it also leads to the problem of acclimation, which makes China's civil law theory and legislation subject to the theory and practice of German law. Since reform and opening-up, the development of China's civil law scholarship is a process of learning, absorbing and digesting foreign civil law theories, and more importantly, a process of innovation. In the last 40 years, China's civil legislation has gone through a development that took the Western countries hundreds of years and has played the important role of escort in the development of a market economy. The basic

experience is to start from domestic practice and move to reform and opening-up and the development of a socialist market economy, with only referencing—not relying on—foreign experiences regarding the rule of law. In fact, this indicates the establishment of the subjectivity, a notion civil law scholarship should insist on. This subjectivity has also guided the development and prosperity of China’s civil law scholarship over the past 40 years and played its role in civil legislation and judicial practice as well as the development of an economic society. Indeed, the major problems of civil law and commercial law in the construction of a market economy with Chinese characteristics are also global concerns, and to solve such problems is a contribution to the development of civil law and commercial law scholarship worldwide.

Only by establishing subjectivity can we focus on the goal of forming a civil law system with Chinese characteristics. Only with the subjectivity can we form our own theoretical system, discourse system and knowledge system. On the contrary, following the discourse of other jurisdictions without insisting on the subjectivity may lead to the circumstance of, “the tasty orange, grown in southern China, would turn sour once it is grown in the north (the fruit may look the same, but the taste is quite different, because the north means a different location and a different climate).” If lacking the subjectivity, social problems can only be solved in a roundabout way by constantly adjusting according to the solutions of other jurisdictions. In the codification of civil law, whether to provide theoretical support for the codification, or to promote the development of civil law scholarship, or even to interpret and perfect the civil code after its promulgation, we need to establish the subjectivity, focus on our own national conditions, and solve our own problems.

### **To Promote the Development of the Civil Law Scholarship System with Chinese Characteristics in the Codification of Civil Law**

After we establish the subjectivity, it will be a necessary requirement to construct a civil law scholarship system with Chinese characteristics, which is a natural process. What is a civil law scholarship system with Chinese characteristics? In my opinion, it is a system of knowledge and theory with strong Chinese characteristics, which is based on Chinese practice and generated from Chinese cultural tradition, responding to the actual demands of Chinese society and displaying the style and features of our nation in this era. It should be based on the socialist theoretical system of the rule of law, fully reflect the interests and aspirations of the great majority of the people, reflect the concepts of the rule of law of fairness and justice, and take the comprehensive protection of civil rights and the promotion of the socialist rule of law as an important goal. For a person, it is vital to be self-reliant for living a life, while for a nation, it is vital to be persevering. China’s civil law also needs to establish its status among the civil codes of the world, and therefore China’s civil law scholarship should create its own contents and systems. This is not only because of the specific characteristics of China’s historical traditions, cultural heritage, economic and social realities, but also because of the arduous task we undertake to carry forward China’s legal system. China’s legal system has a

long history, standing proudly in the forest of the legal systems around the world, and has made a significant contribution to the legal civilization of mankind. China is a country with 1.3 billion people, and hence we should have the confidence to build our own system of civil law scholarship and carry it forward. China is now the second largest economy in the world, a rising power. The great practice of our socialist market economy and the great achievements of the rule of law since reform and opening-up have laid a solid foundation for the civil law scholarship system. We are facing an era of reform, an era that may produce a great civil code and civil law theories. China's civil law needs to establish its important position among civil laws around the world. We, the civil law scholars, should dedicate ourselves to this goal with our utmost efforts.

