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A Propedeutical Approach to Contract History

"The obligation of returning the gift with dignity is mandatory. He who shall not return the gift will forever lose face."

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In his *Institutiones*, the Byzantine Emperor Justinian defined legal obligation as a "binding juridical link by which we must necessarily do, accordingly to the legal provision of our city, a certain action" (*juris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis jura*).

Several theories have been advanced concerning the origins of legal obligations. Ethnographical data confirm the practice of occasional gift-making between tribes, which included reciprocal gifts. In the Late Antiquity, the penal system allowed for a ransom of guilt (*compositio*), which would explain legal obligations arising from offences, crimes or misdemeanors. However, initially, the penal system used private justice and later the *lex talionis* principle (*Si membrum rupsit, talios esto*).[1] The offerings brought before the gods in ancient times were regarded as legally binding obligations for gaining their favor. These religious actions could have been extended to the field of civil law, in a world where the boundary between the sacred and the profane was not very

clear. Finally, the taboo theory, which promoted a ban on actions considered prejudicial, led to the negative duties (*aut non facere*).[2]

Legal ethnography gives us some directions in this case. The most primitive system is that of the gift and reciprocal gift, found with the North American Indians. As M. Mauss stated, "the obligation of giving a reciprocal gift constitutes the real *potlatch*. Usually, *potlatch* must be returned with interest. Even an ordinary gift carries interest. If a person receives from the *chieftain*, for his deeds, a blanket, he shall return two blankets, when a special occasion arises in the chieftain's family: marriage in the family or enthronement of the chieftain's son, etc. The punishment for those who do not fulfill these obligations is slavery, on debt grounds. Legally speaking, the institution is comparable, by its nature and functions to the roman *nexum*."[3]

The system perpetuated itself, in a sublimated form, relating itself to the supernatural, through sacrifices and offerings. In the Old Testament there is mention of a convention between God and the first men, in the form of a verbal agreement. The penalty was the casting out of heaven and the loss of immortality. An apocryphal legend tells us of the *chart* of Adam and Satan, by which the latter would offer the first men the usufruct of the earth in exchange of their souls. The chart was written on a clay brick, signed by hand and hidden at the bottom of Jordan River. The brick was destroyed when Jesus Christ was baptized, releasing the descendants of the original contractors of their obligations. In popular tradition, the tree that accompanies a dead person is adorned with a clay hand, signifying the release from the contract made by Adam.[4]

A remnant of the gift and reciprocal gift system is found in rural areas. When the young get married, there is a competition between the parents-in-law, who must offer more gifts than those received by the groom or the bride. As M. Mauss stated, "the obligation of returning the gift with dignity is mandatory. He who shall not return the gift will forever lose face."[5] The practice is known in Roman law as well. The *coemptio* marriage, in which the wife was carrying a dowry although she had been bought by the husband, constitutes an example of reciprocity in money giving.[6]

In ancient times, the elements from previous structures were maintained. The best known is hospitality, an institution regulating relations with foreigners, on a reciprocity basis. Given the insecurity of traveling from one country to another, the people tried to secure for themselves shelter and protection when traveling to foreign countries. For recognition, they would use distinctive signs, like breaking clay figurines in two and matching them when they would visit one another. Some systems would require the analysis of notches on a tally, such as the *tessera* of the ancient Greeks. The notabilities of citadels were usually preferred for official relations, on a reciprocity basis. These relations are the

ancestor of today's diplomatic relations. Sometime, the agreement was confirmed by a public act. To this end, documents such as the so-called *isopolitia* granted privileges to foreign persons and assimilated them to local citizens. The national regime regarding foreigners, found in public international law, is derived from such relations. For instance, the Callatis community granted to Pasiadas, the son of Herodotus of Chaeronea, "proxenia, citizenship, equality of rights concerning taxes, the right to enter and depart the maritime port, in time of war and in time of peace."[7]

In the early period, the legal obligation was reduced to a mere right over a person (*jus in personam*), based on the idea of property rights. Consequently, the creditor had total freedom of decision over the debtor, in the same way an owner could decide over his property. The binding of the debtor was found within the word *obligation*, which in old Latin meant to bind (*ligare*) someone, for (*ob, obs*) not paying his debt, hence *ob-ligare*.[8]

Gradually, following the development of production and commercial exchanges, the primitive structure of obligations suffered tremendous modifications. The idea of bond or link loses its material meaning, taking on a legal bearing. In case of non-execution, the creditor would have the right to claim the debtor's goods, not his physical person.

