COLLANA DEL DIPARTIMENTO DI GIURISPRUDENZA
UNIVERSITÀ DEGLI STUDI DI BRESCIA

PRODUCTION AND CIRCULATION OF WHEALTH PROBLEMS, PRINCIPLES AND MODELS

Summer school, Brescia 8-12 luglio 2019

Edited by

Maurizio Onza e Antonio Saccoccio

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INTRODUCTION

Antonio Saccoccio

Dear Chinese, European and Italian students,
Welcome to Brescia!

I am very pleased and proud, as director, to open this edition of the Summer School on '*Production and circulation of wealth: issues, principles and models*'. This is the seventh edition of the Summer School that we offer to students from all over the world here in Brescia: five of them had Chinese law as a subject, while two others Latin American law.

Thanks to the generous support of the Rector of the University of Brescia, prof. Maurizio Tira, and his Delegate for International Affairs, prof. Roberto Ranzi: without the valuable contribution of my University (and I proudly underline 'my'), we would have never succeeded in completing this (as well as other) activities. Thanks also to prof. Maurizio Onza and to dott. Francesco Maffezzoni, who have carried on the hardest part of the work, the one concerning the organizational aspects.

The Brescia Summer School initiative was born six years ago, on the basis of the Memorandum of Understanding (MoU) that I have stipulated, as a representative of the University of Brescia, with the *CUPL* (*China University of Political Sciences and Law*) in Beijing, thanks to my friendship with the colleagues Fei Anling and Zhai Yuanjian: I would like to sincerely thank both of them for encouraging their students to come to study in Brescia since six years. At that time, the Summer School started just like a game, almost like a bet, amid laughter of students and colleagues, but now it has become a beautiful reality, reinvigorated year after year, also thanks to the participation of all of you.

This year we added to the team the *University of Xiamen* (and I take this opportunity to greet my collegue Xu Guodong, professor of Roman law in China and author of many publications, including the so-called *Green Project of Chinese Civil Code*, that I think is the most balanced among the proposed projects). Furthermore, we have representatives of *SHUPL* (*Shanghai University of Political Sciences and Law*) and *Suzhou University*. With these Universities we already have in place cooperation agreements (and MoUs), that I hope to intensify in the near future.

I would like to just remind everyone, that here in Brescia we have a Chinese PhD student, who has been working for a year on commercial law, under the guidance of prof. Onza; this year we will start a course on *Introduction to Chinese Law*, in charge to prof. Stefano Porcelli, in order to offer our students a specific knowledge on the topic. Furthermore, we are considering the option of establishing an Advanced Course on Chinese Law, and also an Observatory or a Centre on Chinese Law, with members professors and lawyers, half from China and half from Italy.

I would also like to greet and thank for the precious support the Zaglio and Orizio Law Firm, who is also involved in this Summer School and hopefully will be involved in other activities in the future.

We have the honor of having here among us Italian and European scholars who are the leading world experts on Chinese law: and I am glad to see and greet old friends, with whom I have started and traveled together part of my career.

Please, allow me to remind prof. Onza that the Journal "*Roma e America*", of which I have the honor to be the Chief-editor, is one of the main sponsors of this event and will publish a note on it.

Finally, a special thank you to the students, who, challenging the heat and the exam session, still wanted to participate; of course a warm thank you goes to the Chinese students as well, some of whom came from Rome, where they are studying, while the largest part of them had to go through a long journey from China to be here in person. Thank you very much! I invite you to engage in our activities, but also to enjoy the beauties of our city, despite the heat of these days.

I hope that the Summer School is an opportunity for learning and implementing scientific activities for all the participants, students and professors. But, above all, I hope that for Italian and Chinese students this is also a good opportunity to get to know each other, to exchange their mutual experiences, to realize a fruitful cultural exchange, that, in my opinion, is the real goal of this Summer School.

I wish everyone a productive working week!

LAW AND RULES:
THE NEW CHINESE CIVIL CODE

THE NEW CHINESE CIVIL CODE AND THE REALITY OF THE LOAN

Antonio Saccoccio

1. *The category of the real contract in the face of the attacks from a false modernity*

The dogmatic framework of the contract of loan is still a problematic issue within the Roman legal system, especially considering the development of this institution from the age of the 'foundation' of the system in Justinian's Roman law to its outcomes within the European, Latin American and Chinese juridical 'subsystems'. [1]

The reality of the Roman loan been has for years an unassailable cornerstone of Romanist doctrine. The most obvious legacy of this approach is to find the same systematic placement of our contract in all European civil codes of the past two centuries, with the exception of the Swiss *OR,* which had even abolished the category of real contracts. [2] The Swiss choice to qualify the loan as a consensual contract has been followed by

[1] I have recently dwelt on this point several times: for a summary of my thought, see A. SACCOCCIO, *Il mutuo nel sistema giuridico romanistico. Profili di consensualità nel mutuo reale*, Turin, 2020, *passim*.

[2] For the exclusion of manual donation, see Art. 2421: «la donazione manuale si compie mediante la consegna della cosa dal donante al donatario» ('manual donation is accomplished by the handing over of the thing by the donor to the donee'). About this specific point, see J. MENABRITO PAZ, *Die Entwicklung des Darlehens im mexikanischen Recht – vom römischen Recht zum schweizerischen Obligationenrecht*, in *Roma e America. Diritto romano comune*, 41, 2020, 365 ff. (= in A. SACCOCCIO-I. FARGNOLI [eds.], *Römisches Recht und lateinamerikanisches Rechtssystem. Kolloquium in memoriam Eugen Bucher an der Universität Bern am 13. September 2019,* Modena, 2021, 73 ss.).

several other European and Latin American legislators: it is sufficient to recall here the Federal Civil Code of Mexico of 1927, or those of Peru of 1984, or Cuba of 1987, or the very recent Argentine Civil and Commercial Code of 2015,[3] while in Europe the reform of the law of obligations in Germany in 2002 (see below) has moved in this direction. On the other hand, other contemporary codifiers have chosen to maintain the category of real contracts, and to place the loan within it: the clearest examples of this tendency are the Civil Code of Paraguay of 1987 and that of Brazil of 2003[4] and, precisely, the Chinese Contract Law of 1999 and the new Chinese Civil Code, which we shall examine below.

I find it interesting to note two factors, peculiar to the contemporary period: on the one hand, the resistance of the reality of the loan in some modern juridical legal orders, notwithstanding the strong doctrinal and/or jurisprudential (and, in some cases, legislative) pressure to the contrary; on the other hand, the systematic model adopted in the Chinese Contract Law of 1999 and now in the very recent Chinese Civil Code, which admit (also) a real structure for the loan. Both of these choices appear to be homologous to the construction derived directly from Roman law. In particular, the recent choice of the Chinese legislator to sanction the existence of the category of real contracts and to place within it the loan, albeit with

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[3] On this point, let me refer to what I say in A. SACCOCCIO, *Mutuo reale e mutuo consensuale nel sistema giuridico latinoamericano*, in *Roma e America. Diritto romano comune*, 27, 2009, 101 ff. (spanish transl. in AA.VV., *Tra Italia e Argentina tradizione romanistica e culture dei giuristi*, edited by C. CASCIONE-C. MASI DORIA, Naples, 2007, 261 ff.; chinese transl. *Lun Lameifa zhong de yaowu jiedai he nuocheng jiedai*, in *Xueshuo Huizuan – Digesta*, Beijing, 2011, 21 ff.; port. transl. in AA.VV., *Sistema jurídico romanistico e subsistema jurídico latinoamericano*, edited by S. SCHIPANI-D.B. SANTOS-G. DE ARAUJO, São Paulo, 2015, 455 ff.); IDEM, *La difusión del principio del consensualismo en América Latina: las categorias real y consensual en el derecho de los contratos*, in *Autonomía privada. Perspectivas del derecho contemporaneo,* edited by M.L. NEME VILLAREAL, Bogotá, 2018, 47 ff.; IDEM, *Realità e consensualità nel diritto dei contratti alla luce del Nuovo Cc. argentino,* in *Nuovo Codice civile argentino e sistema giuridico latinoamericano*, edited by R. CARDILLI-D.F. ESBORRAZ, Padua, 2017, 475 ff.; IDEM, *Dal 're contrahere' al contratto reale. Brevi note sulla categoria di 'contratto reale' nel Codice civile di Cuba del 1987*, in *Costituzione e diritto privato. Una riforma per Cuba*, edited by A. BARENGHI-L.B. PÉREZ GALLARDO-M. PROTO, Naples, 2019, 429 ff.

[4] For Paraguay cfr. art. 1292 Cc.; in doctrine, cfr.: J.R. TORRES KIMSER-B. RÍOS AVALOS-J.A. MORENO RODRÍGUEZ, *Derecho bancario*, Asunción, 19992, 226 ss.; M.A. PANGRAZIO, *Código civil paraguayo comentado. Libro tercero*, Asunción, 1998, 530 s. For Brazil, see art. 586 Cc.; in doctrine, cfr. O. GOMES, *Contratos*, Rio de Janeiro, 2002[25] (1st ed. 1959), 319; S. RODRIGUES, *Direito civil. Dos contratos e das declarações unilateral da vontade*, III, São Paulo, 2002[28], 35 e 262; M.H. DINIZ, *Curso de Direito Civil Brasileiro*, III, *Teoria das Obrigações Contratuais e Extracontratuais*, São Paulo, 2002[17], 93 e 298; L. ROLDÃO DE FREITAS GOMES, *Contrato*, Rio de Janeiro-São Paulo, 2002[2], 65 e 270; IDEM, *Tratado teórico e prática dos contratos*, III, São Paulo, 2002, 169; Á. VILLAÇA AZEVEDO, *Teoria geral dos contratos típicos e atípicos. Curso de direito civil*, São Paulo, 2002, 71 s.; A. RIZZARDO, *Contratos*, Rio de Janeiro, 2005, 79 and 599; P. NADER, *Curso de Direito Civil*, III, *Contracts*, Rio de Janeiro, 2005, § 15, 48 f. (with doubts) and § 104, 351.

the cautions we shall see, seems to me to justify the considerations I intend to develop on this issue.

Moreover, the same fluctuations between the maintenance and deletion of the category of real contracts can be seen by observing the more or less recent Projects for the unification of contract law circulating in Europe, in which the model of the consensuality of the loan appears to be by far the dominant one, although the idea of its reality is not ignored.

In fact, the 1994 Unidroit Principles seem to be inspired by the former alternative:[5] the point n. 3 of the 'official' commentary, significantly entitled '*All contracts consensual*', states that although some national legal orders provide for delivery as one of the requirements for the completion of a contract, «these rules are not easily compatible with modern business perceptions and practice and are therefore excluded by this Article».[6] With respect to par. 3.2 of the *UNIDROIT* Principles it has been expressly stated in the literature that the rule is specifically intended to «escludere che il completamento del procedimento di formazione [del contratto] possa … dipendere dalla consegna di una cosa».[7]

In the same vein, the *PECL* (*Principles of European Contract Law* 1996/2000) provides in Art. 2:101, in what has been called a «definizione nascosta di contratto» (hidden definition of contract), that «a contract is concluded if: a) the parties intend to be legally bound and b) they reached a sufficient agreement, without any further requirement».[8] It is evident that the *PECL* «do not recognise the legal category of 'real contracts'».[9] More nuanced is the position of the *DCFR* (*Draft Common Frame of Reference*) of 2008, which, in offering a definition of contract, which – let it be said in passing – is lacking in the other two Drafts, identifies it as an «agreement»:[10] however, at the level of defining technique, it does not es-

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[5] See the *Unidroit Principles of International Commercial Contracts* (latest version I have seen is dated 2016), Art. 3.1.2 headed '*Validity of mere agreement*': «A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement»: the reference to the absence of «any further requirements» seems to me to be sufficiently clear in the sense indicated in the text.

[6] The principles and their commentary are easily accessible: see https://www.unidroit.org/contracts. On the scientific value of the commentary in the *UNIDROIT* Principles it is sufficient here to refer to M.J. BONELL, *An International 'Code' of Contract Law*, Milan, 2006[2], 64 ff.

[7] A. D'ANGELO, *Principi Unidroit e regole causalistiche*, in *I contratti in generale: aggiornamento 1991-1998*, edited by G. ALPA-M. BESSONE, Turin, 1999, 236.

[8] See C. CASTRONOVO, *Prefazione all'edizione italiana dei Principi di diritto europeo dei contratti*, Milan, 2001, XXII.

[9] See L. ANTONIOLLI, in *Principles of European Contract Law and Italian Law. A Commentary*, edited by L. ANTONIOLLI-A. VENEZIANO, The Hague, 2005, 49.

[10] Cfr. *DCFR* II, 1:101: «A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect».

cape notice that the *DCFR* does not intend to offer a list of all the constitutive elements necessary for the existence of a contract, but simply «enucleare l'unico elemento costitutivo (o gli unici elementi costitutivi) che non possono mancare affinché il contratto esista». [11]

On the other hand, the *European Code of Contracts – Avant-projet* (the so-called Gandolfi Project) of 2002 [12] keeps open the possibility of 'doubling' a real contract with a corresponding (and atypical) consensual model: cf. art. 342: «A real contract is completed by delivery of the object of the contract, unless it is deemed, because of usage or agreement by the parties, that the parties intended to make an a-typical consensual contract». [13]

The article is headed «Special form required for validity». It is true that, from a purely empirical point of view, in archaic Roman law the 'forms' served «ad assicurare la serietà, l'obiettiva riconoscibilità e l'efficacia della volontà e a rendere conseguentemente stabili i risultati ai quali si indirizzava il comportamento». [14] But from a more purely dogmatic point of view, to lump together the use of solemn forms and delivery as objective elements which the legislator may require when it considers that the cause is excessively fragile [15] seems to me to lead to the misunder-

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[11] Cf. C. MARCHETTI, *Un'introduzione al contract del DCFR: la (necessaria) bilateralità della formazione del vincolo?*, in C. MARCHETTI (ed.), *Il DCFR: lessici, concetti e categorie nella prospettiva del giurista italiano*, Turin, 2012, 2; but on this point see particularly A. PETRUCCI-G. LUCHETTI (eds.), *Fondamenti del diritto contrattuale europeo. Dalle radici romane al Draft common Frame of Reference*, II, Bologna, 2010; A. PETRUCCI, *Fondamenti romanistici del diritto europeo. La disciplina generale del contratto*, I, Turin, 2018.

[12] Book I of the Project on Contracts in General was first published in French in 1999; a second edition, with the coordinator's reports, indexes and translations, saw the light of day in 2002. Subsequently, book II, 1 concerning the sale and book II, 2 concerning 'contracts for services' were also completed. On the *Avant-projet*, among the various writings of the coordinator, see G. GANDOLFI, *Per un Codice europeo dei contratti*, in *Riv. trim. dir. e proc. civ.*, 1992, 781 ff.; IDEM, *Sul progetto di un 'codice europeo dei contratti'*, in *Rass. di dir. civ.*, 1, 1996, 105 ss.; IDEM, *Il progetto 'pavese' di un codice europeo dei contratti*, in *Riv. dir. civ.*, 47, 2001, 455 ff.

[13] The *Avant-projet can be* read in full at http://www.eurcontrats.eu/acd2/notizie-generali/ in the various languages in which it is written.

[14] See A. CORBINO, *Il formalismo negoziale nell'esperienza romana*, Turin, 2006, 55.

[15] See L. GAROFALO, *Gratuità e responsabilità contrattuale*, in *TSDP*, 5, 2012, 35 ff. (= in L. GAROFALO, *Figure e tutele contrattuali fra diritto romano e contemporaneità giuridica*, Santiago de Compostela, 2015, 122). But for delivery as a necessary form of the binding intention, see already P. FORCHIELLI, *I contratti reali*, Milan, 1952, 87 ff., with whom agrees G. MIRABELLI, *Dei contratti in generale*, in *Commentario del Codice civile*, IV.2.2, Turin, 1958, 36. On the other hand, for delivery as an element which takes the place of the cause or supplements it, see, respectively, R. SACCO, *Il contratto*, in F. VASSALLI, (dir. by), *Trattato di diritto civile italiano*, VI, 2, Turin, 1975, 613 ff.; O.T. SCOZZAFAVA, *Gli interessi monetari*, Naples, 1984, 159; M. DE TILLA, *Donazione-permuta-mediazione-mandato-mutuo-comodato*, in *Il diritto immobiliare. Trattato sistematico di giurisprudenza per casi*, Milano, 1995, 548; R. TETI, *Il mutuo*, in P. RESCIGNO (dir.), *Trattato di diritto privato,* XII, *Obbligazioni e contratti*,

standing of placing on the same level, elements which concern the structure of a contract (such as delivery in real contracts) and elements which concern its validity, such as the form.[16] And the fact that the Chinese law speaks of 'form required for validity', including in this heading also delivery in the real structure of the loan, seems to me to imply the basic view of framing the delivery not as a mechanism necessary for the perfection of the contract, but as a requirement of its validity: and I do not agree with that approach (see also below, nt. 62).

In any case, according to the letter of the Project, the parties could freely choose whether to structure the loan as a real or as a consensual contract.[17]

2. *The New Civil Code of the People's Republic of China and the contract*

As is well known, last 28th May 2019, after a long and troubled path,[18] the New Chinese Civil Code was approved, fruit of a fruitful interaction between legal science and legislation.[19] This Code takes into account the multifaceted (and entirely peculiar, although traceable to the socialist

IV, 2, Turin, 2007, 599 for the first position; V. ROPPO, *Il contratto*, in G. IUDICA-P. ZATTI (dir.), *Trattato di diritto privato*, Milan 2001, 201, for the second.

[16] See, e.g., D. CENNI, *La formazione del contratto tra realità e consensualità*, Padua 1998, 63 ff.

[17] On this point, in a critical sense towards the category, see M.L. RUFFINI GANDOLFI, *I contratti reali nella prospettiva di una codificazione europea: elementi per una discussione*, in *Jus*, 2000, 341 ss. (= in *Diritto privato. Studi in onore di A. Palazzo*, III, *Proprietà e rapporti obbligatori*, Perugia, 2009, 697 ss.); EADEM, *I c.d. contratti reali: profili problematici*, in G. GANDOLFI (ed.), *Académie des Privatistes Européens, Code européen des contrats – Avant-projet*, II, *Des contrats en particulier*, II, Rapports de membres de l'Académie et d'expert, Milan, 2008. On the subject, see also G. GANDOLFI, *Contratti reali e a favore di terzi nel 'Progetto' dell'Accademia dei Giusprivatisti Europei*, in *L'uniformazione del diritto contrattuale. Problematiche attuali e tendenze evolutive – Atti degli Incontri di Studio della Facoltà di Giurisprudenza della Seconda Università degli Studi di Napoli*, 2004.

[18] See H. PAZZAGLINI, *La recezione del diritto civile nella Cina del nostro secolo*, in *Mondo cinese*, 76, 1991, 49 ff. (which suffers, however, from bibliographical gaps); FEI ANLING, *Gli sviluppi storici del diritto cinese dal 1911 ad oggi. Lineamenti di una analisi relativa al diritto privato*, in *Roma e America. Diritto romano comune*, 23, 2007, 111 ff.; but see also below at length in the text and in the following ntt.

[19] For the very first reflections on this Civil Code, see now S. PORCELLI, *Il nuovo Codice civile della Repubblica Popolare Cinese. Osservazioni dalla prospettiva del dialogo con la tradizione romanistica*, in *Studium Iuris. Riv. per la formazione nelle professioni giuridiche*, 7-8, 2020, 811 ff. See now A. SACCOCCIO-S. PORCELLI (eds.), *Codice civile cinese e sistema giuridico romanistico*, Modena, 2021, with several essays by some Italian jurists and some of the Chinese jurists, who contributed to the drafting of the Code.

model) articulation of the sources of law in this Country [20] and is not limited to a mere operation of 'legal transplantation' of norms derived from the Western world: [21] Chinese legal science now feels mature, and, believing that it has overcome the phase of the «trapianto acritico del diritto ('uncritical transplantation of law')», feels ready to face the systematic-conceptual challenges that the launching of a codification of law imposes. [22]

Nowadays we can consider as definitively outdated for Chinese law the metaphor of the «diritto che non c'è ('law that does not exist')». [23] Clear and widely studied by the doctrine, even outside the narrow circle of jurists (and Romanists in particular) [24] are the influences of the Roman legal tradition on Chinese legislation and doctrine. [25] The highly scientific na-

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[20] On this point, cf. P. KELLER, *Sources of Order in Chinese Law*, in *The American Journal of Comparative Law*, 42, 1994, 711 ff. (= in P. KELLER [ed.], *Chinese Law and Legal Theory*, Aldershot, 2001, 239 ff.); F.R. ANTONELLI, *La 'legge sulla legislazione' ed il problema delle fonti nel diritto cinese*, in *Mondo cinese*, 119, 2004, 23 ff.; XU GUODONG, *Le fonti del diritto civile nel sistema cinese*, in *Diritto@Storia*, 4, 2005; E. TOTI, *Elementi di diritto cinese*, Roma, 2010, 15 ss.; more generally, on this point see also G. AJANI, *Le fonti non scritte nel diritto dei Paesi socialisti*, Milano, 1985; E. TOTI, *Diritto cinese dei contratti e sistema giuridico romanistico. Tra legge e dottrina*, Rome, 2020, 41 ff. On the 'absolute value' (in the sense of 'binding legal value') that the interpretations of the Supreme Court in China have assumed, see also YIN QIUSHI, *Le Interpretazioni della Suprema Corte del Popolo cinese e lo ius honorarium*, in *Roma e America. Diritto romano comune*, 37, 2016, 251 ff.; L. FORMICHELLA, *La riforma giudiziaria in Cina e il ruolo della Suprema Corte Popolare*, in *Roma e America. Diritto romano comune*, 167 ff.; and especially S. PORCELLI, *Hetong e contractus. Per una riscoperta dell'idea di reciprocità nel dialogo tra diritto cinese e diritto romano*, Turin, 2020, 84 ss.

[21] See M. TIMOTEO, *Il Codice civile in Cina: oltre i legal transplants?*, in *Mondo cinese,* 167, 2019, 13 ff.; see also EAD., *La lunga marcia della codificazione civile nella Cina contemporanea*, in *BIDR*, 110, 2016, 35 ff.

[22] See XUE JUN, *La polemica sulla codificazione del diritto civile cinese*, available online at http://www.romanlaw.cn/sub2-35.htm.

[23] See, e.g., L. MOCCIA, *Prologo breve sulla 'originalità' del diritto (tradizionale) cinese e sull'importanza del suo studio in prospettiva storico-comparatistica*, in *Riv. trim. dir. e proc. civ.*, 2004, 991 ff., which takes up the old image of MONTESQUIEU, according to whom it is the stick that governs China (cf. *Esprit des lois*, I, 8, 21), who, in turn, borrowed it (see nt. 273) from the orientalist historian Jean-Baptiste Du Halde (1674-1743).

[24] See, for example, M.G. CASTELLO, *L'ombra di Roma. La cultura romana e la Cina*, in *Historia magistra. Rivista di storia critica*, 15, 2014, 42 ff.; L. COLANGELO, *L'introduzione del diritto romano in Cina: evoluzione storica e recenti sviluppi relativi alla traduzione e produzione di testi e all'insegnamento*, in *Roma e America. Diritto romano comune*, 36, 2015, 175 ff.; EADEM, *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*, in *BIDR*, 110, 2016, 195 ff.

[25] The literature on this point is now substantial: making a selection, we can start from the classic writings of Jiang Ping, former Rector of the *CUPL*, one of the most prestigious Chinese universities (cf. JIANG PING, *Il diritto romano nella Repubblica Popolare Cinese*, in *Index*, 16, 1988, 367 ff.; IDEM, *The Spirit of Roman Law in China* [in Chinese], in *China Legal Science*, 1, 1995; italian version in L. FORMICHELLA-G. TERRACINA-E. TOTI [eds.], *Diritto Cinese e sistema giuridico romanistico. Contributi*, Turin, 2005, 49 ff.; about the work of Jian

ture of Roman law, together with its universalist vocation and its focus on respect for the human person[26], were the basic reasons for this option, which is clearly a free choice. [27]

The Civil Code, [28] which came into force on 1 January 2021, [29] is of fundamental importance both for the choice (far from being taken for granted) of regulating the juridical system through a Code, [30] and for its role as a «pietra miliare di una nuova Cina, che vuole connotarsi per una autonomia dichiarata dai modelli esterni», expression of a «identità nazionale, sull'onda della spinta storica che va spostando il baricentro economico (e

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Ping for the dissemination of Roman law in China see extensively E. TOTI, *Diritto cinese dei contratti*, cit., 21 ff.) and then consider the numerous writings on this issue by Sandro Schipani (see, *ex multis*, S. SCHIPANI, *Diritto romano in Cina – XXI secolo*, in *Treccani.it* [http://www.treccani.it/enciclopedia/diritto-romano-in-cina_(XXI-Secolo)], 2009; IDEM, *La Cina e il nuovo diritto romano*, in *Mondo cinese*, 145, 2011, 50 ff.; IDEM, *Fondamenti romanistici e diritto cinese (riflessioni su un comune lavoro nell'accrescimento del sistema)*, in *BIDR*, 110, 2017, 35 ff.) and by Oliviero Diliberto (see O. DILIBERTO, *La lunga marcia. Il diritto romano nella Repubblica popolare cinese*, in L. CANFORA-U. CARDINALE [eds.], *Disegnare il futuro con intelligenza antica. L'insegnamento del latino e del greco antico in Italia e nel mondo*, Bologna, 2012, 53 ff.; IDEM, *Chiusura dei lavori. Diritto romano e codificazione cinese tra passato, presente e futuro. Alcune considerazioni*, in *BIDR*, 110, 2016, 293 ff.). On this point, see also MI JIAN, *Diritto cinese e diritto romano*, in *Index*, 19, 1991, 343 ff. (= in *Diritto cinese e sistema giuridico romanistico*, cit., 13 ff.); XUE JUN, *Il diritto romano in Cina*, in *Cardozo Electronic Law Bulletin*, 12, 2006, 1 ff.; IDEM, *La codificazione del diritto civile cinese e il diritto romano*, in *BIDR*, 110, 2016, 73 ff.; XU GUODONG, *La base romanistica della parte generale del codice civile cinese*, in *BIDR*, 110, 2016, 47 ff.; YANG ZHENSHAN, *La tradizione filosofica del diritto romano e del diritto cinese antico e l'influenza del diritto romano sul diritto cinese contemporaneo*, now in *Diritto cinese e sistema giuridico romanistico*, cit, 29 ff.; R. CARDILLI, *Diritto cinese e tradizione romanistica alla luce del nuovo Codice civile della RPC*, in *Mondo cinese*, 167, 2019, 25 ff. (= in R. CARDILLI-S. PORCELLI, *Introduzione al diritto cinese*, Torino, 2020, 67 ss.); S. PORCELLI, *Hetong e contractus*, cit. 15 ff. with further bibliography, also in Chinese. Finally, on this topic the very recent volume of R. CARDILLI-S. PORCELLI, *Introduzione* cit., appears of great impact, due to the depth of introspection and rigor. See also the essays in *Roma e America. Diritto romano comune*, 41, 2020, dedicated at the same subject.

[26] See S. TAFARO, Ius hominum causa constitutum. *Un diritto a misura d'uomo*, Naples, 2009.

[27] See S. PORCELLI, *Hetong e contractus*, cit., XIII.

[28] On the process that led to the elaboration of the Code starting from 2014, in addition to the authors cited *supra*, see now S. PORCELLI, *Hetong e contractus*, cit., 277 ff.; E. TOTI, *Diritto cinese dei contratti*, cit., 34 ff.

[29] The Chinese text is available on the website of the National People's Congress at http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml. See also the latest italian translation by HUANG MEILING, ed. by O. DILIBERTO, D. DURSI, A. MASI, *Codice civile della Repubblica Popolare Cinese*, Pisa, 2021.

[30] See e.g., P. RESCIGNO, *La 'forma Codice': storia e geografia di un'idea*, in *Riv. dir. civ.*, 2002, 29 ss.; with reference to China, see also N. IRTI, *La Cina verso l'unità di un codice civile* https://www.corriere.it/opinioni/17_gennaio_31/cina-l-unita-un-codice-civile-31b22dce-e705-11e6-b669-c1011b4a3bf2.shtml.

politico) del mondo da Occidente verso Oriente».[31] This point is also clearly perceived by our Chinese colleagues.[32]

Even within this new Code, the contract remains an ordering category of great epistemological, as well as social,[33] value. With the construction of the Code itself, it can be emphasized even more the principle of contractual freedom, which corresponds to a consequent greater distancing from the model that links the contract to the binding effects of the act performed in the perspective of a planned economy,[34] in which «i contratti costituivano soltanto i mezzi e le forme per regolare e realizzare le allocazioni pianificate».[35]

A number of studies have been devoted to the notion of contract in China, which have recognized its tortuous development, both from a civilistic-comparative[36] perspective and from a perspective that looks more closely at Roman law,[37] without forgetting the approach adopted by the Chinese jurists as well.[38] We can divide this development into different temporal phases.[39]

Prior to the adoption of the Code, the topic of the contract in China was mainly regulated by the General Principles Law of 1986 and by the Contract

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[31] See M. TIMOTEO, *Il Codice civile in Cina*, cit., 17.

[32] See, for instance, FEI ANLING, in the *Prefazione* to the volume by S. PORCELLI, *Hetong e contractus*, cit. Moreover, the North American jurist Nathan Roscoe Pound (1870-1964), with regard to the Chinese Code of 1931, had already pointed out how it was essentially the culmination of a series of developments in which the precipitate of Roman law had sedimented, starting from the foundation of the system with Justinian: see R. POUND, *Roman Law in China*, in *L'Europa e il diritto romano. Studi in onore di Paul Koschaker*, I, Milan, 1954, 441 ss. On the 'awareness' of the Chinese jurist today, see also *supra*, nt. 21.

[33] On the importance of the contract as a «istituzione sociale» ('social institution') see now C. DE CORES, *La teoría general del contrato a la luz de la historia*, Montevideo, 2017, quoted from the it. transl. *La teoria generale del contratto. Una prospettiva storica*, Torino, 2020, 11 ff.

[34] On this point, see particularly R. CARDILLI, *Precisazioni romanistiche su 合同e 诚实信用*, in M. PAPA-G M. PICCINEELLI-D. SCOLART (eds.), *Il libro e la bilancia. Studi in memoria di Francesco Castro*, Rome, 2011, 156 ff. (= in R. CARDILLI-S. PORCELLI, *Introduzione al diritto cinese* cit., 225 ss.); IDEM, *Diritto cinese e tradizione romanistica alla luce del nuovo Codice civile della RPC*, in *Mondo cinese*, 167, 2019, 36 (= 83 s.); on the 'economic contract' in China, see also G. AJANI, *s.v. Contratto economico nei Paesi socialisti*, in *Dig. disc. priv. Sez. civ.* IV, Turin, 1989, 259 ff. and now extensively S. PORCELLI, *Hetong e contractus*, cit., 44.

[35] See S. PORCELLI, *Hetong e contractus*, cit., 47.

[36] See M. TIMOTEO, *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*, Padua, 2004.

[37] See E. TOTI, *Diritto cinese dei contratti*, cit. and above all, with greater insights into Roman Law, S. PORCELLI, *Hetong e contractus*, cit.

[38] See now, SHI HONG, *Principali sviluppi e innovazioni nel libro sui contratti del Codice civile della Repubblica Popolare Cinese*, in *Roma e America. Diritto romano comune*, 41, 2020, 45 ss. (= in *Codice civile cinese e sistema giuridico romanistico* cit., 179 ss.).

[39] See M. TIMOTEO, *Il contratto in Cina*, cit., 254 ff.; S. PORCELLI, *Hetong e contractus*, cit., 41 ff.

Law of 1999, which have been a formidable tool in opening up China. [40]

Art. 85 of the General Principles Act 1986 defined a contract as an 'agreement between the parties to create, modify or terminate a civil relationship'. [41]

Article 2 of the Contracts Law of 15 March 1999 defines a contract as follows: «Ai fini di questa legge, per contratto si intende un accordo per costituire modificare o estinguere rapporti civili di tipo obbligatorio tra persone fisiche, persone giuridiche od altre organizzazioni, in qualità di soggetti paritari». [42]

The definition is substantially repeated, apart from a few variations that do not interest the present research, [43] in Art. 464 of the new Civil Code of the RPC. 2020 according to which: 'A contract is an agreement between civil subjects for the purpose of establishing, modifying or extinguishing civil binding relationships'.

The reference model is clearly the Franco-Italian model of the 'contract-agreement', as inheritance of natural law, although on a practical level the definition goes beyond the Italian (but before German) generalization, moving from the (Italian-German) 'legal relationship' towards the 'civil obligatory relationship', [44] in a perspective certainly closer to Roman law. [45]

The «solitario consenso che egemonizza le definizioni» ('solitary consensus that dominates the definitions'), however, cannot be reduced to the only structural element necessary for the construction of the contractual institution, unless we forget the cause, the form, the object, which even the Chinese Code (as well as the European Codes) refers to and regulates in other points, or considers in a more or less implicit manner. [46] The

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[40] On this point, see S. PORCELLI, *Hetong e contractus*, cit., 57 f.

[41] 合同是当事人之间设立、变更、终止民事关系的协议.

[42] I use the italian translation: see *Leggi tradotte della Repubblica Popolare Cinese: Legge sui contratti*, translated by L. FORMICHELLA-E. TOTI, Turin, 2002. ('For the purposes of this Law, a contract means an agreement to establish, modify or extinguish civil relationships of a compulsory nature between natural persons, legal persons or other organizations, as equal partners').

[43] E.g. the reference to 'natural persons, legal persons etc.' is replaced by a reference to 'civil subjects', while the reference to the equal position of the contracting parties disappears: on this point see R. CARDILLI, *Diritto cinese e tradizione romanistica*, cit., 37 ff.

[44] About the disappearance of the express reference to the obligation in the Code, because of the reorganization resulting from the insertion of the rules on the contract in the Code itself and therefore the need for coordination also with the provisions dictated therein, for example in the general part (art. 118) which mentions the contract among the sources of obligation, see, R. CARDILLI, *Derecho Chino y tradición romanista a la luz del nuevo Código civil de la RPC*, in *Roma e America. Diritto romano comune*, 40, 2020, 213 ff. but see also S. PORCELLI, *Hetong e contractus*, cit., 292-293.

[45] See R. CARDILLI, *Diritto cinese e tradizione romanistica*, cit., 37 (83 f.).

[46] See S. SCHIPANI, *La nuova legge cinese in materia di contratti e il diritto romano come base di essa e della comunicazione con i Codici del sistema romanistico*, in *Roma e America. Diritto romano comune*, 8, 1999, 225 ff. and particularly 231.

same can be said with reference to the binding force of good faith and to the «forza generatrice» ('generating force') and re-balancing of the *synallagma*,[47] so that, beyond the merely nominalistic-definition, also for the Chinese legal order it can be seen as misleading the perspective according to which the contract would be 'only' an agreement:[48] consequently, it appears evident that also in this case the «camicia di forza del volontarismo ('straitjacket of voluntarism')» does not fully deploy its effects.[49]

Moreover, the terminologic choice of the Chinese legislator seems to confirm this perspective, also from a mere linguistic point of view: in fact, from the 1950's onwards, the term '合同 (*hetong*)' was preferred to identify the contract, indicating rather the plurilateral legal act (*Gesamtakt*) with greater emphasis on the 'common purpose', as opposed to the term '契约 (*qiyue – Vertrag*)', which had been used until then to designate the contract in general since the time of the Qing modernization.[50]

It has been appropriately pointed out that 'the general category of contract never supplanted and eliminated the regulation of individual types of contracts'.[51] I therefore find useful to return briefly to the category of the real contract, considering in particular the loan contract in the new Chinese civil Code, in order to ascertain whether and what changes the enactment of the Code has introduced with respect to the previous legislation.

3. *The loan in Chinese Contract Law and Civil Code*

A. *The structure: reality and consensuality*

Obviously, the loan contract has been present in Chinese society since time immemorial. An interesting case is that of a loan granted by a certain Cheng Minsheng to a certain Lu Shi during the Ming dynasty (1368-1644),

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[47] Cf. R. CARDILLI, *Diritto cinese e tradizione romanistica*, cit. 38 (= 84), who reinterprets the *synallagma* of Greco-Roman tradition in the light of the Chinese principle (deriving from Confucianism) of the 'vital cycle of reciprocity' as «espressione concreta di una visione armonica del mondo»; on this point, see particularly S. PORCELLI, *Hetong e contractus*, cit., 259 ff., 271 ff., but also for the role «fondamentale, già radicato nella cultura cinese più antica» represented by equivalence in exchanges.

[48] See S. PORCELLI, *Hetong e contractus*, cit., 74; see also 91 ff. on the exception of non-performance and gift.

[49] Cf. M. TIMOTEO, *Il contratto*, cit. 122; on this point see again S. PORCELLI, *Hetong e contractus*, cit., 93.

[50] See S. PORCELLI, *Hetong e contractus*, cit., 8 f., according to whom 契约 (*qiyue*) would be more suitable to identify the meeting of wills that are not 'parallel' but 'opposed'.

[51] R. CARDILLI, *Diritto cinese e tradizione romanistica*, cit., 2019, 38 (= 84): «mai la categoria generale di contratto ha soppiantato, eliminandola, la regolamentazione dei singoli tipi contrattuali».

in which the deciding magistrate concluded that the contract was valid, even after many years. [52]

Most recently, our contract was regulated in the 1999 General Law of Contracts, which I read in the Italian translation edited by Laura Formichella and Enrico Toti. [53]

First of all, it is interesting to note that Chapter XII of the Law is expressly headed 'Money Loan', as if to acknowledge the fact that loans of fungible things other than money are nowadays rarely applied and it is not worth codifying them. [54]

The Chinese Contract Law identifies, within the money loan, a sort of 'subspecies', having as its object the loan between natural persons, for which it provides an *ad hoc* discipline. This suggests, although the legislator does not make this clear, that the intention is to diversify, in the ways we shall see, the loan of money taken out by a credit institution or a bank, which constitutes a true and proper financial operation, from the loan concluded *inter amicos*.

Generally speaking, the loan appears to be structured as a consensual contract. [55] This was in fact the position held by some Chinese scholars, who had argued against maintaining the category of real contracts, with particular reference to the loan. [56]

Nothing in this direction can be deduced from the definition of the contract contained in Art. 196: «Il mutuo è il contratto con cui il mutuatario prende in prestito denaro dal mutuante e alla scadenza lo restituisce, pagando inoltre gli interessi» ('The loan is a contract whereby the borrower borrows money from the lender and pays it back at the due date, together with interest').

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[52] Specifically, the borrower asserted that the passage from the Ming to the Qing dynasty (and the consequent increase in his political and social power, thanks to his greater closeness to the imperial hierarchy) had rendered the restitutive obligation unenforceable: on this point, see the account by WANG GUIGUO, *A Survey of China's Economic Contract Law*, in *Pacific Basin Law Journal*, 4, 1985, 14 ff.

[53] *Leggi tradotte delle Repubblica popolare cinese: la legge sui contratti*, cit. The caution with which I will sometimes express myself in the following pages necessarily depends on the fact that the sources cited, as well as the doctrine, are not (yet) accessible to me, for language reasons, in their original version.

[54] It is worth noting, however, that the restyling of the BGB seems to have moved in the opposite direction, dividing the loan into *Geld* and *Sachdarlehen*: see § 488 Abs. 1 and § 607 Abs. 1.

[55] On this point, for the first comparative observations with Mexican law, see already J. MENA BRITO PAZ, *Estudio sobre la naturaleza equivoca del contrato de mutuo en el Derecho civil mexicano y algunas consideraciones sobre su naturaleza consensual en el Derecho chino*, in *II Coloquio internacional de estudios chino y mexicanos. Del diálogo al entendimiento*, Peking, 2017, 247 ff.

[56] See, for example, in this regard, WANG HONG, *Yaowu hetong de cun yu fei. Jianlun Woguo 'Minfadian' de lifa jueze*, in *Shanghai Shifan Daxue Xuebao*, 4-2007; ZHU QINGYU, *Yisi biaoshi yu falü xingwei*, in *Bijiaofa yanjiu*, 1-2004 (both in Chinese).

The norm not only does not describes the conduct expected from the borrower in terms of duty, pointing out only the fact of the restitution, but also does not offer any element for a structural qualification of the contract. The terminology used in the Italian translation («prende in prestito ('borrows')», in fact, refers to the moment of the *accipere* and not of the *dare*, and so does not make it clear whether the *traditio* (of which the *accipere* represents the conclusive moment) is or is not a structural element necessary for the conclusion of the contract.

However, the subsequent Art. 201 of the Law seems to clarify the point sufficiently, where it provides, in par. 1, that «qualora il mutuante non fornisca il denaro nel termine e nell'ammontare convenuti, provocando perdite al mutuatario, deve risarcirle» ('if the lender fails to deliver the money on the agreed date and in the agreed amount, causing losses to the borrower, he must compensate them'); and, in the second paragraph, that: «Qualora il mutuatario non ritiri il denaro alla data e nell'ammontare convenuti, deve pagare gli interessi da tale data e su tale ammontare» ('If the borrower doesn't collect the money on the agreed date and in the agreed amount, he must pay interest from that date and on that amount').

Reading these norms, it is clear that if the lender may agree with the borrower on the time limit within which the *datio* is to be performed, and the amount of the *datio* may also be agreed upon, the *datio* cannot be elevated to an element of structure of the contract. In the same way, the norm of the second paragraph, which sanctions the borrower who does not respect the agreement on delivery, leads the interpreter to consider the contract already perfect at the time when agreement is reached on the amount and the terms of delivery and restitution (as well as on interest: see *infra*), degrading the *traditio* to a merely executive moment of the contract.

It should be noted, incidentally, that the obligation of the borrower to pay interest from the moment of the agreement, regardless of the actual disbursement of the sum, appears excessively penalizing for the borrower, even in the hypothesis that he is the party that refuses to implement the binding agreement. On this point, the Roman sources leave the borrower free not to follow through with the binding agreement, if he does not want to receive the money, which he has undertaken to repay, even if it is in the solemn form of *stipulatio*. [57]

On the other hand, the practice of consensual loans, which is becoming more widespread in Italy in the form of the so called 'mutui di scopo' and 'mutui edilizi', provides for the disbursement of the sums by the lender according the work in progress (so called '*stato di avanzamento lavori*'), which allows the borrower to better modulate, according to his needs, the receipt of the sums of the loan, which he will then have to repay.

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[57] Cf. *Paul.*, 5 ad *Plaut*. D. 12.1.30: *Qui pecuniam creditam accepturus spopondit creditori futuro, in potestate habet, ne accipiendo se ei obstringat*.

Finally, it cannot be overlooked that it is not clear from the wording of the article of the Chinese law how is sanctioned the borrower who refuses to receive the sums in the time and amount foreseen. In particular, if, as seems likely, the lender is entitled to damages following the borrower's non-performance, it seems inappropriate to impose on the borrower also the obligation to pay interest. On the other hand, the obligation to pay interest is justified in the absence of such an obligation to pay damages, but in this case we would face to a non-performing loan, capable, however, in an anomalous manner, of generating interest, which must therefore be considered not as a conventional interests, but rather as corresponding interests.

A further and definitive argument in favour of the consensuality of the loan as governed by these rules is, finally, provided by the contrast between what has been provided so far, with Art. 210 of the Law, which states that: «Il contratto di mutuo tra persone fisiche acquista efficacia dal momento in cui il mutuante dà il denaro» ('The loan between natural persons takes effect from the moment the lender gives the money').

The Chinese doctrine, in fact, seems to orient the interpretation of this article towards the reality of loans between natural persons.[58] However, the Italian translation speaks of the «acquisto di efficacia» ('acquisition of effectiveness') of the loan, starting from the delivery: this means, for our dogmatic categories, that the delivery is required for the effectiveness and not for the perfection of the contract, i.e. that the loan is to be considered concluded already from the exchange of the consents and that the delivery relates only to its performance.

Now: all constructions which, by relying on the effectiveness of the contract, attempt to move forward respect to the time of the agreement, the moment when the contract actually begins to take effect, including the more refined ones, which rely on the *condicio iuris* or construct delivery as a sort of «concausa di efficacia» ('concause of effectiveness') or speak of «realità differita» (deferred reality'),[59] they do no more than apply the scheme of the real contract (according to which the contract does not become fully effective until after delivery), thus concealing the intention to expunge the category of reality[60] from the juridical system. Nor may the usual argument be adduced in respect of leases, where, although not be-

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[58] See for example JIANG PING, *Zhonghua Renmin Gongheguo Hetongfa Jing Jie* (in Chinese), Beijing, 1999, 164.

[59] See V. DI GRAVIO, *Teoria del contratto reale e promessa di mutuo*, Milan 1989, 83 ff.; A. LUMINOSO, *I contratti tipici e atipici. Contratti di alienazione, di godimento, di credito*, in G. IUDICA-P. ZATTI (eds.), *Trattato di diritto privato*, Milan, 1995, 704.

[60] In doctrine, in this sense see already C.A. MASCHI, *La categoria dei contratti reali. Corso di diritto romano*, Milan, 1973, 7; more recently, there has been talk of an «artifizio volto a soddisfare l'assorbente proposito di conciliare la categoria dei contratti reali con la regola generale per cui il contratto si perfeziona in forza del solo accordo delle parti»: see D. CENNI, *La formazione del contratto*, cit., 49.

ing a real contract, the effects for the lessee are not produced until after the lessor has delivered the thing to him: here, in fact, we are dealing with a synallagmatic contract, in which one performance (payment of rent) cannot arise unless the other (provision of the leased thing) is performed. In the case of a loan, even if one construct it as a bilateral contract in the case of onerous loan (obligation to deliver, against obligation to pay interest), the shifting of the effectiveness to the time of delivery would not make any sense in case of a gratuitous loan, other than to conceal the occurrence of a real contract.

Hence the proposals for modification that have been circulating within Chinese doctrine: I refer, in particular,[61] to the so-called 'Project of Green Code' by Xu Guodong, professor of Roman law at the University of Xiamen, who explains that the name of his project derives from the desire to define, through his work, «un equilibrio tra umanità e risorse, un rapporto di coesistenza pacifica tra l'uomo e gli altri esseri nonché un ridimensionamento dello status umano» ('a balance between humanity and resources, a relationship of peaceful coexistence between man and other beings as well as a re-dimensioning of human status').[62] In the 'Project of Green Code', Xu Guodong, taking up a thesis that circulated in Italy in the last century,[63] proposes to construct the gratuitous loan as real, and the onerous loan as consensual; this opinion in China seems to be supported by the adhesion of other scholars.[64] Now: regardless of the criticism that this thesis has attracted in Italy, and provided that it is not an impression dictated by the translation from Chinese, the structure proposed by Xu

[61] But see also LIANG HUIXING (ed.), *Zhongguo Minfadian Cao'an Fuliyou (A propositional version with reasons for civil code draft of China)*, Peking, 2013, 537.

[62] See XU GUODONG, *Un'esposizione sintetica del principio 'verde' nel Progetto del Codice Civile Verde per la Cina*, in *Contratto Impresa Europa*, 13, 2008, 421.

[63] The thesis is actually quite old: already G. DEMELIUS, *Realkontrakte im heutigen Recht*, in *Jahrbücher für die Dogm. des heut. röm. und deutsch. Privatrecht*, III, 1859, 399 ff. and in particular 405 ff., but also J. UNGER, *Realcontracte im heutigen Recht*, in *Jahrbücher für die Dogmatik des heut. röm. und deutschen Privatrechts (Jhering's Jahrb.)*, 8, 1866, 1 ff. held that real contracts have a *raison d'être* only when they put in place an advantage for the contracting party. Closer to our times, and with reference to the Italian juridical order, see G. DE NOVA, *Il tipo contrattuale*, Padua, 1974, 110 ff.; G. D'AMICO, *La categoria dei contratti reali 'atipici'*, in *Rass. dir. civ.*, 1984, 380; F. GALGANO, *Il negozio giuridico*, in L. MENGONI (dir.), *Trattato di diritto civile e commerciale*, formerly directed by A. CICU-F. MESSINEO, III.1, Milan, 1988, 157 s. It has thus be said, on the basis of R. SACCO, *Il contratto*, cit., 613 ff.; IDEM, *Causa e consegna nella conclusione del mutuo, del deposito e del comodato*, in *Banca Borsa e Titoli di credito,* 1971, I, 502 ff., that the delivery 'takes the place' of the cause: cfr. R. TETI, *Il mutuo*, *Trattato* IV, 2, cit., 591 ff.; M. DE TILLA, *Donazione* cit., 548; P. GAGGERO, *s.v. Mutuo (dir. civ.)*, in *Enc. Treccani*, 2013 (https://www.treccani.it/enciclopedia/mutuo-dir-civ_%28Diritto-on-line%29/).

[64] See, for example, LIU JIA'AN, *'Yaowu hetong' gainian de shenjiu*, in *Bijiaofa yanjiu*, 4-2011, or the reflections in ZHENG YONGKUAN, *Yaowu hetong zhi cunzai xianzhuang jiqi jiazhi fansi*, in *Xiandai faxue*, 1-2009 (both contributions are in Chinese).

Guodong [65] seems to set out from the point of view of validity a question that instead concerns the structure of the contract, that is, the elements required for the juridical qualification of the contract, which are obviously different from the requirements that the juridical order postulates for its validity. [66]

In this regard, it is worth noting that the promulgation of the Chinese Civil Code brought a dogmatic conceptual cleaning up by the Chinese legislator, which has been noticed by the doctrine. [67] Insofar as it is relevant here, it can be emphasized that art. 679 of the Code, which corresponds to art. 210 of the Law, abandons the perspective of efficacy, in order to turn, more appropriately, to that of the conclusion of the contract: the term used, in fact, is '*chengli*' (成立), which is used in the meaning of 'constitute', as for instance happens in the case of art. 136 of the Code on legal transactions, where it is combined with the dogmatically different '*shengxiao*', in a formulation that provides that the legal transaction, unless otherwise provided by law or by the parties, takes effect (*shengxiao*) from the moment of 'constitution' (*chengli*). [68] It is therefore a different term from '*shengxiao*', which we find in Art. 210 of the Law and which, as stated above, refers to effectiveness, creating ambiguity as to the different dogmatic profiles of the conclusion of the legal transaction/contract and its effectiveness.

For the rest of the articles referred to above, there is a coincidence between the Law and the Code: art. 667 of the Civil Code reproduces art. 196 of the Law; art. 671 reproduces in two paragraphs the text of art. 201 of the Law.

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[65] XU GUODONG (ed.), 绿色民法典-Green *Civil Code Draft*, Social Sciences Documentation Publishing House 2004, 559, art. 407: 'the loan contract between natural persons becomes valid when the borrower delivers the object'.

[66] Cf. on this point already U. MAJELLO, *Custodia e deposito*, Naples, 1958, 283; and then also F. MASTROPAOLO, *I contratti reali*, in R. SACCO (dir.), *Trattato di diritto civile. I singoli contratti*, VII, Turin, 1999, 36.

[67] On this point see, brilliantly, S. PORCELLI, La nuova 'Parte generale del diritto civile della Repubblica Popolare Cinese'. Struttura e contenuti, in Riv. dir. civ., 65, 2019, 693 ff. (= in R. CARDILLI-S. PORCELLI, Introduzione al diritto cinese, cit., 113 ss.), who well illustrates the increasingly better understanding and refinement also in Chinese positive law of some dogmatic categories, such as effectiveness, validity, nullity, voidability etc., with important consequences also on the terminology used by the Chinese legislator.

[68] Article 136 of the Code provides that:
民事法律行为自成立时生效，但是法律另有规定或者当事人另有约定的除外.
行为人非依法律规定或者未经对方同意，不得擅自变更或者解除民事法律行为.
See also Art. 490 of the Code on the conclusion of contracts where the term '*chengli*' is used in this sense.
当事人采用合同书形式订立合同的，自当事人均签名、盖章或者按指印时合同成立。在签名、盖章或者按指印之前，当事人一方已经履行主要义务，对方接受时，该合同成立.
法律、行政法规规定或者当事人约定合同应当采用书面形式订立，当事人未采用书面形式但是一方已经履行主要义务，对方接受时，该合同成立.

In the overall assessment of this point, I believe I can say that the choice of the Chinese legislator to try to adapt the dogmatic configuration of the loan to the concrete loan transaction carried out by the parties is appreciable, differentiating according to this the moment of perfection of the contract itself, i.e. providing for a real loan between natural persons and a consensual loan in the event that the contract is concluded between a financing entity and a private party or between two entities. The choice, although not exempt from doctrinal criticism, [69] is not new in the Roman juridical system, because, albeit in different forms and ways, it was already adopted in the Prussian ALR of 1794 [70] and in the French-Italian draft of the Civil Code of obligations of 1927, [71] as well as in the draft of the Italian Civil Code of 1936, [72] whereas it is only with the final text of the Italian Civil Code of 1942 that this solution is abandoned in favour of the choice codified in Art. 1813 of the Italian Civil Code, which makes tip the scales (net of the loan promise codified in Art. 1822 of the Italian Civil Code 1942) decisively in favour of reality. [73] It only seems curious to note that in a country belonging to the same Romanistic juridical system, such

[69] In Italy, the possibility of 'doubling' a real contract with a corresponding (and atypical) consensual contract has always divided the doctrine; for the defenders of this possibility see: N. COVIELLO, *Del contratto estimatorio*, in *RISG*, 15, 1893, 380 f.; P. FORCHIELLI, *I contratti reali*, cit., 152 ff.; F. MESSINEO, *s.v. Contratto (dir. priv.)*, in *ED*, 9, 1961, 107; C.A. FUNAIOLI, *Deposito, sequestro convenzionale, cessione dei beni ai creditori*, in G. GROSSO-F. SANTORO-PASSARELLI (dir.), *Trattato di diritto civile,* V.6, Milan, 1961, 47 s.; A. DALMARTELLO-G.B. PORTALE, *s.v. Deposito (dir. vig.)*, in *ED*, 12, 1964, 252 ff.; F. MASTROPAOLO, *Il deposito*, in P. RESCIGNO (dir.), *Trattato di diritto privato*, XII, *Obbligazioni e contratti,* IV, Turin, 1985, 458 ff.; IDEM, *I contratti reali*, cit., 141 ff.; G. D'AMICO, *La categoria dei contratti reali 'atipici'*, cit., 368 ff. For the contrary opinion, see instead E. SIMONETTO, *I contratti di credito*, Padua, 1953, 212 ff.; G. BENEDETTI, *Dal contratto al negozio unilaterale*, Naples, 1958, 218 ff.; C.A. MASCHI, *La categoria*, cit., 18 ff.; A. GALASSO-G. GALASSO, *s.v. Deposito*, in *Digesto delle disc. priv. – Sez. civ.*, 5, Turin, 1989, 256; S. CASTRO, *I contratti di deposito*, Turin, 2007, 10; A. SCALISI, *Il contratto di deposito. Del deposito in generale, del deposito in albergo, del deposito nei magazzini generali*, in F.D. BUSNELLI (dir.), *Il Codice civile. Commentario*, found. by P. SCHLESINGER, Milan, 2011, 17 f.; M.G. ROSSI-C.E. BRUNO, *I contratti di finanziamento, il mutuo e il mutuo bancario. La tutela del consumatore*, in N. GRAZIANO (ed.), *Il mutuo bancario,* Padua, 2013, 20 ff.

[70] Cfr. *ALR 1794* I, 11, 1 § 653: «Das eigentliche Darlehn ist ein Vertrag, vermöge dessen Jemand gangbares ausgemünztes Geld … einem Andern zum Verbrauche übergibt»; § 654 «Hat Jemand durch einen gültigen Vertrag sich verpflichtet, einem Andern ein Darlehn zu geben, so ist er schuldig diesen Vertrag … zu erfüllen».

[71] *Progetto di Codice delle obbligazioni e dei contratti. Testo definitivo approvato a Parigi nell'Ottobre 1927 – Anno VI*, Rome, 1928, art. 636, 294: «il mutuo è il contratto con cui una delle parti dà o si obbliga a dare...».

[72] On this point, it is sufficient here to refer to R. TETI, *Il mutuo,* in P. RESCIGNO (dir.), *Trattato di diritto privato,* XII, *Obbligazioni e contratti*, IV2, Turin 2007, 646; see also *infra*, following nt.

[73] On this point, for a summary with bibliographical references, see A. SACCOCCIO, *L'eredità del sistema romano dei contratti reali*, in *BIDR*, 110, 2016, 137.

as Cuba, after the introduction of the Civil Code in 1987, has been reached the exact opposite solution to the Chinese Code: the loan between a private individual and a bank is configured as real contract and that between natural persons as consensual contract. [74] At the systematic level, then, in China the distinction between the two models of loan emerges only from a reading of the rule on the loan between natural persons, which is placed almost at the end of Chapter XII dedicated to our contract: perhaps the Chinese legislator would have done better to clarify the point immediately *ex professo*, avoiding laborious reconstructive interpretations.

B. *Preliminary obligations and content of the contract*

Art. 198 of the Law provides that the lender may require the borrower to provide appropriate security, which will follow the requirements set out in the Law on the Guaranties. The norm is not reproduced in the Civil Code and, in fact, one might doubt its usefulness, given that a guarantee may be attached to any contractual relationship and, moreover, that the Code itself, as a unitary regulatory text, incorporates both the norms on guaranties, that had been dictated in the Law on Real Rights (now chapters 16 to 19 of Book II of the Code devoted precisely to Guaranties) and the norms on real guaranties, and a large part of those laid down in the Law on Guarantee, that have been included in the book on contracts of the Code (book III), in the part on typical contracts in chapter XIII, and therefore immediately after the one devoted to the loan (book XII).

Art. 199, on the other hand, requires the borrower to provide «informazioni veritiere sulla sua attività commerciale e situazione finanziaria, secondo quanto richiesto dal mutuante» ('truthful informations about its business activities and financial situation, as requested by the lender'). The norm is substantially reproduced in Art. 669 of the Code. Some aspects of this regulation are not clear. The obligation to act in good faith is codified in the Chinese Civil Code as a general principle, and is included in the general part of the Code, so that any fraudulent behaviour of the borrower already appears to be punishable in the light thereof. [75] In addi-

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[74] Cf. art. 379 Cc. cub. 1987: «Por el contrato de préstamo una de las partes se obliga a entregar a la otra una cantidad de dinero o de bienes designados solamente por su género, y esta a devolver otro tanto de la misma especie y calidad dentro del plazo convenido»; art. 447 Cc. cub. 1987: «Por el contrato de préstamo bancario, el banco pone a disposición del interesado una suma de dinero para aplicarla a un determinado fin, obligándose este a su devolución y al pago del interés convenido, que no puede exceder del legal». On this point, see A. SACCOCCIO, *Dal 're contrahere' al contratto reale. Brevi note sulla categoria di 'contratto reale' nel Codice civile di Cuba del 1987*, in A. BARENGHI-L.B. PÉREZ GALLARDO-M. PROTO (edds.), *Costituzione e diritto privato. Una riforma per Cuba*, Naples, 2019, 429 ff.

[75] See Art. 7: 民事主体从事民事活动，应当遵循诚信原则，秉持诚实，恪守承诺. On the principle of good faith from the 1986 General Principles Law, to the 1999 Contracts Law

tion, the reference to 'what is requested by the lender' seems unclear, as if the borrower could willfully, but lawfully, conceal certain financial criticalities, likely to convince the lender not to conclude the contract, if the latter has not explicitly requested it, except for the fact that good faith operates as a general principle and is also referred to in Art. 500 as a parameter of a general nature for assessing the existence of circumstances that could lead to liability for *culpa in contrahendo*.[76] Finally, the reference to 'business activity' and to the 'financial situation' seems to lead the interpreter to consider this norm as limited only to loans constituting financial transactions, excluding its application (and it is not clear why) to friendly loans between natural persons, which the Code deals with in the final part of the Title.

From the point of view of the behaviour expected from the debtor, the norm contained in Art. 206 of the Law (= Art. 675 of the Civil Code) appears to be absolutely common sense, where it is stated that in the event that the term of restitution has not been agreed or is not clear, the borrower may perform at any time, while the lender is allowed to request restitution within a reasonable time. I observe, however, that, on the one hand, it is not clear why, in view of the consensual nature of the loan, such requirements have not also been introduced with respect to the lender's obligation to pay out the sums. On the other hand, from a practical point of view, it seems highly unlikely that there will ever be any case where a bank or other lending institution (the Law and the Code referring in this part essentially to such types of loans) omits to fix the repayment term or does so in a manner not otherwise rebuildable.

C. *Gratuity*

As regards gratuitousness, the loan was, as is well known, a naturally gratuitous contract in Roman law: the lender who wished to receive interest had to resort to another contract, the *stipulatio* cd. *usurarum*. This was due, in my opinion, not only to technical and legal reasons, since the Roman loan was protected by the *condictio*, a strictly legal action aimed at the restitution only of what had been 'given', but also to ethical and social reasons, linked both to the fact that the loan of fungible goods was founded in Rome on values such as *fides*, *amicitia,* etc., and to the hatred that

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and now in the Code see S. PORCELLI, *Hetong e contractus*, cit., 283 and the bibliography referred to there.

[76] See Art. 500(3), the full text of which is as follows:
当事人在订立合同过程中有下列情形之一，造成对方损失的，应当承担赔偿责任：
（一）假借订立合同，恶意进行磋商；
（二）故意隐瞒与订立合同有关的重要事实或者提供虚假情况；
（三）有其他违背诚信原则的行为.

the Romans repeatedly expressed towards the activities of usurers (*foeneratores*), who were judged to be thieves twice. [77]

On this point, as is well known, the 1942 Italian Civil Code makes a decidedly opposite choice, [78] due in my opinion to various factors, which need not be investigated here, and among which, certainly played a leading role the ethics of capitalism and the acknowledged productivity of money. The same option has been adopted by the Chinese legislator: after all, by limiting this contract only to money, the choice appears almost consequential, even if it is somewhat blurred in the legal texts. [79]

Already the 1999 Law in Art. 197[2] stated that «il contenuto del contratto di mutuo prevede clausole come ... il tasso di interesse» (the content of the loan contract includes clauses such as ... the interest rate'), directing the interpreter towards the natural onerousness of the contract; the norm is slavishly reproduced in Art. 668[2] of the Civil Code, where it is also expressly underlined what was implicit in the wording of Art. 197, namely that this occurs 'generally' (一般, *yiban*). It is evident that the presence of the adverb 'generally' helps a great deal in the interpretation of the text, formally clarifying how the case of onerousness of the loan is to be considered optional (although corresponding to the generality of cases).

In any event, the reading of Art. 211 of the Law, where it is established that: «Nel contratto di mutuo, qualora gli interessi non siano convenuti o lo siano in maniera non chiara, si presume che non si paghino» (In the loan contract, if interest is not agreed or is agreed in an unclear manner, it is presumed that it is not paid') seemed to suggest the 'natural' onerousness of the contract, even in the case where the loan is concluded between natural persons. In contrast, in the Civil Code, where the matter appears to be more clearly settled, it is provided in paragraphs 2 and 3 of Art. 680 that, in general, where the parties have not agreed upon interest, it is pre-

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[77] On this point, for the sources and their discussion, see what I say in A. SACCOCCIO, *Il mutuo nel sistema giuridico romanistico*, cit., 27 ff.

[78] Cf. art. 1815 of the Italian Civil Code 1942: «Salvo diversa volontà delle parti, il mutuatario deve corrispondere gli interessi al mutuante»: the norm does not exclude, as is obvious, the possibility of a free loan, but structures the contract as naturally onerous, if the parties have not agreed otherwise. In reality, since the art. refers textually to the provision of interest, the loan of fungible things other than money should, on the contrary, be naturally free of charge: cfr. M. LIBERTINI, *s.v. Interessi*, in *ED,* 22, 1972, 95 ff. and in particular 110, who points out how in the preliminary draft of the Book of Obligations the presumption of onerousness of the loan was only foreseen for the 'commercial' loan, and was then generalized in the final draft, almost as if to testify to the acquisition in the social consciousness of the general onerousness of credit operations; on this point, see also R. TETI, *Il mutuo* cit., 627 f.; B. GARDELLA TEDESCHI, *s.v. Mutuo (contratto di)*, in *Dig. disc. priv sez. civ.*, Turin, 11, 1994[2], 546 and nt. 4.

[79] Obviously, the reference here is to contractual interest: interest on arrears is expressly provided for in Art. 207 of the Law (= Art. 676 of the Civil Code), where it is specified that the relevant rate is fixed by state provisions, if it has not been agreed upon by the parties.

sumed they are not due (par. 2), while in the event that what has been agreed upon is not clear and the parties are unable to reach an additional agreement on the point, interest is to be determined having regard to local or industry custom, market rates and other factors, with the express clarification, in the last part of par. 3, that the latter option does not apply to loans between natural persons, in which case, therefore, if the agreement on interest is unclear, it is presumed they are not due. [80]

In fact, what is said in paragraph 2 does not appear to be entirely clear: while it may make sense to interpret as not being onerous a loan in which it is not clear whether and to what extent the payment of interest has been agreed, it is difficult, on the contrary, to interpret as other than gratuitous a loan which expressly does not provide for the payment of interest. The norm, in this sense, seems in fact an unnecessary statement.

Art. 208 of the Law (corresponding to Art. 677 of the Civil Code) provides that if the borrower returns the principal in advance, interest is to be calculated only on the period during which has had the use of the money, unless the parties have agreed otherwise: the scope of this last specification seems unclear, as it could impose on the borrower, in a quasi-sanctioning way of the performance made in advance (even if agreed in advance with the lender), to pay interest also for the period during which he has not had the use of the money, effectively depriving of any sense the case of early repayment.

I have already mentioned above (see ntt. 55 ff.) about the opinion of Xu Guodong, who proposes to codify the onerous loan as consensual, and the free loan as real (unless otherwise agreed by the parties or otherwise provided by law), while, again with reference to the issue of onerousness/gratuity, very interesting is Art. 200 of the Law, later replicated in art. 670 of the Code. According to this norm: «Gli interessi del mutuo non possono essere dedotti in anticipo dal capitale. Qualora lo siano, il mutuatario deve restituire la somma effettivamente ricevuta e gli interessi vengono calcolati su tale somma» ('Interest on the loan may not be deducted in advance from the capital. If they are, the borrower shall return the sum actually received and interest shall be calculated on this sum'). In this way, the Chinese legislator wanted to combat usurious practices, whereby interest is pre-deducted from the loan capital, which is thus given in a smaller amount, although interest is calculated on the total amount and not on what was actually received. This practice was also known by Roman lenders, who were facilitated by the abstractness of the *stipulatio*, which allowed them to receive the promise to repay an amount calculated

[80] Article 680(2) and (3) of the Code provides that:
借款合同对支付利息没有约定的，视为没有利息.
借款合同对支付利息约定不明确，当事人不能达成补充协议的，按照当地或者当事人的交易方式、交易习惯、市场利率等因素确定利息；自然人之间借款的，视为没有利息.

taking into account the total amount of capital and interest. [81]

Rules on interest can also be found in Article 204 of the Law, which obliges the lending financial institution to set the rate within the minimum and maximum limits set by the People's Bank of China (a rule that does not appear to be directly reproduced in the Code) and in Article 205 of the Law (= Article 674 of the Civil Code), which sets out the manner and time of payment of interest.

It is worth noting, however, an important change of course that the Civil Code has made with respect to the Law, introducing, in Art. 680 par. 1, expressly the prohibition of usury, which, as is well known, constitutes a cornerstone of the Roman juridical system, as the most attentive legal scholars have not failed to note. [82] The same article of the Code also provides, as pointed out, that if the parties have not expressly agreed upon a rate of interest, the contract shall be deemed to be free of charge and refers to the practices of the local area, in the event that the provision of the parties is not sufficiently clear on the point. It is therefore worth emphasizing, in clarifying what has been said above on the natural onerousness of the loan in Chinese law, that here a clearly (albeit in a somewhat cumbersome manner) different profile appears to emerge, orienting the interpreter towards the presumption of natural gratuitousness of the loan between natural persons.

D. *Form, damages and 'mutuo di scopo'*

The foreign interpreter is also impressed by other Chinese loan rules, which mark discontinuities with both Roman law and the Italian juridical order.

For example, Art. 197 (corresponding, as has been said several times, to Art. 668 of the Civil Code), without prejudice to a contrary agreement of the parties and only in the case where they are natural persons, expressly

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[81] Epigraphic documents provide evidence of this behavior: it is enough here to refer to P. GRÖSCHLER, *Die Tabellae-Urkunden aus den pompejanischen und herkulanensischen Urkundenfunden*, Berlin, 1997, 157 f. (but see also IDEM, *Die Konzeption des mutuum cum stipulatione*, in *TR*, 74, 2006, 261 ff. [= *Il 'mutuum cum stipulatione' e il problema degli interessi*, in *Quaderni Lupiensi di Storia e Diritto*, edited by F. LAMBERTI, Lecce, 2009, 109 ff.]), who, among the ways of calculating interest practiced by Roman lenders, distinguishes the so-called 'accretion' method ('*Disagio*'), in which occurs the mechanism described above and the borrower pays a higher rate, from the 'interest capitalization' method '*Kapitalisierung der Zinsen*'), in which the rate is usually lower, because one pays only on the sum actually numbered. For a possible practical application, see R. LAURENDI, *Mutuum cum pactum adiectum e nuovi formulari contrattuali in una Tabella cerata londinese*, in *Iuris Antiqui Historia. An International Journal on Ancient Law*, 9, 2017, 75 ff.

[82] See S. PORCELLI, *Il nuovo Codice civile,* cit., 817 (= in R. CARDILLI-S. PORCELLI, *Introduzione al diritto cinese*, cit., 104).

requires the written form of the contract, thus clearly departing from the 'informality' that has guided the birth of the institution, since its first steps in Roman law. [83]

Let me briefly return to Art. 201 of the Law (reproduced in Art. 671 of the Civil Code): in this article, as we have seen above, the Chinese legislator provides that if the lender does not provide the borrower with the promised money, causing him losses, he must compensate for them. In this regard, the Roman jurist Paulus (see *Paul., 2 ad ed.* D. 45,1,68) already specified that in such a case the compensation must not be limited to the amount agreed as a loan, but must include the *id quod interest*, an expression corresponding to what the modern doctrine indicates as positive interest: [84] in other words, the lender who does not fulfil his obligation to deliver the money must compensate the borrower for all that the latter would have been able to collect, if he had had the borrowed sum at his disposal. This, I believe, is the best interpretation of the Chinese norm.

Also interesting are arts. 202 and 203 of the Law (now arts. 672 and 673 of the Civil Code), which codify what Italian jurisprudence and doctrine have called '*mutuo di scopo*', i.e. a loan in which the parties fix a destination constraint for the borrowed sum. In such a case, the lender is given a generic power of 'verification' and 'control' (检查, *jiancha* and 监督, *jiandu*) over the actual use of the disbursed sums for the agreed purposes. Since such purposes are set forth in the agreement underlying the transaction, failure to comply with them allows the lender, according to the tenor of the Law and the Code, to suspend the disbursement of the loan (which, of course, takes place on a progress basis ['*a stato avanzamento lavori*']), request the early repayment of the sums disbursed *or* (emphasis mine) request the termination of the contract: in my opinion, the lender, when he stops disbursing the sum and asks for the restitution of what he already gave, is already implicitly manifesting its intention to withdraw from the contract, so that to set an alternative between these two types of behavior is not very perspicous. It would have been better to provide for the possibility of termination of the contract by the lender on the grounds of non-performance by the borrower, which consequently entails repayment of what he has already disbursed and the terminate of the obligation to disburse the remainder capital. [85]

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[83] For the terminology 'informal loan' it is sufficient here to refer to M. TALAMANCA, *Istituzioni di diritto romano*, Milan, 1995, 543.

[84] See A. SACCOCCIO, *Mutuo reale, accordo di mutuo e promessa di mutuo in diritto romano*, in R. FIORI (ed.), *Modelli teorici e metodologici nella storia del diritto privato*, IV, Naples, 2011, 409 ff.

[85] The Italian Supreme Court of Cassation has held that in the '*mutuo di scopo*' a special purpose loan, the failure or exhaustion of the purpose envisaged in the contract entails the obligation of the borrower to repay (see *Cass. civ.*, 12 April 1988, no. 2876, in *Arch. Civ.*, 1988, 1061: the Court points out that in the '*mutuo di scopo*' the purpose becomes an inte-

In any case, it is not clear from the tenor of these legal texts whether it is a general provision, valid for all loans, or a particular rule, to be applied only to certain types of loans, as is the case in Italy. Indeed, both the reference to 'what has been agreed' (约定, *yueding*), and the systematic placement, as well as, finally, the repetition of the same expositive scheme in the preceding and subsequent articles seem to orient the interpreter to consider the norms applicable to all loans and not only to some types of loans. Moreover, a decisive clue in this respect seems to be found in Art. 197[2] (= Art. 668[2] of the Civil Code) where the 'purpose of the loan' is included among the clauses that 'the content of the loan agreement generally includes [86] ...'.

It should also be remembered that the Roman sources also provided, in certain very special cases, for restrictions on the use of the sums granted as loans. [87]

4. *Conclusions*

From a more general point of view, it seems to me that the considerations made so far allow us to confirm some of the conclusions I have allowed myself to draw in previous works. [88]

The Chinese legislator, in keeping with the tradition which I have attempted to outline in the preceding pages, has chosen to keep the way open for the real loan; this does not imply, as we have also seen, denying that, for certain hypotheses, the corresponding consensual scheme may not be more protectiv: it only means, in my opinion, recognizing that this circumstance cannot in any way lead to proposing the setting aside of the real loan from the juridical system, or even, from a more general perspec-

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gral element of the contractual *synallagma*), while the failure to achieve the purpose itself entails the nullity of the contract (see *Cass. civ.*, 19 October 2017, no. 24699, in *I contratti*, 2018, 417 ff., with a note by M. RENNA, *Il mutuo di scopo convenzionale: elementi strutturali e funzionali*), as well as the original impossibility of achieving the purpose (see *Cass. civ.*, 30 March 2015, no. 6395, in *Nuova giurispr. civ. comm.*, 2015, 791 ss., with a note by J. WILES, *Il mutuo di scopo edilizio e l'impossibilità 'ab origine' di realizzazione dello scopo legale*); in doctrine, it is sufficient here to refer to M. DE TILLA, *Donazione-permuta-mediazione-mandato* cit., 570 (who, however, speaks of termination of the contract); and especially L. BALESTRA, *Il mutuo di scopo tra 'arricchimento' degli interessi perseguiti e deviazioni dal modello codicistico*, in *Riv. trim di dir. e proc. civ.*, 2019, 1133 ss.

[86] On the clarification through the use of the adverb 'generally' in the Code see *supra* in the text.

[87] See e.g. *Ulp., 73 ad ed.* D. 20.4.6 (loan granted to buy food for sailors, or to pay for freight or goods to be transported); see also *Hist. Aug. Sev. Alex.* 21 (loan for the purchase of land).

[88] See, e.g., A. SACCCOCCIO, *L'eredità del sistema romano dei contratti reali,* cit., 161 ff.

tive, the abolition or the overcoming of the category of the real contract.

Elsewhere I have attempted to show that the real contract does not appear to be the fruit of an empty deference to tradition, but rather represents a category which has a relevant meaning and which is called upon to perform an important function, even in today's so-called globalized world, and that, on the contrary, its abolition would represent, even today, an abstraction not justified either by the reality of negotiations, or by the needs emanating from society, or by normative data.[89] Instead, it is useful to state that: «lo schema basato sulla consegna è una scelta normativa consapevole in ordine ai fini e al significato della disciplina legale di questi contratti».[90]

In general, I agree with the assertion that it is not possible to identify a unitary *ratio* of the category of real contracts, since «il giudizio sulla realità della singola operazione contrattuale può essere svolto solo in concreto», in order to identify each time the greater correspondence of the structure of the real contract to the interests concretely manifested by the parties.[91]

In particular, in the case of a loan, the scheme of reality allows the lender to assess well, up to the moment of delivery, the risk to which the loan transaction subjects him, but also to avoid anchoring the concrete operation of the contract to the performance by the promisor, which constitutes a fact «di per sé insicuro e possibilmente dilatorio».[92] On the other hand, I still think that the real loan in several cases (which are not limited only to the hypothesis of free loan)[93] presents aspects of better protection of the borrower than the one constructed in a purely consensual manner, which, however, protects an important range of interests and which therefore seems correct to preserve and regulate.

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[89] See previous nt. On this point, see also C.A. MASCHI, *La categoria dei contratti reali*, cit., 16 ff.; A. GUZMÁN BRITO, *La consensualización de los contratos reales*, in *Revista de derecho de la Pont. Univ. Católica de Valparaíso*, 29, 2007, 35 ff.

[90] See, following the position of G. BENEDETTI, *Dal contratto al negozio unilaterale*, Milan, 1969, 64 ff., spec. 78 ff., G. VETTORI, *Contratto e rimedi*, Padua, 20092, 4 (in the third edition, Padua, 2017, the author's opinion does not change, but the textual quotation is reformulated).

[91] D. CENNI, *La formazione del contratto*, cit., 115, who makes it a question of method; E. GABRIELLI, *Il pegno,* in *Trattato di diritto civile*, dir. by R. SACCO, *I diritti reali*, 5, *Il pegno*, Turin, 2005, 113, to whom belong the words quoted in the text.

[92] The objection of M. DE TILLA, *Donazione-permuta-mediazione*, cit., 548, according to whom our legislator has endowed the contract for the opening of credit ('*apertura di credito*') *with* a consensual nature, which would perform a function similar to that of a loan, is not convincing. In fact, while the borrower asks for immediate availability of the sum (and this justifies the realty), the opening of credit constitutes only a sort of reassurance for the debtor with respect to future commitments, and, therefore, may well be structured as a consensual contract.

[93] See in this sense vd. A. GUZMÁN BRITO, *La consensualización de los contratos reales*, cit., 60.

In fact, in my opinion, the drawbacks do not stem from the provision of a consensual loan, which has its *raison d'être* in some cases, but rather from the desire to make this the only viable route for those wishing to conclude a money lending transaction. In other words, if the loan is only consensual, there are inconveniences and redundancies, which are worth briefly mentioning.

E.g. in a consensual loan, the lender may sue the borrower, who has lost interest in the loan, in order to force him to accept it; if this is already not so perspicous in the case of an interest-bearing loan, it becomes definitely incomprehensible in the case of a free loan: it is not by chance that this possibility was expressly excluded by Roman sources. [94]

Moreover, once the loan is configured as a contract exclusively consensual, and it is therefore established that the lender 'undertakes to deliver to the borrower', the latter, faced with the former's breach, could claim, according to the general rules, either the termination of the contract and compensation for damages, or the performance of what was promised: but since in both cases it is a pecuniary obligation, no borrower would choose the second solution, especially considering, as seems to me to be more correct, that the indemnifiable harm in such a case must correspond to the so-called 'positive interest'. [95]

Finally, in the case of consensual loan, a number of other problems may arise, e.g.: if the contract is concluded by a simple exchange of consents, would the borrower's claim to the loan be attachable by his creditors? Could the borrower claim interest for the failure to disburse the loan on time? Could the borrower opposite in compensation this claim against another claim that the lender had against him or, worse still, could the lender compensate it with another claim that he had against the borrower, thus effectively nullifying the meaning of the legal transaction (loan of money) that had been entered into? [96]

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[94] See, e.g., D. 12.1.30 (*Paul., 5 ad Plaut.: Qui pecuniam creditam accepturus spopondit creditori futuro, in potestate habet, ne accipiendo se ei obstringat*) where the debtor who has promised the stipulation of restitution can refuse to receive the sum on loan; on this point, I refer for more details to A. SACCOCCIO, *Mutuo reale, accordo di mutuo* cit., 389 ff. Obviously, the possibility of suing the non-performing borrower for damages would not be at issue here.

[95] It is difficult to envisage the situation of a borrower who, in a case of a consensual loan, faced with the lender's acknowledged failure to pay the sum promised to him, agrees to perform, even though he may claim damages from him after termination of the contract.

[96] For some of these objections see E. SIMONETTO, *I contratti di credito*, cit., 187; more recently, see also D. CENNI, *La formazione del contratto*, cit., 139 ff.; it seems to me more problematic to speak of a repugnance towards the possibility of an executive action against the lender, as a consequence of the birth of a claim by the promisor to the delivery of the money: it seems to me, in fact, that, on the one hand, the lender who does not fulfil his promise settled in Art. 1822 Cc. it. 1942 is faced precisely with this consequence; on the other hand, in Countries that currently admit the mutual loan (Switzerland and Mexico, first of all, but also

For all these reasons, I find justified the choice of the Chinese legislator to provide for certain cases in which the conclusion of the contract does not coincide with the reaching of the agreement, requiring rather the completion of a further procedural act, consisting in the delivery of the thing, [97] delivery which must consist in the material contribution of an asset (a sum of money) and which cannot in any way be replaced by a volitional act. [98]

Consequently, the real loan cannot and must not be considered as a relic of the past, but rather as a concrete requirement of current life, which the juridical system has the right and duty to protect: [99] in this respect, the legislator must not be led astray by adherence to false idols, such as the *a priori* adoption of a general and abstract notion of contract to be superimposed on individual and concrete negotiation schemes, whose usefulness is demonstrated by actual life. In this respect, the choice of the Chinese legislator, who consciously decides not to deprive citizens of the possibility of opting for the real loan, proves, in my opinion, to be much more modern than many other contemporary legal orders. The Chinese codifier has therefore done well not to close this door.

Germany, the Netherlands, Peru, Cuba and Argentina) this eventuality is in no way felt as repugnant.

[97] See U. NATOLI, *I contratti reali. Appunti dalle lezioni*, Milan, 1975, 45.

[98] A. DALMARTELLO, *La consegna della cosa*, Milan, 1950, 201.

[99] With a statement that is not without emphasis but which, in my opinion, is true, see A. GUZMÁN BRITO, *La consensualización de los contratos reales*, cit., 58, who defines the category of real contracts as an immortal category.

ROMAN SOCIETAS AND MODERN COMPANIES MODELS. A COMPARISON BETWEEN 'ATYPICAL' AND 'TYPICAL' MODELS IN THE TWO EXPERIENCES

Aldo Petrucci

ABSTRACT

*Many modern scholars thought and think that the Roman law of partnership is rather primitive and totally unfit for business and trade. The analysis of legal sources reveals us a different reality. Within the framework of a general model of partnership formed through a typical consensual contract (*societas*), partners were allowed to insert conventional terms in order to adapt it to their needs or to choose some models having their own special discipline, often forged by the business practice, or also to combine different models. This pluralism of models was due to the development of commercial relations, face to which Roman jurists made an effort of classification thereof, but partners' autonomy was never limited to one of them. Respect of partners' autonomy and conformity to business needs also emerged in the* lex mercatoria *of the Late Middle Age. Only in the following legal experiences up to modern and contemporary times we can find a progressive imposition by the public authorities to choose legal types to form a partnership, in order to assure a State control over it and a stronger protection of partners and third parties. Nevertheless, nowadays such an imposition appears to conflict with world-wide commercial exigencies, that require a more flexible system. In this perspective it might be useful a diachronic comparative approach.*

KEYWORDS: *Societas – Roman law of partnership – Modern Italian law of partnership – Typical and atypical partnerships*

1. *Partnership (*societas*) in Roman Law: modern points of view and ancient legal sources*

It is a commonplace among many modern scholars that the partnership model concluded by a consensual contract (*societas*) in Roman Law was unfit for trade and commercial activities because of three essential weaknesses. [1]

The first one is the lack of limited liability. This structural weakness compelled the Romans to resort to other devices for developing their economic activities, such as appointing as a manager a co-owned slave and giving him a separate asset (*peculium*) in order to limit his owners' liability. A modern scholar writes: «the Romans never evolved a legal form for commercial manufacturing enterprises similar to our modern joint stock company, which had the advantage of limiting investors' liability and of preserving the business as a unit beyond the death of its owners». [2]

The second weakness is the lack of legal personality. A *societas* formed by a consensual contract was not a legal person different from its members and able to subsist even if they have changed. There is only one kind of partnership in Roman law, that appears to have had legal personality: the *societas vectigalis* or *publicanorum* (see below).

The lack of effect on third parties represents the last weakness. It means that «the deals and contracts that one partner made were binding on him alone and not on his partners (since the partnership did not have legal personality, they were not binding on it either)». [3] The agreement, on which partnership was founded, only had effects among the partners and each third party who concluded a contract with one of them was debtor or creditor to him alone.

Therefore, in the opinion of modern scholars' Roman partnership had no particular advantage as a means of structuring a business. But which were Roman jurists' ideas?

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[1] See thereon A. PETRUCCI, *La flessibilità dello schema societario nell'exercitio negotiationum nel diritto romano della tarda repubblica e del principato*, in *Legal Roots. The International Journal of Roman Law, Legal History and Comparative Law*, 8, 2019, 369 f.

[2] K. HOPKINS, *Conquerors and Slaves*, Cambridge, 1978, 53.

[3] D. JOHNSTON, *The impact of economic activity on the structure of the law of partnership*, in E. LO CASCIO-D. MANTOVANI (Dirs.) *Diritto romano e economia. Due modi di pensare e organizzare il mondo (nei primi tre secoli dell'Impero*, Pavia, 2018, 324. Above the different models of Roman partnerships during this time also see M. TALAMANCA, *Società (dir. rom.)*, in *Enciclopedia del Diritto*, XLII, Milano 1990, 814 ff.; F.S. MEISSEL, *Societas. Struktur und Typenvielfalt des römischen Gesellschaftsvertrages*, Frankfurt am Main, 2004, 105 ff.; A. M. FLECKNER, *Antike Kapitalvereinigungen. Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft*, Köln, Weimar, Wien, 2010, 126 ff.; P. CERAMI, *Riflessioni sul "diritto societario". Fondamenti romani e simmetrie diacroniche*, in *Iura. Rivista internazionale di diritto romano e antico*, 62, 2014, 91 ff.

If we read their works, collected above all in the Digest of Justinian, we may find different kinds of partnership in the frame of a unique model concluded by a consensual contract. Gaius' Institutions (3.148) make a basic distinction between two kinds: partnership formed in all goods (*societas omnium bonorum*) and partnership formed in some business (*societas unius negotiationis*). More complete are two quotations of Ulpian's (31 *ad ed*.): in D. 17.2.5 pr. he tells: «Partnerships are formed in all goods, or in some business, or for the collection of taxes, or even in one thing», [4] and in D. 17.2.7: «It is also permissible to form a partnership without specific terms … the partnership is held to be formed in all that comes in the way of profit …». [5]

According to his text, a first kind is a partnership formed in all goods (*societas omnium bonorum*), that was extended to all assets of partners including acquisitions by way of inheritance, legacy and gifts. This is the most ancient one, the origin of which dated back to the consortium *ercto non cito*, a sort of partnership among brothers after their father's death existing at the beginning of Roman law. More than a kind of partnership fit for business, it seems a simple aggregation of partners' property. Another jurist, Paul (32 *ad ed*.) in D. 17.2.3.1 tells us that the formation of such a partnership needed a specific agreement among its partners (*cum specialiter omnium bonorum societas coita est*).

In Ulpian's list a second kind is the partnership formed in all that comes in the way of profit (*societas universorum quae ex quaestu veniunt*), that reflects a more commercial approach. The jurist observes that, if the scope of the partnership had not been specified, the partners were presumed to have formed this kind of partnership. The questions that Roman jurisprudence has dealt with concern the extent of partners' acquisitions. What does it mean the expression «profit» (*quaestus*) here? Ulpian text in D. 17.2.7 gives the example of profit deriving from sale or hire in the course of business activities (*hoc est si quod lucrum ex emptione venditione, locatione conduction descendit*); the following text of Paul (6 *ad Sab*.) in D. 17.2.8 adds profit coming from a partner's work (*opera*). [6]

A third kind mentioned by Ulpian is the partnership for the collection of taxes (*societas vectigalis*). Its origins dated back to the end of the 3rd century B.C., when they were known as *societates publicanorum*. During

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[4] «*Societates contrahuntur sive universorum bonorum sive negotiationis alicuius sive vectigalis sive etiam rei unius*».

[5] «*Coiri societatem et simpliciter licet: et si non fuerit distinctum, videtur coita esse universorum quae ex quaestu veniunt, hoc est si quod lucrum ex emptione venditione, locatione conductione descendit*».

[6] D. JOHNSTON, *The impact of economic activity on the structure of the law of partnership*, cit., 327; G. SANTUCCI, *Il socio d'opera in diritto romano. Conferimenti e responsabilità*, Padova, 1997, 107 f.

the last two centuries of the Roman republic (2nd-1st centuries B.C.) their scope was much larger because they contracted to the State (*respublica*) in order to perform many public duties on the behalf of it, such as making public works, exploiting mines and public land, etc.

