Civil Procedure Review
AB OMNIBUS PRO OMNIBUS

The various roots of Civil Litigation in China and the influence of foreign laws in the global era*

Ya Xin Wang

Professor of the School of Law at the Tsinghua University

Abstract: The article seeks to analyse the historical influences of the chinese procedural law system and relate them with our modern era of globalization.

Keywords: Civil Procedure. China.

1. Introduction

My report focuses on the influence of foreign laws on China's civil litigation over the past two decades, and introduces the present circumstances and issues relating to legal institutions, theory and practice.

Part One: The various roots of China's civil litigation

Before I begin to estimate the degree to which China's civil litigation has been influenced by foreign law over recent years, it is necessary to mention a number of roots of the system which form the basic framework. To begin with, even in the period before China became entrenched in globalization, China's civil litigation did not simply progress independently by preserving fixed or old traditions, nor was it the result of transferred or received institutions or theories from one single country. One of the characteristics of China's

* Translated from Japanese by **Melanie Trezise.**

civil litigation system is the existence of extremely broad and complicated roots, brought about by the experience of an era of major transformation of modern society.

The long period up until the mid-nineteenth century marked the era of the so-called indigenous laws of China, at which point strong advancements began under the influence of confrontation with Western European powers. At that time, the "hearing civil case", which existed at the basic level of the state and county bureaucratic systems, was the representative system for civil dispute settlements that corresponded with lawsuits and trials. Focusing on the characteristics of this system, Professor Shuzo SHIGA, an eminent Japanese scholar in the field of Eastern legal history, has described the "hearing civil case" as 'didactic conciliation'.[1] Tts essence retains a strong influence on present day civil litigation in China.

With the invasion by Western powers in the nineteenth century, China was increasingly unable to maintain its unique legal system and attempted to fully receive western European modern laws in the form of legislative processes through legal codification at the end of the Qing dynasty, approximately 100 years ago. Japanese academics were invited as advisors on legislation for the civil litigation system and drafts were made using German laws as the blueprint, though these were withdrawn without being completed as laws with the fall of the Qing dynasty. As I will touch upon later, the German and Japanese legal trends within the basic framework of the litigation system are able to be seen clearly in Chinese civil litigation today.

On the other hand, in the region called the "base area", controlled by the communist party during the Sino-Japanese war (1937-1945), a new civil litigation style was devised in a form to serve the purposes of the revolution ideology and the objectives of the war. This civil litigation style had the structure and content such that when the parties instituted a claim, a certain judge, or even executive members of the party, would go to the site of the dispute, collect evidence and clarify the facts, and then a group of the party's peers would propose a decision and convince the parties to accept it. These characteristics were readily evident with slogans such as "fact investigation (or inquiry into facts)", "mediation focus" and "mobilization

[1] See shuzo Shiga, Law and Adjudication of Qing Dynasty's China, Tokyo: Sobundo Press,1984,231-257.(滋賀秀三、清代中国の法と裁判、東京：創文社、1984年、231-257頁.)

of the masses". This kind of trial system later formed the pragmatic basis for dispute resolution in the courts of the People's Republic of China, and is an element which cannot be ignored as being a very important legal root, even in observing civil litigation in China today.

With the formation of the People's Republic of China, all laws were abolished by the Kuomintang government, including the civil litigation law, and for over three decades between 1949 and 1982, no legislation existed in relation to civil litigation. However, there was a period in the 1950s in which the basic concepts, principles, and theory systems of the so-called socialistic civil litigation studies from the former Soviet Union were enthusiastically studied and introduced. This period of learning from the former Soviet Union was short-lived, and although the influence was limited, this influence filled the void left after the rejection of German-style civil litigation studies, and prima facie, it provided an academic basis to civil litigation of the time, which was almost completely deficient in theory. In this sense, yet another root of present day Chinese civil litigation comes from the laws of the former Soviet Union, in the form of socialist law.

However, restricting the discussion only to the practice of the civil courts at that time, instead of applying the letter of the law and theory, while this was frequently controlled by party ideology and policy or political campaigning, a "mediation focused" trial system was maintained which was essentially formulated in the "base area" during the war of 1937-1945. It is also important to point out that at this time, China's civil litigation, which was experiencing social upheaval such as in the "cultural revolution" and which was cut off from the world, was almost entirely divorced from foreign legal influence.

Part two: The influence of foreign laws in the period of reform and liberalization

The influence of foreign laws began to emerge prominently from the period of reform and liberalization in the 1980s, especially in 1982 with the formulation of the first law on civil litigation since the establishment of the People's Republic of China. This law emphasized the

collection of evidence and fact finding by judges and viewed from the prescribing of the principle of "emphasizing mediation", and so on, it can of course be said that the law was essentially built upon the "new traditional" trial system which traced back to the "base area" period of the communist party revolution. However, by developing the *Allgemeiner Teil·Besondever Teil* (general and specific rules) structure, it is clear that it adopted the framework of the German civil litigation law. At the same time, with the trial session, which is similar to court opening procedures corresponding to the hearing date and lawsuit participation, it is possible to say that this code was joined by the lessons learned from the civil litigation law and legal theory of the former Soviet Union.[2] Moreover, legislators as well as general academics barely made mention of foreign legal influence at the time. For example, if we go to the two most representative textbooks published in the late 1980s, one of these raised foreign laws under the heading "Civil litigation laws in bourgeois society" and criticized these simply as "protecting and giving into the service of bourgeois profits"[3]. The description contained in the other textbook was that "we must refer to the successful legislative techniques and beneficial methods of foreign countries", though concrete examples of these points of reference were given only as "the areas of jurisdiction and legal assistance in external civil and financial matters related to foreign countries". [4] Looking back on this now, the mood of China's civil litigation academic community throughout the entire 1980s was the feeling of political and ideological barriers to stating that there was a connection with foreign laws, and the introduction of comparative law materials and research was not an especially active area of academia. Translation work on the civil litigation laws of foreign countries and their theories

[2] Please refer to the following materials for more details on the civil litigation system of the former Soviet Union in these areas: Yaxin Wang, On the Structure of Chinese Civil Procedure, Kazuyuki Tokuda.et al ,edit, The Phases of Modern Judicial System: To Professor Yasuhei Taniguchi for His Seventy's Birthday, Tokyo: Seibundo Press, 2005.264-265.
王亜新、中国民事訴訟の審理構造についての一考察、谷口安平先生古稀祝賀『現代民事司法の諸相』、東京：成文堂、2005年、264－265頁)；
Yiwei Pu, The Third Person in Civil Procedure, Unpublished Paper at Tsinghua University.117-121. (蒲一葦、民事訴訟第三人制度研究、清華大学法学博士学位論文、117－121頁.)

[3] Fabang Cai, edit, Civil Procedure, Beijing: Pekin University Press,1988, 11-12. (柴発邦編、民事訴訟法学、北京大学出版社、1988年、11－12頁.)

