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Yrd. Doç. Dr. Ceren Zeynep Pirim

CORPORATE (UNIT) CRIMINAL LAW IN THE PEOPLE'S REPUBLIC OF CHINA

Prof.Dr. Silvio RIONDATO[*]

Contents: *I. Chinese historical-legal context and criminal liability of collective entities. 1. Role of law and of criminal law in social organisation. 2. Relation between law and morals and promotional function of corporate criminal law. 3. Chinese criminal law as enemy criminal law. 4. The historical precedent of the collective criminal liability of the 'family': a) in the imperial regime; b) in the Mao-communist regime. 5. Criminal liability of the State/Government/Party: a glimpse of the Rule of Law? II. Genesis of corporate criminal liability in China at the end of the Twentieth Century. 1. Arguments in favour and against the introduction of a corporate criminal liability (1979-87). 2. Introduction of corporate criminal liability (1987-1996). 3. Developments and principles of corporate criminal liability in the criminal law reform of 1997. (a) Exclusivity of the monetary penal sanction; relevance of non-penal sanctions. III. Role and first contents of the interpretation given by the Chinese Supreme People's Court. IV. The notion of 'unit'. V. The so-called 'double' punishment. VI. Rules for the attribution of the offence to the entity. VII. The 'Single Crimes' and the 'Non-Single Crimes'. VIII. On the penal relevance of the internal measures aimed at preventing corporate crimes. IX. Summarising conclusions.*

I. Law is a historical, political, social, intellectual creation that exists and works in a certain society especially on the basis of the culture of that society. A 'literal' reading of legal texts in the Greek-Latin-Jewish-Christian-European-American tradition is not appreciated any more. Nor such approach proves to be useful to comprehend the

* Professor in the University of Padua. My thanks to Tatiana Aversano, Aglaia De Angeli, Attilio Nisco and Lorenzo Pasculli, for their precious help.

nature and the recent developments of Chinese law,[1] particularly its evolution in the field of criminal law,[2] which for every State represents the litmus test of the relations between State and individuals.[3] We state this with particular intensity here, as from the beginning of its history until today China considers punishment as a cornerstone of its organisation.

First of all, it would be necessary to examine the legal customs, the Chinese economic and political situations and the political line of the Chinese Communist Party with respect to economic reforms and to the opening of the same Party towards a political liberalisation, with the following legal consequences. However, given the boundaries of this work, we will have to limit ourselves to some short notations within the context of our theme of corporate criminal liability, which, as we will better illustrate later, emerged in China in 1987 and today is established by the Chinese penal code.

In this regard, let us begin from an opinion[4] that may be assumed as a starting hypothesis for the critical analysis of the roots of the present Chinese criminal law both in general and in our specific field: Chinese culture would not adjust itself easily to some well-rooted Western legislative instruments, such as corporate governance (with

1 *Jianfu Chen*, Chinese Law: Towards an Understanding of Chinese Law, Its Nature and Developments (1999); *Jinafu Chen*, Chinese Law: Context and Transformation (2008); *Bin Liang*, The Changing Chinese Legal System, 1978 – Present (2008); *John W. Head*, China's Legal Soul (2009).

2 *Xin Ren*, Tradition of the Law and Law of Tradition. Law, State and social control in China (1997); *Carlos Wing-hung Lo*, Legal Awakening: Legal Thinking and Criminal Justice in Deng's Era (1995), 1; *Eric Hilgendorf*, Das chinesische Strafrechtsystem im sozio-kulturellen Kontext, in Eric Hilgendorf (ed.), Ostasiatischen Strafrecht (2010), 110; *Chen Xingliang*, 'Die Wiedergeburt der chinesischen Strafrechtswissenschaft', (2012) 124 Zeitschrift für die gesamte Strafrechtswissenschaft 823.

3 *Marco Pelissero*, 'Limiti penali alla libertà di manifestazione del pensiero nel codice penale cinese', (2010) Diritto penale XXI secolo 79.

4 See *K-L. Alex Lau and Angus Young*, In Search of Chinese Jurisprudence: Does Chinese Legal Tradition have a place in China's Future?, presentation at the 'Australian and New Zealand Critical Criminology Conference', hosted by 'Crime and Justice Research Network' at the University of New South Wales, 19-20 June 2008, 3 (http://bus.hkbu.edu.hk/hkbusob/userfiles/pdf/papers_on_china/CP200901.pdf), also for further references.

its related punishments), as it is totally alien to the social, administrative, judicial and financial system. Such an opinion is framed in a wider critique to the recent development of Asian law, particularly Chinese. While in the last decades financial reforms have been the focus of governmental programmes of Asian countries, the reforms to the judicial systems have been considered of secondary importance. Legislators would not have cared about assessing the compatibility of the new disciplines of business law with their own cultural background and social norms. The People's Republic of China would be the clearest example, as it introduced many new business acts, concerning, for instance, corporate law, securities markets and competition. But these laws, inspired to U.S. and European law, would have been "transplanted" based on the mere consideration that their functioning in those foreign countries would have granted an efficient application also in China. According to the examined opinion, what Chinese Authorities would not have understood is that the fundamental rights and values connected to such laws of Western derivation are strictly intertwined with the legal history of those States.

Now, it is necessary to agree on the relevance of the consideration that for 2500 years China has been actually ruled by an imperial regime, the longest that has been documented in history, more or less comparable to European feudalism and absolutisms. During such a long era, the will emanating from one man only, that is the emperor, was absolute norm (*rule of man*).[5] Nowadays legislative reforms aimed at fostering the development of a market economy require the recognition of the *rule of law*, that is, the principle according to which each person and organisation, including the government, are subjected to the same laws. Nowadays, and recently, the principle that every person and organization, including the government, is subject to the same laws, which does not necessarily imply democratisation and which is intended in a very singular way with regard to the Chinese constitutional legal experience,[6] is contemplated by art. 5 of the Chinese Constitution in force, albeit through a formula that addresses

5 *Chenxia Shi*, 'The International Corporate Governance Developments. The Path for China', (2005) 7 Austral. J. Asian Law 60.

6 *Chen* (2008, n. 1) 96; *Albert H.Y. Chen*, 'Toward a Legal Enlightenment: Discussion in contemporary China on the Rule of law', http://www.mansfieldfdn.org/backup/programs/program_pdfs/04chen.pdf.

to law in a socialist way ('The People's Republic of China governs the country according to law and makes it a socialist country under rule of law'), with all the consequences for the safeguard of those human rights that, according to the same Constitution, the State shall respect and preserve. However, after more than 2000 years, this entailed a turn in the Chinese legal thought, but also significant difficulties in changing the mentality of more than a billion people, which have been living the previous sixty years in a communist regime. Something more than a mere modification of existing statutes would be needed. This theoretical perspective seems to have some good arguments as it concludes that it was precisely this communist legal system, in good part still in force, that hindered a further progress.

However, on the level of the liability we are considering, the distance from Chinese customs will reveal itself far less intense than it appears at first sight, apart from the consideration that in general we have to acknowledge that in the last thirty years China made also legal progresses of great value, and that a pacific march of modernisation towards democracy by a billion and a half persons demands very long times and extraordinary political caution, so to avoid disastrous, uncontrollable conflicts.

1. In general, it is true that Chinese legal customs are different from the Western ones. It is pointless, though, to emphasise here differences in spite of the recognition of common values.[7] Such customs have been influenced by Chinese historical and ideological roots. Therefore, it is important to clarify, above all, that the Chinese expression 'law' (*Fa*) is different from the Western one and it shall be strictly related to the ethical aspect. This aspect is the *Li*, which includes moral rules concretised in rituals and combined with rules of education and courtesy. The abidance to such rules grants harmony with the cosmos. It is a sort of an extensive natural law. It constitutes the behavioural code of the upper layers of population – the only considered capable to uniform their own behaviour to the natural order.

Nature engenders the 'Human law', that is the *Fa* (word that also means imitating); recently, the Party re-evaluates it also as functional

7 See *Victor C. Yang*, The Recognition of Universal Standards, in Breaking New Ground: A Collection of Papers in the International Centre's Canada-China Cooperation Programme (2002), 123.

to the fight against corruption, and in social sciences someone points at Confucianism as the key to frame corporate and governance social responsibility within ethics.[8] Confucian thought entrusts man with the task of creating harmony between his own acting and natural laws. The sense of humanity (*ren*) and righteousness (*yi*) are virtues to be cultivated spontaneously, without any constriction, in order to achieve such an objective. *Ren* is what makes from the beginning man as a moral being in the network of his relations with others. Its harmonic complexity replicates the universe itself. It is not the moral thought that defines the best way to establish an adequate relation between individuals: it is instead the moral link that comes first, as it founds and constitutes the nature of every human being.[9]

The School of laws upholds the *fa* – it dates back between 708 and 643 b.C., before the Confucian era (551-479 b.C.).[10] The basic principle, as opposed to the Confucian vision, is the certainty that wickedness and egoism characterise the human nature. This has to be controlled through written laws and also harsh and even cruel punishments in function of general prevention. Moreover, also the jurisprudence of *fa* aims at achieving through legislation and repression an internalisation of the norm, which gradually makes useless legislation and punishment. Both the School of law and Confucio's followers share the common ideal that Law is not necessary.

The prevailing of one jurisprudence or the other has been determined by the events of the imperial dynasties, and of the respective central power that, albeit aiming at emphasising the role of written law, basically reaches a compromise taking advantage of the classist structure of Chinese society. In the Thirteenth Century the relation between *li* and *fa* sees the former prevailing over the latter, but includes the resort to statutes whereas rituals are not sufficient. It resorts, therefore, to the sanction whenever law is broken. Nevertheless, there

8 Kim Cheng Patrick Low and Sik Liong Ang, 'Confucian Ethics, Governance and Corporate Social Responsibility', (2013) 8(4) International Journal of Business and Management 30.

9 *Anne Cheng*, *Storia del pensiero cinese* (2000), vol. I, 52.

10 For a first outline see *Maurizio Scarpari*, Il confucianesimo. I fondamenti e i testi (2010); Enrico Dell'Aquila, Il diritto cinese. Introduzione e principi generali (1983), 3.

is a departure. According to an adage of the first Confucians the *li* never reaches down to common people and the *fa* never reaches up to noble literates. Thus, the first Confucians acknowledge the need for penal statutes (such are those constituting the *fa*) to prevent the wicked behaviours of those that have not been grown according to Confucio's teachings, that is those belonging to lower classes.

Therefore, in the several (penal) codes that succeed one another in time since the Seventh Century, the *li* is backed with the penal legislation of the *fa*.

In the Confucian tradition, a primary role is played by filial piety (*xiao*) in the 'father-son' relationship, which is one of the five fundamental human relations (*wulan*): sovereign-subject, father-son, elder brother-younger brother, husband-wife, senior friend-junior friend.[11] Only one of these, the latter, contemplates parity between the two terms of the relation; in the other four cases there is a rigid bond of dependence that originates the heavy hierarchisation of the later Far-Eastern society.[12] Filial piety is the principal virtue, connected as it is to the founding relation of Chinese society, the father-son relationship. Such virtue is not limited to the two terms of the relation, but shapes the whole social body.[13] Family is the fundamental cell of the political and social body. It replicates the political relations existing within society. Earthly society reflects the cosmic order, and family reflects the social order. Through the ethical values embodied by the family, non-noble and mainly agricultural population gets a

11 *Zhongyong* (The Doctrine of the Mean), XX.