This kind of partnership had some unusual features. First, it survived the death of one of its members, whereas in the other kinds of partnerships this fact would cause their extinction. It is therefore deemed to have had a sort of legal personality. Second, they had a complex internal structure with different levels of participation of the partners: a general meeting of them, including a smaller and more influent group called *decumani*, a central manager director (*magister*) and local manager directors (*promagistri*) and one or more partners, whose specific task aimed to undertake contracts to the State. In addition, we find the mention of shares (*partes*) in some Cicero's speeches, that belonged to private investors who were not partners, but received profits from them. [7]

The fourth kind of partnership is the most common one: the partnership to carry on one business (*societas unius negotiationis*). It was «a means of pooling resources and sharing costs and it would allow a business to operate using the capital of more than one person». [8] Finally, a last kind in Ulpian's quotation in D. 17.2.5 pr. is a partnership formed in one thing (*societas unius rei*), where partners' resources, property and work aimed to a single transaction.

2. *The partnership to carry on one business (*societas unius negotiationis*) and its flexibility in the Roman legal thought*

Roman jurists explain us some essential rules concerning all the kinds of partnerships, but their discussions are above all focused on the partnership to carry on one business (*societas unius negotiationis*) considered

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[7] See Cic., *verr.* 2.2.70.169 ss., 2.3.71.167 ss.; *vat.*12.29; *rab. post.* 2.4; *fam.*5.20.9, 13.9.2 e 13.65.1. About *societates publicanorum* cf. M. TALAMANCA *Società (dir. rom.)*, cit., 832 ff.; J.J. AUBERT, *Business Managers in Ancient Rome. A Social and Economic Study of Institores (200 B.C. – A.D. 250)*, Leiden-New York-Köln, 1994, 326; J. ANDREAU, *Banking and Business in the Roman World*, Cambridge, 1999, 88; L. MAGANZANI, *Pubblicani e debitori d'imposta. Ricerche sul titolo edittale* de publicanis, Torino, 2002, 248 ff.; U. MALMENDIER, Societas publicanorum. *Staatliche Wirtschaftsaktivitäten in den Händen privater Unternehmer*, Köln-Weimer-Wien 2002, 236 ff.; F.S. MEISSEL, *Societas*, cit., 209 ff.; P. CERAMI, *Introduzione allo studio del diritto commerciale romano*, in P. CERAMI-A. PETRUCCI, *Diritto commerciale romano. Profilo storico*[3], Torino, 2010, 83 f.; D. JOHNSTON, *The impact of economic activity on the structure of the law of partnership*, cit., 338, 340.

[8] So D. JOHNSTON, *The impact of economic activity on the structure of the law of partnership*, cit., 325.

as a general model where the agreement between partners played a central role. [9] Let us analyse just two points.

A) *Contributions and relations between partners*.

To understand the increasing importance of the partners' agreement in adapting the general model to their concrete needs, we have to move from the well-known text of Gaius' Institutes 3.149:

«There was a great discussion whether one partner could receive a greater share in the profit than he did in the loss. Quintus Mucius said 'no'. Servius however said 'yes': it is possible to have even a partnership where one partner shares only in the profit but not in the loss, as long as his work is regarded as so valuable that it is fair that he should be admitted to the partnership on such terms; it is established that it is possible to have a partnership in which one contributes money and the other does not, yet the profit is shared: often the work of one is as valuable as money». [10]

As modern scholars underline, this passage allows us to disclose a fundamental historical development in the Roman law of partnership. [11] Mucius' approach probably remained influenced by the structure of the ancient partnership formed in all assets of the partners (*societas omnium bonorum*), so that, according to his view, «there would need to be equality in terms of property contributed and profit derived from it» and «there would be no scope for taking account of work done by one of the *socii* 'partners'», as work could not be considered «as forming part of *omnia bona* 'all goods' to which the partnership related». [12] Instead, Servius' thought reflected a more commercial approach in the way the partners could have chosen to mould the contract of partnership to their actual

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[9] Cf. A. PETRUCCI, *La flessibilità dello schema societario nell'exercitio negotiationum nel diritto romano della tarda repubblica e del principato*, cit., 375 ff.

[10] «*Magna autem quaestio fuit, an ita coiri possit societas, ut quis maiorem partem lucretur, minorem damni praestet. quod Quintus Mucius contra naturam societatis esse existimavit et ob id non esse ratum habendum. sed Servius Sulpicius, cuius etiam praevaluit sententia, adeo ita coiri posse societatem existimavit, ut dixerit illo quoque modo coiri posse, ut quis nihil omnino damni praestet, sed lucri partem capiat, si modo opera eius tam pretiosa videatur, ut aequum sit eum cum hac pactione in societatem admitti: nam et ita posse coiri societatem constat, ut unus pecuniam conferat, alter non conferat et tamen lucrum inter eos commune sit; saepe enim opera alicuius pro pecunia valet*».

[11] See M. TALAMANCA *Società (dir. rom.)*, cit., 835 ff.; G. SANTUCCI, *Il socio d'opera in diritto romano*, cit., 35 ff., 94 ff.; P. CERAMI, *Introduzione allo studio del diritto commerciale romano*, cit., 77 ff.; P. CERAMI, *Riflessioni sul "diritto societario"*, cit., 96 ff.; G. SANTUCCI, *La «magna quaestio» in Gai 3.149*, in *Index*. *Quaderni camerti di studi romanistici*, 42, 2014, 331 ff.; A. SCHIAVONE, Ius. *L'invenzione del diritto in Occidente*[2], Torino 2017, 217 f., 256; D. JOHNSTON, *The impact of economic activity on the structure of the law of partnership*, cit., 331 ff.; E. STOLFI, *Commento*. Iuris civilis libri XVIII, in J.L. FERRARY-A. SCHIAVONE-E. STOLFI, Quintus Mucius Scaevola. Opera, Roma 2018, 327 ff.

[12] I quote from D. JOHNSTON, *The impact of economic activity on the structure of the law of partnership*, cit., 331.

purposes. In such a perspective we may understand that contributions in terms of work may be as valuable as those in money and that partners may agree upon different shares in profit and loss and upon «a wider assessment of the relative contributions of the partners». [13] Of course, the assessment of work could be made in terms of material value and according to the real needs of the partnership.

So, Gaius' testimony allows us to follow the increasing role of the partners' freedom of contract in these matters during the 1st century B.C. It was left to their agreement if contributions had to be in money, assets or work, if shares in profits and losses had to correspond to partners' contributions and if their shares had to be equal or they could be different, with the only exception for the prohibition of the so-called «lion partnership» (*societas leonina*), sharing in losses but not in profits. [14]

B) *Duration*.

Partnership in Roman law needed the partners' permanent consent; when their consent anyway ceased to be present, the relationship terminated. Roman jurists of the 2nd and of the beginning of 3rd century A.D. (for example, Ulpian, 31 *ad ed*. in D. 17.2.63.10) inform us that a partnership was dissolved by changes in persons, if one of the partners changed in his civil *status* (for ex., becoming a slave) or by his death, or by their free choice.

Which was the impact of partners' agreement on these causes of termination of the partnership? Could it avoid such an effect?

In case of death or change in civil *status* of a partner, legal data offer us concrete solutions advanced by Roman jurisprudence. Since partnership was a consensual contract based on partners' consent, they could immediately decide to form a new one with the partner's heir or with the same partner whose civil *status* had changed. Legally there were two different partnerships: the dissolved one and the new formed one, but, as refers to efficiency, there was no break in business activities. [15]

We also know that in Roman law it was recognized the partner's free choice to terminate the partnership when the contract did not fix a time limit for its duration. It was correctly pointed out that it was «quite unsatisfactory when trying to run a business that it should be based on a relationship which may terminate at the least opportune moment, with the need to divide property and the risk that the whole enterprise will suddenly and without warning become under-capitalized». [16] Even for this cause

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[13] I again quote from D. JOHNSTON, *The impact of economic activity on the structure of the law of partnership*, cit., 332.

[14] See thereon A. PETRUCCI, *La flessibilità dello schema societario*, cit., 377 f.

[15] See again A. PETRUCCI, *La flessibilità dello schema societario*, cit., 378 ff.

[16] D. JOHNSTON, *The impact of economic activity on the structure of the law of partnership*, cit., 328.

of termination Roman jurists have suggested solutions in order to neutralize unpleasant consequences. If the partnership contract established a time limit, a partner's renunciation before it lacking a *iusta causa* allowed the other/ the others to sue him for the damages; otherwise, in case that the partnership agreement did not contain anything thereon, a partner's withdrawal contrary to good faith and fair dealing, on which the partnership contract was based, made the renouncing member liable for damages. [17]

3. *Special rules for partnerships relate to banking and slave trade*

In the framework of partnership to carry on one business (*societas unius negotiationis*) there are some special models, that are worth considering briefly, because they were exceptions to the ordinary rule that the acts of one partner to third parties had no effects on the other partner or partners (lack of effect on third parties, see above § 1).

One case is the partnership between bankers (*societas argentaria*). As modern scholars have observed since long time, [18] there were formed special rules of law, by means of which a contract made by one partner in the bank was regarded as made by all the partners. Therefore, for example, if the banker, that had concluded the contract, had become debtor, his creditor could have claimed the sum of money in full – of course only once – to any of the other partners. At the same time, if the banker contracting had become creditor, even his partner or partners in the bank could have claimed the sum in full to his debtor. Here we may find a relevant «exception to the general rule that a contracting partner created an obligation only between himself and the third party». [19] The most accepted explana-

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[17] Cf. M. TALAMANCA, *Società (dir. rom.)*, cit., 846 ff.; F.S. MEISSEL, *Societas*, cit., 67 ff.; A.M. FLECKNER, *Antike Kapitalvereinigungen*, cit., 343 f., 356; P. CERAMI, *Introduzione allo studio del diritto commerciale romano*, cit., 91 ff.; P. CERAMI, *Riflessioni sul "diritto societario"*, cit., 124 ff.

[18] See J. ANDREAU, *La vie financière dans le monde romain. Les métiers des manieurs d'argent (IV siècle av. J.C. – III siècle apr. J. C.)*, Rome, 1987, 626 ff.; A. BÜRGE *Fiktion und Wirklichkeit: Soziale und rechtliche Strukturen des römischen Bankwesens*, in *Zeitschrift der Savigny Stiftung für Rechtsgeschichte, romanistische Abteilung*, 104, 1987, 519 ff.; F. SERRAO, *Impresa e responsabilità a Roma nell'età commerciale*, Pisa, 1989, 67 f.; M. TALAMANCA, *Società (dir. rom.)*, cit., 830; F.S. MEISSEL, *Societas* op. cit., 160 ff.; P. CERAMI, *Introduzione allo studio del diritto commerciale romano*, cit., 83 f.; A. PETRUCCI, *L'impresa bancaria: attività, modelli organizzativi, funzionamento e cessazione*, in P. CERAMI-A. PETRUCCI, *Diritto commerciale romano. Profilo storico*, cit., 182 ff.; A.M. FLECKNER, *Antike Kapitalvereinigungen*, cit.,130, 252 ff., 312.

[19] So, D. JOHNSTON, *The impact of economic activity on the structure of the law of partnership*, cit., 337.

tion thereof is the possibility for bankers or their creditors to claim repayment when the partners in the bank were located in different places.

As concerns the second case, partnership between slave dealers (*societas venaliciaria*), we may observe that they normally «form a partnership on the basis that whatever they do, they do 'it' for the common purposes of the partnership». [20] The consequence was that the Roman magistrates, charged with the control of the transactions in markets (*aediles curules*), introduced appropriate remedies (*actio redhibitoria* and *actio aestimatoria*) in their edicts in order to protect buyers in case of hidden vices of slaves, that dealers had not stated at the moment of the conclusion of the purchase contract. According to what the jurist Paul (2 *ad ed. aed. cur.*) in D. 21.1.44.1 tells us, these remedies were available not only against the partner who concluded the contract, but also against any other partner who had a share in the partnership equal or greater than that partner's one. By this way, the buyer was not compelled to sue the partner who had been his contracting party, whereas he was allowed to file for his claims another partner as long as his share in business was equal or greater. The ground thereof depended on the bad reputation of such kind of traders, that were often inclined to a dishonest profit.

4. *Partnerships based on the appointment of an agent*

A partnership to carry on one business might be organized by partners by appointing an agent working as a manager. The act of appointing was called *praepositio*, while the business agent's denomination for land – trade activities was *institor* and for sea – trade *magister navis*. Agents might have been one of the partners or, more commonly, their co-owned slave, but the legal outcomes of the partnership activities were the same. By choosing this kind of organisation, contracts concluded by the appointed agent had effects on all partners' liability. In the texts of the jurist Ulpian we may find two relevant examples.

The first one (28 *ad ed*. in D. 14.3.13.2) concerns a business carried on by two or more partners by appointing a co-owned slave (but in unequal shares) as their agent (*institor*). The legal problem was to ascertain the extent of the partners' liability to the creditors for the contracts concluded by the agent and not performed by him. The solution was given by the ju-

[20] D. JOHNSTON, *The impact of economic activity on the structure of the law of partnership*, cit., 337. Cf. also F. SERRAO *Impresa, mercato e diritto. Riflessioni minime*, in *Mercati permanenti e mercati periodici nel mondo romano*, in E. LO CASCIO (Dir.), Bari, 2000, 48 f.; A. PETRUCCI, *Per una storia della protezione die contraenti con gli imprenditori*, I, Torino, 2007, 224 ff.; R. ORTU, *Schiavi e mercanti di schiavi in Roma antica*, Torino 2012, 83 ff., 110 ff.

rist Julian, whose opinion was reminded and accepted even by Ulpian: a creditor could sue either of the owners and partners for the whole amount (*in solidum*).[21] As a modern scholar correctly underlines, «the third party need not take any interest in what the respective shares of the owners and partners are in the slave or goods: he can sue one for the whole».[22] Of course, the partner who had paid could have claimed to the other/others his/their corresponding share in losses by means of appropriate remedies (*actio pro socio* or *actio communi dividundo*).

The second example exposed by Ulpian (28 *ad ed*. in D. 14.1.4.1) is related to sea-trade carried on by two or more partners by appointing one of them as ship agent (*magister navis*). As far as regards all partners' liability for contracts concluded by him and not performed, the legal solution was identical to that we have just considered in the first example: creditors could sue each partner for the whole amount (*in solidum*).[23]

5. *General remarks on the model of partnership in Roman law*

Although all partnerships were formed by the conclusion of a typical consensual contract, there might be distinguished different kinds deriving from business practices, with different scopes, structures and legal disciplines. Roman jurists tried to offer classifications thereon, but they were conscious of the impossibility to place in strict legal frameworks a more complex and rich reality.

All the models of partnership were extremely flexible by the way of partners' agreement in order to respond to economic needs of the Roman world. Two different models could also be combined according to con-

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[21] «*Si duo pluresve tabernam exerceant et servum, quem ex disparibus partibus habebant, institorem praeposuerint, utrum pro dominicis partibus teneantur an pro aequalibus an pro portione mercis an vero in solidum Iulianus quaerit. Et verius est ait exemplo exercitorum et de peculio actionis in solidum unumquemque conveniri posse, et quidquid is praestiterit qui conventus est, societatis iudicio vel communi dividundo consequetur, quam sententiam et supra probavimus*».

[22] D. JOHNSTON, *The impact of economic activity on the structure of the law of partnership*, cit., 339. See also A. DI PORTO, *Impresa collettiva e schiavo manager in Roma antica (II secolo a.C. – II secolo d.C.)*, Milano, 1984, 343 ff.; J.J. AUBERT, *Business Managers in Ancient Rome* op. cit., 54; A. FÖLDI, *Remarks on legal structures of enterprises in Roman law*, in *Revue Internationale des Droits de l'Antiquité*, 43, 1996, 199 f.; A. PETRUCCI, *Per una storia della protezione die contraenti con gli imprenditori*, cit., 19 ff.; A.M. FLECKNER, *Antike Kapitalvereinigungen*, cit., 233 f., 308, 311 f.

[23] «*Sed si plures exerceant, unum autem de numero suo magistrum fecerint, huius nomine in solidum poterunt conveniri*». Thereon cf. A. PETRUCCI, *Particolari aspetti giuridici dell'organizzazione e delle attività delle imprese di navigazione*, in P. CERAMI-A. PETRUCCI, *Diritto commerciale romano*, cit., 242 f.

crete exigencies. Some models have developed their own legal regimes on the organisation of the structural features of the partnership, its duration and effects of its contracts on third parties.

Finally, if modern scholars may discuss about the suitability of these models for commercial and mercantile activities, Roman jurists and businessmen had no doubt in regarding them as completely fit.

6. *A short overlook on partnership model in the* lex mercatoria *of the Late Middle Age*

Between the 12th and the 15th century, western European countries developed a new mercantile society, based on business, trades and production, giving birth to a new special branch of the legal system called *lex mercatoria*. It was created by merchants in their reciprocal business relations and then extended also to common people who had transactions with them. Also disputes thereon were judged by merchants. For a long time (until the formation of modern States) public authorities did not intervene in its creation and enforcement.

In the framework of this new branch two main partnership models appear to be used: A) the partnership *in commendam* (*Commenda*); and B) company partnership (*Compagnia*). Their structure and characters were rather different. [24] We may resume them as follows.

The partnership *in commendam* (*Commenda*) presented a very deep separation between capitalists and merchants. A capitalist granted a merchant money or goods for his sea – trade or land – trade activities; the merchant used them to carry on his business and proceeded to the distribution of profit (commonly ¾ of it to the capitalist and ¼ to himself) only in case of a safe journey. Risks for the capitalist were limited only to the loss of his money or goods lent to the merchant, whereas the latter was charged with unlimited liability to third contracting parties for unperformed contracts.

The company partnership (*Compagnia*) was born within great business families as a way to carry out transactions on the behalf of the whole family. This explains why there was a joint management and administration of business by all the (male) members of the same family and why its structure was normally divided in a central seat and in more local branches. All the partners bore a joint and unlimited liability for partnership obligations and the bankruptcy of one partner extended to all.

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[24] See U. SANTARELLI, *Mercanti e società fra mercanti*[3], Torino 1998, 134 ff., 171 ff.; F. GALGANO, *Lex mercatoria*, Bologna, 2005, 44.

As we can see, both models were deemed fit for business needs. Their fundamental difference concerned limited or unlimited liability and managing structures. Both inherited some features from Roman law, but developed them in a new way, according the commercial relations of their age: the first model found some roots into the rules of the maritime loan (*foenus nauticum*) as refers to the limitation of the capitalist's risk and to high profit corresponding to him; the second one, starting from the regime of the partnership to carry on one business, provided as general rules the joint administration of the partners, the effects of their contracts to third contracting parties and their consequent joint liability to them.

7. *Modern and present times*

During the 17th and the 18th century we assist to two fundamental changes related to the law of partnership: 1) the birth of a new model of partnership: the 'anonymous company'; and 2) the State control on trade and business activities. These two elements are tied each other.

The 'anonymous company' represents the most ancient form of our actual joint stock companies. It derives from the great colonial companies for Eastern India or Western India, founded in the Netherlands, England and France by grant of a royal authorization. This model of partnership was characterized by: a) limited liability for all partners; b) division of the company capital into shares negotiable by external investors. [25]

The national States followed a policy to limit the merchant class independence and to control their trade and business: a) by granting 'anonymous companies' a royal authorization to carry on their commercial activities; b) by legally regulating all the models of partnership. The most known examples are the Ordinances on land – trade and sea – trade introduced by king of France Louis 14th in 1673 (*Ordonnance du Commerce*) and 1681 (*Grande Ordonnance de la Marine*). According to their rules, carrying on trade and business had to be considered as a privilege granted by the king; each merchant had to be registered in his guild; each contract of partnership (of whatever type) had to be in written form and registered in records kept by public authorities; and finally, each partnership of whatever type had to keep a regular and clear countability.

The following step of the State-control imposed people, that wanted to start and enter business, to choose a type of partnership regulated and allowed by a national legal system. This approach is openly visible in the French Code of Commerce of 1807, that provided only three types of part-

[25] Cf. thereon J. HILAIRE, *Introduction historique au droit commercial*, Paris, 1986, 196 ff.; F. GALGANO, *Lex mercatoria*, cit., 75 ff., 141 ff.

nership: 1) partnership in joint name (*société en nom collectif*), the modern evolution of company partnership (*compagnia*); 2) partnership *in commendam* (*société commandite*); and 3) 'anonymous partnership' (*société anonyme*), that needed a State authorization until 1867.[26] The need to choose among legal types of partnerships had as basic aims to define their rules in order to control the formal fairness of the business carried on and by consequent to protect the rights of the partners and of the third parties.

The same way was followed by the other European countries, that included and regulated in their commercial or civil (as it is the actual situation of Italy and Netherlands) Codes of 19th and 20th century the only types available for partners to form a partnership or a company. So, we may perceive a sort of contradiction between the principles of the freedom of economic activities and of contract and the need for partners to limit their choice to a legal type, having no possibility to create a different one.

Let us now have a look to the actual situation. Of course, we mainly refer to the Italian legal system, but, as it is well known, many of its rules about the law of partnership are common to other European countries because of their origin from some Regulations or Directives of the European Union.

If we limit our speech to profit – seeking partnerships, in the contemporary Italian legal system (mainly in the fifth book of the Civil Code) we basically find seven types, six of domestic origin (the most important are: limited company/*società a responsabilità limitata* and joint stock company/*società per azioni*) and one (the so-called European partnership) introduced in 2003 by European rules. We can widely realize how great barriers the partners' autonomy still finds when they want to form a partnership. But global economy, world-wide trade and business, international competition cannot admit such barriers, that are considered as a legacy of a stricter State control and as a huge obstacle to commercial relations.

By consequence, the Italian legal system has adopted two different strategies: 1) allowing the partners to add many atypical clauses to legal types; 2) dividing the legal types in many sub – types: in the framework of joint stock companies partners may form listed /not listed (*quotate/ non quotate*) joint stock companies or it may be formed a one partner joint stock company; as sub-types of a limited company there are provided start-up companies, one partner limited companies, simplified limited companies, etc.[27]

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[26] Cf. J. HILAIRE, *Introduction historique au droit commercial*, cit., 228 ff.; F. GALGANO, *Lex mercatoria*, cit., 146 ff.

[27] About all these topics in the present Italian law of partnership see M. CAMPOBASSO, *Diritto commerciale 2. Diritto delle società*[8], Torino, 2012.

8. *Some final reflexions*

Finally, let us compare Roman solution and modern solutions. Roman law created one general model of partnership through a typical consensual contract (*societas*), that traders and businessmen could conclude for their economic needs and activities. This general model was very flexible according to the partners' agreements and could aim to whatever purpose. Business practice moulded different kinds of partnerships and only little by little the legal science tried to make a systematic classification, without any presumption to be rigid and compulsory. The great importance given to the partners' autonomy allowed them to combine two or eventually more models of partnership and public authorities did not impose a choice among legal types.

Having to balance the two opposite exigences, the provision of legal types of partnership and their rules to protect partners and third parties and the partners' autonomy for their economic purposes, modern legal systems go on imposing legal types, but correct them introducing many sub-types and giving partners a wide freedom to introduce atypical clauses in the legal types.

RES NULLIUS IN ROMAN LAW, ANCIENT CHINESE LAW AND CURRENT CHINESE LAW

Xu Guo-Dong [1]

SUMMARY: 1. *Res Nullius* in Roman Law. – 2. *Res Nullius* in Ancient Chinese Law. – 3. China's Reception of the Concept of *Res Nullius* of Western Law since the End of the Qing Dynasty and Abandoning it in Nowaday. – 4. The Norms about *Res Nullius* in Current Chinese Law. – 5. Why The Civil Code of the PRC has not Established the Concept of *Res Nullius* and the System of First possession?

1. Res Nullius *in Roman Law*

The concept of *res nullius* was first figured out by *Gaius* in his *Institutiones*. In his opinion, *res nullius* is something that was not previously owned by anyone, and his example is the wild animals, which can be obtained by means of first possession (*occupatio*) (Gai. 2,66). [2] In Roman law, there are four types of owners: human beings as a whole, Roman States, municipalities, private individuals (including natural persons and juridical persons), and the morpheme "owner" in the word of *nullius* should indicate private individuals. The first three types of owner are public subjects, and the fourth is a private subject. It means that an object with owner property for public subject may be *res nullius* for private subject.

Obviously, *Gaius* thought that *res nullius* and *occupatio* are a pair of interdependent concepts. His view is actually based on the assumption of evolution from the natural state to civil society. According to this assumption, the primitive era is a natural state; the subsequent eras are states of civilization. [3] How are the conditions of these two states respectively? *Seneca* (B.C. 4-A.D. 65) explained: All property in the natural state is *res nul-*

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[1] The Distinguished Professor of Xiamen University, Doctor of Law.

[2] See *The Institutes of Gaius*, HUANG FENG, Trans, China University of Political Science and Law Press, 1996, 100.

[3] See XU GUODONG, *Natural Law and the Theory of Degeneration – Interpretation of J. 2. 1. 11 (Part II)*, *Journal of Lanzhou University (Social Sciences)*, Vol. 31, 1, 2003.

lius, because there is no need to establish ownership. Later, the growth of human evil and greed led to the end of the natural state, thereby ownership being established.[4] The poet *Ovidius* (B.C. 43-A.D. 18) said earlier, everything in the previous period was shared by everyone like sunshine, however, later the boundary of land was established and States were set up.[5] It is not difficult to imagine that the transition from the public ownership in natural state to the private ownership in civil society is accomplished by first possession. People enjoy private ownership for themselves and their families by occupying previous public resources. First possession itself is a kind of labour, which combines with the right to share public resources becomes the justification for privatization of *res nullius*.[6]

In the sources of Roman law, *res nullius* has the following types.

a. The pure *res nullius*, i.e., the objects never had an owner, such as various natural resources. In fact, when *Gaius* first used the concept of *res nullius*, he associated wild animals as a type of natural resource.

The concept in opposition to the pure *res nullius* is the impure *res nullius*. That is the property previously with an owner but later confirmed as *res nullius* by the authority, such as treasure-trove. There is no a concept of impure *res nullius* in Roman law, for it is derived from the Germanic law. According to this law, it's obligatory to a finder of a treasure to report his finding to the authority.[7] Before the Emperor *Hadrianus* (76-138) , the treasure-trove belonged to the State. Thank to the interfere of Emperor *Hadrianus*, those who discovered the treasure in their own land can get it's ownership completely; those who discovered the treasure in others' land can get a half and the other half belongs to the landowner.

b. The fictitious *res nullius* is enemy's properties. They are characterized by ownership based on the laws of the enemy is not recognized by Roman law.[8] In order to encourage the soldiers to fight against the enemy hard, the law has made them *res nullius* to allow for first possession. However the first possession is bound by the laws of war. Only the enemy's combat equipment can be held, and the soldiers' personal properties cannot be held.[9]

c. *Res nullius de facto* belongs to some public subject, but the public

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[4] See F.S. RUDDY, *Res Nullius and Occupation in Roman and International Law*, *Umkc Law Review*, Vol. 36, 274.

[5] See Ovid. *Metamorphosis.* Yang Zhouxuan. Trans. People's Literature Press, 1984, 4 etc.

[6] See J. LOCKE, *Two Treatises of Government*, YE QIFANG, Trans. Commercial Press, 1964, 77.

[7] Cfr. M. TROPEA, *Articolo 927 Codice Civile*, Su https://www.brocardi.it/codice-civile/libro-terzo/titolo-ii /capo-iii/sezione-i/art927.html Visited on June 11, 2019.

[8] I. 2,1,17. Whatever We take from the enemy immediately becomes ours by the Law of Nations.

[9] See XU GUODONG, *The System of Transnational Laws of Roman People in the Era of Titus Livius*, 1, *Journal of Xiamen University (philosophy & Social Sciences)*, 2001.

subject cannot exercise its ownership, so the private subject is allowed to enjoy some parts of the property through first possession. The reason is that public ownership is primarily a negative concept, which is designed to exclude some despotic from establishing exclusive ownership over this kind of property and this concept did not clarify the contents of ownership. The use of objects of public ownership often depends on private individuals' initiative. This kind of object is equivalent to *res nullius* and people applicate the rule of first possession to it. I found two examples in this respect. First, *res omnium communes*. They belong to all human beings as a whole nominally, but cannot be used by all human beings as a whole. Therefore, fishes in oceans and rivers must be obtained by private individuals by first possession.[10] Second, *ager compascuus*. They are public land used for grazing domestic animals. When the gens were disintegrated, most of the collective lands were distributed among the *paterfamilias*, but the collective ownership of a small proportion of lands was reserved for public pastures. At the same time, when the Romans established colonies, they also set aside part of the lands as *ager compascuus*, which were shared by the adjacent farmers.[11] The law allowed the co-owners to graze 10 large and 50 small livestock on the public pastures, and if there were more than this number of grazing animals they would have to pay for it.[12] If the number of livestock is within the legal limit, the co-owners obtains grass as *res nullius de facto* by first possession.

In any case, the concept of *res nullius* in Roman law is characterized with a strong national will, which is not only reflected in the fact that the enemy property was regarded as *res nullius*; but also demonstrated by the fact that the similar objects were defined as either *res nullius* or owned property based on the degree of tension of relationship between resources and human desires. For example, the newly formed islands in the sea are defined as *res nullius*, and people can obtain the ownership of them by means of first possession. But the newly formed islands in rivers are deemed as the owned properties shared by the landowners on both sides of the river. Such a provision reminds us that the concept of *res nullius* exists only when the degree of tension of relationship between resources and human desires is relatively loose.

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[10] See O. DILIBERTO, *Res Communes Omnium in the Perspective of the Future*. HUANG MEILING. Trans. Jurisconsults and the Construction of the Law Form the Jurisconsults Romani to Contemporary Law, 18-19, 2019, 67.

[11] See A. BERGER, *Encyclopedic Dictionary of Roman Law*, The American Philosophical Society, Philadelphia, 1991, 357.

[12] See WANG YANG, *Common Land System in Roman Law*, *Comparative Law Study*, 4, 2009, 73.

2. Res Nullius *in Ancient Chinese Law*

There have never been theories concerning the transition from a natural state to a civil society that is the base of the concept of *res nullius* since ancient times in China. However, the legends of *Divine Farmer Tasting Every kind of Herbs* and *Emperors Yan and Huang Establishing Agriculture* indicate that the agriculture and political society begin with the occupancy of *res nullius* in prehistoric times. Therefore, there are also statements and regulations on *res nullius* in the ancient Chinese literature.

First of all, there are statements and regulations about the pure *res nullius*.

Shen Zi (390-315BC.) said, "hundreds of people chase one running rabbit on the field. But for so many rabbits in the market, people do not chase them as passing by. This is not because that people no longer desire the rabbits, but in that the ownership has been determined and the rabbits cannot be captured". In this statements, the rabbit on the field is regarded as *res nullius*, which can be obtained by means of first possession. However, once someone has acquired their ownership, no one else can interfere it.

The Code of the Ming Dynasty stipulated, "if the wood, herbs, stones, etc., in the mountains, have been obtained and piled up there by people with efforts, and some others shall take them away without authorization, this act is considered to be quasi-theft". In this article, wood, herbs and stones can be occupied as *res nullius*, and the violator of the occupancy will be punished as quasi-theft.

In addition, there are statements and regulations about the impure *res nullius*.

a. Lost property. In accordance with *the Rites of Zhou Dynasty*, the finder of a lost property in the market should send it to the authority within three days. If there is no one claiming for it after three days, it will be owned by the State. This norm set up the regulation about the lost property, being the same as the Germanic law that coerced the finders of lost property into reporting his finding to the authority.

b. Objects buried in earth. The *Code of the Tang Dynasty. Miscellaneous law* (article 447) stipulated that, if someone discovers buried objects in the land of another person, the finder and the landowner each have half of the buried objects. If the finder conceal his finding, he commits the crime of concealing stolen goods, but minus three grade of punishment.[13] In this norm, the objects are not necessarily buried by the landowner himself, so the finder is able to acquire half of it, otherwise the landowner may obtain all of them. Therefore, the reason for the finder to acquire the half is the first possession.

c. Derelict thing. The most typical derelict thing is the unclaimed wasteland mainly caused by war. *The Code of the Western Xia Dynasty*

[13] See SUN WUJI, ect. *Tang Code*, Zhonghua, 1983, 520.

stipulated that, "land without being leased or cultivated for three years, are not owned either by public subject or private subject, are allowed to be occupied". [14] In this norm, three years is the time limit for judging whether the land has an owner, when the time is due and nobody claim it, the land becomes *res nullius*, allowing for occupying, so as to make full use of the property in order to make the state have source of tax. Later, all dynasties have made similar regulations in this respect. For example, in the third year *of Hongwu of the Ming Dynasty* (1368), the emperor Zhu Yuanzhang promulgated an imperial edict, saying "if people of some administrative area escape to other places because of war, and their previous lands are well cultivated by other capable families, the latter shall acquire its ownership. If the ex-landowner returns, the competent authority should give them the same amount of wasteland close to his ex-owned lands. Other wastelands are also allowed for obtaining and cultivating by farmers, and these famers are duty-free for three years". [15] For another example, the emperor of the *Qing Dynasty* has promulgated a law in 1649, specifying that "the county government should find out the wastelands without owners, and issue official certificates of ownership with seals on them to those who reclaim the local wastelands, thus allowing them to have a permanent ownership". [16]

3. *China's Reception of the Concept of* Res Nullius *of Western Law since the End of the Qing Dynasty and Abandoning it in Nowaday*

At the end of the Qing Dynasty, China was forced to import the Western law, and the system of first possession of *res nullius* also came into the China.

The article 989 of *The Civil Code Draft of Qing Dynasty* which drew up in 1904 stipulated, that the land without owner belongs to the treasury of the state. But the ownership of shallow, small island in river, dry river bed will be stipulated by other laws. [17] The article 1028 of the *Draft* stipulated, that the occupier with the intention of being owner can obtain the ownership of movable properties. [18] *The Civil Code Draft of RC* in 1925 completely copied

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[14] See ZHANG YICHAO. WANG YUNFEI. *The Value of the Vacantia Legal System and Its Application in China: A Remark on 9th Chapter of the Draft of Real Right*, *Journal of Hei Longjiang Administrative Cadre Institute of Politics and Law*, No. 1, 2007, 51.

[15] See LIU HUIJIE. *Research on the Reclamation of Land in North Chihli Region of Ming Dynasty*, Master Thesis of Zhengzhou University, 2014, 15.

[16] See PENG YUXIN, *History of Land Reclamation in the Qing Dynasty*, Agricultural Press, 1990, 11.

[17] See *The Civil Code Draft for Great Qing Dynasty, The Civil Code Draft for Republic of China*, Jilin People's Press, 2002, 130.

[18] See *The Civil Code Draft for Great Qing Dynasty, The Civil Code Draft for Republic of China*, Jilin People's Press, cit., 135.

the above two provisions. The Article 989 of former was transferred into the article 771 of the latter,[19] and article 1028 became the article 815 of the latter.[20] The above two provisions respectively stipulates acquisitions of unowned immovable and movable properties. The former has adopted a nationalist arrangement for their attribution, and the legislative reason for the article 771 is that the land still are not owned by private subject should belong to the treasury of the state. It should not be considered as *res nullius* and let the people to occupy, which may arouse turmoil and undermine the order. If the legislator determines them as *res nullius,* people will compete with each other for getting them, this will endanger social order.[21] For the latter, an individualistic arrangement for the attribution is deployed.

The article 802 of *Civil Code of the RC* of 1931, namely today's *Civil Code of Taiwan Region*, stipulated that the parties can obtain the ownership of movable property *nullius* with the intention of being owner. This article excludes the possibility of the existence of immovable property *nullius*, and only has an individualistic attribution arrangement for movable property *nullius*. The reason can refer to the legislative reason of the article 771 of *Civil Code Draft of the RC*.

Since 1949, China has received the Soviet law. The article 68 of *Civil Code of Soviet Russia* of 1922, stipulated that the property whose owner is unknown or has no owner, shall be owned by the state in accordance with special regulations. In terms of the farming properties *nullius*, it shall be disposed or used by the rural mutual aid association. If there is no such a local association, it shall be disposed by the Soviet that govern the area.[22] In this article, the property whose owner is unknown refers to the impure *res nullius*; and the property without owner refers to the pure *res nullius*. The farming property *nullius* includes abandoned farm house and wasteland without owner. The legislators have made collectivist attribution arrangement for the three kinds of *res nullius*. The states or collective organizations acquire the ownership of them without first possession, the first possession of the private subject was completely excluded. This arrangement still affects today's Chinese law, although the current *Civil Code of the Russian Federation* has allowed private individuals to obtain some *res nullius* by means of *usucapio* (article 225).[23]

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[19] See *The Civil Code Draft for Great Qing Dynasty, The Civil Code Draft for Republic of China*, Jilin People's Press, cit., 308.

[20] See *The Civil Code Draft for Great Qing Dynasty, The Civil Code Draft for Republic of China*, Jilin People's Press, cit., 313.

[21] See YU JIANG. *The Centennial Festival of the Birth of the Chinese Civil Code: Taking the Property System as the Center to Investigate the Two Main Lines of Civil Law Transplantation. Tribune of Political Science and Law*, Vol. 29, 4, 2011, 122.

[22] See WANG RUNZE, Trans. *Russian Soviet Civil Code*, Xinhua Bookstore, 1950, 33.

[23] See HUANG DAOXIU, *Civil Code of the Russian Federation*, Peking University Press, 2007, 117.

As a part of the first draft of the Civil Code of China (April, 1956), the article 41 of the *Book about Ownership of Civil Code of the PRC* (First Draft), stipulated that the property whose owner is unknown or has no owner is *res nullius*, and shall be owned by the State based on the legal procedures. The farming property *nullius* shall be disposed by the township people's committee.[24] Obviously, this article is copied from the article 68 of the *Civil Code of Soviet Russia*. Subsequent drafts[25] of the book about ownership have retained this provision in a slightly varied form.

However, the *General Principles of the Civil Law of the PRC* promulgated in 1986 has cancelled this article, and directly regulated the objects buried in earth or hidden as the specific forms of *res nullius* in *Civil Code of Soviet Russia* (the article 79, paragraph 1), without a general provisions about the *res nullius*. This may be due to the fact that some legislators cannot understand that the objects buried in earth or hidden may be *res nullius*; some leading scholars of today, such as professor Liang Huixing,[26] still believe that the objects buried in earth are owned properties.

In line with the *General Principles of the Civil Law of the PRC*, *the Property Law of the PRC* give regulations about lost properties, drifting properties, objects buried in earth or hidden, etc. from the article 109 on. All these three are the impure *res nullius*. It removed the norm about *res nullius* that played a role of premise before. Since then, the Chinese Civil Law has lost the concept of *res nullius* at the level of the basic law, eliminating the very foundation of the concept of first possession.

From the point of view of the development of theory, the majority of the deviations of the Chinese law from the Sovietic law means a progress, but unfortunately, this deviation turns out to be a mistake.

4. *The Norms about* Res Nullius *in Current Chinese Law*

Although there are no provisions about *res nullius* and first possession in Chinese basic civil law, there are indeed many provisions in this regard in other laws, which not used the name of *res nullius* and first possession.

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[24] See HE QINHUA-LI XIUQING-CHEN YI, *Completely Collection of the Drafts of the New China Civil Code (First Volume)*, Law Press, 2002, 59.

[25] See *First Draft* in April 1956, *Second Draft* in April 1956, *Third Draft* on May 12, 1956, *Forth Draft* on June 5, 1956, *Fifth Draft* on August 20, 1956, *Sixth Draft* on January 7, 1957, *Seventh Draft* on January 21, 1957. Etc.

[26] See WU LINGXIANG. *On the Legal Ownership Problem of Unowned Property*, *Journal of Shanxi Politics and Law Institute for Administrators*, Vol. 30, 2, 53.

(1) The pure *res nullius*

As mentioned earlier, the pure *res nullius* is every kind of natural resource. In terms of this, article 9 of the *Constitution of the PRC* stipulates: all mineral resources, waters, forests, mountains, grasslands, wasteland, tidal-flat area and other natural resources are owned by the State, namely, owned by all the people, with the exception of the forests, mountains, grasslands, wasteland and tidal-flat area owned by collectives in accordance with the law. The State ensures the reasonable use of natural resources and protects rare animals and plants. It is prohibit appropriation or damaging of natural resources by any organization or individual by whatever means.

According to the article 9, State-owned natural resources include mineral resources, waters, forests, mountains, grasslands, wasteland, tidal-flat areas, etc. Only when animals and plants reach a precious level, they will be protected by the State, but they are not State-owned.

However, the *Property Law of the PRC* of 2007 further expanded the scope of State ownership's objects. The article 46,47 and 49 of the aforementioned law stipulated: Sea areas, urban lands shall be owned by the state. The wildlife resources also shall be owned by the state on condition that some law has prescribed that they shall be so.

As an implementation of the article 9 of the *Constitution*, the article 3 of the *Mineral Resources Law of the PRC* (as an Amendment of 2009) stipulated: mineral resources belong to the State. The State's ownership to mineral resources are exercised by the State Council. The state ownership to mineral resources, either near to the earth's surface or underground, shall not be changed with the alteration of ownership or right to the use of the land which the mineral resources are attached to. The article 3 of the *Forest Law of the PRC* stipulated: the forest resources shall belong to the State, unless the law stipulated that they belong to the collective. The article 9 of the *Grassland Law of the PRC* stipulated: the grasslands are owned by the State, with the exception of the grasslands owned by collectives as stipulated for by law. The article 2 of *Regulation on the Implementation of the Land Administration Law of the PRC* stipulated: the following land belongs to the people as a whole, that is, belongs to the State: ..... (4) forest land, grassland, wasteland, tidal-flat area and other land not under collective ownership according to law.

However, there is no special law to implement State ownership to water, mountains and tidal-flat area. Moreover, the article 3 of the *Law of the PRC on the Protection of Wildlife* goes beyond to the constitutional provisions, saying: Wild animal resources are owned by the State. However, the *Regulations of Wild Plants Protection* did not make such an *ultra vires* norm, and reserved a space for China's pure *res nullius*. So far, within the

framework of *Constitution of the PRC*, the *Property Law of the PRC* and the several natural resources laws, there are these pure *res nullius* as follows:

a. Wild plants. Wild plants protected under the *Regulations of Wild Plants Protection* refer to the precious plants growing in natural conditions, and the natural plants which are rare or near extinction and of important economic, scientific or cultural value. In this regard, wild plants shall be the plants with these features. Nevertheless, the broadly defined wild plants refer to all non-man cultivated plants, such as weeds, wild trees, and wild herbs for medical use. In accordance with the provisions of the article 49 of the *Property Law*: the wild plants not owned by the State according to the prescription of law shall be *res nullius*.

b. Wild fishes. *The Fisheries Law of the PRC* did not stipulate that wild fishes are owned by the State. (I assume that wild fishes does not belong to the wildlife resources, which stipulated in the article 3 of the *Wild Animal Conservation Law*). Therefore, the wild fishes in China's inner water (rivers, lakes and ponds) and in the territorial sea are all *res nullius*. Wild fishes in the high seas is not under the jurisdiction of the law of China. According to the *Convention on Fishing and Conservation of the Living Resources of the High Seas* (which comes into effect in 1966), wild fishes are *res communes omnium*, and all fishermen from all countries can acquire it through first possession.

(2) The impure *res nullius*

The impure *res nullius* refers to the properties once had owner but later not, and the new owner shall be determined according to the rule of *res nullius*. It has the following types:

a. Treasure-trove. According to paragraph 2, article 3420 of the latest edition of *Louisiana Civil Code*: Treasure-trove is a movable property hidden in another movable or immovable property. Treasure-troves come from the widespread habit of digging the earth for hiding treasures. So any treasure always has had an owner. The owner then departs from the possession of his treasure for a long time until such treasures are discovered by others. When these findings are completed, there are two possibilities. Firstly, because the treasure-trove is very ancient, it is immediately determined to be *res nullius*. As for the standard of ancientness, the Spanish scholar Leonardo Gutierrez de Huerta (1680-1736) set the time standard of 100 years, and American courts set the time standard of 35 years. The standard given in paragraph 2, article 1324 of the *Portuguese Civil Code* is 20 years. When a treasures-trove reaches the "degrees" of ancientness mentioned above, there is no need of conducting the process of announcement to public for finding the previous owner. Secondly, the treas-

ures-trove are not very ancient, and it is not even certain when they were buried, so it's not clear whether they are proper treasure-trove or not. In this situation, the method adopted by most countries is to issue an announcement to public for finding the person who buried the treasure-trove. Within a certain period of time, if the person who buried the treasure-trove does not appear, the discovered property shall become the proper treasure and apply the rule of first possession to it. However, the article 79 of *General Principles of the Civil Law of the PRC* stipulated that, if the owner of a buried or hidden property is unknown, the property shall belong to the State. The relative units that have received the property shall commend or give a material reward to the unit or individual that turns in the property. This article qualifies the treasure-trove without the owner as *res nullius*, while does not adjudges them to the first possessor, but to the State, however the finders still have a right to receive spiritual or material rewards from the State.

If the result of the announcement to the public for seeking the owner is the discovery of the person who buried the treasure-trove or his descendants. As to this, the article 93 of *The Supreme People's Court's Interpretation on the Implementation of the General Principles of the Civil Law* (in 1988), stipulated that: if any citizen or legal person could prove that the buried or hidden property being excavated up or discovered is owned by him/it, and it may be returned to him/it according to the laws and policies in effect, his/its such rights shall be protected. Property stipulated by this article is not the proper treasure-trove, the system of first possession can't be applied to it, but it will be handled in accordance with the *Law of Succession*.

The distinction between the proper treasure-trove and the non-proper treasure-trove was formulated by the French jurist Jaques Cujas (1522-1590). In his "*The Commentary on Paulus's Commentary on the Edict*", he said: the treasure-trove without an owner is called the proper treasure-trove; the treasure-trove with an owner is called the non-proper. It is interesting that Chinese legislators, unaware of Cujas' opinion, instinctively divide treasure-trove into two types in their legislation.

b. The lost property and the drifter. The lost property is a movable property, the owner of which is unintentionally separated himself from the possession on it. It is different from the forgotten property, which is the movable property that the owner of which deliberately separate himself from the possession on it. There is only the concept of the lost property but no the concept of the forgotten property in Chinese law. The drifter is a movable property that is out of the possession of its owner then floats on the surface of the water or is washed by the water to the riverbank or seashore due to shipwreck or other disasters or the negligence of the party. According to the article 109-114 of *Property Law*, the finder of the lost property should notify timely its owner for recovery of his property. If the owner could not be found, the lost property should be handed over to some

bureau of public security or other relative authority. The relative authority should publish an announcement for finding of the owner of lost property. If the lost property is unclaimed within 6 months, it will become a *res nullius* and shall be owned by the State. The case of finding a drifter shall be governed by the same provisions about the finding of a lost property.

Moreover, the paragraph 2, article 79, of the *General Principles of the Civil Law* also has stipulated an obligation of finders of stray animals to return them to their owners. If the owner couldn't be found within 6 months, such animals shall become *res nullius* and be owned by finders.

c. The derelict thing. The derelict thing is the property its owner intentionally abandoned his ownership. It could be real estate, such as a wasteland, the house without owner. It could also be movable property, its typical form is garbage. Once the property were abandoned, it becomes *res nullius*. The derelict thing is not configurated in Chinese law. But there are 6 million scavengers in China who make their daily living by recycling the derelict thing.

It is necessary to distinguish the derelict thing from the gifts to gods for realizing some wishes. This gift is a small amount of coin given to gods who can help the donor to realize their wishes. In every Buddhist temples of China, there is always a wishing pools. In Italy, there are also vowing fountains. The wishing coins of Nanputuo Temple are considered a gift to managers of the temple. However, the wishing coins of the *Fontana di Trevi* is regarded as a gift to the Dominicans for helping the poor.

The released animals for practicing the commandment of no killing are similar with the gifts to gods for realizing some wishes. In China, Buddhists release animals every day. Typical released animals are fish, birds, and some large animals such as yaks etc. also are released. The release behaviour seems to be abandonment of ownership. Therefore, some non-Buddhists wait at the release site for occupying the animals after the release is completed, which arouses Buddhist resentment. But they had no choice but to curse these people who captured the released animals will not have a good end. In fact, the releasers do not want to place the released animals in a non-ownership position, but they intend to make these animals their own owners, but this subjectivity of the animals is not recognized by the law, causing a dilemma. Therefore, how to resolve the conflict between the releaser and the preemptor is a legal issue that needs to be resolved. I think that the civil law of China should not recognize the released animals for practicing the commandment of no killing as object of first possession.

d. The inheritance without a heir. In the Roman law of the classical period, if the designated heir refused to inherit, the inheritance would become *res nullius*. The *praetor* allowed people to carry out adverse possession on the inheritance as a heir. But many people may ask for possession of one inheritance, which will result in a struggle. So *Lex Iulia de maritandis or-*

dinibus promulgated by Augustus in 18 BC stipulated: the national treasury inherits all the inheritance without a heir, aiming at to avoid fighting and meanwhile enrich the national treasury.

The article 32 of the *Law of Succession of PRC* stipulated: An estate which is left with neither a successor nor a legatee shall belong to the State or, where the dead was a member of an organization under collective ownership before his or her death, to such an organization. According to this article, the inheritance without a heir is a *res nullius*, shall belong to the State or the collective entity.

Because of an inheritance could include intellectual property, there may be intellectual property *nullius*. There have been cases in China in this respect. The last emperor of Qing Dynasty, Pu Yi, wrote "*My First Half Life*", he died in 1967. The copyright of the book was inherited by Pu Yi's wife, Li Shuxian who passed away in 1997. She had no heirs and did not leave a will at the time of her death. The Mass Publishing House that published the book applied to the court on August 22, 2007 to determine that the copyright of the book was *res nullius*.

Who will have the above-said *res nullius*? The first paragraph of the article 19 of *Copyright Law of PRC* gives us an answer: where the copyright in a work belongs to a citizen, the right of exploitation and the rights under this law in respect of the work shall, after his death, during the term of protection provided for in this law, be transferred in accordance with the provisions of the inheritance law. Which provisions of the inheritance law this paragraph refer to? Obviously it refer to the article 32 that we have discussed before. So, as other kind of tangible *res nullius*, copyright *nullius* also belongs to the state.

The status of impure *res nullius* becomes definite usually after the procedure of seeking for the previous owner ends up in vain. *Civil Procedure Law of the PRC* (as revised in 2017) and *Property Law of the PRC*, both stipulate such procedure. In light of the article 191 of the former, the temporary possessor of the property with uncertain status is required to apply to the court for this procedure. After the court accepts such an application and hears the case, and if no one claims the property with uncertain status one year after the issue of the public notice calling on the owner to claim the his ownership, the court shall determine the property as *res nullius* and turn it over to the State or the collective concerned. The latter has similar provisions as mentioned above, but the period of the announcement to the public required by this law is only six months.

(3) Res nullius de facto

The *res nullius de facto* already has a virtual owner, who cannot actually exercise his ownership, so the use of such property by other people has

to be allowed according to the rules of *res nullius*. A typical example of this is *res omnium communes* in Roman law. It includes air, flowing water, the sea and therewith the seashores. Their owner is human beings, but, human beings cannot exercise this ownership as a whole. They are proclaimed as *res omnium communes* in order to exclude specific countries from dominating exclusively these resources relying on their own strength. The value of these things lies in putting them in use, for example, the main use of flowing water and the sea is capturing the fishes inside. These fishes fall into the container of *res omnium communes*, but they are *res nullius* by themselves. Another example is that the seashores that are also a kind of *res omnium communes*, but the gems and jades found on the shores are *res nullius*, which can be obtained by means of first possession (I.2, 1, 18).

The natural resources under State ownership in Chinese laws share similar status as *res omnium communes*. They are jointly owned by Chinese people, but the people as a whole cannot exercise this kind of ownership of such things, so only those who are with the desire and ability to use them will do so. State ownership simply grants the State the power of management, allowing those who have the desire and the ability to use such resources in accordance with certain standards and procedures.

For instance, although the article 3 of *Law of the PRC on the Protection of Wildlife* declared that wildlife resources shall be owned by the State, but the article 22 of the law also stipulated that: anyone who intends to hunt or catch wildlife that is not under special protection of State must obtain a hunting license which issued by the competent department in charge of wildlife protection of the local people's government at or above the county level and observe the hunting quota assigned. paragraph 1 of the article 23 stipulated that anyone engaged in the hunting or catching wildlife shall observe the prescriptions of his special hunting and catching license or his ordinary hunting license with respect to the species, quantity, area, instruments, methods and time limit. The hunter who captured the wildlife that is not under special protection of State becomes the owner of them. He is not required to turn over the preys to the State treasury. In this way, the object of state ownership becomes private property. Therefore, some wild animals are actually equal to *res nullius*.

Moreover, the article 9 of *Constitution of the PRC* stipulated that the flowing water belongs to the state, but the sand and gravel under the water are equal to *res nullius*. Those who have the desire and ability can obtain a river-channel sand mining license on condition to not prejudice to the safety of the dam and the stability of the situation of river, and can acquire the ownership of the sand and gravel in accordance with the article 39 of *Water Law of the PRC*. If someone holds the water to drink on the boat in the river, it is also a form of first possession of *res nullius*.

Furthermore, although the *Property Law of the PRC* stipulated that the

sea areas belongs to the State, the residents of the coastal areas obtain the little seafood such as oysters and sand worms on the beaches, which is also a form of first possession of *res nullius*.

Some scholars believe that state ownership is the joint ownership of all people. I think it is not true because the objects obtained either by hunters or by sand collectors become their own properties, which are not included in national treasury in order to be shared by all Chinese people. Therefore, it is more proper to interpret their obtained objects as a result of first possession of *res nullius*.

5. *Why the Civil Code of the PRC has not Established the Concept of* Res Nullius *and the System of First possession?*

In summary, there are many provisions on *res nullius* in current Chinese laws, but it is a pity that the *Property Law of the PRC* enacted in 2007 does not have a general norm on *res nullius*, it's further from enacting the system of first possession. Besides, China has started her fourth codification of the civil law in 2014, and has finished this work in 2020.It absorbed all articles about *Res nullius* in *Property Law* and *Succession Law* with some small amendments, for example, the article 113 of *Property Law* has stipulated: If the lost property is unclaimed within 6 months, it will become a *res nullius* and shall be owned by the State. Now this article became the article 318 of the Civil Code,proloning the period for claiming lost property to one year. Furthermore, the article 32 of the *Succession Law* has stipulated: An estate which is left with neither a successor nor a legatee shall belong to the State or, where the dead was a member of an organization under collective ownership before his or her death, to such an organization. Now this article became the article 318 of the Civil Code, but the wording is changed as this: An estate which is left with neither a successor nor a legatee, if the *de cuius* were inhabitant of city ,shall belong to the State and will be used for public welfare, where the dead was a member of an organization under collective ownership before his or her death, to such an organization.The addition is "will be used for public welfare". Nevertheless there is no provision concerning *res nullius* and first possession. This leads to a strange phenomena: the Civil Code does not stipulate *res nullius* but it was stipulated by many other laws, and the Civil Code does not reflect the actual first possession of *res nullius* existing frequently in actual life.

What are the reasons of the phenomena? I think that the reason lies in the fear of legislators to open plunder. The so-called open plunder is collectively robbing others of their property in the event of an accident. Since the 1990s, the open plunder of public and private properties has in-

creased, leading to the supplementary provisions to deal with it enacted in 1997. It also results in articles 56 and 63 of the *Property Law* that prohibit any entity or individual from embezzling, open plunder, privately dividing, retaining or destroying the properties owned by the State and collective subjects. This is the consequence of a newly formed national bad habit deeply rooted in the long-term public ownership regime that make the boundary of property rights unclear. Legislators are worried that since the people dare plunder openly the properties under State and collective ownership, if the law declares something as *res nullius* and allows people to hold it, people will flock to it, and violently plunder it collectively, making it hard or impossible to conduct the first possession. As mentioned above, the concept of *res nullius* is the product of the relatively loose situation of relationship between resources and human desires. There are 1.4 billion people in China, so the relationship between resources and human desires is comparatively tense. Therefore, the concept of *res nullius* indeed has a smaller existing room in China than in a country with a large resources and a small population.

However, it still is feasible to admit first possession to some *res nullius* that may not easily cause a fight. The examples are wild plants, wild fishes, wild animals that are not rare, derelict thing (especially garbage), and orphan works. If legislation is disconnected with daily life, it will lose its prestige; and so it is if it is not in harmony with other laws.

Moreover, the failure to establish the concept of *res nullius* has caused some problems. For example, the treasure-trove may be determined as *res* with an owner or *res nullius* after going through the procedure of looking for its owner. However, due to the absence of the concept of *res nullius*, Chinese lawyers have long regarded all treasure-trove as *res* with owners both theoretically and practically, giving up the treatment of first possession and completely adopting the treatment of inheritance law, thus resulting in one wrong judgments as follow.

In February 2009, Zhan Minghua bought an old house from Wang Mingyou at a price of 10,000 yuan. On the morning of January 8, 2015, Zhan Minghua began to demolish the old house and build a new house. In this process, Zhan Minghua's brother Zhan Minghan discovered a container holding 128 silver coins, some of which were Yuan Datou (silver coins minted in the early years of the Republic of China with the figure of Yuan Shikai on the obverse side), and some were Mexico Silver coins. Wang Mingyou appealed to the court about the ownership of these silver coins. He believed that the silver coins were the properties left by his ancestors, and he had right to own them as a descendant of the Wang family. Zhan Minghua believed that the silver coins were the *res nullius* which could be gotten by first possession. The presiding judge believed that although the owner of the silver coins was not found at present, they were not *res nullius*. His judgment based on the article 93 of *The Supreme Peo-*

ple's Court's Interpretation on the Implementation of the General Principles of the Civil Law was: neither Wang Mingyou nor Zhan Minghua have the ownership of the silver coins, but if there is evidence to prove the ownership of the silver coins, the descendants of the owner can still claim rights within in a proper time.

The subject matter of the case is in full compliance with the requirements of proper treasure-trove. Nevertheless, as the owner could not be found, the silver coin became *res nullius* as revealed by Zhan Minghua correctly. It should be owned by the State in accordance with the article 79 of *The General Principles of the Civil Law*. However, the court has disregarded this provision, but gave a judgment based on article 93 of *The Supreme People's Court's Interpretation on the Implementation of the General Principles of the Civil Law*. It did not solve the actual problem, but naively waited for appearance of the descendants of the silver coin' real owner. This is really regrettable and unfortunate.

EARLY REFERENCES TO THE ROMANIST LEGAL TRADITION IN LATE QING CHINESE SOURCES: ROMAN LAW IN KANG YOUWEI'S WRITINGS *

Lara Colangelo

ABSTRACT

The reception of Western law in China is a gradual and long-lasting process which most likely has its roots in the late Ming period, when the earliest, few and isolated yet undoubtedly valuable, references to this subject begin to appear in the works of Jesuit missionaries. However, it is only at the end of the 19th century that this process assumes a wider scope and a more systematic development, being deliberately promoted first by a restricted elite of intellectuals and subsequently by the Chinese government itself. After an initial stage characterized by Chinese interest towards international law, [1] China will start to look at Western civil law, and especially Roman law which is its foundation, as a model for national legal system reform and as a basis for a new codification. The purpose of this paper is to specifically shed light on how the late Qing scholar Kang Youwei 康有为[2] contributed to the diffusion of Roman law in China by including several references to it in his works.

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[1] The attention towards international law, which was in fact a development of Roman Law, sprang up in China in the second half of the 19th century and was mainly due to utilitarian reasons, that is the increasing necessity felt by the Chinese government to counter the expansionist ambitions of Western countries by using their same instruments (legal and not merely technical).

[2] KANG YOUWEI (1858-1927) was a scholar, philosopher and politician of the late Qing period. As a politician, he was a reformer and wished to replace the absolute monarchy with a constitutional monarchy. In this sense, Kang is famous for initiating the reform movement of 1898 (*Wuxu bianfa* 戊戌变法), because of which he encountered the hostility of the empress Cixi and the conservative circles of the imperial court and was forced to flee abroad.

1. *Roman Law in Kang Youwei's Writings*

The earliest references to Roman law began to appear in China at the end of the 19th century, inside works which were translated or, more seldom, directly composed by Western missionaries and their Chinese assistants. [3] At the same time, in this period we witness the foundation of the first modern universities, whose courses included Western law classes and, in some cases, more specifically Roman law classes. [4]

The process of reception of the Romanist tradition in China takes a step forward when some of the most eminent literati of the time, who in that context had acquired basic information about Roman law, began to include in their works precious references to it, contributing to a wider diffusion of contents which up to then had been confined in translated works (or in works written by foreigners). [5] Kang Youwei was one of the main intellectuals in whose works we can find information about Roman laws and institutions. Below we shall try to give a comprehensive and specific account of some of the main passages of his works including contents of this kind.

The awareness of the importance of knowing Western law and of reforming the Chinese education system through the foundation of modern schools providing courses in this discipline was revealed by Kang already in his *Second Memorial to the Throne* (*Shang Qing di di'er shu* 上清帝第二书, May 2, 1895):

今宜立使才馆，选举贡生监之明敏办才者，入馆学习，其翰林部曹愿入者听。各国语言、文字、政教、律法、风俗、约章，皆令学习。

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[3] See, in particular, the following works: *Zuo zhi chu yan* 佐治刍言 (*Homely Words to Aid Governance*, 1885), which is the translation, done by the British missionary J. Fryer and his assistant Ying Zuxi 应祖锡, of *Political Economy, for Use in School and for Private Instruction* (by an unknown author, published in the volume *Chambers Educational Course*, Edinburgh, 1852); *Luoma zhilüe* 罗马志略 (1886), which is the translation, by the British missionary J. Edkins, of M. Creighton's work *History of Rome* (London, 1879); *Xi guo xuexiao* 西国学校 (*Schools in the Western Countries*, Shanghai, 1873-1874), written in Chinese by the German missionary E. Faber. For further information, see: LARA COLANGELO, *L'introduzione del diritto romano in Cina: evoluzione storica e recenti sviluppi relativi alla traduzione e produzione di testi e all'insegnamento*, *Roma e America. Diritto romano comune*, 36 (2015), 175-210.

[4] Such is the case, for instance, of the *Tianjin Zhong Xi Xuetang* 天津中西学堂, founded in 1895, of the *Jingshi Daxuetang* 京师大学堂 (1898), etc. For specific information about the history of the teaching of Roman law in China see: COLANGELO, *L'introduzione del diritto romano in Cina*, cit.

[5] Prominent figures, such as the intellectuals Ma Jianzhong 马建忠 (1845-1900) and Liang Qichao 梁啓超 (1873-1929), and the diplomat Xue Fucheng 薛福成 (1838-1894) included in their writings, in more or less lengthy form, important references to Roman law. See: COLANGELO, *L'introduzione del diritto romano in Cina*, cit.

We should found schools to form diplomats and let the best students of the country get in, those who already belong to the Imperial Academy may take those courses, if they wish. We should let them study foreign languages, literature, politics and institutions, law, customs and rules. [6]

Three years later, in his *Sixth Memorial to the Throne* (*Shang Qing di di liu shu* 上清帝第六书, January 29, 1898, also known as *Ying zhao tongchou quanju zhe* 应诏统筹全局折 [Proposals for National Overall Planning]), Kang more explicitly underlined the urgent need to create new laws in the civil, penal, international fields, specifically taking as a model those of the Western countries and especially Roman laws (今宜采罗马及英、美、德、法、 日本之律，重定施行 [7] [We should now adopt Roman law and also British law, American law, French law and Japanese law, establishing their implementation]): in his opinion, this would first of all allow China to equally interact with foreigners in commercial relationships, particularly in coastal areas. To this end, he considered it indispensable to found a department charged with fixing national laws following the Western model and guiding the country. [8]

However, a few months after the drawing of his sixth memorial, Kang was forced to leave China because of the failure and harsh repression of the Hundred Days of Reform (*Bai ri weixin* 百日维新, also known as *Wuxu bianfa* 戊戌变法) which he and his followers had promoted. Kang first flew to Japan, then to Canada and to several other both European and non-European foreign countries which he visited during his long stay abroad (1898-1914). During this period, he travels not only for personal interest, but also in order to promote his political ideas and to propagate the ideal of a constitutional monarchy among his fellow-countrymen who lived abroad. He stays in Europe from 1904 to 1908, with the intention of writing a diary of his travels in eleven countries of this continent (*Ouzhou shiyi guo youji* 欧洲十一国游记 [Notes on My travels in Eleven European Countries]). However, despite the initial project of publishing all his travel accounts as a collection, Kang only published a part of them, that is his travel diary in Italy (*Yidali youji* 意大利游记 [Notes on My Travel in Italy], 1905), [9] travel diary in France (*Falanxi youji* 法兰西游记 [Notes on My

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[6] The translation into English of all the extracts of Kang's works is my own. The original text of Kang's second memorial to the throne can be found in: TANG ZHIJUN 汤志钧 (ed.), *Kang Youwei zhenglun ji* 康有为政论集, vol. 1, Zhonghua shuju, Beijing, 1981, 131.

[7] For the original text of the *Sixth Memorial to the Throne*, see: NI ZHENGMAO 倪正茂, *Bijiao faxue shenxi* 比较法学深析, Beijing, 2006, 110.

[8] For a complete and more detailed translation of this passage, see: COLANGELO, *L'introduzione del diritto romano in Cina*, cit., 188.

[9] Included in the volume *Ouzhou shiyi guo youji*, published by Shanghai Guangzhi shuju 上海广智书局.

Travel in France], 1907)[10] and some shorter notes such as *Bu Deguo youji* 补德国游记 [Supplements to the Notes on My Travel in Germany], 1907),[11] while the rest of his diaries remained in manuscript form.[12]

Kang's first stop during his trip to Europe was Italy: he left Hong Kong on March 22, 1904, and arrived there on June 16.[13] In his travel diary in Italy he expresses conflicting opinions, alternating words of praise and criticism towards this nation and the Roman civilization, showing at times a background feeling of strong nationalism. In general, in all his writings, on the one hand he recognizes Western superiority from the point of view of 'material' results[14] (which are less advanced in Italy, compared to the other European countries), but on the other hand he is firmly convinced of Chinese people's moral superiority. Kang's attitude is constantly analytical, perpetually searching for a comparison between China and the West, and this is strictly connected to the main purpose of his travels: to draw useful ideas for the progress of his country and to find elements worthy of emulation by his fellow-countrymen, through the direct observation of that Western world he had in the past only achieved basic information about by reading the very few volumes on the West circulating in late Qing intellectual circles. Through the constant comparison between Italy and his country, Kang draws the conclusion that ancient Rome is not up to Han[15] China in several respects, such as: the strong social inequality traditionally existing in the Roman world and, according to him, absent in imperial China, the high rate of murder and widowhood (*luan sha zhi duo gua* 乱杀之多寡), the crimes and disorders caused by the low morals of the Romans.[16] And also with regards to the cultural sphere Kang does not spare criticism of the Roman civilization, pointing out that – according to him – ancient Rome was essentially a military power devoid of its own literary tradition and that

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[10] Published by Shanghai Guangzhi shuju 上海广智书局.

[11] Published on the magazine *Bu ren* 不忍 (issues: 7-10).

[12] The other travel diaries written by Kang which had remained in manuscript form have been later published in a volume including all his writings, titled *Kang Youwei Quanji* 康有为全集, edited by Jiang Yihua 姜义华 - Zhang Ronghua 张荣华 and published in 2007 by Zhongguo Renmin Daxue chubanshe.

[13] Kang arrives in Brindisi and stays there for twelve days during which he visits Naples, Pompei, Rome, Milan and Venice. He also passes through Florence without stopping there.

[14] MA HONGLIN 马洪林, *Wuxu hou Kang Youwei dui xifang shijie de guancha yu sikao* 戊戌后康有为对西方世界的观察与思考 [Kang Youwei's Reflections and Thoughts on the Western World After the Hundred Days of Reform], *Chuantong wenhua yu xiandaihua* 1 (1994): 19-28.

[15] 206 B.C.-220 A.D.

[16] XIE BINGQING 谢冰青, *Cong Kang Youwei Ouzhou shiyi guo youji zhong de Yidali xingxiang kan Kang Youwei dui Zhongguo wenming de taidu* 从康有为《欧洲十一国游记》中的意大利形象看康有为对中国文明的态度 [Kang Youwei's Attitude Towards Chinese Culture Emerging from The Image of Italy Depicted in His *Notes on My Travels in Eleven European Countries*], *Wenyi shenghuo* 5 (2012): 17-18.

Roman culture was not autochthonous but rooted in the Greek one, from which it had imported several elements, just like the Chinese barbarian dynasties of Northern Wei, Liao, Jin and Yuan had absorbed Chinese culture.[17] Even though Kang's words often reveal a typically sinocentric sense of superiority, to which that kind of interpretation of the cultural relationship between Rome and Greece is functional,[18] nonetheless he appears able to acknowledge the Roman superiority with regard to some elements which are objects of admiration by him, such as the presence in Rome of libraries, theatres, baths and, generally speaking, public services which didn't exist in ancient China or were reserved for the imperial family only. And it is above all with regard to the art field and the conservation of cultural heritage that Kang shows appreciation for Rome and Italy, hoping his fellow-countrymen could draw inspiration from the Italian model.[19]

In the light of what is one of the main purposes of Kang's observation of the Western world, that is identifying functional elements by which Chinese people could be inspired for national palingenesis, it is easy to understand that a recurring feature of his travel diaries is the strong attention paid to the analysis of the institutions and political systems of the visited countries which Kang carefully analyses, searching for the most suitable model for his homeland. In this sense, his travel diary in Italy appears particularly interesting for the presence of contents related to Roman law and institutions. In his diary, the first reference in this respect is related to the figures of Adrian and Justinian, about whose activity in the legal field Kang had some knowledge, although superficial or even erroneous:

哈的练网罗名士，组一议院,名之曰第一院。用法律家苏维亚[20]、裘利亚那辑罗马通行法律。其后茹斯底年"十二铜表律"，即因此而成者也.[21]

Adrian gathered illustrious men of learning and formed a parliament, named "Prime Council". He ordered Salvius Iulianus the Jurist to collect the laws in force in Rome. Afterwards, Justinian's "Twelve Bronze[22] Tables" were created.

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[17] XIE BINGQING, *Kang Youwei dui Zhongguo wenming de taidu*, cit., 17.

[18] It should be kept in mind that this kind of interpretation of Roman culture relationship with the Greek one was already present in Western ancient sources.

[19] For a specific analysis of the references to Italian art included in Kang Youwei's travel diary, see: M. TURRIZIANI, *The Connection Between Art and Patriotic Feeling in Kang Youwei's Yidali Youji*, *International Communication of Chinese Culture* 20/11 (2015): 1-14.

[20] This passage is here faithfully transcribed as reported in the volume edited by Zhong Shuhe, in which there is an enumerative comma between the names *Suweiya* 苏维亚-*Qiuliyana* 裘利亚那, even though they refer to one person only (the jurisconsult Salvius Iulianus).

[21] KANG YOUWEI, *Yidali youji*, in *Ouzhou shiyi guo youji er zhong*, edited by Zhong Shuhe, Yuelu shushe, Changsha, 1985, 102. Unless otherwise stated, all the passages taken from Kang's travel diary in Italy are here cited from the above-mentioned Zhong Shuhe's edition (1985).

[22] The term *tong* 铜, which means 'copper', is often used to refer to bronze (*qingtong* 青铜)

In the first part of the passage Kang provides a series of correct information: the "Prime Council" he mentions is most likely referred to the *Consilium principis*, an advisory body founded in the Augustan age and reorganized by Adrian, with the specific aim of assisting the emperor in the making of the most important and delicate political decisions. Furthermore, Adrian actually surrounded himself of experienced jurisconsults like Salvius Iulianus whom he instructed (A.D. 131) to collect and rearrange the previous Praetor's edicts: thus, as is well known, a new 'codex', the *Edictum Perpetuum*, was created, it remained for a long time the only organic set of laws regulating the relationships between private individuals, and it could be modified or integrated exclusively by means of imperial constitutions.[23] On the other hand, the attribution of the Twelve Tables to Justinian is erroneous, since they are, obviously, much more ancient (451-450 B.C.). Regardless of Kang's misunderstanding, the fact that he was aware of the existence of such documents and, therefore, of their value, is still significant.[24] Moreover, Kang undoubtedly had knowledge of the importance of Justinian's role in the process of codification,[25] as is clear from the following passage of his diary:

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as well, just like the Latin word *aes* refers to both materials. Therefore, I am not sure to which metal Kang referred, in my translation I opted for 'bronze' since the Twelve Tables were most likely made of it (as stated, for instance, by Cassius Dio [Dion. X, 60]).

[23] In Chinese sources a slightly earlier reference to the Edictum Perpetuum can be found in the Roman law history manual *Luoma fa* 罗马法, by an unknown author, translated from Japanese and printed by the publishing house Qixin Shuju 啟新書局 (Nanjing, 1903). For further details see: L. COLANGELO, *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*, in *Bullettino dell'Istituto di diritto romano "Vittorio Scialoja"* (2017), 195-217.

[24] At present, what seems to be the most ancient reference to the Twelve Tables (found in Chinese sources) is included in the above-mentioned translation into Chinese of the volume *Political Economy, for Use in School and for Private Instruction* (*Zuo zhi chu yan*, 1885), which Kang had most likely read. For an in-depth analysis of the history of the knowledge of the Twelve Tables in China, see: L. COLANGELO [臘蘭], *Shijiu shiji mo ershi jishi chu Zhong xi wenhua jiaoliu:* Shi'er biaofa *zai Zhongguo* 19 世纪末 20 世纪初中西文化交流：《十二表法》在中国. *Wakumon* 或問, n. 37, (2020): 61-78.

[25] This study certainly lends itself to further investigations with regard to the possible sources from which Kang derived the Roman law-related contents of his writings. Among the sources from which he might have learnt information about Justinian, besides the above-cited *Zuo zhi chu yan* (1885), there is a letter written by Ma Jianzhong in 1878 during his stay in Paris (*Bali fu youren shu* 巴黎複友人书 [Letter from Paris to a Friend]). This letter was later inserted in the volume *Shike zhai ji yan* 适可斋记言, vol. 2 (Notes from the Shike Studio, 1896), which collects the essays written by Ma Jianzhong in the years 1877-1894. The year after, this volume was also included in the collection *Xizheng congshu* 西政丛书 [*Collection of Writings About Western Politics*] edited by Liang Qichao 梁启超 (Shanghai, 1897). An extract of Ma's letter can be found in: WANG JIAN 王健, *Luoma fa chuanbo zhongguo wenxian jikao* 罗马法传播中国文献稽考 [An Analysis of the Sources Related to the Diffusion of Roman Law in China], in *Luoma fa yu xiandai minfa* 罗马法与现代民法, edited by XU GUODONG 徐国栋 (Beijing: Zhongguo fazhi chubanshe, 2002), 69.

五百二十年，东罗马英主茹斯底年兴，即制定法律者也，乃平定迦太基及非洲，覆汪德罗国，降峨特狄,恢复意大利. [26]

In 520 A.D. Justinian, sovereign of the Eastern Roman Empire, began the codification, i.e. he fixed the laws, then he suppressed rebellions in Carthage and Africa, conquered the Vandal Kingdom and defeated the Goths, restored the independence of Italy.

Likewise, Kang proves elsewhere in his diary to be aware of the extent of Julius Caesar's activity in the legal field, by describing him as both an illustrious historian and an expert of Roman law:

恺撒（...）又深通希腊之哲学，其所作战史最有名。又编定罗马法典，则为史学、 法律学名家. [27]

Caesar (...) also had a deep knowledge of Greek philosophy, his writings on war [28] are extremely famous. Furthermore, he composed Rome's code of laws and is therefore a renowned Roman historian and jurist.

In this case, the information provided by Kang are not quite precise, since, apparently, there exists no 'law code' in a narrow sense written by Julius Caesar (even though some sources mention his project of writing one); however the relevance of his activity in the legislative field [29] is undoubted and Kang was certainly aware of it.

Besides the above-mentioned references to specific figures of Roman history and jurisprudence, in Kang's travel diary there is as well the presence of several more general references to the Roman laws and their fundamental influence on the development of the national law of the European countries. In the first passage of this kind Kang emphasizes the value of Roman law by highlighting that since it was usually extended to all the conquered peoples, it has later become the foundation of the law of modern European countries: [30]

所灭之国，粗收权利，而以宏大之律网罗之，亦自有精妙之律法出焉。今欧洲所用，亦多沿罗马律是也. [31]

The people of the countries conquered by the Romans were brutally deprived of their rights and kept together by means of the great laws of Rome: thus excellent "national" laws were created. The laws which are

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[26] KANG YOUWEI, *Yidali youji*, cit., 169.

[27] KANG YOUWEI, *Yidali youji*, cit., 103.

[28] I.e.: *De bello gallico*, *De bello civili*.

[29] The enactment of most of the so called "Julian laws" (*Leges Iuliae*) has been proposed by Julius Caesar.

[30] For further information on the possible sources (works composed by Chinese authors or translated into Chinese) from which Kang might have learnt this concept, see: L. COLANGELO, *L'introduzione del diritto romano in Cina*, cit.

[31] KANG YOUWEI, *Yidali youji*, cit., 157.

nowadays used by European nations are mostly derived from Roman laws.

Kang's admiration extends elsewhere to Roman political institutions as well, when he underlines the fundamental role of the Senate in guaranteeing the unity of the empire and explains that it subsequently constituted the main model for the parliamentary institutions of the European countries:

论罗马之美政能久保其大一统之国者则实元老院为之。今欧洲各国议院之开亦由元老院旧事入人脑中故得刺激而为之. [32]

What allowed Rome's good government to preserve the great unity of the empire was the Senate. The foundation of the parliaments of all modern European countries is strictly linked to the fact that the people drew inspiration from the ancient institution of the Senate.

In another passage of his diary Kang even identifies in the laws of the Roman people one of the causes of the modern prosperity of Italy, and he includes Roman law among those characteristic elements of Western "material progress" that he wishes for his motherland:

今者重都府、通道路、速邮传、立银行四大政，与其法律大行于欧洲，为盛强之 一大原因焉。我国地土广大，逾于罗马，而不知大治道路以速通之；以金银贮库，而不知立国家银行，以操纵财权焉. [33]

Today the four political strategies – that is: attaching importance to the development of cities, building streets, fastening transportations, founding banks –, together with the diffusion of its [i.e.: Rome's] laws in Europe, are one of the causes of her prosperity and power. China has a huge territory, wider than Rome's, but <China> doesn't know how to control the streets in order to make them quickly viable; <China> fills its storehouses with gold and silver, but doesn't know how to build national banks to manage the financial power.

Later on in his diary, however, Kang harshly criticizes the Roman political customs, claiming they not only are not up to the Chinese ones, but neither to those of the other European countries. In this context, he speaks in a more or less openly skeptical tone also about Roman laws which, despite being universally known as excellent, would need to be compared to those of Han China, so as to confirm or deny their alleged superiority:

其法律号称美备，为今欧人之祖，他日当以与我汉律一一校之。然总而断：

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[32] KANG YOUWEI, *Yidali youji*, cit., 140; See also: ZHAO YANLING-WEI CANGBO, *Kang Youwei youli shiqi jun xian sixiang chutan* [Preliminary Reflections on Kang Youwei's Concept of Constitutional Monarchy During the Period of His Travels], *Chengde minzu shizhuan xuebao* 4 (2001): 20.

[33] KANG YOUWEI, *Yidali youji*, cit., 159.

罗马人之政俗，实为北魏、辽、金、元之比例而已；虽号文明，未脱野蛮之本者也；非今欧人之比，亦非我中国之比[34]也.

Its [i.e.: Rome's] laws are known as well codificated, they constitute the origin of the laws of the modern European countries, at another time we should compare them with those of the Han dinasty. However, in summary, Roman political customs are actually like those of the Nothern Wei, the Liao, the Jin, the Yuan: although they are said to be civilized, they do not differ much from being in a primitive state, they are no match either for the other European people or for the Chinese people.

An analysis of the aforementioned fragment seems to suggest that even with regard to Roman law Kang shows the same ambivalent attitude which is traceable in the rest of his diary: on the one hand, he cannot conceal his high consideration of Roman laws and institutions that he recognizes as the foundation of the law and, generally speaking, of the progress and development of the European countries; on the other hand, his patriotism and nationalistic pride force him to hold back his appreciation towards those elements belonging to the Italian and Western world and, at the same time, to reevaluate Chinese culture by highlighting a series of negative aspects of the foreign one. However, as we can see from a comprehensive analysis of the previous fragments, his overall opinion is undoubtedly positive. Similarly, it is quite sure that his writings, like those of other intellectuals of that time, contributed to the introduction and spread of information related to the Romanist legal culture. That kind of information was of decisive importance in such a delicate phase like that of the last years of the Chinese empire, when the reform of the national legal system was perceived by the government, as well as by the intelligentsia, as an urgent need and, therefore, those information had an even more crucial role in the orientation of the related policies of the central authority.

At the beginning of the 20th century the severe crisis, that had characterized the last decades of the previous century and reduced China to the position of a semi-colonial state, appeared irreversible and forced the imperial government to face the indisputable need for a renovation of the legal system. The legal reform, originated in the observation of the institutions and the juridical systems of several Western countries,[35] consisted of an intense

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[34] KANG YOUWEI, *Yidali youji*, cit., 196.

[35] In 1905 the Chinese government sent a delegation of law experts to several foreign countries with the specific task of looking at their legal and political systems. After the return of the delegation to China, an intense activity of revision of the laws was begun by some of the main jurists of the time, like Shen Jiaben 沈家本 and Wu Tingfang 伍廷芳. It is of great significance that in the written report of the delegation's journey Roman law is referred to as the source of the laws and political institutions of the European countries. See: FAN ZHONGXIN, *Zhongxi fa wenhua de anhe yu chayi* [Similarities and Differences Between Chinese and Western Legal Culture], Zhongguo Zhengfa Daxue chubanshe, Beijing, 2001, 300.

codification activity which led to the first draft Civil Code in 1911: [36] despite its never being put into force because of the fall of the Chinese empire the very same year, this document signalled the adhesion to the Romanist system (confirmed by China in the following decades). Of course, it should be kept in mind that this process was not just a mere "transplantation" of the continental legal system into the Chinese one: China developed over time its own legal system with specific Chinese characteristics. However, it is undoubted that in the late imperial period the Chinese government, willing to reform the existing system, deliberately decided to look outside for inspiration and eventually chose to "follow" the romanistic model.

As has been said, the adoption of the continental system in China is a gradual and fairly elaborate process in which the information included in the works of some of the most eminent late Qing intellectuals surely had a certain influence. This study represents a preliminary phase of a wider research project [37] which aims at verifying the presence of references to Roman law in the works of some of the main Chinese literati of that time, in order to further clarify the dynamics related to this fundamental early stage of the migration of concepts from the Romanist legal culture to the Chinese one. In this sense, this paper has focused on the figure of Kang Youwei and his specific role in the diffusion of basic, yet precious, information about the Romanist legal tradition.

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[36] The draft was mainly inspired by the German pandectistic model and, therefore, generally speaking, by the Romanist system. The choice to adhere to it was founded on both the nature itself of Roman law (universalistic, systematic and particularly suitable for a rapid codification) and China's will to emulate neighbouring Japan which had already adhered to the Romanist legal family by mainly looking at French and German law for the elaboration of a civil code (1898). See.: Sandro Schipani, *Diritto romano in Cina*, in *XXI Secolo*. Norme e idee, Enciclopedia Treccani, Rome, 2009, 533. See also: S. SCHIPANI, *Il diritto romano in Cina*, in D*iritto cinese e sistema giuridico romanistico. Contributi*, edited by L. FORMICHELLA-G. TERRACINA-E. TOTI (Giappichelli, Turin, 2005), 62-68.

[37] The above-mentioned research project is being conducted as part of the activity of the research center "**Observatory on Codification** and Training of the **Jurist** in **China** under the Framework of the Romanist Legal System " (University of Rome "Tor Vergata", "Sapienza" University of Rome, Department of Cultural Identity – Italian National Research Council [CNR], China University of Political Sciences and Law [*Zhongguo Zhengfa Daxue* 中国政法大学]).

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QUINTUS MUCIUS SCAEVOLA AND THE OBLIGATION IN THE PRC CIVIL CODE

Stefano Porcelli

1. *Introduction*

On May 28th, 2020 the President of the People's Republic of China (PRC) promulgated the Civil Code of the PRC (中华人民共和国民法典) right after it has been approved by the National People's Assembly (NPA) earlier on the same day. The Code came into effect on January 1st, 2021.[1]

For the first time in history, a piece of Chinese legislation bears the name of a "code", 典 (*dian*)[2] and therefore already indicating that it is one of the results of the dialogue between China and the Roman law legal system established more than one hundred years ago.[3] The PRC Civil code

[1] On these and other general aspects related to the PRC Civil code, see, for instance, S. PORCELLI, *Il nuovo Codice civile della Repubblica popolare cinese. Osservazioni dalla prospettiva del dialogo con la tradizione romanistica*, in *Studium Iuris*, 7/8/2020, 810, n. 1 (re-published in R. CARDILLI-S. PORCELLI, *Introduzione al diritto cinese*, Torino, 2020); see also S. PORCELLI, *Il Codice civile della RPC quale frutto del dialogo tra Cina e Diritto romano*, in *Roma e America. Diritto romano comune*, 41/2020 (re-published in A. SACCOCCIO-S. PORCELLI, *Codice civile cinese e Sistema giuridico romanistico*, Modena, 2021).

[2] See A. FEI, *Elaborazione e caratteristiche del Codice civile cinese*, in *Roma e America. Diritto romano comune*, 41/2020, 137.

[3] On the beginning of such a dialogue, see S. PORCELLI, *Diritto cinese e tradizione romanistica. Terminologia e sistema*, in *Bullettino dell'Istituto di Diritto romano "Vittorio Scialoja"*, 110/2016, 251 ff.

has been elaborated through a two-step (两步, *liangbu*) process started in October 2014 after the 18th Central Committee of the Chinese Communist Party passed the《中共中央关于全面推进依法治国若干重大问题的决定》, the "Decision on several relevant issues related to the full implementation of the government by the law", where it had expressly put forward the topic of the elaboration of a Civil code.[4] In this regard, another important element of the dialogue between China and the Roman law comes into play: the role of the legal science and the jurists. Indeed the very decision to elaborate a Civil code for the PRC seems to have been stimulated by the advices offered by some of the most influential scholars of the Country about China's need to have a Civil code so as to gather in a better coordinated way the rules provided through several autonomous pieces of legislation during the previous decades (several 单行法, *danxingfa*) and to update some of their contents, given the fact that some of them started being fairly outdated for the way the Chinese society changed over this period of time.[5] Furthermore, as an element of the dialogue between China and Roman law legal systems, it has to be noted that, also from such a perspective, in China the role of the Code is remarked to be that of the core of the private law.[6]

In the past decades, this role of core piece of legislation for the private law has been *de facto* played by the Law on General Principles of Civil Law (GPCL) dating back to 1986, which served the function of a 'concise civil code'.[7] However, the Chinese society and the related legal framework, since 1986 until 2014, went through substantial changes, and the GPCL itself needed some updates. Therefore, it has been decided to work first on updating the GPCL in order to elaborate rules to serve as the general part

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[4] See Y. ZHAI-S. PORCELLI, *European Legal Models and Asia: Novelties from the General Part, towards a Civil Code for the People's Republic of China*, in *Contratto e Impresa/Europa*, 23/2018, 117.

[5] It has been remarked that the NPA did not include the elaboration of a Civil code in its legislative planning, therefore, some of the most influential scholars of the Country, in 2014, gathered in a Conference so to stress the need for a Civil code. The opinions expressed during such a Conference became known among the highest-ranking officials in the Communist Party which therefore, in its Decision taken on October 23rd, 2014, advised the NPA to include the drafting of the Civil code in its legislative plan and the work for the elaboration of the Civil code thenceforth started. See A. FEI, *Elaborazione e caratteristiche del Codice civile cinese*, 135-136.

[6] The Chinese legislator and the Chinese legal scientists defined the Code as an "Encyclopedia for the private law" (私法上的百科全书), for references, see S. PORCELLI, *Il soggetto di diritto nel Codice civile della Repubblica Popolare Cinese. Riflessioni (preliminari) dalla prospettiva romanistica al tempo del COVID-19*, in R. MARINI (ed.), *Pandemia e diritto delle persone, Atti del I Seminario dell'"Osservatorio su Persona e Famiglia' del CSGLA (Roma, 15-16 settembre 2020)*, Milano, 2021, n. 5 at 343-344.