In ancient Roman law, the basis for obligations were either contracts, which, when breached, led to slavery for the debtor, or torts, which prompted the author to reward the victim, who would renounce his/her right to private vengeance. The first contracts known to Roman law were formal conventions, such as *nexum*, *stipulatio* and *litterarum obligatio*. Nexum was a contract made *per aes et libram*, as a loan from the lender who weighs the money and gives it to the borrower, uttering a solemn declaration (*nuncupatio*), which contains an obligation under will (*damnatio, damnus esto*), meant to bind the borrower. The *stipulatio* agreement was verbal, formed of a question asked by the future creditor—"Do you solemnly declare to give me 100?" (*Spondes centum mihi dare?*)—and the answer of the future debtor—"I do solemnly declare" (*Spondeo*). Finally, the *litterarum obligatio* meant that the parties would inscribe their agreement in a special register. The torts (*delictum*) were considered actions contrary to law, which led to injustice (*injuria*). Sometime, they were called *maleficium* (evil deeds). Torts were of public and private nature. The compensation for torts was first acquired through private justice and *lex talionis*. Later, private justice was replaced with voluntary and legal composition. This meant that the victim could choose to receive pecuniary compensations from the assailant, rather than exercising private justice.[9]

In the classical period, the two legal sources (contracts and torts) were systematized and improved. The contract became a formal agreement with legal

effects and the tort was sanctioned independently, as a derivation of breaching the legal order. The postclassical era featured new legal sources, such as the so-called various other causes (*variae causarum figurae*). These would comprise differentiated legal acts and facts, which would create obligations similar to those emerging from contracts or crimes, although they did not have the same juridical nature. For example, the obligation of the heir who accepted the inheritance to pay off particular wills.

Taking into account the needs of a more evolved and modern society, influenced by doctrinarian views, the Emperor Justinian classified the sources of obligations of law more thoroughly. To the well-known concepts of contracts and crimes, he added the quasi-contracts and quasi-crimes, which initially were generally known as *various other causes*. Justinian's categorization is not flawless, because it lacks a logical criterion of classification (*fundamentum divisionis*), scientifically structured, regarding the differences between contracts and quasi-contracts, as well as between crimes and quasi-crimes. Although this categorization does not fit the requirements of formal logic, it has allowed for more practical jurisprudential solutions, accepted by later regulations like the Napoleonic Civil Code and the codes inspired by it.[10] In medieval times, apart from hospitable practices, with consideration for the insecure status determined by relations with the Muslim world, diplomatic agreements were concluded in order to protect merchants who traveled to such countries. This is the case of the so-called *system of capitulations*, put into effect beginning with the 15th century (since 1454 in Genoa and Venice), as unilateral legal actions (*ahdname*, *sulhname*), mainly because, according to the Quran, no treaties were to be concluded with non-Muslims.[11]

The evolution of modern states and international labor development led to intensified commercial exchanges between states, extending the meaning of the contracts. At that point in time, independent cities like Venice, Genoa, Florence, etc. were established as independent republics. Due to the ever increasing need of feudal lords for liquid assets, personal relations began to be replaced with financial ones. Whenever a personal relation was substituted by a financial agreement or money payment replaced natural trade, bourgeois relations replaced the old feudal ones. In this way, the acquisition of a monopoly over commercial relations was attempted.

The fragmentation of territories and authority was also a fragmentation of the law. People coming from the north imposed legal customs based on alien legal systems, founded on the principles of natural economy. In such circumstances, neither the feudal system of territoriality nor the systems of the personality of laws were sufficient to resolve such conflicts. Moreover, it must be

kept in mind that statutes, having a common ground, were not very different from one another, so it was possible to apply the statute of one city to the territory of another. Thus, for the first time in Western European history, the premises necessary for the birth and development of legal norms, comprised in today's private international law, were met. These were: a) the possibility of admitting certain rights for foreign persons, granted according to their national law (hence the recognition of the effects of foreign laws); b) increased commercial exchanges which allowed for a larger flow of people and c) a differentiated civil right, pertaining to legal systems of equal value.[12]

The Industrial Revolution led to the promulgation of legal norms meant to establish the new position of the bourgeois regime. These norms found their full expression in the French civil code, which served as a model for other civil laws.

