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The Reception of Roman Obligations in China

Ius est ars boni et aequi
The law is the art of goodness and equity.
Ulpian*, Digest (1,1,1)

以直報怨，以德報德
Recompense hatred with justice,
and recompense kindness with kindness
Confucius, Analects of Confucius (Chapter XIV:36)

Key words: Roman law, obligations, Confucianism, contract law

Abstract

The Chinese legal system has got many keystones. One of them is Roman law. It can be seen in obligations, in the very important part of private law. China has got a unique history and the Latin civilization has got the same characteristic too. Despite the fact of the independent development of the Roman Empire and the Chinese Empire those two legal systems were able to meet in the reception of Roman obligations in China in the twentieth century.

That process may create some disputes. Roman law is one of the features of Western civilization. In the Far East, the situation is different. It is not possible to understand the Chinese legal culture without Confucianism, other philosophies, the role of relationships and the heritage of communism.

The connection of two different legal systems in the sphere of obligation which was ended in 1999 when The Contract Law was promulgated may be evaluated in different ways. Maybe the most appropriate is the phrase that in current China everything is possible but nothing is easy.

Some years ago anthropologists from The University of Lanzhou parlayed the thesis that ancestors of Chinese people living in cities of prefecture Jingchang, in province Gaosu, in Middle China were Roman legionaries. According to that theory, they could have settled there after the defeat of Marcus Crassus in The Battle of Carrhae in 53 BC[1].

Even if that hypothesis – about a meeting of two civilizations – was true, without disputes, the Latin culture and Sinocentric one had developed separately, until the last century of Modern Ages. It is commonly recognized that the first encounter happened during the famous journey of Marco Polo in the second half of the thirteenth century, and his dwelling at the emperor's

* Ulpian (170 – 223 AD) was a prominent Roman jurist.

[1] W. Kowalski, Rzymscy legioniści osiedlili się w Chinach?, https://histmag.org/Rzymscy-legionisci-osiedlili-siew-Chinach-4882 [12.12.2018].

manor. However, the first regular contacts have taken place at the end of the sixteenth century when Jesuits missionaries achieved Chinese land. They have introduced Christianity into different culture and morality. It is so significant not only from a religious perspective. According to distinguished Polish Romanist – Henryk Kupiszewski – they have implemented one of three main keystones of European civilization[2] (apart from Greek philosophy and Roman law). Missionaries have delivered many, sometimes thousands of books from Europe. But there is no evidence, that there were also papers of Roman jurists.

At the end of the eighteenth century and nineteenth one, the trade exchange between China and Europe intensified (mainly because of the United Kingdom). In fact, after the opium wars, China became the half-colony of European powers. That situation allowed getting to know Chinese law by scholars in Europe.

In China, the first known report about legal culture in Western Europe was written in 1906 when the reception of Roman law has been started. In ongoing report can be read: "Political systems are derived from ancient Roman system, so people who want to engage on political science should engage on Rome; similarity to Chinese scientists who have to study the history of Zhou and Qin dynasty at the beginning of their education"[3].

The mentioned period belongs to the ancient history of China. The Zhou dynasty ruled on some areas of current China from 1045 BC to 256 BC. It was the time when the country was not unified and many smaller states were fighting in numerous wars. During the time at the turn of the 6th and 5th century lived master Kong Zi, called Confucius (孔子). He created the philosophy which may be compared to the role of Christianity, Greek philosophy or Roman law in the history of Europe. Professor Susan Wintermuth from China University of Political Science and Law (中国政法大学) claimed, that it is impossible to understand the Chinese legal culture without Confucianism[4] (which is often perceived as a religion[5]).

The philosophy called Confucianism is, in fact, the compilation of ideas declared by Mencius (孟轲), Xunzi (荀况), Dongzhongshu (董仲舒)[6], and of course Confucius (孔子). It has been the morality, ethics and authority rules. That philosophy did not evolve into a positive law or natural one in European meaning. In Roman sense, natural law is that one, that all living beings were taught by nature; that law is not only applicable for humans, but it is common for all beings, which are born on the ground "*ius natural est, quod natura omnia Animalia docuit, nam ius istud non humani generis proprium,sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est*"[7].

The cause of inconsistency is Confucius' conception of human, as a social being who achieves its humanity throughout the process of socialization, fulfills its duties and devotes for others. What's more, the western pretension of natural law is inconsistent with social hierarchy, the primary role of society and respect for the state and authority.