[7] See A. FEI, *Gli sviluppi storici del diritto cinese dal 1911 fino ad oggi. Lineamenti di un'analisi relativa al diritto privato*, in *Roma e America. Diritto romano comune*, 23/2007, 122.

of the future Civil code, and then, as a second step, to work on the elaboration of the other books of the Code, which were also supposed to be based on updated versions of other Laws promulgated in the previous decades. From the last article of the Civil code it is possible to observe which Laws have been used as its pillars, article 1260 is in fact providing that, with the entry into force of the Code, the following Laws were to be abrogated: the Marriage Law of the People's Republic of China, the Succession Law of the People's Republic of China, the GPCL, the Adoption Law of the People's Republic of China, the Guarantee Law of the People's Republic of China, the Contract Law of the People's Republic of China, the Real Right Law of the People's Republic of China, the Tort Law of the People's Republic of China, and the General Part promulgated in 2017 as a first step in the elaboration process, since it has been included in the Code to serve as its general part. [8]

The Chinese legislator planned to finalize both the steps in 5 years and to promulgate the Code in 2020. Such a schedule has been basically abided by, beside a little delay (3 months) caused by the outbreak of the COVID-19 pandemic. [9] The work on drafting the Code has been undertook by modifying the aforementioned pieces of legislation and by trying to find a way to better coordinate the rules provided. Nonetheless, by keeping into account the fact that the Chinese society and the legal practice started getting used to a certain structure of the legal framework, in the drafting of the Code, attention has also been paid to avoid too radical changes. This kind of guidelines, combined with what seems to be the influence of the Chinese ancient legal culture, [10] and other elements that will be referred to in the coming pages, caused a fairly interesting phenomenon: if in the GPCL there were rules on the joint and several obligations (rules on the joint and several credits and debts – 连带权利, *liandai quanli* and 连带义务, *liandai yiwu*, literally joint and several rights and joint and several duties – provided by art. 87). [11] This kind of rules did not appear in

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[8] Art. 1260 of the Code is prescribing that 本法自 2021年1月1日起施行。《中华人民共和国婚姻法》、《中华人民共和国继承法》、《中华人民共和国民法通则》、《中华人民共和国收养法》、《中华人民共和国担保法》、《中华人民共和国合同法》、《中华人民共和国物权法》、《中华人民共和国侵权责任法》、《中华人民共和国民法总则》同时废止. See S. PORCELLI, *Il nuovo Codice civile della Repubblica popolare cinese*, cit., 811.

[9] See S. PORCELLI, *Il soggetto di diritto nel Codice civile della Repubblica Popolare Cinese*, cit., 341-343 and references therein.

[10] See also what already remarked in S. PORCELLI, *Obbligazione e codice. Diritto romano e sistematica nel nuovo Codice civile della Repubblica popolare cinese*, in *Bullettino dell'Istituto di diritto romano "Vittorio Scialoja"*, 114/2020, 152 ff.

[11] Art. 87 of the GPCL was providing that 债权人或者债务人一方人数为二人以上的，依照法律的规定或者当事人的约定，享有连带权利的每个债权人，都有权要求债务人履行义务；负有连带义务的每个债务人，都负有清偿全部债务的义务，履行了义务的人，有权要求其他负有连带义务的人偿付他应当承担的份额.

the new General part, where there were instead provided, by art. 178 par. 1, rules on the joint and several liability (连带责任, *liandai zeren*).[12] What are the implications of such a shift in perspective?[13] One thing was quite clear since the beginning: if through the joint and several liability it was possible – to a certain extent – to 'cover', the 'negative side' of a certain relationship, how to use it for the 'positive side'? In other terms: how to deal with the joint and several credits? This problem has already been raised within the 2017 General part with regard to the credits involved in legal persons de-mergers and in the legal persons formations in case the formation process would have not been successful. Respectively in artt. 67 par. 2 and art. 75 par. 1 of the 2017 General Part (now artt. 67 par. 2 and 75 par. 1 of the Code) mention has been made to the 连带债权 (*liandai zhaiquan*), the joint and several credits that are, by the way, paired with the 连带债务 (*liandai zhaiwu*), on the 'negative side', the joint and several debts, instead of with the above-mentioned *liandai zeren*, the joint and several liability. Of course, this was, already with the General part, clearly showing the relevance of the conceptual distinction between the obligation and the liability as well as the need, for the Code, to provide rules on the obligation in general in order to better serve the systematic role it is called to fulfil, as the core of the private law.[14] However, in order to understand the reasons why such an issue arose and in order to make clear what are the features of the system of rules created by the China Civil code with regard to duties which the law aims to 'guarantee' that will be performed in the future, it is first and foremost necessary to look back at the Roman time and in particular to what pertained to the invention of the legal-scientific category of the obligation and its subsequent course over centuries, until it entered the Chinese law. Subsequently, it will be possible to try to understand how the obligation has been reinterpreted in a Chinese perspective, based on its own multi-millennia culture and tradition as well as based on the specific social needs that the nowadays Chinese society considers important.

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[12] Art. 178 par. 1 of the 2017 General part, now art. 178, par. 1 of the Civil code provides that: 二人以上依法承担连带责任的，权利人有权请求部分或者全部连带责任人承担责任.

[13] It is probably pleonastic to remark that, as it will be more clearly shown in the following pages, there are quite some relevant implications in the distinction between obligation and liability (and, of course, responsibility as well).

[14] See what already noted in S. PORCELLI, *La nuova "Parte generale del diritto civile della Repubblica popolare cinese". Struttura e contenuti*, in *Rivista di diritto civile*, 3/2019, 678-679, 698-699 etc.; Y. ZHAI-S. PORCELLI, *European Legal Models and Asia: Novelties from the General Part*, cit., 137-139.

2. *Quintus Mucius Scaevola and the* obligatio

A. Quintus Mucius Publii filius pontifex maximus ius civile primus constituit generatim… *Brief methodological remarks*

In one of the most complete overview of ancient legal history that we have inherited from the period of ancient Rome, it is reported by Pomponius, that Quintus Mucius Scaevola was the first to arrange the *ius civile* by creating a new methodology in the legal field, based on the application of some of the achievements of the Greek philosophers' thought, which turned the law itself into a science: he was the one who *ius civile primus constituit generatim*.[15] For sure, as a *pontifex maximus*, Quintus Mucius Scaevola was having a thorough knowledge of the *ius civile*,[16] and also by taking into account other elements, it seems highly probable that, even if he would have not been the very first one to venture into this activity, as also witnessed by the aforementioned source, thanks to him the methodology of employing logics in order to deal with the law moved to a higher level.[17] Quintus Mucius turned the law into a science, exerting a relevant influence on the construction of what has been designated by semiologists as a "*cultura grammaticalizzata*", or by legal scholars as a "legal grammar".[18] Roman jurists, starting probably from Quintus Mucius Scaevola, were not much concerned with the technical philosophical considerations about the διαίρεσις and logics as a science on its own,[19] but by applying the *genus-species* (to which the "*generatim*" in Pomponius' statement refers) classification and other 'instruments' developed within the philosophical field, they organized the law into categories by investigating the common principles and aspects among the rules[20] so as to build legal cat-

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[15] We read in D. 1.2.2.41 (Pomponius *libro singulari enchiridii*) *Post hos Quintus Mucius Publii filius pontifex maximus ius civile primus constituit generatim in libros decem et octo redigendo*. On Quintus Mucius see J.L. FERRARY-A. SCHIAVONE-E. STOLFI (eds.), *Quintus Mucius Scaevola. Opera*, Roma, 2018. On Quintus Mucius and the *generatim* see S. SCHIPANI, *La codificazione del diritto romano comune*, Torino, 1999, 199 ff., on the relevance of the Greek philosophy see S. PORCELLI, *Diritto e logica. Da Roma alla Via della seta*, in *Roma e America. Diritto romano comune*, 39/2018, 201 ff. and references therein.

[16] On the 'monopoly' held by the *pontifices* on the *ius civile* in the earliest Roman time, see G. GROSSO, *Lezioni di storia del diritto romano*, Torino, 1965, 115 ff.

[17] See M. BRETONE, *Tecniche e ideologie dei giuristi romani*, Napoli, 1982, 108.

[18] For the "cultura grammaticalizzata", see U. ECO, *Trattato di semiotica generale*, Milano, 2016, 230; for the "legal grammar" see P. STEIN, *Roman Law and English Jurisprudence Yesterday and Today*, Cambridge, 1969.

[19] See M. TALAMANCA, *Lo schema 'genus-species' nelle sistematiche dei giuristi romani*, in *La filosofia greca e il diritto romano. Colloquio italo-francese (Roma 14-17 aprile 1973), Quaderno dell'Accademia nazionale dei lincei*, Roma, 221-II, 1977, 218; 259-260; 289.

[20] See M. BRETONE, *Tecniche e ideologie dei giuristi romani*, 109; on the good faith principle as such an example where, again, a pivotal role is recognized as having been played by Quintus Mucius see R. CARDILLI, "Bona fides" *tra storia e sistema*, Torino, 2010, 29 ff.

egories further divided into *species* or eventually upwards being classified within the same *genus* and so on. In this way, the law has been built as a science, with its taxonomies, through a methodology we still use nowadays although it was (and it is deliberately so also today) combined with a conception based on which, as it has been clearly stated also several centuries after Quintus Mucius, such a science should serve the purpose of delivering justice. The latter aspect is already clearly shown by the relationship between the terms *ius* and *iustitia* in the Latin language [21] and it is also witnessed in the sources by the definition of the *Iuris prudentia* as the *iusti atque iniusti scientia*, [22] is furthermore showing an awareness of the fact that values cannot (and should not) be neglected by the law. [23] According to such a conception, which is also made available to us in its διαίρεσις based positioning, the law is included in the *genus* of the *artes*, therefore of the 'human activities' (the Latin *ars* is belonging to a semantic field close to the one of the Greek τέχνη), and its fundamental features which do allow it to be distinguished from the other *artes*, are expressed by the *bonum* and *aequum*. Thus, the *ius* is the human pursuit of the best possible solution (*bonum*) – given also the fact that, as a human activity, considering the limits of the human beings, a true perfection may not be reached – in the light of the *aequitas* (and not *aequalitas*) – which does imply that similar matters should be treated in a similar way and different matters should be treated in a different way, otherwise treating similar matters in different ways or treating different matters in similar ways would be *iniquum* and therefore unjust. [24]

However, based on Pomponius' remark, the methodology that has been first employed by Quintus Mucius Scaevola, apart from representing one of the foundations of the subsequent development of the law as a science, may have also let the *Pontifex* himself achieve some relevant results in the 'construction' of legal categories. For instance, it seems fairly probable that by leveraging on the differences and similarities in his διαίρεσις based approach, he may have noticed that certain transactions that, developed

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[21] See, for instance, the 'etymology' of *ius* from *iustitia* provided in D. 1.1.1, pr. (Ulpianus *libro primo institutionum*) *Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. Est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi*.

[22] D. 1.1.10.2 (Ulpianus *libro secundo regularum*) *Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.*

[23] See S. PORCELLI, *Diritto e logica. Da Roma alla Via della seta*, 209-212 and references therein.

[24] On the Celsus's definition of the *ius* as the *ars boni et aequi* (available to us thanks to its statement in the above-mentioned D. 1.1.1 pr.), see F. GALLO, *Celso e Kelsen per la rifondazione della scienza giuridica*, Torino, 2010. See also S. PORCELLI, *Diritto e logica. Da Roma alla Via della seta*, cit., 209-212 and Y. STOEVA, *The 'Uncertainty Hypothesis' in International Economic Law*, in *The Chinese Journal of Global Governance*, 2/2016.

within the *ius gentium* and were afterwards recognized and protected by the *praetor*, were having a common aspect which was that they were all featuring the *consensus* as a means to be stipulated; or he may have noticed that there were common elements among certain kind of duties to be performed in the future that the *ius* was taking into account and protecting. [25]

B. *Quintus Mucius Scaevola and the 'inception' of the* obligatio

As clarified above, Quintus Mucius as a *pontifex maximus* was most certainly well versed with the *ius civile* and, by employing the διαίρεσις and other 'instruments' developed within the field of the logics, has started finding common aspects and differences among the *ius civile* rules, legal schemes and principles.

As it has been clearly shown by recent studies, the obligation as a category has been built on the basis of certain archetypes swinging between the poles of the 'duty' and 'subjection'. [26] An overview of those archetypes may be of help in order to better frame the relationship between the obligation and the liability/responsibility. One of the archetypes to be taken into consideration is the *oportere*, a legal-religious duty included among the *mores* of Rome suitable to be employed with regard to transactions which would not cause immediate legal effects such as in the *gesta per aes et libram*, but should rather be performed in the future. Therefore, an important feature of this *oportere* is that it was not producing an effect that could have been immediately subject to a specific 'enforcement' on the person of the debtor, a 'subjection' state of this person, but it was rather creating a duty, a condition in which although one of the parties was bound to a certain behavior in favor of the other party, its status (no matter if *libertatis*, *civitatis* or *familiae*) was not subject to any restriction until when, in case of non-performance of such a duty, a judge may have ascertained such a non-performance and condemned the *pater,* thus turning his position into the one of a *iudicatus*. Therefore, it was a dynamic scheme under which, even if a party may have undertaken a certain duty, that party would have kept its own freedom and autonomy for the time the duty was pending and, in case of non-performance, until when a judge may have eventually ascertained the non-performance. Beside the *oportere*, among the other legal schemes that were – in the early Roman law time –

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[25] See R. CARDILLI, Damnatio *e* oportere *nell'obbligazione*, Napoli, 2016, 278 ff.; R. MARINI, *Contrarius consensus*, Milano, 2017, 52 ff.; S. PORCELLI, Hetong *e* contractus, cit. *Per una riscoperta dell'idea di reciprocità nel dialogo tra diritto cinese e diritto romano*, Torino, 2020, 133 ff.

[26] See R. CARDILLI, Damnatio *e* oportere *nell'obbligazione*, cit.

employed to deal with matters which today belong to the area of the 'obligation', it has to be mentioned the *damnas esto*. Differently from the former, this archetype was rather belonging to the area of the responsibility: against the *pater* who was *damnatus* could be directly employed the *manus iniectio*. Therefore, similarly to what was happening in the case of the aforementioned *iudicatus*, the *damnatio* was creating a state that can be considered, in a broad sense, as a state of 'subjection'. The *damnas esto* and the *iudicatus* were hence models that could be considered as opposite to the one of the *oportere*: if in the latter, despite a pending duty, the party was still keeping its freedom and autonomy, in the other two models the *pater* was in a state of subjection. In the III-II century b. C., thanks to the contribution of the jurists the *oportere* went through an expansion and in the *formulae in ius conceptae* of the *actiones in personam*, the *oportere* started playing a relevant role not only for what could be considered belonging to the area of 'contracts', but also for some kind of 'torts'. [27]

It is against this background that what can be considered as the contribution of Quintus Mucius came into play. From Aulus Gellius it is possible to read Labeo quoting a sentence ascribed to Quintus Mucius where the *Pontifex* has employed the expression *"furti se obligavit"*; [28] from Varro it is possible to see that he was 'framing' the *nectere* in terms of *"obligari"*; [29] the reference to a *"iuris obligatio"* and another use of the term *"obligatio"* [30] seem to be ascribed to Quintus Mucius by Pomponius. Based

[27] It seems that the *nexum*, although bearing some specific features, was closer to the model of the state of subjection rather than to the one of the duty. On these aspects, see R. CARDILLI, Damnatio *e* oportere *nell'obbligazione*, cit, 61 ff.

[28] See Aul. Gell., Noct. Att. 6, 15, 1-2: *Labeo in libro de duodecim tabulis secundo acria et severa iudicia de furtis habita esse apud veteres scripsit idque Brutum solitum dicere et furti damnatum esse, qui iumentum aliorsum duxerat, quam quo utendum acceperat, item qui longius produxerat, quam in quem locum petierat. Itaque Q. Scaevola in librorum, quos de iure civili composuit, XVI. Verba haec posuit: "Quod cui servandum datum est, si id usus est, sive, quod utendum accepit, ad aliam rem, atque accepit, usus est, furti se obligavit"*. On this issue see R. CARDILLI, Damnatio *e* oportere *nell'obbligazione*, cit, 275-276.

[29] Varr. De ling. Lat. 7, 105 (Goetz-Schoell) *In Colace nexum Manilius scribit omne quod per libram et aes geritur, in quo sint mancipia; Mucius, quae per aes et libram fiant ut oblige[n]tur, praeter quom mancipio dentur. Hoc verius esse ipsum verbum ostendit, de quo qu <a>erit: nam id <a>es[t] quod obligatur per libram neque suum fit, inde nexum dictum. Liber qui suas operas in servitutem pro pecunia quam debebat, dum solveret, nexus vocatur, ut ab aere obaeratus. Hoc C. Poetelio Libone Visolo dictatore sublatum ne fieret, et omnes qui bonam copiam iurarunt, ne essent nexi dissoluti*. See again R. CARDILLI, Damnatio *e* oportere *nell'obbligazione*, cit., 133 ff.

[30] D. 34.2.34, 1-2 (Pomponius *libro nono ad Quintum Mucium*) *Item scribit Quintus Mucius, si maritus uxori, cum haberet quinque pondo auri, legasset ita: "Aurum quodcumque uxoris causa paratum esset, uti heres uxori daret", etiamsi libra auri inde venisset et mortis tempore amplius quam quattuor librae non deprehendentur, in totis quinque libris heredem esse obligatum, quoniam articulus est praesentis temporis demonstrationem in se continens. Quod ipsum quantum ad ipsam iuris obligationem pertineat, recte dicetur, id est ut ipso iure*

on what can be read from the aforementioned sources, it is thus possible to deduce that, by leveraging on his 'systematic skills' for which as already remarked above he has been designated by Pomponius as the one who *ius civile primus constituit generatim*, Quintus Mucius envisioned the *obligatio* as a 'dogmatic category': he put in place an abstract process in which the noun "*obligatio*", has been enriched by a new, metaphorical, legal meaning referring to an ideal 'binding', and it has been employed for what "attracted by the *oportere*, gathered around the *actiones in personam*". [31]

The inheritance left by the *Pontifex* with regard to the obligation has been further elaborated afterwards by other jurists who kept employing a scientific approach to deal with the law. Another milestone is indeed the one achieved by Gaius, who, in undertaking the scientific-systematic effort aimed at organizing the legal knowledge inherited from the preceding jurists in a structure different from the one of the edict of the *praetor*, [32] by arranging the law on the basis of the *genera* of the *personae*, *res*, *actiones*, included the obligations among the *res* (*incorporales*). Gaius considered the obligation as a *genus* and he further divided it (Gai. 3, 88-225), by undertaking his considerations from the perspective of the effects, while he used it to systematize a certain area of the law in view of the fact that

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heres sit obligatus. Verum sciendum, si in hoc alienaverit testator inde libram, quod deminuere vellet ex legato uxoris suae, tunc mutata voluntas defuncti locum faciet doli mali exceptioni, ut, si perseveraverit mulier in petendis quinque libris, exceptione doli mali submoveatur. Sed si ex necessitate aliqua compulsus testator, non quod vellet deminuere ex legato, tunc mulieri ipso iure quinque librae auri debebuntur nec doli mali exceptio nocebit adversus petentem. Quod si ita legasset uxori "aurum quod eius causa paratum erit", tunc rectissime scribit Quintus Mucius, ut haec scriptura habeat in se et demonstrationem legati et argumentum: ideoque ipso iure alienata libra auri amplius quattuor pondo non remanebunt in obligatione, nec erit utendum distinctione, qua ex causa alienaverit testator. On this source and on the "*iuris obligatio*", see R. CARDILLI, Damnatio *e* oportere *nell'obbligazione*, cit., 278 ff. The term "*obligatio*" ascribed to Quintus Mucius does also appear in D. 46.3.80 (Pomponius *libro quarto ad Quintum Mucium*) *Prout quidque contractum est, ita et solvi debet: ut, cum re contraxerimus, re solvi debet: veluti cum mutuum dedimus, ut retro pecuniae tantundem solvi debeat. Et cum verbis aliquid contraximus, vel re vel verbis obligatio solvi debet, verbis, veluti cum acceptum promissori fit, re, veluti cum solvit quod promisit. Aeque cum emptio vel venditio vel locatio contracta est, quoniam consensu nudo contrahi potest, etiam dissensu contrario dissolvi potest.* On this source see R. CARDILLI, Damnatio *e* oportere *nell'obbligazione*, cit., 288 ff.; R. MARINI, *Contrarius consensus*, Milano, 2017, 52 ff.; S. PORCELLI, Hetong *e* contractus, cit., 133 ff.

[31] See R. CARDILLI, Damnatio *e* oportere *nell'obbligazione*, cit., 273 ff.

[32] However, it seems that, with regard to the shaping of the category of the *obligationes quae ex contractu nascuntur* there has been an influence exherted by Quintus Mucius theories, see A. SACCOCCIO, *La consensualità del mutuo reale. Continuità e discontinuità nella disciplina del contratto di mutuo tra diritto romano, Italia e Cina*, in *Revue internationale des droits de l'antiquité*, 65/2018, 343; instead, on the *obligationes quae ex delicto nascuntur* there was perhaps an influence exherted by the way the subject was arranged in the *tres libri iuris civilis* by Masurio Sabino, see R. CARDILLI, Damnatio *e* oportere *nell'obbligazione*, cit., 302 ff.

such a category pertaining to the aspects related to the substantive law did also correspond to the one of the *actiones in personam* for the procedural law side.[33] Again, also in this instance, the employment of a scientific methodology to the law has been fundamental in the building of such a category. For instance, as demonstrated by the fact that in the *Institutiones*, with regard to the undue payment, Gaius divided in two the category of the *obligatio*, between those arising *ex contractu* and those arising *ex delicto*. The jurist went through difficulties since he noticed that it could not completely match with either of the mentioned sub-categories: it was not, for sure, arising *ex delicto*, nor it could have been said it was arising *ex contractu,* given the fact that it is lacking an element that, based on the sources we can access nowadays, was considered at least from the time of Sextus Pedius as a common element to the contracts: the agreement.[34] In a work that is currently considered by the largest part of the scholars as a later product of Gaius scholarship, the *Res cottidianae* or *aureorum*,[35] it is actually possible to find an improvement in the categorization of the obligations, where we read that D. 44,7,1 pr. (Gaius *libro secundo aureorum*) *"Obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam iure ex variis causarum figuris"*. Such a *divisio* of the obligations based on whether they may be originated by contracts, torts or other *causae*, which has been the archetype of what is possible to be found in several modern civil codes, including par. 2 of art. 118 of the PRC Civil code, has been further elaborated by the jurists members of the commission who drafted the *Iustiniani Institutiones* where the obligations are divided among those arising from contracts, from tort and *quasi ex contractu* and *quasi ex maleficio*.[36] In the *Iustiniani Institutiones*, beside the fact that also the so-called praetorian obligations[37] have been included under the category of the *obligatio,* it is also possible to find a definition of the *obligatio* which, as it has been recently clearly remarked by the scholars, is still bearing the signs of the complexity of the vicissi-

[33] See S. SCHIPANI, Obligationes *e sistematica. Cenni sul ruolo ordinante della categoria*, 141 ff.

[34] Gai 3. 91, *Is quoque, qui non debitum accepit ab eo, qui per errorem solvit, re obligatur; nam proinde ei condici potest SI PARET EUM DARE OPORTERE, ac si mutuum accepisset. Unde quidam putant pupillum aut mulierem, cui sine tutoris auctoritate non debitum per errorem datum est, non teneri condictione, non magis quam mutui datione. Sed haec species obligationis non videtur ex contractu consistere, quia is, qui solvendi animo dat, magis distrahere vult negotium quam contrahere*. On the role of the view of Sextus Pedius in Roman contract law, see S. PORCELLI, Hetong *e* contractus, cit., 197 ff. and references therein.

[35] See, for instance, A. SACCOCCIO, *La consensualità del mutuo reale*, cit., 343.

[36] I. 3,13,2 *Sequens divisio in quattuor species deducitur: aut enim ex contractu sunt aut quasi ex contractu aut ex maleficio aut quasi ex maleficio*.

[37] See S. SCHIPANI, Obligationes *e sistematica*, 151 and R. CARDILLI, Damnatio *e* oportere *nell'obbligazione*, cit., 306.

tudes related to the construction, throughout the history, of the category of the obligation itself; vicissitudes that brought to the human society a legal scheme featuring a structure to handle an exceptional state of a relationship among certain persons connected to the duty to undertake a certain cooperation:[38] *obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei, secundum nostrae civitatis iura*.[39]

C. *The obligation in the modern and XXI century codes*

The obligation, along with other legal structures, schemes, notions, has been pushed forward *in omne aevum* thanks to the *Corpus iuris civilis*.[40] Through a tortuous path,[41] the obligation and the related theorizations put in place by the jurists, reached the modern times, when Pothier in his *Pandectae Justinianeae in novum ordinem digestae* and furthermore in the following *Traité des obligations*, undertook a 'rearrangement' of the obligation. In doing so, Pothier outlined a 'general part' where aspects related to the substance of the obligation have been dealt with, to its effects, to the different kind of obligations and their divisions, termination etc.[42]

If the early XIX century, legislators did not include a general part on the obligation in the codes, again thanks to the contribution of the legal science, the obligation took more and more clearly the role of an "ordering category" for the private law, such as in the case of the *Dresdner Entwurf*, the so-called Swiss Obligations code, the Brazilian Civil Code

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[38] See G. GROSSO, *I problemi dei diritti reali nell'impostazione romana. Lezioni universitarie*, Torino, 1944, 218; G. GROSSO, *Schemi giuridici e società nella storia del diritto privato romano. Dall'epoca arcaica alla giurisprudenza classica: diritti reali e obbligazioni*, Torino, 1970, 308; S. SCHIPANI, Obligationes *e sistematica. Cenni sul ruolo ordinante della categoria*, 150; R. CARDILLI, Damnatio *e* oportere *nell'obbligazione*, cit., 306 ff.

[39] I. 3,13 pr.-1 […] *Obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei, secundum nostrae civitatis iura. Omnium autem obligationum summa divisio in duo genera deducitur: namque aut civiles sunt aut praetoriae. Civiles sunt, quae aut legibus constitutae aut certe iure civili comprobatae sunt. praetoriae sunt, quas praetor ex sua iurisdictione constituit, quae etiam honorariae vocantur*.

[40] Actually, there was already such a 'forecast' in the Constitutio Tanta (12) that *Omni igitur Romani iuris dispositione composita et in tribus voluminibus, id est institutionum et digestorum seu pandectarum nec non constitutionum, perfecta et in tribus annis consummata, quae ut primum separari coepit, neque in totum decennium compleri sperabatur: omnipotenti Deo et hanc operam ad hominum sustentationem piis obtulimus animis uberesque gratias maximae deitati reddidimus, quae nobis praestitit et bella feliciter agere et honesta pace perpotiri et non tantum nostro, sed etiam omni aevo tam instanti quam posteriori leges optimas ponere.*

[41] See the path as outlined in S. SCHIPANI, Obligationes *e sistematica*, cit., 155 ff.

[42] See R.J. POTHIER, *Pandectae Justinianeae in novum ordinem digestae*, Paris-Orléans, 1748-1752, in particular *Ad titulum XVII et ultimum. Libri L Digestorum; de diversis regulis juris antiqui, pars III, caput. VII* and R.J. POTHIER, *Traité des obligations*, I, Paris-Orléans, 1761. See also the considerations undertook in S. SCHIPANI, Obligationes *e sistematica*, cit., 167.

that on the point accepted the perspective of the Texteira de Freitas Project and, in Asia, the Japanese Civil Code which, as it will also be better clarified in the following pages, exerted a great influence on the Qing Civil Code Project in China. [43]

The obligation as an "ordering category" [44] did also serve as a legal scheme to overcome a distinction between what was to be regulated in a civil code and what was to be regulated in a commercial code as a *ius mercaturae* descending from the *ius mercatorum*. [45] A distinction that was indeed inherited from the specific circumstances of the social arrangement in Europe during the Middle Ages. Already Vivante, in Italy, observed the benefits that paying a proper attention to the obligation could have provided to the commercial law, [46] the Italian 1942 Civil Code leveraged on the obligation to put in place relevant functions connected to its role of serving as a core for the private law, by providing some fundamental rules on 'labour' and on commercial law. [47] At that time, the Italian Civil Code could be considered as a forerunner of today's Civil Codes (although before it, unitary Codes of civil and commercial law have been already in force in Switzerland and also in China with the 1931 Civil code). Nonetheless, it has to be noted, for instance, that, in the XXI century, on

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[43] See S. SCHIPANI, Obligationes *e sistematica*, 167 ff. and S. PORCELLI, *Obbligazione e codice*, cit., 173 ff.

[44] For this expression, see, for instance, the title of the aforementioned essay: S. SCHIPANI, Obligationes *e sistematica*. Cenni sul ruolo ordinante della categoria.

[45] For the shift from the *ius mercatorum* to the *ius mercaturae* with the codes, see U. SANTARELLI, *Mercanti e società tra mercanti*, Torino, 1992.

[46] "Chiunque abbia qualche familiarità con il nostro Codice di commercio si sarà convinto come sia giusta l'accusa, che gli fu più volte ripetuta, di una grande deficienza delle regole generali, di una soverchia particolarità nelle norme di vari istituti, e questo difetto trae origine dalla povertà dei lavori scientifici. In generale l'opera dei nostri scrittori di diritto commerciale è soltanto descrittiva. Pare a molti di questi giureconsulti improvvisati che tutte le combinazioni nuove abbiano bisogno di una regola nuova; parlano a ogni pié sospinto di contratti *sui generis*, di eccezioni al diritto comune; appena sentono dalla tradizione giuridica qualche imbarazzo, la mettono in disparte; il lavoro lento, sagace del giureconsulto che tenta di far rientrare anche i nuovi istituti nelle regole vecchie, e solo cede di fronte all'evidente necessità di una regola nuova, che ravvicini i vari istituti per risalire ad una norma comune più comprensiva vi è trascurato e, quasi direi, dispregiato. Questa debolezza scientifica del diritto commerciale trae in parte origine dalla sua autonomia. Infatti chi studia gli istituti mercantili non tiene l'occhio fisso ed attento alla teoria generale delle obbligazioni, che appartiene ad un'altra disciplina, distinta nei codici, nella dottrina, ed anche nell'insegnamento. Esso studia ciascun istituto, quasi isolandolo dalla teoria generale, compiacendosi di moltiplicare le eccezioni al diritto comune come di altrettante scoperte giuridiche che giustificano quell'autonomia. Così le regole generali, che a poco a poco, collo studio perseverante dei fatti giuridici commerciali si staccherebbero spontaneamente dalla forma casuistica da cui hanno origine, vanno perdute, perché il commercialista non ha voce in capitolo nella formazione della teoria generale delle obbligazioni e molto spesso non se ne occupa", see C. VIVANTE, *Trattato di diritto commerciale*, I, Milano, 1922, 17-18.

[47] S. SCHIPANI, Obligationes *e sistematica*, cit., 191 ff.

the one hand, a general part of the obligation, remarking its role as an "ordering category" has also been provided with the 2016 reform of the French Civil code (as already noted above, at the time the Code Napoléon has been elaborated, although the French scholarship already proceed with outlining a general part on the obligation, the legislator have not follow that direction yet);[48] on the other hand, it can be noted that also other countries such as Argentina, abandoned the model of the separate civil and commercial code and, actually, with regard to the new Chinese Code, it is not only a civil and commercial law unitary code,[49] but it is also providing rules that are relevant in the context of the labour related regulations, and these rules are provided in the book on contracts,[50] and therefore still within the area of the obligation (and actually in the book where also the rules on the obligations in general are provided).

D. *The liability and the responsibility*

In order to gain a better understanding of the provisions of the PRC Civil code, it is still necessary to take into consideration another aspect. As it has already been remarked, the new Chinese code is insisting a lot on the 责任, *zeren*, a word that is possible to be translated both as liability or responsibility. In view of the fact that, as it happens with other languages related to the Roman law based civilian tradition,[51] also legal Chinese seems not to consider such a distinction between the liability and responsibility, but for such a semantic field it seems that the legal-technical word to refer to is just *zeren*, perhaps this is another clue about the intensity of the dialogue between the Chinese law and the Roman law legal system. Beside taking into consideration what could have been the role of the Chinese 'legal culture', rooted in ancient China, and what could have been

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[48] S. PORCELLI, *Obbligazione e codice*, cit., 173 ff. and references therein.

[49] In China, there has never been a social class of merchants, separated from the other social classes, in condition to provide itself with its own rules, having its own courts etc. Therefore, already from the Qing Project in China, a unitary model of codification of the private law has been adopted. A model that did not implement a distinction between a civil and a commercial code. On this and other reasons why the distinction in two codes has never been accepted in China, see P. JIANG, *"Minfa zongze" pingyi*, in *Zhejiang Gongshang Daxue Xuebao* 144/2017, 7 and X. SUN, *Woguo minfadian bianzuan zhong de ji ge wenti*, in *Zhongguo Renda*, 5/10/2016, 47.

[50] The work relationships which do not exactly fall within the scope of the labour contract as regulated by the Labour contract law, are however regulated either on the basis of the rules on some typical contracts in the book on contracts of the Civil code or, anyways, as atypical contracts still on the basis of the rules provided, in particular, in the book on contracts of the Civil code.

[51] See, for instance, the examples offered in J. BARBOZA, *The Environment, Risk and Liability in International Law,* Leiden, 2011, 22.

the influence of the recent history and contemporary Chinese social arrangement, it is necessary to make a short clarification about what is the meaning conveyed by modern terms such as 'liability' and 'responsibility'. The latter should derive from the Latin *respondere*, "to reply", and it started appearing in the XV century French language as "*responsabiliteit*", although, it has been remarked by the scholars that, also within the Roman law tradition, it started spreading significantly under the influence of the English "responsibility" and "liability".[52] According to some scholar's opinion, it actually seems like there is not such a striking difference between the two terms, but rather between them and the term obligation: "Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong. This *vinculum juris* is not one of mere duty or obligation; it pertains not to the sphere of *ought* but to that of *must*".[53] However, it seems that, even if "liability" could be a bit closer than responsibility to the semantic field of the obligation,[54] it is closer to that of the subjection. For instance, in the entry "liability" of a well-known legal Dictionary, we can read that the liability is: "The quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment 'liability for injuries caused by negligence'. – Also termed *legal liability*; *subjection*. Cf. FAULT".[55] As it is even more clear with "responsibility", by considering also its connection with the Latin *respondere*, the core issue in both cases is the identification of a person who to turn to for the due consequences, which can be somehow connected to the meaning of the duty to perform, but rather, and in a more strict way, the meaning of the *respondere*, to reply, to a claim based on the occurrence of a negative event.[56] Therefore, both in the case of responsibility and liability, as it is also possible to be directly noticed in the above-mentioned entry from the Dictionary, the area where these notions operate is closer to that of the subjection than to that of the duty to be performed where parties keep their equality among each other and freedom.

At least, based on the historical path summarized in the previous pages, in the private law of jurisdictions belonging to the Roman legal system, and thanks to the contribution of the jurists, it seems that the obligation

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[52] See S. SCHIPANI, *Schede sull'origine del termine 'responsabilità' (Contributo per una riflessione sui problemi dell'elaborazione del concetto sistematico generale designato da tale termine)*, in S. SCHIPANI, *Contributi romanistici al sistema della responsabilità extracontrattuale*, Torino, 2009, 3 ff.

[53] J.W. SALMOND (L.W. GLANVILLE ed.), *Jurisprudence*, London, 1947, 364.

[54] See S. SCHIPANI, *Schede sull'origine del termine 'responsabilità'*, cit., 15.

[55] See the entry "liability" in B.A. GARNER (ed. In chief), *Black's Law Dictionary*, St. Paul (MN), 2009, 997.

[56] S. SCHIPANI, *Schede sull'origine del termine 'responsabilità'*, cit., 26-28.

and the liability/responsibility belong (or should belong) to different stages of a certain process: there may be an obligation, a duty, arising from a contract, a tort or from any of the *variae causarum figurae*, to put in place a certain performance in the future, while the duty is still pending, parties keep being on equal footing and keep their freedom; if the duty is not performed, or not correctly performed, within the time limit for its performance, and after a judge (or an arbitrator) would ascertain the non-performance or the non-correct-performance, then a (strict meaning) liability/responsibility will arise and the party in fault would not be at the same level as the other party and as free as the other party, since the latter can exercise a power (still regulated by the law and through the 'mediation' of public bodies) to enforce its rights. Of course, in case the obligation would be (correctly) performed no (strict sense) liability/responsibility may (should) arise!

3. *The obligation in the PRC Civil Code*

A. A *(brief) overview of the ancient Chinese concepts of* 灋 (fa) *and* 禮 (li)

In ancient China, law used to be divided between the "legal circuits" [57] of 灋 (*fa*) and 禮 (*li*). The latter (in current simplified characters 礼) mainly referred to what we can consider as customary rules, strongly influenced by the Confucianism, and it is the 'circuit' to which the very largest part of what can be considered as private law, based on our categorization, was belonging; although it was also serving as a 'foundation' for the *fa*. [58] This one instead (in simplified characters 法) is somehow what we can consider as being perceived as the law in its objective meaning. It was elaborated in a written form, and therefore we can say that a part of the ancient Chinese law was already written and certain 'law codes' were also elaborated in quite a systematic way, like for instance the 唐律 (*Tanglü* – later on with comments 唐律疏议, *Tanglü Shuyi*), from Tang dynasty which has been a model for the 'codes' of the following Chinese dynasties and which exerted its influence also on other countries such as Japan. These written laws were mainly providing rules in the area of what we can consider as the 'public law', and, within which, particular relevance was given to the criminal law. [59] Actually, such a perception of what could have been considered as the (objective) law in terms of criminal law can be clearly noticed by the shape of the ancient character of *fa*, 灋, and by its definition contained

[57] M. TIMOTEO, *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*, Padova, 2004, 130-131.

[58] See S. PORCELLI, Hetong *e* contractus, cit., 1 ff. and references therein.

[59] See, again, S. PORCELLI, Hetong *e* contractus, cit., 1 ff. and references therein.

in an ancient Chinese etymological dictionary, the 说文解字 (*Shuowen Jiezi*), dating back to the year 121 of the Christian era.[60] If in the modern simplified character 法 we can only find the radical of water 氵 (*sandian shui*) on the left and the verb "to go" 去 (*qu*) on the right, the ancient character was also including the (not very simple) character 廌 (*zhi*) representing a – fairly robust – unicorn.[61] By considering these three elements, it is not difficult to understand the etymology of the character as represented in the *Shuowen* as well as what was the ancient Chinese perception of the law, both of them quite clearly explained in the *Shuowen*. We read in the entry related to the *fa* that: "灋、井刑也，平之如水，从水，廌所以觸不值者去之，从廌去".[62] Two elements are of great relevance for the topic we are dealing with: the first one is the connection established at the beginning between the *fa* and the *xing*, the sanction, the punishment, (井刑 is an archaic form of 刑 that also in the contemporary Chinese refers to the punishment, nowadays 刑法 is the criminal law); the second one is basically giving us information on why, within the perspective set with the first one, the character was built in such a way: on the flat water, if there is any protuberance, the (fairly robust) unicorn takes it away. Therefore, with an image that, as it has also been remarked by some Chinese scholars, is recalling the equity, 公平 (*gongping*),[63] if there is any protuberance, symbolizing an injustice, to be considered as a crime, if we take into account the perspective set through the connection between *fa* and *xing* mentioned at the beginning, the robust unicorn takes it away, removes it, hence re-establishing the flatness of the water. This ancient perception of the law – as it will be showed in the following pages – is of crucial importance also for understanding the nowadays Chinese law and in particular (probably) one of the main reasons why in the Civil code the relationship between obligation and responsibility has been arranged in a certain way. However, in order to have a clearer picture of that relationship, it is necessary to take into consideration some further aspects.

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[60] On the *Shuowen Jiezi*, see, for instance, J. SONG-N. WANG-J. HU, *Jiyu yuliaoku fangfa de shuzihua "shuowen" xue yanjiu huanjing de goujian*, in *Yuyan wenzi yingyong*, 1/2007, 133 ff. See also K. TANG, *Qianyan*, in K. TANG (comments and notes), *Shuowen Jiezi*, I, Beijing, 2018, 1 ff.

[61] Again from the Shuowen we can actually see that this unicorn was not matching with the idea of the flying horse having a horn on its nose that we commonly refer to in our current image of an unicorn, but it was rather looking like a mountain bull that instead of having lateral horns was bearing a horn on its nose (廌，解廌兽也，似山牛，一角；古者决狱，令触不直。象形，从豸省; see S. XU, 廌 (*Zhi*), in *Shuowen Jiezi*, for instance in the edition by K. TANG (explanation and notes), *Shuowen Jiezi*, III, Beijing, 2018), it was then rather imaged as a rhinoceros.

[62] See S. XU, s. v. 灋 (*Fa*), in *Shuowen Jiezi*, for instance in the aforementioned edition by K. TANG (explanation and notes), *Shuowen Jiezi*, III.

[63] See M. ZHAN (ed.), *Zhongguo fazhi shi*, Beijing, 2010, 13.

B. *From the late-Qing (清末) 'modernization' to the influence of the socialist models*

During the XIX century, after the so-called opium wars and the subsequent unequal treaties, China came under intense pressure to undertake a modernization. Nonetheless, beside paying some attention to the international law, probably to find a way to better handle the above-mentioned 'unequal treaties', and beside the fact that it tried to look at the 'western' science to improve its military technology, the Qing government did not seem to be much concerned with undertaking a full-scale process of 'modernization'. Things went differently in Japan where, because of a number of historical factors, which brought about a peculiar internal situation at that very moment (the crisis and then the end of the *shogunate* followed by the Meiji restoration), already in the second half of the XIX century a full-scale 'modernization' process has been undertook. A process which did not neglect a full study of certain 'western' social institutions before undertaking the domestic reforms. A clear sign of such a process can be found in the language: given the commonalities, for both, the Chinese and Japanese languages, it was necessary to have a lexicon to refer to certain notions, and therefore terms had to be adapted by leveraging on those which were available or otherwise had to be created.[64] It is in fact possible to find in the 仏和法律字彙 (*Futsuwa hōritsu jii*) a French-Japanese published in 1886 by Kada Kuninori (加太邦憲) and Fujibayashi Tadayoshi (藤林忠良) the term 债权 (*zhaiquan*) for the French *créance* and 责任 (*zeren*), for the French *responsabilité*. These two terms were already employed in the ancient Chinese and Japanese languages, but at this stage they have been vested with a new meaning, not completely identical, in particular with regard to *zhai*, to their ancient meaning so that they could be used to refer to the obligation, *zhai*, and to the liability/responsibility, *zeren*.[65] It has been remarked by some scholars that the current notion of obligation has been based on the model offered by the 'western law' through a translation choice for which the notion of obligation in the Roman law tradition has been rendered in Japanese during the XIX with 債権 (*Saiken* now in the simplified Chinese 债权, *zhaiquan*).[66] If Japan managed to promul-

[64] See S. PORCELLI, *Diritto cinese e tradizione romanistica. Terminologia e sistema*, cit., 253 ff.

[65] See, for instance, G. LI, *Ershi shiji chuqi de Zhongguo faxue*, cit., 4 and 6.

[66] See N. KAMYA, *Aspetti e problemi della storia giuridica in Giappone: la ricezione del diritto cinese e del sistema romanista*, in *Index*, 20/1992, 375-376; but, of course, it has anyways to be considered that the 'western law' notion, that at the time the Japanese scholars may have referred to, was a notion of obligation that has been built from the perspective of the credit, based on the fact that this was the perspective employed in the European scholarship in the XIX century influenced by the bourgeois ideology (see R. CARDILLI, Damnatio *e* oportere *nell'obbligazione*, Napoli, 2016, 3 ff.).

gate a Civil code in the 90's of the XIX century, it was only in the first decade of the XX century that China opted for putting in place a full-scale and fast 'modernization'. Therefore, in order to bypass a fair amount of difficulties and move ahead faster, given the similarities in the culture, language etc., between China and Japan, China decided to leverage on several of the results already achieved in Japan.[67] In this way a dialogue between China and the Roman law system has been established, a dialogue which is still ongoing, although since the first decade of XX century it went through different shapes.

A first Project of a civil code for China was already completed in 1911, the 大清民律草案 (*Da Qing Minlü cao'an*), although it was not named as a "code, *dian*", it was a Civil code strongly inspired by the Japanese Civil code that has been promulgated not many years before and that was, in turn, largely based on the models elaborated by the German Pandectists, on the model of the *Code Napoléon* and other European models (including probably the 1865 Italian Civil code). The Qing Project, as it has been remarked above, was a unitary Code for civil and commercial law, it was made up of five books: general part, obligations (*zhaiquan*), real rights, family, successions.[68] The book on the obligations was featuring a chapter on the general part of the obligation and other chapters dealing with more specific rules on contracts, unjust enrichment, torts etc.[69] Although this Project, given the revolution started in 1911 in Wuhan and the subsequent fall of the Qing dynasty, did not enter into force, it nonetheless opened a path that has been followed afterwards. Another project has been elaborated in 1925-1926 and, the same as the Qing Project, was featuring a second book on the obligation, named through a more 'neutral' *zhai*, instead of *zhaiquan*, that was also providing rules on the obligation in general and some more specific rules on contracts, torts, unjust enrichment, etc.[70] Similar to the Qing Project, due to political reasons, also this new 1925-1926 Project did not come into force. Nonetheless, a Civil code (still not named as a "code", *"dian"*, but a code in the substance) has been promulgated in stages in the coming years and went into force, in its entirety, in 1931. This Civil code too was following the path opened by the Qing Project and, also in this 1931 Code, in the second book on the obligations, it is possible to find rules on the obligation in general as well as more specific rules on contracts, torts, unjust enrichment, etc.[71]

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[67] See S. PORCELLI, *Diritto cinese e tradizione romanistica. Terminologia e sistema*, cit., 278 ff.

[68] See S. PORCELLI, Hetong *e* contractus, cit., 20 ff. and references therein.

[69] See the text of the Project re-published in L. YANG (a cura di), *Da Qing minlü cao'an – Min Guo minlü cao'an*, Changchun, 2002, 3 ff.

[70] See the text of the Project re-published in L. YANG (a cura di), *Da Qing minlü cao'an – Min Guo minlü cao'an*, Changchun, 2002, 203 ff.

[71] See the version of this Code currently in force in Taiwan at the following web-page: https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=B0000001 (last accessed, March 2021).

After the establishment of the "New China", the People's Republic of China in 1949, all the old laws have been abrogated (the 1931 Code is still in force nowadays in Taiwan), and it started, on a national scale, a new season which has already started emerging, on a local scale, in the areas that were already under the control of the Communist Party, areas where instead of getting inspired by the bourgeois models, inspiration has been drawn from the socialist models, in particular from the Soviet model. By following the Soviet model, the family law has been considered as not suitable to be included in the Code, given the personal nature of the relationships it relates to, and a Marriage law has been passed already in 1950.[72] Around half of the decade, the works for drafting a Civil code have been undertaken, the Project was featuring several books among which a book on the general part of the code, and a book on the obligations. With regard to the former, a version on cyclostyled pages has been found by scholars, where it was possible to be found the expression "民事上的责任",[73] liability/responsibility 'on' the civil law, which seems to have been the archetype of the nowadays "民事责任", civil law liability/responsibility used in the Code. Furthermore, a general part on the obligation was provided in the draft of the book on the obligations, as in the soviet model. Nonetheless, in the part on the "由侵权行为所生的债", the obligations arising from tort, already from the first draft, dating back to 1955, the expression "赔偿责任", liability/responsibility for compensation[74] began to appear. This Project did not come into force and a subsequent Project has been drafted in 1962-1964. This Project too was inspired by the socialist models, although the political relationships with the URSS deteriorated already a few years before and China was in search of greater originality, independent from the soviet model.[75] If in the Soviet code that was being approved more or less at that time, the obligation was still playing the role of an 'ordering category',[76] the 'original' Chinese Project, with regard to which also Chinese scholars did sarcastically observe that was bearing some 'quite interesting features',[77] was recalling several time the *zeren* and was also using expressions such as "经济上、行政上的责任", referring to

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[72] S. PORCELLI, Hetong *e* contractus, cit., 37 ff. and references therein.

[73] See Q. HE-X. LI-C. CHEN (a cura di), *Xin Zhongguo Minfadian Cao'an Zonglan*, vol. I, Beijing, 2017, 10.

[74] See Q. HE-X. LI-C. CHEN (a cura di), *Xin Zhongguo Minfadian Cao'an Zonglan*, vol. I, 141-143. For this expression in the following drafts see Q. HE-X. LI-C. CHEN (a cura di), *Xin Zhongguo Minfadian Cao'an Zonglan*, vol. I, 158-159; 177-178; 191-192.

[75] S. PORCELLI, Hetong *e* contractus, cit., 40 ff.

[76] See, for instance, artt. 158 and following of the 1964 URSS Soviet Code, http://www.kremlin.ru/acts/bank/3/page/12 (last visited, February 2021).

[77] See P. JIANG, *"Minfa zongze" pingyi*, in *Zhejiang Gongshang Daxue xuebao*, 144/2017, 6.

the economic and administrative liability/responsibility. By contrast, *zhai* did not appear in this Project. [78]

However, the abovementioned Projects have been influenced by the results of the socialist perspective and interpretation of what could be found in the Roman law sources. Compared to the perspective adopted in the projects and in the Code of the first half of the XX century, these projects from the 50's and from the 60's, more or less inspired by the socialist models, were basically bearing a different ideological orientation. With regard to the obligation, it has to be observed that, in the soviet model, although what belonged to the private law area was still considered from a more 'public law' prone perspective, the obligation was kept as an ordering category and this happened also with the Chinese Project elaborated in the 50's, closer to the soviet model. Nonetheless, probably also under the influence of an arrangement of the private law more affected by the weight of a mainly 'public law' oriented overall system such as that of the economic law, as well as under the influence of the ancient Chinese legal culture, where the objective law was perceived rather from the angle of the criminal law, it seems that the liability/responsibility started gaining relevance. With the more 'original' Project from the 60's, this trajectory has been maintained and it actually went further beyond the soviet model, with the obligation that disappeared, and the liability/responsibility which came to occupy a central position.

C. *The Opening and reform policies and the Civil code of the PRC*

With the Opening and reform policies, the 改革开放政策, started after the 文化大革命, the Cultural revolution and the time described by the legal scholars as the period of the 法律虚无主义, the period of the legal nihilism (although a law, which could be considered under certain aspects, as that of a 'permanent revolution', has been of course maintained), [79] the works for the elaboration of a Civil code restarted. [80] In a draft dating back to 1980, a book entitled "liability for damages" (损害责任) appeared. Nonetheless, the obligation started gaining back some importance: for instance, in the book on the *mortis causa* successions law, chapter V was entitled 债务的清偿, debt settlement, with the *zhai* appearing again. In the subsequent draft, there were not any major changes on the topic beside the reference to the fact that the liability for damages became a reference to a liability for unjust damages, 侵权损害的责任. In a draft completed on July 31st 1981, instead, the book on the liability has been entitled "civil liability", 民事责任,

[78] See, for instance, the drafts of this Project re-published in Q. HE-X. LI-C. CHEN (a cura di), *Xin Zhongguo Minfadian Cao'an Zonglan*, vol. II, Beijing, 2017, 851 ff.

[79] Very sharp on this issue, see G. LOBRANO, *Discussione*, in *Index*, 3/1972, 213-214.

[80] S. PORCELLI, Hetong *e* contractus, cit., 49 ff.

it started increasing in size and it also provided rules on the ways the civil liability can be borne which do represent, also in the nowadays Civil code, a peculiarity of the Chinese legislation on this topic.[81] After another draft issued in 1982, the idea of drafting a civil code was put on a side, the society was still facing major changes in a turbulent manner, therefore it has been decided that under these circumstances, the more agile statutes on single subjects, the 单行法, would have been more suitable.[82] Among these statutes, a very relevant role was played by the Law on the general principles of the civil law of the PRC, promulgated in 1986 (GPCL): it was based on the model of a general part of a civil code, but 'reinforced' under several aspects, to put it in condition to serve the role of a "little civil code", 小民法典,[83] as it has been designated by one of the scholars who drafted it. At that time, the discussion between those who wanted to keep the Chinese law closer to a more conservative socialist model and those who wanted it to be more open was also quite heated. At the end, it was a discussion between those who wanted to keep entrusting a strong role to a more socialist conservative economic law model, and those who wanted to adopt a model somehow more influenced by the 'market economy' based countries. The GPCL managed somehow to strike a balance, although it was already structured in a way that allowed it to serve the role of the 'core of the private law' also years later, when the will to pursue a hybrid 'market socialist' model became more clear and therefore the distance from the economic law model increased. However, as already stressed in the previous pages, in the GPCL the obligation seemed to start gaining back its role, although there was still a chapter devoted to the civil liability, the *minshi zeren*.[84]

Another Project, completed in 2002, was once again not approved, but from this Project a model, that has been further elaborated afterwards during the first decade of the new century, started taking shape and served as a reference point in the construction of the abovementioned features that we can find in the 2020 PRC Civil code. The 2002 Project envisaged a book on contracts (III), an autonomous book on the tort liability (VIII) as well as an autonomous book on personality rights (IV).[85] There were some quite politically sensitive aspects on which an agreement among the differ-

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[81] See Q. HE-X. LI-C. CHEN (a cura di), *Xin Zhongguo Minfadian Cao'an Zonglan*, vol. II, 1151 ff. and in particular 1193; 1199; 1235; 1243 etc.

[82] See S. PORCELLI, Hetong *e* contractus, cit., 51 ff.

[83] See P. JIANG, *"Minfa zongze" pingyi*, in *Zhejiang Gongshang Daxue Xuebao*, 144/2017, 7.

[84] See articles 54 and following of the Law on the General principles of civil law of PRC in order to see the increase of the role of the obligation and Chapter VI of the same Law on the *zeren*. On these issues, again, S. PORCELLI, Hetong *e* contractus, cit., 53 ff.

[85] The text of this Project has been re-published in Q. HE-X. LI-C. CHEN (a cura di), *Xin Zhongguo Minfadian Cao'an Zonglan (zengdingben)*, vol. III, Beijing, 2017, 1483 ff.

ent parties involved was not yet reached at that time. Therefore, the Project has not been approved, but it still set more in detail the direction that has been kept in the following years. The Contract law has already been approved in 1999, the one that was the book VIII of the 2002 Project, after some adjustments has been promulgated as a Law on the tort liability in 2009, and after that the discussions on the drafting and promulgation of a law on the personality rights started. Subsequently, in 2014, the Central Committee of the Party issued the abovementioned decision to elaborate the Civil code followed by the elaboration and the entry into force of the PRC Civil code providing, with regard to the obligation, the rules, and the related criticalities, already pointed out at the beginning of this essay.

4. *Conclusions*

The analysis presented in the previous pages may help obtain a clearer understanding of the rules on the obligations and civil liability that can be found in the PRC Civil Code and some key takeaways can be obtained:

– the obligation remains a pillar of the structure of the private law, and its indispensable role has already been confirmed by what happened with the matters related to the *in solidum* credits in the 2017 General part – at the moment, the book on general part of the Code.

– other 'minor issues' have been caused by the arrangement of the obligations adopted in the Code, such as the fact that the so-called good Samaritan rule appeared, that is difficult to be coordinated with the rules on the *negotiorum gestio*; or the issues provided by the rules on the liability for the torts caused to the name, honor etc., of martyrs, for which it is quite difficult to see who could be the private entity entitled to bring a claim to a court.

– on the one hand, this perspective was already showing the influence of the socialist models with a strong public connotation of the field of the private law, but also, on the other hand, the influence of the Chinese culture, as it clearly emerged from some observations put in place, with regard to some of the 2017 General part rules on the tort liability, in a Commentary edited by one of the most influential scholars in China (authoritative also in the drafting process of the Code, given the fact that he was also a member of the NPA, the PRC national legislation body and he occupied other relevant positions in the China Law Society), where the role of a strong State was clearly remarked in order to remove injustice in the society and restore the justice, which drafted an image quite similar to that of the unicorn in the *Shuowen*. [86]

[86] See L. WANG (ed.), *Zhonghua Renmin Gongheguo Minfa Zongze Xiangjie*, Vol. II, Beijing, 2017, 807.

– of course, this is the way the 'legal grammar' notions and schemes can be adapted to include the values that are relevant in connection to the culture and traditions of a certain society.

– this kind of arrangement of the subject, and the perspective employed, may nonetheless cause some criticalities such as the opening to the category of the so-called punitive damages and all the related problems which under certain circumstances could be quite severe. [87]

– an effort from the jurists [88] will be even more fundamental with regard to teaching in the Universities and in the guiding of the practice to show how the obligation keeps nonetheless being a 'ordering category', a fundamental pillar, for the Civil code and how to find its main constituents spread among several books of the Code as well as how to use it in its relationship with the liability – which should come into play only afterwards, in case the obligation may not be (correctly) performed and a judge may ascertain such a non/performance.

– Quintus Mucius Scaevola did not only put us in condition to deal with law as science, but also outlined and left the legacy of a dynamic instrument of crucial importance since it makes it possible to protect the performance of a certain duty towards the future without employing harsh means to do so such as in the subjection related schemes. An instrument that rather makes it possible to do so by keeping the parties free and on an equal footing, of course as far as they will behave correctly with each other by performing the pending duties. An instrument that is representing a very high-level conquest of legal civilization, made available to all the human beings.

[87] The punitive damages are showing some criticalities, as for instance with regard to their "stark unpredictability", which are trying to be talcked also in the USA. See *Exxon Shipping Co. V. Baker*, 128 S. Ct. 2605, 2621 (2008) and in the literature M. TESCARO, *I* punitive damages *nordamericani: un modello per il diritto italiano?*, in *Contratto e impresa/Europa*, 2-2012, 599 ff.

[88] Whose voices were also largely in favour of the drafting of a book on the obligation during the elaboration of the Code; voices that, nonetheless, have not been heard by the legislator, due to a number of reasons including those formally stated and already mentioned above; see, for instance, A. FEI, *Elaborazione e caratteristiche del Codice civile cinese*, in *Roma e America. Diritto romano comune*, 41/2020, 139-140; H. SHI, *Principali sviluppi e innovazioni nel Libro sui contratti del Codice civile della Repubblica popolare cinese*, in *Roma e America. Diritto romano comune*, 41/2020, 47-49.

WEALTH: PRODUCTION AND CIRCULATION

PRIVATE WEALTH AND MODELS OF RIGHT'S CIRCULATION

Valerio Pescatore

ABSTRACT

This report explains the concept of private wealth from an economic to a legal point of view. Successively, categories of 'things', 'rights' and properties are further distinguished. Finally, some models of circulation of such assets and their functioning according to the Italian legal system are analysed.

KEYWORDS: *Private Wealth – Things – Rights – Circulation – Models*

1. *Foreword*

The title of my report needs a few brief explanations. It contains words such as 'wealth', 'rights', 'circulation' and 'models' whose meaning requires to be clarified.

As for 'wealth', it is an economic concept and generally means 'availability of goods and money'. What we are going to investigate are the (legal) ways of transferring wealth between individuals and/or other legal entities. And, preliminarily, it must be noted that – at least legally speaking – any reference to the 'availability of goods and money' should be made by means of the Italian word 'patrimonio', more precisely meaning any assets (such as goods, things, money, rights, credits, debts, etc.) owned by a person.

As for 'circulation', this word has several meanings in different scientific areas such as physics, economics and law. Obviously, only the last two shall be considered in this report.

As for 'models', this word should be here intended as a set of rules governing a given phenomenon: in our case, such phenomenon is the circulation of (mainly property) rights. Consequently, models of the circulation of the above-mentioned assets, and their functioning according to the Italian legal system, shall be further explained.

2. *Concept of private wealth*

Focusing on the concept of private wealth (i.e. 'patrimonio'), to be considered as any assets owned by a person and i.a. consisting of 'things', the Third Book of the Italian Civil Code (CC) deals with property and starts with Art. 810, which includes the following definition: «*things that can form the subject matter of rights are property*». It is important to note that the English word 'thing' is used to translate the Italian word 'beni' (i.e. goods). In this sense, 'thing' refers to the objects of rights and not to the right of ownership, which is translated into Italian as 'proprietà'. The above-mentioned definition of property implies that there are two requisites to be satisfied in order for something to qualify as property, namely, that it be: i) a thing; and ii) a thing that can be the subject matter of rights.

(i) The word 'thing' covers any number of 'things'. In everyday language one can refer under the word 'thing' to some trait of character, that is, to an abstraction; more narrowly defined, the same word refers to the material objects that surround us: in that sense, health or fame are not considered as 'things'. Hence, under Art. 810 CC clear reference is made to material reality. This does not mean that such reality is solely what is visible, tangible or perceptible, but, more broadly, that it is whatever pertains to the world of matter, in other words, whatever is empirically verifiable and quantifiable. Hence, solids, liquids, gases, but also energy, are 'things' that fall within the definition of Art. 810 CC.

(ii) Not anything can be the subject matter of rights. A certain thing, in other words, may be – under a legal point of view – completely irrelevant or also belong to nobody. For instance, fish in the sea does not belong to anybody (i.e. *res nullius*), but once it has been caught by fishermen, they acquire the right of ownership of it by way of occupation (see Art. 923 CC). A thing abandoned by its legitimate owner (i.e. *res derelicta*) is also said to belong to nobody (differently from things lost or mislaid by their owners). On the other hand, a thing that cannot form the subject matter of rights is not a thing according to Art. 810 CC, and that because the granting of a right always purports to resolve a conflict of interests, which arises from its relative scarcity. To that extent, the air and the water from the sea are things, but they are not property. They are things belonging to everybody.

3. *Categories of 'things'*

Briefly, and because of its relevance on the law of contracts, a distinction in the categories of 'things' can be made between a) replaceable and irreplaceable things, b) consumable and non-consumable things, c) movable and immovable things.

(a) Mass-produced and serial things are replaceable; instead, a piece of ancient furniture bought at an antique shop is not likewise replaceable. Indeed, the determination of a thing as replaceable or irreplaceable depends on the perception of the thing itself the parties involved have or have not.

(b) A further distinction is established between consumable things, such as wine or oil, and non-consumable things, such as jewels or electric appliances. In contract law, the so-called 'comodato' (the gratuitous loan for the use of a thing, see Art. 1803 CC) is generally restricted to non-consumable things. Money, in some manner, is also a thing, and simultaneously it is the economic measure of all other things. Formerly, silver and gold coins had an intrinsic value. Today, paper money has no such intrinsic value, and it is only vested with value. More precisely, banknotes are written promises to pay issued to the bearer by the Central National Bank. As such, they can be transferred and exchanged between persons. To that extent, they can be considered 'things'.

(c) More importantly, under Art. 812 CC things fall into two principal categories: movable things and immovable things. The legal definition of immovable thing is first delineated by way of a shortlist: the soil, water sources, buildings and other constructions, even if joined to the soil for a temporary purpose, and in general everything that is artificially or naturally annexed to the soil is an immovable thing. According to Art. 812, par. 3, CC all other things are considered movable things. Such definition by default is all-inclusive of whatever property falls outside the category of immovables. The distinction between these two last categories of things is of major importance, as it will be further explained (see para. 6. ff.).

Moreover, it has long been admitted that a thing may be intangible. The achievements of creative intellectual activities (see Art. 2575 CC) may be subject to copyright, while innovations may be subject to patent rights (see Art. 2584 CC). Defining these works as intangible things enabled lawmakers to follow a familiar path to ascribe the rights on such things (so-called industrial property). Today, this narrow vision is no longer held. Rights on industrial property are distinct from the right of ownership on tangible things and such property is not defined as a thing (intangible), but as an economic utility, that may be subjected to rights.

Lawmakers have extended the concept of things beyond the realm of tangible things that may be subject to rights. Under Art. 813 CC, the rules

applicable to movable things are applicable to all other things, for instance, to the right to receive a certain performance (an amount of money, or a service: i.e. a credit). Thus, the concept of thing not only extends its confines, but also shifts to refer not to the subject matter of rights, but to the rights themselves. This extensive concept of thing is entrenched in the language of lawmakers. When Art. 2740 CC states that the debtor's liability is unlimited and extends to his present and future things, this is interpreted as encompassing not just the things owned, but all the assets being part of the debtor's property, inclusive of credits.

Hence, the concept of thing may be delineated by two complementary definitions:

(i) according to Art. 810 CC, a thing is any utility that may be subject to rights (corresponding to the Italian concept of 'bene');
(ii) according to Art. 813 CC, a thing is any right that has an economic utility as its subject (corresponding to the Italian concept of 'patrimonio', in English: property).

A third definition, which is more legal than economic, states that property is any interest protected by law (for instance, physical integrity, reputation, etc.).

All of the above departs from the concept of things to the concept of rights.

4. *Categories of 'rights'*

It should be immediately mentioned that between the European Continental scholars there is one aspect of legal rights which has no trace in the Anglo-American tradition. That is the description of rights as being 'subjective' (*droits subjectifs*, *subjective Rechte*, *diritti soggettivi*).

In French, German and Italian the same word (*droit*, *Recht*, *diritto*) serves as the noun which refers both to rules of law (*diritto oggettivo*) and the rights which are created by them (*diritti soggettivi*), and therefore disambiguation is required.

In French, German and Italian law the distinction is drawn by distinguishing between '*le Droit objectif*' (the noun usually spelt with a capital), '*das Recht*', '*il diritto oggettivo*' and, respectively, '*les droits subjectifs*', '*die subjective Rechte*' or '*i diritti soggettivi*'. More precisely, French and Italian law confine the term '*droits subjectifs*' and '*diritti soggettivi*' to a sub-class of legal rights, namely rights which are primarily those of private parties.

Subjective rights can be divided in absolute and non-absolute subjective rights: in the first case the right-holder can exercise his right *erga omnes* and without any co-operation of third parties (rights *in rem*; rights relating to personality); in the latter case, the right-holder aims to get a thing, which

is not at his disposal, and so such rights need third parties' cooperation in order to be exercised (credit-related rights/claims, '*diritto potestativo*').

According to prevailing opinions, in the Italian law it does exist the so-called principle of the limited number ('*numerus clausus*') of rights *in rem*, meaning that rights *in rem*, which are not already provided for by law, cannot be constituted by the private parties (businesses and/or individuals). Such a principle, which is not itself expressly provided for by law, has been explained as a necessary limitation to the private autonomy of the parties, who should not be allowed to autonomously compress ownership by establishing new-branded rights *in rem*, enforceable against third parties, so that the circulation of the related goods could be hindered.

5. *Public-owned and private-owned properties*

Art. 42 of the Italian Constitution states that ownership is either public or private. And that economic things (in the sense outlined in Art. 810 CC) belong to the State, to institutions, or to private parties. Such a clause implies the distinction between public-owned property and private-owned property. It must be noted that this distinction does not merely concern the identity of the owner (the State and other public institutions on the one hand, and private parties – natural persons or legal entities – on the other), but it is extremely relevant at an operational level, since different rules apply to public things (see Art. 822 ff. CC) and to private things (see Art. 832 ff. CC).

Moreover, the above-mentioned distinction is also based on the nature of the object of the right of ownership: for this reason, this report shall focus exclusively on private wealth and, consequently, on private-owned property.

6. *Concept of circulation*

The concept of 'circulation' has been defined in several areas of science: for instance, in physics, economics and law. Under a legal point of view, it must be immediately pointed out that there is a general tendency to confuse economic and juridical perspectives of the circulation of (private) wealth: in any case, the intervention of the law is always necessary to regulate any economical phenomenon of circulation. That because the limited number of 'things' makes the circulation of (private) wealth always determine a conflict of interests between the involved parties and also *vis-à-vis* third parties, which must be regulated by the law providing legal protection to certain interests to the detriment of other interests. Consequently, the intervention of the law can allocate such legal protection from one

party to the other in accordance with the different 'models' of circulation of (private) wealth provided by the legal system (for example, universal or partial successions; *inter vivos* or *mortis causa* successions, etc.).

Analysing the legal concept of 'circulation', the following statements must be considered:

– a circulation of (private) wealth implies the transfer of a thing (*rectius*, a right) from a party to another party;
– such a transfer is implemented in accordance with different 'models' (to be intended as a sequence of legal acts or facts) provided and regulated by the legal system;
– the intervention of the law is deemed to resolve conflicts of interests determined by the (economical) phenomenon of circulation;
– the lawmaker is asked to determine how to resolve such conflicts, and thus to identify to which of the conflicting interest must be given the legal protection.

With reference to the latter point and according to an Italian preeminent scholar (F. Carnelutti, *Teoria giuridica della circolazione*, Padova, 1933, 12), a conflict of interests in case of circulation of (private) wealth can be solved by means of 3 criteria:

1) freedom [because the circulation of (private) wealth is generally left to the voluntary initiative of the private parties];
2) appearance [because in case of the transfer of a 'thing', the involved parties must, and have interest in, let(ting) third parties be aware of such a transfer];
3) legal certainty (because the law must guarantee the transfer has been made by means of legal facts or acts provided with efficacy, effectiveness and binding force).

In consideration of the above, it should now be clear that the circulation of (private) wealth is one of the fundamental conditions which ensures the life of the community. And that explains a strong public interest in the (regulation of) circulation, which can be pursued:

(i) directly by the State, and in such cases the circulation must be viewed as public circulation of wealth (i.e. taxes, expropriation, etc.: this report shall not analyse this type of circulation);
(ii) by means of the voluntary initiative of the private parties, and in such cases the peculiar modalities (for example: *do ut des* or *do ut facias*) and features (for example: for payment or gratuitously) of the transfer of a thing (*rectius*, a right) must be investigated.

Under a legal point of view, the circulation of private wealth always implies the circulation of (property) rights: more precisely and technically, when you transfer a 'thing' what is actually transferred is not a thing,

but a right connected to such a 'thing'. And this transfer is implemented by means of a sequence of legal acts or facts provided and regulated by the legal system (so-called 'models of circulation').

Models of circulation depend on the different categories of things and rights to be transferred.

Preliminarily, it must be considered that the circulation of (private) wealth, more correctly to be intended as a circulation of (property) rights, requires the existence of (at least) two parties: on the one hand, the individual (or the legal entity) who is the holder of the right to be transferred; on the other hand, the individual (or the legal entity) who aims to become the new holder of the said right. Every other party can be considered as a third party. Such a requirement implies that not any economical phenomenon of circulation can simultaneously be also considered, under a legal point of view, a proper model of circulation of (property) rights.

A couple of examples shall be helpful in this case.

(a) According to Art. 922 CC, concerning the modes of acquisition of ownership, the ownership can be also acquired by occupation; and according to the following Art. 923 CC movable things that are not the property of anyone are acquired by occupation. In such a circumstance, it must be asked if it is technically possible to speak about a circulation of (property) rights. Under a legal point of view, although in this case there is an economical phenomenon of circulation, the absence of (at least) two parties does not allow to speak about a model a circulation: because there is not the willingness of the one party (the owner) to transfer his (property) right to the other party.

(b) Similarly, in case of inheritance and even though the death of an individual implies, under an economical point of view, the circulation of wealth, it cannot be legally spoken about a model of circulation of (property) rights. That because, in such a circumstance, it does not occur the simultaneous presence of (at least) two parties (and, in case of intestate succession, it also defects the willingness of the one party – the deceased – to transfer his properties to the other parties – the heirs).

These two examples clearly show the relevance of the presence of (at least) two parties and of the willingness to transfer (property) rights in order to legally speak about circulation of (private) wealth. This is a principle of most western legal systems and implies that the circulation of (private) wealth is mainly realized by means of contracts.

7. *Types of contracts. Sale (*do ut des*). Lease (*do ut facias*)*

Title 3 of the Fourth Book of the Italian Civil Code comprises special rules governing nominate contracts, to be intended as specific types of con-

tract individually named by law (such as sale, insurance, loan for use, carriage, etc.) and governed by specific sets of rules which are supplemented by the rules on contract in general (Title 2 of the Fourth Book of the Italian Civil Code). In addition to types of contracts named by law (legal types), there are other contractual schemes created by the business practice and recognized as admissible by courts (according to Art. 1322 CC).

Most transactions in economic life and in social relations proceed by way of an exchange. Whether they be commodities, services or information, things move from each person towards the other. Since the introduction of money, such exchanges are viewed from the standpoint of circulating money. For all that, contracts still sanction an exchange, but in more sophisticated, complex and diversified forms and manners.

The more ubiquitous form of contract of exchange is the contract of sale, by way of which ownership of a thing or other rights pass from one party (seller) to the other (buyer) and a correlative amount of money (price) moves from the latter (buyer) to the former (seller).

The essential effects of such contract are defined under Art. 1470 CC, which states that sale is the contract having as its object the transfer of ownership of a thing or the transfer of other rights in exchange for a price.

Any contract where a right, not necessarily ownership, is transferred against correlative price, is a sale: hence, also a credit may be sold.

More importantly, according to Art. 1376 CC in contracts having as their object the transfer of ownership of a specified thing (as it is usually the case with a contract of sale), the constitution or transfer of a right *in rem* or the transfer of another right, such ownership or right is transferred and acquired by virtue of the lawfully expressed agreement of the parties. Such contracts, named contracts with 'real' effects (i.e. 'contratti ad effetti reali') and that realize a typical model of circulation, are based on the so-called principle of *consensus* and do not require any *traditio*.

Consequently, the *traditio* is not required by law for the validity of such transfers or constitution of rights *in rem* (so-called 'contratti consensuali' to be distinguished from the so-called 'contratti reali'), but it is only required in case of the acquisition from a non-entitled party, in addition to the requirement of good faith (so-called 'Bona Fide' acquisition of movable property, see para. 8).

What is said above is of fundamental importance, taking into account that in other legal systems agreements transferring the right of ownership or other rights *in rem* are not sufficient to transfer such rights, as their transfer either requires delivery of the thing (in case of movable property) or the observance of a specific and formal transferring procedure (i.e. the registration of the sale in the land public register in case of immovable property). The transfer of the right of ownership occurs solely after the completion of these 'additional (as compared to Italian law) procedures'.

Under the principle of *consensus* (i.e. principle of mutual consent) (which was codified in the French Civil Code), instead, mere agreement is sufficient to transfer the right of ownership or other rights *in rem*. For example, the purchaser becomes the owner from the moment the contract is concluded, provided that the agreement is 'lawfully expressed' (i.e. if expressed as provided by law: for instance, by having recourse to the written form in case of immovable property, see para. 8).

The circulation of (private) wealth may be realized not only by means of contracts where ownership, rights *in rem* or other rights are transferred against correlative price. Such an exchange may be also implemented by means of contracts, named contracts with 'obligatory' effects (i.e. 'contratti ad effetti obbligatori'), which constitute obligations against correlative price (or even gratuitously).

For example, in a contract for lease (so-called 'locazione'), the owner of a piece of property (movable or immovable) grants to the other party (lessee) the exclusive possession and the right of enjoyment of said property for a certain period of time, in exchange for the payment of a rent (see Art. 1571 CC). It follows that when the term of the lease expires, the lessee must return the property leased to the lessor (i.e. the owner). And in addition to this legal type, the Italian case law admitted other contractual schemes that have developed in the international commercial practices. More precisely, such contracts do not transfer ownership nor constitute or transfer rights *in rem* or transfer other rights, but generally consent to a person who is not the owner of a thing to use or enjoy such a thing. Also these contracts may be considered as further models of the circulation of (private) wealth.

8. *Other distinctions and principles*

With reference to the circulation of (private) wealth, it must be considered also crucial the distinction between movables and immovables, because the legal rules aimed at regulating, ascertaining and transfer the rights on these goods are quite different.

In the case of movables, rapidity and simplicity prevail in the operations followed for such transactions. Purchase of consumables at a supermarket, for instance, does not require express written procedures. Nor does the high value of some movables (jewels or paintings) modify the rule that exempts such transactions from any formal requirements. As a general rule, there are no public registers for tracking the rights on movables (apart from the so-called 'movable property inscribed in public registers', see Art. 815 CC).

Moreover, in order to facilitate the circulation of rights on movables

the Italian legal system is also based on the French principle of the 'possession vaut titre' of the Code Napoleon (so-called 'principio del possesso vale titolo').

Also in this case, an example can be helpful.

Suppose that the owner of an Art gallery, Ms B., sells a painting to Mr G. for the amount of Euro 1.000. Suppose that seller and buyer agree that Mr G. will pick up the painting the next day. Suppose that shortly afterwards, Mr N. enters into the Art gallery, sees the painting which has been sold to Mr G. (Mr N. is not aware of the prior sale) and asks the owner of the Art gallery for its price. Ms B. answers Mr N. that the painting is not for sale (remaining silent about the prior sale to Mr G.). At this point, Mr N. offers the major amount of Euro 5.000, inducing Ms B. to agree to (re)sell him the painting. As can be easily inferred, the non-owner Ms B. behaved as if she were the owner (by agreeing to sell the painting to Mr. N., see Art. 832 CC), i.e. she possessed the painting.

Clearly, the question that arises at law concerns the question related to who will eventually get the painting: Mr G. or Mr N.?

In the Italian legal system, the 'possession vaut titre' rule applies. And according to this rule, contained in Art. 1153 CC, the person to whom movables are transferred by one who is not the owner acquires ownership of it by way of possession, provided he is in good faith at the time of transfer, the movable has been handed over to him, and there is an 'appropriate title' for the transfer of ownership.

Thus, in order to acquire the right of ownership 3 requirements have to be met:

(1) good faith, i.e. the person to whom the movable is provided is not aware that such transfer injures the right of another person (as in the example outlined the right of Mr G.);

(2) an 'appropriate title' for the transfer of ownership means that the parties (in the example outlined, Ms B. and Mr N.) entered into a contract that, in the abstract, may transfer the right of ownership. What the legal system wants to express is that the 'possession vaut titre' rule does not apply if, for instance, Ms B. and Mr N. had entered into a lease (as a lease does not, in the abstract, transfer ownership);

(3) possession, i.e. possession of the movable has been transferred (in the example outlined the painting has been handed over from Ms B. to Mr N.).

Provided all 3 requirements are met, the possessor (Mr N.) can keep the painting, as he, according to Art. 1153 CC, acquires ownership even if the transferor did not have the ownership, i.e. he acquires the right of ownership by 'original title' (i.e. the right of the transferee is independent from the right of the transferor, as it is implicit in the wording 'transferred by one who is not the owner acquires ownership').

It is important to understand the implications of the 'possession vaut

titre' rule. By granting the right of ownership to the possessor in good faith, provided that they acquired possession by virtue of an 'appropriate title', the legal system promotes the circulation of wealth: for instance, a prospective buyer of a movable, who does not know (and cannot easily find out) whether somebody offering it for sale is vested with the right of ownership or not, is on 'the safe side' provided the 3 requirements outlined are met. And that even in the case that, at a later stage, it turns out that the person offering the movable for sale was not his legal owner. In this sense, possession plays a fundamental role in the transfer of movable property.

On the other hand, the rules provided for the circulation of rights on immovables are significantly different.

In the case of immovables, the law stipulates that the written form is required, under penalty of nullity, for the transfer of the right of ownership and for the constitution and transfer of property interests (Art. 1350 CC). Moreover, publicity – by way of registration in public registers (Art. 2643 CC) – is necessary in order to make the right transferred or constituted enforceable against third parties.

More precisely, it must be noted that in accordance with the principle of *consensus*, also the registration in a public register (so-called 'trascrizione') in case of immovable property or registered movable property is not required by law for the validity of transfers or constitution of related rights *in rem*, but only as the main form of publicity with declaratory effects *vis-à-vis* third parties.

The registration is carried out by registering the corresponding act in the relevant public register, which are managed by the so-called 'Conservatorie dei re-gistri immobiliari'. Additionally, it must be considered that such public registers are organized, and the corresponding registrations are filed, taking into consideration the legal entities, who have constituted or transferred the right *in rem*, and not its *rem* (i.e. the good).

Moreover, it must be also observed that the above-mentioned discipline of the registration in a public register is not applicable in certain parts of Italy (i.e. in the provinces of Trento, Bolzano, Trieste, Gorizia, as well as in certain municipalities of the provinces of Udine, Belluno and Brescia). Here it finds application the so-called 'regime tavolare' of Austrian origin, which is based on land public registers (so-called 'Grundbücher') and managed by a 'giudice tavolare' (i.e. public registers judge). Such land public registers are organized with reference to the goods and the corresponding registration (in this case called 'intavolazione' and not 'trascrizione') is required by law for the validity of such transfers or constitution of rights *in rem* (so-called publicity with constitutive effects), and not only for granting to such rights their enforceable *vis-à-vis* third parties. In these parts of Italy, where such 'regime tavolare' is provided for by the Italian law, the principle of *consensus* finds no application, considering

that the agreement between the parties related to the transfer or constitution of rights *in rem* produces its effects only when followed by the registration in the land public register.

9. *Conclusions*

All the models of circulation of (private) wealth which have been analysed in this report are deeply rooted in the history of law and in the peculiar features of each legal system. But also in the third millennium it can be stated that the intervention of the law always follows and satisfies economic interests. Doing that, and obviously, the lawmaker has to take his decisions, as for instance it is the case with reference to the circulation of rights on movables. Consequently, the actual legal system is a compromise between past and actual choices, traditional models and modern requirements. The duty of the scholars is to understand the reason of this complexity, being ready to explain it and, if necessary, to change it in order to properly serve the needs of the community.

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THE UNSPOKEN WEALTH: SUSTAINABILITY [*]

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ABSTRACT

This essay summarizes the historical developments around the concept of sustainable development. It covers the period starting from the 1960s until the establishment of the Sustainable Development Goals in 2015.

1. *The premises of sustainable development: from the Stockholm Conference to the mid-1980s*

A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and wellbeing depend. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes. (Declaration of the United Nations Conference on the Human Environment, 1972).

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While the roots of the concept of sustainability can be traced back to ancient times, it is in the 1960s that environmental awareness begun to rise (Du Pisani 2006). Environmental concerns were spurred by an increase in poverty and social inequality, advancements in the scientific understanding of the growing scale of human impact on the natural environment and awareness regarding local air and water pollution, soil degradation and desertification, and improper use of natural resources (Glaser 2006, Quental et al. 2011). In the same period, the Group of 77 (G77) developing countries, established in 1964, brought to the international arena concerns regarding human development in their countries, and specifically issues of poverty and social justice. Particularly thorny discussion in this respect were the terms of international trade and of development aid as well as access to technology (Seyfang and Jordan 2002).

The 1970s were a decade of significant debate around environmental topics (Quental et al. 2011): ecologism gained importance. Earth Day was celebrated for the first time in 1970; Greenpeace and Friends of the Earth were founded and environmental groups became more active, green political parties strengthened (Du Pisani 2006). Environmental concerns increased, both for the public and for governments (Glaser 2006). In the early 1970s, the Club of Rome, a group of economists and scientists, published "The limits to growth" report. Its aim was to warn about the limited supply of physical resources on earth: exceeding such limits through overexploitation would very likely lead to catastrophe (Meadows 1972).

Against this background, the UN Conference on the Human Environment held in 1972 in Stockholm (1972) was the first large gathering where developed and developing nations addressed issues such as transboundary pollution and the co-operative management of shared resources (Basiago 1995). The Conference was characterized by the contraposition of the views and concerns of the Brussels group – a coalition of industrial countries, including the USA, the UK, France, Belgium, and Germany – and the G77. The latter pushed to ensure that environmental and human-development issues were discussed jointly, rather than in isolation. The former worked on the margins to undermine the environmental outcomes of the conference (Seyfang and Jordan 2002).

This notwithstanding, the Stockholm Conference in 1972 was an important milestone: it represented the first step in the global debate around issues of development and environmental protection (Seyfang and Jordan 2002). It also laid the foundations of the international system of environmental law (Basiago 1995). For instance, an important principle negotiated at the Conference was that a nation state's sovereignty over the use of its own environmental resources should not impact negatively on other states. The Stockholm documents also acknowledged that developed and developing countries had different priorities, and pioneered the effort to engage non-governmental organizations and stakeholder in the process

(Seyfang and Jordan 2002). Furthermore, the Stockholm Conference started an important process of institution building both at the national and at the international level (Basiago 1995).

Following the Conference, in December 1972 the UN General Assembly established the UN Environment Programme (UNEP) as a way to coordinate and foster cooperation on environmental issues (Momtaz 1996). While UNEP relied primarily on (often limited and inconsistent) voluntary financial contributions from a small number of countries, it actively engaged in cooperation with other organizations, such as the United Nations Development Program (UNDP), the Food and Agriculture Organization (FAO), and the World Health Organization (WHO) (Linnér and Selin 2013). In addition, UNEP has served as an important forum for major NGOs, including the International Council for Science, the International Union for Conservation of Nature, and the World Wildlife Fund (du Pisani 2006). Yet, the Stockholm Conference undeniably left some issues unresolved. Among them, the difficult theoretical relationship between the concepts of environment and development. Furthermore, the Conference did not identify the financial which would have been necessary to swiftly move towards sustainability (Basiago 1995).

The few years following the Conference saw a flurry of regional intergovernmental conferences and of conventions: the Bonn Convention covering the Rhine in 1976, the 1974 Paris Convention on marine pollution from land-based sources, the 1974 Oslo Convention on sea dumping and the 1979 Geneva Convention on Acid Rain (Basiago 1995). Yet, by 1980, the discussion around sustainability issues began to stagnate (Quental et al 2011). Indeed, at the ten year follow up meeting from the Stockholm Conference organized by UNEP in 1982 it became clear that a long-term, integrated environmental thinking and management planning was missing, in spite of the widespread support for the Stockholm principles (Seyfang and Jordan 2002). Social inequalities were rising in several developing countries; famine spread through African countries – and killed more than 1 million people in Ethiopia in in 1984-1985 (Quental et al. 2011); war refugees doubled from 1980 to the early 1990s (UNEP, 2002). Local institutions in many developing countries were weakened by tax reforms, privatization of public services and the liberalization of trade; all of this lead to massive natural resource exploitation (Dasgupta, 2001).

2. *The Brundtland Report: the first definition of sustainable development*

The international debate around sustainability issues was revived in 1987, as a result of the publication of the "Our Common future" report by

the World Commission on Sustainable Development (WCSD), known as the Brundtland Commission by the name of its chairman, Gro Harlem Brundtland. The Commission was established in 1983 to identify and propose long-term environmental strategies for achieving sustainable development (by the year 2000) and ways and means to deal more effectively with environmental concerns. The Commission was also to recommend ways to increase co-operation among developing countries and between countries at different stages of economic and social development and to help to define shared perceptions of long-term environmental issues (Brundtland 1987).

The Brundtland Report presented the first definition of sustainable development. Although alternative definitions were proposed over time, this one is still widely used today:

> *"Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs"* (Brundtland 1987)

The report declared that technology and social organization could be managed and improved to promote a new era of economic growth, one in which the state of technologies and human societies would not deplete the resources of the biosphere. The report also highlighted that sustainable development could not be promoted in a world in which poverty is endemic: poverty leads to ecological catastrophes as well as to other catastrophes. For this reason, sustainable development implied meeting essential needs, ensuring that the poor get a fair share of the resources required needed for growth. More affluent societies have to adopt lifestyles that respect planetary boundaries; institutions must be designed to support and secure effective citizen participation in decision making. In developing countries, population growth can increase pressure on natural resources (Brundtland 1987). Importantly, the report stated that

> *"… in the end, sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs. We do not pretend that the process is easy or straightforward. Painful choices have to be made. Thus, in the final analysis, sustainable development must rest on political will"* (Brundtland 1987)

The Brundtland Report thus highlighted the three key spheres of sustainable development, later to be known as the "triple bottom line": environmental sustainability, economic development, and social equity (Sachs 2012). While acknowledging the tension between three aspects, the report posited that they can (and should) be pursued simultaneously (du Pisani 2006).

The Brundtland definition of sustainable development was not exempt from criticism from both the radical and conservative sides. Less-developed countries were concerned that sustainable development might simply be an ideology serving neo-liberal interest to impose stricter conditions and rules on international aid. The concept of sustainable development did not challenge the ideology of economic growth as an engine of well-being, nor did it question the predominant consumer culture in developed countries based on material demand (Mitcham 1995). The Brundtland report did not contain specific criteria of sustainability, nor any indication of how to achieve it, or to measure it.

This notwithstanding, the Brundtland Report discussed the need to apply integrated, sustainable solutions to a broad range of problems, including population growth, consumption patterns, agriculture and food security, biodiversity, energy choices, and industry. By highlighting the environment, the economy, and society as the three fundamental components of sustainable development, it provided the first coherent justification debating these three aspect jointly, rather than separately.

3. *The Earth Summit: Rio de Janeiro 1992*

A series of ecological disasters increased the international impact of the Brundtland report: the toxic cloud leaked from a Union Carbide plant in Bhopal, India in 1984, the Chernobyl nuclear disaster leading to a radioactive cloud over Russa and Part of Europe in 1986, the Exxon Valdez 50-million-liter oil spill in Alaska's (Najam and Cleveland 2005, Quental et al. 2011). From the 1990s onward, sustainable development entered the lexicon and became a popular expression (Seyfang and Jordan 2002). In response to the Brundtland Report, in 1989 the UN agreed to convene a global conference to implement sustainable development – the United Nations Conference on Environment and Development (UNCED) – to be held in Rio de Janeiro in 1992 (Glaser 2006).

Several key events followed the publication of the Brundtland report. Two major international agreements were signed – the Montreal Protocol on Substances that Deplete the Ozone Layer (1987) and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) – and two main bodies were established – the Intergovernmental Panel on Climate Change (1988) and the Global Environment Facility (GEF) (1991). The former is an independently operating financial organization established as a partnership between 184 countries and international institutions, civil society organizations, and the private sector with the aim of addressing global environmental issues while supporting national sustainable development initiatives. Over time, it provid-

ed grants for projects related to biodiversity, climate change, international waters, land degradation, the ozone layer, persistent organic pollutants, and such. The latter was tasked with preparing a review and recommendations with respect to the state of knowledge of the science of climate change; the social and economic impact of climate change, and potential response strategies and elements for inclusion in a possible future international convention on climate. In the same year, the World Bank published the World Development report 1990, with a focus on poverty reduction; UNDP published the first Human Development Report, also contributing to fuelling the debate around poverty.