In the French Civil Code we find some solutions borrowed from the statutes and adapted to the new conditions created by the Revolution. It was desired that these privileges be maintained even when the citizens were traveling abroad, to countries were feudal regimes were still in power. By applying the national law to the parties, to their status and capacity, the French Code revolutionized the solutions to the conflict of laws. Before that, an interrupted tradition stated that status and capacity were governed by the law of the place of residence. However, some authors, in order to prevent further instability, rallied themselves to the idea of the place of origin rather that of the actual domicile of the interested parties.

The reform brought by the French Civil Code gained more and more terrain, spreading to most of Europe and to some parts of Latin America. Still, Britain and all other Anglo-Saxon countries remained faithful to the tradition of the law of the domicile, as even today they do not apply the national law of the persons except as yielding to the *comitas gentium*.[13]

With regard to the German doctrines, the one constructed by Savigny was of special importance, as it represented certain interests and the German ideology from the period of pre-monopolistic capitalism (the first half of the 20th century). In this period, the middle class needed freedom of action on the stage of worldwide economic exchanges. Savigny vigorously opposed all forms of codification, seeing it as a measure against the economic development of the middle class. His doctrine may be defined as:

a) a conflict of laws needs not be resolved through aprioristic principles, as each legal relation shall be governed by specific local or foreign law which shall be considered proper;

b) in order to observe which law must govern a legal relation, the judge must find, after careful analysis, what is the foundation of the respective relation

and its link to a certain legal system. This theory states that any person entering a legal relation undertakes, by this very act, to obey the laws in force over the territory on which the legal relation is founded;

c) in contract theory, parties are free to select the applicable law; however, in absence of such clauses, localization assumptions come into effect, which are provisioned to deduce the will of parties. Still, in order not to permit unlimited incidence of foreign laws on local premises, which may inhibit local concerns, a safety precaution exists, namely the public policy of the forum (public order or *ordre publique*). According to this exception, a foreign law, declared incident by the place of conclusion or the nature of things, may be excluded from application if deemed contrary to local public order.[14]

The Anglo-American doctrine was formed in the first half of the 19th century, first in the United States, and then in Britain. The United States, although politically independent from Britain, remained a colonial market for its goods for a long time. In the meantime, a national middle class developed, despite a series of internal contradictions (like the ones between employers and employees) and external ones (industrial north vs. agricultural south). The new middle class was forced to take protective measures for commerce and industry against foreign competitors, both industrial and financial.

In Britain there were few problems of private international law until the 18th century and, as a consequence, no doctrinarian development similar to the continental ones was known. It wasn't until the first half of the 19th century that a British *conflict of laws* doctrine was formed, by borrowing the ideas energed in the United States and based on Dutch doctrines.

The features of the Anglo-American doctrine are:

a) a domination of the legal principle of territoriality, which promotes the incidence of the local legal system over all legal relations;

b) rights obtained according to foreign laws are recognized based on the *Comity* rule (*comitas gentium*);

c) the tendency to consider conflictual norms as internal legal norms which do not provide duties for the courts regarding recognition of rights gained under foreign regulations;

d) the application of proper characterization (using the *lex fori* rule) to all legal relations brought to court, with the purpose of imposing the substantial internal law even to those relations which, based on conflictual norms, should be governed by foreign law;

e) the freedom of action principle which is applied because it offers to private enterprises the possibility to conclude adhesion contracts, set contracts also in the field of international relations.

The decisive step to acknowledging consensualism as a cardinal rule in legal relations is recorded in the history of law ever since the time of the canon-

ists. Canon law is religious law, which, during the Middle Ages, intruded upon secular law, as many legal institutions and events, such as family relations (marriage, divorce interdiction, adoptions, etc.) and even patrimonial ones (interest charge interdiction) were governed by the Church. The influence of the canonists was considerable, especially over the moral aspect of legal relations, and the most important element in the conclusion of contracts was the vow. Afterwards, secular law, although still under the influence of canonist thinking, replaced the vow with a verbal expression, *la convenance*. In the 13th century, both the vow and the verbal formula were applied. *La convenance* was nothing else than the verbal agreement of the parties, sufficient for closing contracts with juridical effects. "Toutes les convenances sont à tenir," French legalist Beaumanoir used to say. This way, consensualism entered permanently in the customary practices of law. The contracts were mandatory in themselves (*pacta sunt servanda*), although some authors and French customary practices remained faithful to old traditional formalism of Roman law. Pothier deserves credit for introducing the consensualism rule in the French Civil Code, inoculating its enforcement in all contracts. In the Romanian Civil Code, this principle was not expressly written, but there are special applications of this principle in articles 971 and 1295 of the Romanian Civil Code.[15]

In our legal system, there is no special requirement regarding form, although there are exceptions to this rule. Generally, contracts may be concluded in written form and even by verbal agreement, telegrams, phone, auctions, etc., hence in any way which allows for the exterior manifestation of will. When the manifestations of will of the parties are not concordant (*public offer countered*), the contract is not concluded. The will must govern all clauses of the agreement. If the parties' agreement is incident only to some of the clauses of the contract, the same parties may concord to limit their agreement, as their will is sovereign.

