

The Preliminary Discussion on the Historical Comparison between Chinese and Western Acquisitive Prescription Systems

LA DISCUSSION PRÉLIMINAIRE SUR LA COMPARAISON HISTORIQUE ENTRE LE SYSTÈME DE PRESCRIPTION ACQUISITIVE CHINOIS ET OCCIDENTAUX

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Abstract: The acquisitive prescription was a type of system in Roman law used for making up the deficiencies under the formal doctrine as well as the power vacuum caused by wars. The elements influencing the emergence of the system also included historical cultures, geographical environments, and relationships with other systems, etc. The “Qing She” system in ancient China was a provisional measure made by feudal dynasties in particular war times to restore agricultural production and as well improve tax revenue. There were some similarities between the system and the acquisitive prescription; nonetheless there were fundamental difference between two of them in terms of causes, system values, applicable scopes, and cultural foundations, etc. There were no such historical traditions in China universally suitable for the acquisitive prescription.

Key words: Acquisitive prescription; Qing She; Historical comparison

Résumé: La prescription acquisitive était un type de système dans les droits romains utilisé pour la confection des lacunes sous de la doctrine officielle, ainsi que le vide du pouvoir causé par les guerres. Les éléments qui influent sur l'émergence du système inclus aussi des cultures historiques, des environnements géographiques et les relations avec d'autres systèmes, etc. Le système Qing She dans la Chine ancienne était une mesure provisoire faite par les féodales de dynasties durant les années de guerre notamment pour restaurer la production agricole et ainsi améliorer les recettes fiscales. Il y avait des similitudes entre le système et de la prescription acquisitive; néanmoins il y avait de différence fondamentale entre deux d'entre eux en termes de causes, les valeurs du système, les champs applicables, et les fondations culturelles, etc Il n'y avait pas de telles traditions historiques en Chine universellement appropriier pour la la prescription acquisitive.

Mots clés: Prescription acquisitive; Qing She; Et la comparaison historique

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1. THE EMERGENCE AND CAUSES OF THE ACQUISITIVE PRESCRIPTION IN WESTERN TRADITIONAL CIVIL LAWS

The acquisitive prescription system was originated in Roman law. As Maine said: "There were traces of the oldest ancient things in the oldest part of Roman law. Yet its late provisions as well provided the civil system information even dominating modern societies."(Shen, translation, 1959). The prescription acquisition or acquisitive prescription in Justinian Law was the mixture of two different systems: usucapio (prescription acquisition) and longi temporis praescriptio (long-term acquisitive prescription). The prescription acquisition (usucapio) was an extremely old civil law system. The meaning of the noun is to achieve acquisition through possession, since "usus" was only the early term to indicate possession (possessio); the terminology of this type of acquiring pattern initially was "usus". Yet this prescription acquisition system was only applicable to Italian land. It might be just for making up the loophole, there emerged Greek Law-originated "Long-term acquisitive prescription defense (exception or praescriptio longi temporis or longae possessionis) system" with co-efforts from both emperors and various provinces governors in the Age of Empires. This system was just to allow possessors to confront the goods-returning claimants with defense after the possessors had possessed goods of the residents living in the same city (residents resided in the same province upon granting all province residents Roman citizenship) for more than ten years or had possessed the goods of missing persons for over twenty years. Although these two systems in practice had different characteristics and as well required different conditions due to different foundations; there initially played same functions. Moreover, the possessors, in addition to defending, could as well file a lawsuit for requesting to return possibly lost goods after ten or twenty years. The only reserved difference (it is presently hard to justify) involved the difference between Italian land and province land, particularly in the issue of acquiring the time requested (Huang, translation, 1992, 218-221).

The acquisitive prescription elements in various Roman historical periods were not totally the same. In ancient law age, the acquisitive prescription elements were: ① Users must be Roman citizens; ② Subject matters only were confined to Roman land and formal transfer movables, but included authority over the households and un-inherited heritages; and ③ the users must have continuously used the subject matters for one or two years. In emperor governing period, the "continuous using" had changed into the "continuous possession"; the added new elements primarily included "goodwill", "legal reason", or "proper name"; the subject matter applicable scope for acquisitive prescription had been further restricted; and suspension and termination systems had been added. To make up the defects of civil laws, there was long-term prescription (longi temporis praescriptio) in this period co-established by the governor and the justice ministry of foreign affairs, parallely imposing with the civil law prescription (Zhou, 1994, 346-357). At the Justinian Age, the acquisitive prescription elements had ultimately evolved into: ① possession; ② time, or possession duration; ③ the ability of matters (res habilis), the noun also included the objective restrictions on heritage prescription acquisitions from early laws; ④ proper reason or proper name (iusta causa or iustus titulus); and ⑤ goodwill (bona fides).