[4] Huaian Wang ,edit. Chinese Civil Procedure, Beijing: People's Court Press, 1988, 18. (王懐安編、中国民事訴訟法教程、人民法院出版社、1988年、18頁.)

was undertaken sporadically in the form of providing "internal reference" for the purpose of providing internal reference materials for legislative bodies, universities and so on, and translations for sale remained quite insubstantial.

However, this mood was transformed from the 1990s, and especially after 1992 with the rapid marketization of the economy. In legislation, and its interpretation or educative research, citing the civil litigation system of foreign countries became normal and no ideological barriers were felt. The comparative research of civil litigation became popular, and as for all other fields, there has been an unparalleled translation boom in relation to civil litigation. In the background to this situation, the influence of foreign laws was spreading throughout the Chinese civil litigation academic community with a force never seen before. It goes without saying that it is this period after the 1990s when society and economics in China became more completely and profoundly caught up in globalization.

Foreign civil litigation systems and theories were perceived positively, and one important catalyst for driving the general attitude of actively studying these was the overall reform of the civil litigation system in 1991, and the completion of the civil litigation law. This newly formulated law took on many elements from continental European and Anglo-American laws. For example, the basic '*Allgemeiner Teil·Besondever Teil*' (general and specific) structure derived from German law , *Mahnverfahren* (summary procedure) and *Aufgebots Verfahren* (Right-exclusion judgment procedure) and so on, clearly involve elements introduced from civil litigation in continental European countries. We can also find clauses in this law which were developed with reference to American law. Representative of this is Article 55 which now provides for "a representative in cases with an undetermined number of parties" for litigation with numerous parties or group litigants. The object of this article is so that even when litigating in matters where the number of litigants is undetermined, through the procedures for notification, registration and so on, an elected representative is entrusted with pursuing the litigation and it is possible for the decision from that case to be incorporated afterwards by latent parties to the same dispute in other litigation also. Seen in this way, the system of "represented litigation for an undetermined number of parties" is found situated beyond the

general framework of continental European law relating to litigation involving a large number of parties and also obviously has similarities with class actions suits in American law.[5]

Furthermore, the introduction of the doctrines and theories of foreign countries' civil litigation became popular in the 1990s. For example, there have been arguments surrounding a number of important concepts such as the "onus of proof" and the "*Verhandlungsmaxime*" (doctrine of oral arguments) , and a new climate has transpired in the civil litigation academic community. For example, throughout the 1980s "onus of proof" was generally only understood at the level of corresponding with "subjective" or "behavioral" burden of proof or "the burden of producing evidence". Facing these circumstances, some academics at the beginning of the 1990s relied on the theories of Leo Rosenberg to actively introduce the concept of "objective" or "resultative" burden of proof, and began to emphasize the most crucial parts of the concept of the onus of proof such as at the level of solving non liquet problems.[6] In the end, understanding the "onus of proof" on both subjective and objective levels gained consensus in the civil litigation academic community, becoming a general idea and commonly accepted notion. In time, this academic consensus ushered in the basic concept of adversarialism, that is, that in the case of non liquet the party with the burden of proof must accept the risk of unsuccessful litigation, and this consensus also played a large part in the litigation system itself and the management of court administration. Furthermore, as I will touch upon in the next section, this understanding of "onus of proof", as an impact from foreign scholarship, is connected to the dissemination of the concept of "legal truth" (procedurally restricted truth), replacing the concept of the "absolute, substantive truth", and the establishment of a system of "time limits for evidence" (the effective loss of a right in relation to late presentation of offensive and defensive means).

[5] There were a number of introductions to "class actions" before and after this Article was promulgated. For an explanation on how legislative bodies were also influenced by these, see: Yu Fan, edit, Group Litigation: About its Problems of System and Practice, Beijing: Pekin University Press, 2005.274-276. (範愉編著、集団訴訟問題研究、北京大学出版社、2005年、274－276頁.)

[6] For a representative work on this see: Hao Li, On Burden of Proof in Civil Procedure, Beijing: Chinese Law and Politic University Press, 1993. (李浩、民事挙証責任研究、北京：中国政法大学出版社、1993年.) This study by Professor Li Hao is primarily based on articles by Taiwanese academics and other translated works, and takes into consideration the theories of Rosenberg and others, and the doctrine of the onus of proof in German and Japanese law.

Moreover, if we raise one more example of a large influence on China's civil litigation academic community and court practices, there is the introduction of the "*Verhandlungsmaxime*" (doctrine of oral arguments) by borrowing important concepts and principles from civil litigation theory of continental European law. For a long time in contemporary Chinese civil litigation, there was a customary practice of judicial inquisition and in the academic community also, the principle of judicial inquisition (*Untersuchungsgrundsatz*) was dominant and there was a background of having rejected the "*Verhandlungsmaxime*" on ideological grounds without sufficiently understanding its sense and purpose. The term used in place of "*Verhandlungsmaxime*" in the text books and so on was "the principle of oral arguments" , and this takes on the meaning that both parties in all circumstances must make assertions and oral arguements, though this would not bind the judge in deciding whether the parties would be heard or not. In the end of the 1980s, the courts of the People's Republic of China launched a reform into civil litigation procedure in order to amend the custom of judicial inquisition[7], however, the civil litigation academic community at the time was still not sensitive to the reformist trend and no solid basis could be given to the movement in practice from the point of view of the doctrine of oral arguments. As well as introducing in detail the concepts and content of the "*Verhandlungsmaxime*" in the civil litigation of Germany and Japan, the "principle of oral arguments" in the Chinese legal academic circles had the position of a "non-binding principle" and the argument that this should be replaced with "*Verhandlungsmaxime*" began to be made public from the middle of the 1990s, starting to become the dominant theory.[8] Recently, through the publication and promulgation of the new litigation rules by the Supreme Court of the People's Republic of China, the legal principles similar in content to the "*Verhandlungsmaxime*", have eventually become accepted into the Chinese civil litigation system and were able to be transferred into practice.[9]

[7] See Yaxin Wang, The Study on Chinese Civil Procedure, Tokyo: Nippon Hyoronsya Press.1995,12-56. (;王亜新、中国民事裁判研究、東京：日本評論社、1995年、12-56頁.)

[8] For a representative discussion of these findings, see Weiping Zhang, Review the principle of oral arguments, Beijing: Jurisprudence Study 6,1996. (張衛平、「我国民事訴訟弁論原則重述」、法学研究1996年第六号.)

[9] For a discussion on this new trend, see: Yaxin Wang, The New Trend of Chinese Civil Procedure: about the New Rules of the Supreme Court, Sapporo:Hokkaido University Jurisprudence Study, 54-6,2004.227.

