The Chinese Civil Code and 'Fascination' with Roman Law. A Conversation with Oliviero Diliberto

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Abstract

The Civil Code of the People's Republic of China came into force on 1 January 2021 following a long and complex gestation lasting decades and involving many failed attempts at different times in Chinese history. The main focus of this short interview is an assessment of the possible significance that the legacy of Roman law (and its Italian scholarship) may have had on civil law codification in China.

I. The Possible Impact of Roman Law on Civil Law Codification in China

Law is both culture and politics, and, as such, is never without bias in its processes and what it produces. This would appear to be a fundamental underlying concept that invites us to reflect on diverse experiences of law, together with their interconnections and transitions. The Civil Code of the People's Republic of China (中华人民共和国民法典)[1] came into force on 1 January 2021 following a long and complex gestation lasting decades and involving many failed attempts at different times in Chinese history.[2]

Geopolitical and geo-economic interest in China goes hand in hand with a marked curiosity regarding historical and comparative discourse. There are many reasons for this: firstly, China's civil code shows the influence of various foreign legal models and their contamination through contact with local traditions, which led in turn to differentiation, adaptation, and/or 'domestication'.[3] Secondly, the

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[1] Civil Code of the People's Republic of China, adopted on 28 May 2020, effective from 1 January 2021 (https://tinyurl.com/p9sy4shh; for the English translation cf https://tinyurl.com/3ennvpd7 (last visited 30 June 2021)). See for the Italian translation of this code, O. Diliberto et al eds, *Codice civile della Repubblica Popolare Cinese*, trad. by M. Huang, intr. D. Xu (Pisa: Pacini Editore, 2021).

[2] R. Zimmermann, 'Codification: History and Present Significance of an Idea' *European Review of Private Law*, 95-120 (1995); P. Grossi, 'Codici: qualche conclusione fra un millennio e l'altro', in P. Cappellini and B. Sordi eds, *Codici. Una riflessione di fine millennio* (Milano: Giuffrè, 2002).

[3] M. Timoteo, 'China Codifies. The first book of the civil code between Western models to Chinese characteristics' *Opinio Juris in Comparatione*, 24-44 (2019).

choice to adopt a modern form of 'codification' appears to be quite significant as it clearly draws upon Western legal traditions as well as cultural and ideological phenomena from the past, far removed from those of today. Indeed, the system of Roman Law (directly, and indirectly, through the undoubted influence of the dominant German model)[4] is also known to have had some bearing on this codification.

A useful insight comes from an old book review that appeared in the Yale Law Journal in 1920. Its anonymous author recognized the key role played by continental Europe's legal systems ('Western jurisprudence')[5] in the early draft of the general principles of Chinese civil law, admitting – from the common law standpoint – that the translation into English and publication in a volume of Chinese Supreme Court decisions constituted a major step towards the civilization of China in comparison to other countries. This is why his or her reasoning concluded with a somewhat provocative aspiration:

> Apparently, the Chinese mind as a result of long centuries of civilization and philosophic study has acquired a nimbleness which enables its judges to apply with mastery the rules of the new *jus gentium*. May we not hope, however, that the legal structure to be erected will not be based exclusively upon the principles of continental law, but that it will appropriate also the good qualities of the Anglo-American legal system? May China be far-sighted enough to send more of her youth to study law in England and the United States, so that they may become acquainted with the spirit of Anglo-American law. If our young sister republic should succeed in blending the two great legal systems of the world – the Roman-continental and the Anglo-American – it would make a contribution to civilization, the effect of which can hardly be over.[6]

Some decades later (close to the proclamation of Mao's People's Republic of China, which occurred on 1 October 1949) Roscoe Pound, the great and renowned American scholar and thinker, among many other religious missionaries, went to China on his appointment as legal advisor. His expectation, shared by the larger American legal community, was to help to inspire, transform – and perhaps even

[4] J. Xue and A. Somma, 'La codificazione del diritto civile nel terzo millennio. Riflessioni storiche e politico-normative' *Materiali per una storia della cultura giuridica*, 329-343 (2004) (where J. Xue, interviewing A. Somma, underscored the strong interest in the German model. The Italian legal system was also of interest as it was a hybrid between the pandectistic tradition and the French civil code). See P.G. Monateri and J. Xue, 'Dialogo sulla codificazione del diritto civile in Cina' *Rivista critica di diritto privato*, 469-499 (2003).