12 *Paolo Beonio Brocchieri*, 'La filosofia cinese e dell'Asia Orientale', in Storia della filosofia (1975-1977), vol. II, 35.

13 In the Classic of Filial Piety (*Xiao Jing*) it is reported that 'The Master said, "The teaching of filial piety by the superior man does not require that he should go to, family after family, and daily see the members of each. His teaching of filial piety is a tribute of reverence to all the fathers tinder heaven; his teaching of fraternal submission is a tribute of reverence to all the elder brothers under heaven; his teaching of the duty of a subject is a tribute of reverence to all the rulers under heaven. It is said in the Book of Poetry (III, 17, 1) "The happy and courteous sovereign is the parent of the people". If it were not a perfect virtue, how could it be recognised as in accordance with their nature by the people so extensively as this?' (transl. by James Legge).

place, albeit modest, within the political and cosmological order of the universe.[14]

The obedience of the inferior to the superior is a main modality of Confucian moral law. It grants the tension towards the perfect social system-order. Moreover, Confucius teaches sovereigns the art of government, which is intended as mediation between the heavenly order and the human order. The family is conceived as an extension of the individual and the state as an extension of the family. As the prince relates with the subjects like a father with his sons, ethics and political theory are blended, the latter extending the first to the social dimension.[15] Ritual harmony is central. Such harmony is granted by the sovereign who is capable to realise the social harmonisation without using instruments of coercion. Power is not central: 'The Master said, "If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good"'.[16]

Given that the essential concept to understand in Chinese traditional law is familism, the consequences can be well appreciated. The law of the 'clan' applies together with state law, so that the addressed subjects comply with social behavioural norms and internalise familiar values, such as respecting the patriarchal authority, admiring the elders and obey to political superiors. Each subject's obligations towards his own family, clan, corporation or community were considered as natural and superior to the individual rights and liberties. With such a moral culture, Chinese people, well accustomed to this familistic system, grew predisposed to accept similar hierarchical models also in other institutions, such as, for instance, in the hierarchy of governmental officers.[17]Although democratisation of law and society is a historically and intellectually predictable process, its realisation in China could result slower and more painful than in other Nations,

14 *Paolo Beonio Brocchieri* (n. 12) 20.

15 *Cheng* (n. 9) 48.

16 *Lunyu* (*Analects*), II, 3.

17 *Ren* (n. 2) 140; John King Fairbank, The Great Chinese Revolution, 1800-1985 (1987), 31.

since civil liberties and democratic principles have never been a relevant part of Chinese traditional legal culture. It is therefore predictable that the trimillenary Chinese traditional legal culture will keep imposing itself for a long time also in contemporary society.[18]

In such a framework the conception of law in China articulates through different channels: orders, rites, statutes enacted by men and systems of control.[19] Law assumes a multiplicity of meanings deeply rooted, at a hermeneutic and ontological level, in the Chinese culture. Summing up, in the framework marked by the bimillenary confrontation between the two schools of thought, legalism and the prevailing Confucianism, the evolution of Chinese law is different under many aspects from the Western one. The construction of family and society, and the heavily hierarchical structure that coagulates since the beginning the Chinese society, show the fundamental importance of the collective interest and of the safeguard of social relations in the Chinese culture. The traditional hierarchical order also shows that the obligations of the various social parties are different from each other.

The emphasis placed on the conception of criminal law, seen as a deterrent and moral guide aimed at maintaining social peace, represents the cornerstone of the Chinese legal tradition.[20] Historically, Chinese law has been famous for the immense relevance given to penal aspects: all the social conflicts, included those that according to a Western vision would have a typically civil nature, were considered as public wrongs. Due to the lack of recognition of individual rights, all the social frictions were legally considered as public issues, to be dealt with by state authorities. Positive law merely assumed a secondary importance, aimed as it was chiefly at defending rights such as property rights. Therefore, any kind of social conflict with

18 *Ren* (n. 2) 32.

19 *Gerhard Benecke*, 'The comparative history of custom in chinese law', (1992) LIII Recueils de la Société Jean Bodin 427.

20 *Gianmaria Ajani*, 'Il diritto penale cinese in trasformazione', (2010) Diritto penale XXI secolo 29; *Xiaoming Chen*, 'Social and legal control in China: a comparative perspective', (2004) 48(5) International Journal of Offender Therapy and Comparative Criminology 523; more widely *Geoffrey MacCormack*, The Spirit of Traditional Chinese Law (1996).

an individual, a social group, a state institution or anything else, was absolutely subjected to the consideration and judgement of state authorities. In the imperial society there was no judicial system based on civil law.[21] Chinese people were reluctant to use formal procedures to solve personal conflicts with others; such an aversion was due, more than to the corruption of the judiciary, to the fact that formal procedures ended up in a penal sanction against the plaintiff and/or against the defendant, as ultimately the otherwise unsolved controversy was regarded at with disfavour, as an undue infringement of the social order. The judiciary represented the last resort to solve a social conflict precisely because the limited accessibility to procedures of civil nature in a Western sense.

Legal and non-legal scholarship unanimously insists in observing also critically the still actual – if historically ancient – never-ending trust of Chinese society, especially of its leaders, towards punishment. Still today criminological science is at its beginning.[22] On the other hand, there is a widespread corruption of public officers,[23] judges included,[24] and generally the judicial system, compared with the Western one, still lacks legal instruments constraining the discre-

21 *Ren* (n. 2) 40; *Derk Bodde*, Law in Imperial China (1973), 4.

22 See the special issue of Crime, Law and social Change – (2008) 50(3) – dedicated to 'Crime and Criminal Justice in China: The Current Knowledge Base and Prospects for Future Research' (guest editors: *Lening Zhang, Steven F. Messner* and *Jianhong Liu*).

23 *Adam Kavon Ghazi-Tehrani, Natasha Pushkarna, Puma Shen, Gilbert Geis* and *Henry N. Pontell*, 'White-collar and corporate crime in China: a comparative analysis of enforcement capacity and non-issue making', (2013) 60 Crime, Law and Social Change 241. See also the study cited in the previous footnote and Andrew Wedeman, 'Win, lose, or draw? China's quarter century war on corruption', (2008) 49 Crime, Law and Social Change 7; *Tak-Wing Ngo*, 'Rent-seeking and economic governance in the structural nexus of corruption in China', ibid. 27; *Ren Jangming* and *Du Zhizhou*, 'Institutionalized corruption: power overconcentration of the First-in-Command in China', ibid. 45; *Yan Sun*, 'Cadre recruitment and corruption: what goes wrong?', ibid., 61.

24 Chief Justice calls for integrity among judicial officers (2013-8-23), http://en.chinacourt.org/news; *Nanping Liu* and *Michelle Xiao Liu*, 'Trick Or Treat: Legal Reasoning in the Shadow of Corruption in the People's Republic Of China', (2008) 34 N.C. J. Int'L L. & Com. Reg. 179 (http://www.law.unc.edu/components/handlers/document.ashx?category=24&subcategory=52&cid=577).

tional powers of state authorities and leaders. It has not been able to protect the individuals from discretional state power yet,[25] even if the announcements express a strong political will to tend to a 'people-oriented' State governed by the rule of law.[26] Of course, the objective of criminal justice, rendering justice to individuals and not merely providing an instrument of affirmation of the power, is not at all alien to the also imperial Chinese tradition.[27] However, according to Western criteria, only since 2013 the Chinese code of criminal procedure recognised the 'respect and protection of human rights' as a general principle of law (art. 2), and only since 2013 it contemplates a Western-like regulation of confession, which in the history of Chinese criminal law, at least since the basic *T'ang* penal codification of 654 A.D., has constantly played the role of main evidence, no matter how extorted. The right of defence is not yet effective enough;[28] legal counsel is so difficult to grant in concrete that the criminal procedure code itself contemplates the defence by a friend or a relative (art. 31). The system of 're-education through work' (*laojiao* system) – according to which the police could discretionarily decide to send a person in a *laodong jiayang* (or *laojiao*) for up to three years to receive such 're-education' – has been formally abolished in December 2013,[29] there are serious doubts that this will be enough to stop the practices of arbitrary detentions.[30] There, treatments we would define as torture

25 *Randall Peerenboom*, China's Long March toward Rule of Law (2002), 46 ff.

26 See the paper by *Wang Shengjun*, President of the Chinese People's Supreme Court on the promotion of the construction of socialist law with a high level of self-consciousness and cultural trust (31.10.2011) (http://www.court.gov.cn/xwzx/yw/201111/t20111102_166563.htm).

27 *William P. Alford*, 'Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China', (1984) 72 California Law Review 1181 ff.

28 See only *Yanfei Ran*, 'When Chinese Criminal Defense Lawyers Become The Criminals', (2008) 3(3) Fordham Law Review 988; *Gerald S. Reamey*, Innovation or Renovation in Criminal Procedure: Is the World Moving Toward a New Model of Adjudication?, (2010) 27 Arizona Journal of International & Comparative Law 324.

29 On December 28, 2013 the Standing Committee of the National People's Congress (NPC) adopted a motion to abolish legal documents on reeducation through labor: http://www.npc.gov.cn/englishnpc/news/Legislation/2013-12/30/content_1821953.htm.

30 *Harry Wu, Cole Goodrich*, 'A Jail by Any Other Name: Labor Camp Abolition in the Context of Arbitrary Detention in China', (2014) 21(1) Human Rights Brief 2 ff.

are largely practiced; police forces dispose of administrative detention.[31]

2. The close relation between law and morals leads to the consequence of conceiving law at large in a penal and repressive function.[32] This essentially depends upon the circumstance that the violation of the moral rule is seen as an action that breaks the balance existing in nature – of which it is a part – and therefore, as such, it has to be decidedly repressed with the aim of re-establishing the altered order. Historically, even breaking a promise or the negligent causation of damage has been considered and dealt with under the penal perspective of their repercussion on the moral and social order.[33] In such situations, the new statutes, especially penal ones, try to assume also an intensely promotional function; that is to say, they attempt to introduce not yet acquired (or not yet lost) cultural orientations, which, in hypothesis, could also concern the case of the criminal liability of legal persons. The phenomenon of promotional criminal law is not new, not even in China, as it could be traced back to the first Confucians, who, as we said, thought that, as the *li* does not concern common people and the *fa* does not touch noble literates, penal statutes are needed for those who are not informed by Confucianism. More recently, just think to the attempts of Chinese penal codification

31 *Shizhou Wang*, Entwicklung und Probleme der chinesischen Straftheorie, in *Manfred Heinrich, Christian Jäger, Hans Achenbach, Knut Amelung, Wilfried Bottke, Bernhard Haffke, Bernd Schünemann* and *Jürgen Wolter* (eds.), Strafrecht als Scientia Universalis (2011), 1585.

32 Enrico Dell'Aquila, Il diritto cinese. Introduzione e principi generali (1981), 106 ff. [see also Enrico Dell'Aquila, Introduzione allo studio del diritto cinese (1979)]. For a recent short history of punishments in China see *Terance D. Miethe and Hong Lu*, Punishment: A Comparative Historical Perspective (2005), 115.