The acquisitive prescription system in Roman law reflected following characteristics: First, early emergence, it initially emerged in civil laws as one of ownership acquiring patterns. Second, it owned two developing contexts. As one of the ownership acquiring patterns in civil laws, the other was the long-term acquisitive prescription, initially functioning as the defending system. And two of them integrated into one at the Justinian Age. Third, the applicable conditions gradually turned to strict. There was no "goodwill" requirement in ancient law times; until the Justinian Age however it demanded to use "goodwill" and "proper reason or proper name" as conditions. Forth, applicable objects included both movable and immovable properties. There were some extra restrictions, though. Finally, there was a trend to make prescription term longer. The primary reasons that the acquisitive prescription emerged in Roman law and then formed these characteristics included: first, economic reasons. The emergence of the acquisitive prescription system reflected the objective requirements from Roman social economy, and it was the outcome of constant productivity development. While interpreting the reasons of acquisitive prescription emergence, Mr. Zhou Nan, the Roman law scholar, believed that: "If there are some people let lands go deserted instead of reclaiming them and let slaves and livestock get stray instead of using them, laws then don't need to protect people own too much property and thereby abandon them as well as prohibit some

people to use them because of needs. Therefore, the prescription system, in the transition from public ownership to private one, was initially used to adjust the conflicts between property owners and people needed property to balance surplus and shortages and encourage people to use the properties abandoned by others for making full use of various things.” (Zhou, 1994, 345). The author agrees this opinion. Second, make up the insufficiency of the formal doctrine. If there are some defects in formal trading patterns conducted by parties, the ownership transfer will not take effect in civil laws. The buying party however can still be protected by continuous subject matter possession. The prescription acquisition functions the role helping the parties acquiring formal matters through releasing method and other similar possessors make up their power defects (Huang, translation, 2004, 135). Third, consider proof reasons. At the end of republic, commodity economy developed, trading and migration happened frequently, highlighting proof issue accordingly. The acquisitive prescription then developed into an indispensable means to conveniently prove ownerships. The Justice therefore stipulated that as long as a seller could prove he had possessed certain matters for one or two years, then he could be considered the legal owner of the matters, no matter if the right of former owner was justifiable, which avoided proof difficulties. The practical utility of the prescription acquisition system was to offer possessors safeguard and as well maintain social benefits, determining a deadline for the potential possibilities incurring legal disputes (Huang, translation, 2004, 220). Forth, consider historical reasons. At the end of empire governing period, there were frequent wars and abandoned lands. To stabilize people's life and restore agricultural production, acquisitive prescription had developed into a system to respect continuous de facto state and protect existing social and economic orders for benefiting agricultural production. Fifth, consider geographic reasons. The victories from expansion wars constantly enlarged the territory of the Roman Empire, and there were more and more provinces emerged beyond Italian homeland as well, plusing inconvenient transportation, made it neither realistic nor rational for entire empire to suit single prescription period, which caused the same province and different provinces to use different prescription periods. Sixth, consider the influence from other systems in Roman law. All civil right system, possession system, and lawsuit system in Roman law influenced the emergence and development of acquisitive prescription to certain extent. The civil right system, for instance, catalyzed the emergence of long-term acquisitive prescription and goodwill possession system influenced the changes of acquisitive prescription elements. Seventh, consider the influence from the deficiencies of associated laws and systems. The Roman law did not generate complete real estate registration system, making real estate applicable to acquisitive prescription possible; there was no goodwill acquisitive system either in the Roman law, making movables applicable to acquisitive prescription both necessary and possible.

In Britain and American law countries, although their law origins, law systems and development are significantly different from the Roman law; there are after all many aspects influenced by the Roman law to various extents. In term of prescription system in Britain and American laws, no matter acquisitive prescription or extinctive prescription, they were as well originated from the Roman law (Li, 1999, 33). In general British and American laws, based on ancient habits, there were no footholds for acquisitive prescription in any case. The acquisitive prescription system in British and American laws mainly was the consequence of statutory laws. What differs from civil law systems is that the applicable scopes of the acquisitive prescriptions in British and American laws are primarily confined to right over other persons property. For example, a neighboring land owner would acquire the easement on passing through, water diverging, or lighting on the land owned by others when he had passed through, diverged water, or lighted on the land for certain years; or acquire the servitudes on the land due to some natural resources sharing, et. Another example, British Prescription Act 1832 respectively stipulated different acquisitive prescription terms on land usufruct, water diverging right, and right of way, etc. The currently imposing Prescription and Limitation (Scotland) Act 1973 in Scotland, as well respectively stipulated different acquisitive prescription terms on interest in land, positive servitudes, and public rights of way (Ge, 2007, 12). Thus it can be seen that although had been influenced by Roman law to certain extent, the establishment and development path of the acquisitive prescription systems in British-American law system reflect the characteristics different from the civil law system.