The increasing influence of foreign laws throughout the 1990s was adopted into the legislative system and consisted not only of the introduction of theories and legal principles, but extended to the general perception and basic ideas of litigation and procedure. Through this, the terms and concepts such as "procedural justice" and "due process" gained currency as "civil rights" in China's civil litigation academic community and were expressed as phenomena such as the concepts becoming slogan-like or even epidemical. Until the end of the 1980s, it was commonly recognized that civil litigation laws, as procedural rules, had an instrumental existence for the sake of essentially realizing substantive justice, a recognition which was also shared by those in the study of civil litigation laws, and civil litigation seemed to take its place at the outer edge of the legal academic world. However, discussions began to be introduced regarding due process in Anglo-American law and procedural justice in Japanese academic circles,[10] and gradually it came to be widely understood that the legal process and court procedures had a major part to play in Western legal systems and philosophy. Coupled with the expansion of judicial system reform, which by the second half of the 1980s had become a frantic boom, the importance of procedure was frequently referred to not only by civil litigation academics, but also by researchers in various fields such as legal philosophy and substantive legal studies. These days, it is no exaggeration to say that these concepts are now shared widely throughout the legal academic community to the extent that "due process" and "procedural justice" are basic keywords in the legal system and legal studies as a whole. These are also the most remarkable signs and results of the influence of foreign law.

Against this background of the various movements outlined above, it should be also pointed out that there now exists the biggest translation boom since the creation of the People's Republic of China (or alternatively, over the thousands of years of Chinese history).

(王亜新、中国民事訴訟の新しい展開——最高人民法院の証拠に関する最新の訴訟規則を中心として、北大法学論集第５４巻第６号、2004年、227頁以下.)

[10] For an introduction to due process, see: Weidong Ji, On Legal Procedure, Beijing: Chinese Social Science, 1993, 1 (季衛東、論法律程序、中国社会科学1993年第１号); for an introduction on the debate in Japanese legal academic circles, see: Yasuhei Taniguchi (translated by Yaxin Wang and Rongjun Liu), Procedural Justice, Beijing: Chinese Law and Politic University Press,1995. (谷口安平著、程序的正義与訴訟（王亜新、劉栄軍訳）北京：中国政法大学出版社、1995年) (additionally, this translation was published in an expanded edition in 2002.)

This boom, which embraces any number of fields includes the domain of civil litigation, dates from the beginning of the reform period and has continued until today. The results of this boom should be given our attention, especially those since the last half of the 1990s. Below I will cite, though not exhaustively, the major translated works in the following order: procedural codes/litigation rules; textbooks; and research works/collected papers. [11]

First, for reasons of geographical proximity to Japan, the large number of civil litigation researchers from China who have studied in Japan both long- and short-term, as well as the relatively frequent exchanges between the civil litigation academic circles of China and Japan, the period of Japanese publication translations came fairly early and as a result of that, it probably also ranks the highest in terms of the quantity translated. The following are the main translated works with regard to civil litigation in Japan.

The New Civil Procedure Law of Japan,(translated by Lvxuan Bai). Beijing: Chinese Legal System Press 2000.白緑玄訳、日本新民事訴訟法、中国法制出版社、2000年；

Hajime Kaneko and Morio Takesita (translated by Lvxuan Bai.) Civil Procedure (new edition), Beijing: Law Press, 1995.兼子一、竹下守夫著、白緑玄訳、民事訴訟法（新版）、法律出版社、1995年；

Takaaki Hatori,et al, (translated by Xingyou Zhu), Civil Trial Procedure of Japan, Xi'an: Shannxi People Press,1991.羽鳥高秋、ヘンダソン著、朱興有訳、日本民事審判程序、陕西人民出版社、1991年；

[11] In addition, there are also great numbers of books and articles written by Chinese scholars, which introduce or provide research on the civil litigation systems and theories of various foreign countries, however I will not go into them here.
Furthermore, in the list below I provide the original title, publisher, date of publication and so on where these are known. However, where these are not known, for the reason of not being clear in the collected works from translators and translated books, I have had to give an abbreviated description.

Hidero Nakamura (translated by Gang Chen et al.) Textbook on New Civil Procedure, Beijing: Law Press,2001.中村英郎著、陳剛ら訳、新民事訴訟法講義、法律出版社、2001年；

Yasuhei Taniguchi (translated by Yaxin Wang and Rongjun Liu), Procedural Justice, Beijing: Chinese Law and Politic University Press, First Edition 1995 (improved edition, 2004).谷口安平著、王亜新、劉栄軍訳、程序的正義与訴訟、中国政法大学出版社、初版1995年（増補版、2004年）；

Hiroshi Takahashi (translated by Jianfeng Lin), Civil Procedure: Deep Analysis on System and Theory. Beijing: Law Press,2003.高橋宏志著、林剣峰訳、民事訴訟法：制度与理論的深層分析、法律出版社、2003年；（重点講義・民事訴訟法、有斐閣、1998年）

Yoshimasa Matsuoka (translated by Zhiben Zhang), On Civil Evidence, Beijing: Chinese Law and Politic University Press,2004. 松岡義正著、張知本訳、民事証拠論、中国政法大学出版社、2004年；

Takeshi Kojima, et al (translated by Zuxing Wang), The History and the Future of Judicial System, Beijing: Law Press, 2000.小島武司ら著、汪祖興訳、司法制度的歴史与未来、法律出版社、2000年；

Takeshi Kojima (translated by Gang Chen, et al), The Theory and Practice of Litigation System Reform, Beijing: Law Press, 2001.小島武司著、陳剛ら訳、訴訟制度改革的法理与実証、法律出版社、2001年；（民事訴訟の基礎法理、有斐閣、1988年）

Takao Tanase (translated by Yaxin Wang), Dispute Resolution and Adjudication System, Beijing: Chinese Law and Politic University Press, 1st edition 1994(2nd edition 2005)棚瀬孝雄著、王亜新訳、糾紛的解決与審判制度、中国政法大学出版社、初版1994年（新版2005年);

Yoshinobu Someno (translated by Jianfeng Lin), Civil Adjudication System in the Transforming Eras, Beijing: Chinese Law and Politic University Press, 2004.染野義信著、林剣峰訳、転変時期的民事裁判制度、中国政法大学出版社、2004;

TakeshiKojima and Shin Yito,edit. (translated by Jue Ding) , The Methods of Alternative Dispute Resolution, Beijing: Chinese Law and Politic University Press, 2005.小島武司、伊藤真編、丁捷訳、訴訟外糾紛解決法、中国政法大学出版社、2005年;

Morio Takeshita (translated by Weiping Zhang and Rongjun Liu), Execution Law, Chongqin: Chongqin Press, 1991.
竹下守夫著、張衛平、劉栄軍訳、強制執行法、重慶出版社、1991年；

On the other hand, the interest in German law, one of the origins of Japanese civil litigation laws, has grown in recent years and as the number of researchers who go directly to Germany to study is increasing each year, there are also many translated works on German civil litigation, which are also garnering respect. The main works are given below.