This overall positive context, and the end of the cold war in 1990, increased expectations regarding the potential of the WCSD, also known as World Summit. Indeed, the Rio Conference was bigger than the Stockholm Conference, and its agenda was broader and much more complex. The participation of media and civil society was large. The Conference marked the shift from a focus on environmental protection to sustainable development (Glaser 2006): leaders from over 120 nations endorsed the concept of sustainable development, which became one of the most important policies of the 21st century (Basiago 1995). There were five major outcomes at the Conference: the 27 principles of the Rio Declaration on Environment and Development, a 40-chapter long blueprint for sustainable development called Agenda 21, the United Nations Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity (CBD) and the non-binding Principles for the Sustainable Management of Forests.

The Rio Declaration on Environment and Development makes constant reference to concepts of sustainability in its 27 principles, thus integrating the debates around economic and social development and environmental protection. Agenda 21 was to serve as a guide book to ensure that development could be socially, economically and environmentally sustainable (Basiago 2005). The Convention on Biological Diversity had three main goals: the conservation of biodiversity; the sustainable use of its components; and the fair and equitable sharing of benefits arising from genetic resources (UN 1992a). The UNFCCC aimed at stabilizing greenhouse gas concentrations in the atmosphere at levels that would prevent dangerous anthropogenic human-induced interference with the earth's climate system. Such stabilization was to occur in a timeframe that would allow ecosystems to adapt naturally to climate change, ensuring food production and sustainable economic development (UN 1992b). Importantly, the Rio Declaration, Agenda 21, and the principle on forests were an acknowledgement of the relevance of 'soft law' for issues related to sustainability (Seyfang and Jordan 2002).

In practice, the Conference managed to better articulate the concerns related to human consumption in developed countries and population

growth in developing countries. New institutional processes were set in motion, both at the at national and sub-national level of governance. In December 1992, the General Assembly of the UN set up the Commission on Sustainable Development (UNCSD) created to maintain peer pressure on states to fulfil their Rio commitments. UNCSD was responsible to ensure and verify the pursuance of Agenda 21 (Momtaz 1996). Through the UNCSD, countries were pushed to provide a more comprehensive account of their sustainable development commitments and strategies (for instance, through the application of the Local Agenda 21 or the benchmarking efforts of the UNCSD). This notwithstanding, the Rio Conference came short of securing long-term agreement regarding the need for a more equitable world order, called for by the Brundtland report. It also failed to reconcile the conflict in the demands of developing and industrialized countries, just like Stockholm had failed (Seyfang and Jordan 2002). Agenda 21 made some progress in linking the debates around environment and development, but it did not succeed in applying consistently a broad and integrated (environmental, social and economic) sustainable development approach (Quental et al 2011).

After Rio and up until the end of 1990s, several international focusing on topics relevant for development took place: the Conference on Population and Development (ICPD) in 1994 in Cairo, the World Summit on Social Development in Copehange and the UN Fourth World Conference on Women in Beijing in 1995, the Second UN Conference on Human Settlements – known as Habitat II – in Istanbul and the World Food Summit in Rome in 1996. (Hulme 2009). Importantly, in 1996, the OECD Development Assistance Committee – an international forum of 30 countries representing the largest providers of international aid – published a document entitled "Shaping the 21st Century: The Contribution of Development Co-operation". This document contained a listing of 'International Development Goals' (IDGs), which all OECD members had approved (Hulme 2009).

Yet, the world experienced several economic, financial and social crises. To just name a few, countries from the ex-Soviet bloc were generally experiencing sluggish economic growth, Latin America experienced economic downturn, HIV and poverty were rampant in Africa, the Asian crisis of 1997-1998 had important repercussions worldwide, a series of environmental disasters occurred (Hurrican Mitch, floods in Mozambic floods, earthquakes in China, India and Iran); Taleban was ruling Afghanistan and mistrust towards international economic institutions was fuelling anti-globalization sentiments. All of this while the budgets of aid agencies were shrinking significantly (McArthur 2014).

4. *The Millennium Declaration and the Millennium Development Goals*

Against this background, the UN General Assembly Special Session on Sustainable Development (UNGASS) was held in New York in 1997 – 5 years after Rio – with the stated aim of reviewing the implementation and progress of Agenda 21. While the meeting produced a 'statement of commitment' and a 'Programme of Action for the Further Implementation of Agenda 21', even agreeing on upon a statement on common concerns such as forests, climate change, trade, and globalization was particularly different among participants from different countries (Seyfang and Jordan 2002). Developing countries were disappointed that previously promised finance and support was not forthcoming (Seyfang 2003).

An important development in December 1997 was the adoption of the Kyoto Protocol. The protocol put into practice the UNFCCC by committing industrialized countries and economies in transition to adopt policies limiting greenhouse gases emissions in accordance with individual targets based on the principle of "common but differentiated responsibility and respective capabilities". The agreement entered into force only in 2005 due to slow ratification progress. Two additional agreements were signed a few years later: the 2000 Protocol on Biosafety and the 2001 Stockholm Convention on Persistent Organic Pollutants.

During 1998, the UN started to lay plans for 'the Millennium Assembly of the United Nations', a major gathering to be held in New York in September 2000. The Secretary General, Kofi Annan, wanted to ensure that this occasion served to put UN reform forcefully back on the agenda. A series of meetings with member states and NGOs was held to select topics that should be the focus of the Millennium Assembly and of a Millennium Declaration. International agencies, NGOs and activists also strongly engaged in processes and the content of the Millennium Assembly (Hulme 2009). To push the process forward, in early 2000 Kofi Annan launched *We the Peoples: The Role of the United Nations in the 21st Century*. Objective of the report was to be a starting point for the Millennium Summit. The report focused on issue of poverty eradication and freedom, economic growth, technology, the setting of goals for the rich countries, the environment and the highlighting of Africa's problems. Soon afterwards, in June 2000 the leaders of the IMF, OECD, UN and World Bank launching a common document, *2000 A Better World for All: Progress towards the International Development Goals*. Over summer 2000, there were heated negotiations about the final text for the Millennium Declaration (Hulme 2009).

At the Millennium Summit in September 2000, the UN adopted the United Nations Millennium Declaration, which presented a set of 8 international development goals (Millennium Development Goals) to be achieved

by 2015: 1. Eradicate extreme poverty and hunger; 2. Achieve universal primary education; 3. Promote gender equality and empower women; 4. Reduce child mortality; 5. Improve maternal health; 6. Combat HIV/AIDS, malaria and other diseases; 7. Ensure environmental sustainability; and, 8. Develop a global partnership for development. To monitor progress towards these goals, a monitoring framework was developed, which originally contained 18 targets and 48 indicators that had to respond to 8 specific goals. In 2005, the 18 targets were expanded to 21 (McArthur 2014).

The MDGs were rooted in the process what had been put into place in the early 1990, aimed at increasing the effectiveness of international aid and focusing it more (McArthur 2014). The MDGs shifted the discourse around poverty towards a multi-dimensional characterization, and not just a lack of income. They represented an important improvement towards providing a clear purpose of development and had the potential to mobilize public support. For the first time, the development agenda could be organized around a manageable set of clear goals, easy to understand and measure, and with a deadline. In this respect, they contributed to rekindling the concern around development issues in developed countries. In addition, the MDGs contributed to increase the accountability of actors, countries and institutions (Loewe 2012). The Millennium Declaration and Millennium Development Goals (MDGs) saw the convergence of development agenda of several international organizations, including UNDP UNEP, WHO, the United Nations Children's Fund (UNICEF) and United Nations Educational, Scientific and Cultural Organization (UNESCO) (Kumar et al 2016). Yet, the MDGs were a North–South aid agenda. 7 out of the 8 goals concerned issues which were largely relevant for developing countries, such as universal primary education. There was one goal, goal 8, in which developed countries had a strong role to play: develop a global partnership for development (Fukuda-Parr and Hulme 2011).

The UN General Assembly in 2000 also took the decision to convene, in 2002, a World Summit on Sustainable Development (WSSD) (Glaser 2006). Yet, in the year following the Millennium Summit, the prospect for an increase in concerted global action to address poverty reduction weakened. The attack on the Twin Towers on 9/11 2001 shook the US; the world experienced a growing sense of insecurity and focused on the threat of terrorism (Najam and Cleveland 2005).

5. *Rio+10*

The World Summit for Sustainable Development, also known as 'Rio+10', took place in Johannesburg in 2002. At the time, few expected the 2002 WSSD to be as impressive as the Earth Summit: the run up to

the summit was not characterized by the optimism and high hopes that had accompanied earlier summits (Quental et al. 2011) In the 10 years since Rio, industrialized countries proved unwilling to provide resources to support developing countries that had been implied and to engage on key issues such as climate change. Yet, Johannesburg was testament to the fact that the term 'sustainable development', which was contained in the title of the summit, had gained political acceptance (Najam and Cleveland 2005). It was also the first major event that was not simply relying on unofficial 'side events' to give room to the perspective of stakeholders: at Johannesburg, key groups of stakeholder identified in Rio provided formal structured official input (Seyfang and Jordan 2002, Glaser 2006). The conference broadly failed its main goal to put in place the necessary mechanisms to implement Rio's decisions and to provide a push for progress, which had been disappointing in the last decade. The conference statement and plan of action basically recalled the targets already established during the Millennium Summit (Quental et al. 2011).

While the outcomes of the WSSD can be considered weak, the major innovation at Johannesburg were the so-called 'Type 2' agreements, namely informal agreements involving non-state parties, sometimes amongst themselves and sometimes with individual governments. These were both a reflection of the fact that NGOs, stakeholders and businesses were taking a more active role in international development, and a push by the organizers to get something memorable out of the summit (Najam and Cleveland 2005). According to the rough count by the summit organizers, over 220 Type 2 agreements were reached at Johannesburg, signifying around US $ 235 million in pledged resources; energy and sustainable development. In the following years, stronger stakeholder engagement gave rise to a flurry of partnerships between governments, industry and non-governmental organizations established to carry out sustainability actions (UNDSD, 2008), this was testament to a new decentralized international governance system around issues of sustainable development in which different actors work at different levels (Haas 2004). After Johannesburg, societal efforts for a sustainability transition cannot be solely measured focusing on governmental actions, as was largely the case before (Quental et al 2011). Importantly, the Johannesburg Declaration and the Johannesburg Plan of Implementation made the important step of mentioning energy use as an important aspect of sustainable development, in addition to the environmental, economic and social dimensions. Furthermore, even if by confirming targets which had previously been discussed in other for a, the Johannesburg Plan of Implementation included actual targets and timetables rather than simple statements of intent as customary in previous summits (Najam and Cleveland 2005).

Over the following ten years, MDGs remained a focus of global policy debates and national policy planning, even though promised of official

development assistance by developed countries did not materialize. Nonetheless, MDGs did promote some meaningful progress towards achieving the MDGs, albeit very variable across different goals, as well as countries and regions (Sachs 2012). They were incorporated into the work of non-governmental organizations and civil society more generally, and are taught to students at all levels of education. Yet, as time passed, it became clear that not all MDGs would be fully achieved, and the momentum should not be lost (Lomazzi et al. 2013, Sachs 2012, Filho 2015). The world had experienced major financial crisis in 2007-2008. Globally, some ecological trends were positive (for instance, steep reductions in emissions of ozone-depleting substances and levels of oil pollution at sea), but other were negative (for instance greenhouse gas emissions, biodiversity, waste). The situation with respect to human development indicators was similarly mixed: life expectancy had increased, education was improving, and access to basic goods was increasing. Yet, inequality was rising and many still lacked access to basic services. Concern over the ecological unsustainability of human presence on Earth, and the growing inequality coupled with continuing deprivation of a huge part of humanity, has grown rapidly in the last couple of decades as Inequality, injustice and unsustainability rose (Rockstrom et al., 2009; Piketty, 2014; Steffen et al., 2015).

Globally, it was agreed to continue to fight poverty should continue, and efforts should be devoted also to address other key societal challenges.

6. *Rio+20*

In December 2009, the UN General Assembly stated that a UN Conference for Sustainable Development shold be organized in 2012 with the objective of securing renewed political commitment for sustainable development, assess progress to date and remaining gaps in implementing outcomes of earlier conferences, and address new and emerging challenges. More specifically, the UNCSD should focus on: (i) a green economy in the context of sustainable development and poverty eradication and (ii) the institutional framework for sustainable development (Linnér and Selin 2013) The UN Secretary-General Ban Ki-Moon's also appointed a high-level global sustainability panel to explore options for a new round of global goals to follow the MDGs. In 2012 the panel issues a report recommending that the world adopt a set of Sustainable Development Goals (SDGs). The perceived success of the MDGs incited the idea and planning for SDGs using a similar approach (Sachs 2012). In preparation for the summit, The United Nations Environmental Programme (UNEP) also published the report 'Towards a green economy: Pathways for sustainable development and eradication of poverty' (UNEP, 2011).

The UN Conference for Sustainable Development, also known as Rio+20 Summit, was held in Rio de Janeiro in 2012. The Future We Want declaration emerging from the conference acknowledged the need for action and called for a wide range of actions (UN 2012), including the establishment of sustainable development goals (SDGs), the identification of ways in which green economy can be used as a tool to achieve sustainable development; the need to move beyond gross domestic product (GDP) to assess the well-being of a country and the urge to develop a strategies for sustainable development financing and tackling sustainable consumption. The document also stressed the need to overcome gender inequality and to engage civil society and incorporate science into policy (UN 2012). Finally, the importance of voluntary commitments on sustainable development was also highlighted (Filho et al. 2015).

Over the next few years, discussion about how the SDGs may be designed in practice was very lively and policy makers, international organizations and stakeholder engaged in a process for elaborating international development priorities (Fakuda-parr 2016, Griggs et al. 2013).

7. *The Sustainable Development Goals*

The Sustainable Development Goals (SDGs) were launched in September 2015 at the UN General Assembly. The constitute a set of 17 broad goals and 169 targets which are guiding the post-2015 development agenda. The list of SDGs is provided in Table 1. In contrast with the MDGs, the SDGs represent global agenda for sustainable development: they are universal (i.e. they apply to both developed and developing countries) and their focus ranges from environmental protection, human life, democracy, sustainable environmental protection, and improved quality of life (Fakuda-parr 2016). Many of the goals and their targets incorporate issues promoted by civil society groups or the developing countries. They also address some politically charged topics, such as a specific focus on inequality (Goal 10) or governance and human right (Goal 16). They represent a much more complex set of goals than the MDGs. Importantly, the SDGs also include 'means of implementation' as a goal of its own (Goal 17), recognizing the need to change policies and institutions if transformative change is to take place (Gore 2015).

Table 1 – *UN Sustainable Development Goals*

Goal	Title Description
1 No poverty	End poverty in all its forms everywhere
2 Zero hunger	End hunger, achieve food security and improved nutrition and promote sustainable agriculture
3 Good health and well-being	Ensure healthy lives and promote well-being for all at all ages
4 Quality education	Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all
5 Gender equality	Achieve gender equality and empower all women and girls
6 Clean water and sanitation	Ensure availability and sustainable management of water and sanitation for all
7 Affordable and clean energy	Ensure access to affordable, reliable, sustainable and modern energy for all
8 Decent work and economic growth	Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all
9 Industry, innovation, and infrastructure	Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation
10 Reduce inequality within and among countries	Reduce inequality within and among countries
11 Sustainable cities and communities	Make cities and human settlements inclusive, safe, resilient and sustainable
12 Responsible consumption and production	Ensure sustainable consumption and production patterns
13 Climate action	Take urgent action to combat climate change and its impacts
14 Life below water	Conserve and sustainably use the oceans, seas and marine resources for sustainable development
15 Life on land	Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse
16 Peace, justice, and strong institutions	Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive
17 Partnership for the goals	Strengthen the means of implementation and revitalize the global partnership for sustainable development

Source: Reyes-Menendez et al. (2018).

Since their launch, SDGs have guided efforts for sustainable development worldwide. Many questions remain about their actual implementation, and their translation into national SGDs (Fakuda Parr 2016). The extent to which they will effectively promote a shift in the thorny question of tackling sustainable development is yet to be seen. Concerns regarding the ability (and need) to forcefully reshape economic systems towards sustainability are even higher in the midst of the COVID 19 pandemic and the economic and social crisis that will follow.

8. *Conclusion*

Economic growth has over time improved significantly the living conditions on many human beings on earth, but it gave rise to huge disparities both between and within countries, and was based on a model of development that is not sustainable. Since the 1960s, concerns regarding the need to promote more sustainable economic development have been present in the international arena. Since the Brundtland Report provided the first definition of sustainable development in 1987, this concept has gained attention and importance in the international policy debate, also as a result of increased engagement of international organizations and civil society. After almost 50 years from the Earth Summit of 1972, in 2015 the UN agreed on a set of 17 goals to shape the next decades of the efforts around sustainable development.

What is certain is that the year 2015 was a pivotal year on the international scene. In addition to the launch of the SDGs launched, two other important high-level international meetings took place. The first was the International Conference on Financing for Development (Addis Ababa), which was to discuss the means of implementation of possible SDGs will be under discussion. The second was the 21st Conference of the Parties of the UN Framework Convention on Climate Change, (Paris) which adopted the Paris Agreement on Climate Change, the first-ever legally binding international treaty on climate change aiming to limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels (Gore 2015).

Focusing on the SDGs will push both developed and developing countries to make significant changes to the environmental, economic and social spheres of the life of their citizens. This is a major challenge: the extent to which countries will be able to fully make use of these tools to promote a more equitable future will have to be assessed in the years to come.

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LAW AND ECONOMICS IN NON-WESTERN LEGAL SYSTEMS

Salvatore Mancuso

1. *Introductory remarks*

The present contribution is the result of a lecture made at the University of Brescia for the summer school organized by that university on the theme "Production and circulation of wealth: issues, principles and models". The purpose of this paper is that of systematizing all the different elements used to prepare the lecture, enriched with further elements and references, with the aim of offering an easy and quick synthesis regarding the subject matter of this paper.

In general, this paper will not deal with the well-known theme of law and economics, but it intends to cast a glance on the relationship between law and economic activities in non-Western legal systems. Being the reference to "non-Western legal systems" extremely wide, and potentially dispersive, three different experiences will be illustrated as case studies, namely Islamic law, Chinese law and African law. After having analyzed this relationship in these three legal traditions, the paper will be concluded with some short reflections on how the relationship between law and economic activities appears in the present globalized world.

2. *Islamic law*

Muslims are now thought to comprise some 23 percent of the global population, about 1.62 billion persons, mainly majority Sunni; many of these Muslims will be high net worth individuals, domiciled in lands ad-

herent in part or in whole to the Islamic law.[1] The Islamic economic and financial system is built especially to be in accordance with Islamic law.

The same meaning of Islamic law is controversial. Traditionally Islamic law identifies with *sharī'a*. The word *sharī'a*, that literally can be translated as "the way to the water spring",[2] means the way to be followed, that is the way revealed by God: signifying the correct way revealed by God to regulate human behavior.[3] This concept reveals the existential role of *sharī'a* in the Islamic law, its legal and constitutional precepts and its day-to-day workings in the everyday life of the pious Muslims. Nevertheless, moving from the fact that the *Qur'an* and the *Sunnah* are non-systematized texts not covering all aspects of human behavior, some authors assert that the terms Islamic law and *sharī'a* cannot be seen as synonyms and distinguish between *sharī'a* and *fiqh* (that is literally "the knowledge")[4], considering that when referring to Islamic law, we usually always mean *fiqh*, not *sharī'a*.[5] This because *sharī'a* is based on the *Qur'an* and the *Sunnah*, i.e. primary, revealed sources representing divine law that is perfect in every detail, while Islamic doctrinal jurisprudence, called *fiqh*, is a human effort to understand the word of God, that is the regulatory framework developed by jurists moving from the two primary sources.[6]

Therefore, if theoretically all Islamic law is revealed and comprehensive, practically it has a strong scholarly background.[7] *Sharī'a* and *fiqh*, then, complement each other to realize a social order that is not limited to the area of law.[8]

The sources of Islam can be divided into primary or material sources and secondary sources comprising a method and a declaratory authority.[9] There is no agreement on the summary and simultaneously on the division of the sources of Islam. The primary sources are the *Qur'an* and *Sun-*

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[1] M. BUNTER, *The growing influence of Islamic law and its economic rules*, available at https://www.caymanfinancialreview.com/2015/10/07/the-growing-influence-of-islamic-law-and-its-economic rules/, last accessed 7 February 2020.

[2] A. RAHMAN I. Doi, *Sharī'ah: The Islamic Law*, Islamic Book Trust, Petaling Jaya, 2006.

[3] F. CASTRO, *Il modello islamico*, Giappichelli, Turin, 2007.

[4] I.A. KHAN NYAZEE, *Islamic jurisprudence*, The International Institute of Islamic Thought, Islamabad, 2000.

[5] F. VOGEL-S.L. HAYES, *Islamic Law and Finance: Religion, Risk, and Return*, Brill, The Hague, 1998.

[6] S.A. ALDEEB ABU-SAHLIEH, *Il diritto islamico*, Carocci, Bari, 2008 and in particular sections 1.3.3 and 19.3 where the authors purporting such contraposition between *sharī'a* and *fiqh* are indicated and their thought is illustrated.

[7] A. GAMBARO, R. SACCO, *Sistemi giuridici comparati*, 4th ed., UTET, Turin, 2018; A. D'Emilia, *Sulla dottrina quale fonte del diritto*, in F. Castro (cur.), *Scritti di diritto islamico*, Istituto per l'Oriente, Rome, 1976).

[8] L. MILLIOT-F. BLANC, *Introduction à l'étude du droit musulman*, Dalloz, Paris, 2001.

[9] J. SCHACHT, *An Introduction to Islamic Law*, Clarendon Press, Oxford, 1964.

nah. The *Qur'an* was sent directly by God to the Prophet, and *Sunnah* is the Prophet behavior in different circumstances and considered a source of law as such behavior is inspired by God. The *Sunnah* is known through a collection of *àhadìth* (sing.: *hadith*, translatable as "tales") referring a Prophet behavior verbally transmitted by worthy storytellers and subsequently systematized in written collections under different classifications.[10] *Qur'an* and *Sunnah* represent the two main *usùl-al-fiqh* (sources of law)[11], directly connected to the divine revelation. Among the sources of Islamic law, two other sources which are considered indirectly connected to the divine revelation are also included: the *ijma'*, the unanimous consensus of the *umma* (the community of believers) on opinions and decisions taken by the learned jurists on different Islamic matters[12], whose validity is based mainly on some *àhadìth* and, more in general, "on a sort of diffused inspiration by which the community of believers never loses contact with the Truth, that is with God";[13] and finally the reasoning by analogy, *qiyas*. There are fundamental differences in how these four *usùl-al-fiqh* of *sharī'a* are to be applied in practice, and these differences have given rise to different schools of legal interpretation.[14]

The institute of *fatwa* (pl.: *fatawa*) has a fundamental role in Islamic law. This is not a source of law, but the religious opinion of an expert on Islamic law (*mufti*) regarding a particular problem. It is often issued in response to a direct question, but it may also be published on the scholar's own initiative. The credibility of the *fatwa* lies in the authority and erudition of the Islamic scholars, who try to give people instructions on how to behave as closely as possible to the message of God.[15] *Fatwa* plays a crucial role in the Islamic finance sector.[16] In the contemporary Islamic finance sector *fatawa* are issued by the members of the law council or in-

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[10] F. CASTRO, *Il modello*, cit., at 15.

[11] On the *usùl-al-fiqh* as science of source methodology that embodies the study and regulation of the sources of Islamic law see A.P. DAHLÉN, *Islamic Law, Epistemology and Modernity*, Routledge, London, 2003, at 77 and ff.; and also I.A. KHAN NYAZEE, *Islamic jurisprudence*, cit.

[12] A. RAHMAN I. Doi, *op. cit.*, at 64.

[13] D. SANTILLANA, *Istituzioni di diritto musulmano malichita*, Anonima Romana Editoriale, Rome, 1926, vol. 1, 32 (translation by the author).

[14] *Igmà'* and *qiyas* are no universally accepted among the *usùl-al-fiqh* by the Islamic jurists. The different positions about their validity as sources of law are illustrated in S.A. ALDEEB ABU-SAHLIEH, *Il diritto*, cit.

[15] The institution of *fatwa* is widely explained in S. A. ALDEEB ABU-SAHLIEH, *Il diritto*, cit., section 10.4, 234 and ff.

[16] At the first conference on Islamic banking convened in Dubai in 1979, the lawyer Ibn Shubruma issued a fatwa confirming the compliance of a *murabaha* subtype with Islam, allowing the foundation of modern Islamic banking. See more in M. ÇIZAKÇA, *Islamic Capitalism and Finance: Origins, Evolution and the Future*, Edward Elgar Publishing, Cheltenham, UK, 2011, at 142.

ternal supervisory authority (the *Sharī'a* Supervisory Board) on the initiative of lawyers, bankers and other parties interested in Islamic finance with the purpose of confirming the compliance of a particular financial product with *sharī'a* tenets. [17]

Islamic financial law is the application of *sharī'a* to financial and commercial transactions. The most obvious distinguishing feature of Islamic finance is the central importance of *sharī'a* compliance However, it is appropriate to underline the fact that a Muslim must follow Islamic law even if he resides or stays in a non-Muslim country. Analogously, an Islamic bank doing its business in a non-Muslim country should preferably follow Islamic law over the secular law effective in the given state. The fact that Islamic law and the banking regulations of the country where the Islamic bank would like to expand its business are not compatible is not a valid argument for departure from the Islamic tenets. [18]

In general, Islam views wealth positively as long as it is not acquired by unlawful means [19], as wealth is seen as a gift from God that human beings shall use wisely as God's trustees, a well-deserved reward for hard work and risk-taking, while poverty is considered as the greatest threat to the preservation of Islam. [20] The Prophet himself dedicated part of his life to business and trading. Consequently, Islam allows wealth, but only to the extent that it brings a benefit not only to a single person: any excess [21] should be used for some pious work or charity. [22]

Sharī'a is characterized in relation to finance by a number of prohibitions and restrictions: Islamic finance is therefore *de facto* based on the principle of certain prohibitions. [23] The following principles of Islamic finance and financial services can be considered as essential:

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[17] M.A. EL-GAMAL, *Islamic Finance: Law, Economics, and Practice*, Cambridge University Press, New York, 2006, at 141.

[18] M. KRÜGEROVÁ & others, *Specific traits of Islamic law in relation to economic and financial systems*, in *Ekonomická revue – Central European Review of Economic Issues*, vol. 18 (2015), 26 and ff., at 28.

[19] A. RAHMAN I. DOI, *op. cit.*, at 373.

[20] M.A. GADHOUM, *Wealth from the shariah perspective*, in M. ARIFF-S. MOHAMAD (eds.), *Islamic Wealth Management*, chapter 2, 13-24, Edward Elgar Publishing, Cheltenham, UK, 2017: ; R. SALIM-M. ZAKIR HOSSAIN, *Equitable Distribution of Wealth and Resources in Islam*, in M.A. CHOUDHURY (ed.) *God-Conscious Organization and the Islamic Social Economy*, Routledge, London, 2016.

[21] As indicated in M. KRÜGEROVÁ & others, *op. cit.*, at 29, footnote 3, "*Excess is defined as the difference between the needs of an individual and the wealth possessed. However, a subject of consideration is whether the excess defined as such can be reached considering the impossibility of the satisfaction of human needs*".

[22] A. RAHMAN I. DOI, *op. cit.*, at 381; M. KRÜGEROVÁ & others, *op. cit*., at 29.

[23] M.A. EL-GAMAL, *Islamic Finance* cit., at 8 and ff. See also M.K. HASSAN-M.K. LEWIS, *Islamic Banking: An Introduction and Overview*, in M.K. HASSAN-M.K. LEWIS (eds., *The Handbook of Islamic Banking*, Edward Elgar Publishing, Northampton, 2007.

– prohibition of *riba*/unjustified enrichment;
– *zakat*;
– *maisir* and *gharar*;
– sharing of profits and losses;
– *halal* and *haram*.

The prohibition of *riba* is considered a synonym of the prohibition of interest. This translation is not entirely correct, as at the time of Muhammad, the monetary economy did not exist, and barter transactions were part of everyday life, and, furthermore, because there are forms of forbidden *riba* (illegitimate increase in exchange) that do not include interest.[24] *Riba* is also translated as usury (excessive interest, not interest as such).[25] Islamic economics considers the sale of money for money as something absurd and immoral under the general prohibition of a monetary advantage without any kind of working activity, that leads to the prohibition of unjustified enrichment.[26] Such immorality is represented by interests. Interests are considered something unfair and exploitative, as charging interests determines an asymmetrical distribution of risk, being the risk of the bank significantly reduced thanks to the possibility to resort to diversification and collaterals.[27] The prohibition of *riba* aims substantially at protecting individuals from getting excessively indebted, as well as paying or receiving unfair compensations for receipt or extension of credit.[28] Then interest, with its characteristic properties, goes against the Islamic vision to provide for a just and equitable distribution of resources and to re-establish a socio-economic balance, as a debtor must pay, in addition to the principal sum, further remuneration to the capital owner regardless of whether the money lent has increased in value: it was due to these arguments that led Islamic scholars to believe that it is necessary to perceive interest as *riba*.[29]

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[24] See more in M.A. EL-GAMAL, *Islamic Finance*, cit., at 51 and ff. As indicated in M. KRÜGEROVÁ & others, *op. cit.*, at 30, the same *riba* concept has a broader meaning, as Islamic law identifies two main subtypes of *riba*: these are *riba al-qurud*, which currently prohibits the use of interest in loans, and *riba al-buyu*, which is related to usury in business transactions.

[25] A. RAHMAN I. DOI, *op. cit.*, at 375.

[26] J. SCHACHT, *An Introduction*, cit., at 145; V.M. DONINI, *Regola morale e pragmatismo economico nel diritto islamico dei contratti*, Istituto per l'Oriente C.A. Nallino, Rome, 2012, at 42 and ff.

[27] V.M. DONINI, *Regola morale e pragmatismo economico nel diritto islamico dei contratti*, Istituto per l'Oriente C.A. NALLINO, Rome, 2012, at 42 and ff.

[28] M.A. EL-GAMAL, *Islamic Finance*, cit., at 55.

[29] R. SALIM-M. ZAKIR HOSSAIN-N. AL-MAWALI, *Distribution of Wealth and Resources in Islam: Restoring Social Justice, Peace and Prosperity*, in *International Journal of Economic Research*, vol. 13, n. 2 (2016), 571-586, at 576.

Zakat is one kind of charitable practice done by Muslims based on accumulated resources and is compulsory for those who can afford it. From the perspective of Islam, *zakat* is seen as a return of part of the assets enabled by God in favor of the poor and those in need. At the same time, the rest of the assets, which are a reflection of a sinful desire to own, are purified in the eyes of God.[30] The collection should in theory be voluntary but, even during the lifetime of Muhammad, it became rather an obligatory contribution, being considered one of the acts that a good believer shall perform.[31] *Zakat* has a significant overlap with finance. The institution of *zakat* is not only a source of alleviating the sufferings of the poor, but also provides an incentive to invest the surplus resources in the real sectors of the economy.[32] There is no fixed percentage for the *zakat*.[33] As it is impossible for Islamic current accounts to pay interest (the prohibition of *riba*) or appreciate the money otherwise (the principle of sharing profits and losses on which see below), in terms of its nominal amount the money deposited in current accounts loses its value every year for an amount equal to the percentage to be paid as *zakat*.[34]

Maisir was in pre-Islamic society a lottery gambling game. *Maisir* can be translated as an easy achievement without work.[35] In later times, the meaning of the word expanded to include all gambling. Although from the perspective of the financial system the prohibition of gambling may seem trivial, it is not. This principle has been very thoroughly expanded to cover all social relations, including economics and finance to the point where Islamic law forbids any business activities which contain any element of gambling.[36] The result of this is the incompatibility of Islamic financial law, for example, with financial derivatives or conventional insurance business activities.[37]

The word *gharar* was characterized by prominent jurists considering its connection to *maisir* (gambling), as it means uncertainty or a large and excessive risk in commercial transactions so that their result can be considered as aleatory:[38] generally speaking, *gharar* includes some forms of incomplete information and/or deception, as well as risk and uncertainty

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[30] A. RAHMAN I. DOI, *op. cit.*, at 388.

[31] V.M. DONINI, *Regola*, cit., at 44.

[32] R. SALIM-M. ZAKIR HOSSAIN-N. AL-MAWALI, *Distribution*, cit., at 574.

[33] On the different mechanisms to calculate the *zakat* see V.M. DONINI, *Regola*, cit., at 48.

[34] M. KRÜGEROVÁ & others, *op. cit.*, at 31.

[35] M. ILHAM SHEIKH, *Introduction to Islamic Finance and Banking*, Educreation Publishing, New Delhi, 2019, at 35.

[36] M.K. HASSAN-M.K. LEWIS, *Islamic Banking*, cit.

[37] M. KRÜGEROVÁ & others, *op. cit.*, at 31.

[38] V.M. DONINI, *Regola,* cit., at 55.

connected to the objects of contract.[39] This leads to the exposure to excessive risk and hazard in commercial transactions, due to either a lack of information or information asymmetry regarding the price, quality and quantity of consideration, data of delivery and the ability of the buyer or seller to fulfil the commitment.[40] The principle of *gharar* has many consequences in the economic sphere. In the case of business relationships, it concerns a ban on the sale of an item subject to uncertainty in terms of its future existence or its characteristics.[41] The principle of *gharar* has an impact on the financial sector. Contrary to it are such situations in which one party makes use of the loss of another entity under conditions of uncertainty.[42] Conventional insurance is therefore in contradiction not only to the principle of *maisir*, but to the principle of *gharar*, since the insurance company earns from the insured even in the case when the harmful event does not occur, realizing – therefore – an unjustified enrichment. Similarly, the prohibition relates to speculation on stock markets.[43] A contractual relationship with such characteristics is invalid, unless the level of uncertainty is extremely low so that it does not exceed that normal level of risk that is inherent to any contract.[44]

The principle of sharing profits and losses is a one of the pillars governing Islamic economics.[45] Money is viewed in an Islamic economy differently from in Western economies. Money is not dealt with to be accumulated, since – as mentioned above – wealth is seen as a gift from God that human beings shall use wisely as God's trustees, being the primary task of money that of being used for an exchange. Money is considered as potential capital that becomes real capital when it is used in productive activities. To be considered in accordance with Islam, a business activity must be based on cooperation and morality. The principle of sharing profits

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[39] M. ILHAM SHEIKH, *Introduction* at 28 and ff.; M.A. EL-GAMAL, *Islamic Finance*, cit., at 58, who, citing M.S. AL-DARIR, *Al-Gharar in Contracts and Its Effects on Contemporary Transactions*, (1997) IDB Eminent Scholars' Lecture Series, no. 16 (IDB/IRTI, Jeddah), indicates the following four conditions for *gharar* to invalidate a contract: first, *gharar* must be excessive to invalidate a contract; second, the potentially affected contract must be a commutative financial contract; third, for *gharar* to invalidate a contract, it must affect its principal elements; fourth, if the commutative contract containing excessive *gharar* meets a need that cannot be met otherwise, the contract would not be deemed invalid based on that *gharar*.

[40] M.A. EL-GAMAL, *Islamic Finance* cit., at 59 and ff; R. SALIM-M. ZAKIR HOSSAIN-N. AL-MAWALI, *Distribution*, cit., at 573; J. SCHACHT, *An Introduction*, cit., at 146 and ff.

[41] A. RAHMAN I. DOI, *op. cit.*, at 359.

[42] M. ILHAM SHEIKH, *Introduction,* at 32.

[43] I.A. KHAN NYAZEE, *Islamic jurisprudence*, cit., at 345 is of the opinion that *gharar* doesn't forbid speculation.

[44] M. KRÜGEROVÁ & others, *op. cit.*, at 31 and ff.; I.A. KHAN NYAZEE, *Islamic jurisprudence,* cit., at 344.

[45] I.A. KHAN NYAZEE, *Islamic jurisprudence*, cit., at 345.

and losses is in line with the philosophy of Islam, it has always been reflected in the requirements for the products of Islamic banks and has determined the character of Islamic finance as a whole. The sharing of profits and losses changes the relationship between creditor and debtor and instead of lending the funds for a pre-fixed rate, a partnership is created between them: if there is a profit, it can be divided according to a predetermined share, in the case of a loss, the creditor is also involved in covering it and the principal borrowed is therefore proportionally reduced. [46]

The literal translation of the term *halal* is lawful, while the opposite of the word *halal* is *haram* (forbidden); they are clearly mentioned and are the boundaries which every believer must respect. [47] *Halal* cannot be referred only to the allowed food, but more broadly to thoughts, deeds, activities and things that are permitted to Muslims and which do not bring with them any kind of religious sanction. [48] Therefore, *halal* is considered to be everything that is in accordance with the Islamic religion and therefore also in accordance with Islamic law; consequently investment activities that respect the Islamic tenets are *halal*. For an investment to be *halal*, both the form and the subject of investment must be in accordance with Islam: the form is referred to the terms and conditions requested by Islamic financial law on each product; the subject is related to the respect of the condition to avoid *riba* and speculative and risky activities (*gharar* and *maisir*). On the other hand, it cannot be said that non-Islamic banking is automatically *haram*, since it is necessary to analyze the products offered and verify their compatibility with Islamic law. [49] This because one of the basic principles of Islam is the general lawfulness of all things: if something is not prohibited by the *sharī'a*, and if it does not contradict the Islamic tenets, it is considered to be allowed, as "lawfulness is a recognized principle in all things". [50] But in determining whether a given investment area is allowed or prohibited, it is also necessary to take into consideration the principle that everything that leads to the *haram* is itself *haram*. [51]

As said above, *haram* can be translated as forbidden. If something is forbidden, it is unlawful for the believer and also for the non-Muslim. [52] The Islamic doctrine distinguishes between acts that are prohibited by themselves (*haram li-dhatih*) and acts that are originally valid, but become prohibited due to the occurrence of external factors (*haram li-ghayrih*): the

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[46] M. KRÜGEROVÁ & others, *op. cit.*, at 32.

[47] A. RAHMAN I. DOI, *op. cit.*, at 9.

[48] S.A. ALDEEB ABU-SAHLIEH, *Il diritto,* cit., at 377.

[49] M. KRÜGEROVÁ & others, *op. cit.*, at 33.

[50] A. RAHMAN I. DOI, *op. cit.*, at 406 and ff.

[51] A. RAHMAN I. DOI, *op. cit.*, at 409.

[52] A. RAHMAN I. DOI, *op. cit.*, at 408.

former do not produce any legal effect *ab initio*, while the latter are intrinsically valid, but vitiated by such obstructing factors that, if removed (if possible), do not affect the validity of the act. [53] With reference to Islamic finance, the acceptability or unacceptability of a product or an operation is assessed in Islamic banks by an internal group of Islamic scholars, and conclusions on the acceptability of the investment can differ not only between individual countries but also between banks in the same country. [54]

The basic concept of Islamic economics and finance is *mudarabah*. In its theoretical form it is a manifestation of the principle of sharing risks and losses. It is often mistakenly referred to as a banking product, which does not fully capture its character. In legal terminology *mudarabah* refers to a contract in which certain goods are offered by the owner to another party to form a joint partnership in which both parties will participate in the profits. [55] As it is considered a "sleeping partnership" where the sleeping partner bears the loss and that becomes a real partnership only for the profit, the principle has been used to regulate the relationship between the bank and the depositor, and to circumvent the prohibition of *riba*. [56]

A *mudarabah* contract is based on a partnership in which one partner is the financier (the investor, or silent partner) and the other partner (the fund manager, or working partner) manages the financier's investment in an economic activity; the working partner (often an entrepreneur) has expertise in applying the venture capital into the economic activities. Both parties agree in advance to a profit and loss sharing ratio and the working partner also receives a fixed fee for managing the project, in addition to a share of any profits. In this contract, the basic factors of production (from the Islamic economics viewpoint) – capital, labor, and entrepreneurship – are combined to make an economic activity. [57]

The central idea in the concept of *mudarabah* is that two parties, one with capital and the other with know-how, get together to carry out a project. [58] If *mudarabah* regulates the relationship between a depositor and a bank, the depositor acts as an investor and the bank works as an agent managing the funds entrusted (each depositor will save the money, the bank then further invest all deposits and the revenue is divided proportionally among the investors while the bank charges the costs invested and

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[53] I.A. KHAN NYAZEE, *Islamic jurisprudence*, cit., at 68; S.A. ALDEEB ABU-SAHLIEH, *Il diritto*, cit., at 375.

[54] M. KRÜGEROVÁ & others, *op. cit.*, at 33.

[55] A. RAHMAN I. DOI, *op. cit.*, at 367.

[56] J. SCHACHT, *An Introduction* cit., at 156 and ff.

[57] S. F. HABIB, *Fundamentals of Islamic Finance and Banking*, Wiley & Sons, Chichester, UK, 2018 , at 79 and ff.

[58] A.L.M. ABDUL GAFOOR, *Mudaraba-based Investment and Finance*, available at http://users.bart.nl/%7Eabdul/article2.html, last accessed 9 February 2020.

a share of the revenue from this profit). On the contrary, if *mudarabah* is used as a tool for financing, the bank acts as an investor and the entrepreneur presenting a business plan as an agent who manages the funds entrusted. Upon the termination of this partnership, the agent is entitled to reimbursement of the costs he invested and to a profit. The investor in turn receives the rest, that is, the principal and interest from the revenue. [59]

There are two types of *mudarabah* contracts: the restricted *mudarabah* (*mudarabah al-muqayyadah*) where the investor specifies a particular business or project where the investment funds are to be used and the working partner should not use the funds for any other business or project; and the unrestricted *mudarabah* (*mudarabah al-mutlaqh*) where the investor gives the working partner permission to use the funds into any type of business or project that best suits the financial goals of both partners. When a *mudarabah* contract is used as a source of bank funds (when the customer deposits money in the bank), the unrestricted *mudarabah* is most often used, while when the contract supports a bank's equity financial product (when the bank supplies funds to a working partner), the restricted *mudarabah* is the one most often used. [60]

Another financial product based on the principle of sharing profit and loss, in addition to *mudarabah*, is *musharaka*. This is a partnership where two or more people bestow capital and labour in a joint venture to divide the profits arising from this partnership according to a predetermined ratio, while losses are divided according to the respective shares. [61] In the case of *musharaka*, differently from *mudarabah*, all the partners are entitled to, but are not obliged, to directly participate in the management of the business. [62]

The principles of Islamic financial law emphasize that profit is justifiable as a reward for the risk taken or the work carried out. This tenet determines the way how deposits are conceived in Islamic banks, as Islamic banking works with two types of accounts, current and investment. In a current account, there is no risk for the customer and therefore there is no profit of any kind attached to it. Conversely, deposits in investment accounts are increased in value in line with the principle of sharing of profits and losses, even if, however, the profit rate cannot be determined in advance, as the rate of return is the result of the real success of the banks in the allocation and investment of the resources, while in case of any loss it is debited to the deposits in investment accounts. [63]

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[59] M. KRÜGEROVÁ & others, *op. cit.*, at 34.

[60] S.F. HABIB, *Fundamentals*, cit., at 82.

[61] M. TAQI USMANI, *The Concept of Musharakah and Its Application as an Islamic Method of Financing*, in *Arab Law Quarterly*, vol. 14, n. 3, 1999, 203-220.

[62] B. KETTELL, *Introduction to Islamic Banking and Finance*, Wiley & Sons, Chichester, UK, 2012, at 77 and ff.

[63] M. KRÜGEROVÁ & others, *op. cit.*, at 34.

In the Islamic environment, conventional insurance is not allowed as it is considered not compatible with the prohibition of gambling (*maisir*) and uncertainty (*gharar*). Islamic doctrine therefore created an alternative insurance principle that would be in agreement with the principle of cooperation and morality [64], called *takaful*. The system is based on the willingness of each participant to donate to other participants who find themselves in a difficult situation, as anyone in the society can contribute to a mutual cooperative fund (that remains their ownership) managed by a licensed *takaful* operator, with the aim of ensuring security against a given risk: the risk in such an insurance system is not sold, but shared. In the event of a claim, the damage is absorbed on the basis of mutual assistance. [65]

It is worth mentioning another banking product, named *murabaha*. [66] This is often referred to as "costs plus surcharge". Murabaha is a tripartite contractual relationship between the seller, the client and the bank. *Murabaha* is a sale-purchase contract of a commodity for the purchasing price accompanied by a resale with a defined and agreed profit mark-up, which may be a percentage of the selling price or a lump sum. This transaction may be concluded either without a prior promise to buy, in which case it is called ordinary *murabaha*, or with a prior promise to buy submitted by a person interested in acquiring the commodity through the institution, in which case it is called banking *murabaha*. In this case, the client will ask the bank to acquire certain assets from a third party, precisely indicated in the contract, which the client purchases from the bank. The actual purchase of an asset at a predetermined price is usually associated with a deferral. The surcharge applied by the bank is justified as remuneration for the work and risk-taking and represent the bank's profit in the transaction. [67]

A couple of examples can help to understand the way how *murabaha* works in practice.

For the purchase of a house, instead of selling a mortgage an Islamic bank will acquire a house that the Muslim wishes to buy from a vendor, at a negotiated price. The bank will then sell the house to the Muslim purchaser at a higher price in tranches over time in a deal known as a diminishing partnership. This method of finance satisfies three Islamic tenets: the prohibition of the payment and receipt of interest, the sharing of risk by both parties and the avoidance of uncertainty.

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[64] On the insurance contract as an agreement based on mutual cooperation see M.M. BILLAH, *Shar'iah Standard of Business Contract*, A.S. Noordeen, Kuala Lumpur, 2006, at 81.

[65] B. KETTELL, *Introduction to Islamic Banking and Finance*, Wiley & Sons, Chichester, UK, 2012, at 127 and ff.

[66] On the background of *murabaha* in the Islamic doctrine see M.A. EL-GAMAL, *Islamic Finance*, cit., at 67 and ff.

[67] H. SULTAN-M. SHAHID EBRAHIM, *Murabaha*, (2011) available at https://www.researchgate.net/publication/228224452_ Murabaha, (last accessed 10 February 2020).

The same diminishing partnership method may also be employed for the development of an asset. In this process the financier contributes cash for development and the client contributes the physical asset. The client or a third party then holds the asset as agent on behalf of the partnership and undertakes to manage the assets to achieve the objectives of the partnership. The client agrees to pay down the financier's share in the assets in installments at cost. Each time the client buys a share of the financier's share the latter's percentage ownership of the assets diminishes and the client's increases. At the same time as the repayment process is underway the client is effectively leasing the financier's share of the asset in return for a periodic rental payment. As the outstanding balance of the asset owned by the financier decreases the rental payment decreases. After the client has purchased the financier's entire share in the asset its title shifts to the client, the lease is terminated, and the transaction is complete.

From all the elements indicated above, a series of principles on the existing relationship between Islamic law and economic activities could be inferred. They can be summarized as follows:

- Islam is approving the making of profits through trade and commerce provided that its subject is lawful;
- Islam insists upon ethics and good governance in business conduct;
- sanctity of contract, that applies to agreements entered into between the believers and also between Muslims and non-Muslims;
- customer-protection and clarity and transparency in commercial transactions;
- risk, profit, loss-sharing;
- prohibition of unlawful or harmful commerce (alcohol, pork etc.);
- money has to be considered merely as a measuring-device of value and not an asset in itself;
- prohibition of the payment or receipt of interest, *riba*, on money loaned;
- as a consequence of the prohibition of usury, Islamic finance is indifferent to the time value of money;
- prohibition of gambling and risky or aleatory activities which therefore disallows speculation, chance and uncertainty;
- emphasis on the use of money or wealth for productive activities and the consequent prohibition of hoarding.

In response to the holy requirements, Islamic economics has produced certain modifications to conventional "western" financial practices, which are not considered to be circumventions of the divinely-inspired *sharī'a* law, but rather re-elaborations made by the Islamic doctrine to offer alternative solutions to achieve the same result and to be *sharī'a* compliant at the same time.

3. *Chinese law*

After the Mao Zedong ruling period when economic activities were totally collectivized and there was no space at all for the private economic sector, the role of law changed, becoming a tool to manage the state sector and then taking on the more recognizable role of providing the instruments and processes that govern, even if (voluntarily) incompletely and imperfectly, the interactions of independent economic agents as well as the relationship between the citizens and the state. This process of change has been gradual – in a Chinese way (changes in China proceed slowly to give people the possibility to get used to changes) – accompanied by economic reforms, and it can be considered still ongoing. [68]

Economic reform in China was characterized from the beginning by the acknowledgement of the new and important role that law had to play. Early reform policy did not contemplate an important role for the private sector, as it was more directed to the improvement of the management of the state sector than concerned to promote private entrepreneurship. In particular, a key ambition of those promoting legal reform was to regulate and bring regularity to government operations. In the economic sector, law was conceived as a tool to regulate the activities of state-owned enterprises, substituting the particularistic bargaining regime of the past with a new system of strict, impersonal, and universalistic rules that would impose discipline on enterprise managers and promote efficiency. [69]

The effects of China's economic reforms gradually rendered such early approach to law less sustainable. A private sector gradually emerged besides the state planned economy that evolved itself within the concept of socialist economy [70], and the alternative to specific commands became gradually a set of generally applicable rules. [71]

Within the Chinese state sector, the replacement of administrative directives with methods of supervision and control based on legal principles has been very gradual. Even presently, the senior management of enterprises in which the state directly or indirectly owns a stake are chosen and controlled through the Communist Party personnel channels, while the

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[68] See more in S.B. LUBMAN, *The future of Chinese Law*, in S.B. LUBMAN, *China's Legal Reform*, Clarendon Press, Oxford, 1996, 1-21.

[69] D. CLARKE-P. MURRELL-S. WHITING, *The Role of Law in China's Economic Development*, in L. BRANDT-T.G. RAWSKI (eds.), *China's Great Economic Transformation*, Cambridge University Press, Cambridge, 2012, 375-428.

[70] On the legal aspects of economic planning see G. SABATINO, *Legal Features of Chinese Economic Planning*, in I. CASTELLUCCI (ed.), *Saggi di diritto economico e commerciale cinese*, Editoriale Scientifica, Naples, 2019, 33-78.

[71] I. CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Università degli Studi di Trento, Trento, 2012.

board of directors simply legitimates decisions made elsewhere. Yet, the activities of state-owned enterprises are increasingly regulated by legal rather than administrative instruments, and the increasing presence of economic actors that are not integrated in the traditional state system – both in terms of number and importance – favored the growth process out of the system of administrative directives, as privately owned enterprises had to rely mainly on the legal system for their organization, as well as for the remedies for wrongs suffered. For example, contractual disputes with non-state suppliers and customers cannot be resolved administratively and shall be solved using legal rules, as there is no common superior to whom the case can be referred. [72]

Despite the traditional Chinese dislike of (written) law, China, since 1979, engaged in a campaign of massive reforms of its legal system designed aiming at attracting foreign investors to the country. Understanding that economic development could have been accelerated through a tolerance of the activities of foreign enterprises in the country, China placed a lot of emphasis on such modernization of the legal system, put forward by passing new economic laws and regulations, and amending those existing: the purpose of these new laws was to show the foreign investor that a secure investment environment, complete with legal protections, exists in the country. [73]

Such parallel evolution of law and economics can be easily understood considering foreign economic investments. Although the changes in the Chinese legal system have been mainly driven by domestic developments, the policy of attracting foreign trade and investment played an extremely important influence on legal developments. At the beginning of the post-Maoist era and for the following years, the Chinese government embarked upon the creation of a special, separate legal system addressed to foreign investors, acknowledging that the domestic legal system was in many ways unattractive for foreigners. As development and reforms in the domestic economy went forward, it became very clear that maintaining a separate legal system was a non-sense in the long run. The result was a move towards the unification of the different legal systems by approximating the Chinese domestic system to the one created for foreigners, and not the other way around. Then, the whole period of economic reforms has been accompanied by a continuing succession of changes in the Chinese legal system, sometimes subsequent to the economic changes and sometimes stimulating them. [74]

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[72] D. CLARKE-P. MURRELL-S. WHITING, *The Role*, cit., at 379 who noted, at footnote 8, how state-owned enterprises existed for decades before the promulgation in 1988 of a law providing for their existence and organization.

[73] L. ZHANG, *The Statutory Framework for Direct Foreign Investment in China*, in *Florida Int'l L.J.*, vol. 4, n. 2 (1989), 289-318.

[74] See more in L. MOCCIA, *Il diritto in Cina*, Bollati Boringhieri, Turin, 2009.

The most relevant change in the more recent Chinese economic history dates 1976, when Deng Xiao Ping becomes the new secretary of the Chinese communist party after the Maoist era.

The first stage, from late 1978 until about 1984, begins with the introduction of the famous "open door policy" aiming at opening China to the world after the Maoist closure times and at rationalizing the state sector so that planning of industry and commerce could be more effective [75], accompanied by the program known as the "Four Modernizations", which focuses on the areas of agriculture, industry, science and technology, and defense. [76] In light of this new Chinese open door policy, a necessary consequence was the tolerance by a socialist nation of capitalistic notions formerly totally repugnant to it. The legal system was not involved in these changes.

Conversely, foreign investments were officially authorized with the enactment of the Law on Sino-Foreign Equity Joint Ventures in 1979. However, this law determined only a very small liberalization (even if at that time it was seen as an extremely important achievement): only state-owned enterprises were allowed as Chinese partners of those joint ventures (individuals were not contemplated), and the Chinese government placed such joint ventures, and the foreign investors partnering there, under a dedicated legal regime that was considered as separate from the domestic legal system. [77]

The 1982 Constitution declared that the Chinese economic system was based on the socialist public ownership of the means of production and that the state sector was considered the leading sector in the economy. The individual economy was considered as subsidiary to the socialist public economy and this was highest level of consideration recognized to the

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[75] On the Chinese "open door policy" and its implications on the Chinese economy see: J.K. GALBRAITH-J.J. LU, *Sustainable Development and the Open-Door Policy in China*, Council on Foreign Relations Press, New York, 2000; A. BOHNET-Z. HONG-MÜLLER, *China's open-door policy and its significance for transformation of the economic system*, in *Intereconomics*, vol. 28, 1993, 191-197; J. HOWELL, *The Impact of the Open Door Policy on the Chinese State*, in G. WHITE (ed.), *The Chinese State in the Era of Economic Reform. Studies on the Chinese Economy*, Palgrave Macmillan, London, 1991; G. HUAN, *China's Open Door Policy, 1978-1984*, in *Journal of International Affairs*, vol. 39, n. 2, 1986, 1-18.

[76] I. MATHUR-J. CHEN, *Strategies for Joint Ventures in the People's Republic of China*, Praeger Publishers, New York, 1987.

[77] On the 1979 Law on Sino-Foreign Equity Joint Ventures see B. CAMPBELL POTTER, *China's Equity Joint Venture Law: A Standing Invitation to the West for Foreign Investment?*, in *Univ. Pennsylvania J. Int'l Bus. L.*, vol. 14, n. 1, 1993, 1-36; N. CAMPBELL, *A Strategic Guide to Equity Joint Ventures in China*, Pergamon Press, Oxford, 1989; A.L. PATRUCCO, *Equity Joint Ventures with the People's Republic of China: A Puzzle in Politics, Law, and Tradition*, in *Hastings Int'l & Comp. L. Rev.*, vol. 10, 1987, 609; A. FENWICK, *Equity Joint Ventures in the People's Republic of China: An Assessment of the First Five Years*, in *The Business Lawyer*, vol. 40, n. 3, May 1985, 839-878.

private sector at that time, but at the same time it was conceived as an instrument to relieve foreign investors from the fear and uncertainty that their business activities were not protected. However, at this time an organizational instrument for larger private enterprises was not yet in place either at policy or at legal level. [78]

In the planned economy before the reforms, contracts were considered only a tool for implementing the plan. Starting from 1979, the State Administration for Industry and Commerce was established and charged with overseeing economic contracts and economic divisions were put in place in the court system to hear economic disputes. [79] In 1985, the Foreign Economic Contract Law governing the legal relationship between Chinese organizations and foreign organizations and individuals became effective. [80]

The second period of reforms goes from 1985 until 1989 and it saw the abandonment of the effort to better implement the planning system with a clear move to an open consideration of the principle of market allocation. This was perhaps epitomized by the adoption in 1986 of the General Principles of Civil Law, which are modeled on the German Civil Code [81], accompanied by the promulgation of the Provisions for the Encouragement of Foreign Investment [82], and in the 1988 amendment of the constitution that authorized land leasing. [83]

This time the status of the private sector was advanced during this second period of reforms. While with the 1982 Constitution only the individual sector was recognized, the Thirteenth Congress of the Chinese Communist Party in 1987 declared more generally the private sector as a necessary supplement to the state sector, followed by a constitution amendment in 1988 to reflect this change. In recognizing the private sector, the 1988 amendment to the constitution still put that sector under the guidance, supervision, and control of the state. [84]

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[78] On the 1982 Chinese Constitution see Z. ZHAI, *The Making and Structure of the 1982 Constitution of China*, in *Tsinghua China L. Rev.*, vol. 8, n. 2, 2016, 142-169.

[79] D. CLARKE-P. MURRELL-S. WHITING, *The Role,* cit., at 389.

[80] The 1985 Foreign Economic Contract Law does not govern contractual relations of Chinese individuals.

[81] On the 1988 General Principles of Civil Law see R. TONG, *The General Principles of Civil Law of the PRC: Its Birth, Characteristics, and Role*, in *Law and Contemporary Problems*, vol. 52, Spring 1989, 151-175.

[82] On these provisions see C.P. CASEY, *The 1986 Provisions to Encourage Foreign Investment in China: Further Evolution in Chinese Investment Laws*, in *American University International Law Review*, vol. 2, no. 2, 1987, 579-614.

[83] On this amendment see J. ALSEN, *An Introduction to Chinese Property Law*, in *Maryland J. Int'l L.*, vol. 20, 1996, 1-60. See also Z. YUAN, *Land use rights in China*, in *Cornell Real Estate Review*, vol. 3, 2004, 73-78.

[84] L. YUEH, *Enterprising China. Business, Economic & Legal Developments since 1979*, Oxford University Press, Oxford, 2011; D.C. CLARKE, *Legislating for a Market Economy in*

However, in this period the legislative activity of the government remained still directed to the public sector, since the problems of the private sector were not considered a concern for the major legislative body (the NPC), but rather something to be managed by administrators at State Council level. Likewise, while the basic framework of the legal regime for foreign trade and investment was completed in this period, foreigners continued to be kept in a separate legal regime. [85]

The following period of reforms era was the brief interval between June 4, 1989 Tiananmen incident and Deng Xiaoping's "Southern Tour" in early 1992. This period saw an endeavor by the leadership under Li Peng to revoke reforms, recentralize, and strengthen the planning system, but the logic of reform was reaffirmed soon. [86]

The fourth phase of reforms can be considered as beginning with Deng Xiaoping's famous Southern Tour in January 1992, during which he delivered speeches supporting economic reforms. The next decades saw a series of measures successively expressing greater acceptance of the market economy principles.

Again, is the Chinese Communist Party that starts the changes with its Fourteenth Congress in 1992 where the principle of the "socialist market economy" was adopted as the aim of the reforms [87]; a constitution amendment followed in 1993 to replace the reference to the "economic planning on the basis of socialist public ownership" with a reference to "the socialist market economy". [88] Here again, law followed rather than led the market. Private economy and business were extended also to the Chinese people ("getting rich is glorious").

By 1997, the Communist Party at its Fifteenth Congress recognized the private sector as an "important" (not just supplemental) component of the economy [89]; as usual, amendments to the constitution followed in 1999, including the concept of rule of law in the constitution [90], a recognition of

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China, in D.C. CLARKE, *China's Legal System: New Developments, New Challenges*, Cambridge University Press, Cambridge, 2008, 13-35.

[85] D. CLARKE-P. MURRELL-S. WHITING, *The Role*, cit., at 390.

[86] D.C. CLARKE, *Legislating for a Market Economy in China*, in D.C. CLARKE, *China's Legal System: New Developments, New Challenges*, Cambridge University Press, Cambridge, 2008, 13-35, at 17 and ff.

[87] D. BACHMAN, *The Fourteenth Congress of the Chinese Communist Party*, Routledge, London, 1993.

[88] J. CHEN, *The Revision of the Constitution in the PRC*, in *China Perspectives*, vol. 53, May-June 2004, 1-22.

[89] W.K. LAU, *The 15th Congress of the Chinese Communist Party: Milestone in China's Privatization*, in *Capital & Class*, vol. 23, n. 2 (1999), 51-87.

[90] The discourse about rule of law in China engaged scholars for a long time and it is far from being closed. The words in the constitution did not imply any change in the role of the legal system, but they were a policy declaration by the government that the legal system

the existence of different sectors of the economy and of further modes of wealth distribution in addition to distribution according to work, so as to legitimate interests and dividends. [91] In 2001, Jiang Zemin announced that private entrepreneurs could become Party members. [92] Another constitutional amendment occurred in 2004 providing that the "non-publicly owned" sector was not only permitted but encouraged and introduced a first mention for the protection of private property. [93]

During this period a legal framework for a rule-based market system, where differences between state and non-state actors, as well as between Chinese and foreign actors, were gradually reduced, was created, and a wider range of structure for the organization of business ventures was made available to both public and private investors. [94] This is the case of company law, preceded in 1992 by two "normative opinions" on joint-stock companies and limited liability companies made by the State Commission on Reform of the Economic System, that were subsequently absorbed in the Company Law enacted in the following year. [95] While the types of companies set forth in the Company Law were mainly designed for restructuring state-owned enterprises, they were also available for private businesses, and the changes in the foreign investment legal framework have gradually made these business forms available to foreign investors, who were not anymore limited to the use of joint ventures and wholly foreign-owned enterprises. [96]

The legal framework concerning business activities was further revised due to China's formal accession to the WTO in December 2001 that determined changes of previous laws (company law) and the introduction of new laws (IP law) to be in line with the WTO requirements.

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from that moment on had more importance as a tool of governance. It is clear that the same concept of law is different in China and in the West, as well as it is different the way how law is used in the two legal traditions, as law in China law has been considered – and to some extent it is still considered – as a tool available to the political authority for government and policy ("rule by law"): "rule by law" means that the party is above the law, while "rule of law" means that the party should be held accountable under the constitution. On the rule of law in China see K. BLASEK, *Rule of Law in China. A Comparative Approach*, Springer, Heidelberg, 2015; I. CASTELLUCCI, *Rule of Law*, cit.; R. PEERENBOOM, *China's Long March toward Rule of Law*, Cambridge University Press Cambridge, 2002.

[91] J. CHEN, *The Revision,* cit.

[92] H. HOLBIG, *The Party and Private Entrepreneurs in the PRC*, in *Copenhagen Journal of Asian Studies*, vol. 16, 2002, 30-56.

[93] Z. AN, *Private Property Rights and Capital Structure: Empirical Evidence from the 2004 Constitutional Amendment in China*, in *Journal of Institutional and Theoretical Economics*, vol. 173, n. 3, 2017, 454-469; J. CHEN, *The Revision*, cit.

[94] D. CLARKE-P. MURRELL-S. WHITING, *The Role*, cit., at 391.

[95] Z. FAN, *The Institutional Evolution of China: Government vs Market*, Edward Elgar Publishing, Cheltenham, UK, 2018; L. YUEH, *Enterprising*, cit.

[96] D. CLARKE-P. MURRELL-S. WHITING, *The Role*, cit., at 391.

The present phase is characterized by Xi Jinping presidency were the strong support of the Chinese economic growth is paired with a greater weight recognized to the law as tool of governance and with directing the Chinese society towards the rule of law always with Chinese characteristics. [97] The emblematic transformation in the Chinese legislation is perhaps represented by the enactment, after a long gestation, of the Civil Code. [98]

The short analysis made above shows that considerable changes occurred in the role of law in general and in its relationship with the economy in China. During the planned economy, it was not customary to resort to courts for dispute resolution, whose role was mainly to execute sentencing in criminal matters and to handle cases involving individual citizens in civil matters. Economic and legislation development widened the areas of courts' jurisdiction, and the number of cases on commercial issues grew fast.

However, the Chinese legal system still has a number of gaps and ambiguities that in most cases are voluntarily maintained in order to give to the authorities a certain level of discretion in the interpretation and application of the law, so that it can continue to be used as governance tool to enforce the party policies with reference to each case.

Speaking about substantive law, an effective system to solve conflicts of laws is absent. Formally, both the constitution and the Law on Legislation indicate a hierarchy of the sources of law, but in practice legislative instruments promulgated by lower levels of government seem often to bypass legislative instruments promulgated by higher levels that should be theoretically superior. Chinese courts are prohibited from challenging the validity of legislation, and the legal mechanisms indicated for handling conflicts of laws – a report to the relevant legislative or government body on which that body should take action – showed to be not effective in practice. [99]

An important characteristic of the Chinese judicial system to be taken into consideration with reference to case decision and enforcement is the

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[97] J. XI, *The Governance of China*, Foreign Language Press, Beijing, 2014.

[98] On the Chinese civil code see Z. WANG, *On the Constitutionality of Compiling a Civil Code of China: A Process Map*, Springer, Singapore, 2020; R. CARDILLI, S. PORCELLI, *Introduzione al diritto cinese*, Giappichelli, Turin, 2020; L. BING, *The New Contract Law in the Chinese Civil Code*, in *The Chinese Journal of Comparative Law*, Vol. 8, n. 3 (December 2020), 558-634; Y. BU, *Chinese Civil Code: The General Part*, Hart Publ., London, 2019; M. TIMOTEO, *China Codifies – The First Book of the Civil Code between Western Models to Chinese Characteristics*, in *Opinio Juris in Comparatione*, Vol. 1, n. 1, 2019, available at http://www.opiniojurisincomparatione.org/opinio/article/view/129 (last accessed 13 February 2020); ID., *La parte generale del Codice civile cinese fra modelli importati e modelli locali*, in *Roma e America. Diritto romano comune*, Vol. 39, 2018, 245-258.

[99] D. CLARKE-P. MURRELL-S. WHITING, *The Role*, cit., at 393.

dependence of courts on the respective government level. The power of appointment and dismissal of court's judges and personnel stays with the People's Congress at the same administrative level, being exercised, in practice, by the local Communist Party department which also controls court finances, material supplies, and other welfare benefits for court officials and their families. Therefore, it becomes very difficult for court judges to contradict local government officials, even should they wish to do so. [100]

This because the state and its officials continue to consider the legal system as a tool of governance and control that is in the hands of the government and not of the citizens. The functioning of the legal system happens secretly unless – and sometimes even although – specific rules provide otherwise. Court documents cannot be accessed freely, and in most courts it would be difficult for a Chinese, and impossible for a foreigner, to arrive unannounced and request to attend a trial in progress. Although company registration records should be public, in practice only licensed lawyers are allowed by the State Administration of Industry and Commerce to examine them. People from law firms requesting clarifications on regulatory issues from government departments – in view of assisting their clients on legal matters – must show to belong to an authorized law firm, as officials consider such requests by law firms as illegitimate attempts to get free information. [101]

With reference to the law-making process, legislative and regulatory drafting continues to be a secreted process at all levels, and the legislative body drafting any law or regulation may deliver draft versions to selected addressees for comments, but this remains a choice of the legislator as there is no general obligation to do so: this may cause the insurgence of different kind of issues (like gaps and/or coordination with other laws and regulations) that instead could be avoided. As far as the implementation of laws and regulations is concerned, the state continues to be irritated in case of excessive citizen litigation. Thus, it is not uncommon that mandatory rules can be enforced only through action by the relevant governmental body, and do not confer a private right of action. Courts are usually subdued to the political power at the correspondent level and have low status in the political system; often government bodies ignore them without any consequence. Resort to courts when a law is violated cannot be generally assumed, and even if the courts are involved, the result (espe-

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[100] L. LI, *The Chinese Communist Party and People's Courts: Judicial Dependence in China*, in *The American Journal of Comparative Law*, Volume 64, Issue 1, 2016, 37-74; C.E. SCHULTZ, *Placing Power in the Cage of Law: Judicial Independence in China*, in *Capital University Law Review*, vol. 44, n. 2, 2016, 393-427; J. SONG, *China's Judiciary: Current Issues*, in *Maine. L. Rev.*, vol. 59, 2007, 141-148.

[101] D. CLARKE-P. MURRELL-S. WHITING, *The Role*, cit., at 396.

cially for cases involving politically sensitive matters) is uncertain due to the influence that the political power can exercise. [102]

In sum, the Chinese legal system has registered a great development since the beginning of the reforms and currently has an important role in general and also in order to manage the economy. However, it is not said that business security could come exclusively from the legal system. It could be that the different mechanisms for the settlement of disputes arising out of contractual relationships are both within and beyond the court system as, for example, within social or business networks. The political structure itself has served as an alternative to the formal legal system in providing a reasonable degree of security to certain nonstate investors.

A discourse on law and economic activities in China would not be complete without casting a glance to Hong Kong and Macao.

After the handover to China of the two territories in 1997 and 1999 respectively, such territories became Special Administrative Regions (SARs) of China according to Article 31 of the Chinese constitution. Under the "One Country, Two Systems" principle, the two SARs continue to possess their own governments, multi-party legislatures, legal systems, police forces, monetary systems, separate customs territory, immigration policies, national sports teams, official languages, postal systems, academic and educational systems, and substantial competence in external relations that are different or independent from that of the People's Republic of China.

This regime finds its correspondent in the two Basic Laws of the two SARs where is expressly provided in both Articles 5 that "The socialist system and policies shall not be practiced in the (Hong Kong/Macau) Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years".

This brought the two SARs to formally have an economic (and legal) system separate from that of the Mainland. In practice, the situation in the two SARs is completely different.

Hong Kong has maintained its fundamental role in the world economy, continuing to be a world business hub, possibly still the main door to access the Chinese market for Western companies, and staunchly defending its autonomy in general and that of its legal systems from the Beijing influences in particular. [103]

Macau is definitely more aligned to the Party's policies as indicated in Beijing, up to be indicated by Xi Jinping as the example to be followed during his recent visit in Macau for the 20th anniversary of the Macau

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[102] D. CLARKE-P. MURRELL-S. WHITING, *The Role*, cit., at 397 and ff.

[103] See A.Y. CHEN-P.Y. LO, *Hong Kong's Judiciary Under 'One Country, Two Systems'*, (2017) *University of Hong Kong Faculty of Law Legal Studies Research Paper Series*, n. 2017/022.

handover to China. Macau's economy continues to be strongly grounded on gambling (it is the world capital of gambling, according to the most recent studies [104]), which has an extreme importance in its legal system that covers all different aspects of gaming activities. [105] Even if we are not facing the same situation of the Mainland, also in Macau the process of legal drafting and implementation may present, from time to time, some obscurities with a light tendency of the political power to look carefully at what the Legislative Assembly and the judges do. [106]

4. *African law*

In Africa, a large part of the economic activities is conducted informally.

The informal sector is a fluid area that usually escapes from a stable categorization. [107] To a jurist who is always seeking for a taxonomical approach, the exercise is complicated even further, since the informal sector tends to elude formalization and to operate in a quasi-legal or, even more, extra-legal environment. A definition that captures the main characteristics of the phenomenon identifies the informal sector in the *"[…] semi-organised and unregulated activities largely undertaken by self-employed persons in the open markets, in market stalls, in undeveloped plots of street*

[104] Macau has been considered the gambling world capital at least from 2010 as having generated more revenue from gambling than the entire state of Nevada in that year. See, for example, T. BRANIGAN, *Macau – gaming capital of the world*, in *The Guardian*, 11 May 2011, available at https://www.theguardian.com/travel/2011/may/11/macau-gambling-capital-of-world (last accessed 15 February 2020). For a more recent evaluation see M. TUREA, *Why Macau Is the Gambling Capital of the World*, in *Gamblers Daily Digest*, 16 January 2020, available at https://gamblersdailydigest.com/gambling-capital-of-the-world/ (last accessed 15 February 2020).

[105] On Macau gaming law see J.A.F. GODINHO, *Direito do jogo*, vol. I, Fundação Rui Cunha, Macau, 2016; S. MANCUSO (ed.), *Studies on Macau Gaming Law*, Lexis Nexis, Hong Kong, 2012.

[106] See E.C. IP, *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions*, Cambridge University Press, Cambridge, 2019. See also J. CHAO-B. CHOU, *Human Rights Issues in Macau 2013*, available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/MAC/INT_CCPR_NGS_MAC_1959_E.pdf (last accessed 15 February 2020).

[107] There are many definitions of the "informal sector". In its 1972 report "Employment, incomes and equality: A strategy for increasing productive employment in Kenya" at 6 the ILO defined "informal activities" as "the way of doing things, characterised by (a) ease of entry; (b) reliance on indigenous resources; (c) family ownership of enterprises; (d) small scale of operation; (e) labour-intensive and adapted technology; (f) skills acquired outside the formal school system; and (g) unregulated and competitive markets. Informal-sector activities are largely ignored, rarely supported, often regulated and sometimes actively discouraged by the government".

pavements within urban centres. They may or may not have licenses from local authorities for carrying out such activities". [108]

The result of the above definition is that the informal sector includes activities usually, but not exclusively, conducted in open or temporary structures, in urban and rural areas. The size of the business is extremely small, with extremely low capital involved, without bookkeeping, and without or with an extremely low number of employees, then such is likely to be informal or, at most, of a small scale. [109] Therefore, the informal sector normally embraces the part of the economy not documented for purposes of the official count of GDP. [110]

Although the activities performed in the informal sector are not necessarily illegal, illegal businesses and tax evasion are phenomena that are also part of the informal sector. [111] This explains why literature has recognized that the informal sector suffers from a negative public image, even if it has many positive characteristics and has a vital role in contributing to the economic growth of the continent. However, a distinction has been developed between the informal and the underground economy, being the former the one conducted legally but without the formalities requested by the official law, and the latter covers the market production of legal and illegal goods and services that are sold or bought illegally and includes the shadow economy, where legal goods and services are produced and traded under illegal conditions, and black markets. [112]

Characteristics of the informal sector have been considered the unstable conditions for conducting the business activity, the extremely small dimensions of the activities whose consequence is the small number of workers employed in each activity when not conducted by a sole nano-entrepreneur, and the low propensity to the formalization of the informal activities. [113] The informal sector tends to escape the rigidity of legal regulation, and the informal entrepreneurs do not look for registration according to the relevant laws.

The question therefore is whether the Western approach to business law can be effectively transplanted in Africa and in its business environment.

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[108] Central Bureau of Statistics of Kenya, cited in K. KIBWANA, *Critical aspects regarding the legal regulation of the informal sector*, in *Lesotho L. J.*, vol. 5, n. 2 (1989), 357-387, at 362.

[109] K. KIBWANA, *op. cit.*, 361 and 363.

[110] F. SCHNEIDER, *Size and Measurement of the Informal Economy in 110 Countries around the World*, in *Discussion Paper Australian National Tax Centre*, ANU, Canberra, Australia.

[111] F. SCHNEIDER-D.H. ESTE, *Shadow Economies: Size, Causes, and Consequences*, in *J. Econ. Lit.* vol. 38 (2000), at 79.

[112] P. LEMIEUX, *L'économie souterraine: causes, importance, options*; Les Cahiers de Recherche de l'Institut Économique de Montréal, Montréal, 2007.

[113] S. KWEMO, *L'OHADA et le secteur informel*, Larcier, Bruxelles, 2012.

The African jurist who examines law through the Western lens that he learnt at university will immediately answer affirmatively. But such an answer does not take into consideration the fact that such law is applicable to a small elite capable of understanding it, and willing and able to apply it. Western commercial law has evolved using legal concepts and technicalities that were developed by Western legal culture over time, and only a jurist trained using Western concepts can understand them, since these are not contemplated in African traditional legal culture.

Moreover, just as there is the official law and the unofficial law in Africa, there is also – as just mentioned – an area of official commerce and a wider area of informal commerce, both equally important to the State economy. These two types of commerce co-exist in most African countries, and informal commerce does not comply with official legal rules, which are too complex and lacking the flexibility necessary to run an informal business; therefore the informal sector has developed its own set of rules that exist outside of the official legal systems of each nation.

If the legal order in the area of business law is characterized by written rules imposed by the state, then the legal principles among informal tradesmen are characterised by the persistence of orality which remains their main way of expression. [114] Contracts of purchase or sale, transport or delivery, performance of services or mandates, in short, commercial contracts, are concluded verbally. Despite these contracts being unwritten, the parties involved easily remember all the obligations resulting from their verbal engagements, even if certain arrangements are concluded in the presence of witnesses to ensure the safety of the transactions.

Resorting to legal orality and not reducing contracts to writing favours simplicity and avoids heavy formalism: the main obligations arising from the verbal contract are simply formulated with all the parties, in easily comprehensible terms and therefore can be easily remembered by them. Ultimately, the entrepreneurs in the informal sector do not act or move in a zone of non-law or illegality. They establish business transactions according to their beliefs and carry them out because people's words are respected, so very seldom a contract obligation is not respected as trust is one of the main elements that determines the entering into a contractual relation. Business relations between the parties are based more on mutual trust and politeness than to formal instruments derived from the official law. [115] Recourse to writing is therefore not excluded in principle from commercial relations among them, but it may be considered unnecessary.

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[114] O. BALLAL, *Les usages et le droit OHADA*, PUAM, Aix-Marseille, 2014, at 57.

[115] C.M. DICKERSON, *Bringing Formal Business Laws to Cameroon's Informal Sector: Lessons and Cautions from the Tax Law Example*, 13 *Washington Univ. Global Studies L. Rev.*, n. 2, 2014, 267-321, at 283.

Most informal entrepreneurs do not meet the legal requirements that would give them access to the official credit system for setting up and running their business. They have therefore to resort to alternative instruments of financing.

Sometimes the writing or legal orality is not exclusive to one or other of the two business sectors. It is not rare to resort to legal orality in the commercial relations between a formal and an informal businessman.

In case of late payments or instalments, interests are normally not charged as they are not conceived in the African legal culture.[116] Legally binding situations derived from time,[117] such as forfeiture, prescription or interest rate are not recognized. The reason is that the traditional concept of time is different in Africa compared to the West.[118] In Africa, time has traditionally been linked to other factors such as market cycles or crops.[119] Thus, the payment of the price of any item is considered to be verified "at the same time" of the fulfilment of the other contractual obligation, even it has been effectively made after several days or months.[120]

In general, the contractual obligation does not involve exclusively the party that contracted it, but all members of its family or community that is – in its entirety – affected by the contract entered into by one of its members. Contract, in Africa, does not bind only the parties that gave their consent to it but also the members of the respective families or communities. Within the communities, contractual relations are based on mutual trust, while testimony or written instruments (if the parties are literate) will support the entering into a contract when the parties belong to different communities.[121]

Enforcement of contractual obligations is not made using the formal court system, but it is rather done resorting to the informal courts in the markets or reporting the event to the police that do not formally enforces the formal law, but uses its authority acting as public order officer, judge and mediator at the same time for an ad hoc enforcement of the basic rule

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[116] S. MANCUSO, *OHADA law and its target population: is there room for African traditional law within the harmonisation of contract laws in Africa?*, in C. RAUTENBACH (ed.), *In the Shade of an African Baobab: Essays in Honor of Thomas Bennett*, JUTA, Cape Town, 2018.

[117] M. ALLIOT, *Les résistances traditionnelles au droit moderne dans les états d'Afrique francophone et à Madagascar*, in C. KUYU (ed.), *Le droit et le service public au miroir de l'anthropologie*, Karthala, Paris, 2003.

[118] A.A. DA SILVA, *Usos e costumes jurídicos dos Mandingas*, Bissau, 1969.

[119] M. AIME, *La casa di nessuno. I mercati in Africa occidentale*, Bollati Boringhieri, Turin, 2002.

[120] J. VANDERLINDEN, *Coutumier, manuel et jurisprudence du droit zande*, Bruxelles, Éditions de l'Institut de sociologie, Université Libre de Bruxelles, 1969; A.A. Da Silva, *Usos e costumes,* cit.

[121] O. BALLAL, *Les usages,* cit., at 46 and ff.

to repay obligations without following any rules of procedure, and therefore highly irregularly from a formal-law perspective. [122]

The simplicity of the above-mentioned instruments is a sign of how the official business law, that is nevertheless based on the formalism derived from the Western pattern, is creating a profound gap with the informal law, gap that reverberates in that between the formal and the informal business that is left out of the application of the law due to the requirements, formalisms and technicalities proper of the Western approach to law.

On the other side African countries are trying to modernize their business law system to be in line with the modern requirements of the global market. OHADA is a clear example of this.

OHADA stands for *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* and derives from the idea of harmonizing business law in the African countries, building a system of modern laws that would be the same in the countries joining the Organization. Presently, 17 countries (15 francophone, 1 lusophone and 1 ispanophone – all civil law) are members of the organization. [123]

In the case of OHADA, modern business laws have been enacted by giving an African flavour to the French rules on the sectors that have been harmonized. This is because those who prepared the draft Uniform Acts at the beginning were French jurists who used the model with which they were familiar, and which seemed more appropriate for the countries where the new legislation was to be introduced. Moreover, this activity has been facilitated by the Western scholars' traditional approach, based on the assumption that commercial law is one of the areas where state laws have a monopoly, since the area of commercial law is not usually covered by African traditional law.

The OHADA Treaty has created a series of institutions, namely a Council of Heads of State and of Government, a Council of Ministers (having legislative competence), a Permanent Secretariat (having executive competence), a supranational Common Court of Justice and Arbitration (CCJA), and a centre for training legal professionals on the OHADA system (ERSUMA). [124] Furthermore, every member country has an OHADA national commission whose task is to comment and propose amendments – mainly from a national perspective – to the draft uniform acts. According to the Treaty, ten uniform acts that already provide substantial coverage of business transactions and relationships have been already adopted. [125] The

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[122] C. M. DICKERSON, *Bringing,* cit., at 284.

[123] Literature on OHADA law is extremely vast. A wide bibliography can be consulted on the website www.ohada.com.

[124] Art. 27-41 OHADA Treaty.

[125] Acte Uniforme relatif au Droit des Sociétés Commerciales et du Groupement d'Intérêt Economique, 17 April 1997, 2 J.O. OHADA 1, revision adopted 30 January 2014, J.O. OHA-

OHADA legislative acts are named "Uniform Acts" since they become part of the internal domestic law of each of the OHADA member states automatically and without modification after having been adopted pursuant to the procedures set out in the OHADA Treaty and published in the OHADA Official Journal. Furthermore, these Uniform Acts replace any existing or future laws on the same subject in all member States. [126] The uniform acts are enforced through the national courts, up to the second instance, since the national supreme courts do not have jurisdiction on final appeals where OHADA uniform acts apply: when a case where OHADA laws shall apply shall be decided by the court of final instance, it is appealed to the CCJA, located in Abidjan, Côte d'Ivoire. [127] To secure a uniform interpretation and application of the OHADA uniform acts in all member countries, the CCJA decides both on the interpretation and application of the OHADA uniform acts and on the merits of the case, and therefore the case is never sent back to the domestic courts for further decision.

When OHADA uniform acts are not applicable, national legislation will be applied depending on the place where the transaction took place and according to the rules of private international law if applicable.

However, the functions that OHADA uniform acts perform in the formal sector and their process of implementation show at the same time their inability to address issues and problems of the business people belonging to the informal sector. Then, it clearly appears "that the regime pays more attention to regulating transactions involving big businesses and multinational corporations than it does to regulating transactions involving smaller businesses or even the informal economy, which is the driving force of African economies in the region". [128]

DA 1 (Special Edition, 4 February 2014); Acte Uniforme portant sur le Droit Commercial Général, 17 April 1997, 1 J.O. OHADA 1, revision adopted 15 December 2010, 23 J.O. OHADA 1 [hereinafter "General Commercial Law"]; Acte Uniforme portant Organisation des Sûretés, 17 April 1997, 3 J.O. OHADA 1, revision adopted 15 December 2010, 22 J.O. OHADA 1 [hereinafter "Securities Law"]; Acte Uniforme portant Organisation des Procédures Simplifées de Recouvrement et des Voies d'Exécution, 10 April 1998, 6 J.O. OHADA 1; Acte Uniforme portant Organisation des Procédures Collectives d'Apurement du Passif, 10 April 1998, 7 J.O. OHADA 1, revision adopted 10 September 2015, J.O. OHADA n. spec. 25 September 2015 1; Acte Uniforme relatif au Droit de l'Arbitrage, 11 March 1999, 8 J.O. OHADA 1, revision adopted 23 November 2017, J.O. OHADA n. spec. 15 December 2017 1; Acte Uniforme portant Organisation et Harmonisation des Compatibilités des Entreprises, 22 February 2000, 10 J.O. OHADA 1, revision adopted 26 January 2017, J.O. OHADA n. spec. 15 February 2017 1; Acte Uniforme relatif aux Contrats de Transport de Marchandises par Route, 22 March 2003, 13 J.O. OHADA 3; Acte Uniforme relatif au Droit des Sociétés Coopératives, 15 December 2010, 23 J.O. OHADA 1; Acte Uniforme relatif à la Médiation, 23 Novembre 2017, J.O. OHADA n. spec. 15 December 2017. All uniform acts can be accessed from the OHADA website www.ohada.org.

[126] Art. 10 OHADA Treaty.

[127] Art. 13-16 OHADA Treaty.

[128] C.M. FOMBAD, *Some reflections on the prospects for the harmonization of international*

5. *Conclusions: law, economics and the global market*

We examined three completely different approaches to law and economic relations: Islamic, Chinese and African law.

It is possible to say that there is a minimum common denominator that joins all these approaches and also those attributable to the Western legal tradition: the fact that the relation between law and economics is changed in the modern society.

In the past decades, characterized by the prevalence of industrial production, the law stood as an instrument to regulate production activities and to guarantee the access to the means of production, therefore it had to remain valid for a long period of time in order to set those fixed and long-lasting limits within which the carrying out of economic activities was permitted. In the present society characterized by consumption, law represents a tool to facilitate economic activities – often not confined within territorial boundaries – and consumption, and, given the volatility and changeability of these activities, law must necessarily be flexible, liquid, in order to be able to adapt quickly to the needs of consumption. Therefore, there is a reversal of the functions and features of law: from an instrument that set the rigid boundaries within which the economic activities could take place, the legal rule becomes a tool to facilitate the smooth functioning of the market.

Legal certainty is lost because it becomes difficult for the law to adapt to the new function it is requested to perform. Stability, predetermination, procedural steps required to enable production or change of the law are considered obstacles to a rapid development of the rules according to the changing needs of society. Law must be ready to respond promptly to (but not anticipate) changes in the society. These changes thus become the driving force, and law must comply with them immediately.

Moreover, law can be created by a number of entities much higher and different than in the past, entities who do not have necessarily a public nature and are sometimes difficult to identify, and whose product may not find a place in the type and predetermined hierarchy of sources. Indeed, it is the very concept of the source of law, as a box in which to place the act having normative value in order to certify its origin and validity, to have lost much of its value faced with the proliferation of the entities that produce rules and the forms that such rule may take.

Despite legal security – intended as certainty and predictability in the application of law – is seen as one of the fundamental values of the legal system, as well as a requirement to aim at economic development, eco-

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business laws in Africa: OHADA and beyond, in *Africa Today* vol. 59 (2013), n. 3, 51-80. See also O. BALLAL, *Les usages,* cit., at 44.

nomic activities very often proliferate and are far more profitable, instead, where there is greater legal and judicial flexibility and/or uncertainty.

Law today is therefore part of the market, it becomes itself a commodity, a consumable item. Consequently, and as a consumable good subject to today's market rules, the shelf life of the law is noticeably reduced compared to the past: today law must be changed a lot more frequently and faster than previously, and the need to use long and complex tools and procedures for the modification of the rule is considered as an element of obstacle to consumption of law. All this because the legal rules, as well as any market good, are "produced" from nothing and can be eliminated at any time, since no rule has the privilege of immutability, being law a human product. [129]

The study of the relation between law and economic activities became today one of the most interesting, but also dangerous, challenges for legal scholars in the present times. Finding the right equilibrium between the more or less central rule that law should have and the need to place the society it regulates in the global market is not an easy task, but such equilibrium must be found to avoid to leave to the market a full autonomy to regulate itself.

[129] The theme is developed in S. MANCUSO, *Liquidità e comparazione*, Pacini Giuridica, Pisa, 2018.

UNPAID WORK, SILENT (HIDDEN) WEALTH

Susanna Pozzolo [1]

1. *Introduction*

"Until the publication of Ester Boserup's book *Woman's Role in Economic Development* (1970), the notion that economic development might have a different impact by gender – or even that development had anything to do with women – was unthinkable", [2] with these words Beneria, Berik and Floro begin the first chapter of their book, *Gender, Development, and Globalization*.

This topic is the core of the fifth of the *Sustainable Development Goals*, since gender equality is the central issue of women's economic situation. Equality is *the* basis of fundamental human rights and is at the root of a peaceful, prosperous, and sustainable world. Equality and, above all, gender equality must be understood as equal respect and consideration, rejecting a trivial idea of equality as a merely *formal* recognition. The latter is a kind of equality measured thanks to a criterion assumed as 'indifferent' to the elements compared. This kind of procedure is valid, for instance, when measuring the weight in kilograms of two baskets filled with different types of fruit. Unfortunately, should we wish to compare people, the procedure is less helpful: so, what is the criterion in this case then?