[5] E.G.L., 'The Private Law of China' 30(2) *Yale Law Journal*, 180-184 (1920), (reviewing the English translation of 'The Chinese Supreme Court decisions: first instalment translation relating to general principles of civil law and to commercial law', translated by F.T. Cheng (and republished: Nabu Press, Charleston SC, United States, 2010).

[6] E.G.L., n 5 above, 184.

fix – Chinese society and its legal system along American lines.[7] By the end of his journey, however, he was forced to admit that China was well equipped with excellent codes inspired by Roman Law. Indeed, to a country whose culture was grounded principally on custom and morals, the systematic nature of this legal model appeared more appropriate and suitable than the Anglo-American one, thus proving particularly apt for its transition to a modern legal system.[8]

These insights explain the main focus of this short interview examining the possible significance that the legacy of Roman law (and its Italian scholarship) might have had on civil law codification in China, looking beyond the latest code, which has recently come into force.

*What are the historical reasons for China looking to the Roman law tradition? Would you say that the so-called philosophy of Roman law (*natura, ratio *and* aequitas *– to quote the exact words of Yang Zhenshan),*[9] *if such a thing really exists, may have played a role in this?*

Answer:

I would start from a general premise: Roman law, as the expression of a 'state reality' ('state' in the broadest sense, since the concept of State would emerge much later), ceased to exist, on the one hand, with the fall of the Western Roman Empire and, on the other, with the collapse of the Byzantine Empire in 1453. It might be useful to draw a parallel: although the Latin language gradually died out (albeit never completely: suffice it to recall the official – and, in its own way, 'universal' – language of the Vatican), many Romance languages sprang from it in Europe and later in Latin America through the Spanish and Portuguese conquistadors. These languages (eg French, Italian, Spanish, Romanian, Ladino, etc) are obviously different from each other, but they share a common syntactic and grammatical structure and many almost identical lexical items: their common origin in Latin represents a shared basis of communication, without prejudice to the evolution of each individual language and their differences.

As for Roman law, a somewhat similar process took place, but it was one of

[7] J. Kroncke, 'Roscoe Pound in China: A Lost Precedent for the Liabilities of American Legal Exceptionalism' 38 *Brooklyn Journal of International Law*, 77-143, 81 (2012). The story of Roscoe Pound symbolizes attempts to Americanize Chinese law and clarifies the role of Sino-American relations in the formation of modern American legal internationalism (for further reflections, Id, *The Futility of Law and Development: China and the Dangers of Exporting American Law* (New York: Oxford University Press, 2015)). See, also Z. Wang, 'The Roman Law Tradition and Its Future Development in China' 1 *Frontier of Law in China*, 72-78 (2006) (pointing out the Chinese preference for continental Roman law over common law in the early 20th century).

[8] R. Pound, 'Roman Law in China' *L'Europa e il diritto romano. Studi in memoria di P. Koschaker* (Giuffrè: Milano, 1954), 441.

[9] Z. Yang, 'La tradizione filosofica del diritto romano e del diritto cinese antico e l'influenza del diritto romano sul diritto cinese contemporaneo' 69(4) *Rivista internazionale di filosofia del diritto*, 582-599 (1992), (now in L. Formichella et al eds) *Diritto Cinese e sistema giuridico romanistico. Contributi* (Giappichelli: Torino, 2004), 29-43.

infinitely wider latitude: with the demise of the 'state' experience of Roman law, 'neo-Roman' legal systems were created all over Europe (these were initially the so-called Romano-Barbarian legal systems, adopted by the populations that took over the Western Roman Empire). The migrants of the time were fully aware of the cultural superiority of the empire they were conquering, immediately learning Latin, converting to Christianity, and assimilating Roman law, which they combined with their own customs and traditions. From that initial melting pot, a formidable phenomenon arose and grew: the *ius commune*, to all intents and purposes a neo-Roman law initially encompassing Central and Western Europe within its spectrum. Then, with the fall of Constantinople, the Orthodox patriarchate moved to Moscow – which, by no coincidence, became the third Rome – bringing with it Roman law, which thus acquired a territorial breadth infinitely greater than that of the Romance languages. Again, Roman law from old Europe reached Latin America and, to some extent, also one of the states in the United States, Louisiana, as well as Quebec in Canada. These are mixed jurisdictions that have adopted a code historically influenced by the French model.