Civil Procedure Law of Germany, (translated by Huaishi Xie). Beijing: Chinese Law and Politic University Press,2001.謝懐栻訳、徳意志連邦共和国民事訴訟法、中国法制出版社、2001年；

Dieter Knoringer (translated by Hanfu Liu), Germany Civil Procedure Law and Practice. Beijing: Law Press, 2000.著、劉漢富訳、徳国民事訴訟法律与実務、法律出版社、2000年；

Othmar Jauemig (translated by Chui Zhou), Zivilprozessrecht,27th edition, Beijing: Law Press, 2003. Othmar Jauemig著、周翠訳、民事訴訟法（第27版）、法律出版社、2003年；（Zivilprozessrecht,27th edition, Verlag C. H. Beck OHG, München,2002）

Hans-Joachim Musielak (translated by Chui Zhou),Grundkurs ZPO , Beijing: Chinese Law and Politic University Press, 2005. Hans-Joachim

Musielak著、周翠訳、徳国民事訴訟法基礎教程(第6版)、中国政法大学出版社、2005年；（Grundkurs ZPO, Verlag C. H. Beck OHG, München,2002）

Hans Pruetting (translated by Yue Wu), Modern Problem of the Burden of Proof, Beijing: Law Press, 2000. Hans Pruetting著、呉越訳、現代証明責任問題、法律出版社、2000年；

Leo Rosenberg (translated by Jinghua Zhuang), Burden of Proof: on the Base of Civil Code and Civil Procedure Code of Germany, Beijing: Chinese Law and Politic University Press,2002.Leo Rosenberg 著、荘敬華訳、証明責任論：以徳国民法典和徳国民事訴訟法典為基礎、中国法制出版社、2002年；（Die Beweislast, 4, Aufl. 1956, C. H. Beck'sche Verlagsbuchhandlung, München）

M Stürner edit.(translated by Xiuju Zhao), Collection of Civil Procedure of Germany. Beijing: Chinese Law and Politic University Press,2005. M Stürner編、趙秀挙訳、徳国民事訴訟法学文粋、中国政法大学出版社、2005年；

Simultaneously, in American civil litigation also, there has been scholarly interest in the representative domain of Anglo-American law to date, and by the 1980s, there were already resources on American civil litigation published for use as learning materials in comparative law in one section of universities. Heading towards the 1990s, many of the bulky textbooks were translated further, and even the somewhat alternative textbooks were published, aimed at the greater studying convenience for researchers and students with English capabilities, which catalogued the contrast between the English originals and the Chinese translations.

American Federal Rules of Civil Procedure, (translated by Lvxuan Bai and Jianlin Bian), Beijing: Chinese Law and Politic University Press,2000.白緑玄、卞建林訳、美国連邦民事訴訟規則、中国法制出版社、2000年；

Green. M. D. An Introduction to American Civil Procedure, (translated by Law Department, Literature School of Shanghai University). Beijing: Law Press, 1988.著、上海大学文学院法律学系訳、美国民事訴訟程序概論、法律出版社、1988年；

Geoffrey. C. Hazard, Michele Taroffo (translated by Mou Zhang), American Civil Procedure: An Introduction, Beijing: Chinese Law and Politic University Press,1998. Geoffrey. C. Hazard, Michele Taroffo著、張茂訳、美国民事訴訟法導論、中国政法大学出版社、1998年；(American Civil Procedure: An Introduction, Yale University Press, 1993)

Introduction the Federal Courts,(translated by Weijian Tan et al), Beijing: Law Press, 2001.
湯維健ら訳、美国連邦地区法院民事訴訟流程、法律出版社、2001年；（Introduction the Federal Courts, Federal Judicial Center Series, Program Three, 1998）

Stephen N Subrin、Margaret Y. K. Woo (translated by Yanmin Cai and Hui Xu), The Nature of American Civil Procedure: In Historical, Cultural and Practical Perspectives. Beijing: Law Press, 2003. Stephen N Subrin、Margaret Y. K. Woo著、蔡彦敏、徐卉訳、美国民事訴訟的真諦、法律出版社、2003年；()

Stephen N Subrin, Martha L. Minow, Mark S. Brodin, Thomas O. Main (translated by Yulin Fu et al) ,Civil Procedure: doctrine, practice, and context, Beijing: Chinese Law and Politic University Press,2004. Stephen N Subrin, Martha L. Minow, Mark S. Brodin著、付郁林ら訳、民事訴訟法：原理、実務与運作環境、中国政法大学出版社、2004年；（Civil Procedure: doctrine, practice, and context, Aspen Law & Business, 2000）

Jack H Friedenthal, Mary Kay Kane and Arthur R Miller (translated by Dengjun Xia et al) ,Civil Procedure, Beijing: Chinese Law and Politic University Press, 2005. Jack H Friedenthal, Mary Kay Kane and Arthur R Miller著、夏登峻ら訳、民事訴訟法、中国政法大学出版社、2005年；

Stephen C. Yeazell, Civil Procedure, Casebook Series , 5th edition, Zhongxin Press,2003. 中信出版社2003年

Furthermore, the following translated English works are not from certain countries but concern European or American civil litigation generally, and international comparative studies.

Bing Song edit, Collection of Trial System and Adjudication Procedure of America and Germany, Beijing: Chinese Law and Politic University Press,1998.宋氷編訳、読本：美国与徳国的司法制度与司法程序、中国政法大学出版社、1998年；

Mauro Cappelletti ,edit. (translated by Junxiang Liu, et al), Welfare States and Access to Justice. Beijing: Law Press, 2000. Mauro Cappelletti編、劉俊祥ら訳、福利国家与接近正義、法律出版社、2000年；

Mauro Cappelletti, et al (translated by Xin Xu), The Basic Procedural Guarantee of Parties and Civil Litigation in the Future. Beijing: Law Press, 2000. Mauro Cappelletti,ら著、徐昕訳、当事人基本程序保障権与未来的民事訴訟、法律出版社、2000年；

Mirjan R. Damaška (translated by Ge Zheng), The Faces of Justice and State Authority: A Comparative Approach to the Legal Process, Beijing: Chinese Law and Politic University Press,2004. Mirjan R. Damaška著、鄭戈訳、司法和国家権力的多種面孔、中国政法大学出版社、2004年；(The Faces of Justice and State Authority: A Comparative Approach to the Legal Process, Yale University Press,1986)

Adrian A S Zuckerman,edit. (translated by Yulin Fu,et al), Civil Justice in Crisis: Comparative Perspectives of Civil Procedure, Beijing: Chinese Law and Politic University Press,2005. Adrian A S