Equality between women and men in our modern constitutional systems is mainly imagined in a formal way. For instance, the Italian Constitution in Article 3 states: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions". This statement estab-

[1] Revised lecture, DIGI, University of Brescia – 2019 Summer School on Production and circulation of wealth. Problems, principles and models.

[2] L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization. Economics as if All People Mattered*, 2nd edition, Routledge, London, 2016, 24.

lishes the 'blind' equality rule, that is, it assumes people's *sameness*, it is indifferent to their specificity. This type of standard is important and problematic at the same time: with hindsight, these norms are liberating, establishing that not having white skin – or being a woman – is not a valid reason to be excluded from having rights. Instead, with foreknowledge, these norms entail illegitimate suspicions on any deviation from the *same treatment*, delegitimizing every consideration of personal specificities such as, as in our case, sex differences. Based on the assumption of a blind equality, women have been treated as men.[3] This would be fine if that equality were true, if we really had reached an identical starting threshold. However, this is not the case. Equality between the sexes is not defined – even in our modern constitutional systems – on an impartial criterion, since formal gender equality has been defined on *the maleness* paradigm, that is, in the best of cases, the law takes for granted *the sameness* of women to men.[4] Yet the idea of humanity itself has been elaborated on the ground of male life and needs.

Very briefly, heterosexual culture has been produced by replacing a traditional homosocial culture: "feudal culture had been rooted in an exclusively male universe. Men – and above all, men of action – frequently lived in a world far removed from that of womankind. Men were trained to exhibit individual courage and integrity as loyal servants and vassals of a rigid feudal order".[5] The new heterosexual culture has been built on a rigid hierarchy between sexes:[6] women have obtained a place in society, but are strictly controlled by and subordinate to men. They have become the 'second sex'.[7] Such an origin began to be questioned after the women's struggles for equality two centuries ago,[8] but even now maleness remains the paradigm for humanity: the rights of women are usually considered 'special rights'.[9] Even the new constitutional system established in the

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[3] S. POZZOLO, *Avvistamenti dall'isola che non c'è*, in M. MALDONADO-P. LUQUE (eds.), *Discutendo con Bruno Celano*, vol. I, Marcial Pons, Madrid, 2020, 337-360; ID., *¿Vulnerabilidad personal o contextual? Aproximaciones al análisis del derecho en perspectiva de género*, in Isonomía, 51, 2019 http://isonomia.itam.mx/index.php/revista-cientifica/article/view/226.

[4] L. GIANFORMAGGIO, in ID., *Eguaglianza, donne e diritto*, eds. A. FACCHI-C. FARALLI-T. PICHT, Il Mulino, Bologna, 2005, especially 96-99.

[5] G.L. TIN, *The Invention of Heterosexual Culture*, MIT Press, Cambridge, 2012, 16.

[6] There is more than one hierarchy, but I shall concentrate my argument on that between man and woman.

[7] SIMONE DE BEAUVOIR, *The Second Sex*, Jonathan Cape, London, 1956.

[8] It could be interesting to focus on *nuns* as a life choice outside the human patriarchate.

[9] C. MACKINNON, *Sex Equality. Family Law*, Foundation Press, N.Y., 2001; C. GOULD, *The Woman Question: Philosophy of Liberation and The Liberation of Philosophy*, Special Issue of *The Philosophical Forum: Women and Philosophy*, co-edited by C. GOULD-M. WARTOFSKY (reprinted as a book, by G.P. Putnam's Sons, 1976).

second half of the last century, in spite of its broadening dimension of rights, recognizes formal equality as a fundamental right, but based on the male model referred to, assuming all differences as illegitimate until 'proof to the contrary'. For this reason, women have had to fight even to have the protection of pregnancy recognized,[10] since this is something '*special* for women'.

Recognizing equal rights has been a key step, but it has also determined a model justifying the subordination of women. Today, the inadequacy of that formal criterion of '*Equality*' is clear and, as I maintain here, it is plainly one of the causes of the feminization of poverty.[11]

2. *Many kinds of jobs ... for both genders?*

Our day-to-day living depends on doing varied forms of work. We meet our daily needs by earning a living as salaried workers or as self-employed, or by depending on others who do a job in the labor market. We also carry out a range of necessary daily activities such as cooking, washing clothes, making beds, housecleaning, shopping, washing dishes, throwing out the garbage, caring for children, the sick, the disabled or elderly family members; and, meanwhile, we also depend on others who perform similar tasks.

"Human beings are ontologically vulnerable and insecure, and their natural environment, doubtful. In order to protect themselves from the uncertainties of the everyday world, they must build social institutions (especially political, familial, and cultural institutions) that come to constitute what we call 'society'".[12]

Looking around our societies, it is easy to note that the care work mentioned is carried out by women, while most men benefit from the result. This is a mere observation about the current division of labor around the world.[13] And, as everyone knows, not all activities are considered part of the market

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[10] H. HILL KAY, *Equality and Difference: The Case of Pregnancy*, in *Berkeley Women's L. J.*, 1, 1985, Available at: http://scholarship.law.berkeley.edu/facpubs/386. Allow me also to refer you to S. POZZOLO, *(Una) Teoria femminista del diritto*, in T. CASADEI (ed.), *Donne, diritto, diritti. Prospettive del giusfemminismo*, Giappichelli, Torino, 2015, 17-39.

[11] The issue of *equality-difference* is a fundamental point of the contemporary debate about the inability of our constitutional systems to build a respectful world for all people. To recall one of the latest discussions around the topic, the concept of merit (a notion which presupposes an equal starting position), see M.J. SANDEL, *The Tyranny of Merit*, Penguin, USA, 2020.

[12] B.S. TURNER, *Vulnerability and Human Rights*, Penn UP, 2006, 26.

[13] The data elaboration available on the website *Our World in Data* https://ourworldindata.org/female-labor-supply shows that 50% of employed women work in the service sector.

or, better, not all the people who perform activities are paid for their work.

Frequently, the labor provided by *volunteers* is indispensable to satisfy basic services: suffice to think of "cultural celebration, immunization, adult literacy, school maintenance, irrigation, canal repairs, and forest conservation". [14] However, the same applies to the preparation of food in the home, the functioning of schools, but also to business or when helping people in the event of disasters such as floods, fires, or earthquakes. An exceptionally large part of this work is provided by women. However, economic gender studies have shown that the performance of these tasks, which are fundamental for our wellbeing, received no attention from policymakers until the 1990s. It is vital to understand why: given "that most of this household and volunteer work is typically unpaid, it has been largely invisible in economic terms and, until very recently, not included in conventional national income accounts, labor statistics, and other economic indicators". [15] There is nothing surprising about this: ever since the development of early capitalism, attention has almost exclusively been attracted by those activities directly relevant to the market – from which, in particular, women's work has been excluded. Even in purportedly progressive Engels' *The Origin of the Family, Private Property and the State*, the gender division of work is mentioned while assuming a limitation of productive activities to those performed by men:

"As to how and when the herds passed out of the common possession of the tribe or the gens into the ownership of individual *heads of families*, we know nothing at present. But in the main it must have occurred during this stage. With the herds and the other new riches, a revolution came over the family. *To procure the necessities of life* had always been the business of the man; he produced and owned the means of doing so. The herds were the new means *of producing these necessities*; the *taming* of the animals in the first instance and their later tending were the man's work. To him, therefore, belonged the cattle and to him the commodities and the slaves received in exchange for cattle. All the surplus which the acquisition of the necessities of life now yielded fell to the man; the woman shared in its enjoyment but had no part in its ownership". [16]

Almost everything has entered into a *commodity-money exchange*: modernity no longer contemplates slavery. Apparently. [17] Against this eco-

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[14] L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 179

[15] L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 178.

[16] F. ENGELS, *The Origin of The Family, Private Property and The State*, Penguin, London, 2010, (italic emphasis added).

[17] Among many on the resurgence of the phenomenon, T. CASADEI, *Il rovescio dei diritti umani. Razza, discriminazione, schiavitù*, DeriveApprodi, Rome, 2016; B. CASALINI, *Migrazioni femminili, controllo dei confini e nuove schiavitù*, in *Ragion pratica*, 2, 2010, 455-468. The literature on this topic is vast but suffice it to recall the classic by K. MARX, *Das Capital*.

nomic background, the social construction of modernity, divided into a private and a public sphere, reformulates and perpetuates, despite the declared sole legal entity and the universality of rights, two different kinds of legitimate spaces, goals and life roles – one for women and one for men.

The private sphere was, and it still is, considered the 'domain' of women: that of the household, where care work and other *non-market* activities are carried out. The extension of the concept of *household* varies, in modern societies it may be restricted to care of the nuclear family, but in more traditional contexts it could embrace milking or wool production, for instance. Observing these variations, it is interesting to note how the activities are divided between those of interest to the market and those which are not, depending on who carries them out: men or women. [18] The historical homosocial reality makes perceiving such divisions as 'gender neutral', thereby helping to determine *manliness* as the generic, natural appearance of the world, as if it were the very form of humanity, that is to say, for both genders.

During the last two centuries, the markets have developed, and livelihoods have become increasingly linked to wage labor, consequently, it has become easy to categorize individuals as, respectively, 'breadwinners' (male household heads) and 'dependents' (women and children). Within tradition, the view of the economy has been narrowed down to the domain for *productive activities*, in turn reduced to those connected with wage labor-capitalist relations: 'productive' here having a limited meaning referring only to activities visible in, and by, the market. The exclusive attention reserved to wage labor-capitalist (industrial) production has left out all the reproductive work of (mostly) women, labelled as *non-productive*. [19] This perspective, which is actually a departure from Engels' emphasis on the dual character of production activities (unpaid and paid) which he deemed essential for the reproduction of (the whole of) society, until very recently, contributed to making reproductive work invisible in economic analyses. [20] Once the labor involved in taking care of people [21] – through a myriad unpaid tasks undertaken within households and com-

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[18] L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 179.

[19] This notion is not new of course, many from the feminist Marxist area have underlined the topic, for instance M. DALLA COSTA-S. JAMES, *The Power of Women and the Subversion of the Community*, Falling Wall Press and a group of individuals from the Women's Movements in England and Italy, London, 1972; S. FEDERICI, *Revolución en punto cero. Trabajo doméstico, reproducción y luchas feministas*, Traficantes de Sueños, Madrid, *Creative Commons*, 2013; ID., *Caliban and the Witch*, Autonomedia, N.Y., 2009[3].

[20] For instance, for the last few years the OECD has had a dedicated section http://www.oecd.org/development/gender-development/; G. FERRANT-L.M. PESANDO-K. NOWACKA, *Unpaid Care Work: The missing link in the analysis of gender gaps in labor outcomes*, OECD Development Center, 2014.

[21] And this also implies taking care of the *surroundings*.

munities – was rendered invisible in economic studies, it was easy to reduce the concept of *work* to a synonym of *paid* or *market work*. An accidental division has become universal for the whole of humanity, paradoxically ending by excluding more than a half of humanity.

The lack of attention, also conceptual, given to unpaid work is obviously reflected by a shortage of available data. For instance, the data collected by the System of National Accounts (US) between the 1930s and 1940s "compute the annual value of marketed goods and services in order to estimate a country's national output" (GDP or GNP) restricting the concept of 'labor' to 'work for pay or profit'", [22] easily quantified using labor force statistics, but banishing care work from the equation, resulting in its marginalization.

In a recent McKinsey report, 15 gender equality indicators were tracked for 95 countries. The study found that, were women to participate in the economy at an identical level to that of men, it would add up to US$ 28 trillion or 26% of annual global GDP by 2025, assuming a business-as-usual scenario. [23] This impact is roughly equivalent to the size of the combined United States and Chinese economies before the pandemic crisis. If we look at the US alone: the annual earnings ratio between women and men was 79.6% in 2015, only marginally higher than 2007 (77.8%). At this rate, it will take 45 years (until 2059), for men and women to achieve parity. Globally, the situation is even worse. The UN 2015 Millennium Development Goal Gender Chart estimates that, on average, women earn 24% less than men and perform 2½ times more unpaid care and domestic work than men. [24] The ILO delineates work as: "any activity performed by persons of any sex and age to produce goods or to provide services for use by others or for own use". [25] This definition helps to provide an outline to count virtually all forms of work, including certain unpaid classes of work as domestic work.

Although data by gender has begun to be collected, it is still not easy to find. From the data reported by Beneria, Berik, Floro, statistics for the year 2009 on activity rates for the female population were 26% (vs. 80% for men) in Morocco and 24% (vs. 70 % for men) in Turkey. [26] In the case

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[22] L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 180. R. STEBBINS, *Unpaid work of love: defining the work–leisure axis of volunteering*, in Leisure Studies, 32, 3, 2013, 339-345.

[23] See the website and reports at the following address https://www.mckinsey.com/featured-insights/gender-equality/women-matter-ten-years-of-insights-on-gender-diversity.

[24] *Millennium Gender Chart*, 2015, http://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2015/Gender_Chart_Web.pdf.

[25] ILO Report 2013e, p. 2, available at the website https://www.ilo.org/global/research/global-reports/world-of-work/2013/lang--en/index.htm.

[26] *Population Reference Bureau* 2011, world population data available https://www.prb.

of Mexico, it was 43% (vs. 81% for men), 47% (vs. 78% for men) in Ecuador, and 49% (vs. 79% for men) in the Philippines.[27] As this data shows, women's participation increases with their employment,[28] but, since a substantial part of women's work is performed within their own households and communities, it has traditionally gone unpaid, and women's work has been excluded from labor force statistics and national income accounts, thereby deepening the gender prejudices which contribute to maintaining women in a subordinate position. Benería, Berik, and Florio underline that:

"the tendency for women to engage in informal employment and to work as casual, seasonal agricultural laborers or unpaid family workers is likely to have increased with the adoption of neoliberal policies and promotion of labor market deregulation, making the need to obtain more accurate estimates of informal employment more urgent".[29]

Care work, it is important to underline, is also central to adult needs, not only to those of children, for example preparing meals and cleaning clothes for those who go to work in industries or other businesses.[30] If we observe world population data and compare 1950 with 2018, it is easy to note the progressive decrease in mortality until the doubling of life expectancy by the end of this period. However, if we make a projection into the future, the pyramid produced by this trend is not going to reproduce itself: scientists currently think that we are close to the *peak child* moment, that is, when the number of newborns no longer increases among the worldwide population.[31] This means, at the least and in the best case scenario, an increasing number of elderly people living in the near future who must be taken care of. Much of this work is voluntary today and not counted in the statistics but will soon become a meaningful subject for national healthcare systems which could end up being severely impacted. This should already be ringing alarm bells among governments and be seen as a matter of justice for those who are doing the caring.

The nature of volunteer work is quite distinct from unpaid household

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org/2011-world-population-data-sheet-2/#:~:text=%20%20%20%20%26nbsp%20%20%20,%20%2020%25%20%206%20more%20rows%20).

[27] All data are discussed in L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 182.

[28] *Female employment to population ratio* https://ourworldindata.org/grapher/female-employment-to-population-ratio-2015-vs-1980.

[29] L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 184.

[30] *Ibidem*.

[31] M. ROSER, *Population momentum: If the number of children is not growing, why is the population still increasing?*, May 28, 2019 https://ourworldindata.org/population-momentum.

work in terms of its effect on the worker's wellbeing. Volunteer work is typically done out of choice; its performance provides women and men with a sense of belonging and fulfilment by serving others; it also gives them an opportunity to socialize and to be active within the community. However, *volunteering* can also be a vague word, for instance, during the 70's in the US, Wendy Kaminer remembered how the topic became a battleground over the nuclear family and the proper priorities for women: volunteering was seen as a career for married women, one that avoided conflicts "with marriage and motherhood". [32]

In contrast, unpaid domestic and care work is often done out of necessity and a sense of obligation as dictated by socialized roles. Although it can increase one's sense of fulfilment, it can also be stressful, an overextension of work and exhausting; carried out in the house it can induce a sense of isolation, and even boredom, depending greatly on norms, social class, and other factors. The low or subordinate status in society of many household workers (i.e. women) is a direct consequence of not being paid for the effort made, which also implies the invisibility and devaluation of what has been done: it makes them economically dependent on the 'breadwinners'. [33] Feminist economists have articulated several arguments in favor of undertaking a project to measure and document unpaid work. [34] Having a clear dimension of it would be important to better explain – and modify the context of – the reasons for women's acceptance of occupational downgrading or why they choose employment below their skill levels. [35] Unpaid work is at the heart of building human capabilities, integrating this work into the economic and political sphere is a need that cannot be deferred. Measuring unpaid work would make its contribution visible and socially appreciated, by recognizing *who* is performing it. [36] Indeed, another reason why this would be important is that the current way in which it is performed creates disadvantages (costs) for the worker in an unjust way: hence its measurement is crucial to analyze the extent to which total work (paid and unpaid) is equitably shared inside the house-

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[32] W. KAMINER, *Women Volunteering*, Anchor Press, N.Y., 1984, 2.

[33] L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 186.

[34] *Idem*; C. DELPHY, *The main enemy*, in *Feminist Issues* 1, 23-40, 1980; V. ESQUIVEL-D. BUDLENDER-N. FOLBRE-I. HIRWAY, *Explorations: Time-use surveys in the south*, in *Feminist Economics*, 14:3, 107-152, 2008.

[35] L. NARAYAN, *Contextualizing unpaid care work and women empowerment*, in *International Journal of Applied Research*, 3,7, 2017, 654-659, 655. On the topic of choice, see also, S. POZZOLO, *Lo sguardo neutrale (del diritto) e le inspiegabili scelte delle donne. Riflessioni intorno a una sentenza della Cassazione*, in *Ragion pratica*, 2, 2017.

[36] Maybe as never before, in a time of global pandemic, has the indisputable importance of care work been so evident to everyone.

hold.[37] This measurement is crucial for policies of justice, to address a more equitable distribution of resources: to participate in the market, women must have time and opportunity.

This is a complex scenario. As shown by the following quotation from Gita Sen, it is a multifaceted situation:

"Piece-work payments, extremely long working hours, sweatshop conditions, considerable occupational health risks, and high job insecurity are the hallmarks of the jobs done by the young women workers employed in the various industries in this sector. A number of countries have gone back on ILO conventions guaranteeing different rights to workers in order to attract foreign investment into export-processing zones. The fact that young women, when interviewed, sometimes prefer this type of work to going back to the confines of rural patriarchal households is not necessarily a positive indicator of the working conditions in their jobs. It only emphasizes how harsh the conditions of rural poverty and rural patriarchal dominance are for young women in particular".[38]

Collecting data "is a crucial input for the project of engendering macroeconomic policies and budgets in order to make explicit their gender-differentiated effects on unpaid work".[39] Analyses by gender are fundamental to design policies which are sensitive to people's real life, and improve their lives: it would be pointless to use statistics that did not take into account the different weights of work by gender. In fact, by using the trends in the share of paid/unpaid overtime work we can understand better the shortfalls in people's wellbeing due to *time poverty* and/or the intensification of work.[40]

The already mentioned McKinsey report says: using "conservative assumptions, we estimate that unpaid work being undertaken by women today amounts to as much as $10 trillion of output per year, roughly equivalent to 13 percent of global GDP",[41] and the fact is that women do 75% of all global unpaid work.

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[37] S. TZEYETKOVA-E. ORTIZ-OSPINA, *Working women: What determines female labor force participation?*, in *Our World* in Data, October 16, 2017; available https://ourworldindata.org/women-in-the-labor-force-determinants.

[38] G. SEN, *Engendering Poverty Alleviation: Challenges and Opportunities*, 687. December 2002 Development and Change 30(3): 685-692.

[39] L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 187.

[40] *Ibidem*. As L. BENERIA-G. BERIK-M.S. FLORO write "in addition, the measurement of unpaid work has other practical uses such as in litigation and in estimating monetary compensation in divorce cases".

[41] McKinsey Global Institute, *The Power of Parity: How Advancing Women's Equality can add $12 trillion to Global Growth*, September 2015, 2.

3. *Women and time poverty*

Accustomed to thinking about money as we are, the importance of the dimension of time is not immediately apparent, of having it at one's disposal or suffering from a lack of it. Looking at domestic activities or caring for others enables us to perceive the excessive work of women; it helps us to note this hard work, left obscure and invisible because of its exclusion from the statistics of modern production. [42]

Resistance to taking unpaid work into account may also have something to do with the methodological individualism in mainstream economics. As Julie Nelson [43] has argued, the traditional approach reinforces the notion of autonomy as an individual who is completely rational and self-sufficient, while the dependence on/of others and "any faltering of self-reliance is a weakness. Hence, an acknowledgement of care work is anathema to the 'separative selves', who simply don't need care". [44] Our culture has been built by men for men, not for humans, but for male-gendered subjects, "to the point where it takes on the perverse and extreme form of a mythical ability to live without relatedness or interdependence with others". [45] For women it is the complete opposite: "to the point where women are rewarded for trying to let [their] own identities dissolve in marriage and family". [46] Johann Gottlieb Fichte expressed the difference in a quite extraordinary way. Referring to men, in *The Vocation of Man*, he wrote:

"I must be free; for that which constitutes our true worth is not the mere mechanical act, but the free determination of free will, for, the sake of duty". [47]

But in *The Science of Rights* speaking of *woman* he claimed that:

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[42] E. BOSERUP, *Il lavoro delle donne. La divisione sessuale del lavoro nello sviluppo economico*, Rosenberg & Sellier, Torino, 1983; L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit.

[43] J.A. NELSON, *Gender and Failures of Rationality in Economic Analysis*, lecture available at https://www.aeaweb.org/conference/2019/preliminary/paper/AKz4fYKT; ID., *Husbandry: a (feminist) reclamation of masculine responsibility for care*, in *Cambridge Journal of Economics*, 40, 2016, 1-15; ID., *Can We Talk? Feminist Economists in Dialogue with Social Theorists*, in Signs: *Journal of Women in Culture and Society* Vol. 31, no. 4, 1051-1074, 2006; ID., *Feminism and Economics*, in *Tufts University Journal of Economic Perspectives*, 9, 2, Spring, 1995, 131-148.

[44] Quoted by L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 190.

[45] J.A. NELSON, *Feminism, Objectivity and Economics*, Routledge, 1995, 15-16.

[46] *Idem*, 16.

[47] Quoted by C. GOULD, *The Woman question*, cit., 19, FICHTE, *The Vocation of Man* (Indianapolis, Bobbs-Merrill, 1956).

"[she] is subjected through her own necessary wish – a wish which is the condition of her morality – to be so subjected", [48]

and that

"The woman who thus surrenders her personality, and yet retains her full dignity in so doing, necessarily gives up to her lover all that she has. For, if she retained the least of her own self, she would thereby confess that it had a higher value for her than her own person; and this undoubtedly would be a lowering of that person. ... The least consequence is, that she should renounce to him all her property and all her rights. Henceforth ... her life has become a part of the life of her lover. (This is aptly characterized by her assuming his name.)". [49]

Some fear that discussing statistics on housework could prove risky since they are likely to be used by conservative groups who have remained in 'Fichte's world', seeing women's primary role as the irreplaceable housemaker, thanks to her crucial services (to family and society). In the end, glorifying the housewife and encouraging her to remain at home and in this way not contributing in any way to gender equality. Helping instead to perpetuate women's dependence on men. This is undoubtedly a risk, however hiding the reality only bolsters the status quo and the subjugation of women. [50] Properly valorizing housework would be fundamental to its recognition as *work* and such data would also be important to vindicate its sharing and visibility, not to speak of the women's effort involved.

As Beneria wrote, we "should emphasize the need for women to engage in paid work in order to reduce their dependence on men and to increase their bargaining power in and outside of the home". [51] However, others insist on saying that the goal would be more easily achieved by implementing policies to facilitate women's direct participation in the market labor force, that is, by promoting affordable childcare provision and paid maternity leave. Actions which enforce gender equality *within* the labor market: equal pay, affirmative actions and, so on. [52] Unfortunately, we are forced to underline that the sharing of the labor market by women has not been matched by a sharing of domestic work by men: women have ended up with a double effort at home and in the traditional market, precisely because of the unpaid work remaining invisible. Working for gender equality means considering both sides of the coin.

As noted previously, 'procuring the necessities of life' was strictly relat-

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[48] *Idem*, FICHTE, *The Science of Rights* (Philadelphia, Lippincott & Co., 1869), First Appendix, sec. 3, Part III, 441; see also sect. 1, Part II-Part VII, 396-403.

[49] *Idem*, 25, *lbid.,* section 1, Part VI, 401-402. Cited by E. FIGES, *op. cit*., 124.

[50] J. STUART MILL, *The Subjection of Women*, 1869.

[51] L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 191.

[52] *Ibidem*.

ed to "food-*getting* rather than food-*processing*".[53] This perspective has been rooted in the division of activities between gender: in this way shepherding became a stronger claim to property than milking,[54] universalizing an accidental division of work as a natural right to be owner and thus, once again, male-domination. This division has easily passed into language which delivers our vision of the world. In analyzing the label 'unpaid care work': 'unpaid' underlines that whoever does the activity does not receive a wage for it; 'care' stresses that the goal is serving people for their wellbeing; 'work' emphasizes that it has a cost in terms of time and energy and finds its reason in a kind of obligation (i.e., a contract or marriage). But *unpaid care work* is an even vaguer phrase; in fact, *domestic labor* and *unpaid domestic labor* could be different, just as reproductive work and housework could be different. The label needs to be more precise: *care* does not mean *with love* here, the work may be done willingly for family or society, but, in other cases, it is given unwillingly and women feel (or *are*) forced by various kinds of pressure (psychological, social, or physical).

The time allocated to unpaid work over the last few decades has received more attention. "Data on how households allocate time for unpaid home production burdens could be used to better analyze and determine each household member's well-being".[55] Even if the data are still incomplete, it is clear that, over time, across geographies and traditions, inequality based on gender persists. The burden of unpaid work is largely ignored, so that data on its amount could demonstrate just how much time is spent "fetching water, for instance, without which authorities may give low priority to deep-well and safe-water provisioning".[56] Time-use research shows the impact of economic and social policies on the quality of life and progress in human development. Using data to promote 'a woman's place is in the home' is a matter for political debate, but not a reason why such information should be collected or not.[57]

"However, the main reasons for measuring and documenting unpaid work have more to do with making it visible and socially appreciated and for identifying its contribution to social well-being and the reproduction

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[53] GOULD, *The Woman Question*, cit., 24.

[54] *Idem*.

[55] D.B. PAPADIMITRIOU, *Preface*, in R. ANTONOPOULOS, I, Hirway, *Unpaid Work and the Economy*, Palgrave Macmillan, London, 2010, XV.

[56] L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 191; As illustrated by the papers in the special issues of *Feminist Economics*, "Time Use, Unpaid Work, Poverty and Public Policy" (2010 and 2011), time-use research shows the impact of economic and social policies on the quality of life and progress in human development (Grown et al. 2010; Floro and Pichetpongsa 2010).

[57] L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 192.

of human resources, than simply for making comparison with paid work". [58]

In fact, one of the main problems has to do with the patriarchal system, with its gender norms of socialization that lead to underreporting certain typical activities such as childcare, and taking care of the sick and people with disabilities which remain in the background of daily living. Analyzing the use of time spent 'around' the home enables us to perceive that many *caregiving activities* as not actually secondary, [59] like the helping of people in general and other 'multitasking' work developed by women. Sometimes childcare or wheat shelling could be done collectively by women and mothers who gather for a chat during part of the day, even perceiving the activities as 'leisure' because of its social nature. Bearing this perception in mind is important to prevent an underestimation of household production and to evaluate a better method to measure it. For instance, the replacement cost of certain labor-intensive activities such as taking care of children tends to come out lower than in the opportunity cost valuation method: [60] "the replacement cost estimates ranged from 53.3% in Turkey to 11% in Norway, while the opportunity cost estimates varied between 83% and 30% of GDP for these countries". [61]

Gender equality – declares the EU website – is one of the fundamental values of the EU. [62] The EU strategy is directed to emphasizing gender equality by urging women to participate in the labor market. The commitment for 2016-2019 specifically underlined the importance of "increasing female labor market participation and equal economic independence, and reducing gender pay, earnings and pension gaps and fighting poverty among women". By following the EU data, we can read that the employment rate of women (20-64 years old) in the EU27 has risen to 64% but evidently the gap still remains, and it is "compounded by **the higher prevalence of part-time work among women** in all countries". In the 2018 Dossier *Female (Un)employment and Work-Life Balance* we can read "One

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[58] L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 193.

[59] D. IRONMONGER, *Bringing up Bobby and Betty: The Inputs and Outputs of Childcare Time*, in M. BITTMAN-N. FOLBRE (eds.), *Family Time: The Social Organization of Care*, Taylor & Francis, London-N.Y., 2004, 93-109; M. BITTMAN-L. CRAIG-N. FOLBRE, *Packaging Care: What Happens When Parents Utilize Non-Parental Child Care*, in M. BITTMAN-N. FOLBRE (eds), *Family Time*, cit., 133-51.

[60] M. BITTMAN-L. CRAIG-N. FOLBRE, *Packaging Care*, cit.

[61] L. BENERIA-G. BERIK-M.S. FLORO, *Gender, Development, and Globalization*, cit., 201.

[62] M. VAALAVUO, *Women and unpaid work: recognize, reduce, redistribute!* https://ec.europa.eu/social/main.jsp?catId=89&furtherNews=yes&newsId=2492&langId=en; *Employment and Social Developments in Europe* 2015, https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7859&furtherPubs=yes; *Employment and Social Developments in Europe* 2019, https://ec.europa.eu/social/main.jsp?catId=738&furtherPubs=yes&pubId=8219&langId=en&.

of the main barriers put forward to explain the lower participation and lower work intensity of women is the fact that they are still the main carer for the family and as such have difficulties in combining a demanding full-time job with such responsibilities". [63]

4. *Unpaid work as women's servitude*

The gender gap could be identified in a different way, and it has multiple dimensions, however, unpaid work, as all the studies show, remains a central phenomenon to the disadvantage of women. Despite women apparently being human, at least on paper, [64] the gap between the sexes seems indestructible. In my view, this depends precisely on the existence of unpaid work which is essential for the reproduction of our form of life but is loaded only onto women's shoulders as if it were a natural extension, becoming a huge source of inequality. For example, on the EU website we read:

"According to the data from national time use surveys compiled by the OECD, women in Portugal, Italy and Ireland carry out more than 70% of the unpaid work. Even in the gender-egalitarian countries of the North, women are still doing almost two thirds of the unpaid work. Portuguese women spend more than five hours per day in unpaid work compared to a bit more than one and a half hours of men. An equal sharing of this work would certainly impact on women's career opportunities and opportunities for self-development". [65]

The drama of the gender gap can become enormous in poor countries. To tackle this difficulty, some have suggested relying on technology. On Bill Gate's website we can read:

"The solution is innovation […]. Some of you will become engineers, entrepreneurs, scientists, and software developers. I invite you to take on the challenge of serving the poor with cheap, clean energy, better roads, and running water. […] Perhaps you can improve on the mortar and pestle, the 40,000-year-old technology I see women using to grind grain into food every time I travel in sub-Saharan Africa or South Asia". [66]

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[63] *Female (Un)employment and Work-life Balance*, *Technical Dossier* 8, November 2018, p. 14, https://epale.ec.europa.eu/sites/default/files/female_unemployment_and_work_life_balance.pdf, quoting EC, 2018 report on equality between women and men in the EU https://ec.europa.eu/newsroom/just/document.cfm?doc_id=50074.

[64] MACKINNON, *Are Women Human?* (1999), in C. MACKINNON, *Are Women Human? And Other International Dialogues*, Harvard University Press, 2006 (Kindle edition).

[65] *Employment: Time spent in paid and unpaid work, by sex*, https://stats.oecd.org/index.aspx?queryid=54757.

[66] https://www.gatesnotes.com/2016-Annual-Letter.

Certainly, helping women's empowerment using technology is fine, but it is not a purely technical matter. In developed countries there are wonderful washing machines, and so the problem should have already vanished. Instead, the real issue is the assumption that servile work must be developed by women *because* they are women: the division of labor depends heavily on cultural norms.[67] In 19th-century occidental society, the ideal woman did not work for money, working women were not 'ladies': "Ladies were active in voluntary associations", as Kaminer notes.[68] However, "through their associations, 'ladies' learned to organize and became involved in public affairs and, eventually, progressive movements for social reform-settlement work, consumerism, and even trade unionism".[69] In Kaminer's opinion, by "choosing a volunteer career, a woman was not simply choosing home and family; she was acknowledging that, although it came first for her, family life and the social activities that went with it were not enough".[70] In this way, women were an active part in a male world, it was not leisure.

If we observe how both partners share their free time, the data show "how resources are shared between spouses and how the household's '*sharing rule*' alters in response to changes in income or prices".[71] Given that, as we have seen, time spent outside the labor market is not automatically leisure time – but if spent on household production and domestic work, and we know that this is unequally distributed by gender, then taking household production into account allows us to prevent misleading results concerning the intra-household allocation of resources.[72] Care work is fundamental for human society, but to recognize this simple truth we need to broaden our analysis, to take a close look at an activity influencing our personal wellbeing which cannot simply be converted into monetary terms. Discussion about AI caregivers is a hot topic today, that is, we will soon be able to robotize care of the elderly by using AI, even if

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[67] Melinda Gates writes that the division's norms "seem normal – so normal that many of us don't notice the assumptions we're making". See the revaluation of women's work by S. LEWENHAK, *Women and Work*, Macmillan, London, 1980; J.E. MILLS-S. FRANZWAY-J. GILL-R. SHARP, *Challenging Knowledge, Sex and Power: Gender, Work and Engineering*, Routledge, 2013.

[68] KAMINER, *Woman Volunteering*, cit., 4.

[69] *Idem*, 5.

[70] *Ibidem*.

[71] A. CAIUMI, *Unpaid work and household living standards*, in A. PICCHIO (ed.), *Unpaid Work and the Economy*, Routledge, 104.

[72] A. CAIUMI, *idem*, 104; "Rather, we provide some support to Becker's initial claim that the state of the market for marriage should influence the intra-household decision process", write P.A. CHIAPPORI-B. ROTIN-G. LACROIX, *Household Labor Supply, Sharing Rule and the Marriage Market*, available https://www.ssc.wisc.edu/~jkennan/teaching/cfldef985.pdf.

the debate about its ethicality is still raging.[73] That aside, receiving care and physical and emotional support is essential for human wellbeing and most of this kind of care is not adequately supplied by the market. As we have seen, these are activities which are usually unevenly distributed between partners with inescapable consequences for the wellbeing of those who provide the care work, and those who benefit from it.

5. *Some conclusions*

The data show inequality in gender wellbeing, in the level of time-poverty, and in the use of work for social reproduction.[74] These differences affect and contribute to people's capabilities and to the most important functions of human life, functions essentially based on unpaid work.[75]

This social construction affects everything, the different opportunities to achieve professional and personal goals are a consequence of the unequal distribution of domestic and care duties, as well as being a consequence of the different enjoyment of time and the level of wellbeing between the sexes.

In the words of Chiappero-Martinetti,

"On average, about 80% of men spend less than 10 hours a week on domestic activities compared with only 11% of women. By contrast, almost 70 % of women dedicate between 20½ hours a week to domestic work. Figures do not really change if instead of looking at the whole sample we look only at those individuals who are in paid employment, the only significant difference being that the male load is reduced even further".[76]

Looking at Italy, men contribute no more than 1/6 of their week-time

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[73] For instance, A.J. SHARKEY, *Granny and the robots: Ethical issues in robot care for the elderly*, in *Ethics and Information Technology*, March 2010; A. ETZIONI, *Robotic Care of Children, the Elderly, and the Sick* (with Oren Etzioni), in *Happiness is the Wrong Metric*, Library of Public Policy and Public Administration, Vol 11. Springer, Cham, 2018.

[74] E. CHIAPPERO-MARTINETTI, *Unpaid work and household well-being. A non-monetary assessment*, in A. PICCHIO, *op. cit*., 123.

[75] Functioning to nourish, dress and educate oneself but also to enjoy an independent life, to avoid disease and to participate in social life, E. CHIAPPERO-MARTINETTI, *Unpaid work and household well-being*, cit., 127-128: "They compensate for conditions of disadvantage and restrictions capabilities for which there are no or only partial solutions. This refers in particular to people who have some handicap or suffer from poor health and who find the primary and sometimes unique answer to their needs within the family.".

[76] *Idem*, 134-139.

to domestic work, while women devote 5/6 of theirs.[77] This disproportion remains also when looking at partners who are both employed. The data show that patterns such as income, age, and dimension of the family affect the proportion shared by sexes with an obvious compression of time dedicated to their personal needs by women. A time poverty which increases in the case of mothers of young children: generally, unpaid work decreases – as Chiappero-Martinetti has shown – by contracting domestic or care help.[78]

Overcoming the difficulties of counting unpaid work is important to obtain a real awareness of it as a form of fundamental *public good* which involves such positive externalities as childcare and feeding and taking care of the workforce. However, what this implies is a cost in terms of time and effort that is borne by women, which needs to be recognized, thereby countering the policymakers' assumption that this is a bottomless supply for the reproduction of humans and workers.

[77] *Idem*, 139.

[78] *Idem*, 144.

EU-CHINA LEGAL COOPERATION ON IPR: NEW STRATEGIES FOR THE PROTECTION OF WEALTH

Angela Carpi [1]

"One of the old rationales for copyright protection … is that it provides an incentive to invest. We are seeing that in play here in China. Copyright is no longer something imposed on China by the U.S. It is now a tool in Chinese hands". [2]

1. *General Framework of EU-China Cooperation on Intellectual Property*

The protection of intellectual property rights is crucial for the creation of a steady and confident environment that not only can attract foreign investment but can also encourage local investments in research and development. Hence, for the protection of wealth it is necessary to create an environment where IPR are strongly protected and enforced. The situation of Chinese legal system at the end of the Maoist era, as it is well known, was not favourable for IPR protection and development. It was necessary to undertake a revision and reconstruction of the legal system.

The legal reform process enacted in China starting from the late seventies was marked by the increasing role assumed by international cooperation.

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[1] University of Bologna.

[2] The phrase is by Mathew Alderson, quoted in *Wall Street Journal* of May 15, 2017 and *China Film Inside – The Business of Entertainment in China*, May 22, 2017, http://china filminsider.com/copyright-protection-china-real-spectacular/, last visit October 15, 2020.

Between the end of the twentieth century and the beginning of the next, in particular, there has been an international bounce towards legal exchanges with the People's Republic: almost a competition that saw competing state agencies, international development bodies, non-governmental organizations, foundations, States and supranational entities such as the EU, all concerned to provide their own as a reference model for the reform of Chinese legal system. [3]

Within this context, the issue of the protection and the enforcement of intellectual property rights can be said to be emblematic. The first relevant framework agreement for EU-China cooperation on intellectual property rights protection is the EU-China Trade and Economic Agreement of 1985. [4] In the agreement, no specific section on intellectual property rights have been inserted, yet it still represents a reference legal framework on the basis of which the various actions in the field are carried out, such as the Agreement for Scientific and Technological Cooperation between the European Community and the Government of the People's Republic of China of 2000. [5] In the latter, there is an annex specifically dedicated to the protection of intellectual property rights and their regulation that essentially reiterates the provisions of the TRIPS Agreement [6] and establishes very specific reciprocal rights and obligations for the parties.

Another important legislative act in this field is the Agreement between the European Community and the Government of the People's Republic of

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[3] For a complete reconstruction of the phenomenon, see NOVARETTI, *Le ragioni del pubblico: le "azioni nel pubblico interesse" in Cina*, Napoli, 2011, 110 ff, and the large bibliography there cited. See also CARPI, *Knowledge and Intellectual Property in the EU-China Cooperation*, in TIMOTEO (ed.), *Towards a Smart Development. A Legal and Economic Enquiry into the Perspectives of EU-China Cooperation*, Bologna, 2016, 81 ff.

[4] COUNCIL REGULATION n. 2616/1985 concerning the conclusion of a *Trade and Economic Cooperation Agreement between the EU and China*, in *OJ* L 250, of 19 September 1985.

[5] *Agreement for Scientific and technological cooperation between the European Community and the Government of the People's Republic of China*, in *OJL* 06 of 11 January 2000, 40. The EU-China cooperation on science and technology as well as having, as it is known, remarkable connections with IPR matters, is the subject of a highly structured dialogue developed especially starting from the years 2000. Since 2006, however, China has begun to focus its energy no longer on the copy industry, but on indigenous innovation, a term which appears for the first time in the speech that Hu Jintao delivered to outline the National Strategic Plan for Science and Technology to be realized between 2006-2020.

[6] The Agreement on Trade Related Aspects of Intellectual Property Rights is an intenational agreement between the members of the World Trade Organisation that sets minumum standards for the regulation of intellectual property rights. It is Annex 1C of the Marrakesh Agreement establishing the WTO, signed on April 15, 1994 as a result of the 1986–94 Uruguay Round negotiations. See https://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs. Last visit October 1, 2020.

China on Cooperation and Mutual Administrative Assistance in Customs Matters of 2004.[7] This agreement constitutes the general framework for cooperation and mutual administrative assistance at the level of customs and establishes the Custom Joint Cooperation Committee, which is tasked with ensuring the proper implementation of the act. On this topic the EU-China Action Plan Concerning Custom Cooperation on IPR (2014-2017) was launched, signed during the seventh meeting of the Joint Custom Committee in 2013.[8] Since 1998, then, the various EU-China Summit devoted themselves, from time to time, to matters concerning the protection of intellectual property rights: at the meeting of September 2012, the *EU-China Dialogue on Innovation* was launched. During the meeting of June 2015 a *Memorandum of Understanding* on *Reinforcing the EU-China IP Dialogue Mechanism* was signed.[9]

In 2004 the *EU-China IP Dialogue* was launched, a structured dialogue which is implemented through annual meetings, held alternately in Brussels and in Beijing, involving the participation of the DG Trade of the European Union and the Ministry of Commerce of PRC. During these meetings, the parties have the opportunity to exchange information and plan high-level actions for the protection of intellectual property rights, as well as analyze national laws and practices in the field, in order to identify priority is-

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[7] *Agreement between the European Community and the Government of the People's Republic of China on Cooperation and Mutual Administrative Assistance in Customs Matters*, in *OJ* L 375/20, of 23 December 2004.

[8] It is important to note that the EU-China cooperation on customs matters is particularly structured. The first formal act of customs cooperation was signed in 2004 at The Hague and it is the *Agreement between the European Union and the Government of the People's Republic of China on Cooperation and Mutual Assistance in Custom Matters*. This agreement provides the framework on the subject and establishes the Joint Custom Committee, a committee of mixed composition which has the task of supervising the implementation of an agreement had. On the basis of the agreement of 2004, Chinese and European customs authorities work together on the protection of intellectual property rights, as well as on a number of other activities ranging from the fight against illegal drug trafficking to security of trade. In 2010 the *Strategic Framework for Cooperation – Enhancing EU-China Customs Cooperation to Promote Legitimate Trade* have been signed, with the specific aim of increasing the synergy of institutions responsible for customs protection. During the seventh summit of the Joint Meeting, in 2014, two documents have been processed, one of which specifically on customs protection of intellectual property rights: the *Action Plan Concerning EU-China Customs Cooperation on IPR* (2014-2017) and the *Ensuring Smooth and Safe Trade between the EU and China Strategic Framework for Custom Cooperation*, which is also intended to cover the time span between 2014 and 2017. For further information see the web site of the Commission, http://ec.europa.eu/taxation_customs/customs/policy_issues/international_customs_agreements/china/index_en.htm, where all the mentioned documents can be find, last visit: October 13, 2020.

[9] Further information can be find on the web sites http://www.ipkey.org/en/activities/upcoming-activities/item/3321-10-year-anniversary-brussels-flagship-event-3321 and http://www.ipkey.org/en/about-ip-key/eu-china-cooperation-on-ipr-issues. For a report of the meeting see http://europa.eu/rapid/press-release_IP-15-5279_en.htm. Last visit October 1, 2020.

sues, examine proposals and amendments to the various disciplines. [10]

Beside the *EU-China IP Dialogue*, since 2005, the *EU-China IP Working Group* was created, with very pragmatic vocation, with the aim at focusing the discussion on more practical aspects of intellectual property rights. In facts, these meetings, which take place twice a year, are attended not only by politicians but also by experts, companies and other intellectual property rights stakeholders.

The described strategy, mainly politically motivated, is supported by a technical assistance, through which the EU seeks to create a working environment with the Chinese government that is based on the values of transparency and equality of the two partners.

This kind of cooperation was launched already in 1985, when the first cooperation agreement between the Patent Office of the EU and the Chinese Patent Office was signed. For the first concrete initiative, though, it was necessary to wait until 1993, when the Spanish Patent and Trademark Office launched the first *EU-China IP Training Programme*, conceived as a program for institutional training on patents and trademarks. [11]

The turning point for European cooperation in the area of IPR is represented by the entry of China into the WTO. In order to accomplish the various commitment that the WTO imposed to China, the Chinese government has promoted a significant package of reforms in the field of intellectual property protection, to the realization of which the Sino-European cooperation wanted to make the difference.

In this context, what Europe could no longer ignore was the concrete change of direction that interested the Chinese's approach towards the research and development policy. [12] The old certainty that China had an inadequate legal system, where copy and intellectual property rights infringement was tolerated is no longer true. Chinese efforts are now focused on the promotion of the so called "indigenous innovation". [13]

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[10] See EUROPEAN COMMISSION, *Bilateral Interaction with China*, of June 28, 2013 available at http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150992.pdf. Last visit, October 14, 2020.

[11] On this program see WEI SHI, *Intellectual Property in the Global Trading System. EU-China Perspective*, Berlin-Heidelberg, 2008, 237.

[12] See GREATREX, *The Authentic, the Copy and the Counterfeit in China: an Historical Overview*, in TIMOTEO (ed.), *Sistema giuridico romanistico e diritto cinese. Regimi e tutela della proprietà intellettuale in Cina*, Rome, 2008, 115 ff.; MANDERIEUX, *The Emergence of China as a Key Intellectual Property Player: New Dynamic International Patenting Policies of Chinese Innovative Companies*, in TIMOTEO (ed.), *Sistema giuridico romanistico e diritto cinese. Regimi e tutela della proprietà intellettuale in Cina*, cit., 2008, 193 ff.

[13] On *indigenous innovation* see SIYUAN AN-PECK (2011), *China's Indigenous Innovation Policy in the Context of its WTO Obligations and Commitments*, in *Georgetown Journal of International Law*, 375 ff.; DIETER (2010), *Indigenous Innovation and Globalization – the Challenge for China's Standardization Strategy*, available at www.talkstandards.com/indigenous-innovation-and-globalization, last visit October 14, 2020; XIAOLAN FU-GONG YUNDAN, *Indig-*

2. *Towards Innovation: the Chinese National Intellectual Property Strategy*

China's entry into the WTO and the related actions supporting Chinese legal reforms in the field of intellectual property, open a new phase for China that is not linked simply to the implementation of the TRIPS obligations,[14] but which is part of a general rethinking of the strategic model of economic development.[15]

A fundamental watershed in this process is the drafting of the National Intellectual Property Strategy,[16] approved on June 5, 2008 which, for the first time, places intellectual property among the government's strategic priorities in support of a structural transformation of the logic of development, to move from a centrality of counterfeiting to a centrality of innovation. The elaboration of the National Intellectual Property Strategy takes place in the broader context of strategic planning concerning scientific and technological development outlined in the National Medium and Long-Term Plan for Scientific and Technological Development (MLP) developed in 2006 and intended to cover a lapse of time between 2006 and 2020.[17]

The National Intellectual Property Strategy is launched in order to con-

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enous and Foreign Innovation Efforts and Drivers of Technological Upgrading: Evidence from China, in *World Development*, vol. 39, 2011, 1213 ff.

[14] On this issue, see HOLBIG, ASH (eds.), *China's Accession to the World Trade Organisation*, London, 2002; MANDERIEUX, *The Emergence of China as a Key Intellectual Property Player: New Dynamic International Patenting Policies of Chinese Innovative Companies*, in TIMOTEO (ed.), *Sistema giuridico romanistico e diritto cinese. Regimi e tutela della proprietà intellettuale in Cina*, Roma, 2008, 193 ff.

[15] Within the context of the mentioned strategic rethinking, specific action plans have been drawn up within most of the Chinese provinces, that led to the issue of White Papers on intellectual property at the local level. See Wechsler, *Intellectual Property Law in the People's Republic of China: a Powerful Economic Tool for Innovation and Development*, in *China-EU Law Journal*, 2011, 37.

[16] *Notice of the State Council on Issuing the Outline of the National Intellectual Property Strategy* (*Guojia zhishi chanquan zhanlue gangyao*), in *Gazette of the State Council*, 2008, No. 17, 12-18. For a comment, see ZHANG LIGUO, *Recent IP Legal Reforms in China and the EU in Light of Implementing IPR Strategies*, in LEE, BRUUN, LI MINGDE (eds.), *Governance of Intellectual Property Rights in China and Europe*, Cheltenham-Northampton, 2016, 189 ff.; ZHANG ZHICHENG, *Roadmaps of China's National Intellectual Property Strategy Outline*, in KEN SHAO-XIAOQING FENG (eds.), *Innovation and Intellectual Property in China. Strategies, Contexts and Challenges*, Cheltenham-Northampton, 2014, 34.

[17] *Guojia zhong chang qi kexue he jishu fazhan guiha gangyao*, issued by the State Council on February 9, 2006 (http://www.gov.cn/jrzg/2006-02/09/content_183787.htm, last visit October 15, 2020). The MLP prepared by a working group chaired by Prime Minister Wen Jiabao and participated by the Ministry of Technology, the National Development and Reform Commission, the Ministry of Finance, the Ministry of Industry and Information Technology, officially presents for the first time the project of transition towards Chinese leadership in the field of knowledge and innovation.

tribute to the Government's objectives with the programmatic intent of "improving China's capacity to create, utilize, protect and administer intellectual property, making China an innovative country and attaining the goal of building a moderately prosperous society in all respects". [18] In the preface of the Strategy it is stated that China "is now experiencing a new historical beginning", marked by a "knowledge-based economy". Within this context, "intellectual property is becoming increasingly a strategic resource in the national development and a core element in international competitiveness".

Although the progress made towards the establishment and consolidation of a system of rules protecting intellectual property is recognized, it is nevertheless considered necessary, in particular in order to make China "an independent and innovative country", to promote further reforms in this area.

The Strategy was also promoted through awareness-raising campaigns aimed at both economic operators and ordinary citizens, with the aim of increasing the competitiveness of Chinese companies and that of the country in general in order to "encourage the society to be more creditworthy". [19]

3. *The Implementation of the National Intellectual Property Strategy and its Consequences on IPR Protection*

For the implementation of the strategy, an Inter-Ministerial Joint Meeting is set up involving around twenty ministerial-level officials headed by a commissioner of the State Intellectual Property Office [20] and by the deputy secretary general of the State Council. Enforcement is a central issue, as shown by the part named *Strategic Measures* of the strategy, identified with specific measures to be taken in this direction. Equally important is the question of the regulatory reform process of the core subjects in the field of intellectual property. The most significant impact took place on the leg-

[18] See *The National Intellectual Property Strategy*, Preface, § 2. The Strategy is divided in several sections: *Guiding Principles and Strategic Goals*, *Strategic Focuses*, *Specific Tasks* and *Strategic Measures* (where a particular attention is devoted to *enforcement*).

[19] See ZHANG QIN, *Reflections on China's National Intellectual Property Strategy*, in *Perspectives of Scientific and Technological Achievement*, n. 1, 2005, 4. Some scholars affirmed that the Strategy has been influenced by the British *Report on Integrating Intellectual Property Rights and Development Policy* issued in September 2002 by the *UK Commission on Intellectual Property Rights*. See ZHANG ZHICHENG, *Roadmaps of China's National Intellectual Property Strategy Outline*, cit., 2014, 39.

[20] Now renamed as China Intellectual Property Administration.

islative and regulatory framework of the IPR field. The first amendment, in order of time, carried out under the aegis of the provisions of the Strategy is the Anti-Monopoly Law, which came into force on August 1, 2008.

One of the objectives pursued most strongly by the Strategy is to find a balance between the various interests at stake. Thus, the new art. 55 of the Anti-Monopoly Law expressly states that the provisions of the law apply to those economic operators who try to limit market competition by abusing their intellectual property rights. [21]

Still in the direction of the balance between the various interests at stake, an amendment of the Measures for the Compulsory Licensing for Patent Implementation was approved in 2012 which allows the China Intellectual Property Administration to issue compulsory licenses to local companies in emergencies, abnormal circumstances or if it is necessary to do so in the interest of the community. This provision could significantly improve access to pharmaceutical products. [22]

Another important amendment issued under the aegis of the Strategy is the new Patent Law, approved in December 2008. Its new art. 1 states: "This Law is enacted for the purpose of protecting the lawful rights and interests of patentees, encouraging invention-creation, promoting the application of invention-creation, enhancing innovation capability, promoting the advancement of science and technology and the economic and social development". Although the meaning of the new article does not differ significantly from the previous versions, there are some changes regarding the choice of words in the last sentence. [23] In the new art. 1, the reference to Denghist modernizations disappears to make room for more general concepts of economic and social development, thus placing the emphasis on strengthening China's capacity to be an innovative country and not just an imitator. It would seem, therefore, that during the 24 years from the entry into force of the first Patent Law, China has adapted its system on the subject and "reached" the rest of the industrialized world and is now in the next phase of its development. [24] However, the art. 1 of 2008 shows

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[21] See art. 55 AML: "(…) Business operators' conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law".

[22] See ZHANG ZHICHENG, *Roadmaps of China's National Intellectual Property Strategy Outline*, cit., 2014, 44.

[23] In the version of the year 2000, art. 1 stated "This Law is enacted to protect patent rights for inventions-creations to encourage invention-creation to foster the spreading and application of inventions-creations and to promote the development and innovation of science and technology for meeting the needs of the construction of socialist modernization". While the original version of 1984 was the following: "This Law is formulated in order to protect patent rights for invention-creations, encourage invention-creations and facilitate their popularization and application, promote the development of science and technology and meet the needs of the socialist modernization".

[24] See STOIANOFF, *The Influence of WTO over China's Intellectual Property Regime*, in *Sydney Law Review*, vol. 34, 2012, 85.

more than anything else a greater harmonization to international obligations, adapting to the objectives of the TRIPS agreement, in particular those expressed in art. 7. [25]

Still in the area of patents, in 2010 was approved the National Patent Development Strategy, [26] with the stated objective of "(…) thoroughly implementing the Outline of the National Intellectual Property Strategy, enhancing China's capacity to create, utilize, protect and administer patent and providing vigorous support for accelerating transformation of economic development mode and promoting social and economic development". [27]

Structured in a similar way to the National Intellectual Property Strategy, the Patent Strategy focuses on the need to strike a balance between the internal conditions of China and international developments. It also stresses the favour for inventions and national market rules, the protection of individual as well as public interests. [28]

In the preface of the document it expressly stated that the current Chinese patent system still fails to meet the needs of national development. [29]

To address this need, the Chinese government has, implemented more decisively indigenous innovation policies as well as deepened international cooperation in intellectual property. [30]

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[25] Art. 7, TRIPS: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".

[26] It is a strategy approved by the State Intellectual Property Office that should cover the years 2011-2020 in the area of patents. For the English version see http://graphics8.nytimes.com/packages/pdf/business/SIPONatPatentDevStrategy.pdf. Last visit, October 15, 2020.

[27] *Ibidem*, Preample.

[28] *Ibidem*, part 4, paragraphs 4 ff. On this matter see SUTTMEIER-XIANGKUI YAO, *China's IP Transition: Rethinking Intellectual Property Rights in a Rising China*, cit., 2011, 11-12.

[29] In the Preface it is stated that "(…) The patent system has not become fully integrated with development of socialist market economy, and its role has not been brought into full play in guiding industrial restructuring and upgrading and promoting China's innovation capacity. The patent policies are not closely consistent with China's policies on economy, science and technology, and effective patent policy system to encourage and protect innovation has not been fully established. The market entities have inadequate number of core patents and their capacity to utilize patent is poor. The system and mechanism of patent administration need to be improved and law enforcement on patent protection need to be further enhanced as well. There is still a gap between the current situation of patent information dissemination and service and the demand for economic and technological development. The general public does not know much about the patent system and their patent awareness is weak. All these problems have largely restricted the role of the patent system in encouraging innovation and promoting economic development".

[30] Paragraph 12 of part IV of *National Patent Development Strategy* expressly mentions international cooperation for the implementation of a strategy on patent: "(…) Deepen international exchange and cooperation on patents. Consolidate and develop multi-lateral and

On May 15, 2020 the China National Intellectual Property Administration published the "Plan for Further Implementation of the National Intellectual Property Strategy to Accelerate the Construction of an Intellectual Property Power Country by 2020". The plan lists 100 points to accomplish the goal of becoming an "IP Power Country." Some of the highlights include eliminating subsidies or rewards for utility model, design and trademark applications; reduce examination time for trademark and patent applications; reduce "abnormal" patent application filings and malicious filing of trademarks; and ensure university promotion decisions aren't solely based on patent filings and grant rates.[31]

Moreover, on July 10, 2020 the same Administration has published a news highlighting that "the implementation of the national innovation strategies has facilitated the leapfrog development of China's technological innovation and promoted the transformation of Chinese innovation from the expansion of scale to quality improvement".[32]

The last policy document issued on these topic is the "Guidelines for Building a Powerful Intellectual Property Country (2021-2025)", issued by the CCP Central Committee and the State Council on September 22, 2021.[33]

As it has been pointed out, legal efforts are highlight of the plan. Lin Guanghai, president of Civil Adjudication Tribunal No. 3 (IPR Division) of the Supreme People's Court, said the court will firmly hold the concept that protecting IPR is protecting innovation. "We'll equally protect the legitimate rights of domestic and foreign market entities to build an open, fair, justified and unbiased environment for scientific and technological development", he said.[34]

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bi-lateral communication channels with major countries and regions (…)". Further, in next paragraph it is stated that: "Enhance comprehensive capacity to participate in international affairs concerning patents. Strengthen coordination in affairs related to overseas intellectual property, increase guidance on local intellectual property related to foreign affairs and improve communication and exchange mechanism on patent information related to foreign affairs. Strengthen research on global and strategic policies in the affairs related to overseas patents. In accordance with the development trend of international intellectual property regime, duly adjust international cooperation policies on patents. Promote development of high-end talents for international cooperation who are familiar with technology, laws, foreign language and market".

[31] See SCHWEGMAN, LUNDBERG, WOESSNER, China Releases the "Plan for Further Implementation of the National Intellectual Property Strategy to Accelerate the Construction of an Intellectual Property Power Country by 2020", in The National Law Review, 2021, vol X, n. 138.

[32] Source: https://english.cnipa.gov.cn/art/2020/7/10/art_1343_150299.html, last visit November 9, 2021.

[33] See the full text of the Guidelines at https://www.cnipa.gov.cn/art/2021/9/22/art_53_170293.html, last visit November 9, 2021.

[34] See XU GUOXIU, *China aims to boost its competitiveness in intellectual property rigths*, available at https://news.cgtn.com/news/2021-09-30/China-aims-to-boost-its-competitiveness-in-IPR-13Z4wjjKZ2M/index.html, last visit November 8, 2021.

4. *Chinese Indigenous Innovation Policies*

In undertaking the path of systematic regulation of intellectual property rights, by adapting to international standards, China has gone further and has pursued a purely "internal" goal: the promotion of what is commonly called "indigenous innovation". [35]

The mentioned strategy explicitly recognizes that the progress of a nation depends on innovation; the previous stage, based fundamentally on technology transfer from abroad, was necessary because it clarified the significant role that intellectual property rights play in the innovation process. No wonder, then, that one of the latest developments in the Chinese innovation strategy has given preference to products of so-called "self-innovation". This preference, also known as indigenous innovation (*zizhu chuangxin*), i.e. a series of investments and industrial policies addressed to strengthen the role of innovation in economic growth of China, was formally introduced in 2006 with the abovementioned National Strategic Plan for Science and Technology, [36] where in it clearly underlined how the lack of innovative capacity is seen as a weakness of the economic system and China is asked to become an innovative country (*chuangxing guojia*) by 2020. [37]

An essential first step towards the implementation of the indigenous innovation policies has been the increasing of government funding for research and development: the National Strategic Plan for Science and Technology, in fact, provides for an increase of the costs for this sector of 2.5% of the country's gross domestic product by 2020. [38] The goal has not

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[35] The expression was used for the first time in 2006 by President Hu Jintao during his speech for the presentation of the Medium and Long-Term Plan on Scientific and Technological Development and summarize the new approach of Chinese government for the promotion of local innovation.

[36] See STOIANOFF, *The Influence of WTO over China's Intellectual Property Regime*, in *Sydney Law Review*, vol. 34, 2012, 88.

[37] At § 1 of the Plan, "Guiding Principles" it is said: "(…) The guiding principles for our S&T undertakings over the next 15 years are: indigenous innovation, leapfrogging in priority fields, enabling development, and leading the future. Indigenous innovation refers to enhancing original innovation, integrated innovation, and re-innovation based on assimilation and absorption of imported technology, in order improve our national innovation capability". Furthermore, at § 2, "Development Goals", it is stated: "The general objectives for the nation's S&T development (2006-2020) will be to: noticeably enhance indigenous innovation capability and S&T level in promoting economic and social development and in maintaining national security, in an effort to provide powerful support for the building of a well-to-do society; noticeably improve comprehensive strength in basic research and frontier technology development; and attain a series of high world impact S&T achievements and join the ranks of innovative countries, thus paving the way for becoming a world S&T power by mid 21stcentury". See the English translation of the plan on http://www.most.gov.cn/eng/pressroom/200611/t20061106_37842.htm. Last vist October 13, 2020.

[38] *Ibidem*, "By 2020, the nation's gross expenditures on R&D (GERD) are expected to rise

been reached yet, however, in the two years following the entry into force of the Plan, the funds provided to this sector increased by 54%. [39]

This is already the sign of a change of course, but it is not the only one. The Government has also implemented a series of industrial policies to provide strategic advantages to national companies in order promote the growth and future development. Precisely these industrial policies are at the heart of what is known as "indigenous innovation". [40]

Furthermore, for the first time it is established a systematic policy of government actions aimed at supporting local enterprises, the core of which is represented by the preference in public contracts granted to a number of products classified as "indigenous innovation". [41] The rationale behind the implementation of this system moves from the assumption according to which, by guaranteeing to the abovementioned products a market, the profits of the companies that produce them will be risen and that can be reinvested in new research and development projects in order to increase the production of innovative products. [42]

The criteria initially used to assess whether a product had the necessary accreditation standards were established in the Notification Regarding the Trial Measures for the Administration of the Accreditation of National Indigenous Innovation Products, issued in 2006 by the Ministry of Science and Technology. To be classified as a product of indigenous innovation, the good in question must meet the following requirements: it must be produced by a company that possesses full ownership in the Chinese territory, also with regard to intellectual property rights, must be the bearer of a trademark registered in China and owned by a Chinese com-

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to 2.5% or above of the gross domestic product (GDP) with the rate of S&T contribution to the economy reaching 60% or above, and dependence on imported technology reduced to 30% or below, and the annual invention patents granted to Chinese nationals and the international citations of scientific papers moving into the top five countries".

[39] NATIONAL BUREAU OF STATISTICS, *China's Statistical Yearbook – 2009*, Beijing, 2009.

[40] See BOUMIL, *China's Indigenous Innovation Policies Under the TRIPS and DPA Agreements and Alternatives for Promoting Economic Growth*, in *Chicago Journal of International Law*, vol. 12, n. 2, 2012, 762 ff.; SUTTMEIER-XIANGKUI YAO, *China's IP Transition: Rethinking Intellectual Property Rights in a Rising China*, in *The National Bureau of Asian Research Special Report*, n. 29, 7, 2011.

[41] See O'BRIEN (2010), *China's indigenous Innovation. Origins, Components and Ramifications*, in *China Security*, 6 (3), 55.

[42] See BOUMIL (2012), *China's Indigenous Innovation Policies Under the TRIPS and DPA Agreements and Alternatives for Promoting Economic Growth*, cit., 764. To be classified as indigenous innovation, the product in question must meet all the following requirements (established in 2006 in the *Notification Regarding the Trial Measures for the Administration of the Accreditation of National Indigenous Innovation Products* and checked by the *China National Certification Administration*): it must be produced by a company that possesses full ownership throughout China, including in relation to intellectual property rights, it should be the bearer of a trademark registered in China and owned by a Chinese company, it must be highly innovative, it must be of high quality.

pany, must be highly innovative, must be of high quality. These parameters must all be verified and certified by the China National Certification Administration. Once the product is granted an innovative product status, it can benefit from a series of preferential treatments. [43]

Until 2009, following a typical pattern of Chinese reforms, indigenous innovation policies were mainly implemented at the local level, so although monitored by foreign governments, due to the unquestionable consequences on the global market, these policies had not aroused particular concern up until that time. In 2009, however, the actions for the implementation of measures in favour of indigenous innovation become more pressing, with the immediate consequence of turning on the attention of foreign governments. [44] In fact, in 2009 the Beijing Government announced the preparation of a national catalogue of indigenous innovation products. Considering the growth of the Chinese economy and the limitations of the market towards foreign products coming from the issue of catalogues, it is obvious that many foreign companies did not look favourably on these policies encouraging domestic products. Several American industrial sector representatives have publicly stated that indigenous innovation policies are an even worse threat to companies in China than intellectual property infringement. [45] Moreover, these policies remain a major issue in the US-China trade war.[46]

This concern has also been expressed in a series of controversies in the World Trade Organization due to the fact that indigenous innovation policies have violated Articles 3, 20 2 27 TRIPS. [47]

Following an agreement signed with the US, in 2011, the Ministry of Finance announced the revocation of three of the measures issued in favour of domestic products. First of all the Evaluation Measures on Indigenous Innovative Products for Government Procurement have been re-

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[43] See, for example, the *Selected Supporting Policies for the 2006-2020 Medium and Long-Term Science and Technology Development Plan* (*2006-2020*), issued by the State Council in February 2006, where it is expressly stated that a local product should be preferred in public auctions, if the price is lower or the same of the one of the concurring product.

[44] See BRADSHER (2001), *Pentagon Must Buy American – Barring Chinese Solar Panels*, in *New York Times*, January 9. http://www.nytimes.com/2011/01/10/business/global/10solar.html. Last visit October 20, 2020.

[45] See UNITED STATES INTERNATIONAL TRADE COMMISSION, *China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the US Economy*, Investigation No 332-514, 2010. V. STEWART (2010), *Evaluating China's Past and Future Role in the World Trade Organisation. Testimony Before the US-China Economic and Security Review*, June 9, on: http:// www.uscc.gov/hearings/2010hearings/transcripts/10-06_09_trans/stewart-testimony.pdf.

[46] See BAARK, *China's Indigenous Innovation Policies*, in *East AsianPolicy* 11 (2), 2019, 5-12.

[47] These disputes were settled in favor of China. For a complete reconstruction, see BOUMIL, *China's Indigenous Innovation Policies Under the TRIPS and GPA Agreements and Alternatives for Promoting Economic Growth*, cit., 2012, 768 ff.

pealed, which included preferential procedures for indigenous innovation products, as well as the Administrative Measures on Budgeting for Government Procurement of Indigenous Innovation Products, where the procedures for the financings granted preferentially to accredited products, and the Administrative Measures on Government Procurement Contracts for Indigenous Innovation Products, which encouraged government agencies to use procurement contracts to favour products of indigenous innovation, are also repealed.[48] It is clear that Chinese indigenous innovation policies have entered a new phase. What is not yet certain, however, is whether political declarations have translated into concrete actions especially at the local level, where the ultimate responsibility for implementing strategies lies.

5. *Outcome and prospects on EU-China Cooperation*

The effects of the indigenous innovation strategy are immediately visible in the statistics relating to the patents filed. In 2011 the Chinese State Intellectual Property Office approved the registration of a total of 172,113 patents, signalling an increase of 27% compared to 2010. Among these, 112,347 are patents attributed to local companies, which corresponds to 63% of the total number of registered patents.[49] According to the Global Innovation Index,[50] published in 2012 by the World Intellectual Property Organization, China's position in the world ranking has moved from n. 43 to 34 in two years and in 2014 is in 29th place. Although some scholars have pointed out that the promotion of strategies in favour of local innovations can actually weaken national companies that are no longer subjected to the pressure of competition, the above mentioned results show how Chinese companies have invested significantly in research and development, with remarkable concrete results.[51]

Within this context, the role of cooperation with Europe has been once more crucial. The legal cooperation project on IPR have been three and a fourth is ongoing.

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[48] See BOUMIL (2012), *ibidem*, 767.

[49] See the *China Report – Intellectual Property*, issued by State Intellectual Property Office, on March 7, 2012. On: http://english.sipo.gov.cn/.

[50] The complete Report can be found on: http://www.wipo.int/edocs/pubdocs/en/economics/gii/gii_2012.pdf.

[51] See BOUMIL, *China's Indigenous Innovation Policies Under the TRIPS and GPA Agreements and Alternatives for Promoting Economic Growth*, cit., 2012, 776 ff.; ERNST, *Global Production Networks and the Changing Geography of Innovation Systems: Implications for Developing Countries*, 2000, 26.

The first project of technical cooperation between the EU and China in the field of intellectual property has been established before the formal change of policy: it was launched in 1999 and was called *EU-China Intellectual Property Rights Cooperation Programme* (IPR1). The project represents a crucial step for the construction of a more structured system of relations and cooperation between China and the European Union and, on the European front, finds its basis in the Communication *Building a Comprehensive Partnership with China* of 1998. [52] The cooperation program intended to act for the purpose of supporting the process of adaptation of Chinese law to international standards of protection of intellectual property, marked by the TRIPS Agreement. The action was taken in view of the fact that the low level of Chinese enforcement of those standards could be resolved in serious injuries for the European companies engaged in trade relations with Chinese partners. The IPR1 program was, then, specifically targeted on the assistance to the Chinese government in the process of adjustment of the law system on intellectual property and had a specific focus on the subject of enforcement, both at the administrative and judicial level.

The IPR1 program was overall positively evaluated, especially since it was considered a flexible tool "to provide best European experts to support on-going initiatives, new subjects and needs expressed by Chinese partners", [53] as well as an opportunity to set up a relational network between Europe, China and international organizations. The program was also the starting point of a dialogue between the mentioned stakeholders for the provision of assistance to the legislative review in intellectual property matters. This activity was carried out in the context of the following program: the *EU-China Project for the Protection of Intellectual Property Rights in China*, better known as IPR2, officially launched on November 27, 2007. [54]

The IPR2 is qualified as a project of technical assistance and cooperation. Its overall final goal is the regulation of Chinese integration in the

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[52] On the communication, see AA.VV., *Successful Move for Closer Cooperation in the Protection of Intellectual Property Rights*, in *European Patent Network*, Monaco, 2003, 67 ff. In particular, whith this communication, Europe intended to act as a privileged partner of China in view of Chinese entrance and integration into the international trading system.

[53] EUROPEAN COMMISSION, EUROPEAID COOPERATION OFFICE (2006), Financing proposal n. CHN/AIDCO/2006/018-178, p. 2 available at https://ec.europa.eu/europeaid/projects/eu-china-project-on-the-protection-of-intellectual-property-rights_en, visited the last time on October 25, 2020.

[54] See IPR2, *Press Release*, November 26, 2007, available at https://ipkey.eu/en/china/ip-information?query=IPR2%20overall&refinementList%5Bproject%5D%5B0%5D=China, visited the last time on October 25, 2020. For further information on the administrative structure of the project, leaded by a team leader, Carlo Pandolfi of the *European Patent Office* (for the EU side) and by a project director, Qian Liyong (for Chinese side).

international trading system and the support of the transition of Chinese economy towards the global market. In view of these objectives, the project aims at contributing to the improvement of the legislative framework and procedures, at the administrative and judicial level, in the field of intellectual property. The project also aims at ensuring European companies over the construction of a minimum level of protection of intellectual property rights in China and at building a sustainable network involving Chinese and European economic entities, in the presence of a common denominator, namely the protection Intellectual property rights. The *Overall Work Plan* of the project is based on a watchword: "IPR enforcement". [55]

In the final report presented to the European Commission, the project was rated a success. To confirm this judgment, data on cases closed before the courts in a year, on the registration requests submitted by Chinese companies, on the abbreviation of some administrative procedures, as well as on the increase in the value of administrative fines granted are presented. The positive aspects of the project are not identified only in terms of quantity, but also quality. The analysis of Chinese case law has shown how the familiarity of the operators with the technical aspects related to the protection of intellectual property rights has significantly increased. [56] Furthermore, a grater transparency connected to the on-line publication of civil judgements on IPR has also been achieved.

On January 2014 a new cooperation project on IPR was launched, named "IP: A Key to Sustainable Competitiveness" (IPKEY). [57]

This project is framed in a different way than the previous one, since it is no longer a program of cooperation to development: it not based on an

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[55] See IPR2, *Overall Work Plan*, of August 5, 2008, available at https://ipkey.eu/en/china/ip-information?query=IPR2%20overall&refinementList%5Bproject%5D%5B0%5D=China, last visit October 16, 2020.

[56] On case law, in the last year of the project, a translation and comment work was sponsored by IPR2. This work ended with the publication of two volumes, one dedicated to the translation in Chinese language and comment of European leading cases on intellectual property and the other one dedicated to the translation in English language and comment of Chinese leading cases on intellectual property. The two volumes have the value to let the reader get in touch with the legal reasoning of the European and Chinese courts, to follow the argumentative paths and to frame operational rules expressed by the cases within the same reference system. Moreover, the interesting aspect of this work is the fact that Chinese and European scholars and judges, have shared setting and job processing on the respective parts. This permitted the starting of a dialogue that went beyond the simple exchange of data on legal solutions and that allowed a comparison of the different legal mentality, which, even in a hyper-technical matters such as the intellectual property, end up affecting the final form of the rules. See the two mentioned volumes: STRAUS-MEIER-BECK (eds.), *Leading Court Cases on European Intellectual Property*, Tongji IP Series, Beijing, 2011; ZHENG SHENGLI-TIMOTEO-GONG HONGBING (eds.), *Leading Court Cases on Chinese Intellectual Property*, Beijing, 2011.

[57] See the official web site of the project www.ipkey.org. Last visit, October 20, 2020.

assistance plan made by the EU toward China, but on an equal basis. IP-KEY is a platform for cooperation and acts as bridge between EU and Chinese agencies in order to create an IP landscape that benefits both Chinese and EU Industry operating in China. The development of the project is made trough cooperation on a number of activities including in-depth studies, peer to peer exchanges, development of databases and tools, seminars, workshops, training and high level events. [58]

Another important difference with the previous projects is that the Chinese government is not involved as a key actor. Indeed, IPKEY is "managed by the Beijing-based Technical Experts' Team who receives administrative and technical backstopping support from the IP Key Action Team at EU Intellectual Property Office's headquarters in Alicante, Spain. An EU-China Joint Platform, co-chaired by China's Ministry of Commerce (MOFCOM) and the EU Delegation to China, identifies and oversees implementation of mutual-interest activities under IP Key". [59]

The IPKEY project came to its conclusion in 2017.

At present the cooperation is managed under the IPKEY.EU platform, designed as the EU's financial vehicle for the cooperation on IPR.

The new program commenced in mid-2017, was designed to be set for 4 years and implemented EU Partnership Instrument (PI), a new financing instrument to support foreign policy-driven actions in the period 2014-2020.[60] The IP Key China was designed to enhance EU-China cooperation on selected emerging challenges in the area of Intellectual Property, with particular attention to opportunities arising from China's own policy choices and market access. The overall objective was to "promote a more level playing field for EU companies operating in China by contributing to greater transparency and fairer implementation of the IPR protection and enforcement system in the country".[61] Although the main purpose of the action was the EU interest, Chinese stakeholders and the public at large could also benefit from the alignment of the EU-China IP Environment.

In the final evaluation report, IPKEY-China was considered a successful program, offering added value to the EU as a global player.[62]

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[58] See the web site http://www.ipkey.org/en/about-ip-key. Last visit, October 20, 2020.

[59] *Ibidem*.

[60] The new program was structured as a comprehensive dialogue and a platform that included actions not only within the Chinese context but also Latin America, and South East Asia.

[61] See the Final Evaluation Report of the program, implemented for the European Commission by ECORYS Trade Group: *Evaluation of the IP Keys in China, Latin America and South East*, available at https://ec.europa.eu/fpi/system/files/2021-05/final_report_-_ip_keys_public.pdf, last visit November 8, 2021, p. 10.

[62] *Ibidem*, p. 24.

All the described programs are framed in the context of an EU-China Intellectual Property Dialogue and represent the implementation of art. 67 of the TRIPS Agreement, relating to technical assistance to developing countries. From the comparative law point of view, the activities of international cooperation represent an interesting point of view to follow the evolutionary lines of action and dynamics of many processes of reform and modernization of non-Western legal systems. Indeed, we can see how in the IPR2 cooperation project has grown considerably the awareness of the modalities and effects of the assistance provided to legal reforms in the framework of cooperation projects. [63]

A deeper knowledge of local contexts, of inter-cultural and inter-linguistic issues, of the multi-layer dimension of legal systems, of the means of transfer of legal models, are essential factors for greater effectiveness of the processes of assistance to legal reforms. This awareness is even more crucial in the field of intellectual property rights, where the building of an efficient global legal order is a common goal.

[63] See SEMPI (2017), *A Pendulum Swinging Between Conflict and Dialogue: Eu-China Relations in Intellectual Property When the 'IP Key' Project Is Coming to an End*, in *Dir. Comm. Int.*, 2, 409 ff.

AN OVERVIEW OF THE BEPS PROJECT AND THE EU FISCAL STATE AIDS BETWEEN THE PAST AND THE FUTURE

Giuseppe Corasaniti [1]

I. *Background*

According to the OECD, [2] BEPS refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity or to erode tax bases through deductible payments such as interest or royalties.

Although some of the schemes used are illegal, most are not.

This undermines the fairness and integrity of tax systems because businesses that operate across borders can use BEPS to gain a competitive advantage over enterprises that operate at a domestic level. Moreover, when taxpayers see multinational corporations legally avoiding income tax, it undermines voluntary compliance by all taxpayers.

The international tax landscape has changed dramatically in recent years.

With political support of G20 Leaders, the international community has taken joint action to increase transparency and exchange of infor-

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[2] Background brief – inclusive framework on BEPS, OECD, 2017, https://www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf.

mation in tax matters, and to address weaknesses of the international tax system that create opportunities for BEPS.

The internationally agreed standards of transparency and exchange of information in the tax area have put an end to the era of bank secrecy.

With over 130 countries and jurisdictions currently participating, the Global Forum on Transparency and Exchange of Information for Tax Purposes has ensured consistent and effective implementation of international transparency standards since its establishment in 2009.

At the same time, the financial crisis and aggressive tax planning by multinational enterprises (MNEs) have put BEPS high on the political agenda.

With a conservatively estimated annual revenue loss of USD 100 to 240 billion, the stakes are high for governments around the world.

The impact of BEPS on developing countries, as a percentage of tax revenues, is estimated to be even higher than in developed countries.

II. *Development of a comprehensive BEPS Action Plan*

In September 2013, the G20 Leaders endorsed the ambitious and comprehensive BEPS Action Plan, developed with OECD members.

On the basis of this Action Plan, the OECD and G20 countries developed and agreed, on an equal footing, upon a comprehensive package of measures in just two years.

These measures were designed to be implemented domestically and through tax treaty provisions in a coordinated manner, supported by targeted monitoring and strengthened transparency.

1. *The BEPS package*

The BEPS package consists of reports on 15 actions, and sets out a variety of measures ranging from new minimum standards, the revision of existing standards, as well as common approaches which will facilitate the convergence of national practices, and guidance drawing on best practices. [3]

In particular, four minimum standards were agreed, to tackle issues in cases where no action by some countries or jurisdictions would have created negative spill overs (including adverse impacts of competitiveness) on others.

Their consistent implementation will allow countries to protect their taxable base.

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[3] See A. VIOTTO (a cura di), *Overview del progetto OCSE in materia di Base Erosion and Profit Shifting (BEPS)*, Pacini, Milano, 2019.

Existing standards have also been updated and will be implemented, noting however that not all countries that have participated in the BEPS Project have endorsed the underlying standards on tax treaties or transfer pricing.

In other areas, such as recommendations on hybrid mismatch arrangements and best practices on interest deductibility, countries and jurisdictions have agreed a general tax policy direction. In these areas, domestic rules are expected to converge through the implementation of the agreed common approaches, thereby still enabling further consideration of whether such measures should become minimum standards.

Guidance based on best practices will also support governments intending to act in the areas of mandatory disclosure initiatives or controlled foreign company (CFC) legislation.

2. *Implementation of the BEPS package through joint action*

The BEPS package was agreed and delivered by OECD members and by G20 economies,[4] and subsequently endorsed by the G20 Leaders Summit in Antalya on 15-16 November 2015.

Effective and consistent implementation of the BEPS package requires an inclusive implementation process.

First, the implementation of the BEPS package into different tax systems should not result in conflicts between domestic systems.

Furthermore, the interpretation of the new standards should not lead to increased disputes.

Finally, it is necessary to ensure a level playing field among countries and jurisdictions in the fight against tax avoidance.

Jurisdictions identified as relevant to the work of the Global Forum on Transparency and Information Exchange for Tax Purposes (Global Forum) have already been subject to monitoring and peer review of the implementation of the Global Forum's standards on transparency and the exchange of information for tax purposes.

A similar process is being developed for the implementation of the BEPS package.

Inclusiveness also means that the implementation process is open to interested countries and jurisdictions.

Therefore, the G20 Leaders called in their Communique from Novem-

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[4] For an evolutionary analysis of the BEPS project see HERNÁNDEZ GONZÁLEZ-BARREDA, P.A., *A historical analysis of the BEPS Action Plan : old acquaintances, new friends and the need for a new approach*, in *Intertax,* Alphen aan den Rijn, Vol. 46 (2018), no. 4, 278-295; DANON, R.J., *Base erosion and profit shifting (BEPS): impact for European and international tax policy*, Zürich : Schulthess, 2016; RUSSO, R., *Inside observations on the BEPS project*, in *International tax review*, Vol. 26, London, 2015, no. 10 (December 2015/January 2016), 20-23.

ber 2015 on the OECD to develop a framework which is open to all interested countries and jurisdictions, including developing countries: "*… We, therefore, strongly urge the timely implementation of the project and encourage all countries and jurisdictions, including developing ones, to participate. To monitor the implementation of the BEPS project globally, we call on the OECD to develop an inclusive framework by early 2016 with the involvement of interested non-G20 countries and jurisdictions which commit to implement the BEPS project, including developing economies, on an equal footing*".

3. *Establishment of the Inclusive Framework on BEPS*

In response to the mentioned call of the G20 Leaders, the OECD members and G20 countries have developed an Inclusive Framework which allows interested countries and jurisdictions to work with OECD and G20 members on developing standards on BEPS related issues, and to review and monitor the implementation of the whole BEPS package.

To join the framework countries and jurisdictions are required to commit to the comprehensive BEPS package and its consistent implementation and to pay an annual BEPS Member fee (reduced when applied to developing countries).

However, it is recognised that interested developing countries' timing of implementation may differ from that of other countries and jurisdictions, and that their circumstances should be appropriately addressed in the framework.

With a strong political support, the Inclusive Framework is now in place.

The first meeting of the Inclusive Framework on BEPS was held on 30 June-1 July 2016 in Kyoto, Japan, and the second one on 26-27 January 2017 in Paris, France.

To date, 81 countries and jurisdictions have joined the Inclusive Framework with the existing group of 46 countries (including OECD, OECD accession and G20 members), making the total number of countries and jurisdictions participating 129.

4. *BEPS implementation at a national level*

As foreseen in the BEPS package, more than 100 jurisdictions have negotiated the Multilateral Instrument (MLI), to swiftly incorporate tax treaty-related BEPS measures. [5]

[5] OECD (Organisation for Economic Co-operation and Development). 2014. "*Developing a Multilateral Instrument to Modify Bilateral Tax Treaties*". Paris: OECD Publishing; OECD (Organisation for Economic Co-operation and Development). 2016. "*Explanatory Statement*

In November 2016, the participants finalized the main text on the MLI and the accompanying Explanatory Statement.

The MLI is now open for signature by any interested country. The MLI allows Members of the Inclusive Framework to meet the BEPS minimum standards in an efficient manner by putting an end to treaty shopping (Action 6) and improving the resolution of treaty-related disputes (Action 14). The MLI also implements other treaty-related BEPS measures and contains an optional provision on mandatory binding arbitrage. Given the broad participation of countries, more than 3,000 bilateral treaties can be amended when the countries involved sign the MLI.

III. *The objectives of the Project*

Organized around three pillars, the objectives of the Project were to:

(i) reinforce the coherence of corporate income tax rules at the international level,
(ii) realign taxation with the substance of the economic activities, and
(iii) improve transparency.

As a result of an ambitious work program that was completed in only two years, the BEPS package of 15 measures was delivered in October 2015.

Action 1: Addressing the Tax Challenges of the Digital Economy

Action 1 of the base erosion and profit shifting (BEPS) Action Plan deals with the tax challenges of the Digital Economy. [6]

The digital economy [7] is the result of a transformative process brought

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to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting". Paris: OECD Publishing; OECD (Organisation for Economic Co-operation and Development). 2017a. *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profits Shifting. Status as of 20 December 2017*. http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf accessed 22 January 2018; OECD (Organisation for Economic Co-operation and Development). 2017b. *Toolkit for Application of the Multilateral Instrument for BEPS Tax Treaty Related Measures Legal Note on the Functioning of the MLI under Public International Law*. http://www.oecd.org/tax/treaties/application-toolkit-multilateral-instrument-for-beps-tax-treaty measures.htm accessed 29 September 2017; OECD (Organisation for Economic Co-operation and Development). 2017d. *Frequently Asked Questions on the Multilateral Instrument (MLI)*. https://www.oecd.org/tax/treaties/MLI-frequently-asked-questions.pdfaccessed 29 September 2017.

[6] See L. VENDRAME, *Action 1: addressing the tax challenges of the digital economy*, in *Overview del progetto OCSE in material di BEPS* (a cura di A. VIOTTO), Pacini, Milano, 2019, 9 ss.

[7] OECD (2015), *Addressing the Tax Challenges of the Digital Economy*, Action 1 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris; OECD (2018), *Tax Challenges Arising from Digitalisation – Interim Report 2018*, Inclusive

by information and communication technology (ICT), which has made technologies cheaper, more powerful, and widely standardized, improving business processes and bolstering innovation across all sectors of the economy.

Because the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy for tax purposes.

The digital economy and its business models present however some key features which are potentially relevant from a tax perspective. These features include mobility, reliance on data, network effects, the spread of multi-sided business models, a tendency toward monopoly or oligopoly and volatility.

The types of business models include several varieties of e-commerce, app stores, online advertising, cloud computing, participative networked platforms, high speed trading, and online payment services. The digital economy has also accelerated and changed the spread of global value chains in which MNEs integrate their worldwide operations.

While the digital economy and its business models do not generate unique BEPS issues, some of its key features exacerbate BEPS risks. These BEPS risks were identified and the work on the relevant actions of the BEPS Project was informed by these findings and took these issues into account to ensure that the proposed solutions fully address BEPS in the digital economy.

Accordingly to this, it was agreed to modify the list of exceptions to the definition of PE to ensure that each of the exceptions included therein is restricted to activities that are otherwise of a "preparatory or auxiliary" character, and to introduce a new antifragmentation rule to ensure that it is not possible to benefit from these exceptions through the fragmentation of business activities among closely related enterprises.

It was also agreed to modify the definition of PE to address circumstances in which artificial arrangements relating to the sales of goods or services of one company in a multinational group effectively result in the conclusion of contracts, such that the sales should be treated as if they had been made by that company.

The revised transfer pricing guidance makes it clear that legal ownership alone does not necessarily generate a right to all (or indeed any) of the return that is generated by the exploitation of the intangible, but that the group companies performing the important functions, contributing

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Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris; OECD (2019), *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, www.oecd.org/tax/beps/programme-of-work-to-develop-aconsensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.html.

the important assets and controlling economically significant risks, as determined through the accurate delineation of the actual transaction, will be entitled to an appropriate return.

The digital economy also raises broader tax challenges for policy makers. These challenges relate in particular to nexus, data, and characterization for direct tax purposes, which often overlap with each other. The digital economy also creates challenges for value added tax (VAT) collection, particularly where goods, services and intangibles are acquired by private consumers from suppliers abroad.

Action 2: Neutralising the Effects of Hybrid Mismatch Arrangements

Hybrid mismatch arrangements exploit differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions to achieve double non-taxation, including long-term deferral. [8] These types of arrangements are widespread and result in a substantial erosion of the taxable bases of the countries concerned. They have an overall negative impact on competition, efficiency, transparency and fairness.

With a view to increasing the coherence of corporate income taxation at the international level, the OECD/G20 BEPS Project called for recommendations regarding the design of domestic rules and the development of model treaty provisions that would neutralise the tax effects of hybrid mismatch arrangements. [9] This report sets out those recommendations: Part I contains recommendations for changes to domestic law and Part II sets out recommended changes to the OECD Model Tax Convention.