In the late 19th century, Japan began its phase of 'modernization' and decided to adopt its own civil law legislation, directly inspired by the German legal system, reflecting the greatness of the Pandectics, the contemporary European doctrinal model par excellence. Through Japanese contamination, Roman law also reached China at the beginning of the twentieth century.[10]

A question thus arises: what is the common 'grammar' of the various neo-Roman laws? First of all, there is a shared exegetical technique that originated in Roman jurisprudence, ie the interpretation of legal texts, which is the same in all legal orders based on the Roman system. Secondly, the private law 'system' is also shared by the Roman one. If we think about it, this is one of the great paradoxes of history, albeit a fascinating one: classical Roman law, in fact, actually had no system (or almost none), being of a casuistic nature. However, in drafting the *Corpus Iuris*, Justinian, for the first time (apart from a few previous attempts) created a model from which the subsequent codices would stem, a systemic work. The 'technique' and the 'system' are therefore the same everywhere. An example may help to simplify and clarify: in 1930s Europe, Roman private law was applied in Stalin's Russia, Mussolini's Italy and in the France of Léon Blum and bourgeois representative democracy. The Roman matrix, its systematic layout, is the same in these very different countries, although, naturally, the content of each private law institution varies according to the political-ideological, economic, and social contexts of the various States. The epiphanies of property law are emblematic of this phenomenon.

The fundamental landmarks in this story are two epoch-making occurrences: firstly, the creation of Justinian's *Corpus Iuris Civilis*, which spread right across

[10] S. Schipani, 'Diritto romano in Cina' *Enciclopedia Treccani* (2009), available at https://tinyurl.com/99h8ne5m (last visited 30 June 2021).

Europe from the year one thousand (it should be recalled that the institution known as 'university' came into being at the *Studium* in Bologna, the first school of law, founded with the precise aim of promoting the study of Justinian's Roman law). Another fundamental step was the *Code Napoléon* of 1804. From a reading of Portalis's '*Discours préliminaire au premier projet de Code civil*',[11] and tracing the history of the code's development, which followed the French tradition while being imbibed with the new post-revolutionary individualist spirit, we may observe that the French jurists themselves constantly claimed to take their inspiration from Roman law. This is solemnly declared, starting with the right to property, and emphasized in Art 544 of the Civil Code as

> the right to enjoy and to dispose of things in the most absolute manner, provided that one does not make a use of them that is prohibited by laws (*lois*) or regulations (*règlements*).

This concept, originating with the bourgeois Enlightenment, does not exist as such in Roman law, which does not recognize the absolute right to property.[12] As I mentioned, I will return to this theme, which is obviously a central one in our reflection, later.

These two stages, the *Justinian Corpus Iuris* and the *Code Napoléon*, are in communication with each other. The *Corpus Iuris* transforms Roman case law into a 'code', and it is from this model of 'code' that the French protagonists of 1804 would draw direct (though largely misinterpreted) inspiration. Some authors have claimed that Roman law was so successful because of its philosophy: the *naturalis ratio*, the *ars boni et aequi* etc. The objective reality is that the system of Roman law has taken root in environments with very different ideologies and in equally diverse socio-economic environments (eg, monarchies, local seigniories, feudalism, the dictatorship of the proletariat, democratic republics): this means that the ideological component is of no consequence, otherwise it could not have worked.

The Roman law system was chosen because of its utility – its rationality – which, however, should not to be understood as *ratio naturalis*, invoked to affirm

[11] J.E.-M. Portalis, *Discours préliminaire au premier projet de Code civil (1801)* (original title: Motifs et discours prononcés lors de la publication du Code civil. Discours prononcé le 21 janvier 1801 et le Code civil promulgué le 21 mars 1804, with an introduction by M. Massenet (Bordeaux: Éditions Confluences, 2004), available at https://tinyurl.com/2h457k8m (last visited 30 June 2021). According to J. Gordley, 'Myths of the French Civil Code' 42(3) *The American Journal of Comparative Law*, 459-505, 489 (1994): 'For Portalis, law was founded on human nature, reflected in the laws of all civilized peoples but particularly those of the Romans, and discovered through the efforts of jurists and scholars over the centuries. 'Law (*droit*) is universal reason', he explained, 'supreme reason founded on the very nature of things. Enacted laws (*lois*) are or ought to be only the law (*droit*) reduced to positive rules, to particular precepts'. This higher law was reflected in those 'valuable collections for the science of laws' made by the Roman jurists'.

[12] O. Diliberto, 'L'eredità fraintesa. Il diritto di proprietà dall'esperienza romana al Code Napoléon (e viceversa)' *Rassegna di diritto civile*, 374-382 (2020).

that 'man is at the centre of law' as some have claimed. This statement fails to consider that over half of the human beings in ancient Rome were slaves and, therefore, a matter for law; women, moreover, could become *sui iuris* and enjoy legal capacity, but they had a reduced capacity to act. Essentially, I'd say the workings of Roman law, compared with modern codifications – had nothing to do with an alleged 'value system' of its own, but with its intrinsic, ductile and – so to speak – 'meta-temporal' nature.