To serve the social life and fulfill its historical mission, China's civil law scholarship system must be constructed. The codification of civil law is no ordinary legislation for it reflects the strong standing will of China's authorities to comprehensively promote the rule of law, and it is also a comprehensive review of the existing civil law research results. Therefore, civil law scholars should strive to promote the formulation of a theoretical system and discourse system of China's civil law scholarship during the process of the codification of civil law, and thus form a theoretical system of civil law scholarship with Chinese characteristics. In the codification of civil law, civil law scholars should start from China's practice and fully respond to various practical problems emerging from the construction of China's market economy in terms of structure and content, and constantly study new situations and solve new problems. This process itself is a process of the innovation of civil law, a process of development. As Merryman (2007) said, law is rooted in culture and history and reflects the needs of institutions at a specific stage of their social development (p. 150), hence the construction of a theoretical system of China's civil law scholarship should also focus on China's issues with the characteristics of this era. Also, the development of China's socialist market economy and the deepening of reform and opening up have put forward new requirements for civil legislation. Civil law study should come from and serve the great practice of China's reform and opening up, and provide creative solutions to practical problems generated from social life. True research is possible only with true problems. Therefore, to respond to the needs of this era, it is a necessity to complete the construction of civil law scholarship during the process of the codification of civil law based on national conditions.

Civil law scholarship with Chinese characteristics should be open and inclusive to excellent cultures of civil law throughout the world. To construct a civil law scholarship system focusing on China's actual problems does not mean rejecting foreign legal cultures. On the contrary, in the context of globalization, China's civil law scholarship system should be inclusive to the essence of civil law cultures from around the world and reflect the common problems in the development of human societies and the wisdom to deal with these problems. With regard to the outstanding achievements of human legal civilizations, we should uphold what Lu Xun said, "We should use our brains, open our eyes and take them by ourselves" (*Qie jie ting za wen*, p. 32). The study of civil law should have a broad vision and a broad mind, extensively draw on the advanced experience of the two legal systems,

and serve the demands of China's civil legislation and judicature, as the Chinese proverb says, "There will be good qualities that I can select for imitation and bad ones that will teach me what requires correction in myself." Therefore, we need to attach great importance to comparative law studies and the development trends of civil and commercial law around the world. However, comparative law studies require not only a superficial introduction to foreign institutions and doctrines, but also an accurate interpretation based on the historical backgrounds of the formation of these institutions and doctrines, only then can we conduct comparative analysis between China's institutions and doctrines and those of other countries and finally draw conclusions that can guide our practice. "Only when a specific comparative approach is carried out in the process of discussing the problems in specific situations can it really be called comparative law" (Zweigert & Kotz, 2017, p. 10). If only focusing on foreign laws without relating to China's national conditions, the study will be an introduction to foreign laws, not the comparative law for dealing with real Chinese situations. The objects of comparative law should be of wide range and should not be limited to German or French law. We should pay attention not only to the civil law system, but also to the common law system; and not only to developed countries, but also to developing countries. The most important thing is that civil law studies should start from China's actual situations. Foreign institutions and theories are the materials we use for reference, and therefore our studies must not be based entirely on Greek and Roman laws or be absolutely obedient to Roman Law, and we must not "cut the feet to fit the shoes" (a Chinese idiom here meaning to apply foreign theories without considering China's national conditions), neither dancing in the theoretical cage designed by foreign scholars nor being a porter of Western theories.

China's civil law scholarship system should be of a scientific nature. Jurisprudence is different from natural sciences. Nevertheless it also studies the laws of social life and serves specific value purposes. Jurisprudence needs self-based logical, conceptual and theoretical systems, and hence it must respond to the demands of scientificity (Rühl, 2005, pp. 290 & 296). The reason why civil law study is a science is that civil law study itself has a scientific theoretical system and scientific research approaches. After 2,000 years of development, civil law scholarship has formed concepts, rules and institutions through consensus and has formed a logical and rigorous theoretical system. In addition, civil law scholarship has established a unique value system and its own research approaches based on principles such as private law autonomy. By using these approaches, civil law scholars can communicate with each other on the same issue and then reach a consensus. Particularly, civil law scholarship needs to be adapted to the development of the internet, big data, and high technology in modern society, respond to the actual demands of reform and opening up and the development of a market economy, maintain the character of keeping up with the times, and demonstrate the distinct nature of this era. This also requires the civil law scholarship system to keep up with the times and follow the trends of the times. In my opinion, we should grasp the development of the civil law scholarship in the following aspects.