Zuckerman編、付郁林ら訳、危機中的民事司法：民事訴訟程序的比較視角、中国政法大学出版社、2005年； (Civil Justice in Crisis: Comparative Perspectives of Civil Procedure, Oxford University Press,1999)

Additionally, there are many codes and rules translated and published regarding the civil litigation laws of countries other than those given above. Please see the translations of the representative laws given below for examples:

New Civil Procedure Code of France, (translated by Jiezhen Luo), Beijing: Chinese Legal System Press, 1999.羅結珍訳、法国新民事訴訟法典、中国法制出版社、1999年；

Jean Vincent,Serge Guinchard (translated by Jiezhen Luo), Procédure Civile,25th édition, Beijing: Chinese Legal System Press, 2001.Jean Vincent,Serge Guinchard著、羅結珍訳、法国民事訴訟法要義(上、下)、中国法制出版社、2001年；(Procédure Civile,25th édition,Dalloz,1999)

Jean Vincent,Jacque Prévault (translated by Jiezhen Luo), Voies D'Execution et Procédure De Distrubution,19th édition, Beijing: Chinese Legal System Press,2002. Jean Vincent,Jacque Prévault Voies著、羅結珍訳、法国民事執行程序法要義(上、下)、中国法制出版社、2002年；(Voies D'Execution et Procédure De Distrubution,19th édition,Dalloz,2002)

The Rules of Britain Civil Procedure,(translated by Xin Xu), Beijing: Chinese Legal System Press, 2001.徐昕訳、英国民事訴訟規則、中国法制出版社、2001年；

Civil Procedure Code of Russia,(translated by Daoxiu Huang), Beijing: Chinese People Gongan University Press, 2003.黄道秀訳、俄羅斯連邦民事訴訟法典、中国人民公安大学出版社、2003年。

Part three: The dynamics between the influence of foreign laws and Chinese civil litigation

Historically, China has, for a long time, been proud of its own legal traditions, which can be said to have a legal personality not easily open to the incorporation of foreign legal influence due to dispute resolution systems corresponding to civil litigation. In this tradition, the resourceful and capable procedures and techniques of mediation had been developed. This personality is also reflected in phenomena such as the Communist party revolution's rejection of European and American legal systems and following from this trend, the declaration of a total divorce from civil litigation laws. On the other hand, in recent years, Chinese civil litigation in a different era has the background of actively learning about systems and theories from any number of foreign countries, and of being influenced by them. This is also a kind of historical "path dependence" and is thought to have exerted a considerable effect on the global era which followed. In the period since the 1980s, reform and the opening up of Chinese society, in the sense of starting to participate in world-scale globalization, has provided the background to urge increased foreign legal influence on the field of civil litigation. Specifically, however, through what kind of social conditions and by what dynamics was foreign legal influence increased? This question is dealt with below.

As I have touched upon in the sections above, the process and mechanisms which increased foreign legal influence in the field of civil litigation is in fact deeply tied to "adjudication system reform" in the courts of the People's Republic of China which began in the second half of the 1980s. Originally, this reform, which related to the specific methods of litigation practice and procedures, was not born from the reception of some kind of influence from foreign civil litigation systems, but was, unexpectedly, almost entirely set into motion "endogenously" by the internal situation of the courts of the People's Republic of China. The origins of this reform in an attempt to amend the procedural customs of judicial inquisition and the strengthening of the "onus of proof", or in other words, shifting the onus and responsibility for the collection of evidence from the judge to the parties. In the background to this

movement were a number of changes to social conditions brought about by the major historical turning point of China's reform and opening-up. There was a high incidence of problems involving assets and financial disputes along with the large scale transition of people goods and capital, which emerged as a phenomenon directly related to civil litigation, and it was many of these cases which swamped the courts of the People's Republic of China. For example, the number of civil trial cases received in 1979 was still less than 300-odd thousand cases, but by 1989 this had swelled to approximately 2,500,000 cases which represents an impressive increase of almost 800 percent over 10 years. These circumstances meant that in each individual matter the courts of the People's Republic of China reached the limits of their human and physical resources in order to research facts and collect evidence. Therefore, the very practical considerations to do with the "efficiency" of the courts, such as economizing on the courts' resources and receiving and dealing with a higher number of cases within a limited period of time, were reform-motivated and became connected with the slogan of "strengthening the onus of proof" on the parties.

There are two reasons why this relationship was made possible. One reason is the incorporation of foreign legal theories, and the other, more basic reason is the permeation of society with the doctrine that commercial goods equate to a market economy. The academic movement which introduced continental legal theory on the concept of "onus of proof" could already be seen from the beginning of the 1980s in one section of the civil litigation academic community, but without really attracting a response from those in legal practice, the discussion regarding this concept and doctrine was for the most part brought to a standstill at a fairly premature level. However, once the trial system reform began in the courts of the People's Republic of China, to shift the burden of evidence collection to the parties in the circumstances given above, the concept of the onus of proof along with the corresponding foreign legal theory suddenly came under the spotlight. The phrase "onus of proof" frequently made an appearance in the internal court procedural rules and reports, and furthermore the theories learnt from foreign laws were also soon adopted as a foundation to lend legitimacy to trial system reform. Conversely, this attitude of legal practitioners greatly stimulated discussion in the academic

community and was not only limited to continental law, but further popularized the impassioned introduction of related concepts from foreign civil litigation systems such as the "burden of producing evidence" and the "burden of persuasion" from Anglo-American law. However, at a more basic level, in the background of these concepts and theories borrowed from abroad forming the legitimizing foundation for Chinese court practice, the logic of private autonomy and self-responsibility was of course infiltrating society based on the concept that commercial goods equate to a market economy, which followed China's liberalization and reform. The court custom of judicial inquisition was reformed by the courts, and the slogan or catch phrase of "strengthening the onus of proof" in order to get the parties to take on the burden and responsibility of collecting and presenting evidence, had an affinity with the market economy behavioral patterns of subject autonomy and self-responsibility. The start of the trial system reform which gave effect to these principles, occurred after these market principles were introduced to the so called planned economy system after a finite period of time, a timing which was in no way accidental. This also formed the general background for the movement brought about by the market economy which was to actively introduce civil litigation systems and theory from foreign countries.