II. Periodizations and the History of Codification: Academic and Institutional Dialogues with Italy

The history of Chinese codification is remarkably complex and strongly influenced by the political, social, and economic scenarios of each different period. It is recognized that the first draft of the civil code dates back to 1911, under the great *Qing* dynasty (*Da qing minlu cao'can*).[13] This project was never adopted, but a revised version based on the 'civil' parts extracted from the Qing code remained in use until the promulgation of the civil code drawn up by the Kuomintang (*Guomindang*) government in 1929-1930 during the Republican period. The German model, and the pandectistic school notably inspired both of these attempts to such an extent that the Chinese system started to be considered to belong to the civil law family, or to wear 'the civil law dress', and it was intellectualized within the framework of Roman law.[14]

Although this code is still in force in Taiwan,[15] it never took effect in mainland China, being formally abolished due to its incompatibility with the new spirit of the People's Republic of China (PRC), proclaimed in 1949, and the victory of the Chinese Communist Party (CCP) in the Chinese Civil War.

Professor Sandro Schipani proposed a possible division into periods: the pre-socialist period; the phase in the early 50s after the foundation of the People's Republic of China, shaped by the guiding role of Moscow and the inspiring

[13] P.C.C. Huang, *Code, Custom, and Legal Practice in China. The Qing and the Republic Compared* (Stanford: Stanford University Press, 2001) (comparing the Qing period with the Republican one); P.R. Luney, 'Traditions and Foreign Influences: Systems of Law in China and Japan' 52 *Law & Contemporary Problems*, 131 (1989) (pointing out the key role of this early codification in the history of China and subsequent attempts to draft a civil code); J. Zhang, 'On the Qing Civil Law (Qingdai minfa zonglun)' *Chinese University of Political. Science and Law Press*, 1998; L. Chen, 'The Historical Development of the Civil Law Tradition in China: A Private Law Perspective'78 *The Legal History Review*, 159, 161 (2010).

[14] Following the classification of R. David and J.E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (London: Stevens, 2nd ed, 1978), 23-24. See J. Xue, 'Il diritto romano in Cina' 12 *Cardozo Electronic Law Bulletin*, 1-6 (2006).

[15] For further references see L. Zhang, 'Latest Development of Codification of Chinese Civil Law' 83 *Tulane Law Review*, 1000-1001 (2009). This codification was inspired by the BGB (Bürgerliches Gesetzbuch) but also by the Swiss and French legal systems: T.-F. Chen, 'Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution' *National Taiwan University Law Review*, 400 (2011).

example of the Soviet Union; the change in legal policy of 1978, with strong links to the socialist market economy and socialism with Chinese characteristics.[16] Here, legal discourse made its way back onto the political agenda after the 'nihilism' of the Soviet period.

Since 1978, with the opening of China to the world and under the political leadership of Deng Xiaoping, significant new steps have been taken in developing civil law: a first attempt, however, resulted simply in the enactment of the General Principles of Civil Law (GPCL) in 1986.

The law-making process started again in earnest in March 1998, when Wang Hanbin, Vice Chairman of the National People's Congress (NPC), created 'a Group for the Redaction of the Civil Code', comprising scholars from all over the world.

The aim shared by the members was to conduct feasibility studies for a future civil law code and to express their opinions on its possible contents and structure. At the very beginning, the commission focused on some preliminary questions that were incorporated into a questionnaire, analyzing the main Western legal models and evaluating their compatibility with the Chinese experience and tradition. It would seem no coincidence that one of the key questions of the questionnaire (which prof. Xue Jun distributed among Italian scholars) concerned 'the problem of assessing the pandectistic system and its modernity'.[17]

This additional phase, once again, did not lead to significant results, as the attempts at codification were intertwined, over the years, with a 'piecemeal approach'[18] where many special laws were passed in the different fields of private law (eg contract law, property and civil liability respectively, rights *in rem*, marriage, etc).