The first is the development of civil law values. In modern civil law, there has been a tendency of property law centralization, an orientation of "pan-property centralization" (Xue, 2006, p. 121), whose value idea

is based on the principle of private law autonomy. However, with the development of a market economy and technology, there have been major changes in the social and economic situations. Since the beginning of the 21st century, it has been the universal consensus of the entire international community to respect and protect human rights. Compassionate care has become an important civil law value, which is embodied in the protection of personality rights and other personal interests by legislation and precedents. Even in property transactions, the protection of personal dignity is highly valued. Where personal dignity conflicts with the private law autonomy principle, personal dignity shall prevail before the law. In the future, China's civil law should value personal dignity and freedom as highly as the party autonomy principle and implement them in civil law regulations and systems. China's civil code is working on should be a civil code that highlights the compassionate care, protects the personal dignity and the party autonomy principle, and demonstrates the spirit of the times by promoting the notion of the sanctify of private property rights. This civil code will not only be long-standing and exemplary but will also lead China's society to become an ideal one where "personal autonomy and a life with dignity" is fully realized. Therefore, in the codification of civil law, full consideration should be given to the interests and demands of socially vulnerable groups, which means giving them ways to express themselves, fully respecting their personal dignity and protecting their legitimate rights. In the marriage and family field, we should fully implement the principle of best interests of minors and demonstrate the care for the elderly by designing an elderly guardianship system.

The second is the development of civil law contents. Civil law should change continuously with the development of society and the economy. The 21st century is an era of technological explosion and rapid internet development. Civil law should respond to the demands of society, strengthen the protection of personal dignity and prevent personal objectification and alienation. In addition, social and economic development has stimulated the protection of transaction security and reliance interest. The rules of apparent agency, bona fide acquisition and effectiveness of unauthorized disposal contracts have been established for fulfilling this protection, which reflect concerns about market developments. Furthermore, modern society is a society of risk and the risk is everywhere. The frequent occurrences of large-scale accidents such as nuclear accidents, severe traffic accidents, medical accidents, and chemical leakage are threatening individual security. Also, the development of a market economy has caused frequent occurrences of violations of consumer's rights, and the torts caused by food safety and product defects are increasingly serious. The ecological environment is deteriorating and environmental pollution has become a serious social problem. Therefore, the scope of tort law is constantly expanding, and tort law should not only be functional in indemnifying damage, but also needs to intervene in the source of risk in order to prevent damage. Finally, our ecological environment is increasingly vulnerable in modern society. Resource scarcity is increasingly serious, and the increasingly powerful human activities are squeezing the natural environment, which has caused irreversible damages to the ecological environment. How civil law can play a more important role in protecting the ecological environment is a new task and new challenge that human society has never faced before. Therefore, civil law scholarship should keep up with the times and

constantly absorb new nutrients from the demands of social life.

The third is the development of the civil law system. The separate compilation of personality rights law and the tort law has injected new vitality into the development of civil law contents and systems and will also become a new growth point for future civil law. However, the civil law system is an institutional structure that is constantly changing, and it needs to develop along with the changes in social life. As stated earlier, an important trend of modern civil law is the unification of civil law and commercial law. Some traditional commercial law values can be gradually integrated into the civil law value system and civil law also needs to absorb the commercial law system and regulations. As Wagatsuma Sakae (2008) pointed out, the relationship between civil law and commercial law is exactly like a glacier. Commercial law is the snow on the glacier, which continues to fall but will be gradually integrated into the glacier—the civil law—after falling (p. 5). For example, the *Rechtsschein Theorie* is well reflected in civil law. The rules of civil law such as apparent agency and bona fide acquisition have embodied the protection of reliance interest. In addition, with regard to the internals of civil law, it is necessary to consider both the equality of each subject and the particularity of commercial transactions. China's civil legislation does not distinguish between merchants and non-merchants, commercial agents and civil agents, or commercial acts and civil legal acts. But in this context, there is still a special issue that civil law must deal with in the future, i.e., how to provide special protections to vulnerable groups (consumers, minors, the elderly, the disabled, etc.) and strengthen the notion of compassionate care.