This report supersedes the interim report "Neutralising the Effect of Hybrid Mismatch Arrangements (OECD, 2014)" that was released as part of the first set of BEPS deliverables in September 2014.

Compared to that report, the recommendations in Part I have been supplemented with further guidance and practical examples to explain the operation of the rules in further detail. Further work has also been undertaken on asset transfer transactions (such as stock-lending and repo transactions), imported hybrid mismatches, and the treatment of a payment that is included as income under a controlled foreign company (CFC) regime.

Part I of the report sets out recommendations for rules to address mismatches in tax outcomes where they arise in respect of payments made under a hybrid financial instrument or payments made to or by a hybrid entity. It also recommends rules to address indirect mismatches

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[8] See F. GIACOMAZZI, *Action 2: Neutralising the effects of hybrid mismatch arrangements*, in *Overview del progetto OCSE in material di BEPS* (a cura di A. VIOTTO), cit., 25 ss.

[9] OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements – Action 2: 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2015), International Organizations' Documentation IBFD.

that arise when the effects of a hybrid mismatch arrangement are imported into a third jurisdiction.

The recommended primary rule is that countries deny the taxpayer's deduction for a payment to the extent that it is not included in the taxable income of the recipient in the counterparty jurisdiction or it is also deductible in the counterparty jurisdiction. If the primary rule is not applied, then the counterparty jurisdiction can generally apply a defensive rule, requiring the deductible payment to be included in income or denying the duplicate deduction depending on the nature of the mismatch.

Part II addresses the part of Action 2 aimed at ensuring that hybrid instruments and entities, as well as dual resident entities, are not used to obtain unduly the benefits of tax treaties and that tax treaties do not prevent the application of the changes to domestic law recommended in Part I.

Part II first examines the issue of dual resident entities, i.e. entities that are residents of two States for tax purposes. It notes that the work on Action 6 addresses some of the BEPS concerns related to the issue of dual resident entities by providing that cases of dual residence under a tax treaty would be solved on a case-by-case basis rather than on the basis of the current rule based on the place of effective management of entities.

Part II also deals with the application of tax treaties to hybrid entities, i.e. entities that are not treated as taxpayers by either or both States that have entered into a tax treaty (such as partnerships in many countries). The report proposes to include in the OECD Model Tax Convention (OECD, 2010) a new provision and detailed Commentary that will ensure that benefits of tax treaties are granted in appropriate cases to the income of these entities but also that these benefits are not granted where neither State treats, under its domestic law, the income of such an entity as the income of one of its residents.

Finally, Part II addresses potential treaty issues that could arise from the recommendations in Part I. It first examines treaty issues related to rules that would result in the denial of a deduction or would require the inclusion of a payment in ordinary income and concludes that tax treaties would generally not prevent the application of these rules. It then examines the impact of the recommendations of Part I with respect to tax treaty rules related to the elimination of double taxation and notes that problems could arise in the case of bilateral tax treaties that provide for the application of the exemption method with respect to dividends received from foreign companies.

Action 3: Designing Effective Controlled Foreign Company Rules

Controlled foreign company (CFC) rules respond to the risk that taxpayers with a controlling interest in a foreign subsidiary can strip the base

of their country of residence and, in some cases, other countries by shifting income into a CFC. [10]

Without such rules, CFCs provide opportunities for profit shifting and long-term deferral of taxation.

Since the first CFC rules were enacted in 1962, an increasing number of jurisdictions have implemented these rules.

Currently, 30 of the countries participating in the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project have CFC rules, and many others have expressed interest in implementing them. However, existing CFC rules have often not kept pace with changes in the international business environment, and many of them have design features that do not tackle BEPS effectively.

In response to the challenges faced by existing CFC rules, the Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013) called for the development of recommendations regarding the design of CFC rules. This is an area where the OECD has not done significant work in the past, and this report recognizes that by working together countries can address concerns about competitiveness and level the playing field.

The report [11] sets out recommendations in the form of building blocks.

These recommendations are not minimum standards, but they are designed to ensure that jurisdictions that choose to implement them will have rules that effectively prevent taxpayers from shifting income into foreign subsidiaries.

Action 4: Limiting Base Erosion Involving Interest Deductions and Other Financial Payments

Action 4 of the Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013) called for recommendations regarding best practices in the design of rules to prevent base erosion through the use of interest expense. [12]

The recommended approach [13] is based on a fixed ratio rule which lim-

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[10] See M. BIASOTTO, *Action 3: Designing effective controlled foreign company rules*, in *Overview del progetto OCSE in material di BEPS* (a cura di A. VIOTTO), cit., 49 ss.

[11] OECD (2015), *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241152-en.

[12] See F. CAVALLINO, *Action 4: Base erosion involving interest deductions and other financial payments*, in *Overview del progetto OCSE in material di BEPS* (a cura di A. VIOTTO), cit., 67 ss.

[13] OECD (2015), *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241176-en; OECD (2016), *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 – 2016 Update: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264268333-en.

its an entity's net deductions for interest and payments economically equivalent to interest to a percentage of its earnings before interest, taxes, depreciation and amortization (EBITDA). As a minimum this should apply to entities in multinational groups. To ensure that countries apply a fixed ratio that is low enough to tackle BEPS, while recognizing that not all countries are in the same position, the recommended approach includes a corridor of possible ratios of between 10% and 30%.

Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance

The BEPS project [14] envisages a restructuring of work on harmful tax practices, increasing transparency and highlighting the substance of the operations, as well as using shared methodologies in setting minimum standards to be met in order to benefit from preferential schemes. [15]

To this end, a mandatory exchange of information between countries on decisions concerning existing preferential schemes and related procedures is envisaged.

Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

Action 6 [16] of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project identifies treaty abuse, and in particular treaty shopping, as one of the most important sources of BEPS concerns. [17]

Taxpayers engaged in treaty shopping and other treaty abuse strategies undermine tax sovereignty by claiming treaty benefits in situations where these benefits were not intended to be granted, thereby depriving countries of tax revenues.

Countries have therefore agreed to include anti-abuse provisions in

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[14] OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241190-en.

[15] See A. VISENTIN, *Action 5: Countering harmuful tax practices more effectively, taking into account transparency and substance*, in *Overview del progetto OCSE in material di BEPS* (a cura di A. VIOTTO), cit., 85 ss.

[16] OECD (2015), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241695-en.; OECD (2017), *BEPS action 6 on preventing the granting of treaty benefits in inappropriate circumstances: peer review documents*, http://www.oecd.org/tax/beps/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf; OECD (2019), *Prevention of Treaty Abuse – Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris, https://doi.org/10.1787/9789264312388-en.

[17] See F. LORCET, *Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, in *Overview del progetto OCSE in material di BEPS* (a cura di A. VIOTTO), cit., 105 ss.

their tax treaties, including a minimum standard to counter treaty shopping. They also agree that some flexibility in the implementation of the minimum standard is required as these provisions need to be adapted to each country's specificities and to the circumstances of the negotiation of bilateral conventions.

These new treaty anti-abuse rules first address treaty shopping, which involves strategies through which a person who is not a resident of a State attempts to obtain benefits that a tax treaty concluded by that State grants to residents of that State, for example by establishing a letterbox company in that State.

Action 7: Preventing the Artificial Avoidance of Permanent Establishment Status

Tax treaties generally provide that the business profits of a foreign enterprise are taxable in a State only to the extent that the enterprise has in that State a permanent establishment (PE) to which the profits are attributable. The definition of PE included in tax treaties is therefore crucial in determining whether a non-resident enterprise must pay income tax in another State. [18]

The Action Plan [19] on Base Erosion and Profit Shifting called for a review of that definition to prevent the use of certain common tax avoidance strategies that are currently used to circumvent the existing PE definition, such as arrangements through which taxpayers replace subsidiaries that traditionally acted as distributors by commissioner arrangements, with a resulting shift of profits out of the country where the sales took place without a substantive change in the functions performed in that country.

Changes to the PE definition are also necessary to prevent the exploitation of the specific exceptions to the PE definition currently provided for by Art. 5(4) of the OECD Model Tax Convention (2014), an issue which is particularly relevant in the digital economy.

Actions 8-10: Aligning Transfer Pricing Outcomes with Value Creation

As the Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013) identified, the existing international standards for transfer pricing rules can be misapplied so that they result in outcomes in

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[18] See M. FIORESE, *Action 7: Preventing the Artificial Avoidance of Permanent Establishment Status*, in *Overview del progetto OCSE in material di BEPS* (a cura di A. VIOTTO), cit., 121 ss.

[19] OECD (2015), *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241220-en.; OECD (2018), *Additional Guidance on the Attribution of Profits to Permanent Establishments, BEPS Action 7*, www.oecd.org/tax/beps/additional-guidance-attribution-of-profits-to-a-permanent-establishment-under bepsaction7.html.

which the allocation of profits is not aligned with the economic activity that produced the profits. The work under Actions 8- 10 of the BEPS Action Plan [20] has targeted this issue, to ensure that transfer pricing outcomes are aligned with value creation. [21]

The work on transfer pricing under the BEPS Action Plan has focused on three key areas.

Work under Action 8 looked at transfer pricing issues relating to transactions involving intangibles, since misallocation of the profits generated by valuable intangibles has contributed to base erosion and profit shifting.

Work under Action 9 considered the contractual allocation of risks, and the resulting allocation of profits to those risks, which may not correspond with the activities actually carried out. Work under Action 9 also addressed the level of returns to funding provided by a capital-rich MNE group member, where those returns do not correspond to the level of activity undertaken by the funding company.

Work under Action 10 focused on other high-risk areas, including the scope for addressing profit allocations resulting from transactions which are not commercially rational for the individual enterprises concerned (recharacterisation), the scope for targeting the use of transfer pricing methods in a way which results in diverting profits from the most economically important activities of the MNE group, and neutralising the use of certain types of payments between members of the MNE group (such as management fees and head office expenses) to erode the tax base in the absence of alignment with value creation.

Action 11: Measuring and Monitoring BEPS

Six indicators of BEPS activity highlight BEPS behaviours using different sources of data, employing different metrics, and examining different BEPS channels. [22] When combined and presented as a dashboard of indicators, they confirm the existence of BEPS, and its continued increase in scale in recent years. [23]

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[20] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 – – 2015 Final Reports*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241244-en.; OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris, https://doi.org/10.1787/tpg-2017-en.

[21] See M. ZAGO, *Actions 8-10: Aligning Transfer Pricing Outcomes with Value Creation*, in *Overview del progetto OCSE in material di BEPS* (a cura di A. VIOTTO), cit., 137 ss.

[22] See M. FIORESE-B. PERUZZA, *Action 11: Measuring and Monitoring BEPS*, in *Overview del progetto OCSE in material di BEPS* (a cura di A. VIOTTO), cit., 155 ss.

[23] OECD (2015), *Measuring and Monitoring BEPS, Action 11 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241343-en.

➢ The profit rates of MNE affiliates located in lower-tax countries are higher than their group's average worldwide profit rate.

➢ The effective tax rates paid by large MNE entities are estimated to be 4 to 8½ percentage points lower than similar enterprises with domestic-only operations, tilting the playing-field against local businesses and non-tax aggressive MNEs, although some of this may be due to MNEs' greater utilization of available country tax preferences.

➢ Foreign direct investment (FDI) is increasingly concentrated. FDI in countries with net FDI to GDP ratios of more than 200% increased from 38 times higher than all other countries in 2005 to 99 times higher in 2012.

➢ The separation of taxable profits from the location of the value creating activity is particularly clear with respect to intangible assets, and the phenomenon has grown rapidly.

➢ Debt from both related and third-parties is more concentrated in MNE affiliates in higher statutory tax-rate countries.

Along with new empirical analysis of the fiscal and economic effects of BEPS and hundreds of existing empirical studies that find the existence of profit shifting through transfer mispricing, strategic location of intangibles and debt, as well as treaty abuse, these BEPS indicators confirm that profit shifting is occurring, is significant in scale and likely to be increasing, and creates adverse economic distortions.

Action 12: Mandatory Disclosure Rules

The lack of timely, comprehensive and relevant information on aggressive tax planning strategies is one of the main challenges faced by tax authorities worldwide.[24] Early access to such information provides the opportunity to quickly respond to tax risks through informed risk assessment, audits, or changes to legislation or regulations. Action 12 of the Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013) recognized the benefits of tools designed to increase the information flow on tax risks to tax administrations and tax policy makers.[25] It therefore called for recommendations regarding the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures taking into consideration the administrative costs for tax administrations and businesses and drawing on experiences of the increasing number of countries that have such rules.

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[24] OECD (2015), *Mandatory Disclosure Rules, Action 12 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241442-en.; OECD (2018), *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures*, OECD, Paris. www.oecd.org/tax/exchange-of-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshorestructures.pdf.

[25] See F. CONTESSOTTO, *Action 12: Mandatory Disclosure Rules*, in *Overview del progetto OCSE in material di BEPS* (a cura di A. VIOTTO), cit., 181 ss.

This Report provides a modular framework that enables countries without mandatory disclosure rules to design a regime that fits their need to obtain early information on potentially aggressive or abusive tax planning schemes and their users.

The recommendations in this Report do not represent a minimum standard and countries are free to choose whether or not to introduce mandatory disclosure regimes. Where a country wishes to adopt mandatory disclosure rules, the recommendations provide the necessary flexibility to balance a country's need for better and more timely information with the compliance burdens for taxpayers. The Report also sets out specific recommendations for rules targeting international tax schemes, as well as for the development and implementation of more effective information exchange and cooperation between tax administrations.

Action 13: Transfer Pricing Documentation and Country-by-Country Reporting

This report contains revised standards for transfer pricing documentation and a template for Country-by-Country Reporting of income, taxes paid and certain measures of economic activity. [26]

Action 13 [27] of the Action Plan on Base Erosion and Profit Shifting requires the development of "rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNEs provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template".

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[26] See M. ZAGO, *Action 13: Transfer Pricing Documentation and Country-by-Country Reporting*, in *Overview del progetto OCSE in material di BEPS* (a cura di A. VIOTTO), cit., 193 ss.

[27] OECD (2015), *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241480-en.; OECD (2017), *BEPS Action 13 on Country-by-Country Reporting – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, http://www.oecd.org/tax/beps/beps-action-13-on-country-by-country-reporting-peer-review-documents.pdf.; OECD (2017), OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris, https://doi.org/10.1787/tpg-2017-en.

needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template".

Action 14: Making Dispute Resolution Mechanisms More Effective

Eliminating opportunities for cross-border tax avoidance and evasion and the effective and efficient prevention of double taxation are critical to building an international tax system that supports economic growth and a resilient global economy. [28]

Countries agree that the introduction of the measures developed to address base erosion and profit shifting pursuant to the Action Plan on Base Erosion and Profit Shifting should not lead to unnecessary uncertainty for compliant taxpayers and to unintended double taxation. Improving dispute resolution mechanisms is therefore an integral component of the work on BEPS issues.

The measures developed under Action 14 [29] of the BEPS Action Plan aim to strengthen the effectiveness and efficiency of the MAP process. They aim to minimise the risks of uncertainty and unintended double taxation by ensuring the consistent and proper implementation of tax treaties, including the effective and timely resolution of disputes regarding their interpretation or application through the mutual agreement procedure. These measures are underpinned by a strong political commitment to the effective and timely resolution of disputes through the mutual agreement procedure and to further progress to rapidly resolve disputes.

Eliminating opportunities for cross-border tax avoidance and evasion and the effective and efficient prevention of double taxation are critical to building an international tax system that supports economic growth and a resilient global economy.

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The measures developed under Action 14 of the BEPS Action Plan aim to strengthen the effectiveness and efficiency of the MAP process. They aim to minimize the risks of uncertainty and unintended double taxation

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[28] See S. BRUNELLO, *Action 14: Making Dispute Resolution Mechanisms More Effective*, in *Overview del progetto OCSE in material di BEPS* (a cura di A. VIOTTO), cit., 205 ss.

[29] OECD (2015), *Measuring and Monitoring BEPS, Action 11 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing*, Paris. http://dx.doi.org/10.1787/9789264241343-en; OECD (2016), *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris. www.oecd.org/tax/beps/bepsaction-14-on-more-effective-dispute-resolution-mechanisms-peer-review-documents.pdf.

by ensuring the consistent and proper implementation of tax treaties, including the effective and timely resolution of disputes regarding their interpretation or application through the mutual agreement procedure. These measures are underpinned by a strong political commitment to the effective and timely resolution of disputes through the mutual agreement procedure and to further progress to rapidly resolve disputes.

OECD BEPS MEASURES AND RELATED EU ACTION [30]

	OECD BEPS	EU ACTION
Action 1: **Digital Economy**	The digital economy is the whole economy and ring fenced solutions are not appropriate. OECD BEPS actions in general should address risks posed by digital economy.	The EU agrees that no special action needed but will monitor the situation to see if general anti-avoidance measures are enough to address digital risks.
Action 2: **Hybrid Arrangements**	Specific recommendations to link the tax treatment of an instrument or entity in one country with the tax treatment in another, to prevent mismatches.	The Anti Tax Avoidance (ATA) Directive includes a provision to address hybrid mismatches.
Action 3: **Controlled Foreign Companies (CFCs)**	Best practice recommendations for implementing CFC rules.	The ATA Directive includes CFC rules.
Action 4: **Interest Limitation**	Best practice recommendations on limiting a company's or group's net interest deductions.	The ATA Directive includes provisions to limit interest deductions, within the EU and externally.
Action 5: **Harmful Tax Practices**	Tax rulings: Mandatory spontaneous exchange of relevant information. Patent Boxes: Agreement on "Nexus Approach" to link tax benefits from preferential regimes for IP to the underlying economic activity.	Tax rulings: Mandatory automatic exchange of information on all cross-border rulings from 2017. Patent Boxes: Member States agreed to ensure that their Patent Boxes are in line with the nexus approach (Code of Conduct Group, 2014).
Action 6: **Treaty Abuse**	Anti-abuse provisions, including a minimum standard against treaty shopping, to be included in tax treaties.	The Recommendation on Tax Treaties suggests that Member States introduce a general anti-abuse rule in their treaties in an EU-compliant way.

[30] See P. PISTONE-D. WEBER, *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study*, IBFD, Amsterdam, 2018, available at www.ibfd.org.

Action 7: **Permanent Establishment**	Definition of Permanent Establishment (PE) is adapted in Model Tax Convention, to prevent companies from artificially avoiding having a taxable presence.	ATA Recommendation encourages MSs to use the amended OECD approach for Permanent Establishment.
Actions 8 -10: **Transfer Pricing Intangibles** **Risk and Capital High Risk Transactions**	Arm's Length Principle and Comparability Analysis confirmed as pillars of Transfer Pricing. More robust framework for implementing this standard.	Joint Transfer Pricing Forum (JTPF) working on EU approach to review and update transfer pricing. Work includes looking at more economic analysis in TP, better use of companies' internal systems, and improving TP administration.
Action 11: **Beps data analysis**	The OECD aims to publish statistics on corporate taxation and its impact.	EU study underway on the impact of some types of aggressive tax planning on Member States' effective tax rates.

Action 12: **Disclosure of Aggressive Tax Planning**	Recommendation to introduce rules requiring mandatory disclosure of aggressive or abusive transactions, structures or arrangements.	Council Directive (EU) 2018/822 of 25 May 2018 and Council Directive (EU) 2021/514 of 22 March 2021, both amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.
Action 13: **Country-by-Country Reporting**	Country-by-Country reporting (CbCR) between tax administrations on key financial data from multinationals. Information for tax authorities only – not public CbCR.	ATA Package proposes legally binding requirement for Member States to implement CbCR between tax authorities. Work ongoing on feasibility of public CbCR in the EU.
Action 14: **Dispute Resolution**	G20/OECD countries agreed to measures to reduce uncertainty and unintended double taxation for businesses, along with a timely and effective resolution of disputes in this area. A number of countries have committed to a mandatory binding arbitration process.	In 2016, the Commission proposed measures to improve dispute resolution within the EU.
Action 15: **Multilateral Instrument to modify tax treaties**	Interested countries have agreed to use a multilateral instrument to amend their tax treaties, in order to integrate BEPS related measures where necessary.	ATA Recommendation sets out the Commission's views on Treaty related issues, which MSs should consider in negotiations on the Multilateral Instrument.

IV. *Latest developments of the BEPS project*

According to the OECD,[31] is evident that the combined effect of the BEPS Actions has brought increased coherence, transparency and substance to the international tax rules, and their implementation has produced tangible results:

• Action 5 (Harmful Tax Practices) – Since the beginning of the BEPS Action 5 peer reviews, the Forum on Harmful Tax Practices (FHTP) has reviewed over 300 preferential regimes to ensure that there are no harmful features associated with the activities they are intended to attract, and virtually all harmful preferential regimes have been amended or abolished. Over 36 000 exchanges on tax rulings between governments have taken place to date, with peer reviews on tax rulings covering 124 jurisdictions;

• Action 6 (Tax Treaty Abuse) – In April 2021, the third peer review report 10 on the implementation of the Action 6 minimum standard on preventing treaty shopping was released and reveals that a large majority of members of the OECD/G20 Inclusive Framework are translating their commitment on preventing treaty shopping into tangible action and modifying their tax treaty network to comply with the Action 6 minimum standard. Treaty shopping typically involves the attempt by a person to access indirectly the benefits of a tax treaty between two jurisdictions without being a resident of either of those jurisdictions. To address this issue, all members of the OECD/G20 Inclusive Framework have committed to the implementation of the Action 6 minimum standard and the participation in annual peer reviews to monitor such implementation. Most OECD/G20 Inclusive Framework members are relying on the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) to implement Action 6. To date, the MLI covers 97 jurisdictions and effectively modified over 650 treaties concluded among the 68 jurisdictions which have ratified, accepted or approved it. The MLI will modify an additional 1 100 treaties once all signatories have ratified it. Existing tax treaties are also being amended via bilateral negotiations to conform with the Action 6 standard;

• Action 13 (Country-by-Country Reporting) – More than 2 700 bilateral relationships for CbC report exchanges are now in place, which are helping to increase tax transparency and facilitate BEPS risks assessments. Over 100 jurisdictions have already introduced legislation to impose a filing obligation on Multinational Enterprise (MNE) groups, covering almost all MNEs with consolidated group revenue at or above the EUR 750 million threshold;

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[31] OECD/G20, *Inclusive Framework on BEPS: Progress Report July 2020 – September 2021*, available at *https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2020-september-2021.html*.

• Action 14 (Mutual Agreement Procedures) – As the need for tax certainty increases, this minimum standard is critical to ensuring that tax disputes are resolved in a timely, effective and efficient manner. In total, 82 stage 1 peer review reports and 45 stage 1 + stage 2 peer monitoring reports have now been finalized. As a result of the peer review, there has been a significant increase in the number of resolved MAP cases in almost all jurisdictions under review, and access to MAP has been expanded and streamlined.

With regard to progress in other BEPS actions, progress in Action 1 should be noted.

Although implementation of the BEPS package, which began in 2015, has dramatically changed the international tax landscape and improved the fairness of tax systems, one of the key BEPS issues identified under BEPS Action 1, "Addressing the tax challenges of the digital economy", remained unresolved and has been the top priority of the OECD/G20 Inclusive Framework over the last year.

Despite the practical challenges posed by the COVID-19 pandemic, significant progress on BEPS Action 1 was made by the OECD/G20 Inclusive Framework, based on the two-pillar approach first established in the January 2019 policy note [32] where it was agreed that Pillar One would establish new rules on where tax should be paid ("nexus" rules) and a new way of sharing taxing rights among countries ("profit allocation" rules), and Pillar Two would introduce a global minimum tax to help countries around the world ensure that multinationals pay a minimum level of tax at a globally agreed effective tax rate. In October 2020, the OECD/G20 Inclusive Framework published detailed reports on the blueprints for both pillars [33] which were the subject of public consultation in January 2021, as well as a Cover Statement [34], which highlighted the progress made, remaining political and technical issues. Negotiations that had been previously stalled were rebooted by a new proposal for comprehensive, quantitative scope under Pillar One while also calling for a robust minimum tax under Pillar Two.

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[32] OECD (2019), *Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note, G20/OECD Inclusive Framework on BEPS, OECD*, Paris, *www.oecd.org/tax/beps/policy-note-beps-inclusive-frameworkaddressing-taxchallenges-digitalisation.pdf*.

[33] OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS, G20/OECD Base Erosion and Profit Shifting Project*, OECD Publishing, Paris, *https://doi.org/10.1787/beba0634-en*; OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS*, G20/OECD Base Erosion and Profit Shifting Project, OECD Publishing, Paris, *https://doi.org/10.1787/abb4c3d1-en*.

[34] *Cover Statement by the G20/OECD Inclusive Framework on the Reports on the Blueprints of Pillar One and Pillar Two*, as approved by the G20/OECD Inclusive Framework at its meeting on 8-9 October 2020, *www.oecd.org/tax/beps/coverstatement-by-the-oecd-g20-inclusive-framework-on-beps-on-the-reports-ontheblueprints-of-pillar-one-and-pillar-two-october-2020.pdf*.

On 1st July 2021, 130 member countries and jurisdictions, representing more than 90% of global GDP, joined the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy [35] establishing an historic new framework for international tax reform.

V. *State aid, tax competition and BEPS*

As part of the fight against tax evasion and harmful tax competition, the European Commission has used the versatility of the Community legislation on State aid to supervise the tax ruling practices of the Member States in relation to the aggressive tax planning strategies implemented by multinational groups. [36]

In 2013 and 2014, the European Commission initiated a review of the tax ruling practices of a number of Member States that had come to public light. In June 2014, formal investigations were opened into Apple (Ireland), Starbucks (Netherlands) [37] and Fiat Finance [38] & Trade – FFT – (Luxembourg).

In October 2014, the Commission opened a formal investigation into alleged State aid granted to Amazon (Luxembourg). [39]

In December 2014 and February 2015, formal investigations were opened into Luxembourg's tax treatment of McDonald's and the Belgian "excess profit" tax scheme, respectively.

Without doubt, the use in the EU of the OECD studies on base erosion and profit shifting (BEPS) have given renewed importance to the monitoring of the called tax rulings by means of the Community regulations on

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[35] OECD (2021), *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – July 2021*, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, *https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economyjuly-2021.pdf*.

[36] *See* EU Commission, *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*, (2016/C 262/01), 19.7.2016.; DG Competition – Internal Working Paper – *Background to the High Level Forum on State Aid* of 3 June 2016; EU Commission, *Commission notice on the application of the State aid rules to measures relating to direct business taxation (98/C 384/03)*, 10.12.1998.

[37] Commission Decision (EU) 2017/502 of 21 October 2015 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks (notified under document C(2015) 7143), Brussels, 29.3.2017.

[38] Commission Decision (EU) 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat (notified under document C(2015) 7152), Brussels, 22.12.2016.

[39] Commission Decision (EU) 2018/859 of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon (notified under document C(2017) 6740), Brussels, 15.6.2018.

State aid as a way to combat tax avoidance and harmful tax competition.

This new approach coincides with the most recent OECD work on the BEPS plan, where transfer pricing is not only regarded as a possible strategy of tax avoidance, but also as a form of harmful tax competition.

In fact, Action 5 of the BEPS Action Plan states that the aim of the OECD is to "revamp the work on harmful tax practices", giving renewed momentum to the Forum on Harmful Tax Practices to study the tax regimes of the Member States.

The Commission appears to take the same stance, but using the more robust mechanism of State aid.

1. *Focus: the "Apple case"*

Following an in-depth state aid investigation launched in June 2014, the European Commission [40] has concluded that two tax rulings issued by Ireland to Apple have substantially and artificially lowered the tax paid by Apple in Ireland since 1991. [41]

The rulings endorsed a way to establish the taxable profits for two Irish incorporated companies of the Apple group (Apple Sales International and Apple Operations Europe), which did not correspond to economic reality: almost all sales profits recorded by the two companies were internally attributed to a "head office".

The Commission's assessment showed that these "head offices" existed only on paper and could not have generated such profits. These profits allocated to the "head offices" were not subject to tax in any country under specific provisions of the Irish tax law, which are no longer in force. As a result of the allocation method endorsed in the tax rulings, Apple only paid an effective corporate tax rate that declined from 1% in 2003 to 0.005% in 2014 on the profits of Apple Sales International.

This selective tax treatment of Apple in Ireland, according to the Commission, is illegal under EU state aid rules, because it gives Apple a significant advantage over other businesses that are subject to the same national taxation rules.

The Commission ordered recovery of illegal state aid for a ten-year period preceding the Commission's first request for information in 2013.

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[40] EU Commission, State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) – Ireland Alleged aid to Apple, C(2014) 3606 final, Brussels, 11.06.2014; EU Commission, Decision 2017/1283 of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (notified under document C(2017) 5605), Brussels, 19.7.2017.

[41] Between tax scholars, see T. O'SHEA, *Apple's tax planning scheme and CJEU jurisprudence*, *Tax notes international*, 2017, vol. 85, no. 8, 739 ss.; J.G.S. YANG-A.S. MEZIANI-S.(Y.) SHEN, *Understanding Apple's global tax strategy in Ireland*, *International tax journal*, 2016, vol. 42, no. 6, 41 ss.; R.S. AVI-YONAH-G. MAZZONI, *The Apple state aid decision: a wrong way to enforce the benefits principle?*, *Tax notes international*, 2016, vol. 84, no. 9, 837 ss.

In particular, the Commission's state aid investigation concerned two consecutive tax rulings issued by Ireland, which endorsed a method to internally allocate profits within Apple Sales International and Apple Operations Europe, two Irish incorporated companies. It assessed whether this endorsed method to calculate the taxable profits of each company in Ireland gave Apple an undue advantage that is illegal under EU state aid rules.

The Commission's investigation has shown that the tax rulings issued by Ireland endorsed an artificial internal allocation of profits within Apple Sales International and Apple Operations Europe, which has no factual or economic justification.

As a result of the tax rulings, most sales profits of Apple Sales International were allocated to its "head office" when this "head office" had no operating capacity to handle and manage the distribution business, or any other substantive business for that matter.

Only the Irish branch of Apple Sales International had the capacity to generate any income from trading, i.e. from the distribution of Apple products. Therefore, the sales profits of Apple Sales International should have been recorded with the Irish branch and taxed there.

• The "head office" did not have any employees or own premises. The only activities that can be associated with the "head offices" are limited decisions taken by its directors (many of which were at the same time working full-time as executives for Apple Inc.) on the distribution of dividends, administrative arrangements and cash management. These activities generated profits in terms of interest that, based on the Commission's assessment, are the only profits which can be attributed to the "head offices".

• Similarly, only the Irish branch of Apple Operations Europe had the capacity to generate any income from trading, i.e. from the production of certain lines of computers for the Apple group. Therefore, sales profits of Apple Operation Europe should have been recorded with the Irish branch and taxed there.

• On this basis, the Commission concluded that the tax rulings issued by Ireland endorsed an artificial allocation of Apple Sales International and Apple Operations Europe's sales profits to their "head offices", where they were not taxed. As a result, the tax rulings enabled Apple to pay substantially less tax than other companies, which is illegal under EU state aid rules.

It should be noted that Ireland, on 18 September 2018, indicated that it had recovered the State aid unlawfully granted to Apple.

According to a press release of the EU Commission,[42] "*A total of €14.3 billion including interest was repaid by Apple into an escrow fund pending the final judgments of the EU courts in the actions for annulment of the*

[42] Available at https://ec.europa.eu/ireland/news/state-aid-commission-decides-withdraw-court-action-against-ireland-failure-recover-illegal-aid_en.

Commission decision brought by Ireland (Case T-778/16) and Apple (Case T-892/16)".

On this point, it should be noted that on 15 July 2020, the EU General Court issued its judgment in the Apple case (17 July 2020, Cases T-778/16 and T-892/16, Ireland and Apple v. Commission), annulling Decision 2017/12833 – by which the Commission had ordered Ireland to recover more than 13 billion in unpaid taxes from Apple – because the existence of an advantage resulting from the tax rulings issued by Ireland did not appear to be sufficiently demonstrated.

The EU General Court notes, in that regard, that the method adopted by the rulings was commonly accepted and agreed at OECD level and that the Commission wrongly concluded that the Irish tax authorities had granted a selective advantage to ASI and AOE. Indeed, in the European Commission's view, the Irish authorities should have allocated the economic use of the Apple group's IP licences and the resulting profits to the branches in Ireland. According to the European Court, however, the Commission erred in reaching those conclusions because it had used an 'exclusionary' approach (see, in particular, paragraphs 186 and 259 of the judgment) on the basis of presumptions: that is to say, by basing itself on the assumption that ASI's and AOE's head offices were presumably lacking a structure capable of handling the Apple group's IP licences, the Commission had reached the erroneous conclusion that the profits attributable to those licences should be allocated to the Irish branches.

According to the EU General Court, the Commission should, on the other hand, have provided 'direct' evidence that ASI's and AOE's Irish branches did in fact have control of the Apple group's IP licences, that those branches did in fact perform the management functions and assume the associated risks and that, consequently, all the profits made by ASI and AOE should have been attributable to the activities of those branches.

In the absence of such evidence, the European Court concludes, it cannot be argued 'upstream' that, by issuing the contested tax rulings, the Irish tax authorities granted ASI and AOE an advantage within the meaning of Article 107 TFEU; consequently, the Court adds, there is no need to examine 'downstream' the further question of the selectivity of the contested measures and their possible justification.

2. *The General Court annuls the Commission's decision concerning tax exemptions granted by Belgium by means of rulings*

By its judgment of 14 February 2019 in Joined Cases T-131/16 Belgium v Commission and T-263/16 Magnetrol International v Commission, the EU Tribunal annulled Commission Decision C(2015) 9887 final of 11 Jan-

uary 2016,[43] on the State aid scheme concerning the Excess Profit exemption granted by Belgium with tax rulings granted to 55 beneficiaries.[44]

Since 2005, Belgium has applied a system of exemptions for the excess profit of Belgian entities which form part of multinational corporate groups. Those entities could obtain an advance ruling from the Belgian tax authorities, if they were able to demonstrate the existence of a new situation, such as a reorganisation leading to the relocation of the central entrepreneur to Belgium, the creation of jobs or investments. In that context, profits regarded as being 'excess', in that they exceeded the profit that would have been made by comparable standalone entities operating in similar circumstances, were exempted from corporate income tax.

In 2016, the Commission found that that system of excess profit exemptions constituted a State aid scheme that was incompatible with the internal market and unlawful and ordered the recovery of the aid thus granted from 55 beneficiaries, including the company Magnetrol International.[45]

Belgium and Magnetrol International brought an action before the General Court seeking the annulment of the Commission's decision. They allege inter alia that the Commission: (1) encroached upon Belgium's exclusive tax jurisdiction in the field of direct taxation and (2) erred in finding an aid scheme in the present case.

As regards the alleged encroachment upon Belgium's exclusive jurisdiction, the General Court notes that while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law.

Accordingly, a measure by which the public authorities grant certain undertakings advantageous tax treatment which – although it does not involve the transfer of State resources – places the beneficiaries in a more favourable position than other taxpayers is capable of constituting State aid.

Since the Commission is competent to ensure compliance with the State aid rules, it cannot be accused of having exceeded its powers in the present case. The General Court therefore rejects the argument put forward by Belgium and Magnetrol International.

As regards the alleged encroachment upon Belgium's exclusive jurisdiction, the General Court notes that while direct taxation, as EU law cur-

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[43] EU Commission, Decision of 11 January 2016 on the Excess Profit Exemption State Aid Scheme SA.37667 (2015/C) implemented by Belgium (2016), available at https://ec.europa.eu/competition/state_aid/cases/256735/256735_1748545_185_2.pdf.

[44] General Court of the European Union Press Release No 14/19: *Judgment in joined cases T-131/16 Belgium v Commission and T-263/16 Magnetrol International v Commission* (15 Feb. 2019), available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-02/cp190014en.pdf.

[45] EU Commission, *State aid SA.37667 (2015/C ex 2015/NN) – Belgium – Excess profit tax ruling system in Belgium – Art. 185§2 b) CIR92, C(2015) 563 (final)*, Brussels, 3.2.2015.

rently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law.

Accordingly, a measure by which the public authorities grant certain undertakings advantageous tax treatment which – although it does not involve the transfer of State resources – places the beneficiaries in a more favourable position than other taxpayers is capable of constituting State aid.

Since the Commission is competent to ensure compliance with the State aid rules, it cannot be accused of having exceeded its powers in the present case. The General Court therefore rejects the argument put forward by Belgium and Magnetrol International.

Next, the General Court finds that the Belgian tax authorities had a margin of discretion over all of the essential elements of the exemption system in question, allowing them to influence the amount and the characteristics of the exemption and the conditions under which it was granted, which also precludes the existence of an aid scheme.

Lastly, the General Court holds that it cannot be concluded that the beneficiaries of the alleged aid scheme are defined in a general and abstract manner or that there was actually a systematic approach on the part of the Belgian tax authorities as regards all of the advance rulings concerned.

The Commission therefore wrongly considered that the Belgian system relating to the excess profit constituted an aid scheme.

2.1. *ECJ Sets Aside General Court's Decision and Refers Case Back in Belgian Excess Profit Scheme: Magnetrol (Case C-337/19 P)*

On 16 September 2021, the Court of Justice of the European Union (ECJ) has set aside the General Court's decision of 2019 in Case C-337/19 P, *Commission v Belgium and Magnetrol International*, and decided – contrary to the General Court – that the European Commission had correctly concluded that the Belgian excess profit scheme constituted an aid scheme.

The ECJ held that the General Court had committed several errors in law relating to the 3 cumulative conditions that must be satisfied for an aid scheme to be present.

In relation to the first condition – that the aid be granted on the basis of an act – the General Court had, *inter alia*, not taken into account the fact that the European Commission had inferred application of the provisions from a "systematic approach" by the Belgian tax authorities, and not only from certain acts. Regarding the second condition – that no further implementing measure be required for the aid to be granted – the General Court had, among other things, incorrectly held that the fact that the Belgian tax authorities systematically granted the exemption in cases where the conditions were met is not a relevant factor in establishing, where ap-

plicable, whether the tax authorities did not in fact have any discretion. In relation to the third condition – that the undertakings to which the aid is granted are defined in a general and abstract manner – the incorrect assessment of the General Court of the other two conditions adversely influenced its assessment of this third condition.

The ECJ, though setting aside the judgment of the General Court, notes that the status of the proceedings does not allow for a final judgment regarding (i) pleas alleging incorrect classification of the excess profit exemption as State aid due to the absence of advantage or selectivity, and (ii) pleas in law alleging, among others, infringement of the principles of legality and protection of legitimate expectations. As such, the case is referred back to the General Court for a decision on those outstanding issues.

VI. *Background on the Commission's State aid investigations on tax*

Since June 2013, the Commission has been investigating individual tax rulings of Member States under EU State aid rules.

The following investigations concerning tax rulings have already been concluded by the Commission:

• In *October 2015*, the Commission concluded that Luxembourg and the Netherlands had granted selective tax advantages to Fiat and Starbucks, respectively. As a result of these decisions, Luxembourg recovered €23.1 million from Fiat and the Netherlands recovered €25.7 million from Starbucks.

• In *January 2016*, the Commission concluded that selective tax advantages granted by Belgium to at least 35 multinationals, mainly from the EU, under its "excess profit" tax scheme are illegal under EU State aid rules. On 14 February 2019, the General Court of the European Union annulled the Commission decision. The Commission is currently reflecting on next steps.

• In *August 2016*, the Commission concluded that Ireland granted undue tax benefits to Apple, which led to a recovery by Ireland of €14.3 billion.

• In *October 2017*, the Commission concluded that Luxembourg granted undue tax benefits to Amazon, which led to a recovery by Luxembourg of €282.7 million.

• In *June 2018*, the Commission concluded that Luxembourg granted undue tax benefits to Engie of around €120 million. The recovery procedure is still ongoing.

• In *September 2018*, the Commission found that the non-taxation of

certain McDonald's profits in Luxembourg did not lead to illegal State aid, as it is in line with national tax laws and the Luxembourg-US Double Taxation Treaty.

• In *December 2018*, the Commission concluded that Gibraltar granted undue tax benefits of around € 100 million to several multinational companies, through a corporate tax exemption scheme and through five tax rulings. The recovery procedure is ongoing.

• In *April* 2019, the Commission concluded that the United Kingdom granted undue tax benefits to several multinational companies by allowing certain artificially diverted group financing income to remain outside the scope of the United Kingdom's anti-tax avoidance provisions. The recovery procedure is still ongoing.

The Commission also has two ongoing in-depth investigations concerning tax rulings issued by the Netherlands in favour of Inter IKEA and Nike and an investigation concerning tax rulings issued by Luxembourg in favour of Huhtamäki.

WEALTH AND CIVIL JUSTICE

A COMPARATIVE VIEW ON JUDICIARY INDEPENDENCE AND ACCOUNTABILITY IN ITALY

Luca Passanante [1]

0. *Introduction*

This paper is aimed at providing a short outline of accountability and transparency in civil justice in Italy, in the European context.

It is divided into four main parts: the first one deals with the institutional profile of independence and autonomy of the judiciary. The second part concerns mainly the civil and disciplinary accountability; the third addresses the problem of transparency along the civil process and then focuses on judicial decisions. The last part deals with the problem of internal and external evaluation of the civil justice system.

In the following paragraphs we will see how nowadays – mainly thanks to principles set forth in the republican Constitution, but also to technical rules placed in the Code of Civil Procedure Code of Civil Procedure [2] –

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[1] Full Professor of Civil Procedure at the University of Brescia, Italy.

[2] For the appropriate placement of the problems concerning the judiciary system inbetween constitutional law and procedure rules, see G. SCARSELLI, *Ordinamento giudiziario e*

transparency and accountability are well established features of the Italian civil justice system and work together, with different degrees, in quite a good balance. Such a context – despite the well known inefficiency of Italian civil justice – makes it possible that civil litigation is dealt with in a reliable and trustable way. [3]

However, transparency and accountability of civil justice in Italy have not always been the same. In the past, particularly before the Constitution of Italian Republic came into force (1948), the state of civil justice and of the judiciary, from the points of view here examined, was substantially different. [4]

It is neither possible, nor desirable to develop in a few pages such a complex topic, that would require a much deeper analysis. Nevertheless, this "historical warning" is important and shouldn't be underestimated.

1. *Institutional profile*

The institutional profile mainly involves the two fundamental concepts of independence and autonomy of the judiciary. [5]

However, other (not less) important features concerning the judiciary – such as the nature of the judiciary itself or the pivotal principle of the natural Judge pre-established by law, the principle of impartiality of the Judge and the principle of its irremovability – are relevant enough to deserve to be briefly discussed hereinafter.

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forense, IV ed., Giuffrè, Milano, 2013, 2. See also on this subject the recent book by L.P. COMOGLIO, *Mito, fantasia e realtà del giudice imparziale*, Cedam-Wolters Kluwer, Milano, 2021, *passim*.

[3] On the importance of the Italian model of the judiciary system, see: F. DAL CANTO, *Lezioni di ordinamento giudiziario*, Giappichelli, Torino, 2018, 30 and 36 ff. In general on the judiciary systems in comparative perspective, in the Italian literature, see: A. PIZZORUSSO, voce *Ordinamento giudiziario (dir. Comp. e stran.)*, in *Enc. Giur.*, XXI, Treccani, Roma, 1990, 1 ff.; C. GUARNIERI-P. PEDERZOLI, *La magistratura nelle democrazie contemporanee*, Laterza, Roma-Bari, 2002, 49 ff. (on the judiciary in common law Countries) and 82 ff. (about the judiciary in civil law Countries); M. MAZZA, *Il potere giudiziario*, in P. CARROZZA-A. DI GIOVINE-G.F. FERRARI (eds.), *Diritto costituzionale comparato*, Laterza, Bari, 2009, 1056 ss.; C. GUARNIERI-P. PEDERZOLI, *Il sistema giudiziario*, Il Mulino, Bologna, 2017, 133 ff.; R. PEGORARO-A. RINELLA, *Sistemi costituzionali comparati*, Giappichelli, Torino, 2017, 518 ff.

[4] Some useful information about the history of the judiciary in Italy can be found in G. MARANINI, *Storia del potere in Italia 1948-1967*, Vallecchi, Firenze, 1967, 259 ff.; A. MENICONI, *Storia della magistratura italiana*, Il Mulino, Bologna, 2012, *passim*; E. BRUTI LIBERATI, *Magistratura e società nell'Italia Repubblicana*, Laterza, Roma-Bari, 2018, *passim*.

[5] About independence and autonomy of the judiciary, see C. GUARNIERI-P. PEDERZOLI, *Il sistema giudiziario*, cit., 127 ff.; F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 78 ff.; F. BONIFACIO-G. GIACOBBE, *Commento agli artt. 104-107*, in G. BRANCA-A. PIZZORUSSO (eds.), *Commentario alla Costituzione*, Zanichelli, Bologna-Roma, 1986, 4 ff.

1.1. *What is the judiciary?*

Before going deeper in examining the concepts of independence and autonomy, it seems appropriate to report shortly an interesting debate developed in the Italian Parliament about the nature of the judiciary, a debate that is impossible to understand if not conveniently placed in the cultural climate of the birth of Italian Constitution, distinguished by a strong scepticism towards the judiciary. The Judges, as a matter of fact, especially at the highest ranks, were firmly supporting the fascist regime, which has been strongly repudiated by the Italian Constitution and the democratic State. It's important to note that the passive acceptance by the judiciary of the fascist regime was also due to the fact that the totalitarian government used to purge – it happened at least twice: in 1923 and in 1926 – the judiciary of that Judges, who were reluctant to obey to the fascist power.[6] Anyway, the compliant attitude of the Judges (the ones allowed to remain) toward the fascist regime inspired a common sense of mistrust, which raised especially in the left wing MPs serious doubts in order to name and recognize the judiciary as a power of the State in the republican Constitution.

Other doubts about the opportunity of recognizing the judiciary as a State power derived from the common idea that the constitutional *status* of "power" should be granted only to authorities that represent the popular sovereignty, and the judiciary lacked this legitimacy.

All these factors led the Parliament to adopt an intermediate solution, now expressed by the wording of the art. 104 of the Constitution, according to which the judiciary is not defined as a «State power», but – in a somehow inconsistent way – as a «body independent and autonomous from *other* State powers» (par. 1).[7]

This means that, although the judiciary cannot properly be named a "state Power", to it has been indirectly acknowledged the dignity of other State powers, from which it must be kept independent and autonomous.

The Constitutional Court since the Seventies has recognized the judiciary the nature of a "widespread power" (Corte Cost. 231/1975):[8] the es-

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[6] The literature over this subject is wide and large. It's not possible here to mention all the relevant sources. See, among many others, A. MENICONI, *Storia della magistratura italiana*, cit., 250 ff.; A. GALANTE GARRONE, *La magistratura tra fascismo e Resistenza*, in *I giudici dalla Resistenza allo Stato democratico. Atti del Convegno di Cuneo del 26 ottobre 1985*, L'artistica, Savigliano, 1986, 29 ff. A very recent interesting analysis shows that the cultural background (marked by a strong legal positivism) of the Italian Judges (being the law mostly untouched) prevented them from being passively obedient in front of the fascist power: see P. BORGNA, *La magistratura resistente*, in www.questionegiustizia.it (2019).

[7] See S. PANIZZA, *Commento all'art. 104*, in R. BIFULCO-A. CELOTTO-M. OLIVETTI (eds.), Utet, Torino, 2006, 2008.

[8] The decision has been published in *Giur. cost.*, 1975, I, 2197 ff.

sence of this definition consists in the absence of hierarchical relationship between Judges and perfectly matches with the principle set forth by art. 107, par. 3 of Italian Constitution, according to which «the Judges are distinguished from each other only by different functions» (and not by a different rank).

In the following paragraphs we will see how this fundamental principle is realized and completed by other norms, either in the Constitution, or in ordinary Acts of Parliament.

1.2. *The principle of «independence» and «autonomy» of the judiciary*

The institutional profile, as seen before, involves two fundamental concepts: independence and autonomy of the judiciary.

Independence concerns the position of the single Judge when deciding cases (although it shouldn't be confused with the different concept of *impartiality*: see *infra*, par. 1.7).[9] Autonomy concerns the judiciary, as a body, in respect of other State powers, such as the legislative and the executive. In other words, we can say that: while independence concerns the function, autonomy concerns the structure, the institutional "position", of the judiciary.

Although the Italian Constitutional Court, in some past decisions, has underlined the difference between these two concepts, nowadays it is commonly recognised, either in case law, or in literature, that they compose a hendiadys and both express the constitutional need of external and internal independence of the judiciary.[10]

As a matter of fact, the two concepts are inseparable: the autonomy of the judiciary from the other State powers is a necessary requirement and is strictly connected to the independence of the judicial function.

We can now distinguish, as it is common in many legal systems, between an *external* and an *internal* independence:[11] the first refers to the relationship between the judiciary and other State powers. As we will see hereinafter, this principle is realized mainly by means of the Superior Council of the Judiciary (*Consiglio Superiore della Magistratura*, C.S.M. in short), that is a committee of self-government of the judiciary, which composition and functioning guarantee from a structural point of view the autonomy of the judiciary from other State powers (see par. 2.3).

The *internal* independence, on the contrary, refers to the relationship be-

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[9] On judicial independence, see G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 39 ff.

[10] F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 8.

[11] About this distinction, see, in general: R. ROMBOLI-S. PANIZZA, voce *Ordinamento giudiziario*, in *Dig. disc. pubbl.*, vol. X, Utet, Torino, 1995, 368 ff.; for an historical perspective, see A. MENICONI, *Storia della magistratura italiana*, cit., 247 ff.

tween different Judges or Courts.[12] This principle, which is not openly set forth by the Constitution, emerges clearly from other principles, in particular the one according to which «Judge is only subject to law» (see *infra* par. 2.4), and the one stating that Judges are distinguished from each other only by different functions (see *supra* par. 2.1). On one side, the lack of a formal binding effect of the judicial precedents and, on the other side, the absence of a proper hierarchical relationship between Judges belonging to different ranks (such as Judges of inferior/superior Courts) are both effective means in order to achieve the internal independence of the judiciary. However, in respect to internal independence some problems might arise nowadays, because of the stronger effect of judicial precedents, supported by means of new procedure rules, come into force in the last 13 years, which encourage civil Judges to follow the judicial precedents, particularly the ones held by the Court of Cassation in Joined Chambers (Sezioni Unite).[13]

1.3. *The Superior Council of the Judiciary (and other boards) as institutional expression of the autonomy principle*

After the parenthesis of the fascist regime,[14] with the liberation of the Country,[15] Italy resumed the path towards the fulfilment of the independence of the judiciary, which took place thanks to two very important stages. The first one is represented by the so-called law "Act on the Guarantees for the Judiciary" ("Legge sulle Guarentigie della Magistratura", approved by the Royal Legislative Decree No. 511 of 1946), which suppressed the relationship of hierarchical dependence that used to bind the public prosecutors to the Minister of justice.[16] The second stage is due to the coming into force of the republican Constitution (1948), which, in this regard, attributed the functions relating to the legal status of Judges to a body that was completely independent of political power and is composed mostly of Judges elected by Judges.[17]

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[12] For an analysis of the relationship between judicial independence and the system of appeals, see A. PIZZORUSSO, *L'organizzazione della giustizia in Italia. La magistratura nel Sistema politico e istituzionale*, Einaudi, Torino, 1982, 22 ff.

[13] On this phenomenon and on its implications see, if you wish, L. PASSANANTE, *Il precedente impossibile. Contributo allo studio del diritto giurisprudenziale nel processo civile*, Giappichelli, Torino, 2018, 1-57 and, for a summary, 57-60. Upon the relationship between internal independence and judicial precedent see now On this subject see L.P. COMOGLIO, *Mito, fantasia e realtà del giudice imparziale*, cit., 139 ff.

[14] For an interesting and accurate study of the relationships between the judiciary and the fascist regime, see A. MENICONI, *Storia della magistratura italiana*, cit., 145 ff.

[15] A. GALANTE GARRONE, *La magistratura tra fascismo e Resistenza*, cit., 29 ff.

[16] F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 35.

[17] F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 36 ff.

After the Constitution came into force, the Superior Council of the Judiciary (hereinafter also C.S.M.), originally established in 1946, was replaced with the current one, by virtue of the Act of Parliament no. 195/1958 and subsequently reformed with the Act of Parliament n. 695/1975 and n. 44/2002. [18]

The Superior Council of the Judiciary is currently composed as follows:

– By the President of the Republic, who is a member by right, by virtue of her/his function, and presides over it

– By the First President of the Court of Cassation, who is a member by right

– By the Attorney General at the Court of Cassation, who is a member by right

– By 16 Judges: 2 members of the Court of Cassation, 10 members of inferior Courts and 4 public prosecutors in the inferior Courts

– By 8 full professors in legal subjects or lawyers with at least 15 years of practice.

The composition of the Superior Council of the Judiciary is very important to understand its position in the context of constitutional balances: [19] it is, in fact, an institution that, despite designed to ensure the autonomy of the judiciary and its independence from the other State powers, is not entirely free from a connection with political power. This connection, however, does not affect the autonomy of the Council. Only one third of the members of the Superior Council of the Judiciary (i.e. 8), in fact, are elected by the Parliament, with particularly high quorums, it being essential that a broad consensus be formed on the names of the candidates. [20] The remaining two thirds (i.e. 16) of the members of the Superior Council of the Judiciary are Judges elected by Judges. [21]

In a nutshell, we can say that only the Superior Council of the Judiciary is entrusted with the adoption of all decisions concerning the professional life of the Judge and, more generally, the administration of justice. There are four fundamental points (the "four nails", as the MP Meuccio Ruini used to call them) [22] which must remain in the exclusive jurisdiction of the Superior Council of the Judiciary and in which the Minister of Jus-

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[18] On the Superior Council of the Judiciary, see A. PIZZORUSSO, *L'organizzazione della giustizia in Italia. La magistratura nel Sistema politico e istituzionale*, cit., 87 ff.; G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 91 ff. and, for an interesting analysis of similar Councils in other European Countries, 106-120; F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 99 ff.

[19] A. PIZZORUSSO, *L'organizzazione della giustizia in Italia. La magistratura nel Sistema politico e istituzionale*, cit., 87 ff.; F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 99 ff.

[20] G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 96.

[21] G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 94-95.

[22] F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 118.

tice or the political power cannot interfere: 1) Appointments; 2) Promotions; 3) Disciplinary justice; 4) Transfers. Preventing other State powers from having a say in these matters avoids the risk that the decisions taken by the Judges in the exercise of their functions can be "influenced" by fears of political consequences on their career.

The Council decides on all aspects of the professional life of the magistrate: [23]

– access and traineeship; [24]
– career progressions (i.e.: professional evaluations); [25]
– training; [26]
– authorization of extra-judicial appointments; [27]
– transfers to another location or other functions; [28]
– placement "fuori ruolo" (it means that the Judge is still working and paid, but has different functions: such as Ministry's Counsel); [29]
– appointment of Chief Judges of the Courts; [30]
– absences and leaves;
– retirements;
– disciplinary sanctions. [31]

The appointment of the Chief Judge of the Courts is the only case in which the Minister of Justice plays a significant role, giving his consent, a sort of necessary opinion on the Judge (who is expected to be appointed as the Chief Justice of the Court), selected by the Council. This is due to the fact that, according to the art. 110 of the Italian Constitution, the Minister of Justice is responsible for the organization and functioning of services relating to justice. Therefore, since the Chiefs Judges of the Courts have considerable powers in matters of organization, it is consistent with this principle that the Minister of Justice can express his own assessment. [32]

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[23] A. PIZZORUSSO, *L'organizzazione della giustizia in Italia. La magistratura nel Sistema politico e istituzionale*, cit., 91 ff.

[24] G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 163 ff.; F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 137 ff.

[25] G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 172 ff.; F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 149 ff.

[26] G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 163 ff.

[27] G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 185 ff.; F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 160 ff.

[28] G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 169 ff.

[29] G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 185 ff.

[30] F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 118 ff.

[31] See hereinafter par. 2.2.

[32] G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 183 ff.; F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 118 ff.

Furthermore, the Superior Council of the Judiciary has significant powers regarding the organization of offices and judicial IT, since – without prejudice to the jurisdiction of the Minister of Justice – it establishes the objective and predetermined and general rules for the assignment of Judges to the panels and the allocation of proceedings to individual Judges, thus protecting the autonomy of the Judge from external interference and ensuring the respect of the constitutional principle of the pre-establishment of the Judge (Article 25 of the Constitution). [33]

Finally, the C.S.M., when requested, has the power to give opinions to the Minister of Justice on the legislative acts being examined by the Parliament and to draft legislative proposals to the latter. This happens, of course, when the matters are directly or indirectly related to the judiciary and the functioning of justice.

The particular position of the C.S.M. in the context of relations between the powers of the State has the consequence that the Council itself does not fall within the category of public administrations. [34]

One of the most important functions of the Superior Council of the Judiciary is carried out by the Disciplinary section, which is competent to adopt disciplinary measures against magistrates pursuant to art. 105 of the Constitution. This function will be better dealt with in the following par. 3.2.

Finally, it should be noted that for any judicial district there are Judicial Councils, which are defined as "auxiliary" bodies of the Superior Council of the Magistracy. [35] They express motivated opinions on numerous matters and measures falling within the jurisdiction of the C.S.M., providing fundamental elements for the correct exercise of the powers of the C.S.M. itself, as these bodies have direct knowledge of the magistrate or the judicial office concerned.

The legislative decree 27 January 2006, n. 25 introduced into the judiciary a body within the Court of Cassation, equivalent to the Judicial Councils at the Court of Appeal: the "consiglio direttivo" (Executive Council) of the Court of Cassation. [36]

1.4. *The «Judge is only subject to law» principle*

Art. 101 of the Italian Constitution, after proclaiming in the first paragraph that «The justice is given in the name of the people» (see *infra*, par.

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[33] About the constitutional principle of the Judge pre-estabilished by law, see *infra* par. 1.6.

[34] See F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 101 ff.

[35] For more information on Judicial Councils, see A. PIZZORUSSO, *L'organizzazione della giustizia in Italia. La magistratura nel Sistema politico e istituzionale*, cit., 93 ff.; G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 129 ff.

[36] See, for more details, G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 133-134.

2.4), sets, in the second paragraph, the fundamental principle according to which «Judges are only subject to law». [37]

The meaning of this principle, as already mentioned, is linked to the concept of internal independence: in fact, it is commonly understood that the Judge does not have to undergo the conditioning deriving from the higher Judges by means of the judicial precedents. The Judge, in other words, has a direct relationship with the law and remains free to give it the meaning it deems correct on the basis of the accepted criteria of interpretation. In addition to the Constitution and the laws of the State, the Judge is subject to the laws of the European Union. The Judge, however, is not subject to the regulations of the public administration, which the Judge can and must not apply when it seems to be contrary either to the law, or to the Constitution.

Finally it is worth emphasizing that art. 101, par. 2, of the Italian Constitution, as already mentioned, states that the Judge is subject "only" to the law: the adverb "only" implies that the judicial authority shouldn't suffer any constraint or conditioning nor from outside (especially from political power), neither from inside (i.e. from the judiciary itself: especially higher Courts).

1.5. *The «justice is given in the name of the people»*

As seen in the previous paragraph, the first proposition of art. 101 of Italian Constitution establishes a link between the judicial function and the sovereignty of the people: the first, in facts, is an expression – although in an indirect way – of the second.

This doesn't mean that the judiciary expresses the temporary, contingent political majority, but that the judiciary is indirectly a means of actualization of the popular will. [38] More precisely, the relationship between

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[37] The English word "law" is the (imperfect) traslation of the Italian word "legge", that literally means "act of Parliament". About this principle, see: R. GUASTINI, *Commento all'art. 101*, in G. BRANCA-A. PIZZORUSSO (eds.), *Commentario alla Costituzione*, Zanichelli, Bologna-Roma, 1986, 172 ff.; N. ZANON-L. PANZERI, *Commento all'art. 101*, in R. BIFULCO-A. CELOTTO-M. OLIVETTI (eds.), Utet, Torino, 2006, 1960 ff. On the meaning of the word "legge" in the art. 101 of the Italian Constitutions, see: S. FOIS, *Legalità (principio di)*, in *Enc. dir.*, vol. XXIII, Giuffrè, Milano, 1973, 684 ff.; A. PIZZORUSSO, *Fonti del diritto*, II ed., Zanichelli-Il Foro Italiano, Bologna-Roma, 2011, 1 ff. For a interesting contribution to the interpretation of this principle, see D. BIFULCO, *Il giudice è soggetto soltanto al diritto: contributo allo studio dell'articolo 101, comma 2 della Costituzione italiana*, Jovene, Napoli, 2008, *passim*. See also, for the role of the Judge in the context of the crisis of the traditional sources of law, G. VERDE, Il difficile rapporto tra giudice e legge, Edizioni Scientifiche Italiane, Napoli, 2012, *passim*; N. LIPARI, *Il ruolo del giudice nella crisi delle fonti del diritto*, in *Il diritto civile tra legge e giudizio*, Giuffrè, Milano, 2017, 1-38.

[38] About the problematic relationship between Judiciary and politics, see M D'ADDIO, *Politica e magistratura (1848-1876)*, Giuffrè, Milano, 1966, *passim*, in historical perspective; see also A. BATTAGLIA, *I giudici e la politica*, Laterza, Bari, 1962, *passim*; M.R. FERRARESE,

the judicial function and the popular sovereignty is mediated by law, which reflects the popular will, and that Judges have the duty to apply. [39] Justice is not in the hands of the people as expression of a majority, but it is administered by an independent Judge, who, subject to law, acts in the name of the people.

In different words, although democracy remains the ultimate basis also of the judiciary power, the popular consent in itself cannot be a measure of the legitimacy of the judicial function.

1.6. *The «natural Judge pre-established by law» principle*

The «natural Judge pre-established by law» principle derives from the French revolutionary experience, as a reaction to the king's interference in the administration of justice and originally expresses three types of guarantees: [40]

1) the prohibition of establishing extraordinary Judges, created specifically after the fact to be submitted to the Judge;
2) the prohibition of setting up special Judges, with jurisdiction to decide disputes in specific matters;
3) the prohibition of transferring a process from a Judge originally competent to another Judge.

In the past, the principle of the "natural Judge" used to be associated with the first of these guarantees, namely the prohibition of the establishment of extraordinary Judges (in the sense of Courts estabilished after the dispute has arose). [41] It was expressly recognized (Article 71) already in the constitution of the Savoy Kingdom (Statuto Albertino, 1848), which later became the Constitution of united Italy in 1861 and is today set forth by art. 25, paragraph 1, of the republican Constitution. [42]

The principle was for a long time underestimated and associated, as we said, only to the prohibition of the establishment of extraordinary Judg-

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L'istituzione difficile. La Magistratura tra professione e sistema politico, Edizioni Scientifiche Italiane, 1984, *passim*.

[39] F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 73; A. PIZZORUSSO, *L'organizzazione della giustizia in Italia. La magistratura nel Sistema politico e istituzionale*, cit., 55.

[40] On the historical roots of this principle, see, in the Italian literature, P. ALVAZZI DEL FRATE, *Il giudice naturale. Prassi e dottrina in Francia dall'Ancien Régime alla Restaurazione*, Viella, Roma, 1999, 1 ss.

[41] On the relationship between this principle and the prohibition of extraordinary Judges (in the sense of Courts estabilished *after* the dispute has arose), see A. PROTO PISANI, *Per l'attuazione ragionevole della garanzia del giudice naturale*, in Foro it., 2000, V, 121 ff.

[42] For this remark, see F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 82; see, for the interpretation of this principle mainly as a prohibition of the establishment of special Judges, G. CHIOVENDA, *Principii di diritto processuale*, III ed., Jovene, Napoli, 1923, 389.

es.[43] With an important decision, the constitutional Court (No. 88/1962)[44] recognized the incompatibility between the principle of the natural Judge pre-established by law and the discretion in its concrete choice. In other words, the constitutional Court has emphasized the need for the law to establish the criteria to identify the Judge that will menage and decide the case *before* the facts of the case itself have occurred and without any possibility of referring such a choice to an authority other than the legislator (that provides with a general and abstract rule). In particular, the prohibition of identifying the competent Court after the dispute has arisen also applies to the judiciary itself: in essence, the law must predetermine the connection between an abstract case and a competent Court.[45]

Once again, this principle is inspired by the need to protect the independence and the impartiality of individual Judges: it is necessary to prevent the Judge from being influenced or interfered either from outside or from inside the judiciary. It is also necessary to avoid that the identification of the Judge that will manage and decide the case takes place on the basis of the subjective characteristics of the single Judge.

A final aspect that deserves attention concerns the question whether in this principle, the "Judge" should be understood as the *individual Judge* or the *judicial office* (i.e.: the Court). In order to fully implement this guarantee, it would be appropriate to refer the principle of the "natural Judge" to the Judge as a person and not to the Court as a whole.[46] However, the Court of Cassation has decided to give this principle a restrictive interpretation, applying it only to the judicial office and not to the individual Judge.[47]

Nowadays for each Court every three years the Ministry of Justice approves a schedule, proposed by the Superior Council of the Judiciary,[48] that identifies the criteria for the composition of judicial panels and the

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[43] About the principle of the «natural Judge pre-established by law», in general see: G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 225 ff.; L.P. COMOGLIO, *Precostituzione, indipendenza ed imparzialità del giudice*, in E. FAZZALARI (ed.), *Diritto processuale civile e Corte costituzionale*, Edizioni Scientifiche Italiane, Napoli, 2006, 87 ff.; A. PIZZORUSSO, voce *Giudice naturale*, in *Enc. giur.*, vol. XV, Treccani, Roma, 1988, 1 ff.; R. ROMBOLI, voce *Giudice naturale*, in *Enc. dir.*, vol. II Agg., Giuffrè, Milano, 2000, 365; in general on this fundamental principle, see ID., *Il giudice naturale. Studio sul significato e la portata del principio nell'ordinamento costituzionale italiano*, Giuffrè, Milano, 1981, *passim*.

[44] The decision of the Constitutional Court, 7 luglio 1962, n. 88 has been published in *Foro it.*, 1962, I, 1217 ff.

[45] For more details, see A. PIZZORUSSO, voce *Giudice naturale*, in *Enc. giur.*, cit., 1 ff.; R. ROMBOLI, voce *Giudice naturale*, cit., 365; in general on this fundamental principle, see ID., *Il giudice naturale. Studio sul significato e la portata del principio nell'ordinamento costituzionale italiano*, cit., *passim*.

[46] M. MAZZIOTTI, *Laranzia del giudice naturale precostituito per legge*.

[47] See, among others, Cass., 27 novembre 1992, n. 12709, in *Rep. Foro it.*, 1992, voce *Procedimento civile* [5190].

[48] On this fundamental institution, see above par. 2.3.

criteria on the basis of which the cases are assigned to individual Judges. [49] These schedules are approved by the Ministry, on the proposal of the Superior Council of the Judiciary, according to the directions expressed by the Chief Justices of the district Courts, after hearing the opinions of the judicial council and of the lawyers' council (see l. 479/1987). [50]

1.7. *The impartiality of the Judge* [51]

The Judge, in the Italian legal system, enjoys, as we said, an internal independence (which operates within the judiciary and deals with the relationship between "superior" and "inferior" Judges) and an external independence (which operates in respect of other State powers).

Moreover, the independence of the Judge can be distinguished in an *institutional* independence and a *functional* independence. [52]

These are important distinctions, which help us to understand, but the various dimensions of independence cannot be clearly separated and tend to overlap and merge.

For example, the institutional independence is aimed at functional independence, since it guarantees that the judicial function is exercised, by the Court with impartiality and in compliance with the general principle of equality of citizens before the law. Furthermore, the rules that guarantee the independence of Judges often have an appreciable value for the purpose of both internal and external independence. The establishment of the Superior Council of the Judiciary [53] prevents the executive power from having a significant say in the administration of the judiciary and, therefore, guarantees firstly the external independence of the Judge. But, at the same time, it also protects individual Judges from possible interference coming from other members of the judiciary, so it is also a very useful rule to protect internal independence.

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[49] The systems of these schedules is named as «Sistema tabellare». On this subject, see: A. PIZZORUSSO, *L'organizzazione della giustizia in Italia. La magistratura nel Sistema politico e istituzionale*, cit., 113 ff.; L. SALVATO, *L'organizzazione degli uffici giudiziari: il sistema tabellare*, in *Cass. pen.*, 1999, 1045; RIVIEZZO, *Sull'applicazione delle tabelle infradistrettuali*, in *Gazz. giur.*, 1999, f. 1, 7; SALMÈ, *Principio di precostituzione del giudice, disciplina tabellare e Corte di cassazione*, in *Quest. giust.*, 1997, 648.

[50] This proceeding is very accurately illustrated in details by G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 228 ff.

[51] On this subject see L.P. COMOGLIO, *Mito, fantasia e realtà del giudice imparziale*, cit., *passim*.

[52] For more details on this distinction, see N. ZANON-F. BIONDI, *Il sistema costituzionale della magistratura*, Zanichelli, Bologna, 2012, 53 ff.

[53] See above, par. 1.3.

1.8. *The irremovability of the Judge*

Another fundamental principle, that guarantees the independence of the Judge is expressed by the constitutional provision (article 107, paragraph 1 of the Italian Constitution), according to which the Judges cannot be dispensed, or suspended from the service, or transferred to other locations or to other functions, except on the basis of a decision of the Superior Council of the Judiciary (which must be adopted only for the reasons and with all the guarantees of defense established by the law) or with their consent. [54]

This rule is also useful to protect both internal independence and the external independence of the Judge. [55]

The rule of the irremovability of the Judge concerns both the judicial office where the Judge is assigned and the functions of the Judge. In principle, the Judge cannot be removed or transferred without his/her will only in the cases provided by the law, which are four:

– removal for reasons of supervening infirmity or ineptitude;
– the transfer due to environmental incompatibility; [56]
– disciplinary transfer;
– the transfer of the Judge with managerial functions for the completion of the maximum period of stay in the office.

One of the most problematic hypotheses concerns the so-called environmental incompatibility, which exists in the event that the Judge cannot administer justice in the conditions required by the prestige of the judicial order. The problematic nature of this hypothesis derives from the fact that the Superior Council of the Judiciary enjoys a wide range of discretion in deciding whether removing or transferring the Judge. [57]

In any case, it must be emphasized that most of the transfers take place with the consent of the interested Judge.

1.9. *The salary of the Judge*

An interesting aspect, which concerns, although indirectly, the independence of the Judge concerns his salary. It is not possible here to go in-

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[54] For this principle, see: F. DAL CANTO, *Lezioni di ordinamento giudiziario*, cit., 87 ff.; G. SCARSELLI, *Ordinamento giudiziario e forense*, cit., 169 ff.; R. NUNIN, *In tema di trasferimento d'ufficio dei magistrati*, in *Lav. giur.*, 1998, 406 ff.

[55] See, for a deeper analysis, F. BONIFACIO-G. GIACOBBE, *Commento agli artt. 104-107*, in G. BRANCA-A. PIZZORUSSO (eds.), *Commentario alla Costituzione*, cit., 170 ff.

[56] On this subject, see S. MAZZAMUTO (ed.), *L'incompatibilità ambientale e funzionale*, in ID., *Il Consiglio Superiore della Magistratura*, Giappichelli, Torino, 2001,103 ff.

[57] S. MAZZAMUTO (ed.), *L'incompatibilità ambientale e funzionale*, *ibidem*.

to detail on this subject, which is often overlooked, but it is worth pointing out that an excessively low salary may be a threat both to the prestige and to the independence of the Judge. Before the coming into force of the Constitution, the Judges, who are state officers, were paid with rather modest salaries. This situation continued even after the Constitution came into force for several decades. The salaries of the Judges have been progressively increased over the years, expecially in the 80's and today the Italian Judge enjoys a salary, proportionate to his seniority and career progression, which is among the highest of State officials and higher than the European average. [58]

2. *Accountability of the Judiciary*

The discipline of the Judge's responsibility is clearly one of the most relevant aspects that contribute to design the model of Judge and his/her position with respect to the interests at stake. Today in Italy the Judge is responsible both for damages and on a disciplinary level.

The responsibility of the Judge for damages derives from the fact that the Italian system has joined a model of "professional Judge"; the disciplinary responsibility of the Judge derives from the fact that the Italian system has joined a model of Judge as State officer. Both these models coexist and are linked to the various forms of responsibility of the Judge.

2.1. *Civil accountability for damages*

In the 1940 Code of Civil ProcedureCode of Civil Procedure the Judge's responsibility was limited to cases of Judge's fraud in the performance of the functions or in the event that the Judge, without reason, had refused or delayed the fulfilment of a duty.

The Constitution, that came into force in 1948, raised the problem of the applicability to the Judges of the art. 28 of the Constitution itself, which provides that "the officials and employees of the State and public bodies are directly responsible, according to the criminal, civil and administrative laws, of acts committed in violation of rights". According to the prevailing opinion, this rule should not apply to Judges, who, as we have already seen, are an independent and autonomous order with respect to the other State powers. In this perspective, art. 28 of the Italian Constitution only applies to State officers in the strict sense. A subsequent ruling

[58] See, for comparative data, CEPEJ website: https://www.coe.int/en/web/cepej.

by the Constitutional Court (Constitutional Court No. 2/1968), however, established that the article 28 of the Constitution also applies to Judges, with the limits established by the Code of Civil Procedure (Article 55 ff. 74 cpc then in force, today repealed). Ultimately, the Constitutional Court ruled that in the Italian constitutional system some form of Judge liability must be provided by the law and that the legislator can provide for limits and conditions in the presence of which the aforementioned liability exists.

In 1987 a referendum abolished articles 55, 56.73 and 74 of the Code of Civil ProcedureCode of Civil Procedure. The effect of this referendum, in the light of the principles held by the Constitutional Court, consisted in suppressing the limits to Judge liability for damages. It was therefore necessary for the Parliament to vote an Act to regulate (and at the same to limit) the responsibility of the Judge. This Act (No. 177/1988) was approved the following year, but its content betrayed to a large extent the intent of the referendum, as it provided for some hypotheses of direct responsibility of the State, but providing, at the same time, that the Judge could only be responsible in an indirect way. In other words, the party who claimed to have been damaged by the Judge could sue only the State, which had the right (now the duty: see hereinafter) to claim to be refunded by the individual Judge, without prejudice to the exceptional case in which the Judge had committed a crime in exercise of its functions; in the latter case, the injured party could have started a civil process directly against the Judge held responsible. This Act was often criticized, but its consistency with Constitution was confirmed by the Constitutional Court (see, in particular, sentence No. 18/1989).

The law n. 177 of 1988 on the civil liability of the Judge has entered a state of deep crisis due to some important rulings of the Court of Justice of the European Union, which, starting from the famous *Francovich* judgment in 1991 has progressively begun to highlight the inadequacy of the Italian system of civil liability of the Judge. The *Francovich* judgment (European Court of Justice, November 19th 1991, C 6/90 and 9/90, Andrea Francovich and others, v. Italian Republic) stated that, despite the fact that each Member State, as addressee of a directive, remains free to choose between different possible tools to achieve the purpose prescribed by the directive itself, this does not rule out that individual citizens can claim their own rights deriving from the EU Law contained in the directive directly before the national Courts, since, if this were not the case, the EU Law would lose full effectiveness.

After the *Francovich* case The European Court of Justice issued other judgments, which reaffirmed the principle established in *Francovich*. It should be noted in particular the 2003 *Köbler* judgment (European Court of Justice September 30th 2003, C-224/2001) which expressly extended the principle of the obligation for Member States to repair damages caused to

individuals from the violation of the EU Law also to the manifest violation of the law by the national Judge.

Two more recent judgments of the Court of Justice of the European Union have, then, definitively and expressly sanctioned the inadequacy of the Italian discipline contained in the law n. 177 of 1988 on the Judge's responsibility: this is the *Traghetti del Mediterraneo S.p.A.* (2006) and of the judgment November 24, 2011, C-379/10, delivered at the end of a process promoted by the European Commission against Italy.

In the first decision – *Traghetti del Mediterraneo S.p.A.* (European Court of Justice June 13th 2006, C-173/2003) – the Court has stated that:

«Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a Court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that Court.

Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the Court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the judgment in Case C-224/01 Köbler [2003] ECR I-10239».

In the second decision abovementioned, issued in 2011, the European Court of Justice, examining in detail the Italian legislation on the responsibility of the State and the Judge, established that Italy has failed to fulfil its obligations arising from the general principle of responsibility of the Member States of the European Union for violation of the law of the Union by a Court of last instance. In particular, the Court found that the Italian law on the Judge liability (l. n. 117/1988) excluded any responsibility of the Italian State for damages caused to individuals following a violation of European Union law attributable to the Judge of last instance, if such violation results from an interpretation of legal norms or from evaluation of facts and evidence, limiting liability only to cases of fraudulent misconduct or gross negligence of the Judge.

The inadequacy of the Italian legislation of 1988 on the Judge's responsibility, pointed out by the jurisprudence of the European Court of Justice, is reflected in the very scarce application that the law had had: along 26 years, out of 400 trials for the Judge's responsibility, only seven ended with a Judgement that awarded compensation for damages.

The latest sentences abovementioned have led the Italian legislator to vote a reform approved by the Act of Parliament n. 18/2015. The overall structure of the new regulation generally reflects that of the previous law: the responsibility of the Judge coexists with the State liability; it is possible that a party directly sue the Judge only in the case of a crime, while in

all other cases it is possible to sue directly only the State, which then can (in most cases now must) claim a compensation against the Judge found responsible. The action for compensation for damages can be promoted only after bringing all the possible appeals.

Despite the conservation of the general structure of the previous one, the new regulation introduces several important innovations in order to make the system of the Judge's responsibility more effective, also in light of Italy being part of the European Union. The new legislation has extended the compensable damage, which is now not limited only to property and non-money damage deriving from an unjust deprivation of personal freedom, but is also extended to any other non-money damage. Moreover, the Judge can be held responsible for some serious unlawful behaviours that are identified by the law, as follows:

– manifest violation of State Law or European Union Law;
– seriously wrong judgment of the issues of fact or wrong evaluation of evidence;
– statement of a fact, which is certainly excluded on the basis of documents delivered in the proceeding;
– denial of a fact, which is certainly existing on the basis of documents delivered in the proceeding;
– issue of a freezing injunction or a search order in cases not permitted by the law.

The new regulation also provides for two further innovations that can strengthen the protection of the citizen before the administration of justice: on the one hand, it is expected that in cases where the Judge's behaviour is due to malice or inexcusable negligence, the claim of the State against the individual Judge (in order to obtain a reimbursement) is mandatory; on the other hand, the so-called "eligibility filter" of the claim for compensation was eliminated. The "filter" provided that the process for stating the liability of the Judge could begin only after the Court had verified the existence of the legal conditions and after the Court had excluded the manifest groundlessness of the claim.

2.2. *Disciplinary accountability*

Another important aspect of the Judge's liability concerns the disciplinary profile.

The dark experience of the fascist regime delivered in the hands of the Democratic Republic a disciplinary system in which the executive power and the Minister of Justice played a very pivotal role. The coming into force of the Republican Constitution marks an important change of direction, thanks to which the concrete functioning of disciplinary justice is placed under the control of the self-governing body of the judiciary, the

Superior Council of Judicature (see above). The Minister of Justice is left with the role of promoter of disciplinary action, in its function of link between judicial power and popular sovereignty, a role that is an expression of the general interest of the State to punish unlawful conduct of Judges.

The main problem of the law governing the disciplinary system after the Constitution was mainly due to resources insufficiency: in fact, until the 2005 reform (see hereinafter) the disciplinary system was regulated by some constitutional principle and by some rules contained in the so-called "Act on the Guarantees for the Judiciary" ("Legge sulle Guarentigie della Magistratura", approved by the Royal Legislative Decree No. 511 of 1946), as amended by the Act n. 195/1958, with which the Superior Council of the Judiciary was established. This law was considered insufficient, mainly because the disciplinary offenses were not typified, being divided only into two general categories: a first category linked to the failure to respect the duties by the Judge and a second, linked to Judge's behaviour threatening the prestige of the judiciary.

The void of regulation, described above, has been filled with the Act of Parliament n. 150/2005 (the so-called "Legge Castelli"), which provides a long list of typical disciplinary offences, while containing some clauses that reduce the rigidity of the system. These clauses make it possible to hold the liability of the Judge even in cases that fall outside the typical offences.

It deserves to be reported an unusual (but significant) rule of the Act n-150/2005, a rule that has been amended soon after in 2006, which prevented the Judge to make a "creative interpretation" of the law.

The initiative of the disciplinary process against the Judge under this regulation is optional for the Minister of justice and mandatory for the Attorney General at the Court of cassation. The system, in this way, appears very rigid. In addition, the Minister of Justice is given considerable powers in the disciplinary procedure, which is quite "unhealthy" for the independence of the Judiciary.

As mentioned above, only one year after the approval of the 2005 Judge's liability Act (n. 269/2006), some important reforms were introduced in this matter. The regulation of 2006 eliminates some types of offenses that had been strongly criticized: in particular, on the one hand, some irregularities that had been defined in an extremely vague manner were suppressed and, on the other hand, as we have already said, the offense that prevented the Judge to give "creative interpretation" of the law was suppressed. The reform has also introduced a general clause of "irrelevance of the unlawful behaviour", which introduces a certain degree of flexibility. Finally, the powers of the Minister of Justice have been to some extent reduced: now, for example, he can no longer participate in the disciplinary hearing through a delegate.

On the whole, we can conclude that the reforms mentioned above have

led to a significant widening of disciplinary responsibility, which has also led to a considerable increase in disciplinary charges transmitted to the General Public Prosecutor's Office. The latter reach around the number of 1400 each year. The General Public Prosecutor's Office, however, plays an important role in the selection of these charges, dismissing the 90% of them: this means that roughly only 100-120 disciplinary proceedings are started each year. The Minister of Justice promotes about 160 disciplinary proceedings a year. Finally, it should be pointed out that in recent years the highest number of convictions concerns the serious and unjustified delay in the management of proceedings.

2.3. *Political accountability*

The status of the Judge in the Italian legal system doesn't allow to consider him/her subject to political responsibility. The Italian Judge is selected by means of a competition, has not a popular investiture and formally is an official of the State. Although, as we have seen, justice is administered "in the name of the People", the relationship between the administration of justice and popular sovereignty is mediated by law and in the Italian legal system it does not seem possible to claim that the Judge has a political responsibility.

3. *Transparency in the civil process*

3.1. *Transparency along the proceeding*

The Italian code of civil procedure provides – in theory – the general principle of publicity of the hearing, at least with regard to the discussion hearing (see art. 128 of the Italian Code of civil procedure). The principle of publicity of the hearing matches with art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedom signed in Rome on 4 November 1950 and come into force in Italy by the Act of Parliament n. 848/1955, as well as in article 14 of the International Convention on Civil and Political Rights, signed in New York and December 16, 1966 and made executive in Italy with the Act of Parliament n. 881/1977.

In practice, however, due to an important major reform of the Code of Civil ProcedureCode of Civil Procedure introduced in the Nineties, today the public hearing is no longer mandatory; it is quite the opposite: it is optional in the most cases and it is mandatory only in rare, exceptional cases. It follows that currently it cannot be said that the Italian civil procedure is inspired by the rule of publicity of the hearing: on the contrary, on

the one hand, this principle is provided by art. 128 c.p.c. only with reference to the discussion hearing, which takes place at the end of the procedure, leaving behind several non-public hearings in which the parties have already carried out the overwhelming majority of the most important litigation activities, in particular that relating to evidence. On the other hand, as we have said, this discussion hearing, having a minimum content and a purely formal character, is moreover no longer even obligatory, so that almost all civil trials end without it.

Despite the law "in action" relegates to an absolutely marginal role the principle of publicity of the hearings, however it must be underlined that the Code of Civil ProcedureCode of Civil Procedure state the right of the counsel of the parties and of the parties in person to attend all the preliminary hearings and, in particular, the evidence hearings (art. 84 dispt. Att., Cpc).

Transparency reasons require that a written report is drawn up for each hearing. In this report the Registrar acknowledges the procedural activities carried out by the parties at the hearing, as well as the decisions taken by the Judge. The Code provides (art. 130) that the Registrar draws up the hearing report under the direction of the Judge. However for many years, due to lack of staff, these reports were handled by the lawyers by hand writing on paper sheets. Today, the IT technology has made this custom much more rare: very often the reports are nowadays typed with a computer by the registrar or by the Judge himself in electronic form.

3.2. *Transparency and judicial decision*

The main guarantee of transparency of judicial decisions consists in the duty for the Judge to give reasons of her/his judgments, provided for by art. 111, par. 6, of the Constitution, and by art. 132 of the Code of Civil Procedure.

As has been authoritatively said, the reasons of the decision performs various functions and, in particular, from the perspective of transparency, takes on a very important value both internally and externally. Under the first profile (internal), in fact, it is very important for the parties to know the reasons of the decision in order to allow it to be challenged on appeal. Under the second profile (external), the reasons given by the Judge play an important role of transparency outside the process, allowing the control of judicial decisions by the general public, that is to say, of that people in whose name justices administered.

Recently the legislator has heavily influenced the rules on the drafting of judicial decisions, acting on three different levels.

Firstly, the Government and Parliament in 2009 (with Act of Parliament No. 69/2009) amended certain provisions of the Code of Civil Procedure (art. 132 c.p.c., art. 118 disp. att. c.p.c.), with the aim of promoting

the drafting of reasons more and more concise, also allowing the Judge to motivate in law only with reference to precedents.

Secondly, with the same Act n. 69/2009, simplified proceedings have been introduced (for example the summary process regulated by articles 702-bis ff. c.p.c.); the cases tried with these procedures can be decided with a simplified judgment, provided with short reasons (art. 134 of the Italian Code of Civil Procedure).

Finally, in 2012 (by Law Decree No. 83 2012, converted into Act of Parliament No. 134 of 7 August 2012), it was decided to reduce significantly the control by the Court of cassation over reasons given by lower Courts. Although the latter aspect affects only indirectly the way lower Courts Judges give reasons, nevertheless, limiting strongly the control by the Supreme Court (which can void an appealed judgment only when the motivation is totally illogical or absolutely missing) can negatively affect the style and content of judgment reasons. It is legitimate, in fact, to expect a lower degree of accuracy by lower Courts Judges in the drafting the decisions, both in fact and law. This is normally denied, but it is not logic to imagine that a reduction in the control of the judgment reasons by the Supreme Court has no impact over lower Courts.

The factors discussed above shows that the drafting of civil judgment reasons has now entered a state of crisis and unfortunately this also affects negatively the administration of civil justice in terms of transparency. Lastly, it must be pointed out that the due to give reasons is provided for by the Constitution: an adequate interpretation of such a principle requires the Judge to draft a logical, sufficient and complete reasoning.

3.3. *Transparency after the decision*

After the decision, transparency in the administration of civil justice is guaranteed by the possibility of dissemination and publication of judgments. A very important role in this is played by the Internet website of the Supreme Court of Cassation (www.cortedicassazione.it), where all the decisions of the Court are published in unabridged version. Judgment of lower Courts are published occasionally on the Internet both by institutional and private websites, as well as in specialized law journals.

The publication of judgments can only take place in compliance with the privacy rules, which impose a "darkening" of the judgment before they are published, which must make it impossible to recognize the identity of private persons involved in the dispute. Therefore, the names of the private parties (not, instead, the names of private companies or public bodies) are cancelled before the judgments are disclosed to the public.

The availability of all the decisions of the Supreme Court of Cassation is certainly able to promote transparency in the civil justice system. How-

ever, it should not be forgotten that the number of decisions handed down each year by the Italian Court of Cassation is very high: around 35,000 a year. This circumstance, on the one hand, shows the great productivity of the Italian Supreme Court, but, on the other hand, even in the presence of a system of publication of all judgments, plays a negative role against transparency. The achievement of an optimal level of transparency of a justice system presupposes the possibility not only for the parties to have access to an adequate justification of the decision over their rights (a topic already mentioned), but also the possibility for the general public to recognize the directions towards which the law "in action" moves. The huge amount of judgment delivered each year by the Italian Supreme Court stands as a strong obstacle to the intelligibility of the judicial interpretation of law. A key role of leadership is entrusted to the Grand Chamber (Sezioni Unite) of the Court of Cassation, a role significantly strengthened by the most recent reforms, but this may not be enough.

One last aspect concerning transparency, in connection with the great number of judgments delivered by the supreme Court, deserves to be briefly addressed. The huge amount of judgments published every year on the official website of the Supreme Court makes it impossible for a normal human being to become aware of all the judgments and the law interpretation they express. This implies the need to rely on a selection and synthesis work that in Italy is institutionally entrusted to a special office, named "Ufficio del Massimario e del Ruolo". This office, established within the Supreme Court, has the task of selecting the judgment from which extract the so-called "massime" of sentences, i.e. synthetic statements that sum up the interpretation given to a certain rule by the Supreme Court. This is a very important function, as it is suitable to bring out interpretative guidelines that would otherwise remain buried in the great mass of decisions. The "Ufficio del Massimario e del Ruolo" enjoys a great deal of prestige and more than 70 Judges with great experience are employed in that Office, so that its work, from a technical point of view, is unexceptionable. If, however, we move from a technical point of view to the subject of transparency, things start to change: the abovementioned Office, in fact, operates under the direction of the president of the Supreme Court, but the criteria for selecting judgments and the criteria for the drafting of "massime" are not open to discussion and, moreover, are not public. The large number of decisions delivered each year by the Supreme Court, associated with the highly selective role of this Office and with the way it operates, gives us an image of civil justice that cannot be said to be fully satisfactory in terms of transparency.