Actually, it was only after 2014 and the presidency of Xi Jinping that the idea of a domestic code was fully and effectively embedded in the Chinese political agenda, in line with the 'theory of rule of law with Chinese characteristics',[19] looking at foreign legal systems while comparing and experiencing them through a 'learning by doing' approach'.[20]

On 15 March 2017, the Fifth Session of the 12th National People's Congress passed the General Provisions of Civil Law, which represent an important step in Chinese civil law codification. They were incorporated in the first part of the

[16] Cf S. Schipani, 'Fondamenti romanistici e diritto cinese (riflessioni su un comune lavoro nell'accrescimento del sistema)' *Bullettino dell'Istituto di diritto romano*, XVI, (2016), (in line with the thinking of P. Jiang, 'Il diritto romano nella Repubblica Popolare cinese' 16 *Index*, 367 et seq (1988), (and in L. Formichella et al eds, n 8 above, 3)).

[17] J. Xue and A. Somma, n 4 above, 329.

[18] M. Timoteo, n 3 above, 28; L. Chen, 'Introduction', in Lei Chen and C.H. (Remco) van Rhee eds, *Towards a Chinese Civil Code: Comparative and Historical Perspectives* (Martinus Nijhoff Publishers: Leiden-Boston, 2012).

[19] H. Liang, 'The Reception of Foreign Civil Law in China' 1 *Shandong University Law Review*, 5 (2003).

[20] L. Wang, 'The Modernization of Chinese Civil Law over Four Decades' 14(1) *Frontiers of Law in China*, 39-72, 40-41 (2019).

civil code that was adopted on 28 May 2020.[21]

Within the framework of a contemporary Chinese legal system – complicated by the circulation of multiple foreign legal models and their contamination with the domestic reality and culture – one element seems to recur:

> In the long-lasting project of the codification of Chinese private law, the German model still plays a leading role as far as the structure of the code and the core component of its conceptual framework are concerned.[22]

And the German model – as has repeatedly been observed – is, in turn, profoundly influenced by Roman law.

The different periods in the codification process seem closely tied in with a different role of the inspiration by Roman law or its 'reception'.[23] *Within this framework, how did the dialogue with Italian scholars come about and how did it evolve?*

Answer:

At the turn of the 20th century, law was an alien concept in China, at least as it is understood in the West: the rules of civil coexistence were based on Confucianism and local customs and traditions, even though some provisions of rather elementary criminal law did exist. When China therefore decided to adopt a system of private law, and to start a process of modernization, it was inevitable that it would look to the most widespread system in the world (Roman law in the 'meta-temporal' sense), so that it might relate to it as Japan had done shortly before it. This country had a millenary culture, totally different from that of the West. As it opened to the world and abandoned feudalism (the *Shōgun*), Japan drew from the most solid and prestigious Western tradition, namely from the German model. Essentially, at that point in history, the common law was mainly applied in the United Kingdom, a colonial empire. This meant that it is was not particularly attractive to these Eastern countries. India had a common law system, but as a colony. This explains why other Eastern countries did not adopt the Anglo-Saxon system, preferring the continental one. Obviously,

[21] H. Jiang, 'The Making of a Civil Code in China: Promises and Perils of a New Civil Law' 96 *Tulane Law Review,* 777-819 (2021).

[22] L. Zhang, n 18 above, 1039: 'Actually, China's civil law is also a mixed jurisdiction, not only because of the great diffusion of the studies on the common law in China, but also because of the very special and important role of judicial interpretation in current legal practice. Today's Chinese civil law is based on Roman law and *Pandectenrecht*. However, by incorporating the common law experiences in the drafting of its civil code, Chinese legal scholars and the legislature are trying to exceed them and build a new and modern codification model in the world, mixed with the common law experience'.

[23] R. Li, 'The Reception of Roman Law', in Z. Yang and S. Schipani eds, *Roman Law, China Law and the Codification of Civil Law* (Beijing: Chinese University of Political Science and Law Press, 1995), 71.

we are talking about a period – the turn of the twentieth century – when the Chinese, for the first time, posed themselves the problem of constructing a civil code. Numerous commissions were set up but repeatedly failed. The last of these commissions – set up in the 1930s – succeeded in drawing up a code that, however, would never be applied in mainland China as war had broken out in Manchuria in the meantime; the area was occupied by the Japanese, and a very long period of aggression was to follow. Of course, the 1930s code would never be applied in China. We have a very well-researched work by Lara Colangelo,[24] a young scholar of Chinese language and law, who has produced a convincing chronology of all these attempts and the various commissions. Following the defeat of the nationalists, this code was therefore taken to Taiwan, where it is still in force today.