What characterized the old formalism of Roman law was the preoccupation for the juridical security of contracting parties. Formalism constituted a warranty against denial of assumed obligations, while the form was a means to support the burden of proof, in case of litigation. In modern law, which is heavily influenced by the large numbers of contractual relations, formalism is the expression of the protection of interest for third parties, rather than for the contracting parties. Neo-formalism tried to prevent fraud against third parties, made possible by "hiding" the real material status of the contracting parties. The third parties, who were the most interested in knowing the material status of the parties, were the creditors. They had, as an effect of the law, a pledge right, general and tacit, over the movable and fixed assets of their debtor (articles 1718–1719 of the Civil Code). Informing the third parties on the material status of those who entered commercial relations would best be done by

knowing the transcription of alienation or affecting of the debtor goods for the indemnification of creditors. The person who was asked to extend a loan would do it more easily if he knew the material situation of the one asking. The possibility of knowing the patrimony of the debtor which shall be mortgaged is obtained by the analysis of the records of transcriptions concerning fixed asset alienations and mortgage inscriptions.

The unilateral declaration of will theory, of German origin, states that although no one can substitute the creditor through his own will, a debtor may be substituted in this way by another person. Therefore, when making a legal offer, the issuing proposer shall become, by his/her own will, an obligor against withdrawal of the offer for a limited period of time. The term may be proposed by the issuer or established according to the nature of the agreement. The tempestuous withdrawal of the offer may lead to liability for the issuer, if the offer was accepted by the recipient, even if this fact wasn't brought to the issuer's attention (according to a singular opinion in doctrine). The same rule applies in the case of public promise of reward for lost items, if the finder brings the item back to the person that lost it. In this case, there is a legal obligation for payment and both the promissor and the issuer are unilateral debtors. Therefore, it is not an ambulatory unilateral will of a party that generates legal effects, but the concordant wills of the issuer and the promissor that give birth to a legal relation. The legal effect is not produced by a single will, but by the adhesion of a secondary will to the first one exhibited by the issuer.[16]

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Notes

1. I. Tanoviceanu, *Curs de drept penal*, vol. 1 (Bucharest, 1912), 14–15.
2. L. P. Marcu, *Drept român*, vol. 1 (Bucharest, 1997), 153.
3. M. Mauss, *Eseu despre dar*, trans. (Iaşi, 1993), 114.
4. R. Vulcănescu, *Mitologie română* (Bucharest, 1987), 200.
5. Mauss, 115.
6. Marcu, *Drept român* 1: 102.
7. *Crestomaţie pentru studiul istoriei statului şi dreptului R.P.R.*, vol. 1 (Bucharest, 1955), 80.
8. Marcu, *Drept român* 1: 153–154.
9. S. G. Longinescu, *Elemente de drept roman*, vol. 2 (Bucharest, 1929), 202–203, 350.
10. Ibid., 154.
11. L. P. Marcu, *Istoria dreptului românesc* (Bucharest, 1977), 106 sqq.
12. P. Mayer, *Droit international privé*, 2nd edition (Paris, 1983), 41.
13. Ibid., 49 sqq.

14. Ibid., 56 sqq.
15. Ibid., 59 sqq.
16. Ibid., 62. See also I. P. Filipescu and A. I. Filipescu, *Drept internaţional privat* (Bucharest, 2007), 91.

Abstract

A Propedeutical Approach to Contract History

In ancient Roman law, the basis for obligations were either contracts, which, when breached, led to slavery for the debtor, or torts, which prompted the perpetrator to reward the victim, who would renounce his/her right to private vengeance. In the classical period, the two legal sources (contracts and torts) were systematized and improved. The contract became a formal agreement with legal effects and the tort was sanctioned independently, as a derivation of breaching the legal order. The postclassical era featured new legal sources, such as the so-called various other causes (*variae causarum figurae*). The evolution of modern states and international labor development led to intensified commercial exchanges between states. Thus, for the first time in Western European history, the premises necessary for the birth and development of legal norms, comprised in today's private international law, were met.

Keywords

contracts, Roman law, Civil Code, formalism