Through the changes to the social conditions and environment given above, the ideological barriers were removed and the social groundwork for receiving foreign legal influence was prepared in order to learn legal concepts and theories from foreign countries, however in the domain of civil litigation, the process itself of learning from foreign countries and accepting their influence naturally satisfies a certain kind of internal logic and has come via a unique path. In other words, the influence of foreign laws on the Chinese civil litigation academic community was initially fragmented and limited only to seemingly "helpful" fields and concepts. Nevertheless, following the continued expansion of reform at the level of legal practice and the development of comparative legal studies in the academic community, this influence eventually became more principled and systematic and went as far as the basic procedural structure and fundamental philosophies or overall litigation system. Looking at this specifically, the trial system reform, which began with the "strengthening of the onus of proof"

was, by and large, not only pragmatically and opportunistically motivated at aimed at "improving efficiency". In the academic community, which had been stimulated by this turn of events and was experiencing a boom, the study of comparative law and the introduction of foreign laws were similarly unsystematic and there was a sense that this was a "piecemeal" movement. Similar to the reaction to practical speculation that "onus of proof" was to shift the burden of the collection of evidence onto the parties, the phrase "onus of proof" initially only had the meaning of the responsibility to submit evidence which was not disadvantageous and from which there was no risk of losing a case. In other words, while preserving the concept of the "absolute substantive truth", even more so the general thought at the time was that in order to get the parties to take on the burden of following up on litigation, the division of roles between the parties and the court with regards to the collection and presentation of evidence was not to be apportioned evenly, but to have a kind of multi-layered structure which expressed each role in different dimensions. However, in reality, there were no legal means by which to enforce the parties to collect and present resources for litigation and in practice there was a tendency for the burden of investigating facts and collecting evidence to fall to the courts, and realizing the reform goal was extremely difficult. Under these circumstances, the introduction of the concept and related theory of 'objective' or 'resultative' "onus of proof" from abroad provided an invaluable catalyst for a breakthrough on the difficult aspects in practice as given above. The concept that parties in non liquet cases who do not present evidence, or whose evidence is inadequate, must take the risk of losing their case, gradually permeated through both academic and legal practice circles. Following this, concepts such as "absolute substantive truth" and "complete alignment of subjective recognition with past objective facts" were eventually left behind, while "legal truth" and "procedural truth" were emphasized in their place. Furthermore, throughout that process, the slogan borrowed from abroad of "procedural justice" also assumed a major role and for a time it was the catchphrase of the civil litigation academic community. Today it can be counted as one of the basic legal concepts which are firmly fixed in Chinese law.

Similarly, one more dynamic process which began with the reform towards "strengthening the onus of proof" is linked to the impact on the litigation structure. When judges receive a claim, in the conventional trial process which consists of immediately going to the place of the dispute and investigating facts and collecting evidence, for example by way of broad ranging interviews, the collection of evidence and formulating the investigation and evaluation of evidence are liable to become integrated with one another in a single trial structure. However, the division of stages in the litigation trial has already been encapsulated by the division of roles, putting the burden of collecting evidence onto the parties and of carrying out the investigation onto the courts after they have the evidence presented. Because in mediation centered practices the judge engages in the investigation of the facts and collection of evidence, and at the same time consistently approaches and persuades the parties using the resources gathered, there is therefore little necessity to convene the court. Moreover, since the "substantive" pleadings have been performed, an "opening of the court" session is generally nothing more than a formality. In contrast, by putting the "onus of proof" onto the parties, theoretically the parties need to approach the judge with their evidence and arguments and with the increasing decision rate, there is also an increasing necessity to convene trials. Following this trend, there is a possibility that the "opening session" becomes an independent stage in litigation as the more appropriate "location" for these approaches to be made. The trial system reform process that started with the "strengthening of the onus of proof" will soon become associated with the slogan of "trial centered in public courts" and the motivation for reform that was grounded in improving efficiency also transformed into acquiring new legitimacy by making "opening sessions" substantive. In this process also, the rules of the "*öffentlichkeit*" (doctrine of public disclosure), the "*Verhandlungsmaxime*" (doctrine of oral arguments) and "*Unmittelbarkeitsgrundsatz*" (direct, face to face dealings) which were brought in from foreign countries, as well as the concept of "due process", had a major influence and offered a foundation for legitimacy from the new angle of procedural security of the parties in public trials.

There has therefore lately been encouragement received from the movement of recent years towards an Anglo-American trial structure and civil litigation pre-trial procedures from Germany, Japan among other countries. The Chinese civil litigation academic community has also prepared pre-trial procedures and this, combined with more productive trial opening sessions, has continued to bring about consensus on realizing the so-called two-stage court structure. On the institutional side, the Supreme Court of the People's Republic of China issued civil litigation rules called the "minor provisions on evidence in civil litigation" in December 2001 and stated that from April 1 of the following year they would formally implement the content of these provisions.[12] These rules, as stated above, contain provisions which prohibit judicial inquisition in principle and which establish "legal truth" in the place of "absolute substantive truth". Additionally, with regards to court structure, these rules aim for broad productivity in pre-trial procedures and hammer out a system of "time limits to produce evidence" which can lead to the forfeiting of rights. Hence, the division of stages of the trial process into the "opening of the trial" and the "pre-opening of the trial" become substantive and expanded and are crystallized systematically. With regards to the procedures in preparation for opening the trial and their effect, the above litigation regulations are largely bound to the following rule. That is, by Article 33 of the regulations, when the court receives a case and serves the complaint and other documents, both parties must be sent a "notice of evidence" which includes a time limit of no less than 30 days to present evidence, and provides that both parties may decide the time limit on consultation. Articles 34 to 40 determine various particulars and procedures including: the effect of the loss of a right by evidence being rejected where it is presented after the time limit has passed as a method of offense/defense; the principle that changes to a claim and the filing of cross claims must be done within a time limit; a motion by a party to extend the time limit for evidence and the conditions to do so; and the relationship between the session for pre-trial evidence exchange between the parties and the time limit for producing evidence. The "exchange of evidence" comes from pretrial discovery in American civil litigation and is an attempt at trial system reform which has already taken place

[12] See The Note of the Supreme Court of People Republic of China, Number 1,2005. (中華人民共和国最高人民法院公報2005年第一号)

in one section of the courts. This is not a formal trial opening but rather both parties gather at the court or some other location and a session is conducted to exchange various information held by the parties, in front of the judge and court officers. In this attempt, as well as helping with the evidence collection by the parties, and facilitating settlement, as a pre-trial procedure it is expected to have the function of determining what issues are in dispute and consolidating evidence. The next litigation rules will systemize and put this attempt into statutory form, and will regulate various matters including the following: the exchange of evidence being performed by means of an application of the parties or the authority of the court; when the court arranges such sessions, that day, in other words, will become the time limit for the presentation of evidence; and that in principle the evidence exchange will be limited to two sessions. As is implied from this content, the composition of the litigation trial process which has arisen from this, the parties put out all the arguments and evidence they can before the trial so that when the formally court opens, the presentation of new arguments and evidence are essentially precluded by the loss of a right and the majority of cases can be concluded in one trial opening session. This composition is clearly similar to the two-stage trial structure which forms the basis of civil litigation in America, or lately also in Germany and Japan. It goes without saying that these reform attempts in pursuit of this structure as well as the process of planning the next litigation rules have exposed the courts of the People's Republic of China to civil litigation comparative law information from foreign countries such as the United States and Japan and continues to deliver this influence.