Further observations would deserve the issue of the language of sentences, which in our country is extremely technical and difficult to be understood by the common citizen, but this would take us too far, so that it is not possible to deal with this complex and fascinating topic here.

4. *Evaluation and Ranking of Civil Justice in Italy*

There are systems for assessing the Italian justice system both internally, externally and supranational.

4.1. *Internal evaluation*

In Italy the "state of health" of civil justice system is measured through statistical data coming from the General Office of Statistics of the Ministry of Justice. These data are made available to the public on an annual basis, but they are not always easy to find, and often access to them appears difficult.

One of the most important data, according to which the Italian civil justice system appears to be in a situation of poor efficiency, concerns the duration of proceedings. In 2017, the average duration of first instance civil proceedings was around 981 days (about 3 years); a similar time is, on average, necessary for an appellate proceeding and for a decision to be delivered by the Supreme Court of Cassation. This means that it takes an average of 10 years from the first to the last instance.

4.2. *External evaluation*

Probably the most important institution offering an "external" measurement of the degree of civil justice efficiency is the World Bank, through its annual Doing Business report. The results of this report regarding the civil processes in Italy show a state of chronic inefficiency.

The first president of the Court of Cassation, at the opening ceremony of the "2019 judicial year", presented the results of the Doing Business report as follows:

«The 2019 Doing Business Report concerning Italy, elaborated by a group of supranational economic institutions grouped in the World Bank Group, places our country at no. 51 of the general classification of the eleven indicators that characterize the "doing business" (in the previous year the position was at number 46). With reference to the parameters of time and costs of disputes (enforcing contracts, data 1st May 2018), the report places us at n. 111 (worse than No. 108 of 2017 and No. 106 of 2016) in the ranking of the 190 countries taken into consideration. In this ranking, countries close to Italy for economic and social situation (all members of the European Union) are placed in a better position (France and Sweden 12, Spain 23, Germany 26, United Kingdom 32, Belgium 54, Portugal 35, Ireland 102); only Greece (132) and Cyprus (138) have a worse position. On the other hand, the evaluation of the quality of the Ital-

ian judicial service remains high. It takes into account four sub-parameters (structure of the judicial offices and the adopted procedures, methods for examining the dispute, degree of automation of the judicial offices, possibility of resolving the dispute alternatives to the judicial ones) which, on a scale from 0 to 18, assigns to Italy the score 13 (Germany 10.5, France 12, Spain 11.5, Belgium 8), higher than the score of 11.5 which is the average of the EU countries. The low degree of efficiency of civil justice is considered one of the structural aspects of the unfavourable business environment and, while taking note of the improvements implemented in the past years, it is noted that "improving the set of institutions, rules and practices on to which economic activity is based, and which influence the behaviour of workers and businesses, is a long-term effort"».

At the level of European Institutions, an important role is played by The European Commission for the Efficiency of Justice (CEPEJ), established by the Committee of Ministers of the Council of Europe, that has the task of assessing the efficiency and quality of European judicial systems and proposes measures in order to provide a good justice service for the public.

The CEPEJ report 2018 (data 2016) doesn't provide an overall evaluation of the justice systems in different countries, but offers some useful data, that deserve some attention. These data show that Italy has a budget for the justice system per habitant, which is higher than the average of European Countries (see figure 2.7). Also the budget for the Courts is higher than the European average (see figure 2.16). On the other hands Italy applies taxes and Court fess which are lower than the European average (see figure 2.33). The legal aid in Italy is available only for people with a very low income (less than about € 10.000) and the public budget for legal aid funding per inhabitants is particularly low compared with the average expenditure in Europe (see figure 2.43). The number of professional Judges per 100.000 inhabitants in Italy is half of the European average: 11 out of 22 (see figure 3.6). The gross salary of Italian Judges is a little higher of the average European gross salary at the beginning of the career (€ 56.000 out of € 50.000), but it's significantly higher with respect to Judges of the Supreme Court (who have a gross salary of € 186.000 out of an average of € 96.000) (see figure 3.20). The number of lawyers per 100.000 inhabitants is incredibly high: it scores 390, making Italy one of the most lawyer-populated country in Europe, following only Cyprus, Luxembourg and Greece (see figure 3.53). Italy has one of the higher time of disposition of first instance civil and commercial cases more than double of the average (see figure 5.8) and has also the highest number of first instance civil and commercial pending cases per 100 inhabitants: 4,1 out of an average of 1.6 (see figure 5.9).

Finally, other data concerning the efficiency of civil justice seem to be relevant: Italy has a clearance rate higher than 100%. This shows that the

Courts, notwithstanding the high number of incoming proceedings, are coping with the inflow of cases. In this respect CEPEJ notes that «Italy has been slowly but constantly improving the Disposition Time in the last 3 cycles, following the implementation of reforms to improve performance and to enhance the quality of statistical information».

NEW RULES ON FOREIGN INVESTMENT IN CHINA

Laura Formichella

1. *Introduction*

The start of the strategy for the reform of the foreign investment system in China finds its basis in the *Decision* adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China on November 12, 2013. Through a repeated reference to the instrument of the law, in order to define a balance between the role of the government and that of the market, it had set the goal of providing a generally unified system of laws and regulations on both Chinese and foreign investment and to create an environment for foreign investments characterized by stability, transparency and predictability, indicating 2020 as the deadline to achieve decisive results in the reform of important areas and crucial segments. [1]

On January 19, 2015, Ministry of Commerce (MOFCOM) brought out Foreign Investment Law of the People's Republic of China (Exposure Draft) to solicit opinions from the general public. [2]

In a text of 170 articles, the Chinese government affirmed the current inadequacy of a management mode *"case-by-case examination and approval system"* established by the Three Foreign Investment Laws [3] for

[1] About the *Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform*, *see* http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm.

[2] See *Mofcom Spokesman Sun Jiwen Comments on Foreign Investment Law (Exposure Draft) Issued for Soliciting Public Opinions*, http://english.mofcom.gov.cn/article/policyrelease/Cocoon/201501/20150100875221.shtml.

[3] See, M. TIMOTEO, *La Costituzione di Equity Joint Venture in Cina. L'Investitore Occiden-*

construction of a new open economic system, activation of the market and transformation of governmental functions; the necessity to provide as general reference the Chinese Company law and the importance to include a security review system in fundamental laws on foreign investment.

On the basis of these forecasts, the work of the Ministry of Commerce to amend the *Law on Chinese-Foreign Equity Joint Ventures*, the *Law on Wholly Foreign Owned Enterprises* and the *Law on Chinese-Foreign Contractual Joint Ventures* began at that time, meanwhile highlighting as strengthening governmental functions in facilitating foreign investment is a new tendency in foreign investment legislations and policies of the countries all over the world.

It was not until three years later that, on December 26, 2018, the official website of the National People's Congress (NPC) released a draft of *Foreign Investment Law*, consisting of six chapters and 39 articles, and sought for the public's comments. The draft, despite through provisions of principle at the most, focused on promotion and protection of investment, as 20 of 39 articles which were concerning about them. It confirmed, for foreign investments, the system first implemented by the Shanghai Pilot Free Trade Zone in 2013 as a pilot policy (the pre-establishment national treatment plus negative list management system) and provided a complain system for foreign-funded enterprises. [4]

The second draft of the Foreign investment law was published on January, 2019 [5] to be then approved two months later at the annual meeting of the National People's Congress.

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tale a confronto con il diritto cinese, in *Dir. comm. Internazionale*, 12, 1, 1988; P. BUCKLEY, *Foreign Direct Investment, China and the World Economy*, Springer, Berlin, 2010; T. MAHONY, *Foreign Investment Law in China: Regulation, Practice and Context*, Tsinghua University Press, Beijing, 2015, 4-12.

[4] HUANG, D.C.-VAN, V.T.-HOSSAIN, MD.E.-HE, Z.Q. (2017) *Shanghai Pilot Free Trade Zone and Its Effect on Economic Growth: A Counter-Factual Approach*. *Open Journal of Social Sciences*, 5, 73-91. https://doi.org/10.4236/jss.2017.59006.

[5] The second draft did not differ significantly from the first one. Some changes were related to: a) the scope of foreign investment where "foreign investment" no longer covered capital increases by foreign investors, either individually or jointly. Any acquisition by foreign investors of "shares, equity, property shares, or other similar rights in mainland Chinese enterprises" was considered "foreign investment" under the second draft with no restriction to mergers and acquisitions; b) the definition of "pre-establishment national treatment", to be explicitly understood as "affording foreign investors and their investments treatment no less favorable than that afforded to Chinese domestic investors and their investments, during the establishment, acquisition, expansion, and such other stages of an enterprise"; c) requisition that, in addition to expropriation, was authorized by government for public interest; d) anti-monopoly review to which must be submitted any foreign investors that "merge with or acquire mainland Chinese enterprises" or otherwise participate in concentration of undertakings.

2. *Preliminary steps of change for foreign invested enterprises*

Since foreign investment in PRC companies became permitted in 1979, the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC) and the State Administration of Industry and Commerce (SAIC) were the frontline regulators in approving the establishment of foreign-invested enterprises (FIEs).[6] This regime, characterized by a complete separation of discipline from the one reserved for domestic enterprises, was built from the beginning according two specific pillars, relevant for the establishment and modification of these forms of foreign presence in China: the delimitation of areas in which allow such enterprises to enter the market, in full or limited form where not prohibited (*see paragraph 3 below*), and a system of a case-by-case evaluation and approval of the corresponding forms of investment, involving the Ministry of Commerce and the State Administration for Industry and Commerce, at central and local levels, depending on the size of the proposed investment and further, different, parameters.

However, in the period of time between the publication of the first draft of the Foreign Investment Law and its approval, the Chinese government has taken important steps to reform the above regime, working towards harmonization between rules for domestic and foreign subjects, starting from the *Decision on Revising Four Laws, Including the «PRC Wholly Foreign-owned Enterprise Law»* adopted by the Standing Committee of the People's National Congress on September 3, 2016.[7]

Since the NPC Decision came into effect on October 1, 2016, a FIE engaged in a business that was not subject to restrictions or "special administrative measures for access" changed from being subject to administration by way of examination and approval, to administration by way of record filing. This development has consistently reduced time and complexity of establishing a non-restricted FIE.

The NPC Decision only amended a single article in each of the laws governing the three traditional types of FIE – the wholly foreign-owned enterprises, the equity joint venture and the cooperative joint venture – which changed the approval regime to a filing regime.

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[6] *See*, T. MAHONY, *Foreign Investment Law in China: Regulation, Practice and Context*, Tsinghua University Press, Beijing, 2015, 19, where these entities and their respective provincial and municipal sub-entities involved in the foreign investment approval process, are indicated as representatives of three separate stages of one process, beginning with the "planning approval" from the NDRC, followed by the "foreign investment approval" from Mofcom and concluding with the "business establishment approval" (the issuance of the business license) from the Saic.

[7] E.J. DE BRUIJN-X. JIA, *Joint Ventures in China Face New Rules of the Game*, *Research technology management*, Vol. 61(3), 2018.

To implement the new process, MOFCOM adopted and released, jointly with the National Development and Reform Commission, also the *Tentative Measures for the Administration of the Record Filing of the Establishment of, and Changes to, Foreign-invested Enterprises* (Filing Measures),[8] describing businesses subject to special access administration as being those listed in the "restricted" or "prohibited" categories of the Foreign Investment Industrial Guidance Catalogue and those listed in the "encouraged" category but subject to foreign shareholding limits or requirements for senior management.[9]

This change has meant, first time, that the pre-access national treatment and negative list administration model for foreign investment (better described below) would no longer be limited to the pilot free trade zones[10] but would be implemented nationwide, shaping some general rules later contained in the Foreign Investment Law.

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[8] The Filing Measures have been promulgated on October 8, 2016 and entered in force on the same date. Announcement of the Ministry of Commerce [2016] No. 3.

[9] Under the Filing Measures, filing with a local authority under Mofcom was required for specified matters in relation to Wholly Foreign Owned Enterprises (WFOE), Equity Joint Ventures (EJV) and Cooperative (or contractual) Joint ventures (CJV) as well as foreign-invested companies limited by shares, foreign-invested investment type companies (holding companies), and foreign-invested venture capital investment and "equity investment" enterprises. Equity investment enterprises refer to onshore private equity and venture capital funds, which are often organized as foreign-invested limited partnerships. Although Mofcom had no authority over the establishment of partnerships, which only needed to be registered with the local counterparts of the State Administration for Industry and Commerce, the Filing Measures apparently extended Mofcom's powers to cover partnerships as well.

The matters that only required Mofcom filing were: the establishment of a non-restricted FIE; a change in basic company particulars of a non-restricted FIE (name, registered capital, form of organization, term of operation, category of business, business scope, total investment, legal representative, ultimate controlling shareholder, etc.); a change in basic information regarding the investors of a non-restricted FIE (name, nationality, subscribed capital contribution, country of origin of funds, etc.); transfer of equity interest in a non-restricted FIE (other than a transfer that represents a less than five percentage point change in the aggregate holding of foreign investors in a non-restricted FIE that is a listed company); merger, division or dissolution of a non-restricted FIE; creation and enforcement of security interests over assets of a WFOE; early recovery of investment by the foreign investor of a CJV; and the entrustment management of a CJV.

The filing for the establishment of a new non-restricted FIE could be made either during the period between the date the company name is reserved with the SAIC and the date the business license is issued or within 30 days after the business license is issued. A change in the registered particulars of a non-restricted FIE or its shareholders should be filed within 30 days after the change.

[10] See *Decision on Authorising the State Council to Provisionally Adjust the Administrative Examination and Approval Specified in Relevant Laws in the China* (Shanghai) *Pilot Free Trade Zone*, adopted by the Standing Committee of the National People's Congress, on August 30, 2013 and effective on October 1, 2014. The Decision has authorised the State Council to provisionally change the administrative examination and approval relating to foreign investment, except where the State specifies the implementation of special administrative measures for access, to administration by way of record filing in the Shanghai Free

3. *Guidance Catalogues for foreign investment and Negative List*

The People's Republic of China, after Mao Zedong's death in 1976, embarked on radical economic reforms. Deng Xiaoping, who succeeded him in 1978, understood the necessity to open the doors to foreign investors. In the 1980s, the "open door policy" (*gaige kaifang*) marked the gradual transition from a planned economy to a socialist market economy.

In order to ensure better stability in foreign investment and within a careful macroeconomic planning framework, the central government launched, in 1995, the Catalogue of Foreign Investments (*Waishang touzi chanye zhidao mulu*) jointly issued by the National Development and Reforms Commission and by the Ministry of Commerce of the PRC.

The Catalogue was structured schematically into three macro-categories: encouraged investments; restricted investments; prohibited investments. The types of investments not expressly contemplated were to be considered permitted.

The belonging of an investment to one of these macro-categories affects factors such as the level of the government authority competent to approve the project (usually at the central government level for restricted projects), the participation of the sector government agency in the project approval phase as well as the necessity or otherwise of a Chinese partner.

This document has been subject of several amendments and updates over the years (1997, 2002, 2004, 2007, 2011, 2015, 2017). On June 28, 2017, following the adoption of the Filing Measures, China's National Development and Reform Commission and Ministry of Commerce released the 2017 edition of the Catalogue for the Guidance of Foreign Investment Industries, which came into effect one month later and, changing the traditional structure of the Guidance Catalogue, has introduced a nationwide negative list system for market access of foreign investment.

Compared to the previous division into three categories, the Catalogue version updated to 2017 keeps the encouraged category and provides a "Negative list" for the Special Administrative Measures that contains the restricted and prohibited categories as well as restrictions, such as equity ratio and senior executive requirements, for certain types of foreign investment industries. Additional investment restriction measures that ap-

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Trade Zone established on the basis of the Shanghai Waigaoqiao Free Trade Zone, Shanghai Waigaoqiao Bonded Logistics Zone, Yangshan Free Trade Port Area and Shanghai Pudong Airport Free Trade Zone.

In September 2019, the State Council established 6 new pilot free trade zones in the provinces of Shangdong, Jiangxu, Guangxi, Hebei, Yunnan, Heilongjiang. For the first time, FTZs have been established in border areas to facilitate cooperation with neighboring countries, and are characterized by different policies and reform experiments.

ply to both foreign and domestic investments and those not related to market access are not included in this Negative list. [11]

Under the new system, in principle, no restrictive measures should be applied to foreign investment access in areas of investment other than those included in the negative list, and setting up projects and enterprises with foreign investment in such areas will be subject just to record-filing requirements, but not pre-approvals, from the authorities.

The national Negative list, deleted from the Catalogue of Industries for Guiding Foreign Investment in 2017 and presented under the name of *Special Administrative Measures on Access to Foreign Investment* was published in 2018 and revised in 2019 and 2020. On 23 June 2020, the State Development and Reform Commission and the Ministry of Commerce jointly issued two "negative lists", both of which entered into force on July 23, 2020 to further ease market access for foreign investments. [12]

With regard to the Catalogue of Encouraged Industries for Foreign Investment and in terms of investment policies, Chinese government has continued to use it to facilitate and guide foreign investment in specific industries, fields and regions in China.

In order to further promote opening-up, to accelerate the construction of a new open economy and to improve foreign investment policies, on July 30, 2019 the State Development and Reform Commission and the Ministry of Commerce issued the *Catalogue of Industries for Encouraged Foreign Investment* (2019 edition). On the same date, the encouraged fields detailed in the Catalogue of Industries for Guiding Foreign Investment (Amended in 2017) and the *Catalogue of Priority Industries for Foreign Investment in Central and Western China* (Amended in 2017) have been abolished. [13]

On this basis, Chinese government announced that it would continue to expand the scope of encouraged industry sectors. Against such background, a Catalogue of Encouraged Industries for Foreign Investment (2020 version) was announced on 31 July 2020, [14] keeping the same struc-

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[11] The National Development and Reform Commission and the Ministry of Commerce released for the last time on December 16, 2020 the Market Access Negative List that standardizes market entry rules for domestic and foreign players.

[12] The two Negative Lists refer to the Special Administrative Measures on Access to Foreign Investment (2020 National Negative List) and the Free Trade Zone Special Administrative Measures on Access to Foreign Investment (2020 FTZ Negative list) which will replace their respective 2019 versions.

See, C. CHEN, *The Negative List in China – Causation, Content and Implication. In International Conference on Humanities and Social Science 2016*, Atlantis Press, 2016.

[13] The General Administration of Customs issued an Announcement on Issues Concerning the Implementation of the Catalogue of Industries for Encouraged Foreign Investment. See, GAC Announcement [2019] No. 125.

[14] The revised parts of the Catalogue encourage foreign investors to participate in the

ture of the latest model so by combining the National Catalogue of Encouraged Industries for Foreign Investment and the Catalogue of Advantageous Industries for Foreign Investment in the Central and Western Regions" together. [15]

China's Negative lists (at national and local level) and Encouraged Catalogue are used as a tool for foreign direct investment attraction and their industrial and geographical composition while free trade zones are used as a testing ground for new policies later to be applied in the whole country.

Both of them are instruments to realize a deepen reform of the administrative system aimed at an administrative simplification and power decentralization, purpose of the Third Plenary Session of the 18th CPC Central Committee.

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high-quality development of the manufacturing industries, invest in the production service industry, further invest in the central and western regions of China.

[15] The first version of the *Catalogue of Advantageous Industries for foreign Investment in Central and West China* (*Zhong xibu diqu waishang touzi youshi chanye mulu*) was adopted in 2000 by the National Development and Reform Commission and the Ministry of Commerce and then amended in 2004, 2008, 2013. This Catalogue, limited to the central-western area of mainland China, constituted a further intervention of the Chinese Government for the realization of the objectives set under the Twelfth Five-Year Plan.

Through this new Catalogue, the Government aimed to continue the policy of economic and administrative decentralization, giving each province an autonomous economic plan, putting the provinces in competition with each other in order to stimulate the development of the national economy. Leveraging the opportunities offered to foreign investors in these new areas, it aimed to maintain a competitive advantage and prevent foreign investment from moving to areas bordering China. The purpose of this Catalogue was threefold: 1) to create districts and specialized areas for the production of different types of products; 2) to standardize the level of development of China's inland areas to that of the more developed areas on the east coast; 3) to encourage the development of environmentally sustainable technologies and industrial plants. This text is structured on a provincial and municipal basis and uses as a reference 22 areas (including provinces and municipalities) in which the following are encouraged: i) industrial sectors affected by crisis; ii) those sectors that play a fundamental role in the development of the local and national economy.

The development policy of central-western areas actually began in March 1999 with the publication of the first Development Strategy for Western areas, where the Chinese government had established the main criteria of the strategy which included: the development of infrastructure, the exploitation of local natural resources, greater attention to environmental protection aiming, among other things, to redistribute sources of pollution in different areas of the territory to avoid the accumulation of pollution only in certain areas.

The first phase of this strategy ended in 2008 with only apparently encouraging results. The second phase of the plan opened with the creation of three development plans for the following special economic zones in the western area: Chongqing-Chengdu; Guangxi-Gulf of Beibu; Guanzhong-Tianshui. This development policy paved the way for an economic development policy also for the central regions with the aim of developing four major industrial sectors: grain production; transport; development of energy sources and exploitation of raw materials; production of high-tech equipment. This plan was integrated in May 2010 by the Ministry of Commerce with the Central China Foreign Investment Promotion Plan, and six provincial plans.

4. *The Foreign Investment Law: scope of application*

On January 1, 2020, the *Foreign Investment Law* of the People's Republic of China came into force. On the same date, the related *Implementing Regulations for the Foreign Investment Law of the People's Republic of China*, issued by the State Council [16] and the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Foreign Investment Law of the People's Republic of China* became effective as well. [17]

The Foreign Investment Law contains general principles to consolidate provisions of various laws and regulations on foreign investments in China, to promote and provide a fairer treatment of them, to safeguard foreign investors by strengthening the protection of intellectual property rights, to establish a national security review system and other provisions.

The Law enacted is extremely shorter than the draft submitted for public comment in 2015: within 42 articles compared to 170 of the original draft, it embodies the implementation of obligations undertaken two decades ago upon accession to the World Trade Organization, particularly the duty of transparency and prohibition of discrimination. [18]

In six chapters (general provisions, investment promotion, investment protection, investment management, legal liability and supplementary provisions), as better described below, the Foreign Investment Law affirms promotion and protection of foreign investment concerning investment safety and further market liberalization and emphasizes the protection of intellectual property.

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[16] Approved by the 74th Executive Session of the State Council on December 12, 2019 and in force since January 1, 2020, the text consists of 49 articles and reproduces the same structure as the Law to which it refers. For an Italian translation, *see*, *Leggi tradotte della Repubblica Popolare cinese*, vol. XII, *La normativa in materia di investimenti esteri*, translation and notes by L. FORMICHELLA-E. TOTI, Wolters Kluwer, Milan, 2021, 38-81.

[17] Adopted by the 1.787th Session of the Judicial Committee of the Supreme People's Court on December 16, 2019, and effective as of January 1, 2020, the text consists in 7 articles governing issues related to the law applicable to investment contract dispute cases between equal parties before the Chinese People's courts, in order to ensure the proper implementation of the Foreign Investment Law of the People's Republic of China, the fair protection of the legitimate rights and interests of Chinese and foreign investors under the law and the establishment of a stable, impartial and transparent business environment governed by law in concert with judicial practice. Among areas regulated by the Law and the Implementing Regulations, the Interpretation of the Supreme People's Court exclusively and partially addresses the one related to market access requirements.

[18] A.S ALEXANDROFF-S. OSTRY-R. GOMEZ (a cura di), *China and the Long March to Global Trade. The Accession of China to the World Trade Organization*, London-New York, Routledge, 2003; R. CAVALIERI, *L'adesione della Cina alla Wto. Implicazioni giuridiche*, Argo, 2003; C.G. CHOW, *The Impact of Joining Wto on China's Economic, Legal and Political Institutions*, in *Pacific Economic Review*, 1, 9, 2003, n. 2, 105-115.

In the general provisions (art. 2) the Law defines the scope of application of the legal framework, [19] further specified by the Implementing Regulations (art. 3) and sets out some clear indications on it, leaving other issues open, while hinting at the solution it intends to adopt.

The first disclosure is provided by the first paragraph of art. 2, which refers the application of the new discipline to investments made in the territory of the People's Republic of China, so-called Mainland China. It is confirmed in the Implementing Regulation (art. 48) where investments in Mainland China by investors from Hong Kong Special Administrative Region and Macau Special Administrative Region are subject to the new rules on foreign investments, unless laws, administrative regulations or the State Council stipulate otherwise; differently, to investments in Mainland China by investors from Taiwan, shall apply provisions of the *Law of the People's Republic of China on the Protection of Investment by Taiwanese Compatriots* and its Implementation Regulations and, merely matters not governed by these Law and Regulations shall be handled with reference to the Foreign Investment Law and the Implementation Regulations.

A second issue, of the utmost concern, relates to what can be considered foreign investment.

Through a formulation that explicitly includes direct and indirect investments conducted by foreign individuals, enterprises or other organizations, by means of a three-point list specifying the types of investment and a final open clause, the Law does not clearly resolve the question of whether an individual Chinese citizen may be part of an investment with a foreign investor, as was the case in the draft prepared by the Ministry of Commerce in 2015.

The interpreter will be able to find an answer in art. 3 of the Implementing Regulations where it is provided that other investors referred to in item (1) and item (3) of the second paragraph of Article 2 of the Foreign Investment Law shall include Chinese natural persons. So, under the new regime, a previous restriction has been abolished and Chinese individuals no longer need to set up a legal entity to establish a Sino-foreign joint venture for legal reason. [20]

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[19] For the purposes of the Law, "foreign investment" means the investing activities within China directly or indirectly conducted by foreign natural persons, enterprises, and other organizations including the following circumstances: 1) a foreign investor forms a foreign-funded enterprise within China alone or jointly with any other investor; 2) a foreign investor acquires any shares, equities, portion of property, or other similar interest in an enterprise within China; 3) a foreign investor invests in any new construction project within China alone or jointly with any other investor; 4) investment in any other manner as specified by a law or administrative regulation or the State Council. "Foreign-funded enterprise" means an enterprise formed and registered within China under the laws of China in which all or part of investment is made by a foreign investor.

[20] Under the previous laws, it was not allowed them to be part of investment with foreign

Compared with the previous regulatory context, in which laws on foreign investment were silent on indirect investment (set forth in the *Interim Provisions on Investment Inside China by Foreign Investment Enterprises* which only addressed issues in connection with investments made but with no legal prescriptions about further investment made by foreign investment enterprises or their subsidiaries), the current Law explicitly states that "foreign investment" includes direct and indirect ones while leaving without a clear prescription about what may fall under the latter category, re-proposing so uncertainty, through a catch-call clause, with respect to those "contractual arrangements", commonly used by foreign investors to enter in China industry sectors (prohibited or restricted) where Chinese government exercises the greatest control and deferring to the future the regulation of such eventualities.

In particular, according to art. 2, paragraph 2, under 4), doubts have been raised by all sides that so called Variable Interest Entities (VIEs) may fall within the scope of application of the general rules governing foreign investments. VIEs, also known as contractual control or contractual arrangements, represent legal structures in which an entity, owned by a Chinese legal person or Chinese natural person is in fact controlled by a foreign investor, possibly achieving a penetration of those areas banned, in whole or in part, by the government.

The provision by the Chinese government of areas in which foreign investments are prohibited or limited is obviously connected to the will to exclude any hypothesis in which, through structures that do not fall within the types of investment specifically listed in art. 2, the foreign investor may attempt to circumvent the regulatory framework.

The 2015 Draft of the Law, for the first time, clearly referred to VIE as a way to create a foreign investment. [21] The final version of the Law, by inserting the catch-call clause, including "investments made by foreign investors in China through other means", temporarily shelves many contro-

investor unless such Chinese individuals had been shareholders of the target company for at least one year before the acquisition of such target by foreign investors.

[21] Art. 15 of the Draft stipulated that foreign investment referred to, among others, "control" of a domestic enterprise or the holding of an interest in a domestic enterprise by foreign investors through contracts, trusts, etc., which shall be governed by investment access management provisions, security reviews, information reporting on foreign investment under the foreign investment law; art. 11 of the Draft stipulated that foreign investors also included domestic enterprises that are "controlled" by non-PRC nationals, overseas registered entities and other organizations; with regard to the definition of "control", article 18 further clearly provided three means of control, specifically: (1) by acquiring more than 50% of the equity, voting rights or similar rights of the controlled enterprise; (2) in the absence of 50% equity ownership, (i) be entitled to decide the appointment of more than half of the board members of the controlled enterprise; (ii) have a significant impact on the shareholders' meeting or the board of directors of the controlled enterprise; or (3) be able to exert decisive influence on the business, finance, personnel or technology of the controlled enterprise through contracts, trusts, etc.

versial issues leaving them for later legislative response, case by case analysis or consider VIEs to be implemented as a pilot program in certain sensitive industries.

5. *Market access and impact on the governance of companies with foreign capital*

The new rules on foreign investment have had a large impact on the business forms and structures of foreign investment enterprises (FIEs) they have taken since the late 1970s on the basis of the special regulations contained in the Sino-foreign Equity Joint Ventures Law,[22] the Wholly Foreign Owned Enterprises Law,[23] the Sino-foreign Contractual Joint Ventures Law[24] and related legislation.

With regard to the three forms considered above, it should be noted that joint ventures have always been the most frequently used structure by foreign investors to enter the Chinese market. This is due both to the restrictions imposed by the government, which in specific areas has necessarily required it (*see above* paragraph 3), to the evaluations of opportunity that have made it preferable to involve Chinese partners for a better market access and, finally, to the obvious preference of the administrative authorities.

With reference to the business structure of the contractual joint venture, it should be pointed out, as far as the Law on foreign investments is concerned, that it has been set up with or without the Chinese legal personhood status and that the choice for this more flexible structure has often been determined by the different criteria for sharing the profits deriving from its activity.

The Law on Foreign Investments has, at one stroke, replaced the special legislation which for about 40 years governed the special statutory regime of these business forms, bringing them, in the new terms and guaranteeing a transition period of five years, into the sphere of application of the PRC Company Law,[25] like domestic companies, with a specified scope of application and conflicting with the special laws in many parts.

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[22] The Law, adopted in 1979, was amended in 1990, 2007 and 2016.

[23] The Wholly Foreign Owned Enterprises, adopted in 1986, was amended in 2000 and 2016.

[24] The Law was adopted in 1988 and amended in 2000 and 2016.

[25] The Company Law of the People's Republic of China came into force on 1994 and has been amended in 1999, 2004, 2005, 2013 and last time at the 6th Session of the Standing Committee of the 13th National People's Congress, and effective as of, October 26, 2018. For an Italian translation of it *see*, *Leggi tradotte della Repubblica Popolare cinese*, vol. X. *Legge sulle società*, (ristampa aggiornata), translation and notes by L. FORMICHELLA-E. TOTI, Wolters Kluwer, Milano, 2018, X-140.

The main aspects affected by the change in legislation concern the scope and the procedure for setting up FIEs, the relevant types of companies that the legislation will make available for foreign investors and their organizational structure.

With regard to the former, art. 4 of the Law on Foreign Investment establishes in terms of general principle the application of a pre-access national treatment, namely a treatment no less favorable than that granted to Chinese investors and their investments, with the exception of those included in the Negative list sectors. In order to ensure high-level investments liberalization and facilitation, Chinese government shall implement at pre-establishment stage a principle of equality and a general administration of foreign investment activities in line with the principle of equal treatment between domestic and foreign investment (art. 22, paragraph 3). Under specific circumstances, government could provide to foreigners even preferential treatment if it is required for the development of the national economy and society at national level (art. 14 FIL) as well as at local level (art. 18, FIL).

This principle is confirmed in several other provisions of the Law and Implementing Regulation where it is provided that policies of the State supporting the development of enterprises shall apply equally to FIEs in accordance with the law (art. 9, FIL), the possibility to participate in accordance with the law in the formulation of standards on an equal footing and the equal application to FIEs of mandatory standards formulated by the State (art. 15 and art. 13, Implementing Rules). Same principle is also shared with regard to government procurement activities to ensure a fair competition (art. 16).

In order to attract and encourage foreign investments, the Implementing Regulations involve, within the scope of investment promotion, an equal treatment in terms of government funding, land supply, tax reduction and exemption, qualification licensing, formulation of standards, project declaration, human resource policies (art. 6). Relevant policies to support enterprise development must be available pursuant to the law as well as applications terms and conditions.

More, to the application of national treatment with reference to the pre-establishment phase, the Foreign Investment Regulation, after having abolished the previous special legislation with the exception of the sectors included in the Negative List, confirms the change for handling applications by foreign investors, removing the governmental approval and requiring only the registration with the government authority of the place where foreign investment is made and filing for record. The latter fulfilment is once required to newly established FIEs and later imposed by the government authority for certain changes made to the FIEs as in total investment, registered capital, equity or cooperative rights, mergers or divisions, business scope, operating terms, early termination, methods and

terms of capital contributions, return in advance of investment of foreign partner of a contractual joint venture or cross-region migration of enterprises.

The application of the Company Law to foreign investment enterprises is wide-ranging and entails several changes, not only in the incorporation stage but also in the very governance of the companies which, according to the Law, must adapt their decision-making and management structure and may retain their original organizational form for a period of five years since the Law became effective (art. 42).

Moreover, where a foreign investor acquires an enterprise in China or otherwise participates in a concentration of business operators, they will be subject to a review of the concentration of business operators in accordance with the *PRC Anti-Monopoly Law*.

Reference is also made to the scope of application of the Company Law covering the two different forms of limited liability company and company limited by shares (or stock company), both of them identified as legal person and it seems to exclude the possibility that contractual joint ventures may fall within the scope of this discipline.

Compared to the previous discipline of foreign investment enterprises, the Company law differs significantly, in particular with respect to the structure of joint ventures. With reference to the highest authoritative body, joint ventures will need to establish a new shareholders meeting system and a new voting mechanism. Shareholders meeting shall become the highest authority and share rights and responsibilities with the board of directors in accordance with the Company law. This issue will require the start of a new season of negotiations between the parties that may not always be easy to finalize.

For the voting mechanism, changes will affect the quorum required for the approval of the main resolutions, in the area of amendment of the company's articles of association, increase or decrease of the registered capital, merger division dissolution or change of the company's form, for which Company Law requires the consent of a number of shareholder representing more than two-thirds of the voting rights and the Law on Chinese-foreign Equity joint ventures required the unanimous approval by directors present at the meeting. The repealed legislation and the Company law also differ with reference to the number of the board members, the term of office, the appointment of directors.

A further important difference concerns the rules relating to the distribution of profits which, under the rules no longer in force, indicated for joint ventures a distribution criterion based on registered capital contribution; differently the Company Law relies it on proportion of paid-in capital, unless otherwise agreed by all shareholders. In this sense, the application of the new legislation could provide more room for joint-venture members to regulate.

Finally, the allocation of a company's remaining assets differs significantly among the disciplines: Company law requires consent of more than half of the other shareholders if shares are to be sold to a non-shareholder; the previous joint ventures' regime required consent from all the other shareholders, regardless the shares purchaser or the subject to whom shares will be allocated.

6. *Intellectual property protection and technology transfer*

Within the scope of Chapter III of the Law on foreign investment relating to the protection of investments, articles 22 and 23 expressly refer to the subjects of intellectual property protection (art. 22, paragraph 1),[26] prohibition of technology transfer (art. 22, paragraph 2)[27] and duty of confidentiality by the administrative bodies and their officials with regard to trade secrets (art. 23).[28] The same issues can be found, with more specific reference to the procedures for settling disputes and the system of sanctions, in the Implementing Regulations (articles 23, 24 and 25).

Following the entry into force of the Law and the Implementing regulations, these provisions have found multiple forms of concrete expression in specific documents of regulatory nature.

It is enough here to mention the *Revision of the Patent Law*,[29] the *Revision of the Supreme People's Court Interpretation on Several Issues Concerning the Application of the Law in the Trial of Patent Infringement Disputes*,[30] the *Decision on Amending the PRC Copyright Law*,[31] the *Revision of the*

[26] The state protects the intellectual property of Foreign Investors and FIEs, and protects the lawful rights and interests of intellectual property rights holders and neigh boring rights holders; and pursues legal liability for infringement of intellectual property rights in strict accordance with the law (art. 22, paragraph 1).

[27] The state encourages technical cooperation in the course of foreign investment based on the principle of free will and business rules. The conditions of technical cooperation shall be determined by the parties to the investment through consultations conducted on the basis of equality in accordance with the principle of fairness. Administrative authorities and their working personnel may not use administrative means to compel technology transfer (art. 22, paragraph 2).

[28] Administrative authorities and their working personnel shall keep confidential, in accordance with the law, the trade secrets of Foreign Investors and FIEs to which they are privy in the course of performing their duties, and may not disclose or illegally provide the same to third parties (art. 23).

[29] Adopted at the 22nd Session of the Standing Committee of the 13th National People's Congress on October 17, 2020 and effective as of June 1, 2021.

[30] Promulgated on December 29, 2020 and effective as of January 1, 2021.

[31] Adopted at the 23rd Session of the Standing Committee of the 13th National People's Congress and in force on June 1, 2021.

Trademark Law,[32] the latter in particular including provisions against bad faith registration.

With specific regard to technology transfer, it should be noted that the transfer of the most advanced technologies to China represents one of the pillars on which the country's current development towards an economy based on innovation has rested on.

The Chinese government stimulates innovation by providing incentives for companies to import and absorb cutting-edge foreign technologies. The aim of this policy is to increase high value-added production in China and build an innovation-centered economy.

The approach of Chinese policy here, as in other fields, is characterized by a utilitarian way of thinking: access to the Chinese market in return for access to new technologies. The long-term objective is to strengthen domestic market players and increase the domestic industry's share of the high-tech market.

Chinese enterprises have an extraordinary ability to absorb inventions and technologies already on the global market. Enterprise returns are generated by process innovation (improved factory and distribution systems) and product innovation (adaptation of existing goods for specific Chinese needs).

Since the issue of the first special regulations on market access for foreign investors, these dynamics resulted in the opportunity to exploit their own technologies in the Chinese market. On the other hand, the main risk for foreign companies has always been the loss of control and ownership of technology (with particular reference to those intellectual property titles, patents and trademarks, whose ownership is entitled, in the Chinese system, under the first registration and not under the first use).

Therefore, against the facilitation of access to the Chinese market, subsidies, tax and financial incentives, on the negative side of the balance have always impacted the exploitation of the technology by the Chinese recipient beyond the scope agreed in the contract on transfer, the disclosure of the technology to third parties, the illegal reproduction of the contents of the transferred technology, up to the possibility, for the transferor, of being permanently cut off from the Chinese market.

In this regard, the provision of art. 22, paragraph 2 of the Law on Foreign Investment, takes on particular relevance, both with reference to the amendments introduced almost at the same time in the special legislation on technology transfer, both in relation to the most recent provisions of the *Chinese Civil Code* (Book III, Chapter XX)[33] regulating the so-called techno-

[32] Adopted at the 10th Session of the Standing Committee of the 13th National People's Congress on April 23, 2019 and effective as of November 1, 2019.

[33] The Chinese Civil Code was approved on May 28, 2020, and went into effect on January 1, 2021. For an extensive and detailed analysis of the process of drafting the Chinese

logical contracts, previously covered by the *PRC Contract Law* (1999). [34]

With regard to the prohibition of forced technology transfer by administrative authorities and their officials, the Law on Foreign Investment reverses a long-standing trend expressed by the Chinese government where it provided for technology transfer to Sino-foreign joint-ventures as a precondition for market access (business license) and access to state support (public procurement and other financial resources) in traditional high interest industries of the Chinese market; or other foreign investment restrictions as the establishment of R&D center in China as a precondition for entering a joint-venture in industries in which it was the requisite mode in entry, or data servers localization in China as a precondition by law for receiving and maintaining certain business licenses. [35]

Art. 22 introduces another significant provision, that allows technological cooperation to be based on principle of voluntariness and commercial norms in the process of foreign investment. This means, among others, there is room for the parties to regulate their own contractual relationship involving a transfer of technology by seeking to strike a balance between the interests of the parties, where regulatory provisions that prevented the pursuit of it have disappeared.

This remarkable rule, must be read in connection with a valuable regulatory change introduced shortly before, of which art. 22, while expressing the essence, raises to a general rule.

On March 2, 2019, State Council issued a *Decree* to amend the *Technology Import and Export Regulations* (TIER), applicable to contracts that realize an entry or exit of technology from the territory of the PRC, and therefore in the first instance to contracts in which one of the parties is a foreign entity. [36]

Over time, the regulations set by the Technology Import and Export

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Civil Code, its structure, the civil law tradition and traditional Chinese law to which it refers, see R. CARDILLI-S. PORCELLI, *Introduction to Chinese Law*, Giappichelli, Torino, 2020.

[34] For an Italian translation of it see, *Leggi tradotte della Repubblica Popolare cinese, Legge sui contratti*, translation by L. FORMICHELLA-E. TOTI, Giappichelli, Torino, 2000.

[35] See DAN PRUD'HOMME, *Reform of China's "forced" technology transfer policies,* University of Oxford, Oxford, 2019 (*https://www.law.ox.ac.uk/business-law-blog/blog/2019/07/reform-chinas-forced-technology-transfer-policies)*.

[36] "Import and export of technology" is defined as any act involving the transfer of technology from abroad to the territory of the PRC and vice versa through the modes of "trade" (technology transfer contracts), "investment" (contribution to the capital of companies through the contribution of technology) or "economic and technical cooperation" (Article 2 TIER). With particular reference to importation, a distinction must be made between unrestricted and restricted (or prohibited) technologies. Depending on whether the technology qualifies as restricted or unrestricted, specific licenses will be required and different procedures to be followed for the transfer (Art. 8 TIER). For restricted import technologies, there is an "administrative license" regime (Art. 10 TIER). For unrestricted import technologies, on the other hand, a more streamlined and rapid "filing" system is in force.

Regulations was likely to dissuade foreign companies to export their own technologies to China and, in a context of strong tensions and pressures at international level, the need to rebalance the positions of the parties has been the reason of the amendment of the aforesaid rules, then confirmed both in terms of general provision, by the Law on Foreign Investments, and in terms of specific provisions, by the Chinese Civil Code (articles 862-877).

In particular, the Chinese government has granted greater freedom to the parties as regards the allocation of liability towards third parties, by repealing paragraph 3 of article 24, which provided "if the assignee of a technology import contract had used the technology covered by the agreement causing damage to the rights or interests of third parties, the liability would be borne by the assignor"; likewise, article 27 has been repealed: it provided that any right raising from improvements and modifications made to the technology transferred was due to the author of the modification.

However, the most significant response is undoubtedly represented by the repeal of article 29, the provisions of which effectively laid down the clearly disadvantageous treatment reserved for the transferor.

In the pre-reform context, a party transferring technology to a Chinese counterparty was not permitted to include conditions in the agreement that were not essential or closely related to the importation of the technology, including the purchase of technology unrelated to the contracted technology, raw materials, products, equipment or additional services; in other words, all the ancillary services that are frequently included in sales, supply, administration or licensing contracts and that in economic language are defined as "tie-in".

In addition, the ban on including in the agreement clauses in order to oblige the beneficiary to pay royalties relating to technologies whose patent has expired or has been declared null and void (art. 29 paragraph 2, previous text) has been formally dropped, as has the prohibition on preventing the assignee from modifying the technology or limiting its use (art. 29 paragraph 3, previous text).

Greater room for the autonomy of the parties has then been recognized with regard to the limitation of competition and exploitation (quantitative and qualitative) of the technology. More specifically, the provisions of paragraph 4 of the previous text of article 29, which prohibited the transferor from preventing the beneficiary from obtaining similar or competing technologies from third parties during the period of validity of the contract, have been removed.

Finally, the prohibitions on unreasonably restricting the channels of trade through which the transferee obtains raw materials, components, products or equipment; on unreasonably restricting the quantity or quality of production, as well as the selling price of products; and on unreasonably restricting the export of products made by the transferee through the use of imported technology have been formally dropped.

These provisions, if read in conjunction with the relevant chapters of the Civil Code, mark out a considerable space for negotiation between the parties for the achievement of a more balanced structure, on condition that the relevant contractual provisions are included in the negotiated agreements.

7. *Security review system*

After provided for the prohibition of endangering China's national security in the implementation of investment activities, as a general principle (art. 6), the Law on foreign investments establishes a system for verifying the safety of foreign investments with respect to the impact or potential impact that they may have on national security; the decisions on security review adopted under the law are final, thus introducing a standard of potential selection on any type of investment aimed at the PRC market (art. 35).

This general provision, as was to be expected, was shortly to be specified in an appropriate regulatory text governing the perspective, given the silence of the Implementing Regulation for the Foreign Investment Law, which contains no details regarding the object, standards and procedures about the security review system. [37]

On December 19, 2020, the National Development and Reform Commission and the Ministry of Commerce jointly released the *Measures for the Security Review of Foreign Investment* which became effective from January 18, 2021. [38]

The issue had been previously regulated by the Standing Committee of the National People's Congress within the *Anti-Monopoly Law*, which called for a review mechanism based on the protection of national security with specific reference to concentration of undertakings by mergering and acquiring a domestic enterprise or by other method [39] and by the

[37] *See* art. 40 of the Implementing Regulation.

[38] Rules also find reference in what was expressed within the Fourth Plenary Session of the 19th Central Committee of the Chinese Communist Party with regard to the necessity to build a new higher-level open economic system and improve the foreign investment security review system. The Fifth Plenary Session of the 19th Central Committee of the Chinese Communist Party had required a coordination of development and security, with security development integrated into all fields and the entire process of national development, improving the national security review and supervision system.

[39] *See*, *Anti-Monopoly Law of the People's Republic of China*, adopted at the 29th Session of the Standing Committee of the 10th National People's Congress on August 30, 2007 and effective as of August 1, 2008. According to the art. 31 "Where a foreign investor participates in a concentration of business operators through a merger or acquisition of a domes-

General Office of the State Council on February 2011 with the *Notice on Establishment of Security Review System Pertaining to Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* thus marking the birth of China's national security review regime and then by the Ministry of Commerce which in the same year issued the *Provisions on Implementation of Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* providing more detailed procedural rules on national security regime. [40]

In 2015, in accordance with the usual operating mode of the Chinese government, a general regulation, not limited to merger and acquisition cases, was introduced on the matter through the *Tentative Measures for the National Security Review of Foreign Investment in Pilot Free Trade Zones*, with a restricted (territorially and provisionally) scope of application but with more specific references to the conditions and procedures the review system would be applied, later found in the more recent *Measures for the Security Review of Foreign Investment*. [41]

In July 2015, the 15th Meeting of the Standing Committee of the 12th National People's Congress approved the *China Security Law*, providing for the establishment of national security review and oversight management systems and mechanisms related to foreign commercial investment, special items and technologies, internet information technology products and services, projects involving national security matters, as well as other major matters and activities that impact or might impact national security (art. 59).

The introduction of this analysis and review system at such a scale, officially resulting in the Law on Foreign Investments in 2020, is also a reply to a number of foreign Countries that, in recent years, have introduced or widen mechanisms with similar purposes that the pandemic phenomenon has confirmed and increased, due to economic and security concerns on the part of governments around the world.

The *Measures for the Security Review of Foreign Investment* in force since the beginning of 2021 extend the scope of application compared to the former rules, as the whole national territory is subject to the new regime with regard to the foreign investments in China, whether directly or indirectly and regardless as to whether the target is a foreign-invested-

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tic enterprise or another method and state security is involved, a state security review shall be conducted in accordance with relevant state provisions in addition to the examination of the concentration of business operators conducted in accordance herewith".

[40] Announcement of the Ministry of Commerce (No. 53 [2011]), issued on August 25, 2011 and effective as of September 1, 2011.

[41] *See* the *Notice of the General Office of the State Council for the Issuance of Tentative Measures for National Security Review of Foreign Investment in Pilot Free Trade Zones referred to Shanghai Pilot Free Trade Zone, Guangdong Pilot Free Trade Zone, Tianjin Free Trade Zone, Fujian Pilot Free Trade Zone*.

enterprise or a domestic one and with no restriction to merger and acquisition transaction but with extension to green-field projects.

In these terms, the wording of art. 2 of the *Measures* with the provision of a general clause is intended to include under its application any form of structure or reinvestment through a foreign invested enterprise. With reference to the industry sectors involved, the *Measures* add new areas [42] but the assessment whether a target will be "controlled" by foreign investors will rest on the "actual control" standards. [43]

8. *Conclusions*

The Law on Foreign Investment, together with the Implementing Regulations and the Interpretation of the Supreme Court is a positive step in the direction of promoting and protecting foreign investment in China.

Although it provides high-level guidance, in some cases vague and lacking in implementing provisions even with reference to the State Council's Regulations, the discipline of the different issues analyzed proves how the government has promptly intervened in the matters identified to fill these provisions with content, partly reducing the margins of uncertainty with regard to the enforcement of this discipline, particularly in those areas in which it has amended or established rules of a procedural nature for the purpose of protecting lawful rights and interests recognized in principle and to be coordinated with the Law of Civil Procedure.

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[42] According to the *Measures for the Security Review of Foreign Investment*, a foreign investment transaction is subject to security review if it is (i) in sectors related to national defence and security, such as arms and arms related industries; or (ii) in geographic locations in close proximity of military facilities or defence-related industries facilities; or it (i) involves critical sectors significant for national security, such as critical agricultural products, critical energy and resources, critical equipment manufacturing, critical infrastructure, critical transportation services, critical cultural products and services, critical information technology and Internet products and services, critical financial services and key technologies; and (ii) will result in foreign investors' obtaining actual control of the invested enterprise.

The scope of transactions subject to security review expanded, compared to the 2001 rules, by including: (i) foreign investments in geographical locations within near proximity of any military facilities and defence-related industries facilities; and (ii) foreign investments in critical cultural products and services, critical information technology and Internet products and services and critical financial services where foreign investors will also gain actual control of the invested enterprise.

[43] See art. 4, comma 2: (a) if the foreign investor holds more than 50% equity in the target; or (b) if the foreign investor holds less than 50% equity but exercises significant impact in the board of directors, board of shareholders or general meeting of shareholder by means of voting rights; or (c) other circumstances where the foreign investor may have a significant impact on the target's business decision-making, human resources, finance, technology etc.

For the purposes of understanding the context and the direction in which the Chinese government is moving, it should also be noted that article 4, paragraph 4 of the Law on foreign investment, provides for the relevance of any treaties or international agreements concluded by the People's Republic of China or to which it is party that may accord more favorable access treatment to Foreign Investors.

On 30 December 2020, China and European Union concluded in principle the EU-China Comprehensive Agreement on Investments (CAI), a bilateral treaty that will replace existing bilateral investment treaties between individual EU Member States and the Mainland China and will provide a uniform legal framework.

The Comprehensive Agreement's main purpose would be to enhance the protection and reduce the barriers of bilateral investments, which in turn significantly improves the market access for EU companies in China and vice versa. In addition, the CAI also promotes the sustainable development initiatives by highlighting the core environmental standards and labour rights.

The agreement is, however, a political and symbolic victory for China in terms of projecting an image of strong cooperation with the European Union, at the same time against the prospects for a renewed transatlantic approach.

Foreseeable improvements for Europe will be selective with respect to market access, non-discrimination, and operating conditions in China, and many of the market openings offered by China are mostly a repackaging of existing commitments analyzed in this article. Some crucial and structural issues, are not, however, addressed – such as domestic procurement rules that discriminate against foreign investors or restrictions on cross-border data flows.

Reading the provisions of the Comprehensive Agreement on Investments in the context of broader ongoing developments in Chinese law, however, one finds, for example, that both the Foreign Investment Law and the Data Security Law permit "corresponding measures" for discriminatory actions against Chinese companies by other states.

The recent provisions promulgated by the Ministry of Commerce of the People's Republic of China about *Rules on Blocking Unjustified Extraterritorial Application of Foreign Legislation and Other Measures*, which came into force on January 9, 2021, grant the relevant PRC authorities certain powers to block the extraterritorial application of foreign laws and measures if it is considered that they unjustifiably prohibit or restrict Chinese citizens and organisations from engaging in "normal economic, trade and related activities" with another State, or a citizen or organisation of that State, in violation of international law and the basic principles of international relations. [44]

[44] Mofcom likely drew on international precedent, including "a series of resolutions call-

This leads to believe that the high expectations generated by China to create a foreign investment environment in the Country that is open, fair and transparent, although extremely important, will be subject, in practice, to possible downsizing and/or enforcement depending on the corresponding actions that China's international partners will take within their own territories.

ing for the repeal of unilateral laws and measures with extraterritorial effects imposed on enterprises and individuals of other countries" adopted by the United Nations since the 1990s and on experience from the European Union's 2018 Blocking Statute.

PRODUCTION AND TRANSFER OF WEALTH IN CHINA

Matteo Piccinali

1. *Introduction*

This is a concise socio-economic analysis of China, as a typical case of the phenomenon of production and transfer of wealth.

In this respect, some data appear to be significant:

– since 2014 China is considered the world's largest economy (on equal purchasing power conditions);

– between 1980 and 2014, China consolidated an annual GDP growth rate of 9.8% and 600 million people lifted out of poverty;

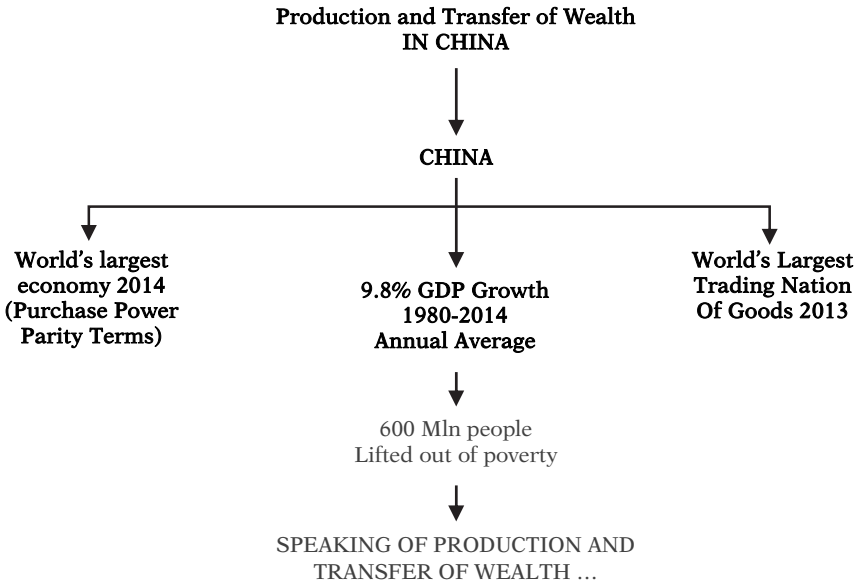
– since 2013, China is also considered the world's largest trading nation of goods.

This growth path is closely linked to certain political, social and economic factors, in particular:

– on the political level, China is a planned economy, which consists of identifying government targets to be achieved within economic cycles of five years;

– on the social level, China is oriented towards increasing urbanization, as a mechanism for economic development which, amongst other factors, determines an increase with reference to the thresholds of minimum salaryies;

– finally, on the economic level, reference is e.g. made to the new economic models developed in China after the Western crisis, which made it necessary to change the structure of the system from export-based to a system based on internal consumption.



2. *Political factors: the five-year planned economy*

As mentioned, China is a planned economy, essentially aimed at steering government action.

An analysis of the most recent Five-Year Plans reveals some peculiar targets for which increasingly ambitious objectives have been identified.

Indeed, in the Twelfth Five-Year Plan (2011-2015), the main targets identified concerned:

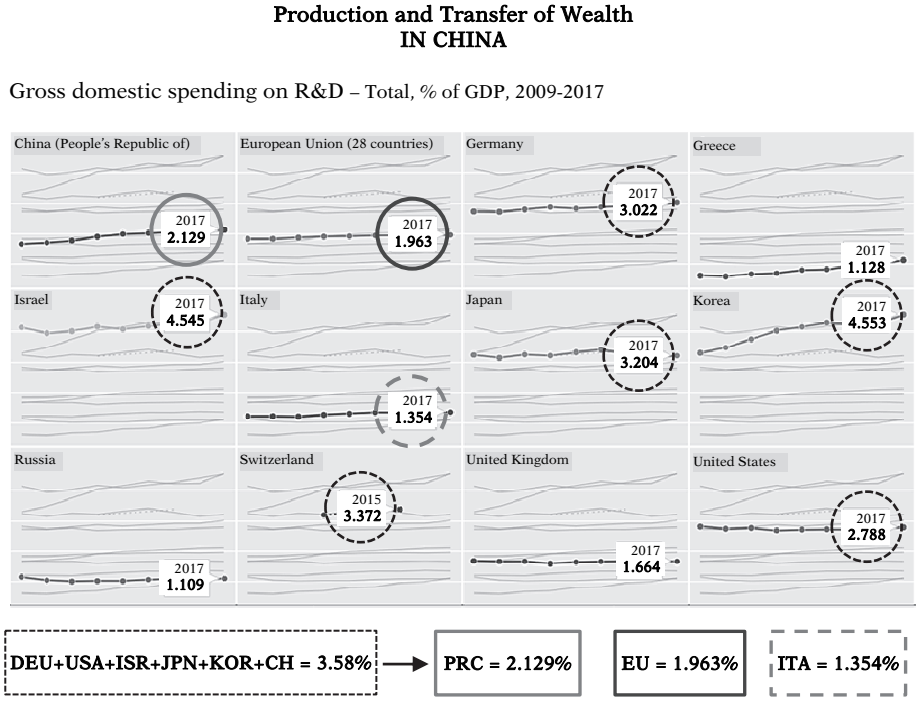
– control of the GDP growth rate from 7.5% (2010 target) to 7%, with a view to income re-distribution among the 1st, 2nd and 3rd tier areas (*i.e.* cities, coastal area and inner China);
– internal consumption increase;
– growth of urbanization rate from 47.5% to 51.5%;
– minimum salary growth of 13% per year;
– reach 45 million new employees;
– increase research and development expenditure up to 2.1% (by 2016).

Similar targets are included in the subsequent – currently "in force" – Thirteenth Five-Year Plan (2016-2020), which sets as key points:

– control of the GDP growth rate from 7.8% (estimated in 2015) to 6.5%;
– implementation of an internal consumption-led economy;

– achieve the "moderately prosperous society" status;
– growth of urbanization rate to 60% by 2020;
– ecological growth;
– increase research and development expenditure up to 2.5% (by 2020).

The increase in research and development spending leads to an overall improvement in production quality. In Western countries, gross domestic expenditure on research and development is 3.58% on average. China currently has an average expenditure of 2.129% which, although lower than the Western average, is nevertheless higher than the one reached in the European continent (1.963%) and in Italy (1.354%).



3. *Social factors: minimum salary growth and urbanization*

As indicated, social relevant factors to China's development process include the growth of the minimum salary and the increase of the urbanization rate.

As for the first, it has already been pointed out that the Twelfth Five-Year Plan identifies as an objective the growth of the minimum salary of 13% per year. This measure underpins the following objectives:

– providing adequate support for internal consumption, *i.e.* ensuring the progressive consolidation of the population's income and spending capacity;

– providing support for the growth of 2nd and 3rd tier cities (*i.e.* cities with a population of 8-10 million inhabitants – other than 1st tier areas, which have +15 million inhabitants);

– inland development policies: investing more in the Chinese western Provinces, so as to generate wealth and implement a more balanced and equitable geographical income redistribution.

On the other hand, it is noted that urbanization generates wealth in and of itself. The average rate of urbanization in Western countries is around 80%, while currently the rate of urbanization in China is 60%, although it has been growing progressively since 1980. It has so evolved:

– urban population in 1980: 200 million people (20%);
– urban population in 2011: 690 million people (50%);
– urban population in 2018: 820 million people (59.2%);
– urban population in 2020: 831 million people (60%).

The growth in the rate of urbanization plays a central role in the development process of the internal economy, also in view of the fact that the average wage in cities is generally higher (about 2/3 times higher) than the rural wage. In turn, the growth of the minimum salary assumes, from an economic policy perspective, the role of an incentive for investment (in housing, services, infrastructure and consumer goods).

Since 1980, 600 million people in China have overcome the state of poverty, but there is still a pool of 565 million people (mainly rural population), which is characterized by a low vocational training trend, thus representing an opportunity, from various points of view, such as: 1) for investments in support of educational programs; 2) as a population to be transferred to the 2nd and 3rd tier cities, to support the process of consolidation of the urbanization rate; 3) for investments in measures to promote higher quality employment.

4. *Economic factors: the economic crisis in the West and the new economic models*

China's growth process is linked to certain economic factors. The economic crisis that has hit the West since 2007 has affected the Chinese economy, leading to a severe contraction of exports. This has made it necessary to change China's economic structure from a system based on production for export to a system capable of sustaining internal consump-

tion, through, among other things, the development of new distribution models.

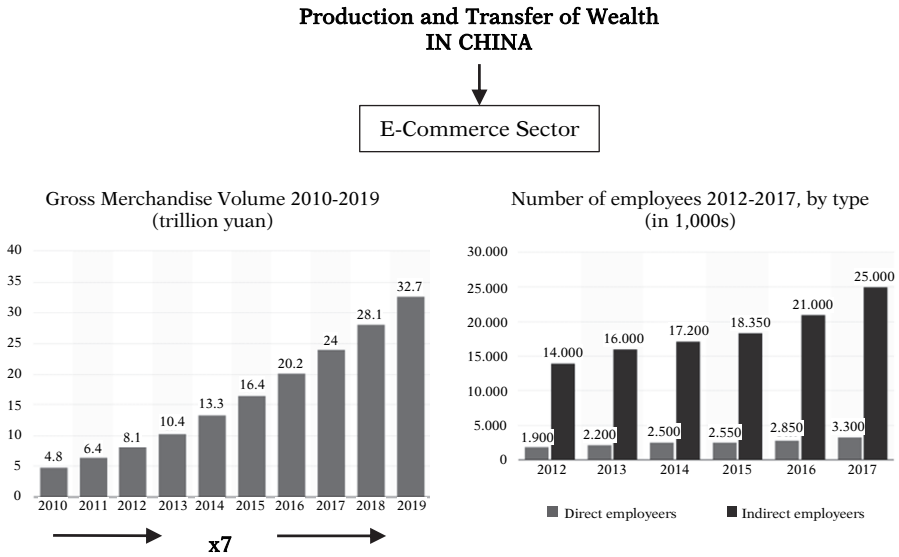
In this regard, the case of retail trade is exemplary:

– in 2003 the prevailing distribution model was that of shopping malls, *i.e.* large shopping centres located in the down-towns;
– in 2009 the so-called factory outlets began to spread; they consist of shopping centres located outside the cities, where luxury goods are distributed at lower sales prices and therefore becoming more accessible;
– in 2011 the e-commerce model began to develop.

The e-commerce model, in particular, constitutes a valid support to internal consumption, as it guarantees the geographical capillarity in the distribution of goods, especially those of foreign origin, which become progressively more accessible to a wide range of population.

In turn, this distribution model has determined:

– the increase in fixed Internet connection penetration from 40% to 70%;
– the increase in mobile Internet penetration from 57% to 85%;
– the fact than 800 million users in China have access to the Internet.



It is noteworthy to see that with regards to the e-commerce sector, between 2010 and 2019 the gross volume of goods distributed increased 7 times (from 4.8 to 32.7 trillion yuan); likewise, the growth in the number of employees in the sector, which in 2012 counted 1.9 and 14 million, re-

spectively, direct and indirect employees, in 2017 reached 3.3 million direct employees and 25 million indirect employees.

Moreover, on the economic level, it is highlighted China's effort to move towards a Western model of GDP redistribution by sectors. In this regard, it is outlined that the GDP of Western countries is on average distributed as follows: 1.1% agriculture, 23.5% industry and 75.4% tertiary, while in China the redistribution of GDP has thus progressively evolved:

– 1980: 29,6% agriculture, 48,1% industry e 22,3% services;
– 2011: 10,6% agriculture, 46,8% industry e 42,6% services;
– 2017: 7,9% agriculture, 40,5% industry e 51,6% services.

Production and Transfer of Wealth IN CHINA

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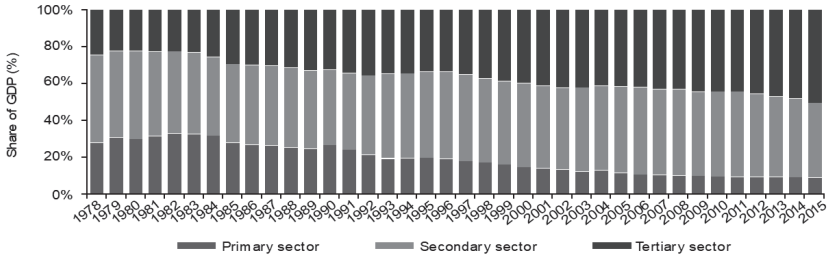
Economic Structure by Sector

2011

Sector	Agriculture	Industry	Services
GDP %	10.6 *(29.6)*	46.8 *(48.1)*	42.6 *(22.3)*
Labour Force %	39.5 *(68.7)*	27.2 *(18.2)*	33.2 *(13.1)*

1980

Figures in parenthesis based on 1980 statistics – China Statistical Yearbook Series http://www.stats.gov.cn/tjsj/ndsj/2018/indexeh.htm.



x2.3

Source: 1978-2014 data from the "China Statistic al Yearbook series"; 2015 data from the "Statistical Communiqué of the People's Republic of China on the 2015 National Economic and Social Development".

2017

Sector	Agriculture	Industry	Services
GDP %	7.9 *(1.1)*	40.5 *(23.5)*	51.6 *(75.4)*
Labour Force %	27.7 *(1.8)*	28.8 *(22)*	43.5 *(76.2)*

2017

Average Figures in parenthesis based on ITA, USA, UK, DEU - The World Factbook 2016-17. Washington, DC: Central Intelligence Agency, 2016. https://www.cia.gov/library/publications/the-world-factbook/index.html.

5. *Conclusive notes*

In the light of the above, some brief final considerations can be made.

From the political point of view, China presents itself as an efficient system, and therefore as a model of inspiration for the West, in consideration of its capacity, in a context of political stability, to plan and achieve medium-long term national objectives, noting, in particular, the effort employed for the growth of expenditure in research and development and infrastructures.

As regards the social profile, education support plans appear to be of central importance, which also constitute a possible opportunity for foreign private investment. In this respect, China has the objective of making compulsory education for 95% of children by 2020, with a view to integrated urban-rural development. In addition, reference should be made to the need for support for vocational training (especially for the rural population) and the development of modern university systems in order to promote higher quality employment.

Finally, at the economic level, there are some crucial issues in terms of sustainable growth: in fact, China has a long-term growth curve to achieve the economic and social well-being of its 1.5 billion population, raising concerns in terms of impact on natural resources (limited) and industrial output.

This, moreover, raises some questions in terms of geopolitical sustainability, in other words, the question is what consequences can be imagined for other countries' economic systems.

However, it is emphasized that China has increasingly addressed significant attention and effort to the issue of sustainable growth, as the Five-Year Plans appear increasingly oriented towards the gradual economic slowdown and the transition to an economic model of sustainable, inclusive and balanced production and transfer of wealth, domestically as well as in the transnational context, hence resulting into a geographically widespread and virtuous economic and social benefit.

REGULATORY POWERS AND PUBLIC ROLE IN THE PRODUCTION OF WEALTH

Mario Gorlani

1. *Premises*

The aim of the Summer School that the Law Department of our University has organized is to compare models of production and circulation of wealth. We're talking about an old issue, solved in different ways in each country, that today has to be considered, more and more, in a global frame, since the problems of one country affect naturally the problems of other countries.

Production and circulation of wealth concern all private and public subjects operating in a national system, and involve not only economic matters, but the pattern of social relationships of an entire society. That's why we have given to our summer school a multidisciplinary approach.

The object of my lecture is something a little different from the other speeches you will listen to during this summer school, but with the board we have thought that it is something preliminary and necessary to put the subject into the correct context.

Production of wealth – but also circulation and conflicts – depends firstly on the legal frame and the position of public institution towards it: that's why we want to devote this first lecture of the morning to this aspect, that we hope will be useful to understand the other aspects of the question.

So, in the program of the summer school, my specific task, because of my field of studies (constitutional and public law), is to consider the production of wealth in the perspective of the public role.

That means that we have to consider the general pattern of the public role in the economy and, in particular, which and how public institutions take part in the production of wealth.

The idea that public institutions take part in the production of wealth can sound strange in some countries, but there are many ways in which this may happen: a) because public institutions are directly the owner of all or part of the means of production (in this case we can talk of an internal participation of the State to production of wealth); b) because public institutions control and regulate how private enterprises produce wealth (in this case we can talk of an external participation of the State to production of wealth); c) because public institutions, through the fiscal system, can encourage or discourage production of wealth, or can advantage or disadvantage different sectors of economy. Moreover, public institutions can favour the development of economic system through the stipulation of international treaties or through the construction of public works or infrastructures, which are an indispensable support to carry out economic activities and to production of wealth.

So, we can have different ways and different approaches in different countries about how State participates to production of wealth, and we can say that the role of the State is an essential and characterizing element to describe an economic model.

My speech will be related to these issues, focusing specifically on the Italian system, and it will be organized into three parts: firstly, the Italian and European model of economy and the relationships between public institutions and market according to the Italian Constitution and European Treaties; secondly, which public institutions are involved in the Italian System in regulating the production of wealth or, directly, in producing wealth; thirdly, how and according to which principles Italian public institutions rule the production of wealth.

In my speech, the principal focus will be on the Italian system.

However, we will devote some time and some hints to the European Union, since in economic matters EU has had an increasingly binding influence in the choices and the politics of the Member States, especially in the last thirty years, after the Maastricht Treaty of 1992.

As we know, European Treaties have pointed their attention on the creation of a common market, where no-one can benefit from unfair advantages and where everyone can produce whatever he wants, with just a few limitations in some sectors, like agriculture or steel industry, and, mostly, where everyone can sell his products everywhere in Europe.

This is possible, according to European Treaties, through three main instruments:

a) the four freedoms of movement: goods, persons, services, capital, which grant every European citizen large (unlimited) chances to make business and to product wealth everywhere in Europe;

b) strong protection and promotion of free competition between enterprises (probably, this can be considered the main principle of the European model of the economy);

c) prohibition of State aids.

In this frame, for European Treaties production of wealth must be essentially a matter of private enterprises, with the public institutions called to supervise that situation of unfair competition are not created between countries and enterprises and called to create a common market on the entire European territory.

2. *The Italian model in the relationship between State and market and between public institutions and freedom of enterprises, as regards the production of wealth*

We can say that our economy is a mixture between market, planned economy and direct production of wealth by the State and public institutions.

Our economy is not a pure liberal one, neither a socialist one, neither a planned economy: it is something different, taking something from each of these models.

It is a quite original model, deriving from the choices made in Italy between 1920 and 1950, which still show their effects.

From the political point of view, 1920-1950 was a period of the huge European and world crisis, that in Italy led to fascism and to the Second World War. From the economic point of view, in the same period we had the great financial and economic crisis of 1929, which definitively showed the weakness of an un-ruled free market and brought about a massive intervention of the State in the economy.

As a consequence, we can underline three points.

1. Some branches of economy – such as transports, communications, sources of energy, etc. – were subtracted from private initiative and were concentrated in the hands of the State.

2. In many other sectors of economy, the State – to remedy market failures, to combat un-employment and to preserve jobs for workers – bought some important private enterprises – for example in the steel, automotive, food industries and banks – and became a direct operator on the market. For this reason, in this period Italy put the basis of one of largest state-owned sectors in the Western world.

3. At the same time, we had the enforcement of public institutions of social protection, like INPS or INAIL.

After the end of the Second World War, Italy became, thanks to a popular referendum, a democratic Republic, with a new Constitution.

The Constitution states the main features of our national system, including the main characteristics of economy, even if the model of economy depends also from many other factors, such as the choices of the legislator, the financial politics of the central bank, powers of administrative entities in authorizations of private activities, the role of trade unions, and so on.

The model of the Italian Economic Constitution was the result of a most difficult and controversial choice for the Constituent Assembly, because of the different cultural and political tendencies in the members of the Assembly.

The Liberals were oriented towards a market economy; the Left Party was inspired by the idea of a collectivistic economy; the Catholics were ready to accept free market economy but only if properly controlled, to pursue social justice aims.

The result was a compromise about a flexible model, open to possible system changes in the future (as actually happened in the following decades), with a public power to control, limit and support private economy, at first more balanced between private freedom and needs of public intervention, and later more inclined towards a market economy.

In fact, all rights and freedoms granted to private people in the economy are limited and conditioned by social rights and interests, strongly protected by the Italian Constitution.

It is also true that Constitution left much room to future legislators, who were allowed to change the shape of the Italian economic system and to transform it in the course of time, within the limits mentioned above.

The Constitution constantly reaffirms the importance of social interests in the economic field, thus underlining, on the one hand, the choice of a mixed economy, a social market economy, where public and private actors coexist; on the other hand, it specifies the kind of mixed economy devised by the Constitutional Assembly: State intervention in a capitalistic economy aims at pursuing social justice. To be more precise, it aims at social purposes described in other parts of the Constitution, starting from Article 2 which, after stating the inviolability of constitutional rights, underlines the 'unalterable duties of economic, political and social nature', and from Article 3(2), which states that 'it is the responsibility of the Republic to remove all economic and social obstacles which […] prevent the full development of the individual'.

The heart of Italian Economic Constitution consists of three articles – 41-42-43 – which regulate two fundamental institutes: freedom of enterprise and property.

As a matter of fact, there isn't a clear distinction between provisions about economic activities and those connected with property.

This is clearly demonstrated by the decisions of the Constitutional Court, that do not distinguish the purpose of Articles 41 and 42 of the Constitution, since regulation of economic activity implies similar laws for property, at least as concerns the means of production and products deriving from economic activities.

In fact, the Constitution implies the coexistence of public and private economic activities and ownership with limitations on the rights of private companies aimed at guaranteeing the social function of the Italian model of mixed economy or social market economy provided for by the Constitution.

According to art. 41, "*Private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programs and controls so that public and private-sector economic activity may be oriented and coordinated for social purposes*".

This provision places the Italian Economic Constitution among mixed-economy models because, after stating that 'private economic enterprise is open to all', specifies that 'it cannot be in conflict with social utility or be prejudicial to security, freedom or human dignity', and that 'law establishes suitable plans and controls in order to direct and coordinate public and private economic activity towards social aims'.

This rule implies the existence of economic activities carried out by public bodies in addition to private individuals.

Article 41 provides for two kinds of State participation in private economic activity:

a) it establishes negative limitations, leaving private operators the opportunity to act freely but with limits which can be summed up in the prohibition of putting profit before human dignity and social objectives.

b) It establishes positive limitations by which public authorities can regulate economic activity; economic planning which can be developed by the State; relative advisable controls.

As examples of negative limits, we can mention the regulation of subordinate employment, rules about safety of the environment, taxation on some activities to discourage them, rules about timing or zoning, rules for fair competition. This is possible because most private economic activities are subjected to public authorization, which offers public institutions the instruments to control them.

As examples of positive actions, in accordance with art. 41.3, we can mention measures which consist in favouring or discouraging economic decisions by making them profitable or disadvantageous. One example consisted in granting tax relief or financial facilities to those who took socially useful decisions, such as investing funds in the disadvantaged Mezzogiorno or creating new jobs. We can also mention programs and plans

to create industrial districts, or to help private enterprises to make investments, or to create conditions to facilitate exports. We have a ministry for economic development created to this purpose.

In the system delineated by art. 41 we can see different approaches, that coexist in our model of economy.

According to art. 42, "*property shall be public or private. Economic assets may belong to the State, to public bodies or to private persons. Private property shall be recognized and protected by the law, which shall determine how it can be acquired, enjoyed and restrained so as to ensure its social function and render it accessible to all. In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest. The law shall regulate and limit legitimate and testamentary inheritance and the rights of the State in matters of inheritance*".

At last, article 43 also confirms that the State can participate directly in economic life by stating that some economic sectors can be reserved or transferred to the State, public bodies or workers' or consumer communities (Article 43).

According to art. 43, "*For the purposes of the common good, the law may establish that an enterprise or a category thereof be, through compulsory purchase authority and subject to compensation, reserved to the Government, a public agency, a workers' or users' association, provided that such enterprise operates in the field of essential public services, energy sources or monopolies and is of general public interest*".

Reserving or transferring companies to the State (nationalization), to Regions (regionalization), to Municipalities (municipalization), or to workers (socialization) is an extraordinary intervention as it can only involve companies or groups of companies providing essential public services or monopolies or sources of energy.

So, nationalization is or should be an exception to the rule. As a result, collectivization has always been rare in Italy. Since the Constitution came into force, Article 43 has only been applied twice, when ENI (Ente Nazionale Idrocarburi, National Hydrocarbon Agency) was given the sole right to carry out research and produce hydrocarbons in some geographical areas (Law No. 6/1957), and with the nationalization of companies producing electricity, which led to the creation of ENEL (Ente Nazionale dell'Energia Elettrica, National Electricity Agency) by Law No. 1643/1962.

After the approval of our Constitution and the return of Italy to the liberal-democratic model, for many years the Italian system has followed and implemented these economic trends. In economic matters, in this specific field, there was no solution of continuity between fascism and constitutional period, except for a completely different concern for job and workers, and except for the strong recall to social purposes in the economy and in the activities of public and private enterprises.

Having said this, we can affirm that the period between 1950 and 1990

was a period of implementation of the model of a mixed economy as stated in the Constitution. In this period there was an increase of the State intervention in the economy, with public enterprises, with a monopoly to guarantee public services of economic interest, like transports, television, phone services, mail system, energy, and so on; but also with state-owned enterprises in sectors of economy which needed huge investment of capital, such as steel, heavy engineering, energy, motorways and public utilities: at the beginning of the Eighties, one fourth of Italian enterprises was owned by the State or by public bodies.

At the same time, there was a strong development of welfare State, according to Constitution involving public schools, public health, public housing, social assistance and social care, strong protection of workers.

That meant, of course, also an increase in taxation, in the state budget and in the redistributive role of the state and in public expenditure.

In the last thirty years many things have changed.

Because of Italian high public debt, and because of the stronger integration into EU – which implied the acceptance of European directives in favour of a liberal model, based on free competition between enterprises – the model of economy has become more liberal, with a progressively lower rate of the presence of public enterprises.

However, we don't have to forget that despite this recent trend, our economy remains a mixed economy, since we still have, on the one hand, the presence of the State in some branches of our economy as an exclusive operator, and, on the other hand, strong regulatory power of private enterprises.

Moreover, we have to underline that our economy has been in stagnation in the last 20 years, and this condition normally requires a strong intervention of public powers.

So, we can note both the effort to reduce public role in the economy, and the need of a strong public support for social and economic reasons, which is a substantial contradiction with the main trend we have talked about.

In fact, as early as 1990, the doctrine had highlighted that our Constitution rejects a logic of pure functionalization of economic activities to social aims, and considers instead economic freedom as a fundamental right, not hierarchically inferior to others, which needs to be continually balanced with other fundamental constitutional values.

In any case, the multiplicity of interests – varies in relevance and nature: constitutional, social and economic – involved by the freedom of enterprises explains why economic matter is the subject of a meaningful public regulation, which, in the relationship with Public Administration, involves weakening of individual right to the exercise of enterprise to the so called "*interesse legittimo*". This doesn't mean the private economic enterprise isn't a fundamental right, but it means that Italian Constitution inserts it in ad articulate context of values and interests, which must be coordinated by public intervention, whenever this becomes necessary.

3. *Which public institutions play a role in the economy and the market*

We talk of public institutions in a plural form, because the power to rule the production of wealth is not only a competence of the State, but in a system based on institutional pluralism it is the task of many institutions, which must be coordinated with each other.

Title V, part II, of Constitution, shares the task mainly between State and Regions. Italy is a Regional State, not a federal one; but Regions have many powers given by Constitution to pursue social policies and the economic development of their territories. That is partly true also for Provinces and Municipalities.

According to art. 117 Cost the regulation of economic system concerns matters of State responsibility, matters of regional responsibility, matters of concurrent legislation.

The State law prevails when uniform rules are needed on all the Italian territory.

The basic article for the economic legislative power of the State is Art. 117, co. 2, lett. e). It deals with currency, savings protection and financial markets; competition protection; foreign exchange system; state taxation and accounting systems; equalization of financial resources. In this article there is no mention of a general power to rule the market. Nevertheless, the Constitutional Court, in the judgement 14 of 2004, gave an interpretation of lett. e) and of legislation for the protection of competition as the basis for State economic power: the idea of competition is not only a static one, which imposes limits to enterprises to protect weaker competitors. The idea of competition in the constitutional meaning, according to the Constitutional Court, implies that the State must promote market, since when the market is growing a true competition between enterprises becomes possible.

It is the same idea that we find in the European system: through competition it is possible to develop the market and, generally, the whole economy.

It is also for this reason that the competition has become the most important regulation of the market and of the economic system in the last thirty years. The first aim that Italian institutions must pursue is to promote the maximum possible competition; even if the several economic crises of the last ten years have challenged the model and have requested new public intervention to support the market.

Moreover, the State has the main legislative powers in fiscal and taxation matters, so it can decide which activities are worthy to be helped and encouraged, and which ones are to be discouraged.

What can Regions do in the economic field?

Regions have many legislative concurrent powers, such as in international and EU relationship; professions; scientific and technological research and innovation; support for productive sectors; land-use planning; civil ports and airports; large transports and navigation networks; communications; national production, transport and distribution of energy; harmonization of public accounts and co-ordination of public finance and taxation system; savings banks, rural banks, regional credit institutions; regional land and agricultural credit institutions.

Moreover, we have a general residual power of the Regions in all the matters not mentioned in the Constitution, such as commerce, tourism, agriculture, handicraft activities. In the frame set by national legislation, Regions can direct and rule economic activities, provided that regional regulations don't put obstacles to free circulation of enterprises and workers and confer unjustified competitive advantages to local activities.

Regions, through their powers, can do much to influence economic development, because they can plan the distribution of the activities on their territory, can build infrastructures to facilitate transports and products exchange, can allocate money to industries or to agriculture or to small operators, can stipulate agreements with Regions of other European countries to intensify trade.

In Italy even Provinces and Municipalities have some powers in the economic field. Where you can open a new economic activity depends on a choice of the Municipality; agriculture is regulated by the Province; authorizations for a shop is a power of the Municipality. According to Art. 13, D.Lgs. 267 del 2000, Municipalities are entitled of all administrative functions concerning population and municipal area, especially in the organic sectors of services to persons and to the community, of the use of land, of economic development; and according to Artt. 19-20 the same powers are recognized to Provinces. As you see, in the economic field in Italy we have powers at every territorial level; it's not always simple to coordinate these powers.

Sometimes, we say that we are going towards a form of competitive regionalism, instead of a cooperative one, where each Region or Province or Municipality struggle to conquer the most profitable activities to create jobs for their population. This is what has been happening in the last 40 years also in US. A competition between territories to secure themselves more richness.

In the same perspective, it is important the role of AGCM (anti-trust Authority), that rules the private market to assure that everyone can participate in it without improper obstacles from other competitors. It can set new rules or apply sanctions against enterprises.

AGCM is an Administrative Independent Authority with regulatory powers on enterprises and market, to protect and promote free and fair competition between enterprises. It is independent from political pow-

ers, because our constitutional system prefers that regulation of the market shouldn't be made by the government, but by an independent body.

AGCM was established by Law No. 287/1990, which is modelled on the corresponding European laws and based on three main principles:

1. the prohibition of a dominant position of a unique enterprise in its own market;
2. the prohibition of agreements among groups of companies working in the same sector aimed at, or having the effect of, preventing, tightening or heavily distorting competition;
3. the control of mergers.

Besides representative public institutions, such as State, Regions, Provinces, Municipalities, and beside antitrust Authority, we have many other entities – probably too many – which participate in the government of economy and of production of wealth. We can mention, just as examples, Central Bank, other Independent Authorities, enterprises owned by the State o by Regions and Municipalities

Law 287/1990 has started a new legislation strongly orientated towards pro-competition measures, towards liberalizations and privatizations and towards the removal of barriers to enter in the market, also of those which had been since long of public monopoly.

Nevertheless, more individual economic freedom, through politics about competition, has not weakened the intervention of the legislator to protect social goals; the power of the public institutions has remained intact when it was necessary to support economy to face crisis or, in general, to protect other relevant constitutional values. The reason of this doble perspective is that competition alone cannot guarantee the synthesis of the different objectives of art. 41 Cost., because the ones expressed by the 2° and 3° comma are not a question of efficiency of the market, but something more, related to social needs which requested legislative rules on one hand, and corporate social responsibility on the other hand. Anyway, according to Constitutional Court (judgement n. 241 del 1990), also competition can be an instrument of social regulation of the market consistent with the aims of our Constitution that are still valid.

As we can see, despite the focus on competition, Italian economy remains a mixed one, and the model outlined in the Constitution is still effective, even after the recent stronger integration between European countries.

4. *How public institutions intervene in the market and in the production of wealth and according to which principles*

Public institutions can intervene in the market and in the production of wealth in many ways:

a) as a direct operator in the market, in an exclusive sector;
b) as a licensor of public goods, that can be dealt with under license by private people to make business, by paying a concession fee to the State;
c) as a regulator of free competition, through AGCM;
d) as a controller of private activities, through authorization and subsequent checks on the conduct of the activities;
e) through positive actions to develop some branches of the market or some disadvantaged territories;
f) as a builder of infrastructures to facilitate movement and exchanges of goods.

After the revision of Italian Constitution in 2001, we can say that there are 3 main principles about production of wealth:

a) competition: everyone must have the chance to compete with other enterprises in the production of wealth, and no one can occupy a dominant position in a single market;
b) subsidiarity: private people can carry out any activities of economic interest, except the ones that involve general interest and that cannot be correctly performed by single citizens. Subsidiarity is written in art. 118 Cost., but it is also a fundamental principle of European Union;
c) substantial equality: It shall be the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country (art. 3, co. 2, Cost.). These principles implie that public institutions can rule private activities to reach social purposes, as indicated in art. 41, co. 2, Cost.

However, the limit of social utility doesn't mean, for the Constitutional Court, a sort of possible functionalization of economic activities to public scope, but only the possibility of setting limits to private activities to protect other relevant constitutional values.

The scrutiny of the Constitutional Court is one of reasonableness: there must be a proportion between the sacrifice of private freedom and public purposes.

The push towards a greater competition has concerned not only the effort to guarantee fair challenges in the market between enterprises and to avoid illegal form of exclusion of some of them because of illegal agree-

ment restricting competition or abuse of dominant position, but also simplification of authorization schemes and a different relationship between public powers and individual freedom. More competition doesn't mean a reduced role of public powers, but a different approach, to preserve and encourage an effective freedom of the enterprises; and this goal has been achieved also by lower discretion in authorizing private activities, to guarantee to operators more legal certainty in order to access to target market.

We can see this tendency in d.l. 223 del 2006, converted into Law 248 del 2006 (so called "Bersani decree") and Eu directive n. 2006/123/CE (so called "Bolkenstein" directive), and the subsequent decree n. 59 del 2010. The goal to increase competition – not only to make it fair, as AGCM does – has been achieved by legislator by cancelling quota of authorizations, time limits for shops or minimum distance, and bringing competition also in monopoly, as much as possible. In this perspective it is very important the judgement of Constitutional Court n. 14 del 2004, that we already talked about, which adopts a dynamic concept of competition, not only a static one. According to that judgement, the best way to increase competition is to help enterprises and market to grow and to expand their business.

Bersani decree and Bolkenstein directive are in legislation the maximum effort of our country towards a greater competition; even if this hasn't meant necessarily ad advantage for consumers, without a strict public control on prices and commercials politics of operators.

5. *Conclusions*

What we have said shows that in the last thirty years Italian legislation has enhanced competition and the development of a wider market, even in sectors traditionally reserved to public monopoly. This tendency has gone together with a stronger European integration and has led to a substantial modification of economic Constitution.

It's also true that in the last decade things have changed, because of a dramatic crisis in many sectors of the economy, started in 2008 and enduring till now.

The conclusions we can draw from this short speech are the following:

1. Although the growth of economic competition, the Italian model of the public role in the production of wealth is still a mixed one, with different characteristics deriving from different influences; and that model has changed in the years, according to international influences, economic reasons and political choices.

2. In the last ten years the character of a mixed economy has been strengthened, even if the role of the public institutions has been decreas-

ing as a direct producer of wealth, but it has been increasing as regulator of private activities and as awarder of subsidies.

3. Since economic activities, according to our Constitution, must also be aimed at social purposes, nowadays this goal can be reached not only through regulation or direct public intervention, but also through subsidiarity, which implies the possibility of public intervention only when and if necessary, because of the failure of the market and of the private initiative in pursuing social aims. In the last years, public intervention to support economy has become normal because Italian economy is going through a recession.