In any case, I'm not fully convinced by the periodization proposed by Jiang Ping. The Soviet period (from 1949 to the end of the 1950s) certainly existed, as Jiang Ping is aware, having graduated in law in Moscow and now being regarded as a sort of doyen among Chinese legal scholars. Jiang Ping, however, omits to mention – perhaps due to an understandable oversight – that after the Chinese Communist Party's break with the USSR, the Soviet period ended, and the season of 'legal nihilism' began. This phase coincided with the Cultural Revolution, when the Soviet model was abandoned, yet there was no consideration on law as such, as it was considered a bourgeois superstructure. Of course, after Mao's death, Deng Xiaoping came back on the scene. He seized power, and the era of the four modernizations began. It started in 1978 but took some time to become established.

The turning point in the development of the law actually occurred in 1988, when Ping Jiang came to Rome, invited by Professor Sandro Schipani, the eponymous hero of the construction of a cultural network and exchanges between Italian and Chinese academics. Schipani is credited with having foreseen a reality that, in the Italy of that time, was considered a sort of 'intellectual oddity', but which was, in reality, an absolute truth: China's opening to the market meant that it would soon need rules and to develop a civil law system. After Ping Jiang's visit to Italy, an initial cooperation agreement was drawn up, first with the University of Tor Vergata (in partnership with Beijing's CUPL), to begin translating Roman legal texts into Chinese, which would allow a direct approach to Roman law works. Thus, translations of some volumes on specific areas (ie the law of obligations, rights *in rem*, succession, the family) were published, with a selection of texts from the Digest. After this, the Institutes of Gaius and the Institutes of Justinian were translated into Chinese in their entirety. Then, in

[24] L. Colangelo, 'La traduzione delle fonti del diritto romano e la formazione di un linguaggio giuridico cinese: possibili interferenze grammaticali dal latino' *Rivista degli studi orientali. Nuova Serie*, 285-312 (2015); Id, 'La ricezione del sistema giuridico romanistico e la relativa produzione di testi in Cina all'inizio del xx secolo: le fonti del diritto romano in due dei primi manuali in lingua cinese' *Bullettino dell'Istituto di diritto romano*, 195 (2016).

the 1990s, a process to disseminate knowledge of Roman law began, one of dialogue and comparison in order to assess which legal model might best suit the Chinese context.

In all this, there is also a 'case' that concerns me and that helped the 'long march'[25] of Roman law in China to progress. In 1998, I became Minister of Justice in Italy; the Chinese were engaged in reflections on what the best model for their civil law might be, and I, in addition to being a politician and a Communist minister, was also a professor of Roman law. So, in 1999, in the company of Sandro Schipani and the Attorney General of the Italian Supreme Court, I went to China. The affair also assumed an 'institutional' – and no longer a solely academic – dimensions. In fact, the Chinese Minister of Justice was also present at that meeting. From then on, Party leaders, and later the People's Assembly, began to legislate according to the Roman private law model, mediated through a number of contemporary experiences of codification, starting with the BGB.

III. The 'Current' Sense of Roman Tradition

The Chinese Civil Code, approved on 28 May 2020, consists of 1260 articles and 7 books: the general provisions, property, contracts, personality, family law, succession and tort. A separate book deals with personality rights. The code stands as 'a milestone for both the protection of human rights and the promotion of rule of law in China'.[26] Compared to other codifications of the past, this code of the second millennium seeks to prioritize the human person and his or her dignity, promote core socialist values, and respond to the needs of the modern era (such as the digital revolution and ecological change), with a view to settling the practical problems arising from the Chinese context.

It is the result of legal transplants of foreign models and multiple contaminations with Chinese features and culture, which still create tensions for adaptation locally.[27] Among these models there is no mention of Roman law.

What remains, if anything, of this tradition/legacy of Roman law in the new code? Can we speak of current relevance, or is it simply an image of historical fascination?

Answer:

Rather than speaking of current relevance, we ought to discuss (use, employ, refer to) a somewhat stronger term: being in force. Roman law, as an expression of

[25] M. Timoteo, 'La lunga marcia della codificazione civile nella Cina contemporanea' *Bullettino dell'Istituto di diritto romano*, 35 (2016).

[26] Z. Huo, 'China Enters an Era with a Civil Code' *China Justice Observer* (May 29, 2020), available at https://tinyurl.com/2nw3s4ay (last visited 30 June 2021).

[27] H. Jiang, n 21 above, 777-919.

statehood (the Roman empire), is a definitively concluded experience. On the contrary, the 'meta-historical' or meta-temporal Roman law and its systemic structure is easily adaptable to other state realities. The Chinese relate to the German legal system, which is based on Roman law. On some matters, again because it is useful and practical, the Chinese have also drawn inspiration from some common law experiences and from the *lex mercatoria*, given their fundamental role in international trade.