The changes to the institutional framework surrounding the trial structure in Chinese civil litigation, were not simply an approach toward division of the trial stages, such as the division of "trial" and "pretrial" in Anglo-American law, or the division of "procedures to consolidate the issues in dispute" and "the day to present the main oral submissions" in German and Japanese law. Rather, the changes were, more importantly, deeply related to a shift in the basic philosophies and values of litigation and the courts. In other words, civil litigation in China until now has had the "courts versus the parties" structure as its foundation while the judge's judicial inquisition and persuasion or education of the parties, and so on, were

driven by the court's initiative. However, throughout "trial system reform", the pursuit of litigation has shifted the emphasis to the expansion of the offensive and defensive elements between the parties and after the change of the basic structure of procedural development to "plaintiff versus defendant" the adjustment of procedural regulations regarding the litigating behavior of each party gradually became a practical concern. The regulations regarding the "time limit for evidence" and "exchange of evidence" seen in the litigation rules produced by the Supreme Court, encourages the strengthening of vigorous, early-stage presentation of evidence by the parties and attempts to actualize a productive offense/defense becomes clear, and are simply rules to give shape to the adjustment of the offensive and defensive elements between the parties. For the courts also, the deployment of these rules demands the performance of strict self-responsibility, premised by the establishment of the parties' independence, in other words, showing the existence of an all-out adversarial mind-set. Based on what has taken place up until this point, we can say that the procedural rules of Chinese civil litigation have recently come to the point of totally adopting the mindset of the basic philosophies and foundations which exist in the background to Western-style civil litigation.[13]

Part 4: The complicated phenomenon of foreign legal influence

As we have seen above, the influence of foreign law in China is not simply a case of academically introducing comparative legal learning, to then instantly spread to legal practice. Rather, it spreads gradually via a kind of internal logic, under the constraints of the general conditions of society and selectively received in response to the practical demands of the time and place. During this process, a wide variety of elements interacted with each other, such as promoting reform toward adversarialism on the practical level, the expansion of comparative legal studies on the academic level and the change in general social circumstances such as the

[13] These basic philosophies and mindsets are thought to be common to both Continental European law and Anglo-American law. For an attempt at developing a theoretical model which takes into consideration the adversarial relationship of the parties, and the elements of self-selection and self-responsibility, underlying civil litigation in the West, see: Yaxin Wang, A Model of Civil Procedur's Basic Structure, Taibei: Cross-Strait Law Review,3. 2003 (王亜新、関於民事訴訟基本構造的一個理論模型、台北：月旦民商法雑誌2003年第三号).

development of the market economy, and produced a complicated and dynamic modality. At present, from the founding philosophies and thoughts held in common with Western civil litigation as the starting point, basic philosophies and theories or a part of the technical procedural framework have become settled in Chinese civil litigation and this influence is now exercised in a stable way. However at the same time, if the rules regarding civil litigation from foreign countries are "imported" into an environment which has a radically different system and doctrine, naturally it is not possible to maintain the original shape and form of those rules as they cannot be exercised in the same role as they had in the origin country. In particular, if we consider elements such as the fact of China's massive geographical area and huge population, and moreover the developmental inequalities and differences which stand out between cities and rural communities and the geographical areas of the relatively economically advanced east coast compared with the lagging central-west areas, the Chinese civil litigation academic community has still not become a single combined "legal community". It is therefore not difficult to understand that the attempts in litigation practice and procedural reform in the courts of the People's Republic of China are varied over different regions. Under these circumstances, the influence from foreign law is not omnipresent in a simple form in Chinese civil litigation, but rather we must say that at present it is a very complicated phenomenon.

What I must point out from the outset is that the part of the system which has taken on foreign legal influence in its procedural laws is not necessarily being utilized in practice. One example of this, as touched on before, is the "represented litigation for an undetermined number of parties" which was newly created by the civil litigation laws in 1991, and learned from American "class actions". Even though it has been more than ten years since Article 55 put this system into place, there are scant cases where this article has been applied and on the practical side there is even a sense that its application is avoided as much as possible. [14] The elements which affect or regulate these circumstances are extremely complicated and indicate

[14] There are still no results of systematic or empirical investigation into the circumstances of the operation of the system or its causes, however there are numerous materials on the state of affairs. For example, a certain author pointed out that "the articles regarding represented litigation for an undetermined number of parties are mostly empty text": Yu Fan, edit, Group Litigation: About its Problems of System and Practice, Beijing: Pekin University Press, 2005.361. (範愉編著、集団訴訟問題研究、361頁,)as cited above.

many things, however it is perhaps the following situation which forms the most basic factor. As opposed to the "class action" procedure in American civil litigation by giving an incentive to the institutional means and to those mobilized for a number of dispersed parties to come together to form a group or association, it appears that presently in China, in litigation practice it is often judged to be certainly not in the best interests for a large number of parties legally mobilized or associated where the scope and number of litigants is not defined, since social stability is given considerable emphasis. Ultimately, in most cases where the application of the article on representative litigation in which the number of litigants is undefined, the practical norm is to deal with claims by dividing them up and dealing with them separately, only consolidating them at the trial stage.

Furthermore, it is difficult to say that the procedures introduced from continental civil litigation laws are being sufficiently utilized. For example, *Mahnverfahren* (summary procedure) is the system utilized more than civil litigation ordinary procedures in Germany, France and Japan. However, in contrast to these countries, since these *Mahnverfahren* were introduced in China in 1991 by the current civil litigation law, summary proceedings are applied in only a small number of cases by comparison with the number of ordinary procedures received each year. [15] The causes of this problem have not been systematically investigated, however there are normally two explanations which are argued as generally indicative factors. [16] One is the explanation that from the point of view of institutional design, when parties use summary proceedings make a claim for a payment of a debt, their opponent normally institutes a direct notice of opposition. As the court is unable to make a substantive investigation of this, the case can only be aborted, and hence summary proceedings are rarely used because they become an inefficient and work intensive system in which the applicant has no choice but to make an amended claim. One further explanation is that, taking into account the court's financial

[15] Chinese justice statistics do not include summary proceedings and no systematic data exists. According to fragmentary media coverage, in one section of the courts of the People's Republic, the summary proceeding matters processed per annum seems to only be a small percentage of the ordinary procedures matters. See: Wusheng Zhang, The Study on summary procedure, Beijing: Chinese People University Press,2002 172. (章武生、民事簡易程序研究、北京：中国人民大学出版社、2002年、172頁.)