In conclusion, Italian economy is going through a moment of great uncertainty and of transition. Different causes and different influences lead public institutions to assume various roles to rule, support and promote the economy. What's sure is that in the future the model of the public government of the economy won't be only one, but it will continuously change to adapt to needs that market on one hand, and society on the other hand, will present. And also, the legal frame will have to be enough flexible to make possible this changeable public intervention.

It's something that is already happening and that will strengthen over time, and that will require more and more integration between European countries. Italy is already on that way.

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CORPORATE SOCIAL RESPONSIBILITY

CORPORATE SOCIAL RESPONSIBILITY AND CORPORATION

Maurizio Onza

1. *Corporate social responsibility: An introduction*

I would like to seek to address the issue of Corporate social responsibility from a strictly legal perspective.

This is so because, to a certain extent, in Italy and more generally, in the European legal area, corporate social responsibility evokes aspects that often involve other fields of science, ranging from philosophy (in particular ethics) to sociology.

Well, concentrating the analysis on the legal profile, it seems beneficial to proceed expressly from the words that isolate the subject under investigation: that is to say, "Corporate social responsibility".

Thus, if we reflect on these words, we can see that:

(*A*) the mentioned theme concerns *enterprises*.

Therefore, entities carrying *a professional activity for the production of goods and services* [1] or, in adhering to the perspective of European Union competition law, that is to say any entity that carries out an *economic activity which produces wealth* [2] (while the latter definition is broad, on the one hand, it is inclusive of the intellectual professions while, on the other hand, it is excluded from the Italian definition of the enterprise); [3]

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[1] Art. 2082 of Italian Civil Code.

[2] For example, see Judgment January 10, 2006, Court of Justice of the European Union (C-222/04).

[3] Art. 2238 of Italian Civil Code.

(*B*) carrying out the activity that can generate a (*B'*) *"responsibility"* and qualified as (*B''*) a *"social"* one. The two expressions should be analysed separately.

(*B'*) In legal terms, the word "responsibility" can generally mean either of two concepts:

1) with reference to the debt (responsibility *stricto sensu*) *as asset guarantee*, *i.e.* subjection of assets to the enforcement action of creditors aimed to satisfy its obligation; [4] or

2) with reference to the obligation (liability) *as obligation for compensation of the damage caused by* non-jure *conduct*, *because such is either contrary to law* (tort liability) *or in breach of the contract* (contractual liability).

With respect to this second meaning [above, *sub* 2)] of liability, it is furthermore to be noted that:

2.1) the difference between tort and contractual liability is based, as far as Italian law is concerned, *on a disciplinary difference* regarding the distribution of the burden of proof and the prescription (the limitation of action), the contractual liability *showing more advantages for the damaged party*. In particular, the burden of proof is assigned to the damaging party in contractual liability. The damaged party is to prove only the breach of contract whereas the damaging party is to prove the correct fulfilment of the obligation or that the breach depends on a fact caused without fault. Conversely, in tort liability, the damaged party is to prove all the elements (Article 2043 of Italian Civil Code which states that: «*whatever intentional or negligent act, which causes unjust damage to another person, obliges the responsible party to pay the relevant compensation*»). Concerning the limitation of action (the prescription) provided for by contractual liability, this prescription period is of 10 years (instead of 5 years as provided for in cases of tort); [5]

2.2) in case of conflict between tort and contractual liability, *it is necessary to find operative solutions* that resolve this conflict (thus making it possible to hypothesize, as a decisive criterion, the cumulation or exclusion of one or the other); and

2.3) between one and the other, the *difference tends to diminish* according to a reconstruction that *directs towards a contractual qualification of liability* (with the already mentioned advantages, for the damaged party) if there is a legally *qualified relationship* (although not contractual) between the damaged party and the damaging party (so-called social contract liability).

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[4] Art. 2740 of Italian Civil Code.

[5] Artt. 2043 and 1218 of Italian Civil Code. Regarding the limitation of action (the prescription) see Art. 2947 of the Italian Civil Code (for the tort liability) and the precedent Art. 2946 (for contractual liability).

In light of the aforementioned, it seems to me that the *legal problem of social responsibility, firstly, points to the second meaning of the word responsibility* [above, *sub* 2)]: *i.e.* as an obligation to compensate the damage caused by *non-jure* conduct because it is contrary to law (tort liability) or in breach of contract (contractual liability). Therefore, the issue lies on the question as to whether, when, and under what conditions one can *identify this obligation*.

Accordingly, this means searching for rules which: (*a*) based on an agreement or law, impose an *obligation to follow a specific conduct*; and (*b*) if this obligation is not fulfilled or not appropriately fulfilled, *oblige the non-performing party to compensate damages*.

The other meaning of the word "responsibility", as asset guarantee [above, *sub* 1)], in fact, is concerned with the *assets* subject to the claims of the creditors aimed to satisfy their obligation, assuming *ex ante* the identification, subjective and objective, of a fact that legally entitles the action against the assets of a debtor.

(*B''*) Yet more complex is the identification of the meaning of the word "social".

It is a word that projects *the non-jure conduct* (that has caused damage) *into a "social" dimension*.

Therefore, this damage, in the first place, should be able to be *qualified as "social damage"* thus damage that brings an effects on a (or the) community (as a plurality of human beings living together in an organized way) which is taken as a point of reference.

It is therefore necessary to clarify *when damage can be considered as "social damage" in the following meaning*.

In a first approximation, it could be said that damage is likely to be qualified as "social damage": (*a.1*) because of its "*extent*", as to the *damaged party*; (*b.1*) because of its "*economic entity*", the economic entity of the obligation to pay compensation. In this regard, to avoid misunderstandings, it should be noted that, on another level, there is a difference between economic and non-economic damage. Such refers to the *type* of damage (which may or may not affect an *economic interest*) and not to its economic relevance for the purposes of the quantity of the compensation; and (*c.1*) by its "quality", affecting goods, values, "social principles" which are particularly felt by the community or in reference to the community in a particular historical moment.

In short, the characteristics of corporate social responsibility *damage* can be summarized as follows: *the extent with respect to the damaged parties*, *the extent with respect to the economic value* and *quality*.

This leads to two orders of considerations.

The first.

In order to avoid such damage, *the corporation must adopt rules* (based

on law: Tort liability; or based on contract: Contract liability) *to prevent the damages* de quibus.

Thus, it seems to me, that the juridical sense of "corporate social responsibility" can (and should) arise if:

i. there are *unwritten* rules bearing an *obligation to follow a specific conduct*, *the violation of which generates an obligation for compensation for damages*;

ii. there are *unwritten* rules that connect to *voluntary* conduct, and one such conduct is actually performed, *the duty to compensate for the damage caused thereafter is triggered*;

iii. the law *provides* for *mandatory conduct* but does not establish the *consequences of the breach of the obligation*;

iv. the law *provides* a type of conduct that is performed *voluntarily act* but does not determine *the consequences in the event of damage resulting from the conduct in question*; or

v. due to an *eventually grey zone of the written rules* applicable to a concrete case on the qualification of the liability (whether such falls under contractual or tort liability), the "corporate social responsibility" *determines the qualification of such liability*. Moreover, such qualification, if contractual, may have a strong juridical consequence, thus generating the said advantages [regarding the burden of proof and the prescription; *supra*, *sub* (*B'*), 2.1 and 2.3] in favour of the damaged party.

Finally, corporate social responsibility has a juridical sense, at least from the point of view of the damaged party, if it: (*a.2*) introduces *new "unjust damages"* (*i.e. non-jure* conducts) in tort liability; (*b.2*) it is able *to "convert"* tort liability that occurred in a concrete case thus *into contractual liability* (facilitating the damaged party); and (*c.2*) *in pre-existing legal relations*, introduces *new obligations,* the violation of which trigger *compensation for damages* caused by such violation.

The second.

Having already attributed to the term "social damage" the aforementioned meaning, it is normally (but not necessarily) required that an enterprise that tends to be of a "big-size", is capable, as such, to cause quantitatively and qualitatively significant damage. Additionally, it may be said that according to Italian and EU law, *"big-size" enterprises are (again: normally but not necessarily) run by corporations* (or – perhaps in the future – by private limited companies open to the public): corporations which may be stand-alone or integrated in a group. This legitimizes the conduct of the investigation by "looking" at the corporation.

2. *Techniques of protection in the event of liability for damages in a corporation: A map*

We can now focus on the techniques of protection in the event of liability for damages in the corporation, with respect to which one must distinguish: (*A*) *the liability for damages caused by the corporation* (corporation as the damaging party); and (*B*) *the liability for damages caused by the directors and auditors of the corporation* (the directors and the auditors as the damaging parties).

(*A*) The corporation as damaging party.

There are *no specific rules* with reference to the liability of the corporation as damaging party.

In principle, *the common rules of contractual and tort liability apply*.

We can only point out that:

i. in the absence of specific rules, corporate social responsibility could be used *to oblige a corporation which is head of a group of companies* (the parent corporation) *to pay compensation for damages* (if identified as "social" in the sense of the term) *caused by the conduct of the subsidiary companies*. This is due to the fact that according to Italian law only the parent company's liability for damages caused to the shareholders and creditors of the subsidiaries is regulated, regardless of whether the management and coordination of the group have been conducted by the parent corporation in a *non-jure* way; [6]

ii. there are provisions that "*punish*" (also) the corporations (indeed all type of companies, not just the corporations) [7] *with a fine when crimes are committed*.

At this point, it is important to focus on a further aspect, since it is a very new rule introduced in Italy which overrules the traditional principle of "*societas delinquere non potest*" (*i.e.* a corporation can not commit crimes).

This is the so-called administrative liability of legal entities provided for by Legislative Decree No. 231/2001, which establishes the administrative liability of the corporation when crimes are committed by directors and auditors of the corporation *in the interest or to the advantage* of the corporation itself. [8]

This liability:

1) *always* [9] generates *the obligation to pay a sum of money* (not as compensation but *as a fine*) for the corporation, an obligation of the corpora-

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[6] Artt. 2497 ss. of Italian Civil Code.

[7] As well as entities other than companies.

[8] Art. 5, § 1, of Legislative Decree No. 231/2001.

[9] Art. 10, § 1, of Legislative Decree No. 231/2001.

tion *that must be fulfilled by using only the assets of the latter* [10] and an obligation which can *be accompanied by other types* of sanctions; [11]

2) is excluded if the corporation proves to have adopted a model «*of organization and management suitable for preventing crimes within the type of crime that is similar to that which has occurred*» (so-called models of prevention crime), the contents of which *are set out by law*, also basing itself on codes of conduct drawn up by associations representing the category of producers to which the corporation belongs. [12]

The administrative liability of legal entities is, therefore, a very detailed discipline which stimulates the adoption of instruments (the models of prevention of crime), possibly taken from the so-called rules of soft law (the codes of conduct), aimed at preventing particular "social damages" characterized by the breach of those interests of life which are considered fundamental by the community, and as a consequence are protected, by the criminal laws.

Indeed, a balance between "social damages" of a corporation which has been considered liable under this law (and therefore which has been sanctioned) is provided for by an Article of Legislative Decree No. 231/2001, by which, "if as a consequence of the commission of a crime, the sanction of the interruption of the activity of the corporation has been disposed, the Judge can order the continuation of the activity if, after taking into account the dimensions and the economic conditions of the territory in which it is situated, there is a possibility that this interruption may produce relevant repercussions on employment".[13]

For qualified administrative violations (therefore lacking criminal character), a similar system is structured by the Banking law.[14]

(*B*) The directors and the auditors as damaging parties.

On the other hand, specific rules are set out when the *damaging parties are the directors and auditors of the corporation*.

With respect to the conditions, there must be at least a *negligent breach of law or by-laws* [15] (and additionally, the degree of care required is extraordinary diligence).

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[10] Art. 27 of Legislative Decree No. 231/2001.

[11] Listed in art. 9 of Legislative Decree No. 231/2001: *i.e. prohibition sanctions* (*i.e.*, prohibitions to carrying out the activity; suspension or revocation of authorizations, licenses or concessions functional to the commission of the crime; prohibition of contracting with the public administration, except for obtaining the services of public service; exclusion from subsidies, financing, contributions or subsidies and possible revocation of those already granted; prohibition of advertising goods or services), *confiscation* and *publication* of the sentence.

[12] Art. 6, §§ 1, let. *a*), and 3, of Legislative Decree No. 231/2001.

[13] Art. 15, § 1, let. *b*), of Legislative Decree No. 231/2001.

[14] Art. 144 of Legislative Decree No. 385/1993.

[15] Art. 2392, § 1, of Italian Civil Code.

With respect to the characteristics of the protection, we can remark that the liability is directed to compensate the damage caused: i. to the *corporation*; ii. to the *creditors of the corporation*; iii. to the *single shareholder or the third party*.

And so, in detail:

i. liability towards the corporation and the creditors of the corporation is a liability that aims at compensating *"collective damage"*, shared by all those included within a damaged class. In short, all shareholders or all creditors damaged; [16]

ii. liability towards the individual shareholder or third party is a liability that compensates for damage which is *not shared with others*, i.e. *damage directly caused to the assets of the shareholder or third party* (so-called direct damage);[17] *damage that does not "pass" through the assets of the corporation* (*e.g.* when the value of the shares, of all the shares, decreases because the assets of the company have decreased as a result of the *non-jure* conduct of the directors. In this case, the damage is located in the assets of the corporation: so that the relevant and appropriate protection is the action for liability towards the corporation).

Therefore, more specifically:

1) in case of liability towards the corporation, the assets directly damaged (and therefore compensated) are the assets of the corporation, *the shareholders suffering only a "reflected damage"* that is compensated by reimbursing the corporation;

2) in case of liability towards the creditors of the corporation, the damage is the insufficiency of the assets of the corporation to satisfy the claims of the creditors due to the failure (of the directors and the auditors) in observing the obligations inherent in the conservation of such assets.[18]

Well, among these techniques of protection, the technique provided for in the case of liability for compensation towards the single shareholder or the third party [above, in this §, *sub* (*B*), ii.] seems to have a conceptual space and a wider operative margin to act as corporate social responsibility.

This is because, in effect, liability towards the corporation and liability towards the creditors of the corporation *not only presuppose a qualified and pre-existing relationship* (between the corporation and the directors/auditors; and between the corporation and the creditors); but also, and above all, at least with respect to the liability towards the creditors of the corporation, that *the damage is pre-required*: the reduction of the assets of the corporation. With respect to these cases, it becomes difficult, alt-

[16] Artt. 2393, 2393 *bis* and 2394, of Italian Civil Code.

[17] Art. 2395 of Italian Civil Code.

[18] Art. 2394, § 1, of Italian Civil Code.

hough perhaps not impossible, *to find those elements* which make corporate social responsibility useful from a juridical perspective and which have been identified before [above, § 1, *sub* (*B''*), i.-v.]; and additionally *to find the requirements with reference to the "social" damage* qualified, as we said before, by "extension, entity, and quality" [above, § 1, *sub* (*B''*), (*a.1*), (*b.1*), (*c.1*)].

On the contrary, in case of *liability towards third parties (also shareholders) directly damaged* by the *non-jure* conduct of the directors and the auditors, *there is no pre-existing relationship* (the shareholder, in this case, is considered a third party) and *the damage is "open"*, qualified as *any economic reduction of the assets of the damaged third party*.

For completeness sake, on the system of liability faced by the corporation, I would like to conclude with a short note on the problem of *liability faced by the shareholders of the corporation*.

Even in this case, the two meanings of the word responsibility [above, § 1, *sub* (*B'*)] can be used: (*a*) to *indicate the assets of the shareholders destined to satisfy the obligations of the corporation*, overruling the principle by which a corporation is a legal person responding to its obligations exclusively with its own assets and, therefore, raising the question of the so-called lifting of the veil (*i.e.* abuse of the legal entity); and (*b*) to indicate the liability of shareholders for compensation for damages caused by non-judicial conduct of the corporation, thus evoking the issue of the *liability of shareholders for the exercise of the right to vote* and, more generally, for the management of the corporation.

Issues similar to these have been the centre of much debate in Italy (as well as in Europe) and as far as Italy is concerned, it has been chiefly, due to the absence of rules of the written law (except for the private limited companies):[19] therefore, on this point, I would like to highlight the fact that a part of the doctrine is inclined towards recognizing liability, according to the two meaning aforementioned, *i.e.* the liability of the shareholders; while the decisions of the Courts substantially tend not to recognize such liability.

3. *Investigation on the normative system of written law*

In this way, I would like to try to share with you some attempts to identify some possible hypotheses of corporate social responsibility based on written law.

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[19] In private limited companies, where the quota-holders, in certain cases of participation in the decision, may be liable together with the directors for the damage occurred (art. 2476, § 8, of Italian Civil Code).

A. The first hypothesis could arise from legislative Decree No. 254/2016. Such law implemented Directive 2014/95/EU [20] and imposed to the listed corporation and big-size corporation (in terms of assets and/or net revenues) [21] the obligation to draw up *a statement of a non-financial nature*, for each financial year to be *made public* on the market. Such statement is to describe the policy of the corporation with respect to "the impact of business activity on the environment (in relation to the use or lack of use of renewable energy, gas emissions, etc.), on the reference community, on the personnel (health, safety, gender equality), on the respect of human rights, on the fight against active and passive corruption", describing, among other things, the organizational models adopted [including the models of prevention of crimes provided for by the Legislative Decree No. 231/2001 of which we have spoken before: above, § 2, *sub* (*A*), ii.]. [22]

This obligation, however, is not technically followed by a "real" juridical consequences in case of breach: in fact, on the one hand, the corporation can declare, providing reasons, why it did not adopt those policies,[23] thus bearing the possible (only) reputational consequences on the market (in terms of loss of customers); on the other hand, the directors and the auditors are liable (in addition to a fine) in the event of failure to declare or of non-conformity of the declaration with the legal model,[24] including non-compliance and incorrect declarations. In these cases (*non-jure* conducts), the relevant point focuses on the type of liability that can be triggered. There is no doubt that if this *non-jure* conduct causes damage to the corporation or the creditors of the corporation, the system of protection will be the liability towards the corporation and towards the creditors [*supra*, § 2, *sub* (*B*), i.]. But it could also be assumed that, if the non-financial statement has been made but is incorrect, damage may also be suffered by those who rely on that statement in their relationship with the corporation. Damage that may entitle to an action grounded on corporate social responsibility: *i.e.* new unjust damage, possibly to be restored with the rules of contractual responsibility and, even, new obligations contained in a pre-existing legal relationship [*supra*, § 1, *sub* (*B''*), (*a.2*), (*b.2*), (*c.2*)].

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[20] With this respect, see also: (*i*) the Proposal for a Directive of the European Parliament and of the Council regarding the corporate sustainability reporting (21 April 2021); (*ii*) the Motion for a European Parliament Resolution with recommendations to the Commission on corporate due diligence and corporate accountability (19 September 2020); and (*iii*) the Regulation (EU) No. 852/2020 on the establishment of a framework to facilitate sustainable investment.

[21] Art. 2, § 1, of Legislative Decree No. 254/2016.

[22] Art. 3, § 1, of Legislative Decree No. 254/2016.

[23] Art. 3, § 6, of Legislative Decree No. 254/2016.

[24] Art. 3, § 7, of Legislative Decree No. 254/2016.

This is especially true if the corporations (other than those which are obliged) voluntarily decide (not being specifically obliged) to publish the non-financial declaration; such is a possibility allowed by law[25] but without any type of consequences arising from this voluntary adoption.

B. The second hypothesis is made with regard to the so-called benefit corporations, introduced in Italy by Law No. 208/2015.[26]

Benefit corporations are lucrative companies that "pursue one or more purposes of common benefit and operate in a responsible, sustainable and transparent way towards people, communities, territories and the environment, including cultural and social assets and activities, bodies and associations and other stakeholders (in particular, workers, customers, suppliers, lenders, creditors, public administration and communities of reference)", so-called benefit activities. Objectives, indicated in the corporate purpose, that must be pursued "through a management aimed at balancing the interests of shareholders and the interests of those on whom the corporate activity may have an impact". This balance legitimizes the *qualification of the corporation as a benefit corporation*, which can thus present itself on the *market* by *indicating this qualification* in its corporate name and *communicating it to the market*, in a special report, the so-called benefit activity carried out. This "presentation to the market" is likely to deceive the market if the corporation "presented" as a benefit corporation does not concretely pursue the benefit activity: such deception is sanctioned by the written rules under the realm of misleading advertising.

With respect to such written discipline, one could hypothesize *a corporate social responsibility for damages suffered by those who have relied on the congruence of the name in the act of carrying out the activity of the corporation that was "presented" under the benefit scope but in reality was operating in a non-benefit way*.[27]

C. Within the law of the financial markets, we can see significant *use of codes of conduct as models of conduct*, standards and guidelines by professional associations, which can be *voluntarily adopted by a declaration to the market*. For example, the report on the directors of listed corporations must declare «*the compliance to a code of conduct on corporate governance promoted by companies managing regulated markets or by professional as-*

[25] Art. 7 of Legislative Decree No. 254/2016.

[26] §§ 376-384.

[27] The social enterprise, provided for the Legislative Decree No. 112/2017, is different from the benefit corporation. The social enterprise produces, without profit, "social" goods and services designed to meet (just for this purpose and for non-profit) the needs of a community (for example: health care and services, education, etc.). Here, the point of attention is focused on whether the social enterprise satisfies the need to which it aims exclusively (or substantially exclusively).

sociations, giving reasons for any failure to comply with one or more provisions».[28] Well, again, one could ask whether the (voluntary) adoption of a code generates an expectation which if unfulfilled (such as in the case when the corporation has declared to adhere to the provisions of the code but has not actually complied with them) and cause damages, such can *be repaired by assuming corporate social responsibility* [a case of optional conduct: see above, § 1, *sub* (*B''*), ii. and iv.].[29]

D. Finally, the last example could be illustrated by reading Article 2086 of Italian Civil Code, recently modified by Legislative Decree No. 14/2019 (Code of Insolvency and Enterprises' Crisis). The current text provides, in the second paragraph, that «*the entrepreneur* [i.e.: the corporation] *has the duty to establish an organizational, administrative and accounting structure appropriate to the nature and size of the enterprise, also in relation to the timely detection of the crisis of the enterprise and the loss of business continuity, and to take due action without delay for the adoption and implementation of one of the tools provided by the system for overcoming the crisis and the recovery of business continuity*». One could then ask whether this obligation is imposed to protect not only those who have *a pre-existing legal relationship with the corporation* (creditors, workers, suppliers and so on) but also in favour of *those who can actually suffer a (new) unjust damage from a crisis*: and then, if so, whether, with respect to both cases, the *breach of this obligation generates the right to compensation for damages to be claimed under the rules of contractual liability*, assuming, in fact, a case of corporate social responsibility [still see above, § 1, *sub* (*B''*), *(a.2*), (*b.2*), (*c.2*)].

4. *Two questions about the future*

So far, we've seen a possible current scenario for corporate social responsibility. I would like to end by looking at the future. Conceivably, in the future, corporate social responsibility could play a significant role, stimulating virtuous behavior,

a) for corporations operating in specific markets (*i.e.* listed corporations, banks, insurance companies, etc.), conceptualizing *liability of such corporations towards all participants (for whatever title) in a*

[28] Art. 123 *bis*, 2nd §, let. *a*), of Legislative Decree No. 58/1998.

[29] And in particular, see the relevance of the "sustainable success" as criterion of the management the corporation (defined as «*the objective that guides the actions of the Board of Directors is to create long-term value for the benefit of shareholders, taking into account the interests of other stakeholders relevant to the corporation*») provided for by the Italian Code of the corporate governance for the listed corporation (January 2020).

specific market that have been damaged (*e.g.* protecting the shareholder of company "A" which suffers damages caused by *non-jure* conduct of a director of company "B" causing the reduction in the value of transactions on the market in which its share are listed); and

b) preventing and fighting the damages caused *by the use of artificial intelligence*, as a "risk factor" *towards all the participants of a specific community to be "governed" by the technique of corporate social responsibility*.

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DAMAGES CAUSED BY ALGORITHMS: A STUDY BETWEEN CORPORATE SOCIAL RESPONSIBILITY AND CIVIL LIABILITY

Francesco Maria Maffezzoni

1. *Introduction, Business 4.0: revolution or reality?*

It is the distinctive feature of the *ius mercatorum* to be in constant dialogue with the economy and society, as it strives to provide suitable rules to regulate production and wealth generation,[1] dealing with new problems as they arise.

At present, the 'problem' lies in the large number of digital systems operating within societies[2] and on the financial markets in particular;[3] *al-*

[1] See N. IRTI, *Scambi senza accordo*, in *Riv. trim. dir. proc. civ.*, 1998, 364, according to whom «la storia del contratto non può separarsi dalla storia delle tecnologie, mediante le quali si determinano i rapporti di scambio».

[2] According to Il Sole 24 Ore, Artificial Intelligence is a huge market expected to be worth about 1901 billion dollars globally this year, a 62% increase compared to 2018, when turnover had already grown by 70% over the previous year. In fact, we are witnessing an unprecedented boom in this phenomenon, since in the last four years the number of businesses adopting it has increased by 270%, and company IT managers have made it a priority. According to company IT managers, technologies of this kind have become an integral part of every digital strategy, are already adopted in a huge number of applications, and are one of the pillars of every business's digital transformation, naturally in a variety of forms: for example, 52% of telecommunications firms use chatbots (software packages created to 'dialogue' with people), and 38% of health sector businesses use diagnostic procedures in which computers play a central role. See *Intelligenza artificiale, è boom (+270%): ma ecco i 5 miti da sfatare*, in *Il Sole 24 Ore* 19 March 2019.

[3] Examples include algorithmic trading or automated trades, involving software able to decide whether or not to proceed with a transaction, and to send orders without any human intervention. «Secondo Aite Group nel 2018 i robot hanno gestito circa il 53% degli scambi delle azioni globali cash. Una percentuale che negli Usa sale al 66%. Più contenuta, seppure

ternative data, *alternative data analysis*, algorithmic trading, digital registers and *artificial intelligence* are new technologies capable of acquiring and processing millions of data, and they provide people with more and more sophisticated information for use to read, interpret and influence the world around them.

From these opening remarks, it is already clear that the *homo oeconomicus* of the third millennium is offered the exciting opportunity to live in a 'new' world in which he has complete freedom of movement, unrestrained by any frontiers, since distances are superseded by the use of technologies that increasingly come in the form of compact, portable devices.

The boundaries removed are those not only of space but also of time, since the vast calculating power of today's robots enables actions unthinkable until a few years ago, giving people access to data or results, [4] as in the case of *High Frequency Trading*, [5] generated by extremely complex calculations which AI is able to perform in real time (thousandths of a second or nanoseconds). [6]

The last few years have seen the appearance of an ever-increasing

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sempre importante, la penetrazione dell'algoritmo in Europa (in media il 47%). In particolare, in Italia, a detta degli esperti, più di un terzo degli scambi azionari è gestito da software. Il robot investitore – spiega Anna Kunkl, partner di Be Consulting – vale almeno il 30% degli scambi. La stima è finanche superiore aggiunge Tullio Grilli, capo del brokerage elettronico di Banca Akros. Il peso dell'algoritmo sul listino italiano – fa da eco Enrico Malverti, presidente di Fintech4i –, seppure inferiore a quello in Europa, è maggiore del 30%». See V. CARLINI, *Borsa, il robot sostituisce l'uomo: ai robot il 53% degli scambi*, in *Il Sole 24 Ore* of 2 June 2019 and R. MATTERA, *Responsabilità e danno nei mercati finanziari, aspetti di diritto civile*, Napoli, 2020, 265 et seq.

[4] An American company wishing to investigate possible correlations between conversations on social media and Stock Exchange trends has developed language analysis processes able to scan more than three billion messages a month. We are therefore witnessing a transformation of the markets on three levels: the first is the Internet (the hardware), which allows the orders for trades to be sent anywhere in the world in a matter of milliseconds; the second comprises the financial products (software) which, transformed into digital bits, travel on this network; and the third consists of the mathematical models on which the financial products are based. See V. CARLINI, *Borse: così social, algoritmi e intelligenza artificiale sono le mani invisibili dei mercati*, in *Il Sole 24 Ore* 17 March 2017.

[5] Art. 1 comma 6-septies TUF defines *High Frequency Trading* as any algorithmic trading technique characterised by: a) infrastructures designed to minimise network and other time lags, including at least one of the structures for the algorithmic input of the order: colocation, proximity hosting or high speed direct electronic access; b) initialisation, generation, transmission or execution of the order by the system without human intervention for the individual order or trade and; c) high level of daily traffic of messages consisting of orders, quotations or cancellations.

[6] It should be remembered that in high frequency trading, thousands of orders can be executed in a fraction of a minute on the basis of sophisticated algorithms that allow investment choices to be made in 30 nanoseconds. See *Gli algoritmi costano cari a Knight Capital Group. Per 45 minuti di caos persi 440 milioni di dollari*, in *Il sole 24 Ore* 2 August 2012 e M. BERTANI, *Trading algoritmico ad alta frequenza e tutela dello slow trader*, in *Analisi Giuridica dell'Economia*, 1, 2019, 261 ss.

stream of neologisms, essential tools for the cataloguing and definition of the continuous evolution of an economic world which is gradually transforming from a 'simple' industrial economy to a digital one.

The term *digital economy* refers to the phenomenon based on IT, meaning an economy centred on the digital world, which embraces all forms of business activity that make use of IT solutions. [7]

At the summit of the *digital* economy, which we may also call the fourth industrial revolution, is Industry 4.0 [8] or, to be more precise, Business 4.0, [9] the term used to identify a new model of industrial and economic growth, towards which companies are evolving. [10]

This change is already leading to the ever-increasing diffusion of artificial intelligence, and the problems associated with it, in the business world, and this trend is destined to continue in the future. [11]

In fact, in spite of the huge computing power capable of processing millions of data simultaneously, and the typical capabilities of *machine learning* or *deep learning*, [12] AI can still not be defined as a real form of in-

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[7] The first authors to use the term digital economy, in 1994, include D. TAPSCOTT, *The Digital Economy: Promise and Peril in the Age of Networked Intelligence*, Mc Graw-Hill, 1994, 368.

[8] Examples of Industry 4.0 companies include Siemens, the first to put forward the ideal of building a production plant with absolutely no human staff, see ed. A. CARLEO, *Decisione robotica*, Bologna, 2019, *passim* and A. TROISI, *La digitalizzazione del sistema industriale ed il piano Industria 4.0 in ambito UE,* in *Rivista trimestrale del diritto dell'economia*, 2020, 3, 488 et seq. More recently, near Rome Amazon has opened a plant where a whole department is run exclusively by robots and access by 'human beings' is prohibited; see *Amazon, nel magazzino dove lavorano solo i robot*, in *Corriere della Sera*, 8 July 2019.

[9] Since 2018, the term Business 4.0 has superseded that of Industry 4.0, reflecting the political decision to extend this plan to include the service sector, in view of its high digitisation potential. In Italy, this change is reflected in the Piano Nazionale di Impresa 4.0, the National Plan comprising a package of measures and subsidies intended to encourage investments in innovation and in increasing businesses' competitiveness.

[10] See V. FALCE-G. FINOCCHIARO, *La* digital revolution *nel settore finanziario. Una nota di metodo*, in *Analisi Giuridica dell'Economia*, 1, 2019, 313, which states that «l'onda lunga della quarta rivoluzione industriale non si arresta, travolgendo confini (tra servizi e prodotti) e categorie (giuridiche ed economiche) tradizionali. Non è immune alla disruption il settore finanziario, che pure vive profondissimi cambiamenti sotto il profilo dei soggetti (Techfin), dei processi e dei servizi (unbundled), dei mercati (disintermediati), dei modelli (market place model) e dei rapporti (non più fiduciari)».

[11] In the latest edition of the Visual Networking Index, CISCO (one of the world's top digital technology suppliers) outlined the trends in the world of new technologies, especially with regard to the Internet, in relation to which the multinational is well known to enjoy a particularly privileged viewpoint. 2019 is the year in which artificial intelligence and machine learning will enable people to take better informed decisions and to work at higher speeds. For example, data centric hedge funds are already using artificial intelligence to support and develop their new trading models. See *Nel 2019 il vero boom di internet. E ci sarà l'Intelligenza artificiale a gestire le reti*, in *Corriere Comunicazioni* 2 January 2019.

[12] *Machine Learning* is an analysis method that enables computers to learn data independently. Deep Learning is the learning system that utilises neural network structures to

telligence, since as long ago as the Eighties Hans Moravec, in his paradox, [13] argued that it was comparatively easy to make computers exhibit adult level performance on intelligence tests or chess, and difficult or impossible to give them the skills of a one-year-old when it came to mobility perception. [14]

In fact, it is still not possible to equip these robots with the peculiar, variegated capabilities of the human brain, [15] which enable people to make assessments and change their minds in response to unforeseen or unforeseeable factors. [16]

It may therefore seem misleading to make a comparison between AI and human intelligence, since these technologies are based on an algorithm designed by man and are the outcomes of an IT engineering sector evolving continually in the attempt to develop software to resolve specific problems. [17]

Our lives are surrounded almost without our being aware of it by forms of smart technology ranging from the ability to access our PCs by unlock-

process large datasets with results similar to those which could be achieved by man. Using this system, the machine learns by example, as affirmed by S. CRISCI, *Intelligenza artificiale ed etica dell'algoritmo*, in *Foro amministrativo*, 10, 2018, 1787.

[13] H. MORAVEC, *Mind Children: The future of robot and human intelligence*, Harvard University Press, Cambridge, 1988, 15.

[14] Attempting to create a new category of highly specialised humanoid robots capable of performing even simple operations, technological evolution has sought to overcome Moravec's paradox, according to which a high level of reasoning requires a low level of computation, while low level sensorimotor skills require enormous computational resources, see E. BRYNJOLFSSON-A. MC AFEE, *La nuova rivoluzione delle macchine, lavoro e prosperità nell'era della tecnologia trionfante*, Milano, 2015, 37 et seq.

[15] The various capabilities typical of the human brain include discernment, judgement, fairness, discretion, sensitivity and moral sense.

[16] G. SPEDICATO, *Creatività artificiale, mercato e proprietà intellettuale*, in *Diritto Industriale*, 4/5, 2019, 253, states that «sebbene l'avvento di un'intelligenza artificiale c.d. generale in grado di raggiungere, o addirittura superare, l'intelligenza umana sia ancora lontano e, per alcuni esperti, del tutto irrealizzabile, i sistemi di intelligenza artificiale […] hanno fatto straordinari passi in avanti negli ultimi anni, arrivando a emulare la mente umana e le sue abilità in un significativo numero di attività tipicamente creative da sempre ritenute appannaggio esclusivo degli esseri umani»; see also A. RAMALHO, *Iginality redux: an analysis of the originality requirement in AI-generated works*, in *AIDA*, XXVII, 2018, 24, «humans can use logic and reasoning to find a solution to a problem; but they can also use their creativity to produce artistic works, for instance. What many authors agree on is that human intelligence is an ensemble of several components, and that creativity is one of them».

[17] On this point, see the report by Gratner published in Il Sole 24 Ore, which states that «alcune applicazioni del machine learning sono impressionanti: per esempio i software di riconoscimento facciale danno risultati spesso più accurati di quelli ottenuti da un essere umano, ma non dobbiamo dimenticare che si tratta di tecnologie in grado solo di svolgere quella specifica funzione. Non sono in grado, per esempio, di risolvere un banale problema di matematica». See E. MARRO, *Intelligenza artificiale, è boom (+270%): ma ecco i 5 miti da sfatare*, in *Il Sole 24 Ore* 19 March 2019.

ing them via facial recognition or a fingerprint to the capability to park our cars without touching the steering wheel or buy a coffee via our watches.

However, the spread of smart devices is not restricted to daily life alone; as already mentioned, it affects large parts of the economic and business world.

In fact, electronic devices are gradually breaking out of their 'captivity' in R&D laboratories and production departments and are starting to conquer more and more space in company boardrooms, [18] where they are used as necessary aids for making strategic and business decisions. [19]

Therefore, the activities of technological tools are constantly evolving, expanding out from their more traditional functions in production departments, with participation in strategic decisions at the highest levels [20].

Confirmation of this trend comes from the Vital [21] AI program, software which has not only been adopted by the Board of a Hong Kong-based Japanese company specialising in biotechnologies, regenerative medicine and pharmaceutical research, called Dkv (Deep knowledge ventures), [22] but has also been awarded a vote in BoD decisions with the same weight as those of the Board's other, non-robotic, members.

However, here the intention is to focus on the question concerning possible liabilities arising from damage caused by the action of the algorithm, and the consequent allocation of this category of risk, bearing in mind that, as respected legal experts state, [23] the problem of civil liability is never a self-contained matter, but is always interlinked with the issue of setting the criteria on which the judgement concerning liability should be made.

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[18] See M.L. MONTAGNANI, *Intelligenza artificiale e governance della "nuova" grande impresa azionaria: potenzialità e questioni endoconsiliari*, in *Rivista delle Società*, 4, 2020, 1003.

[19] On this, see C. SALAZAR, *Umano, troppo umano... o no? Robot, androidi e cyborg nel "mondo del diritto" (prime notazioni),* in *BioLaw Journal – Rivista di BioDiritto*, 1, 2014, 257 et seq., where we are reminded that as long ago as during the 2014 *European Robotics Forum*, the ambitions of robotics were not limited only to the construction of working machines such as the forklifts and arms used in factories; rather, the aim was to give the new technologies the ability to perceive the world, and to give this perception a meaning thanks to AI, which allows information to be processed also in comparison with that already in the memory or available from online databases, and even to act to change the surrounding context.

[20] N. ABRIANI-G. SCHNEIDER, *Diritto delle imprese e intelligenza artificiale*, cit., 191 et seq.

[21] Acronym of *Validating investment tool for advancing life sciences*.

[22] Vital was produced by Aging Analytics, a company which supplies 'business intelligence' tools to insurance companies and pension funds. The new member of the BoD, which has five existing members, will be particularly decisive in the company's financial investment choices, due to its ability to process and correlate financial and medical data, see *Vital, l'algoritmo con un posto in Cda*, in *Ansa.it*, 19 May 2014.

[23] S. RODOTÀ, *Il problema della responsabilità civile*, Milano, 1954, 51 et seq.

2. *Algorithm error and use of the civil liability paradigm: limitations and reasons for a different approach*

The question naturally arises as to whether artificial intelligence can commit errors in the same way as human intelligence.

The answer to this question is definitely an affirmative.

We have already seen that algorithms can get things wrong and cause racial or gender discrimination,[24] contribute to the formation of a monopolistic cartel on the market[25] and lead to harmful situations that create new forms of anomalies in the financial market, even with a knock-on effect,[26] which can be difficult to control and contain.[27]

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[24] For example, algorithms' assessments of candidates for a job or of creditworthiness for a mortgage may incorporate defects of form arising from calculation mechanisms that discriminate on the basis of a person's ethnic origin or sexual orientation. See *AI programs exhibit racial and gender biases, research reveals*, in *The Guardian*, 13 April 2017 and F. DI TODARO, *Anche gli algoritmi sono razzisti discriminano in base all'origine di una persona*, in *La Stampa* 11 July 17.

[25] See P. MANZINI, *Algoritmi collusivi e diritto antitrust europeo*, in *Mercato concorrenza e regole*, cit.

[26] In the last 15 years, the financial markets have increasingly relied on software and IT systems to automate their operations, to achieve a speed that gives traders a competitive advantage, of the order of milliseconds for each order. «La conseguenza però è il rischio di una catena di errori a cascata. All'origine in fondo c'è sempre un errore umano: di programmazione del software, per esempio. Ma l'automazione e l'enorme velocità del trading lo amplifica e lo porta alle estreme conseguenze, perché i programmi utilizzano semplici routing statiche di analisi per prendere decisioni. Non si pongono insomma domande, non mettono in discussione la portata delle proprie azioni per trovare errori di fondo, come invece farebbe un essere umano. L'intelligenza umana, a differenza di quella artificiale, è in grado di prendere le distanze da schemi e routine già adottati e così uscire da circoli viziosi di errori basati su un presupposto sbagliato. Un sistema automatico può essere ingannato anche con più facilità. Quest'anno l'account di Twitter dell'Associated Press è stato piratato per inviare notizie di esplosioni alla Casa Bianca. Gli algoritmi sono entrati in fibrillazione causando ordini di vendita a catena, senza lasciare il tempo ai decisori umani di controllare la veridicità delle notizie». See A. LONGO, *Quando l'algoritmo impazzisce: le soluzioni allo studio contro l'eccesso di automazione*, in *Il Sole 24 Ore*, 21 August 2013.

[27] For example, *spoofing, pinging and quote stuffing* are all illegal behaviours by high frequency algorithmic traders which can manipulate the market. For example, a *spoofing scheme* involves the emission onto the market of a large number of trading proposals via computerised platforms, with the aim not of agreeing trades but of generating fake information to pilot trading through a kind of spontaneous race to the top or bottom. This may lead other human or robotic investors to believe that an upward or downward trend is beginning, and induce them to follow that direction. *Spoofing* is therefore a type of market manipulation which may take a variety of forms, such as *pinging*, which is the emission onto the market of thousands of orders (with no intention of executing them) to persuade other traders to react and to reveal their strategies. *Quote stuffing*, on the other hand, is the emission of a large number of trade offers that overload the market, affecting counterparties' behaviours. All these activities, in which the potentials of algorithms are used unethically, are defined and prohibited by the EU Market Abuse Directive. See C. MOTTURA, *Deci-*

Once we are aware that the algorithm may commit errors, the question arises concerning the liabilities arising from the damage caused by the machine.

The European Union has started to consider the issue [28] of which party bears this liability and has drawn up various hypotheses, starting from the algorithm's producer and designer, and also considering whether the machine itself has a digital personality, [29] or whether the liability lies with its owners or the end users.

I believe we should start from the warning issued by the European Commission, which states that civil liability for damage caused by an algorithm must not be subject to any limitations of the type or entity of the damage which can be compensated, or of the forms of compensation which can be offered to the injured party, since it cannot be claimed that the damage was caused by a non-human entity. [30]

In the light of the above there are two categories of forms of civil liability deriving from AI: producer liability and user liability, particularly difficult to identify and classify in corporate terms.

The former, [31] which I shall briefly outline but which could easily be

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sione robotica negoziale e mercati finanziari, contrattazione algoritmica, nuovi abusi di mercato, algoritmi di controllo (degli algoritmi), in *Decisione robotica*, ed. A. CARLEO, Bologna, 2019, 265 et seq. *Il lato oscuro dei listini: così gli algoritmi manipolano i mercati*, in *Il Sole 24 Ore*, 29 April 2018.

[28] See the Proposal for a Regulation of the European Parliament and of The Council on liability for the operation of Artificial Intelligence-systems, in the Draft Report with recommendations to the Commission on a Civil liability regime for artificial intelligence (2020/2014(INL)) regarding the strict liability for high-risk AI-systems (art. 4), and the Fault-based liability for other AI-systems (art. 8); see also A. FUSARO, *Quale modello di responsabilità per la robotica avanzata? Riflessioni a margine del percorso europeo,* in *Nuova giurisprudenza civile commentata*, 6, 2020, 1353 et seq.

[29] There are many problems regarding the assignment of a digital personality to machines, since underlying the argument of those wishing to attribute subjectivity to software agents, which would imply partial legal capacity in functional terms, there is probably, in the final analysis, a problem of the theory of declaration: the need to define the entity with whom the human party has a 'dialogue', see M.F. CAMPAGNA, *Gli scambi attraverso algoritmi e il problema del linguaggio. Appunti minimi*, in *Analisi Giuridica dell'Economia*, 1, 2019, 163.

[30] See Civil law rules on robots, European Parliament resolution of 16 February 2017 containing recommendations to the Commission concerning civil law rules on robots (2015/2103(INL)).

[31] For a list of European legislation regarding the production and sale of AI goods and services, see U. PAGALLO, *Intelligenza Artificiale e diritto. Linee guida per un oculato intervento normativo*, cit., which lists the main items of legislation relevant to this issue: directive 2001/95/EC on general product safety, protecting consumers, the 'machinery directive' 2006/42/EC, directive 2009/48/EC on the safety of toys, directive 2010/35/EU on the transportation of hazardous goods, EU regulation 305/2011 on construction products, directive 2014/30/EU on electromagnetic compatibility, directive 2014/53/EU on radio equipment, EU regulation 2014/910 on electronic identification and trust services for electronic transactions, EU regulation 2016/425 on personal protection equipment, EU directive 2016/1148

the subject of an entire article, considers the robot as a product and regulates the damage caused in the event of a defect in its production. This liability is not restricted to the producer as such, meaning the party which constructs the finished product, but also extends to all the other parties who have participated and collaborated in the production process through which the machine was produced. Under this approach, the parties responsible might also include the programmer and/or the creator of the algorithm. [32]

With regard to user liability, as an initial approximation it could be argued that the concept of the user should include all those parties within a company who have taken or actively participated in the decision relating to the use of the AI. Under this approach, these parties might include the company, the directors and, in the final analysis, the shareholders, if they have directly or indirectly influenced or participated in a decision in view of the specific relationship in force between the shareholders and the directors.

Amongst the possible models for the attribution of user civil liability, the European Parliament recommends an approach based on strict liability. [33]

In the approach to this model of liability adopted at the EU level, the preference appears to be for a mechanism [34] under which penalties for this kind of civil offences will act as a deterrent and help to reduce risk, rather

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for a high common level of security of network and information systems across the Union, and the relevant provisions of the GDPR.

[32] See directive 85/374/EEC, which, in the fourth 'whereas' clause, states that protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective; for the same reason, liability should extend to importers of products into the European Community and to persons who present themselves as producers by affixing their name, trade mark or other distinguishing feature or who supply a product the producer of which cannot be identified.

[33] See the Proposal for a Regulation of the European Parliament and of The Council on liability for the operation of Artificial Intelligence-systems, in the Draft Report with recommendations to the Commission on a Civil liability regime for artificial intelligence (2020/2014(INL)) regarding the strict liability for high-risk AI-systems (art. 4), 1. The deployer of a high-risk AI-system shall be strictly liable for any harm or damage that was caused by a physical or virtual activity, device or process driven by that AI-system. 3. The deployer of a high-risk AI-system shall not be able to exonerate himself or herself by arguing that he or she acted with due diligence or that the harm or damage was caused by an autonomous activity, device or process driven by his or her AI-system. The deployer shall not be held liable if the harm or damage was caused by force majeure.

[34] According to P. TRIMARCHI, *Rischio e responsabilità oggettiva*, cit., 36 et seq., in some cases the pressure exerted by strict liability, applied to the people with control of the general risk conditions, may be more effective than that exerted by liability arising from a fault, applied to the people who actually perform the individual risky actions; the author seems to believe that the pressure applied by the principle of fault-based liability would not be sufficient to eliminate a socially unjustified risk.

than for the provision of incentives for free scientific and technological experimentation. [35]

In particular, this system of liability is agile and its efficacy can be relied upon. It aims to ensure that the risk arising from his business is borne by the entrepreneur himself, and thus constrain him to reduce this risk within an economically justifiable limit by creating economic pressure intended to force him to rationalise his business activity [36] through the adoption of suitable safety measures intended to limit the causation of damaging events. [37]

This reinforces the centrality of the figure of the entrepreneur, who is in a position of superiority with regard to choices concerning operating procedures and organisational structures, since he has the power and the competences to act effectively to eliminate or reduce the possible risks related to his business. [38]

The aim of this form of liability is to [dehumanizing the damages] «depersonalizzare la problematica dei fatti dannosi» [39] and it is rooted in the need to protect third parties and the community by identifying a party who will be obliged to provide compensation for the sole reason that he has exposed the company to a (hazardous) situation, [40] and who will thus

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[35] See G. COMANDÈ, *Responsabilità ed accountability nell'era dell'Intelligenza artificiale,* in *Giurisprudenza e autorità indipendenti nell'epoca del diritto liquido,* ed. F. DI CIOMMO-O TROIANO, Piacenza, 2018, 1001 et seq.; G. COMANDÈ, *Intelligenza artificiale e responsabilità tra liability e accountability. Il carattere trasformativo dell'IA e il problema della responsabilità*, cit., 186, who states that «la scelta della regola di responsabilità civile collegata all'uso di IA in questo rinnovato e più ampio quadro può essere scelta di volta in volta per la sua maggiore capacità di servire uno o più delle sue tradizionali finalità (compensation, deterrence) senza dovere per forza farle carico di una soluzione olistica. Questa invece andrebbe ricercata nel più ampio principio dell'*accountability*. Di questa logica, che del processo, dei controlli, del sapiente uso dei diritti degli interessati e delle prerogative imprenditoriali è ormai da tempo un territorio di sperimentazione la data protection».

[36] A. MASTRORILLI, *Algoritmo scellerato?*, in *Mercato Concorrenza Regole*, 2, 2019, 349 and 350, states that «il sistema di *strict liability* collegato all'assunzione del rischio derivante dall'uso dell'algoritmo, attraverso la rivisitazione della distribuzione dell'onere della prova, riversando tale rischio dall'attore all'impresa convenuta, in considerazione della oggettiva complessità delle dinamiche sottostanti alle condotte di impresa nell'era degli algoritmi […] presuppone complesse considerazioni sull'algoritmo, al fine di stabilire se e in che misure le condotte illecite possono essere predeterminate, e quanto i *designers* dello stesso siano in grado di controllare le macchine *self-learning*, posto che essi programmano l'algoritmo iniziale e lo avviano senza alcuna possibilità di controllare le successive evoluzioni».

[37] On this point see P. TRIMARCHI, *La responsabilità civile: atti illeciti, rischio e danno*, cit., 275 et seq.

[38] See P. TRIMARCHI, *Rischio e responsabilità oggettiva,* cit., 37 et seq.

[39] C. CASTRONOVO, *La nuova responsabilità civile*, Milano, 2006, 276 et seq, with regard to strict liability, states that «non ha più senso chiedersi se il fatto dannoso sia dovuto a un comportamento negligente del lavoratore individuo che operi all'interno dell'impresa o esigere che almeno ricorra la colpa del titolare dell'impresa stessa».

[40] G. ALPA-M. BESSONE, *La responsabilità civile: 1. Prospettiva storica, colpa aquiliana, illecito contrattuale; 2. Responsabilità oggettiva, rischio d'impresa, prevenzione del danno*, Mi-

be forced to pay compensation even for damage due to causes unknown to him or which cannot be identified.

The field of robotic intelligence [41] is, at present, characterised by a regulatory vacuum, forcing lawyers and judges to seek answers by applying general legislation which is dated but not antiquated, [42] such as the provisions of articles 2049, 2050 and 2051 of the Italian Civil Code with regard to liability. [43]

Some authorities [44] maintain that the provisions of art. 2049 of the Italian Civil Code with regard to employers and principals could also be applied to the topic of artificial intelligence, since a robot can be considered as a substitute for a worker.

Under this principle, the entrepreneur would be responsible as a party availing himself of an organisation consisting of employees, and for that reason would also be liable for damage caused to third parties if the employee (robot?) has acted beyond the limits of his (its) duties. [45]

On the other hand, if article 2051 of the Civil Code is applied, artificial

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lano, 2001, 332 state that the responsible party is under an obligation to adopt all available measures to prevent damage, and must therefore adopt a level of diligence so deep and broad that it embraces every precaution, every safeguard and every means for preventing the occurrence of the event.

[41] See *Una politica industriale europea globale in materia di robotica e intelligenza artificiale*, European Parliament resolution of 12 February 2019 on a comprehensive European industrial policy on artificial intelligence and robotics (2018/2088(INI)), which, in whereas K, underlines the importance of reviewing and if necessary modifying existing rules and processes to account for artificial intelligence and robotics.

[42] See U. RUFFOLO, *Per i fondamenti di un diritto della robotica self-learning; dalla machinery produttiva all'auto drivererless: verso una "responsabilità da algoritmo"*, ed. U. RUFFOLO, in *Intelligenza artificiale e responsabilità*, Milano, 2017, 1-30, which underlines that «stiamo parlando, sul terreno della responsabilità extracontrattuale, di norme derivate dalla cultura romanistica, tradotte in modo relativamente uniforme negli ordinamenti dell'Europa continentale e modulate partendo dal Code Napoléon. Si tratta, quindi, di norme generali che hanno dimostrato, per secoli, una elevata potenzialità regolatrice anche con riguardo a scenari socio-economici e tecnico-produttivi ad alto tasso di innovazione».

[43] Some authors have argued that robots with artificial intelligence should be subject to art. 2052 of the Italian Civil Code «dunque, anche della cosa intelligente si risponde oggi alla stessa maniera e con gli stessi criteri normativi che governano la responsabilità da (intelligenza) animale. Per regolare il fatto della cosa resa se-agente dall'intelligenza artificiale, dunque della cosa-robot, sono sufficienti i criteri di responsabilizzazione codicistici omologhi a quelli della responsabilità per fatto animale?»; see U. RUFFOLO, *Per i fondamenti di un diritto della robotica self-learning; dalla machinery produttiva all'auto drivererless: verso una "responsabilità da algoritmo"*, ed. U. RUFFOLO, in *Intelligenza artificiale e responsabilità*, cit.

[44] See G. SARTOR, *Gli agenti software e la disciplina giuridica degli strumenti cognitivi*, in *Diritto dell'informazione e dell'informatica*, 1, 2003, 55, which argues that the liability of the user of the software agent can be considered as equivalent, not to the responsibility for the safekeeping of an object, but to vicarious liability (the liability of employers and principals, under art. 2049 of the Civil Code, and in particular the liability of the employer for the actions of his employees).

[45] See Cass. 24/01/2007 no. 1516.

intelligence is no longer considered as a subject in its own right, but is rather simply an object at the disposal of the entrepreneur for the conduct of his business, and he will be held liable for any damage since he is responsible for its safekeeping. This approach is founded in the principle that the risk lies with the party who uses and profits from the good in question.[46] As some authorities[47] have commented, an approach of this kind might however be restricted by the 'free will' or rather the autonomy which smart machines enjoy, in view of which the entrepreneur is unable to influence the conduct which leads to the damage and is therefore not responsible for it.

As things now stand, it appears that liability as defined by art. 2050 of the Civil Code,[48] as just described, may be the model best suited for regulation of the mechanisms typically involved with artificial intelligence, although review will inevitably be necessary with the passage of time, scientific developments and increases in the safety of the technology.

The context of application of this principle has gradually been extended to include many hazardous activities, which according to the Italian Corte di Cassazione are potentially damaging in themselves or due to the high percentage of damage they may cause as a consequence of the nature or type of the resources used.[49]

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[46] According to Italy's highest court (Corte di Cassazione): Cass. 29/09/2017 no. 22839, Cass. 01/02/2018 no. 2480 and Cass. 09/07/2019 no. 18415, which states that art. 2051 of the Civil Code refers to the kind of civil liability generally defined as strict (objective), in which, for socio-political reasons, the risk which intrinsically lies with some categories of party is allocated to other, specified parties. The rationale of this approach is the allocation of the risk not to the person who becomes subject to the hazardousness of the thing concerned by coming into contact with it, but to the person who enjoys ownership of the thing, so that the risk counterbalances this enjoyment. See also E. VINCENTI, *La dottrina in dialogo con la giurisprudenza: il pensiero di Pietro Trimarchi in taluni orientamenti della Cassazione Civile*, in *Responsabilità Civile e Previdenza*, 4, 2018, 1369, which states that «muovendo proprio dalla ratio della responsabilità prevista dall'art. 2051 c.c., intesa come esigenza di addebitare i costi del danno cagionato direttamente dalla cosa in capo a chi si trovi nella condizione di controllare i rischi ad essa inerenti, si è valorizzato il fattore selettivo della compresenza di una disponibilità giuridica e materiale della res, per ribadirsi, quindi, che custode è colui che ha 'il potere di governo' della cosa; chi, dunque, può controllarne le modalità d'uso e di conservazione, eliminare le situazioni di pericolo che siano insorte ed escludere i terzi dal contatto con essa».

[47] See M. COSTANZA, *Impresa Robotizzata e responsabilità*, ed. U. RUFFOLO, in *Intelligenza artificiale e responsabilità*, Milano, 2017, 107-120.

[48] M. COMPORTI, *Esposizione al pericolo e responsabilità civile*, Napoli, 1965, 86 et seq., first describes the law relating to strict liability and then defines its underlying *rationale*, which is the creation of a situation of hazard from which the occurrence of damage subsequently originates.

[49] See Cass. 27/03/2019 no. 8449 which, distinguishing between the forms of liability, states che «in materia di responsabilità per esercizio di attività pericolose, considerato che tutte le attività umane contengono in sé un grado più o meno elevato di pericolosità per coloro che le esercitano, occorre sempre distinguere tra pericolosità della condotta e pericolosità

From this point of view, the use of artificial intelligence may be considered to be a tool that is not yet sufficiently tried and tested, and which thus runs the risk of bringing hazard into activities which would not in themselves be hazardous. [50]

In fact, today the use of robots still involves many unknowns and doubts which to a certain extent correspond to the distinctive characteristics of the conduct of a hazardous activity.

In a recent sentence, the Italian Corte di Cassazione ruled that the home banking service and the relative processing of sensitive data by a Bank form part of the professional risk of the payment service provider, thus making the provision of this service a form of hazardous activity under art. 2050 of the Civil Code. [51]

However, I believe that the issues regarding algorithm damage should not be limited merely to the forms of liability regulated by the Italian Civil Code. Instead, there is the need to open out to new horizons, by taking a strictly juridical approach to the concept of corporate social responsibility.

The contents of CSR may vary depending on the legal relationship established between the various parties, giving rise to an obligation to compensate even in situations where specific safeguards are apparently not in place.

For this purpose, it is necessary to increase the focus on the implications of the social dimension [52] intrinsic to CSR, which generates a liability which cannot be restricted simply to a legal mechanism designed to ensure the reimbursement of extra-contractual damage.

CSR tools should acquire the status of binding regulations for the conduct of society, providing guidance for the way in which directors operate within the markets and helping to transform best practices into fundamental legal values. [53]

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dell'attività in quanto tale: la prima riguarda un'attività normalmente innocua, che assume i caratteri della pericolosità a causa della condotta imprudente o negligente dell'operatore ed è elemento costitutivo della responsabilità ai sensi dell'art. 2043 c.c.; la seconda concerne un'attività che, invece, è potenzialmente dannosa di per sé per l'alta percentuale di danni che può provocare in ragione della sua natura o della tipologia dei mezzi adoperati e rappresenta una componente della responsabilità disciplinata dall'art. 2050 c.c.».

[50] See U. RUFFOLO, *Per i fondamenti di un diritto della robotica self-learning; dalla machinery produttiva all'auto drivererless: verso una "responsabilità da algoritmo"*, ed. U. RUFFOLO, in *Intelligenza artificiale e responsabilità*, Milano, 2017, 31-52.

[51] See Cass. 12/04/2018 no. 9158.

[52] On this point see A. ADDANTE, *Rapporti di impresa e responsabilità sociale*, in *Rivista di diritto privato*, 2, 2011, 229-253.

[53] A. FALZEA, *Il civilista e le sfide di inizio millennio*, in *Studi in onore di Schlesinger*, Milano, 2004 and A. FALZEA, *Introduzione alle scienze giuridiche, il concetto del diritto*, Milano, 2008, 434 argue that social values, once they have also become legal values, are enshrined in current legal practice, and by this mechanism the emotional current which underlies them is able to influence the world of law through public opinion and forms, to the point where it influences the way in which laws are interpreted.

This would enable an understanding of the role of civil liability within corporate social responsibility, and the possible consequences for the various players concerned with it, including the company's directors. [54]

Through the rules of corporate social responsibility, the action of a company and its directors in the context of a regulated market becomes a kind of 'social contact' with the relative obligations as defined by Italian law. [55] This contact is founded in the rule of good faith, in the sense of a rule of conduct, and in the trust [56] that the various stakeholders (market or consumers) are justified in placing in the listed company.

In fact, in the financial markets the duty of social and economic solidarity integral to CSR implies a kind of duty (or ethic-moral imperative?) on companies and their managers, and on the private and public controlling bodies. [57]

Directors are therefore called upon to adopt decisions which conserve and guarantee the integrity of the market itself and thus to abstain from behaviours which denote policies based on *moral hazard*, which may generate damaging situations and liability on the part of the managing body.

The roots of this social mission can be traced back to the broader, more general duty of social solidarity contained in art. 2 of the Italian Constitution. This principle safeguards both parties to the relationship, both active and passive, by guaranteeing the protection of the interests in-

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[54] See J.M. EMBID IRUJO, *Responsabilidad social corporativa y responsabilidad civil*, in *Rivista del diritto commerciale*, 2, 2019, 209, which states that «como es fácil de comprender, no resulta posible plantearse el estudio de la responsabilidad civil por inobservancia de la RSC con la extensión que la referencia precedente supondría. Parece más adecuado, sobre la base de algunas realidades prácticas y con el apoyo de la doctrina existente, concretar cuál pueda ser el puesto de la responsabilidad civil en el universo jurídico de la RSC».

[55] The 'social contact' is a specific form of obligation-generating relationship, and is amongst the relevant actions and events regulated by art. 1173 of the Civil Code. The legal theory and the line of decisions have evolved this concept in order to regulate all situations in which the relationship between parties arises not from a contract but from obligational ties that derive from the more general principle of good faith, as per art. 1175 of the Civil Code. For example, see Cass. 13/10/2017 no. 24071 and Cass. 12/07/2016 no. 14188.

[56] On the regulated markets, the legitimate trust placed in companies is guaranteed by the presence and the far-reaching powers of market regulator Consob, tasked with protecting investors not only by ensuring the efficiency and transparency of the markets, and control over their organisation and trading practices, but also through its many regulatory mechanisms, including those which enforce transparency obligations in relation to Consob on the part of listed issuers (with regard to ownership structures, for example). Consob is also empowered to intervene in the company's life by appealing general meeting resolutions, to ensure compliance with the rules binding on shareholders, or by issuing disqualifying orders. See R. COSTI, *Il mercato mobiliare*, Torino, 2018, 397 et seq.

[57] Private controlling bodies include internal and external accountability departments and auditing firms, while the highest public controlling bodies are the regulatory authorities.

volved, giving rise to an obligation of protection of the party which was encouraged by the other party to place trust in it. [58]

It is clear that the connotations of social mission [59] (meaning the attention, based on social solidarity, to the interests of all the parties affected by the company's business) mean that business relations can also be assessed on the basis of criteria of liability, which becomes a kind of qualified 'social contact' liability. [60]

It is argued that this occurs whenever the liability derives from the breach of specific, pre-existing obligations such as the obligation to act in good faith, the obligation of diligence, the obligation to act on the basis of reliable information or the precautionary principle, and the failure to establish a suitable organisational structure.

In view of the 'social contact' established between the parties, given the trust which a company enjoys on the regulated markets, the 'social contact' principle might be similarly applied to the relationships between the various companies or investors, who would not otherwise be protected. [61]

On this basis, the concept of CSR could be viewed as close to a form of 'social contact', and thus as establishing a contractual relationship between the various parties involved, in spite of the absence of a contract as such.

This reinforces the reparatory function of corporate social responsibility, which can be viewed, thanks to this connection to the theory of liability arising from 'social contact', as the possible response to the need for a systematic framework for managing types of damage which are difficult

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[58] It has been stated that obligations of protection, from which the 'social contact' theory originated, have provided a buffer-category between contractual and criminal liability, filling the gaps in both of them. See A. DI MAJO, *Il problema del danno al patrimonio*, in *Rivista critica del diritto privato*, II, 1984, 322 et seq. and S. ROSSI, *Contatto sociale (fonte di obbligazione)*, in *Digesto delle Discipline Privatistiche Sezione Civile*, Agg, V, Torino, 2010, 349 et seq.

[59] See C. AMATO, *Frammenti di un discorso sulla responsabilità da affidamento,* in *Liber Amicorum per F.D. Busnelli, Il diritto civile tra principi e regole*, I, Milano, 2008, 389 et seq.

[60] Qualified 'social contact' responsibility is thus one of the forms of civil liability which does not depend on the existence of a contract, but is based on a particular relationship between two parties, which is considered, from the legal viewpoint, to generate specific behavioural and professional duties above and beyond the general duty of *neminem laedere*. See M. BARCELLONA, *L'ingiustizia del danno e il doppio regime della responsabilità*, in *Commentario del codice civile* ed. U. CARNEVALI and directed by E. GABRIELLI, Milano, 2018, 100-140; On this subject, also see Tribunale sez. lav. Rome, 07/10/2019, no. 8200, which states that «spesso il rapporto contrattuale nasce e produce i propri effetti non sulla base di valide dichiarazioni di volontà, bensì in base al contatto sociale che si determina tra le parti (cioè al complesso delle circostanze e dei comportamenti, valutati in modo socialmente tipico, mediante i quali si realizzano di fatto operazioni economiche e trasferimenti di ricchezza tra i soggetti)».

[61] See C. AMATO, *Financial contracts and 'junk title' purchases: a matter of (in)correct information*, in M. KENNY-J. DEVENNEY-L. FOX O'MAHONY, *Unconscionability in European Privat Financial Transactions, Protecting the Vulnerable*, Cambridge, 2010, 308 et seq.

to classify in view of their hybrid nature, «[rientrando] in una zona di turbolenza ai confini tra responsabilità aquiliana e responsabilità contrattuale». [62]

Thus, once the relative 'community' of reference (meaning the perimeter within which CSR applies) has been defined, CSR can be considered to provide a kind of protection of broad interests particularly vulnerable to the risk of harm, in the context of the relationships and functioning of the financial markets or their parts. [63]

In the final analysis, the algorithm's correct use must comply with high standards of diligence and the precautionary and preventive principle, and its user must be aware that otherwise he may be held liable for the damage it causes, even if it does not wreak havoc in an entire sector or trigger a collapse or even just a reduction in prices.

In fact, if the algorithm's error has been caused by reckless choices in breach of protection obligations, the damaged companies and their shareholders may be entitled to sue for compensation against those (companies and/or directors) who have caused and are responsible for the malfunctioning of the software or have failed to exercise vigilance over it.

Moreover, against the backdrop of a constant increase in demand from society in general for the development of a sustainable economic and production system, [64] the European Union, to boost the adoption of *best practices* related to corporate social responsibility, has introduced new technical and legal instruments with the aim of tackling the many criticalities concerning the social and environment impact of business operations.

Amongst the various instruments introduced, for our purpose I consider the non-financial reporting envisaged by Italian Legislative Decree no. 254 of 30 December 2016 to be particularly significant; this represented a major innovation in corporate law, updating corporate reporting by ren-

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[62] On this point, see C. CASTRONOVO, *La nuova responsabilità civile*, cit., 443 ss., which states that «determinate ipotesi di danno risultano di difficile collocazione, [in quanto] appaiono giuridicamente più pregnanti del semplice rapporto obbligatorio di risarcimento del danno al quale si riduce quest'ultima e però meno articolate del rapporto obbligatorio incentrato sulla prestazione».

[63] For a definition see G. MANFREDI, *Interessi diffusi e collettivi (diritto amministrativo)*, in *Enciclopedia del Diritto Annali*, VII, Milano, 2014, 513 et seq., in which the author states that «l'espressione interessi diffusi in genere viene impiegata per indicare gli interessi che pertengono ad un insieme indefinito di soggetti».

[64] The environment and climate change are starting to occupy a major position within the political and social debate: examples include the concerns raised by Italian President Sergio Mattarella, who has underlined the importance of adopting measures agreed at the global level to ward off a global climate crisis, and the Global Strike for Future held in 150 countries on 15 March 2019. See A. GAGLIARDI-M. SESTO, *Cambiamento climatico, in Parlamento solo il 4% di proposte di legge è green*, in *Il Sole 24 Ore*, 24 March 2019.

dering the disclosure of non-financial information by large companies and groups compulsory. [65]

Therefore, non-financial statements form part of a gradual spread of the practice of *disclosure*, which helps to raise awareness amongst company managements, encouraging them to prefer conduct which favours the development of the community as a whole and thus to permit a form of social control over the company's operations.

Moreover, in terms of future developments, thanks to the flexibility permitted by the drafting of this legislation, [66] as well as information regarding sustainability as such, non-financial statements could also include information about the use of and strategies adopted with regard to artificial intelligence, giving directors the opportunity to set out their organisational structures, the underlying policies, the operating procedures and the security protocols introduced for the use of new technologies. [67]

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[65] In Legislative Decree no. 254 dated 30 December 2016. 'Implementing directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014' amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, introduced the obligation to submit an individual non-financial statement for public-interest entities which have had an average number of employees higher than 500 during the financial year and, as of the end of the reporting year, have exceeded at least one of the following two dimensional limits: a) total balance sheet equity: 20,000,000 euro; b) total net earnings from sales and services: 40,000,000 euro. Moreover, under Decree no. 254 of 30 December 2016 all other undertakings not subject to this obligation may issue a voluntary non-financial statement covering the areas referred to by art. 3 of the Decree, with simplified forms envisaged for SMEs. In fact, statements of companies with fewer than 250 employees, unlike other companies, can be considered to comply with this legislation without being subject to the control mechanisms.

[66] On this topic, see the paper given by Consob Commissioner Prof. Anna Genovese, entitled *L'opzione regolatoria in tema di finanza sostenibile e prime evidenze della vigilanza della Consob sulle dichiarazioni non finanziarie*, during the Congress *"Finanza sostenibile e responsabilità sociale di impresa"*, held in Rome on 25 October 2018, which states that «le modalità con cui le società hanno adempiuto all'obbligo di redazione e pubblicazione della DNF sono state molto diverse, anche per via della flessibilità 'garantita' dal legislatore. Gli operatori si sono avvalsi di tale flessibilità per minimizzare l'impatto della disciplina su prassi già in uso».

[67] Also see Assonime circular no. 13 of June 2017, which states that «in base al d. lgs. n. 254/2016, la società che non pratica politiche in uno o più degli ambiti tematici rilevanti per la disciplina in esame (ambiente, comunità di riferimento, dipendenti, rispetto dei diritti umani, lotta alla corruzione attiva e passiva) deve fornire nella dichiarazione, individuale o consolidata, per ciascuno degli ambiti, le motivazioni di tale scelta, indicando le ragioni in maniera chiara e articolata. Quest'obbligo di trasparenza riprende, anche nell'ambito dell'informazione non finanziaria, l'approccio del comply or explain adottato in tema di obblighi informativi sulle pratiche di governo societario delle imprese in base al quale le società devono indicare, nel caso in cui aderiscano a un codice di comportamento in materia di governo societario, le ragioni dell'eventuale mancata adesione a una o più disposizioni del codice. La regola in esame ha la fondamentale funzione di bilanciare, a livello informativo, la non rendicontazione su determinati aspetti, imponendo alla società di esplicitare le motivazioni di tale scelta, con l'indicazione in maniera chiara e articolata delle ragioni sotto-

In the light of these considerations, it might be reasonable to introduce liability on the part of directors, for violation of art. 2381 of the Civil Code, if they place information on the market in breach of their transparency obligation. [68]

In the final analysis, I believe that in corporate terms, the question regarding the allocation of the problem of the use of artificial intelligence will inevitably end with the attribution of liability to the company which adopted the technological tool, and secondly to the directors, who may be held liable if their conduct has caused damage to the company [69] or directly to the shareholders, [70] as a result of wrong choices with regard to artificial intelligence.

To conclude, we can therefore safely state that corporate social responsibility does not conflict with the standard concept of legal liability, but rather usefully completes and extends it.

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stanti. In tale ottica diventa dirimente la qualità delle spiegazioni rese nella dichiarazione in merito alla scelta di non fornire determinate informazioni. La dichiarazione dovrebbe contenere informazioni chiare, esaurienti e circostanziate che consentano di valutare a tutti gli stakeholder interessati le motivazioni in base alle quali si considerano determinate informazioni non rilevanti».

[68] On this topic, see S. BRUNO, *Dichiarazione "non finanziaria" e obblighi degli amministratori*, cit., which states that «secondo la nuova disciplina, l'obbligo di trasparenza sulle c.d. informazioni non finanziarie risponde alla finalità di identificare i rischi che potrebbero derivare da una mancata considerazione dei fattori sociali ed ambientali. Da questo punto di vista la qualificazione di questa informativa come 'non' finanziaria non sembra essere corretta: la trasparenza è funzionale alla mitigazione dei rischi e quindi delle perdite che gli emittenti potrebbero subire e che, a sua volta, conduce ad un corretto calcolo del valore attuale del patrimonio sociale. Probabilmente l'espressione è frutto di un errore di traduzione perché in inglese *non financial information* significa che le informazioni non sono contenute nel bilancio: sarebbe stato più corretto tradurre 'non contabili'. Senza queste informazioni, in ogni caso, il mercato potrebbe stimare in maniera non corretta gli emittenti. La trasparenza, finalizzata ai rischi, pertanto produce conseguenze sulla gestione: la considerazione di questi fattori può dirsi rientrare tra gli obblighi degli amministratori ex art. 2381, comma 3 c.c., al fine di valutare l'adeguatezza dell'assetto organizzativo, amministrativo e contabile della società in quanto ciò include il monitoraggio dei rischi».

[69] See Cass. 02/02/2015 no. 1783, which states that «in tema di responsabilità degli amministratori verso la società, il giudizio sulla violazione del generale obbligo di diligenza, cui l'amministratore deve attenersi nell'adempimento dei doveri imposti dalla legge o dall'atto costitutivo, non può tradursi nella valutazione dell'opportunità economica delle scelte di gestione operate dall'amministratore, ma deve riguardare il modo in cui esse sono compiute. Ne consegue che la responsabilità dell'amministratore può essere generata, ai sensi dell'art. 2392, comma 1, c.c., dall'eventuale omissione di quelle cautele, verifiche e informazioni preventive normalmente richieste prima di procedere a quel tipo di scelta».

[70] On this head, the decisions of the courts seem to be unyielding in considering the extracontractual nature of the liability governed by art. 2395 of the Civil Code, since they postulate the existence of illegal acts arising directly from negligent or criminal behaviour on the part of directors, see Cass. 08/02/2019 no. 3779, and, taking the same view, Cass. 12/06/2019 no. 15822, Cass. 25/01/2016 no. 1261, Cass. 08/09/2015 no. 17794, Cass. 23/06/2010 no. 15220, Cass. 05/08/2008 no. 21130, Cass. 25/07/2007 no. 16416 and Cass. 07/09/1993 no. 9385.

3. *Towards a new horizon*

During our survey we have seen that the still largely unexplored terrain of the use of artificial intelligence is an area where light and shadows alternate. [71]

While academics ponder the topic and attempt to define the basic features of this phenomenon, millions of transactions are already taking place undisturbed via the airwaves, governed by algorithms, [72] designed to influence the market and direct sales and purchases in a way which benefits individual interests, [73] and robots are continuing their process of apprenticeship, learning very quickly from their mistakes, and dialogue with the objects connected to them with no need for human intervention.

In this system we must always bear in mind that the development and use of these technologies, with their vast potentials, demands that they be used responsibly and with care.

If this is ensured, artificial intelligence will be able to contribute to the achievement of the goals set by the European Union with regard to sustainable finance, [74] for the launch of specific Community economic

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[71] As an example, we may take the issues regarding the use of driverless cars, for which risk assessment and risk management may be conducted «secondo logiche che contemplano apertamente la possibilità della compressione di diritti fondamentali quali la salute, l'integrità fisica e la stessa vita come inevitabile conseguenza dell'adozione di decisioni funzionali a garantire il più soddisfacente livello possibile di realizzazione dei plurimi interessi reputati meritevoli di tutela [per i quali il Legislatore si troverà di fronte ad un scelta che porterà inevitabilmente verso una] assunzione di decisioni tese a privilegiare la soluzione funzionale a proteggere il maggior numero di persone, pur nella consapevolezza che essa comporterà necessariamente un sacrificio per un numero sensibilmente inferiore di altri individui che, nondimeno, subiranno danni significativi o fatale», see G. CALABRESI-E. AL MUREDEN, Driverless Car *e responsabilità civile,* in *Rivista di diritto bancario*, 1, 2020, 18 et seq. and D. TAFANI, *Sulla moralità artificiale. Le decisioni delle macchine tra etica e diritto*, in *Rivista di filosofia, Rivista quadrimestrale*, 1, 2020, 81 et seq; A. DAVOLA, *Veicoli autonomi, sinistri stradali e nuovi modelli di responsabilità,* in *Giurisprudenza e autorità indipendenti nell'epoca del diritto liquido,* ed. F. DI CIOMMO-O TROIANO, cit., 961 et seq.

[72] On this point C. MOTTURA, *Decisione robotica negoziale e mercati finanziari, contrattazione algoritmica, nuovi abusi di mercato, algoritmi di controllo (degli algoritmi)*, in *Decisione robotica* ed. A. CARLEO, cit.

[73] See F. SARTORI, *La consulenza finanziaria automatizzata: problematiche e prospettive (Robo advice: policy issues and challenges)*, in *Rivista trimestrale di diritto dell'economia*, 3, 2018, 253-270.

[74] The then President of the European Commission, Jean-Claude Juncker, stated «this conference sends a strong signal about the need to scale up sustainable finance globally. It shows the determination of the EU and its partners to enable the transition to a climate-neutral and circular economy, supported by private capital. The establishment of an international network on sustainable finance would support this goal beyond the EU. Given the urgency and importance of this project, I hope this momentum continues well into the next

policies to benefit society and the planet. [75]

This kind of implementation of best practices in the area of artificial intelligence should not be restricted to simply *ethical orientation*, a goal as ambitious as it is difficult to achieve but should be viewed as a tool for improving a company's economic performances (under a socially responsible approach) and for effectively protecting and safeguarding the environment. [76]

Artificial intelligence therefore plays (and will continue to play) a fundamental role in complex innovative design activities, [77] enabling companies to process the huge masses of data and information required in short times, and permitting entrepreneurs to define effective strategies [78] for energy saving and for the production of new, eco-compatible, eco-sustainable products. [79]

To achieve this ambitious, complicated goal, it will be essential to

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years»; see European Commission – Press Release *Sustainable Finance: High-Level Conference takes global cooperation on sustainable finance to the next stage*, Brussels, 21 March 2019. The term sustainable finance refers to Sustainable and Responsible Investment, which aims to create value for the investor and for society as a whole through a medium-long term investment strategy which considers environmental, social and good governance considerations when assessing companies and institutions. *See Text produced in 2013 by the Borsa Italiana Forum for Sustainable Finance Working Group on the Definition of Sustainable and Responsible Investment.*

[75] See European Commission, *Sustainable finance: the Commission's action plan for a greener and cleaner economy*, 8 March 2018 and the 2030 Agenda for Sustainable Development adopted by all United Nations Member States in 2015.

[76] Environmental issues such as biodiversity, climate change, lifecycle analysis and pollution prevention are increasingly included in the primary objectives of Corporate Social Responsibility policies, as exemplified by the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *A Renewed EU strategy 2011-14 for Corporate Social Responsibility*, 2011.

[77] The transition to a circular economy will require changes to design of products, their components and the materials used, in order to enable their good quality use over a long period of time, to plan for and enable reuse cycles, and to ensure effective repairability and complete, simplified recyclability.

[78] Industry 4.0 machines, compliant with the laws of the circular economy, will have to be designed including sensors that enable predictive maintenance, or with features which allow for increases in production efficiency. This will enable society to move beyond the antiquated (but unfortunately still very widespread) production system based on planned obsolescence, which forces consumers to constantly move on from the old to the new.

[79] It should be remembered that strategic business choices must concentrate on the selection and adoption of new materials, together with the use of new, less pollutant and toxic, chemicals, to ensure the circularity of products and the relative production processes. Product development and design will be crucial and must focus on chemical and physical characteristics and properties, toxicity, biodegradability, recyclability and available substitutes. Therefore, under the circular economy principle, products should be designed so that their destination once they have become waste is foreseen from the outset, rather than looking for feasible solutions at the end of their life cycle, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a circular economy: a zero waste programme for Europe*, Brussels, 25.9.2014.

adopt the tools associated with corporate social responsibility [80], which will break out of its confinement as an instrument of *soft law*, only applied where regulatory compliance ceases, and will gain new importance as a necessary means for preventing possible damages. This kind of prevention may be implemented through precautions regarding the programming of robot software and the introduction of safeguarding mechanisms under which any activity initiated by AI programs is subject to human approval.

Pending the construction of a complete legal framework, which must respond to society's new and emerging needs and be integrated with AI tools, the need is felt to place humans back in the centre of technological development, [81] partly through the use of CRS instruments, which may provide safeguards in situations which would otherwise risk being overlooked.

In particular, the new legal framework must be drawn up with an economic approach to the law, [82] and careful consideration will have to be given to the values at stake [83] in future developments in the world of artificial intelligence. [84]

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[80] N. ABRIANI-G. SCHNEIDER, *Diritto delle imprese e intelligenza artificiale*, cit., 246 et seq.

[81] See the presentation entitled *Artificial intelligence: Great power comes with great responsability*, given by Prof. Fei Fei Li, Stanford University before the Committee on Science, Space and Technology of the U.S. House of Representatives, which states that «Artificial intelligence emerged in the mid 20th century as a quest to build machines with intellectual capabilities similar to those of the human mind. As a science, it draws on fields like cognitive science, neuroscience, statistics and mathematics. As a technology, it represents some of the most active developments in computer science and engineering, including machine learning (ML) – a family of techniques that use statistical modeling to learn from data. Today, AI and ML are part of a vibrant, interdisciplinary pursuit, with fields like robotics, natural language processing, computer vision, speech recognition, and even philosophy playing ever-growing roles. We have good reason to be excited about AI. But this is a nascent field, and as a scientist, that humbles me. After all, we've never created a technology to mimic human qualities so closely, and we know little about the impact it will have on the world. Guiding its development will be an ethical, philosophical and humanistic challenge, and it will require a diverse community of contributors. I call this 'Human-Centered AI', and it consists of three simple ideas».

[82] A.M. PACCES, *Analisi economica del diritto: positiva e normativa,* in *Giurisprudenza e autorità indipendenti nell'epoca del diritto liquido,* ed. F. DI CIOMMO-O TROIANO, cit., 45 et seq.

[83] Here it is worth remembering the debate in the United States regarding the possible forms of liability applicable to driverless cars: «application of the model's factors to autonomous vehicles suggests the adoption of either a no-fault system or a strict, collective liability standard within the common law that requires proof of neither fault nor individual causation as a requirement of liability. The choice between these two alternatives should be made on the basis of three factors: (1) the magnitude of the increase in net social utility resulting from reliance on autonomous vehicles as a principal mode of transportation, (2) the perceived need to subsidize the development of the autonomous vehicle transportation system by limiting liability costs, and (3) our trust in administrative regulation to assure adequate attention to safety in the absence of full awards of damages under the common law. Regardless of the choice, the next technology-inspired revolution in American tort law looms on the horizon»; see D.G. GIFFORD, *Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation*, in *Journal of tort Law*, 11(1) 2018, 71-143.

[84] See Civil law rules on robots, European Parliament resolution of 16 February 2017

To conclude, I believe we should remember that, significantly, amongst the first steps in legislation, those relating to the regulation of financial markets [85] have opted for the prudent, cautious use of new technologies, reaffirming the superiority of the person over the machine.

In the past, these markets have been called upon to deal with scandals arising from computer errors, such as the ones that have affected the world of automated trading. [86]

With the entry into force of MiFID II Directive [87] and the introduction of the obligation to register algorithms with regulatory authorities, [88] there

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containing recommendations to the Commission concerning civil law rules on robots (2015/2103(INL)), in which the Parliament urged the insurance sector to develop new products and offerings in line with the progress in robotics, and considering that a system of compulsory insurance, as in the case of motor vehicles, could be one possible solution to the complexity of assigning liability for the damage caused by more and more autonomous robots. Unlike the insurance system for motor vehicles, which covers human actions or errors, the insurance of robots would have to consider all the potential liabilities throughout the chain, and this insurance system could be supplemented by a fund to ensure that damage could be compensated in cases where no insurance cover is available.

[85] F. CAPRIGLIONE, *Diritto ed economia. La sfida dell'Intelligenza Artificiale,* in *Rivista trimestrale diritto dell'economia*, 3 – Supplemento, 2021, 4 et seq.; D. VALIANTE, *La regolazione dell'Intelligenza Artificiale in finanza: tra rischio e design,* in *Rivista trimestrale diritto dell'economia*, 3 – Supplemento, 2021, 37 et seq.; S. LANNI, *Pregiudizi algoritmici e vulnerabilità dei consumatori,* in *Rivista trimestrale diritto dell'economia*, 3 – Supplemento, 2021, 51 et seq.; R. LENER, *Intelligenza Artificiale e interazione umana nel robo-advice,* in *Rivista trimestrale diritto dell'economia*, 3 – Supplemento, 2021, 101 et seq.; L. AMMANNATI, *Diritti fondamentali e rule of law per una Intelligenza Artificiale,* in *Rivista trimestrale diritto dell'economia*, 3 – Supplemento, 2021, 170 et seq. and M. SEPE, *Innovazione tecnologica, algoritmi e Intelligenza Artificiale nella prestazione dei servizi finanziari,* in *Rivista trimestrale diritto dell'economia*, 3 – Supplemento, 2021, 186 et seq.

[86] One kind of algorithm error occurs in high frequency trading, where machines decide automatically without waiting for permission from human operators; this means that algorithms are able to move the markets, because they react faster and automatically. However, in some highly unstable market conditions, technical problems with the software programs used have generated huge losses, as in the case of the Knight Capital Group, which incurred a loss of 440 million dollars in August 2012 after admitting a malfunction linked to its algorithms, see *Gli algoritmi costano cari a Knight Capital Group. Per 45 minuti di caos persi 440 milioni di dollari*, in *Il sole 24 Ore* 2 August 2012. Other similar events include the programming error in the Goldman Sachs trading software, which led to the accidental sale of stock options and generated losses of 100 million dollars on Goldman's 400 thousand contracts with corporations such as JPMorgan, Johnson & Johnson and Kellogg. Or a similar incident in China, involving the state brokerage agency Everbright, which was banned from trading for three months for this reason, see A. LONGO, *Quando l'algoritmo impazzisce: le soluzioni allo studio contro l'eccesso di automazione*, in *Il Sole 24 Ore* 21 August 2013.

[87] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 (MiFID II), article 12 of which states that ESMA is tasked with drawing up the requirements to ensure appropriate testing of algorithms so as to ensure that algorithmic trading systems, including high-frequency algorithmic trading systems, cannot create or contribute to disorderly trading conditions on the market.

[88] See Borsa Italiana, *Modifiche del regolamento dei mercati di Borsa Italiana*, which re-

is also the requirement for algorithms which provide the basis for algorithmic trading to be suitably tested to ensure that a suitable procedure is provided to block their operation in the event of an error. [89]

If correctly designed, the new technologies must enable man to exercise a preventive function, implying the adoption of efficient, reliable technologies, which enable control of their operation and of the algorithm itself.

Superficial use of artificial intelligence generates the risk of delegitimising human input, and this can only be avoided by creating robots inspired by and at the service of people, since only a human being – «un essere nato da ventre di donna» [90] – can be considered the real keystone of future developments of artificial intelligence under a socially responsible approach. [91]

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peats the obligation to use the Borsa Italiana Membership portal to report the *short codes* on which the codes of the algorithms used are based, or the identities of the clients on whose behalf orders are issued, and to implement suitable controls to ensure that the information included in trade proposals is complete. It also introduces the obligation on operators engaging in *algo-trading* to perform suitable tests on trading algorithms, which will be submitted within the membership process, through the Borsa Italiana Membership portal. The declaration that all the algorithms the trader uses have been tested must be uploaded onto this portal prior to their use and at every substantial change in the trading strategy.

[89] On this point, see the ESMA Guidelines on some aspects of the MiFID II suitability requirements, which underlines the importance of suitable policies and procedures for the management of any changes to an algorithm, including monitoring and the keeping of records of the changes made. This implies having security arrangements in place to monitor and prevent unauthorised access to the algorithm, the review and updating of algorithms to ensure that they reflect any relevant changes (e.g. market changes and changes in the applicable law) that may affect their effectiveness, and the adoption of procedures allowing any errors within the algorithm to be detected and appropriately dealt with, including, for example, suspending the provision of advice if the error is likely to result in unsuitable advice and/or a breach of a relevant law/regulation.

[90] For a definition, see T. ASCARELLI, *Saggi di diritto commerciale*, Milano, 1955, 164 et seq.; ID., *Problemi giuridici*, Milano, 1959, 234 et seq., according to whom «la personalità giuridica si riduce a una relazione tra uomini e non alla creazione di omoni», see T. ASCARELLI, Personalità giuridica e problemi delle società, in Rivista di diritto societario, 1957, 321. On this point, the author refers to the theories of Kelsen, who argued that in the juridical world there are no legal subjects other than man, see H. KELSEN, *Teoria generale del diritto e dello Stato*, trad. it., Milano, 1952, 98 et seq.; this concept has been reaffirmed many times, including by and F. GALGANO, *Trattato di diritto civile,* Padova, 2010 and by L. DELLI PRISCOLI, *Società e criteri di riparazione dei danni non patrimoniali*, in *Rivista delle Società*, 4, 2003, 908.

[91] G. TONELLI, in PL. MILANI, *L'algoritmo ribelle, già troppo tardi?*, Salerno, 2019, 1, states that «la scienza e la tecnica, private di una guida umana, cioè di una collettività che si confronta, si interroga e decide, possono produrre mostri».

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