33 At least with regard to Imperial China laws, there was no distinction between norms of private or civil law and norms of criminal law: from the perspective of Western legal science, they would all belong to criminal law [Dell'Aquila (n. 32) 108]. Such an attitude is testified by the norms, present in all the Chinese codes – from that of 654 A.D. of the T'ang dynasty (618-907 A.D.) to the last one in time of the Qing dynasty (1644-1912 A.D.) – which, with a very broad formulation, establish as a criminal offence doing 'what is blameworthy': 'whoever acts in a blameworthy way will be punished with forty hits of a small club: in the most serious case he will receive eighty hits' [Gui Boulais, Manuel du code chinois (1923), ch. LXII, par. 3, n. 1656, our transl.].

of the pre-communist Twentieth Century, with the related importation of Western models. Monarchic-fascist Italy with Attilio Lavagna much contributed to one of these models, to the extent that (only) the Italian penal code of 1930 was translated in Chinese language.[34]

In the promotional perspective we could also frame the criminal liability of legal entities, while the real fabric of the Western clothes apparently worn by such a new acquisition and, more widely, by the penal codification, both substantive and procedural, and by coercion at large, shall be verified in concrete, also because the history of the relations between Chinese people and the Western world already knows the methodology highlighted by Wei Yuan, imperial officer and conservative scholar of the Nineteenth Century, famous for his system of control of the so-called 'barbarians' through techniques learned by other 'barbarians'. Such pragmatism suits also the liability we are considering.

3. Chinese people, who see the criminal offence not only as a mistake of the offender, but also as an failure of the social group to which he belongs, tends to help the individual both for his own sake and for the sake of society, also in the case the individual does not appreciate such efforts. It is necessary to remember that Chinese society has always been a society oriented to the collective interest, a society in which individual choices and liberties are considered morally inferior, or even insignificant, compared to collective will.

Therefore, in the Chinese punitive conception the rehabilitation of the criminal is not considered an option for the offender, but instead an intrinsic responsibility of society to save such person from going ad-

34 *Enrico Altavilla*, 'Il codice penale cinese del 1935', (1938) XIII Annuario di diritto comparato e di studi legislativi 133; *Mario G. Losano*, 'Il contributo di Attilio Lavagna al codice penale cinese del 1935', in Il diritto in Cina (1978), 137. Lavagna is mentioned in the (official) introduction by Ho Tchong-Chan to the Chinese penal code of 1935, who acknowledges that the code is particularly inspired to the Italian code [in *Code pénale de la République de la Chine* (1935), 16-24; an English translation of the code, not covering the mentioned introduction, can be found in *Yui Ming* and *M.C. Liang*, 'The Revised Criminal Code of the Republic of China', (1935) VIII The China Law Review 41]. See also *Luca Luparia*, 'Quelques Réflexions d'un observateur européen sur le procés pénal chinois', (2006) Cahiers de défence sociale 123.

rift towards moral degradation.[35] Here we find concentrated the main distinctive elements of penal sanctions and of the control by the public officers in the still living traditional China. Spontaneous surrendering, confession, unequal treatment of the various criminals, collective sanctions, which we are about to see, and the repression of political oppositions perfectly embody the power of state force and of also familiar social rules in establishing punishments for disliked behaviours and opinions. The punishment of deviance is directly connected to the Confucianism's discovery of the importance of human mental faculties in commanding and controlling one's own acts. According to Confucius, a person's will is not free but it can be limited through bindings imposed by society, moral obligations internalised and imposed by family; such standardised rules were powerfully enforced by the State. Complying with and conforming to certain behaviours and ways of thinking do not represent a free choice for the individual but a strong social duty tied to the active participation of the State in the social moral and behavioural development and in the control of opinions.[36]

In such a perspective, we can better understand that historically and currently Chinese criminal law is structured according to a strong tendency to become a sort of enemy criminal law – to use categories that have been recently revived, upon Gunther Jakobs' solicitation.[37] The strong State will to control both the behaviour and the

35 *Ren* (n. 2) 128-129, who, repeating that for Chinese people as a whole, the only force exercised on them is the pressure of the public opinion, observes that even if such a pressure exists in every society, in none of them it has such an important weight as it has in Chinese society, where it influences also on the modalities of dealing with individual behaviours deemed not complying with social norms.

36 *Ren* (n. 2) 140. See also many writings in *Hans-Jörg Albrecht* and *Helmut Kury* (eds.), Kriminalitaet, Strafrechtsreform und Strafvollzug in Zeiten des sozialen Umbruchs. Beitraege zum Zweiten deutsch-chinesischen Kolloquium (1999).

37 *Günther Jakobs*, 'Kriminalisierung im Vorfeld einer Rechtsgutsverletzung', (1985) 97 ZStW 751; *Günther Jakobs*, 'Bürgerstrafrecht und Feindstrafrecht', (2004) 3 HRSS 88; *Günther Jakobs*, 'On the Theory of Enemy Criminal Law', (2010) http://www.law-lib.utoronto.ca/bclc/crimweb/foundation/Jakobs%20current%202.pdf. See also, one for all and with further indications, *Matteo Tondini*, 'Beyond the Law of the Enemy. Recovering from the Failures of the Global War on Terrorism through Law', (2007) http://www.juragentium.org/topics/wlgo/cortona/en/tondini.htm; *Carlos Gomez-Jara Diez*, Enemy Combatants versus Enemy Criminal Law, (2008) Buffalo Law Review 1; *Claire Saas* 'Exceptional Law in Europe with Emphasis on "Enemies". Preventive Detention and Criminal Justice', (2012) http://

thought of the individuals in order to attain a social uniformity hindered the formalisation of Chinese law, and even today such process of legalisation keeps proceeding slowly between the Legalist vision – characterised by a prominence of law in a (more) Western sense – and the Confucian one – characterised by a prominence of the 'rule by man or "rule above the law"'.[38] Equality before the law is therefore constitutionally granted since 1954, but it has never been interpreted as a right to an equal treatment. As opposed to the Western notion of equality before the law, which is primarily based on the individual's citizenship in a certain society, in China the meaning of the concept of equality is limited by the coercive existence of social classes, that is, the division between the class of 'citizens' and that of 'opponents'. In practice, the typologies of behaviours and of subjects exposed to penal controls and sanctions were not chosen according to the nature or the harmfulness of the behaviour but they were predetermined by the belonging of the single individual to a particular social class. As a consequence, the recognition of equal rights, but only for those belonging to the same social class, inevitably resulted into an unequal treatment before the law.[39] The control of 'counterrevolutionary' crimes does not consist only in the political repression of the adversaries of socialism, but also in the traditional Chinese custom of limiting the free contrast with the political ideology approved by state authorities. Despite many constitutional reforms, by analysing 'counterrevolutionary' offences in the Chinese law in force we understand the cultural and historical roots on which the government's will to control the behaviours and thoughts of the population. The modality of facing political and ideological dissidents represents the best indicator of the level of social control and of acceptation of democracy in a certain society. Currently, the Chinese government does not differ from its predecessors in the modalities of treatment of individuals characterised by a free and independent spirit and thought.[40]

4. In such a framework, a coherent, important historical observation induces to maintain that the criminal liability of legal entities

www.law.unc.edu/documents/faculty/adversaryconference/exceptionallawsineuropewithemphasisonenemiesapril2012.pdf.

38 *Ren* (n. 2) 8-10.

39 *Ren* (n. 2) 11.

40 *Ren* (n. 2) 12; *Pelissero* (n. 3) 79.

is not the result of a fracture with the Chinese legal tradition, but in many senses the not at all surprising, harmonic evolution of such a tradition and, on the other hand, on the contrary, a sign of breaking with the past.

We are referring to the tradition concerning collective punishment. It is well known that both in the European-continental experience and in that of anglo-saxon derivation the criminal liability of legal entities, although constructed in different ways in many national jurisdictions, coincides, under many aspects, with the criminal liability of collective entities. Indeed, it is a collective criminal liability, which contrasts with the most elementary penal principles developed by the Western legal culture from Cesare Beccaria onwards.[41] China knows the criminal liability of collective entities too, practically uninterruptedly at least since fifteen centuries.

a) The fact that the Chinese penal system includes the criminal liability of legal entities is not at all surprising, mainly because China traditionally extended penal sanctions to the whole family-entity of the culpable of a crime included within the 'ten abominations'. The importance of the family in the Chinese context, which we highlighted above, also upholds this consequence of penal policy.

Such a collective family sanction was introduced in the penal system as death penalty or as 'blood corruption'[42] which could be ex-

41 *John Hasnas*, 'The centenary of a mistake: one hundred years of corporate criminal liability', in (2009) 46 Am. Crim. L. R. 1329; *Silvio Riondato*, 'Tipo criminologico e tipo normativo d'autore al cospetto della responsabilità penale dell'ente (d. lgs. n. 231/2001). Il caso dell'"ente pubblico"', in Il soggetto autore del reato: aspetti criminologici, dogmatici e di politica criminale. Atti della Giornata di Studi penalistici in ricordo di Alessandro Alberto Calvi (2013), 95. Contra, for all, *Sara S. Beale*, 'A Response To The Critics of Corporate Criminal Liability', (2009) 46 Am. Crim. L. R. 1481. A recent framework of corporate criminal liability in Europe is traced by *Antonio Fiorella*, Corporate criminal liability and compliance programs, vol. I, Liability "ex crimine" of legal entities in Member States (2012); *Antonio Fiorella*, Corporate criminal liability and compliance programs, vol. II, Towards a common model in the European Union (2012); *Antonio Fiorella* and *Alfonso Maria Stile* (eds.), Corporate Criminal Liability and Compliance Programs. First Colloquium (2012).

42 *Ren* (n. 2) 41. On group responsibility in traditional Chinese culture see also *Derk Bodde, Clarence Morris*, Law in Imperial China (1973), 24, 28-29.

tended to the whole family of the condemned. Such a typology of collective sanction clearly reflected the extreme importance given to the familiar nucleus by Chinese penal law, which entailed the extension of individual penal responsibility to all the members of the family. In such a conception the fate of the family, which provided psychological support and social protection to the individual, was connected to the behaviour of each of its members. The obligations of the single individual towards his/her own family and the obligations of the family towards the single individual depended upon each other. Consequently, the decision of the individual to respect the law was not due to a personal motivation, as much as to an altruistic will to protect the wellbeing of one's own family. The coercive power of these reciprocal obligations between the individual and his/her own family certainly worked as a control of social deviance behaviours.[43]

Historically, this kind of sanction, which is called *yi sanzu*, applied up to the third degree of kinship, including the family of the condemned, the family of his/her parents, the family of his/her siblings and the family of his/her spouse[44]. Later, the execution of the whole family was replaced with the exile or the hard labour for the whole family having its 'blood corrupted'. Whenever a person was condemned for having committed one of the 'ten abominations', the

43 *Ren* (n. 2) 27.

44 *Ren* (n. 2) 43, also for what follows in the text and in this footnote, with further references. Collective family sanction remained one of the most important punishments during the whole imperial age and was abolished only at the beginning of the Twentieth Century. During the Qin Dynasty (221 b.C. – 207 A.D.), the emperor Qin Shi Huang confirmed such a rule, making it harsher and extending it to the most hideous crime, high treason, which could be punished up to nine degrees of kinship, causing the execution of whole families connected to the culpable. The following imperial dynasties maintained such a family for the most serious crimes, with a significant number of convictions during the Ming Dynasty (1368-1644), until, in 1905, under the Qing Dynasty (1644-1912), such a sanction was officially abolished. This form of collective family sanction was ideated under the Qin Dynasty by an illustrious lawyer, Shang Yang. The scope of the application of such a collective sanctions slightly changed from a Dynasty to another. For instance, during the Three Kingdom Period, the norm excluded from the application of the sanction married women, such as, for instance, the married sisters of the convicted. The Northern Dynasty extended the sanction to the fifth degree of kinship, including the families of the aunts and uncles and of the sisters of the convicted.

members of his/her family were exiled or became property of the State.