The foundation of the functioning of Chinese society happened mainly due to Confucius' moral system, which, through ritual, has become the obligatory custom. On the second position was criminal law and on the third one were taxes and civil law. Statutory law was also considered as an external and indispensable element of society. Confucianism created harsh norms of altruistic behaviors that became a role model of it. Sanctions were enacted on the grounds of reasonableness and social justice. Two terms in philosophy are worth mentioning because there are so crucial. First being *dao (*道), a word with extraordinary meaning. *Dao (*道) means to all normative social and political order and its connections of roles in families, social–political offices, status, ranks and to objective rules of appropriate conduct in ceremonious, ritual and ethical sphere. The second term is *Li* (禮). It is related to every norm of appropriate behavior which pertained to the ceremony, manners, and behavior in general. *Li* (禮) is perceived as a binding material of all social order. In almost every period of history the Chinese society was more or less stepped in Confucianism. That is taking place also nowadays in the People's Republic of China, in spite of fact that Marxism-Leninism-Mao though is written in the constitution as a ruling ideology.

[2] H. Kupiszewski, Prawo rzymskie a współczesność, Od Nowa 2013, p. 16.

[3] G. Xu, Recepcja i nauczanie prawa rzymskiego w Chinach, Zeszyty Prawnicze 8/1, 2008, p. 2.

[4] Lectures of prof. Susan-Gale Wintermuth, Program Chinese Law Taught in English, China – EU School of Law, 2016.

[5] Lectures of prof. Krzysztof Koscielniak, Jagiellonian University, Institute of the Middle and the Far East.

[6] Mencius (372–289 BC), Xunzi (298–238 BC), Dongzhongshu (179–104 BC).

[7] D.1,1,1,3.

A similarity to the unique role of Confucianism it is impossible to decline the singularity role of Roman Law.

The period of the Roman legal system has begun in 449 BC, when the Law of the Twelve Tables *(Lex Duodecim Tabularum*) was enacted, and ended in 476 AD (the year of fall of the Western Roman Empire). Adding Byzantine period – till the year 1453 (the fall of Constantinople), it gives twenty centuries when a single legal system was in use, almost entirely related to private law.

Derivative nature is not a minor characteristic of the Roman Law. It survived Roman Empire and its social--economic form. In the time when slavery formation has disappeared, the law created by it was still in force. While it may seem like it was forgotten during Dark Ages it remained in the feudalistic and capitalistic form on the areas of former Roman Empire. Until the time of big, European codifications (French CC in 1804, German BGB in 1896, Swiss ZGB in 1907, Austrian ABGB in 1911), Roman Law was in force on the huge areas of Europe and the world. Simultaneously, with succeeding codifications that area started to decrease. In the 20th century *ius romanum* was in effect only in a few separated places of the globe, but of course, in indirect influence has been seen in innumerable norms of civil law written in articles of civil codes based on the Roman legal though. According to many scholars, Roman law was excellent, noncontradictory, fair legal system that included values such as: *aequitas* (equity), *iustitia* (justice), *humanitas* (humanitarianism), *dignitas* (fairness). Obligations in Gaius' *Institutiones*[8] according to his systematic was presented in that part of the textbook, which was related to things (res). Allocation of obligations in that part was connected to apportionment on the material and immaterial things (res corporals – res incorporales) Gaius recognised obligations as a financial authorisation. In *Institutones* they were treated as rights with relative nature; which were protected by *actiones in personem* – complaints.

The current doctrine of civil law defines obligation as a legal attitude, in which one side is obligated to do another one a benefit. The entitled side is called the creditor and obligated side-debtor[9]. Obligation from creditor's position is called credibility and from obligator's side – debt. In sources found in Roman law, there is no full definition of the obligation. However, trials of conceptualizations, the essence of obligation may be found in many Roman texts. The oldest one is in Gaius' *Institutiones*. In his elaboration about *actio in personam* Gaius has written: "*Actio in personam* occurs in that time, when litigation is against someone, who is commited to us, it means, there is a statement that he/she should give us something, make, or provide something" (*In personam actio est, qua agimus cum aliquo, qui nobis vel ex contractu vel ex delicto obligatus est, id est cum intendimus dare, facere praestare oporter*[10]). In another fragment of *Institutiones* Gaius disclose the apportionment of obligations based on the way of their creation. He has written, that every obligation is sprunged from contract or tort (*omnis enim obligatio vel ex ceontractu nascitur vel ex delicto*[11]).

Another term was conveyed in Digest It is derived from jurist Paulus*[14]*: "The essence of obligation does not depend on that, some things or servitude become ours, but on forcing some alien to give, make or provide us something" (*Obligationum substantia non in eo consistit, ut aliquid corpus nostrum aut servitutem nostrum faciat sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum*[12]).