The fourth is the development of civil law hermeneutics. After the promulgation of the civil code, scholars will need to make many interpretations accordingly. The theoretical civil law system is also an important basis for legal interpretation. The history of France over 200 years since the promulgation of the *French Civil Code* shows that scholars' interpretations have profoundly affected the development of that civil code. French scholar Jean-Joseph Bugnet once said, "I don't know civil law, I only teach the civil code" (Julien, 1928, p. 8)! This saying reveals the significance of civil law hermeneutics. After the promulgation of the *Italian Civil Code*, the legislature provided that the courts should not cite the jurists' works when making decisions, but the judges made many references to the thoughts and doctrines of jurists (Zweigert & Kotz, 2017, p. 61). As Merryman said, "In civil law system countries, even though the jurisprudence is not a formal legal source, it is of great authority" (Zweigert & Kotz, 2017, p. 61). With regard to China's civil law codification, we have to notice that the length and capacity of the civil code are limited, so is the rationality of the legislation. Therefore, the civil code cannot be comprehensive and a great deal of interpretation work is required to extract the value systems, discover the normative content, find the possible loopholes in the civil code, and to complement the rules that are insufficiently developed in the civil code. For example, China's civil code may not include a separate part on general rules of the law of obligations, which leads to the question—how to find common rules between the law of obligations and the existing general principles of contract law and extend the rules of contractual obligations to the obligations caused by other reasons, and thus to deal with newly born complex obligations.

The fifth is the development of diversity in civil law approaches. In the beginning, traditional civil law scholarship was mainly composed of conceptual jurisprudence, focusing on the derivation of and the connections between concepts and then gradually developed into the jurisprudence of interests advocated by Rudolph von Jhering and Philipp Heck and the theory of free law advocated by Eugen Ehrlich. These have actually contributed to the diversification of civil law approaches. After the promulgation of China's civil code, civil law scholarship should be dedicated to the annotation of the civil code otherwise civil law scholarship will lose its existing vitality for development and its research scope will be limited to the framework of the civil code. And thus civil law scholarship will be a pool of stagnant water. "How could it be so clear and cool? For fresh water comes from the source." We are in the era of the internet and big data. The development of science and technology will certainly provide us with new research approaches. For example, in the era of big data, the development of data analysis technology has provided us with effective methods to summarize and extract China's problems and experience in the rule of law from more than 50 million publicly available judicial precedents. Therefore, the judicial empirical analysis of society will be more convenient. In essence, law is a social phenomenon. We should use ethics in the research of marriage and family, use economic analysis in the research of transaction rules, and use logical analysis in the research of rationality for rule designs. The application of the interdisciplinary approach can enhance the scientific nature and practicability of civil and commercial law research (Wang, 2006, p. 87). In addition, research approaches such as law and economics, legal sociology, legal dogmatics, legal ethics, and social investigation should be adopted as important civil law research approaches, and thus free civil law from the constraint of "rigid articles" and promote the civil code to become a "living law" (Liu & Lin, 2017, p. 202).

## Conclusion

By referencing the advanced legislative experience of other jurisdictions and under the actual demands of reform and opening up and the development of a market economy, civil law scholars should establish a scientific civil code that is based on China's actual situation and towards the 21 century, which is a sacred mission entrusted by the times. The codification of civil law is also a good opportunity to promote the prosperity and development of civil law scholarship and formulate China's civil law scholarship system. However, the construction of a socialist civil law system with Chinese characteristics cannot be accomplished in a single day, which requires the continuous efforts of civil law scholars over generations. Even though civil law research has made great progress, we must be soberly aware that the present civil law theory and the corresponding civil law systems have not yet effectively responded to many major practical issues. The international influence of China's civil law theory is far from perfect, and China's civil law theory is still of limited international discourse power. In certain theoretical fields, there is still a lack of necessary self-consciousness and independent thinking. We civil law scholars still have heavy and long-standing responsibilities, and we should

continue to strive for advancement, keep up with the times, continue to innovate and make greater contributions to the revitalization and prosperity of civil law scholarship.

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