As a consequence, the strict punitive rules of the clans applied also in order to avoid the clan's responsibility towards the government and the relative punishments.[45] The collective sanction was not limited to common criminals, but it also concerned the offences committed by public officers. For instance, if a governmental officer was judged guilty of a crime against the Emperor, his descendants were banished forever from the possibility of being appointed with any office in the imperial bureaucracy.

The liability of the family-entity is therefore a considerable 'imperial' precedent of the extant criminal liability of the legal entity. But there is more than that to confirm this traditional imprinting, as we are about to say.

b) Collective guilt, abandoned (only) at the beginning of the Twentieth Century with the dissolution of the empire and never reprised by the following republican penal legislations until 1949, was resurrected in the recent Chinese history by Mao Tse-tung's regime.[46] In his fight to individual antagonism, to the individual-enemy of the regime, Mao held in high consideration the traditional conception of family. In accordance with the traditional collective sanction, once again criminal liability was considered a familiar liability[47] and the legal tradition of the 'corrupted blood' was practiced during the Twentieth Century under the communist regime. The discriminations, persecutions and penal sanctions imposed by the authorities to the whole family of the convicted showed that the Maoist class struggle was somehow connected to the Chinese legal tradition. The mistake of one single person often brought to a family tragedy and, consequently, the elder generations of the family had to be very careful to their own behaviour, so to protect their progeny.

Collective liability and sanctions were employed to discourage behaviours that the regime authorities considered undesired.[48] While

45 *Hui-chen Wang Liu*, The traditional Chinese clan rules (1959), 39.

46 *Ren* (n. 2) 41.

47 *Yutang Lin*, The Wisdom of Confucius (1966), 135-151.

48 *Ren* (n. 2) 71.

humanitarian influences were hard to find in the Maoist revolutionary ideology, the negative side of the familist tradition, characterised precisely by the familiar collective liability, was very present in and influent on the communist conception of inequality before the law.

Although the Communist Party affirmed, within the labour and social field, that personal performance was more important than the familiar belonging to a particular class, the Chinese tradition of collective punishment, according to which the sons were held co-responsible for the 'crimes' committed by their parents, was upheld during the first thirty years of the People's Republic of China by the communist regime during its battles against politically disliked social classes. After Mao's death, the new political leaders finally seemed to have abandoned such indoctrination practices that had influenced the lives of dozens of millions of people.[49] Article 33 of the Constitution of 1982 establishes that 'all citizens of the People's Republic of China are equal before the law', finally formalising the abandonment of the Maoist doctrine by the Communist Party at least whereas it conceived as hereditary the social class, thus replacing socialist pragmatism to the communist ideal. Nevertheless, the Party kept maintaining that the struggle of class had not ended, that due to the dangers coming from liberal bourgeoisie supported by the antagonist international forces that aimed at removing China from the socialist system. Consequently, under the new guidelines, the incongruities with the Marxist ideology and the infidelity to the Communist Party kept being considered intolerable and harmful behaviours. The conception of criminal liability of the new leadership of the Party changed, moving away from the traditional familist collective liability and reaching individual liability. But it still has to be verified in practice whether the new enemies of proletariat have the rights granted by the Constitution, and whether the constitutional principle of equality before the law really means that law shall treat equally all the individuals of different social classes.[50]

Summing up, a new direction is marked, but traditional methods are being developed against the new enemies. It is not surprising that collective punishment is deployed against private companies, new

49 *Ren* (n. 2) 77-78.

50 *Shao-Chuan Leng* and *Hungdah Chiu*, Criminal Justice in Post-Mao China: Analysis and Documents (1985), 1.

axis of the Chinese economic and social development. The commercial corporation, as it happened in Western history, comes alongside the family and tends to compress its relevance, proposing itself as main axis of social development. And moreover it tends to propose itself, especially in its multi-national, and often actually supranational, dimension, as an antagonist subject compared with the (ever less) sovereign State.

In the end, the method is the same – collective punishment. We are into tradition. Indeed, amongst the arguments that in the Eighties of the last Centuries Chinese penal scholars brought against the introduction of corporate crimes, which we will be considering more widely later (par. II.2 and following), there was, together with the painful recollection of the result of the so-called Great Proletarian Cultural Revolution, the fear that the punishability of legal persons could end up in a repetition of the tragedy.[51]

5. Despite law does not establish any express penal immunity for the elite of the Party, still today traditional values and customs, together with the norms concerning official personalities and the *guanxi*[52] of the Party's members with aristocracy keep providing the members of the Party with a system of strong protection and privileges above the law. Given the conformation of the notion of collective liability in the Chinese tradition, punishing an eminent member of

51 *Shizhou Wang*, 'Strafbarkeit juristischer Personen im chinesischen Strafrecht – Entwicklung und Ausblick', (1995) 107(4) ZStW 1021.

52 *Guanxi* is a system of very deep relations, a fabric of social and economic relationships, a network between persons, which is born in school (the parents choose it according to the opportunities for their son to enter in a social group where to found his/her own references of support in the adult age). The net of contacts is formed in a very long time; the individual resort to it whenever it is needed (to solve bureaucratic practices, to obtain important information or to obtain other benefits; an objective may be also achieved through another's *guanxi*. Related to the *guanxi* are: the *renqing*, moral obligation to maintain the interpersonal relationship; the lian, which is realised through a behaviour suitable to the situation (for instance a behaviour that is adequate to hierarchy and status); the *mianzi*, social perception of a person's prestige. A loss of *lian* brings to a loss of trust in one's own social network; a loss of *mianzi* entails a loss of authority within the *guanxi*. Cf. Udo C. Braendle, *Tanja Gasser* and *Juergen Noll*, 'Corporate Governance in China - Is Economic Growth Potential Hindered by Guanxi?', (2005) (SSRN: http://ssrn.com/abstract=710203, or http://dx.doi.org/10.2139/ssrn.710203).

the Party for his criminal behaviour is perceived by the Party as a public admission of its own incapability in selecting persons of high moral integrity and in controlling their behaviours. Such an admission certainly has a devastating effect on the Party's ability to maintain a public image of strong leadership. Some could suppose that the 'Central Commission for Discipline Inspection of the Communist Party of China' was established to keep the morality level in the Party high; nevertheless, the traditional customs of Chinese bureaucracy often bring the Commission to behave in a parental and superficial way with the officers and not properly with the aim of detecting behaviours that are contrary to the public interest.[53]

However, the *unconditioned* insertion of public bodies (included governmental and Party structures, see *infra* par. IV) within the subjects concerned by the norms on criminal liability of legal entities it is a great step forward, although it is all still in the 'letter' of the law and although such a novelty, which is not shared by most Western systems,[54] takes place in a non-democratic system having a hierarchical structure (and ignoring the principle of separation of powers), without a judicial review of constitutionality, and ultimately depending only on the decision developed by the only dominating Party. Moreover, since 1982 the Party's Constitution establishes that this shall carry out its activities within the limits set by Chinese Constitution and statutory law. This is the beginning of the rule of law in the Chinese context. Coherently, the change of those subjected to the rule of law (and to criminal liability) can represent a serious fracture with tradition, which in part goes together with the socio-organisational structure, and in part perhaps will contribute to found a change in the socio-organisational structure, as it keeps offering a precious dialectical moment. The challenge of the corruption of public administrators, which is the most important match currently played (not only) in China, is strictly connected, on the level of prevention-repression, to the crimes committed by private and public legal entities, with their respective top officers and persons in charge.[55]

53 *Ren* (n. 2) 83.

54 Elisa Pavanello, La responsabilità penale delle persone giuridiche di diritto pubblico. Societas publica delinquere potest (2011).

55 Cf. *Ghazi-Tehrani, Pushkarna, Shen*, Geis and Pontell (n. 23) 24.

II. On the basis of these premises, we may now consider the short history of modern corporate criminal responsibility in China, which should be a fundamental issue of penal-legal research, that research which is due to the rebirth of Chinese penal-legal science.[56]

Since the Seventies of the Twentieth Century Chinese legal scholarship deemed such a kind of responsibility inadmissible.[57] Based on opinions not different from those developed within European-continental scholarship, in China both the legislator and the academic world excluded the applicability of penal liability and sanctions to corporations. Legal persons were conceived as organisations recognised by the State responding to the requirements set by society and incapable to commit a crime on their own, capable as they are of acting only through a representative: representatives have the duty to act according to the limits and the modalities established by the certificate of incorporation, and whenever they act out of this limits, the effects of and responsibilities for such actions will fall within the sphere of the single representative; the idea that a legal person may be considered as an offender contrasts with the punitive, re-educative and preventive aims of punishment, since the legal person has no 'mind' susceptible to be re-educated; whenever a corporation intentionally produces and commercialises low quality products or products inconsistent with legal standards, it is the director or the technical personnel who will be held responsible – not the corporation.

China's reluctance to establishing a corporate liability mainly derives from two factors. On the one hand, after the socialist transformation at the beginning of the Fifties of the last century the planned economic system contributed to discourage the illegalities committed by the single production units, not focused on the maximisation of profits any more. On the other hand, Chinese lawyers introduced in China, without particular modifications, the theories of Soviet lawyers concerning the definition of crime and its elements, strongly connected to German penal theories. The concept of corporate crimi-

56 *Chen Xingliang*, 'Die Wiedergeburt der chinesischen Strafrechtswissenschaft', (2012) 124 ZStW 118.

57 *Zhenjie Zhou*, 'Corporate Punishment in China: Hystory, Legislation and Future Reform', (2009) http://www.waseda.jp/wias/achievement/bulletin/data/zhnjie_zhou.pdf 80.

nal liability is still contrasted in the German academic world on the basis of the conviction that a legal person cannot commit a crime. The missing recognition of corporate criminal liability by the Chinese legislator and Chinese lawyers is understandable.

Only at the beginning of the Eighties, when the system of the market economy replaced in some entrepreneurial fields the previous socialist system, corporate criminal liability attracted the attention of the political and academic world.[58]

The following history of corporate criminal liability in China may be divided in three phases,[59] which we will consider in the next three sub-paragraphs.

1. The Chinese penal code of 1979 did not provide for any norm concerning corporate criminal liability until 1997. Before the Reform and before the open policy started in 1978, in China planned economy predominated. Legal persons were not authorised to operate independently in the free market as single individuals that are capable to relate with other subjects for their own personal interest and to assume their own responsibilities. All legal subjects different from physical persons were State property and could act only subordinately to the State and for its own interest. As a consequence, until 1997 the Chinese penal code did not provide for any corporate criminal responsibility.[60]

After China's economic reform and open policy, State corporations began to break down and with the growth of new private economic sectors private assets entered the market. Private enterprises, foreign joint ventures, joint-stock companies, limited liability companies and other forms of organisations emerged, which caused an increment of the (not yet regulated) criminal offences committed by legal persons.[61]

58 *Zhou* (n. 57) 80; *Yang Zhao and Thomas Richter*, 'Verantwortlichkeit für Straftaten in Unternehmen, Verbänden und anderen Kollektiven in China', *in Ulrich Sieber and Karin Cornils* (eds.), Nationales Strafrecht in rechtsvergleichender Darstellung, *A.T.* (2010), Bd. 4, 350; *Pang Dongmei, Liu Yangping*, 'Corporate Crimes and Criminal Liability in the Criminal Law of the PRC', (2008) Justitias Welt 1 (http://justitiaswelt.com/Aufsaetze/AS12_200809_PDLY.html).