The best designation of the essence of obligations was written up in Justinian's *Institutiones*[13]: "Obligation is a legal junction, which forces us to realize some items according to the law of our state" (*Obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae ivitatis iura*).

It is possible to distinct the following parts of Roman obligation:

1. Relative nature of obligated relation; as a "legal junction" (*vinculum iuris*) linked strictly indicated persons: creditor (*creditor*) and debtor (*debitor*). Roman jurists infallibly detect a difference between obligations, treated as relative rights (executed by *actiones in personam*), and absolute rights.
2. Debtor's duty to fulfill a specific provision in favor of creditor, and it pertains the essence *obligatio*. That provision could be specified on assertion, that creditor has exclusive right to use the thing (*dare*), he/she may take action (*facere*) or relatively pay him/her a compensation (*prastare*).

[8] Written in 2nd century.

[9] R. Longchamps de Berier, Zobowiązania, Księgarnia Wydaw. Gubrynowicz i Syn, Lwów 1939, p. 13.

[10] D.4,2.

[11] D.3,88.

[12] D.33,7,3.

[13] I.3,13 pr.

3. Contestability of Roman *obligatio*, being its basic character was on clear grounds, which were the sources of obligation. The sources of it, which according to Gaius' *Institutiones* were only contracts and torts, and gradually they have been broadened and generalized.

In spite of the separated development of two systems, is it possible to indicate similarity in Chinese law before the reception of Roman obligation in China?

Since 221 BC when the emperor Qin Shi Huang unified China to the end of the Empire in 1911 AD there were several codes established by following dynasties. The code of Han dynasty (221 BC–220 AD) is known, however, its articles were lost. The first which survived to contemporary times is Tang's one (Tang dynasty: 618–907). During the period of Mings' dynasty (1368–1644), there were also numerous norms. There have been introduced to Great Legal Code of Qing dynasty. All ongoing codifications have one attribute, these were criminal codes.

The clear divergence can be seen between the role of written law in ancient China and the Roman Empire. First is related almost only to present criminal law; second to private law. Coincidence may be recognized in Chinese norms as a kind of torts. And genuinely, the population used Great Legal Code of Qing for bringing the lawsuit. Lack of civil law may be seen, but it has had a marginal role with the lack of significance of obligations indeed,. Notwithstanding, the Chinese phrase: civil law consisted of two words: ren (人) and fa (法). First means "human" and second is "law". So civil law may be translated into a "law of the people". The most known equivalent of contract in Chinese legal tradition is *Qi Yue* (契約), commonly translated as an agreement. Some scholars claim that in the first century AD the term: contract – *He Tong* (合同) existed. However, it was exchanged by term *Qi Yue* (契約). In modern China, ongoing term – contract – has been used until the decade of the 70s.

There were debates about the difference between *He Tong* (合同) and *Qi Yue* (契約), but nowadays it is said that there are no practical value in differentiating them. Despite the fact that the concept of *Qi Yue* (契約) has been used in China for centuries it was not clearly defined. Before modern times it was mostly referred to the monetary obligation under which the debtor was responsible for paying the creditor. Rules of *Qi Yue* (契約) have been in use through the period of 2000 years of Chinese Empire during many dynasties. However, as it was written, the majority of rules in their formality were customs or common used ones and the punishment for breach of agreement or violation of it was regulated by criminal law.

The year 1898 can be recognized as a starting point of the reception of Roman Law, as then the first University (The Peking One) has been opened[14]. It has had the additional course of Roman Law. 30 students graduated from that course in 1899. At the beginning of the 20th century, many scholars from Japan and Europe have arrived to China. Their aim was to introduce legal knowledge form the West. In the same time, Japan enacted the civil code based on the German BGB. Changes in Japan after the revolution of *Meiji* was the archetype for the big part of Chinese establishment. That is the cause why Japanese lawyers also arrived to China in 1900s. It is worth mentioning that the Chinese government has chosen the Roman tradition instead of the common law system. There are many causes of this; the one is certainly the applicability of Roman's conception of the family to Chinese hierarchy based on Confucianism.

In 1906 mentioned report about systems in Europe and similarity of Rome to Zhou and Qin dynasty was written. One year after was established The Office of Legal Revisions. That Office was constituted mainly from returned Chinese students studying abroad in Europe, Japan and the U.S. In December the first draft of Civil Code was completed and it was finalized in 1911. However, that was also the end of the Qing dynasty and the Chinese Empire. Notwithstanding that draft was a milestone in the reception of Roman law in China. It contained five parts: general principles, rights of obligation, property rights, domestic relations, and inheritance. The draft was based on the German (BGB) and Japanese law models and the first three parts were prepared by Japanese jurist who was hired as an advisor of Office of Legal Revision. Although the draft has never been enacted, many of its provisions were introduced to the civil law of the Republic of China.