2. HISTORY REVIEW ON THE QING SHE SYSTEM – THE EMBRYO OF ACQUISITIVE PRESCRIPTION IN ANCIENT CHINA

There was a system similar to the Western acquisitive prescription system in ancient China, or Qing She system. The direct reason of Qing She system emergence was to settle the social problem of “Escaped families and abandoned lands”. There were plenty of “Escaped families and abandoned lands” in Northern and Southern Dynasties due to frequently happened wars. The abandoned lands were granted and received as public lands in the Sui and Tang Dynasties of Northern Dynasty. Nonetheless, the ascription of “Escaped families and abandoned lands” had grown into a social problem needed to be settled urgently after the collapse of the Land Equalization system. In the period of the Five Dynasties at the end of Tang Dynasty, most laws just followed related laws in Sui and Tang Dynasties, governments let soldiers or detained “captives” to cultivate lands for governments (Ye, 1993, 335) the effects however were not satisfactory. The ordinance was issued in the 2nd year of Sejong Xian De in the Later Zhou Dynasty to allow other to possess “Escaped families and abandoned lands” called “Qing She”. The possessors could have half ownership in three years and total one in five years upon continuous possession. The possession term in Northern border areas was fifteen years. The Two Song Dynasties succeeded the method from the Late Zhou Dynasty; the specific durations of the prescription had been changed frequently, though. In the early years of Tiansheng of Songrenzong, the ordinance was issued: “When people had left their lands for accumulative ten years, their lands would be cultivated by others, and the possessors of the abandoned lands could just pay half amount of two types of taxes after three-year cultivation.” It also stipulated: “Refugees are demanded to restore their production in 100 days, the remit taxes will scale down to 20% of the original ones in five years. And if they fail to restore production in specified time, their lands will be taken by others to cultivate.” It thus can tell that the law-stipulated acquisitive prescription term on abandoned lands was ten years in Northern Song Dynasty. The law in the Southern Song Dynasty followed the method in the Northern Song Dynasty. The acquisitive prescription term in principle was still ten years; there were however some flexible stipulations. Based on the act issued in the 9th year of Shaoxing, Songgaozong, the acquisitive prescription term could be temporarily extended to five years; but it was still ten years in general. The ordinance issued in the 7th year of Xinglong, Songxiaozong stated: “Governments hair people to cultivate abandoned lands with tax free for three years and the lands will become family property of cultivators after three years.” This ordinance reduced acquisitive prescription to three years. The Qing She system was gradually abolished after the Southern Song Dynasty. The Yuan Dynasty did not follow the Qing She system, and it implemented simple laws to tackle abandoned lands and land escaping, instead. Except the lands managed and controlled by governments, other lands could be distributed to private persons with ownership. Both Ming and Qing Dynasties did not adopt the Qing She system, either; they changed to the “Xian Zhan (Possess first)” system, instead. Mingtaizu (Chu Yuan-chang) issued the act in the early years of state-founding: “There are refugees since wars have started. It allows various people to cultivate abandoned lands and take them as family properties. Or lands belong to their cultivators, and the cultivators can also be given nearby lands to cultivate by the law, no arguments allowed. Only graves and houses will be returned to their original owners, no possessions allowed.” Based on the ordinance, abandoned lands would belong to their cultivators according to the possession first principle. It aimed at encouraging cultivation as much as possible to restore agricultural production as soon as possible. The acquisitive prescription, stipulated in Civil Code formulated in the period of the Republic of China, was nothing but simulating Western legal systems, having nothing to do with China-inherent Qing She system.