59 *Zhou* (n. 57) 80.

60 *Wang* (n. 51) 1020.

61 *Zhou* (n. 57) 80.

For the fist time, Chinese lawyers, moved by the need to control the behaviour of legal persons, inspired by foreign legal systems and persuaded by the effectiveness of penal sanctions as an instrument of control, defied the traditional and dominant penal theories based on individual criminal liability, suggesting the introduction of a corporate criminal liability. The arguments in favour of the criminal liability of legal persons were based on reflections concerning the nature of the legal person, the elements of crime, the functions of punishment and more. According to the supporters of corporate criminal liability, such liability complied with the nature and character of the legal person, as its socialist nature, on the one hand, and the nature of its activities, on the other hand, were not to be overlapped. Only when the legal person adjusts its own profit to the national interest, its socialist nature integrates with its own activities. Otherwise the nature of the legal person and that of its activities are separate entities, and illegalities embody the divergence of its activities from socialist principles.

Corporate criminal liability was based both on subjective and objective elements. On the one hand, every legal person owns a body having decisional powers quite similar to the human brain, which represents its nervous centre. Consequently, the order given by such body to the legal person should be considered an expression of the collective organisational will. The will to commit a crime of the entity with decisional powers is the subjective basis of corporate criminal liability. On the other hand, according to law, a legal person is capable to realise social activities within the limits of its certificate of incorporation and its actions are acts and/or omissions in the legal meaning of the expression.

Despite the main penalties limiting personal liberty, such as imprisonment or surveillance, were not applicable to legal persons, fines and confiscation of property were considered appropriate. Through fines and confiscation the State can achieve the punitive and preventive objective of punishment also against a legal person, discouraging other entities from perpetrating similar criminal behaviours. Moreover, the State may concede to law-abiding legal persons the use of property and assets deriving from fines and confiscation in order to create an economic interest to the abidance to law. Consequently, both the State and the citizens would benefit from the application of penalties also to legal persons, without this being perceived as a self-punishment of the State.

Finally, some maintained that the penal code of 1979 already contemplated corporate criminal liability on the basis of indirect (or delegated) responsibility provided for by article 127, which specifies that 'where an industrial or commercial enterprise violates the laws and regulations on trademark administration and counterfeits the registered trademark of another enterprise, the person directly responsible shall be sentenced to fixed-term imprisonment of not more than three years or to hard labour'. The offender is an industrial or commercial enterprise and punishment applies only to the subjects directly responsible for the harmful behaviours. Similar dispositions can be also found in article 121 concerning tax evasion.

However, for a long time the academic theory in favour of corporate criminal liability did not receive much support, and while the practicability of corporate criminal liability remained controversial, illegalities committed by corporations became a phenomenon considered extremely dangerous, also for the harm to stability and the economic world.[62]

Finally, amongst Chinese leaders the favourable arguments prevailed.

2. It is believed that it was Chinese *civil* law that, in 1986, first prefigured, under the solicitation of the government longing to fight such kind of crimes,[63] that 'any company, enterprise, institution, State organ, or organization' can commit a crime[64] (articles 41 and 29, second section dedicated to the enterprise as a legal person).[65] Similar

62 *Zhou* (n. 57) 82.

63 *Zhou* (n. 57) 82.

64 General Principles of the Civil Law of the People's Republic of China (Adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986 and promulgated by Order No. 37 of the President of the People's Republic of China on April 12, 1986), in force since January 1, 1987. *See Liu Jiachen*, 'The Legislation and Judicial Practice on Punishment of Unit Crime in China' (presentation at the International Colloquium on Criminal Responsibility of Legal and Collective Entities, May 4-6, 1998, Berlin), in *Albin Eser, Günther Heine and Barbara Huber* (eds.), Criminal Responsibilities of Legal and Collective Entities, (1999) 71.

65 Section 2 Enterprise as Legal Person: article 41: 'An enterprise owned by the whole people or under collective ownership shall be qualified as a legal person when it has sufficient funds as stipulated by the State; has articles of association, an organization and premises; has the ability to independently bear civil liability; and

dispositions may be found in more than ten statutes or regulations enacted during the half of the Eighties.[66] The first was the customs law of January 22, 1987, which, other than the criminal liability of physical persons, established a fine and the confiscation for the crime of smuggling committed by a private or public enterprise.[67]

A legal person could be considered an offender and its legal representatives could be indicted for the offence it committed.

Since 1987 various types of corporate criminal offences, starting with smuggling, has been established by several penal, civil, financial and administrative norms.

The high number of such offences provided for by different statutes raised some criticism, chiefly due to (1) the vagueness of the concept of individual responsibility within corporate crimes; (2) the high number of terms used, such as 'company', 'enterprise', institution', 'State organ', 'organization' or 'enterprises and institutions' or simply 'entities'; (3) incongruities concerning the penalties for such crimes, as some statutes set a binary system of penalties, while others use a unitary system.

has been approved and registered by the competent authority. A Chinese-foreign equity joint venture, Chinese-foreign contractual joint venture or foreign-capital enterprise established within the People's Republic of China shall be qualified as a legal person in China, if it has the qualifications of a legal person and has been approved and registered by the administrative agency for industry and commerce in accordance with the law'. Article 49: 'Under any of the following circumstances, an enterprise as legal person shall bear liability, its legal representative may additionally be given administrative sanctions and fined and, if the offence constitutes a crime, criminal responsibility shall be investigated in accordance with the law: (1) conducting illegal operations beyond the range approved and registered by the registration authority; (2) concealing facts from the registration and tax authorities and practising fraud; (3) secretly withdrawing funds or hiding property to evade repayment of debts; (4) disposing of property without authorization after the enterprise is dissolved, disbanded or declared bankrupt; (5) failing to apply for registration and make a public announcement promptly when the enterprise undergoes a change or terminates, thus causing interested persons to suffer heavy losses; (6) engaging in other activities prohibited by law, damaging the interests of the State or the public interest'.

66 *Zhou* (n. 57) 83.

67 *Zhonglin Chen*, 'Una svolta storica nel diritto penale cinese: l'introduzione di un nuovo codice', (1998) 2 Rivista italiana di diritto e procedura penale 584.

3. The new Criminal Law of the People's Republic of China, revised in 1997,[68] represents the cornerstone of the history of corporate criminal liability in China, since other than defining such liability, it extends the provisions concerning the liabilities of the single individuals established in the General Part to offences that can be committed by legal entities and lists in its Special Part a series of specific offences.[69] In the section dedicated to *Crimes committed by a Unit*, article 30 establishes that any company, enterprise, institution, State organ, or organization that commits an act that endangers society, which is prescribed by law as a crime committed by a unit, shall bear criminal responsibility.

Article 31 specifies that where a unit commits a crime, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be given criminal punishment. Where it is otherwise provided for in the Specific Provisions of this Law or in other laws, those provisions shall prevail.

A first reading highlights the following principles: i) the unit does not respond in general for any criminal offence, but only for those for which its liability is expressly provided for; ii) the unit is the offender; iii) the unit is punished with a monetary sanction; iiii) also those who are generally directly in charge and those who are immediately responsible for the crime are punished together with the unit.

The number of offences that a unit can commit has increased up to more than 120.[70] Such offences are mainly contained in Chapter III concerning 'Crimes of Disrupting the Order of the Socialist Market

68 We used two translations, one in English language and one in Italian: 'Criminal Law of the People's Republic of China' (official English translation), from the official website of the National People's Congress of the People's Republic of China, 1997; *'Il codice penale della Repubblica Popolare Cinese'*, translated in Italian by Shenkuo Wu and revised by Sergio Vinciguerra, 2010 *Diritto penale XXI secolo* 85-233. The problems concerning the translation from the original language are illustrated by Shenkuo Wu in *'Il codice penale della Repubblica Popolare Cinese: un nuovo codice repubblicano'*, (2010) *Diritto penale XXI secolo* 17-28.

69 *Zhou* (n. 57) 79. See also *Chao Xi*, Corporate Governance and Legal Reform in China (2009).

70 *Yingjun Zhang*, 'Corporate Criminal Responsibility in China: Legislations and Its Deficiency', (2012) 3 Beijing Law Review 105 (http://www.SciRP.org/journal/blr).

Economy'; other notable offences can be found, for instance, in Chapter IV, on 'Crimes of Infringing upon Citizens' Right of the Person and Democratic Rights'.

The Western criminal lawyer's attention is caught especially by the cited crimes against the socialist market economy (artt. 140-231).[71] It is a wide penal regulation of economic activity that has no matches in any Western-European penal code, not to mention the Italian experience, where financial crimes are dispersed in the statutes concerning the single types of economic activity. Moreover, in Italy the system of corporate punishment (2001)[72] does not include many categories of financial crimes yet, such as tax evasion. The focus of the Chinese legislator on financial crimes is probably due to the importance of the economic organization, so different in its foundations from that prevailing in the rest of the world, for the political system.[73] Such importance is consecrated also in the Constitution, which establishes that 'the state ... penalizes actions that ... disrupt the socialist economy and other criminal activities' (art. 28):[74] the functioning of such economy is essential in order to 'ensure the smooth progress of socialist construction', as article 2 of the Chinese penal code concludes in defining its own purpose. But if we reflect on the fact that the word 'competition' never appears in the norms that criminalise financial offences, we realise that we are far from market economy as we know it, thus outlining the indispensable premise to appreciate the

71 *Sergio Vinciguerra*, 'Impressioni di un penalista italiano alla lettura del codice penale cinese', (2010) Diritto penale XXI secolo 38, also for what follows in our text; *Alessandra Rossi*, 'I reati contro l'economia nella sistematica del codice penale della Repubblica Popolare Cinese', ibid., 67; *Knut Benjamin Pissler*, 'Chinesisches Wirtschaftsstrafrecht', in *Hilgendorf* (ed.) (n. 2) 197.

72 *Nicola Selvaggi*, 'Compliance Programmes and "Organisational Faults" in Italian Legislation. An Overview of Ten Years of Experience with legislative Decree 231/2001', (2012) 3 Eucrim, 2012, 3, 127.

73 On financial criminal law in China see *Hans-Jörg Albrecht, Albin Eser and Thomas Richter*, 'Drittes deutsch-chinesisches Kolloquium über Strafrecht und Kriminologie' (2000).

74 PRC law, like jurisdictions that in the past were inspired to soviet organisational models, does not admit the presence of a judicial review of constitutionality, which is deemed harmful for the principle of the sovereignty of the people [Ajani (n. 20) 34].

harm to the Chinese 'economic order' (art. 13 PRC crim. law),[75] in its unavoidable Chino-socialist framework.