[16] For example, see Xuezai Liu,et al, Some Problems of summary procedure, Lawyer World, 2001. 7. 45-46. (劉学在、胡振玲、督促程序的適用現状及其立法完善、律師世界2001年第７号、45－46頁.)

incentives, if the court accepts an ordinary case, the litigation fee comes into the court proportionate to the litigation expenses. However, in summary proceedings the payment of fees is kept at a nominal amount, and therefore there are few merits to summary proceedings, and a lack of motivation to advance and promote its use in courts which rely financially on litigation fees. Although there is as yet no empirical research to support these explanations, I think that we must pay attention to points in each explanation and I suggest that the utilization of institutions and procedures borrowed from abroad is in fact related to many social conditions and environments which exist both inside and outside of the law.

Therefore, the basic thoughts and concepts adapted from foreign laws are already fixed in Chinese civil litigation procedures and have become a part of the institution and doctrine. However, it will be some time before they can be effectively utilized since the factors and conditions which form the necessary premise and setup for these elements are insufficient and underdeveloped. Let me explain this by way of the "onus of proof" concept discussed above. With the reception of the concept of the "onus of proof" and other basic notions into the civil litigation system, one of the more important roles of the concept was to distribute risk and the burden of the delivery and verification of arguments evenly between the parties. As I touched upon in the previous section, the concept and basic notions of the onus of proof in Chinese civil litigation come from continental European law. In continental European civil litigation, these burdens and risks are essentially distributed according to the organization requirements in each individual article in the substantive law. Doctrinally, there is "regulative theory" and "legal requisite classification theory" and both the academic conflict and practical treatment are developed surrounding substantive law and these doctrines. In other words, the division of the onus of proof is closely connected to the content of the substantive law and in one sense presupposes its related theoretical framework and doctrine. However, as is typified by the lack of civil code or general commercial code in China, the substantive law on the relationship between civil and commercial matters is still being developed. In this situation, despite the concept of the onus of proof being a major concern in the Chinese civil litigation academic community, there is almost no detailed research being conducted on the allocation of the onus

of proof in accordance with the individual laws in the substantive laws and their organizational requirements and added to this is the fact that there are almost no personnel with a detailed knowledge of both substantive and procedural laws. It is therefore difficult to say that that this legal concept sufficiently exercises its function in civil litigation in China today, despite being the quickest concept to be adopted from foreign laws and settled in the law.

On the other hand, we can also identify the phenomenon that although the institutions and procedures formed via influence from foreign laws may be used frequently in litigation practice in one region, in another region or in a different part of the courts it may be barely utilized at all. We can raise the example of the system of "time limits for evidence" through which delay tactics in the offense and defense may cause the loss of a right. In this system, the litigation contest is fought out even where it is contrary to the "substantive truth", and moreover, by being able to legitimize the win/loss result based only upon the principles of the independence and self-responsibility of the parties, it seems to mean that "procedural justice" is replaced with "substantive justice". It does not seem so extraneous that these philosophies and substantiated procedures are far divorced from the traditional social conventions of China. This is because in civil litigation procedures, the parties normally employ a lawyer, as expert in the law, as their representative and it is in the context of the social environment of modern advancements such as industrialization and urbanization and of large urban centers which consist of strangers. However, there are other cases in which the parties to a dispute are from expansive agricultural communities who have essentially maintained their traditional way of life, who often do not have the financial means to employ a lawyer and where they cannot comprehend the foreign specialized technical procedures and philosophies. In these cases it is hard to imagine the courts strictly applying the "time limits for evidence" regulations, or to directly impose court sanctions to take away rights for being late with the presentation of arguments and evidence.

Furthermore, despite continuing to formulate consensus between both the academic and practical spheres with regard to receiving a certain type of legal thought from foreign laws and establishing particular institutions and procedures, there are also examples where this

consensus can not be realized as a system of civil litigation due to the various problems and obstacles caused by China's specific historical traditions and current social conditions. For example, philosophies and thoughts such as *res adjudicata* and the finality of a judgment which are extremely important factors and form the bedrock of Western style civil litigation systems, have become more widely known in the spheres of Chinese civil litigation academia and practice, via comparative legal research and introduction in recent years. Under this influence, there is much criticism against the "system of directed civil trials" under the current laws, in which already confirmed judgments can be relatively easily overturned and matters can be repeatedly contested even where they have been concluded legally. Furthermore, there is also strong emphasis from Chinese scholars and legal practitioners pushing for the review of retrial procedures, heavily weighted in the finality of judgments and based on the theory of *res adjudicata* as well as on the retrial systems in continental European law. On a practical level, because the "system of directed civil trials" is becoming one of the obstacles to denying the finality of decisions, a legal arrangement between mainland China and the Special Administrative Region of Hong Kong (based on British law) to enforce those decisions made in each other's jurisdiction has yet to be reached, causing an atmosphere of frustration between the two. However, at the present, with the various proposals for reform not yet making it onto the legislative agenda due to difficult political and social challenges, and also looking forward into the near future, it will surely not be a simple matter to change the "system of directed trials" in the present civil litigation law from the ground up by following the Western style of "retrial procedures" and "review".

In one sense, the various aspects I have provided with regards to foreign legal influence are the complicated conditions and the outcome of problems directly faced by Chinese society, which is approaching a profound turning point, and the Chinese legal system in its entirety, are given from one aspect on the condition of Chinese civil litigation today. From now into the future, with China increasingly being drawn deep into globalization, China will also become more closely and more frequently engaged in exchange with other countries and will continue to be influenced from outside its borders in the area of civil litigation. However, on the other

hand, in the academic "space" in Chinese civil litigation legal scholarship, reflected in the diverse university research institutes and knowledge structures of researchers, the cooperation and exchange between researchers in pursuit of scholarship is not necessarily close-knit and the "academic sphere" is itself multi-tiered and constructed very loosely. Hence, even if there are research results into foreign laws and comparative law, these do not spread and permeate throughout the entire academic sphere. Therefore, one issue which we must research is by what processes and mechanisms can we share and accumulate knowledge. Simultaneously, because the numerous courts of the People's Republic are distributed over wide and developmentally disproportionate geographical areas, rather than there being commonality been civil litigation and the practice of the courts, there are large sections which differ from others. In these circumstances, the systems and procedures adopted from foreign countries are not guaranteed to be applied uniformly or generally, but rather these are ruled and influenced according to the customary methods and management of each area and are used selectively. The phenomena of the occurrence of subtle differences between court practices in different geographical areas are likely to continue into the future.

The issue of foreign legal influence in the area of Chinese civil litigation must be understood against the background and phenomena of the unification and diversification of procedural law and the related academic agency in the era of globalization on a world-wide scale. Chinese civil litigation legal scholars have also come to resemble that seen in the academic spheres of Japan, Korea and Taiwan, and are increasingly "taking the view of integrated comparative legal scholars"[17]. However, the important issue from now on should be the full cooperation in international academic circles and participation in those discussions that take place within.

[17] See
谷口安平、比較民事訴訟法の課題・序説、京都大学法学部創立百周年記念論文集第三巻・民事法、東京：有斐閣、1999年、523頁.