In the Chinese collective imagination, their civil code was inspired by the Roman legal system. When President Xi Jinping came to Italy on a state visit to seal the New Silk Road agreement (the 'Belt and Road Initiative' (BRI)), he wrote an article that appeared in *Corriere della Sera*.[28] The Chinese President described the friendship between Italy and China as a phenomenon rooted in a prestigious historical legacy. There were two empires in the world, the Chinese in the East and the Roman in the West, and Italy is the heir of the latter. Italy still enjoys, undeservedly perhaps, the long wave of the Roman empire, which the Chinese recognize as being the only other one on the same level as the Chinese empire. We are faced with the recognition of a legal heritage, of which Italy is an expression.

There is more: another key element to consider is the progressive rediscovery of Western classical culture, beyond legal works, by the Chinese world. About fifteen years ago, some leaders of the Chinese Communist Party asked about Demosthenes, the well-known Athenian politician and orator. The question was justified by their interest in ancient Western rhetoric to train Chinese managers, given that learning the art of persuasion and argumentation is considered a fundamental skill, much more important than knowing how to do mathematics. Furthermore, the translation of works such as the Divine Comedy[29] shows an interest in the Western cultural tradition in the broadest sense, which necessarily

[28] 'La visita di Xi Jinping «Un patto strategico con l'Italia»' *Corriere della Sera*, 20 March 2019, available at https://tinyurl.com/ptbvzd6w (last visited 30 June 2021): China and Italy are respectively emblems of Eastern and Western civilization and have written some of the most important and significant chapters in the history of human civilization. Italy is the home of ancient Roman civilization and the cradle of the Renaissance, and its heritage of great monuments, artistic and literary masterpieces is now widely known in China. The contacts between the two great civilizations, the Chinese and Italian, have their roots in history. Already more than two thousand years ago, the ancient Silk Road connected ancient China and ancient Rome, despite the great distances that separated them. The Han dynasty sent Gan Ying on a mission in search of what they called '*Da Qin*' or 'Great Qin' which referred precisely to the Roman empire, while the writings of the poet Virgil and the Roman geographer Pomponius Mela contain multiple references to the 'Silk Country'. Later, Marco Polo's '*Milione*' triggered the first 'passion for China' in Western history and its author became a pioneer of contacts between Eastern and Western cultures, a model that still inspires ambassadors of friendship today (Authors' translation from Italian).

[29] On the various translations (among which, the one by Tian Dewang 田德望 (1997) stands out, as it would be the first complete translation from the original text) and their shortcomings with respect to an increasingly sophisticated and demanding Chinese public, cf K.P. Laurence, 'Translating the Divina Commedia for the Chinese Reading Public in the Twenty-First Century' 21(2) *Wong TTR: traduction, terminologie, rédaction*, 191-220(2008).

includes law.

The great difference in the Chinese civil codification process compared to other non-European civil codes, and unlike the Italian code, is that it lacks the political and cultural mediation of the *Code Napoléon*, although knowledge of French scholarship is still evident. All the codifications with a basis in Roman law have transposed it through its age-old tradition throughout the Middle Ages and the Modern Age. Contemporary civil codes, in essence, all have Roman foundations, but this results from a bourgeois Enlightenment mediation, which does not derive directly from Roman law as such but from the interpretation and use that the drafters of the French Civil Code of 1804 made of it.

An example may illustrate this phenomenon. The right to property is an absolute legal right in the Italian legal order (and in most others) to the point of being called 'the selfish right'. It builds on the work that the drafters of the first code of the modern age, namely the Napoleonic code, carried out on Roman legal sources. Indeed, in the first code of the united Italy, dated 1865, the definition of private property was literally and slavishly translated into Italian from the French code.

But in Roman law as such, the absoluteness of the right to private property is an unknown category. It was the bourgeois revolution to reconsider the Roman legal sources and draw concepts aiming to uphold the absolute and inviolable character of private property. Roman law, being flexible and adaptable, provided the Napoleonic codification with the framework, the system, but the contents – as already pointed out above – were determined by the lawmaker of the time.

By contrast, the Chinese codification has 'skipped' – so to speak – Napoleonic mediation, directly engaging in the appropriation and re-elaboration of the Roman system. The rules on property clearly demonstrate this process. Private property is not framed as a cornerstone (a sort of static engine) in the system of rights; no reference is made to its absoluteness (much less to its inviolability); no question is raised about its unity: in fact, different forms of property coexist on the same foot in Chinese statutes. Of course, the right to property is the foremost of real rights, but devoid of any sacredness or inviolability or absoluteness, as we are used to reading in contemporary civil codes.