(a) The appreciation of the harm should at least react on the punishment since its legislative provision. But the framework of penalties for corporate crimes is very simple. Only monetary sanctions apply to legal entities. With regard to the physical person, there are three types of monetary sanctions: those of a predetermined amount, those of a multipliable amount and those of unlimited amount. Nevertheless, when the offender is an entity, the unlimited monetary sanction is the only sanction applicable, where not otherwise stated (for instance through criteria of proportion with the illegally obtained proceeds).[76] All this is not enough to prevent corporate crimes, although the unlimited measure of the sanction (and. 52), thus entrusted to the Courts, which, besides, do not seem to be particularly strict. Therefore, legal scholarship asks for a reform to introduce new typologies of penalties for legal entities such as the suspension of their commercial activities, their exclusion from public procurement and the mandatory modification of their structure so to establish internal organisms of control.[77]

These and other kinds of sanctions may be applied as administrative sanctions by administrative authorities, according to administrative regulations. In China (like in Italy) there is a high number of administrative statutes providing for sanctions against enterprises, other than those provided for by criminal law, and (like in Italy) such sanctions can be applied by different administrative authorities. The isolated and dispersive nature of these administrative regulations caused a heterogeneous administrative regulation of corporate wrongdoing, since each authority has its own vision. This is the reason why many

75 *Lorenzo Picotti*, 'Offensività ed elemento soggettivo del reato nel codice penale della Repubblica Popolare Cinese', 2010 Diritto penale XXI secolo 54.

76 *Ling Zhang and Lin Zhao*, 'The Punishment of Corporate Crime in China', in *Henry N. Pontell and Gilbert L. Geis* (eds.), International Handbook of White-Collar and Corporate Crime (2007), 672.

77 *Zhang* (2012) 3 Beijing Law Review 108; *Zhou* (n. 57) 92. See also *Roderic G. Broadhurst*, 'Crime and its Control in the People's Republic of China. Proceedings of the University of Hong Kong Annual Symposia 2000-2002' (2004).

enterprises can escape administrative sanctions.[78] Moreover, the wide range of non-penal sanctions strictly considered, both administrative and 'non-administrative', seems adequate enough to set the basis for a modulated system making the prevention and repression of corporate wrongdoing more effective. But the weak point is that there is no certainty that administrative authorities will apply the sanctions, also in case of criminal conviction.[79]

III. It is generally believed that the People's Republic of China is, *mutatis mutandis*, roughly a civil law jurisdiction, as it is not based on the binding precedent.

PRC legislation is often implemented through executive regulations aimed at integrating and illustrating the many technical terms and facilitating their interpretation. The top Court of the Chinese judiciary, the Supreme People's Court,[80] delivers interpretative opinions. The highest authority in the interpretation of law is the Central People's Government of the PRC, acting upon the authority conferred by the National People's Congress and its Standing Committee (NPC-SC). According to the Chinese constitutional principles, the National People's Congress is inserted in the political system, which does not tolerate any conflict with the authority of the Chinese Communist Party. This is the reason why courts cannot be considered independent. Thus, the neo-imperial system takes advantage also of the judicial source, which draws its power from the central government.

It is not surprising, then, that judicial interpretation by the Supreme People's Court, starting from the opinions, may be seen as a source of criminal law. The same Court regulates the succession in time of interpretations.[81] Legal literature considers judicial interpretation as legislation[82] or 'secondary law',[83] and recognises its import-

78 *Zhang* (2012) 3 Beijing Law Review 108.

79 *Ghazi-Tehrani, Pushkarna, Shen*, Geis and Pontell (n. 23) 27.

80 For a wider outline see also *Nanping Liu*, Judicial Interpretation in China (1997).

81 Dispositions on the applicability in time of judicial interpretations in penal matters (Supreme People's Court and the Supreme People's Procuratorate, in force since December 17, 2001).

82 *Zhang* (2012) 3 Beijing Law Review 104.

83 *Ronald C. Keith, Zhiqiu Lin*, 'Judicial Interpretation of China's Supreme People's Court as "Secondary Law" with Special Reference to Criminal law', (2009) 1

ant role in improving the norms concerning the punishability of corporations.[84] The original rudimental system has evolved into a system that is considered the functional equivalent of the binding precedent in common law systems.[85] However, some warn against crossing the boundaries between judicial power and legislative power,[86] although such boundaries in China do not exist.

Judicial interpretation includes, amongst others: 'Supreme Court interpretation on the specific issues related to the application of criminal law in hearing criminal cases involving crimes commit-ted by units' (17/1999) and the 'Supreme Court interpretation on the question of whether or not, in hearing the cases of crimes committed by a unit, should distinguish principal criminal or the accomplice between the persons who are directly in charge and the other persons who are directly responsible for the crime' (31/2000); the 'Explanatory document from the research institution of Supreme Court on the issues related to the application of law in hearing the criminal cases involv-ing the crimes committed by the foreign companies, enterprises and institutions within the territory of P. R. China' (2003).

a) In 1999, the Supreme Court of P.R.C. (17/1999) interpreted as follows: '1) The "companies, enterprises and institutions" provided in Article 30 of the China 1997 Criminal Law, include not only state-owned, collectively owned companies, enterprises, public institutions, but also legally-established joint ventures, cooperative enterprises as well as those private or wholly-owned companies, enterprises and institutions which are qualified as legal persons.

China Information 223. More widely, *Ronald C. Keith, Zhiqiu Lin, Shumei Hou*, China's Supreme Court (2013).

84 *Zhou* (n. 57) 85, 88, footnote 59: 'According to article 6 of Regulation on Judicial Interpreta- tion issued by the Supreme Court on Mar.23, 2007, Judicial Interpretation of the Supreme Court will be issued only in four forms, they are Interpretation, Regulation, Official Answer and Decision, and Summary isn't included. However, all documents issued by the Supreme Court actually have the same effect in practice, either they are in legally prescribed form or not'.

85 *Albert H.Y. Chen*, An Introduction to the Legal System of the People's Republic of China (2011), 118.

86 *Bin-zhi Zhao, Jian-ping Lu, Pin Sun*, 'Réponses de la justice pénale au défi d'une catastrophe sanitaire soudaine: études sur les "explications" des autorités judiciaires suprêmes chinoises en la matière', in *Jacques Sagot* (dir.), 'La Chine et le Droit en 2004: vers une legalité renforcée', (October 2004) Gazette du Palais 35.

2) The crimes committed by those companies, enterprises and institutions which were established by individuals to commit the crime, or the companies, enterprises, institutions which commit crimes as the main activities since their establishment, shall not be criminalized as the crimes committed by unit.

3) If the individuals commit a crime falsely in the name of the unit and distribute the proceeds from this crime under the table, shall be criminalized as the crime committed by natural persons and punished in accordance with the Criminal Law'.

b) In 2000, the Supreme Court of P.R.C. (31/2000) interpreted as follows: 'In hearing the cases of the crimes committed by a unit, shall condemn the persons who are directly in charge and the other persons who are directly responsible for the crime separately, in accordance with their role in committing the crimes, don't have to distinguish between principal criminal and the accomplice'.

c) In 2003 explanatory document, the Supreme Court holds that: 'Within the territory of P.R.C., the foreign companies, enterprises and institutions which can be qualified as the Legal Persons in accordance with the Chinese law, commit the offences of endangering society which can be criminalized as a crime according to the Criminal Law of China, shall be held the corporate criminal responsibility in the light of the provisions of the crimes committed by a unit in the Criminal Law of China.

The crimes committed by the foreign companies, enterprises and institutions which were established by individuals to commit crimes or offences within the territory of P.R.C., or, since the establishment, the foreign companies, enterprises and institutions have committed crimes within the territory of P.R.C. as their main activities, shall not be criminalized as the crimes committed by unit'.

IV. In general, according to Chinese legislation, the status of 'legal person' is limited to organisations complying with certain requirements, such as the possession of their own goods and the limited liability, and usually it indicates bodies of smaller dimension compared to 'organisations' or 'entities'. Indeed, in China the terms 'organisations' or 'unit' have a wider meaning.[87] They include, for instance, the

87 *Victor C. Yang*, 'Corporate Crime; State-Owned Enterprises in China', (1995) 6(1) Criminal Law Forum 147.

collective body without legal personality: an example is given by an institution under the direction of the University.[88] The term 'organisation' generally indicates any kind of entity or group, especially those operating in the private sector and with a simpler organisation, while the term 'unit' includes not only any society, enterprise, institution or organisation, but also other types of entities operating in the public sector, such as, for instance, administrative State bodies.[89]

It is believed that the expression 'unit' used in criminal law is more suitable to the current Chinese situation, as a State body too can be an offender – in this regard, there are interesting disputes on the self-punishment of the State.[90] It is generally maintained that the Party organs can be included in the definition[91] – we have already illustrated above (par. I.5) the consequences of such an inclusion.

88 *Chen* (n. 67) 586.

89 See the above-mentioned General Principles of the Civil Law of the People's Republic of China: Section 3, Official Organ, Institution and Social Organization as Legal Person, Article 50: 'An independently funded official organ shall be qualified as a legal person on the day it is established. If according to law an institution or social organization having the qualifications of a legal person needs not go through the procedures for registering as a legal person, it shall be qualified as a legal person on the day it is established; if according to law it does need to go through the registration procedures, it shall be qualified as a legal person after being approved and registered'. Section 4, Economic Association, Article 51: 'If a new economic entity is formed by the enterprises or an enterprise and an institution that engage in economic association and it independently bears civil liability and has the qualifications of a legal person, the new entity shall be qualified as a legal person after being approved and registered by the competent authority'. Article 52: 'If the enterprises or an enterprise and an institution that engage in economic association conduct joint operation but do not have the qualifications of a legal person, each party to the association shall, in proportion to its respective contribution to the investment or according to the agreement made, bear civil liability with the property each party owns or manages. If joint liability is specified by law or by agreement, the parties shall assume joint liability'. Article 53: 'If the contract for economic association of enterprises or of an enterprise and an institution specifies that each party shall conduct operations independently, it shall stipulate the rights and obligations of each party, and each party shall bear civil liability separately'.

90 *Zhang* (2012) 3 Beijing Law Review 106.

91 See, for all, *Thomas Richter*, 'Zum Umweltstrafrecht in der VolksRepublik China, insbesondere zur Strafbarkeit der Koerperschaften – Statement', in *Eser, Albrecht and Richter* (eds.) (n. 73) 137.

There are some questions concerning the possibility that an association of individuals is an active subject of the same crime that can be committed by a unit.[92] As we said above, the Supreme People's Court's interpretation and the relative explanatory document (17/1999; 2003) establish that only crimes committed by corporations, enterprises and institutions having as principal activity the commission of crimes since their incorporation, shall not be prosecuted as the units that commit crimes are. The solution is criticisable, as it excludes precisely the top of corporate criminality, without any reasonable foundation, and moreover with a high level of indeterminacy.

Apart from this, the definition of unit is very broad in the interpretation of Supreme bodies. In the 'Opinions of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues concerning the Application of Law in Handling Criminal Cases of Commercial Bribery' (effective on November 20, 2008) we read that the term 'unit' as mentioned in Articles 163 and 164 of the Criminal Law shall include not only the permanent organizations, such as public institutions, social groups, villagers' committees, urban residents' committees, and villagers' teams, but also the non-permanent organizations, such as organizing committees, preparatory committees and project contracting teams, which are set up to organize the sporting events, theatrical performances or other legitimate activities.

V. According to a common reading, corporate criminal liability is characterised by a 'double penalty', that is both against the unit and against the physical persons responsible of the criminal behaviour.[93] The liability of the unit is defined as subsidiary,[94] or parallel,[95] to that of physical persons, meaning that the former is never established separately from the latter. The structure of article 31 seems peculiar, as it tends to assume both the punishment of the unit and the punishment of the persons responsible for the unit as penalty for the fact committed by the unit.