In 1912 Sun-Yat-Sen became the first president of China; a few years later a chairman Chiang Kai-shek has become the leader of the young state. The codification seemed to be an important issue in the disturbed time. It 1925 there was written a draft and its promulgation has taken place in 1930. In that act of law, for the first time, the law of obligations was adopted as a part of the civil code. The Civil Code of year 1930 has five parts: "General Principles", "Obligations", "Rights of things"(property), "Family" and "Succession" and has

[14] G. Xu, *op.cit.*, p. 3.

966 articles. The second book – "Obligations" is based on the Roman system, like in Germany or Japan.

That Civil Code is still in force in the Republic of China in Taiwan, However, in mainland China, it was not the time of verification. In 1937 the second world war began for China; the majority of the state was occupied by Japanese armies. Immediately after the capitulation of Japan on September 2nd, 1945, the civil war broke out. The result was the victory of communist, establishment of Peoples Republic of China by Mao Zedong, and cancelation all republican acts as a kind of imperialistic and bourgeois ideology[15].

In Constitution established in 1949 can be read that criminal law, administrative one, and civil law indeed is the most important substantial portions of the Chinese legal system. All norms have not had positive (binding) character, but only aspirational one (that is the Marxism ideology).

Despite many trials, People Republic of China has not enacted one comprehensive Civil Code. There have been four rounds of it since 1949, The first draft was in 1956, which was based on the Civil Code of the Soviet Union. The second one was written in 1964 and underlined characteristics of the planned economy.

In 1978 there was the breakthrough in PRC. Deng Xiaoping announced his opened-doors policy. Due to that fact, there was a third draft which has not enacted form various reasons. The fourth draft ended as a General Principles of Civil Law promulgated in 1986. Despite that enforcement, there was a popular opinion that China should have one unified Civil Code. That is the main cause why GPCL has been recognized as an act of universal structure by many scholars. The most important characters of it are:

– the open and loose structure,
– the classical German Civil Code structure following Pandectic system,
– the classical German/French structure following Institutions.

As a result of opened door policy and delivery of many legal books to China in the 70s. Chinese legislators, as well as scholars, started to debate over the theory of contracts. There was the consensus that the contract law regulates commercial and civil matters and the essence is mutual dealing. In questions about how the contract law should be addressed, there are three doctrines:

1. Agreement theory – it emphasizes the meeting of minds of the parties. The aim is to enforce a deal that records both intention and theoretical benefits of the parties.
2. Civil Act theory – conduct of parties.
3. The exchange theory – the point is the exchange of goods and products and realization of economic movements of society. There are consistent with the heritage of Gaius' ideas.

In the decade of 80s academic partnership between China Europe and the United States has been established. Nowadays the desirable example of it is program China–EU School of Law in Beijing supported by the European Commission[16]. The first legal definition of contract occurred in 1981 in Economic Contract Law which defines it as an: "agreement between legal persons to ascertain their mutual rights and obligations for purposes of achieving certain economic goals". At the end of 80s Gaius' Digests were translated into Chinese.

The biggest milestone was the promulgation of the Contract Law of Peoples Republic of China in 1999[17]. In article number 2 a contract is defined: "Contract is an agreement between natural persons, legal persons or other organizations with equal standing, for the purpose of establishing, altering, or discharging a relationship of civil rights and obligations". The reason of promulgation was applying for the membership in World Trade Origination by PRC. The state was introduced in 2001. Enforcement of The Contract Law does not denote the overall abolition of Marxism ideology. In that act, there is not expressed the freedom of contracts which has already been the significance in Napoleon's Code (1804). On the other hand, the lack of freedom is related to socialist

In June 2016 the Chinese Agency: *Xinhua* announced that the draft of the first Civil Code in the People's Republic of China will be ready in 2020. In March 2017 the new General Provisions of Civil Law were enacted which seem to be a part of the new code. Roman system will be on the primary consideration. However, it will not overcome the role of Marxism Leninism-Mao though; aspirational norms of the constitution, the significance of Confucius' *Li* (禮), relationship (关系) and *Dao* (道), but it will be the next step.

[15] Preamble, Constitution of the People's Republic of China of September 20th, 1954.

[16] http://en.cesl.edu.cn/ [12.12.2018].

[17] Contract Law of the People's Republic of China of March 15th, 1999, https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn137en.pdf [12.12.2018].

Maybe the most appropriate for European people using Chinese obligation law is the phrase: "In current China everything is possible, but nothing is easy"[18].

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