A further aspect should be considered. In the Western experience, the codes were born before the Constitutions. Constitutions are a twentieth century phenomenon and present extraordinarily advanced concepts in terms of social rights. The Italian civil code dates back to 1942 and the Constitution to 1948. A few years passed between these two texts, yet they seem to belong to two different universes. It is not by chance that Italian private law scholars thought for some decades that the Constitution was a mere political-ideological manifesto, and it is only since the mid-1960s that scholars and courts have explored the relationship between the code and the Constitution. In so doing, they launched the season of constitutionalization of private law and promoted the interpretation of institutions

in the light of Constitutional principles.[30]

China reversed this process. The modern code was born after the Constitution of 1982, then amended several times in the following decades (1988, 1993, 1999, 2004 and 2018), thereby gradually and formally extending the rule of law and the protection of human rights.[31] The code appeared after the Constitution and stands as an instrument to recognize new rights, in implementation of the rule of law, while still within a socialist legal system. Art 1 of the Chinese Civil Code, not surprisingly, states

> This Law is formulated in accordance with the Constitution of the People's Republic of China for the purposes of protecting the lawful rights and interests of the persons of the civil law, regulating civil-law relations, maintaining social and economic order, meeting the needs for developing socialism with Chinese characteristics, and carrying forward the core socialist values.

IV. The Code of the New Millenium?[32]

Initial attempts at Chinese codification performed a 'defensive' function[33] vis-à-vis the local system, to react to the imposition of the law and jurisdiction of the courts as envisaged by international treaties. There was a tendency to 'imitate' foreign models and, in particular, Western legal traditions. Over time, the need to build a solid legal system, in line with domestic traditions and capable of 'contributing', with its own specificity, to transnational legal discourse, has emerged.

On a global level, will the new Chinese civil code represent a strategy of 'resistance' and identity, or will it actively seek to spread its paradigm within the international arena?

Answer:

The code should not be read in a (or at least not only) strictly political key,

[30] E. Navarretta, 'Diritto civile e diritto costituzionale' *Rivista di diritto civile*, 643 (2012); F. Macario, 'Autonomia privata (profili costituzionali)' *Enciclopedia del diritto. Annali* (Milano: Giuffrè, 2015), VII, 61. For a comprehensive study see the monumental work in five volumes, by P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020) (first published in 1983).

[31] Q. Zhang, 'A Constitution without constitutionalism? The paths of constitutional development in China' 8(4) *International Journal of Constitutional Law*, 950-976 (2011) (for more historical details, Id, *The Constitution of China: A Contextual Analysis* (Oxford: Hart Publishing, 2012)).

[32] J. Gordley and H. Jiang, *Part I: Will the Chinese Civil Code Become the Code of the Century?*, 16 November 2020, available at https://tinyurl.com/2m56uh69 (last visited 30 June 2021).

[33] S. Schipani, n 10 above.

as it essentially responds to a need for simplification and a *reductio ad unum*, given the many special statutes that have been enacted over time, in addition to the General Part.[34] But the intrinsic existence of a code changes society. The code is interpreted by giving specific form to the textual rules it contains, considering the millenary and extremely rich Chinese cultural tradition. And 'law in action' differs from the 'law in books'.

A recent case decided by the Court of Beijing is very significant. The Court recently applied Art 1088 of the Civil Code, holding that

> when one spouse is burdened with the additional duties to raise children, care for the elderly, or assist the other spouse in his or her work, he or she is entitled to receive due compensation in the divorce proceedings:

this is a recognition of domestic work, a decisive achievement.[35]

A political-ideological justification can probably be found in the 'non-choice' of the common law model – the system used in the UK and the US, China's main competitors on the global arena.

To conclude, I would like to add that, in my opinion, in a system aiming for the primacy of law, a code is to be preferred, in terms of certainty and predictability, to a law based essentially on judicial decisions.

[34] Y. Bu, *Chinese Civil Code: The General Part* (München: Beck; Oxford: Hart Publishing; Baden-Baden: Nomos, 2019).

[35] *La Repubblica*, available at https://tinyurl.com/5sez2hee; *The Guardian*, available at https://tinyurl.com/3an6cz64; *New York Times*, available at https://tinyurl.com/3an6cz64 (last visited 30 June 2021). See X. He, *Divorce in China: Institutional Constraints and Gendered Outcomes* (New York: NYU Press, 2021) (analyzing current divorce law practices).