It interesting to notice the provision according to which '... Where it is otherwise provided for in the Specific Provisions of this Law

92 *Zhang* (2012) 3 Beijing Law Review 106.

93 *Zhang and Zhao* (n. 76) 670.

94 *Chen* (n. 67) 586.

95 *Zhao and Richter* (n. 58) 353.

or in other laws, those provisions shall prevail'. This clause indicates, amongst others, the possibility that in some circumstances it could be possible to punish only the unit that is liable for the crime, and leaves space for the possibility to develop new types of punishment in the future.[96]

VI. Within the framework of a scarce accuracy of definitions in the field of corporate liability, still today pointed out by Chinese scholars,[97] some doubts are raised[98] by the fact that corporate criminal liability lacks that element typical of Western-European codifications that the Germans call 'fact of connection' between entity and crime, and that German law on administrative violations individuates in the breach of a duty concerning the activity of the entity attributable to a person who acts on behalf of the entity (art. 30). Similarly, the French penal code makes reference to crimes committed on behalf of legal persons by their bodies or representatives (artt. 121 and 122) and in Italy legislative decree n. 231/2001 concerns criminal offences committed in the interest or in the advantage of the entity (art. 5). The lack of such a connection link in the Chinese code, together with the fact that the entity is considered an offender, is sign that Chinese law followed the anglo-saxon identification model. According to this model, the directing mind and will of the entity is to be found in the belonging of the author of the crime to the management. It is necessary that he/she acts with the subjective element required for the criminal offence.[99] But – the interpreter asks – as the direct responsible is always mentioned together with those who are generally directly in charge, can the former be a subject that does not belong to the management, that is to say, can he/she be an inferior servant? In case of an affirmative answer, the Chinese code would build the criminal liability of the entity by joining the vicarious liability to the corporate liability of the doctrine of identification. Vicarious liability would

96 *Zhang* (2012) 3 Beijing Law Review 106.

97 *Hen Xiao-Ying, Shil Ren-Li and Liu Xiao-peng*, 'Réflexions sur le droit pénal chinois depuis la mise en oeuvre du Code pénal chinois de 1997', *in Sagot* (dir.) (2004) Gazette du Palais.

98 *Rossi* (2010) Diritto penale XXI secolo 71.

99 This conclusion seems upheld by Richter (n. 91) 138; *Zhao and Richter* (n. 58) 354.

make possible for the unit to respond also for the crime committed by the non-manager employee, provided that he acted with *mens rea* (intention or recklessness), that is, with the subjective element required for the offence. But does not the insistence with which the code refers to crimes 'committed' by the unit means perhaps that the doctrine of the personal liability has been followed? Such a doctrine implies the direct criminal liability of the unit for having violated its duties without the necessary individuation of a culpable physical person. According to the Summary of Meetings of Courts of All Levels on Trying Financial Crimes (Supreme People's Court, January 21, 2001), the 'participation of the unit in crime' is admitted on the basis of a unitary conception of the participation in crime, and the intention can be attributed to the unit, given that whenever two or more units commit a crime with a common intention, the crime of the unit shall be identified according the position and role of each unit in the offence.

He Bing-Song[100] suggested a direct model of liability that he describes as a 'personalized social system liability'. Basically, the criminal responsibility of the legal person would be that of the whole entity. A legal person is a personalised entity of the social system, it has a 'collective mind', it acts collectively and has its own criminal capacity and culpability. Its 'collective mind' and its actions are not to be confused with the mind and the actions of a single individual. He Bing-Song maintains that the offence committed by a legal person consists in a single crime committed by two subjects (the legal person and the individuals that are part of it) and may therefore result in the responsibility of 'one or two penal subjects'. Such a vision may be suitable to the 'binary' penal system that is currently used by Chinese law and that admits the punishability of the corporation alone without determining whether there are any particular individual blames (obviously, individuals too may be punished for their behaviours).

Nevertheless, the author does not define the concept of 'collective mind and acts' subjected to direct responsibility. Practically, the prosecutor and the court shall in any case examine the mental state

100 *He Bing-Song and Zhu Bian*, Crime and Criminal Liability of Legal Persons (1991), 485.

and the actions of single individuals in order to prove the enterprise's culpability.[101]

Along with the promulgation of the above-mentioned special laws, Chinese lawyers suggested many new theories to justify the punishability of corporations, especially that of the *Liability of Personified Social System*, deemed compliant with the *Organization Liability of Corporation*:[102] a legal person may be considered penally culpable since it is a structured and personified legal organisation having its own unitary will and, therefore, the capacity of committing a crime and assuming the consequent criminal liability. Due to the lack of a physical body, a legal person can only commit a crime through the wilful act of one of its representatives or employees and, thus, also the subjects who are substantively responsible for that crime should be held penally responsible. Summing up, in a criminal trial concerning a legal person there are one crime only (unitary crime of the legal person), two offenders (the legal person and the physical one) and two (double sanction) or one (single sanction) punishable subjects.

What acts definable as criminal offences can be attributed to the unit? This is a question to which the Chinese penal code does not seem to answer, not even in the text of article 31, which establishes that the behaviours of persons who are directly in charge and the other persons who are directly responsible for the crime are attributed to the unit.

These subjects, though, act as objective elements of connection between the unit and the criminal offence. The question is which subjects fall under the definition of 'persons who are directly in charge' and of 'persons who are directly responsible for the crime': the legal representative, the management area officers, the owner or those who control the corporation, the enterprise, the private organisation or the subjects acting on behalf and for the good of the unit?[103] According to the different corporate structures and positions that a physical person may fill in the management of a corporation, since the entrance into force of the 1997 code many theories have been

101 *Yang* (1995) 6(1) Criminal Law Forum 160.

102 *Zhou* (n. 57) 84.

103 *Zhang* (2012) 3 Beijing Law Review 106.

hypothesised. For instance, four theories, similar in the essence, but different in the extension, have been suggested to identify the persons 'directly in charge':[104] (1) the persons 'directly in charge' are those having a function of organiser, director or decision-maker; (2) substantial decision-makers in the execution of the corporate crime are those 'directly in charge'; (3) in order to qualify a subject as 'directly in charge' two conditions shall be satisfied: first, he/she has to assume direct liability, secondly, he/she has to hold a supervision office; (4) top level leaders who secretly inspire, culpably conspire or even publicly support criminal offences committed by their subordinates and those who organise, direct and determine shall be punished as persons 'directly in charge'.

The debates amongst scholars and the absence of interpretations by the authorities led to incongruities and conflicts in practice. With the aim of offering a clear and practicable standard, the Summary of Meetings of Courts of All Levels on Trying Financial Crimes (Supreme People's Court, January 21, 2001) clarifies that persons generally directly in charge are those who decide, approve, order, authorise or direct the execution of the crime of the unit: usually they are those responsible for the administration of the unit, included the legal representatives. Direct responsible is the person who materially executes the crime of the unit, having a relevant function in the unit: this might be the person in charge with the management of the unit or an employee. Other persons directly responsible for the crime are those who play a relatively important role in the commission of the crime, they might be a manager, a supervisor or ordinary employees. However, those who are assigned or ordered to take part in a corporate crime shall not be held culpable as those who are directly responsible for it.[105] Persons directly in charge and persons directly responsible for a corporate crime should be punished respectively in accordance with their own position, with their own role and with the circumstances of the crime.

The cited Memorandum is criticisable, as it unreasonably restricts the number of persons who can be considered 'directly in charge' and as it is incapable to offer a practical standard to decide whether a subject shall or shall not be considered directly responsible of the

104 *Zhou* (n. 57) 89.

105 *Zhou* (n. 57) 89.

crime. There is also someone who thinks that it solves the academic disputes and explains article 31 of the criminal code and that it would be wrong to say that the provided definition is not practicable, since each word may be subjected to many interpretations.[106]

Meanwhile, an important clarification comes from the Supreme People's Court, in the above mentioned 'Supreme Court Interpretation on the Specific Issues Related to the Application of Criminal Law in Hearing Criminal Cases Involving Crimes Committed by Units' (Supreme Court Interpretation No. 17/1999). Paragraph 3 establishes that 'If the individuals commit a crime falsely in the name of the unit and distribute the proceeds from this crime under the table, shall be criminalized as the crime committed by natural persons and punished in accordance with the Criminal Law'. This seems to suggest that if, on the contrary, the criminal behaviour is realised on behalf of the unit and the illegal proceeds belong to the same unit, then the crime should be considered as if it was committed by the unit. Furthermore, it is clarified in the "Supreme Court Minutes of a Panel Discussion on the Legal Issues in Hearing the Cases Concerning Financial Crimes" that if the individual acts on behalf of the unite and the illegally obtained proceeds are owned by that unit, than the crimes should be defined as crimes committed by a unit. Conclusion: for the criminal act to be ascribable to the crimes committed by a unit, the proceeds that have been illegally obtained through such act should belong to the unit.[107]

According to the terms used and to the context of Chinese law 'illegally obtained proceeds' could generally refer to the material profit of crime obtained directly or indirectly. However, this is true only in some cases, while in other cases the unit benefits of crime but not necessarily gaining material profit. Sometimes there are non-material interests, such as, for instance, the increase of the social status or of the reputation of the unit, or competitive advantages and commercial opportunities. Such interests might perhaps turn into material profits, but only in the future. Nevertheless, whenever a unit commits such a crime, it might not satisfy the requirement of the 'illegally obtained proceeds', because the benefits deriving from such crime have not a material character. For this reason, the diverse and wider requirement of the 'benefit for the unit' is deemed more appropriate and practicable.[108]

106 *Zhou* (n. 57) 89.

107 *Zhang* (2012) 3 Beijing Law Review 107.

It has to be clarified whether the 'benefit for the unit' may be intended also in an exclusively subjective dimension, possibly referred to the person generally directly in charge, or to the direct responsible. However, in the law in action the benefit does not seem to constitute a substantive requirement unavoidable when it comes to corporate criminal liability, as it is not required by law, but instead a criterion for proving the also subjective connection between the unit and its crime, which becomes a substantive requirement in judicial interpretation. We could not find any judicial opinions for the cases in which the crime is not related to any interest or benefit for the unit, which would be most interesting.

VII. Chinese scholars distinguish the crimes that can be committed by a unit in two typologies: single crimes and non-single crimes.[109] Single crimes refer to the offence that can be committed only by a unit and not by any physical person. That means that only the unit can be active subject of such criminal offences. For instance, the crimes provided for by art. 427 of Chinese Criminal Law: 'Where a State-owned museum, library or other institution sells or presents as gifts without permission any cultural relics in its collection, which is under State protection, to any non-State-owned institution or individual, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the offence shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention'.

Non-single crimes refer to offences that can be committed by a unit and also by physical persons. In the special part, the majority of offences that can be committed by a unit are non-single crimes. In these cases, physical persons that commit such crimes are punished with the same sanction applicable to the persons in charge or directly responsible for the crimes committed by a unit. For instance, article 187 establishes that: 'Any employee of a bank ... shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention and shall also be fined ... . Where a unit commits the cri-

108 *Zhang* (2012) 3 Beijing Law Review 107.

109 *Zhang* (2012) 3 Beijing Law Review 105.

me mentioned in the preceding paragraph, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be punished according to the provisions in the preceding paragraph'.