The Qing She system was the special one existed in the late years of Five Dynasties and Two Song Dynasty period, the main reasons that the system could emerge and exist in such particular period are: First, it was needed by the background back to time. There were frequent wars and much widespread “Escaped families and abandoned lands” in the Five Dynasty period, agricultural production was destructed severely from which. It was an irresistible trend to unify the whole country with the establishment of the Northern Zhou and Northern Song Dynasties. To restore agricultural production, it must take effective measures to settle the issue of “Escaped families and abandoned lands”. Second, it was influenced by land system changes. Although the “Land Equalization System” was not nominally abolished in the Five and Two Song Dynasties; it actually had been existing in its name only. Now that there had been no way to settle the issue

of abandoned land ascription through “Land Equalization”; it then must establish certain system in other ways to settle the issue of abandoned land ascription. Third, the need from state tax revenue. The direct purpose to implement “Qing She” system from the Northern Zhou and the Two Song Dynasties was to ensure the stable land-rental tax revenue source on country’ behalf. The all laws and ordinances then formulated stipulated that the land-rental taxes would be reduced or exempted at the early period of abandoned land possession to encourage the implementation of the “Qing She”; when land possession had reached certain term, full rental taxes would be collected by governments. Finally, the factor from property concepts. The concept of land as “permanent property” had not yet been established in the Northern Zhou and the Two Song periods. Then governments generally treated abandoned lands as “government lands”; in addition the concept of “King soil” still had certain influence. Therefore, the “Qing She” system was not a deviant one at all in the concept of people then.

There are indeed some similarities between the “Qing She” system and the acquisitive prescription in the traditional civil laws in various European countries, and both recognized non-obligee could acquire corresponding rights upon possessing others’ properties for certain terms. Both share similar value orientation to certain extent, such as making the best use of everything and ending the unstable state of legal relationships, etc. There however still fundamental difference between the “Qing She” system and the acquisitive prescription: First, different emerging reasons. The “Qing She” system emerged in special war times to restore agricultural production and settle the issues of “Escaped families and abandoned lands” after the abolishment of the “Land Equalization System”. The reason of acquisitive prescription emergence in Roman law was relevant to making up the insufficiency of strict formal doctrine. Based on the opinion of British scholar Barry Nicholas: “The effect of prescription acquisition is to help those who acquire Res Mancipi via Demisability and other similar holders make up the defects in terms of legal possessing rights. In addition, the prescription acquisition rules are generally not the effective pattern to provide people ownerships; they are the method to provide people to shirk proof, instead.”(Huang, translation, 2004, 135). Second, different system values. The “Qing She” system was a temporary measure in special periods of China, or it was established to settle the issue of “Escaped families and abandoned lands” under the circumstance of abolishment of “Land Equalization” system without emergence of other matured land systems yet. The acquisitive prescription was a permanent system in Roman law; in addition it was followed by later legislations. Third, different objects oriented. The “Qing She” system was only applicable to lands (and confined to arable land only), not for either immovables or movables such as houses and graves, etc. The applicable objects of acquisitive prescription include both immovables and movables. Finally, different foundations of property concept. The “Qing She” system was established based on certain “King soil” concept. “Abandoned lands” theoretically belonged to “government lands”, thereby what “Qing She” persons possessed was not private properties of others, and they were “government lands”, instead. The acquisitive prescription, on the other hand, was established based on the private property ownership in ancient Roman society.

3. CONCLUSIONS

In conclusion, the acquisitive prescription, on Western law development history, was a system generated in a then specific social historical background in the Roman law period. In the Roman law period, the acquisitive prescription could emerge and grow into an important system to make up power vacuum because of strictly imposed formal doctrine, inadequate goodwill acquisition, and immovables registration system, as well as historical culture and geographic environmental factors. Although the Qing She system, primarily implemented in Two Song Dynasties in ancient China, shared certain similarities with the acquisitive prescription; the system was all after a temporary measure taken by feudal dynasties in particular war times to restore agricultural production and improve tax revenue. In addition, the Qing She system was culturally based on “King soil” concept, evidently differing from the concept of private property ownership in Roman law significantly.

Particularly, it needs to point out that with the completion of civil law systems as well as the development of various systems in Western countries, the specifically social historical conditions in Roman law period no longer exist in modern societies any more; the acquisitive prescription has almost lost its foundation to function, and its applicable scope has been squeezed out by other systems as well. Based on Roman law system, although most civil law system countries stipulate acquisitive prescription, the

applicable effects of the system are actually not that satisfactory. China does not have the historical tradition universally applicable to the acquisitive prescription after all, China society's mainstream values block people to accept the system; as well the pattern of public ownership of land introduces the realistic obstacle for the system to exist. Therefore, as the issue of existence or abolishment of the acquisitive prescription in future civil laws, to make rational choice, the legislature needs to conduct in-depth investigation on both the historical background and cultural basis of the emergence of the system, and exactly judge the true effects to apply the system under current legal system.

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