Other provisions, though, establish less harsh punishments for the unit compared with those established for the physical persons. For instance, article 191 establishes that, 'if the circumstances are serious', the physical persons who commit money laundering 'shall be sentenced to fixed-term imprisonment of not less than five but not more than 10 years ...' but 'Where a unit commits any of the crimes mentioned in the preceding paragraph, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be sentenced to fixed-term imprisonment of not more than five years ...'.

This analysis may offer some basis to the assessment of the Chinese penal and criminal policy. Seemingly, the new Chinese code does not adopt any substantive criterion of distinction between crimes that can be committed (possibly only) by a unit and crimes that can be only committed by physical persons, while the same code contemplates crimes that can be only committed by the unit and by those who are in charge of the unit, crimes that can be committed by a physical person or by a unit (other than crimes of physical person that are not extended to units), crimes that (at least literally) contemplate not the unit but the physical persons directly in charge or those who are in charge with the control (this is a case of 'negligence', in a context that is considered similar to strict liability of the common law systems). The substantive criterion of distinction derives from a political decision that is not clear about its purposes and means.[110]

Moreover, the distinction itself does not clarify whether it has particular legal effects. It would be necessary, amongst other, to understand the functioning of the regulation of the participation (of physical and legal persons) in crime (both by a physical person and by a unit), which would require a separate consideration. The alleged exclusion of the natural person from the number of the active subjects in single crimes seems to imply an unexpressed irrelevance

110 *Zhou* (n. 57) 86.

of participation in crime. In the code the participation in crime is regulated before the provision of corporate criminal liability and it does not contain any reference to the unit. However, the 'participation of units in the crime committed by a unit' is mentioned in the 2001 Memorandum, according to which when two or more units commit a crime with common intent, the crime of the unit shall be identified according to the position and relevance of each unit in the crime.

The courts have also established that in the case of crimes of a unit, the person generally directly in charge and the person directly responsible are punished according their own influence in the crime of the unit, instead of distinguishing between principal offender and accomplice.[111]

VIII. The mentioned Italian legislation on the punishment of the legal entity, aimed at striking the so-called 'organizational fault', as the entity did not do anything that was reasonably possible to prevent the crimes for which it is responsible, gives a particular relevance to the set of internal measures that the entity has effectively adopted and that result effectively adequate to prevent crimes, according to an *ex ante* judgement. In the Chinese penal regulation there is not a corresponding regime, nor the specialised penal scholarship we consulted gives any importance to such topic.[112] Nevertheless, the issue of inner controls, and of the lack of adequate rules on internal organisation but also on the professional competences of public controllers is a crucial point in the investigation on the adequacy of the Chinese apparatus with regard to the prevention of corporate crimes under the aspect of the mentioned social governance and corporate responsibility, also in respect to the responsibility for activities performed abroad.[113] The Chinese State is co-owner of many and also big enterprises, which entails a factual influence on the management of such

111 Opinion of the Supreme People's Court with regard to the distinction between principal offender and accomplice for the person directly in charge and the person directly responsible in the case of crime of a unit (Supreme People's Court, in force since October 10, 2000).

112 However, see *Chenxia Shi*, Political Determinants of Corporate Governance in China (2012).

113 *Joyce Tsoi*, 'Stakeholders' Perceptions and Future Scenarios to Improve Corporate Social Responsibility in Hong Kong and Mainland China', (2010) 91 Journal of Business Ethics 391.

enterprises by the political power and according to criteria of more or less good policy, rather than commercial criteria.[114]

IX. In conclusion, we may notice that corporate criminal liability as regulated by Chinese law needs to be coherently framed within the most peculiar structure of the Chinese socio-legal organisation, which diverges under many aspects from that of Western tradition. Such a responsibility finds an historical antecedent in the collective responsibility of the family, known both to imperial law and to the law of the Maoist era. Therefore, it is not something alien to the Chinese tradition at all, when we consider the importance that the enterprise is assuming in China as a fundamental cell of society, coming alongside and overcoming the family. However, the Chinese model of corporate criminal liability in its essential features and in its important problematical aspects does not diverge so much from the Western legal experiences. This concerns also the indeterminacy of the regulation in many parts, and the following integrative contribution by the courts, in several forms. The crucial point of the difference remains that of the comprehensive framework of Chinese law. This is true also for criminal law, which in China still lacks those effective organisational modalities, truly democratic, that more or less connote the Western world. Nevertheless, China has already brought to its law many improvements that, if effective, will aim democratically. In such a direction we may conceive also the extension of criminal liability to public bodies, included the organs of the Party.

ÖZET

Çin Halk Cumhuriyeti'nde Kurumsal (Birim) Ceza Hukuku

Çin Halk Cumhuriyeti'nde kurumsal ceza sorumluluğunun, Çin'in Batı geleneğine göre birçok açıdan farklılık arz eden sosyo-hukuki örgütlenmesinin kendine has yapısı içinde, onunla uyumlu bir tarzda açıklığa kavuşturulması gerekmektedir.

Bir taraftan, Çin'de tüzel kişilerin cezai sorumluluğu geleneğin uyumlu bir gelişimidir, çünkü bu gelişimin hem imparatorluk hem de Maoist dönem hukukunda rastlanılan ailenin kolektif sorumluluğu gibi tarihsel bir öncülü

114 Huong Ngo Higgins, 'Learning Internal Controls from a Fraud Case at Bank of China', (2012) 27(4) Issues In Accounting Education 1171

bulunmaktadır. Diğer taraftan, 1997 yılına kadar Çin Ceza Kanunu'nun kurumsal cezai sorumluluğa ilişkin herhangi bir düzenleme getirmemesinin de gösterdiği gibi, kurumsal cezai sorumluluğu savunan teoriler, uzun bir süredir Çin'de çok fazla destek görmediğinden böyle bir sorumluluk geçmişle bağların koparılmasının da bir işaretidir.

Çin Halk Cumhuriyeti'nin 1997 yılında gözden geçirilen yeni Ceza Kanunu, Çin'deki kurumsal cezai sorumluluk kavramının tarihinin temel taşını teşkil etmektedir. Birimler tarafından işlenen suçlara ilişkin bölümde 30. madde, bir şirket, teşebbüs, kurum, devlet organı veya organizasyon, toplumu tehlikeye atan bir eylemde bulunursa, bu eylem de kanunun tanımladığı anlamda bir "birim" tarafından gerçekleştirilmişse ve kanuna göre suç teşkil ediyorsa, bu "birimin" cezai sorumluluğu olacağı düzenlemesini getirmektedir. Bir "birim" tarafından işlenebilecek suçların sayısı 120'den fazla olacak şekilde arttırılmıştır.

Çin Halk Cumhuriyeti'ndeki kurumsal cezai sorumluluk düzenlemeleri ilk bakışta şu prensipleri vurgulamaktadır: i) Birim, sorumlu olduğu açık bir şekilde belirtilenler dışındaki suçları işleyemez; ii) suçun faili birimdir; iii) genel olarak doğrudan idareden sorumlu olanlar ve suçtan doğrudan doğruya sorumlu kişiler birimle birlikte cezalandırılır.

Çin tipi kurumsal cezai sorumluluk temel nitelikleri ve sorunlu yanları açısından Batı hukuk tecrübesi ile çoğunlukla örtüşmektedir.

Örneğin (suç işleyen bir birime uygulanabilecek tek yaptırım olan) para cezası, üst sınırı bulunmamasına rağmen, kurumsal suçları önlemek için tek başına yeterli görüntü çizmemektedir. Hukuk bilimi, birimlerin ticari faaliyetlerinin askıya alınması, kamusal alımlar dışında bırakılması ve dâhili kontrol yapıları oluşturmak amacıyla birimin içyapısının cebren değiştirilmesi gibi yeni ceza tiplerinin getirilmesini talep etmektedir. Bu ve başka tip yaptırımlar idari makamlarca, idari düzenlemelere uygun bir şekilde, idari cezalar olarak da uygulanabilir.

Diğer bir problem ise Çin Halk Cumhuriyeti'ndeki kurumsal cezai sorumluluk kavramının Almanların kurum ile suç arasındaki "bağlantı gerçeği' olarak adlandırdıkları, Batı-Avrupa yasal düzenlemelerinin tipik bir unsurundan yoksun olmasıdır ki bu durum bir birimin suçundan doğrudan sorumlu olanın (Çin Ceza Hukuku'nda suçtan doğrudan sorumlu olanla genel olarak doğrudan idareden sorumlu olanlardan daima birlikte bahsedilmektedir) yönetime dâhil olmayan bir suje (bir başka ifadeyle ast konumdaki bir hizmetli) olup olamayacağı sorusunu gündeme getirmektedir.

Diğer sorunlar birime atfedilebilecek suçların tespitinde; "doğrudan idareden sorumlu kişiler" ve "suçtan doğrudan doğruya sorumlu kişiler" tanımıyla tam olarak hangi süjelerin kastedildiğinden, düzenlemenin birçok

yerinde göze çarpan genel belirsizlikten ve bu nedenle mahkemelerin hukuku bütünleyici ve açıklığa kavuşturucu katkılar yapmaya çalışmasından kaynaklanmaktadır.

Bu nedenle Çin ve Batı kurumsal cezai sorumluluk sistemleri arasındaki ana farklılık, Çin hukukunun kapsamlı yapısı olarak ortaya çıkmaktadır. Bu, Çin'de hala aşağı yukarı hep Batı dünyasını çağrıştıran o hakikaten demokratik, etkin organizasyon biçim ve türlerinden yoksun olan ceza hukuku için de geçerlidir. Yine de Çin, yasalarında etkili olurlarsa demokratik bir yönelime yol açacak birçok iyileştirme yapmıştır. Böyle bir yönelim cezai sorumluluğun Parti'nin organları da dâhil kamu kurumu organlarını da kapsamasına doğru giden bir yol açacaktır.

DER MISSBRAUCH VON STRAFVERFAHREN IM LICHTE DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION

*Prof.Dr.Dr.h.c. Friedrich-Christian SCHROEDER**

Feridun Yenisey hat große Verdienste um die Verbreitung der Kenntnis der Europäischen Menschenrechtskonvention in der Türkei. Zu zahlreichen Veranstaltungen vor Richtern, Staatsanwälten und – vor allem – Polizei-beamten hat er mich eingeladen; hieraus sind mehrere gemeinsame Publikationen hervorgegangen.[1] In der Festschrift zu meinem eigenen 70. Geburtstag hat er über den Begriff des „fair trial" im türkischen Recht geschrieben.[2] Ich hoffe, dass die folgenden Zeilen unsere Zusammenarbeit fortsetzen.

I. Einführung

Die Europäische Konvention zum Schutz der Menschenrechte und Grundfreiheiten ist ein wichtiges Instrument zum Schutz vor unzulässigen Eingriffen der Staatsgewalt. Dies gilt insbesondere für das Strafverfahren. Gelegentlich erfolgen im Strafverfahren nicht nur

* em. Professor an der Universität Regensburg.

1 *Schroeder/Yenisey*, Dürüst Yargılanma Hakkı (Fair Trial) (1997); *Schroeder-Yenisey-Peukert*, Ceza Muhakemesi Hukukunda Fair Trial (1999); *Schroeder*/Yenisey, Ceza Hukukunda Adil Yargılanma Hakkı (2002).

2 *Feridun Yenisey*, Der Begriff des „fair trial" im türkischen Recht unter Berücksichtigung der höchstrichterlichen Rechtsprechung (2006) *Andreas Hoyer* u, a, (Hrsg.), Festschrift für Friedrich-Christian Schroeder zum 70. Geburtstag, 895ff.