

*NAVEIÑ REET*: Nordic Journal of Law & Social Research  
An Annual Interdisciplinary Research Journal, Number 9, 2019

# LIVING APART TOGETHER

CHINESE-EUROPEAN PERSPECTIVES  
ON LEGAL CULTURES AND  
RELATIONS IN THE DIGITAL AGE



Guest editors:  
Hanne Petersen, Wen Xiang and Marya Akhtar



*NAVEIÑ REET:*  
Nordic Journal of Law  
and Social Research

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# Introduction: Living Apart Together - Chinese-European perspectives on legal cultures and relations in the digital age

Hanne Petersen<sup>1</sup>

“Living Apart Together” (LAT) is a term used for partners having an intimate relationship but living in separate places. It is mainly used in a Western context. However, in the present planetary world, we are increasingly closely related, even if we live apart, as both individuals, communities, regions and continents as well as countries. This special issue of *Naveiñ Reet*, *Nordic Journal of Law and Social Research*, deals particularly with China – seen and understood from both Europe and China. Both Europe and China face challenges for their legal and normative cultures in the digital age. They also face global challenges due to transformation of intimate relations and increasing demands for sustainable relations and lifestyles. *Naveiñ Reet* is a Punjabi expression, which means in translation *New Traditions*. All the mentioned challenges require developments of ‘new traditions’.

During the beginning of 2020, the COVID19 crisis hit first China and shortly after Europe continuing to other parts of the globe. Many have had somewhat shared experiences and feelings of living both together and apart, and of being linked to people and populations nearby but under conditions of social distancing, as well as to people far away under a kind of common destiny. This experience of living with stress, anxiety and insecure health and economic conditions has brought out both positive and negative traits and reactions in individuals – as well as in countries. One of the forms of communication beyond the close ones, which have been important during this period, has been digital communication. It has been essential for production, cooperation and for carrying out a lot of tasks and activities, which in earlier periods required face-to-face contact and interaction. In fact, it would probably not have been possible to lock down cities, regions and countries the way it happened in 2020, without the strong support and impact of digital technology. We are increasingly living apart together on both a private, local and global scale. This issue of *Naveiñ Reet*, which has been edited during the COVID19 pandemic, has underlined that the world we live in now together

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1 Hanne Petersen is professor of legal cultures and former head of CECS (Centre for European and Comparative Legal Studies) at the Faculty of Law, UCPH. She has dealt with issues concerning Chinese legal culture since 2009, and has written on labour law, gender and law, Greenland, religion and law and numerous other topics.

has a need for new traditions, as well as tools to create such new traditions. American-Belgian therapist and author, Esther Perel, said in May 2020 in an interview in the New Yorker “if we want to look at the challenges of communication, of sexuality, of desire, of conflict in relationship, this is such a Petri-dish moment’.<sup>2</sup> During the locked down spring of 2020 the world has witnessed conflict and increased violence in intimate relations and growing tensions in geopolitical relations particularly between China and the US, but to some extent also Europe. These tensions are played out also in the field of competition regarding development and use of digital technology. At the start of the 21st century the development in China and its improved relationship to the West gave hope of mutual economic and cultural gains.<sup>3</sup> Presently the relationship seems fraught by what could perhaps be called a Western identity crisis, and a wish of the Chinese one-party dominated state to secure strong internal control and growing international influence. USA and Europe make up an ever-smaller part of the global population and the time of US dominance globally has gradually been coming to an end since Nine-eleven and the financial crisis in 2008, underlined by the COVID19 crisis, which has hit the US particularly strongly. In the 21st Century the European Union has been troubled by tensions in relation to its Muslim populations and neighbours, by division between new and old EU member states, by a Euro-crisis, a migration crisis, by Brexit and not least by a global climate crisis, which its very young population have reacted strongly towards.

The experience of having to develop and handle a new digital technology, which initially was met with enthusiasm in both the West and China, is common to both major and minor players in a changing world society. It seems to be a general trend in this special issue that Chinese authors still view the potential of technology with more optimism than Western authors do at present. The European enthusiasm was never as strong as the North American was, and seems to be cooling off further. However, as the COVID19 crisis has taught us, we may be sceptical about digital technology, but we can hardly live without it any longer. Probably improvements are the order of the day.

Lawrence Friedman, American legal historian, has on several occasions written on legal culture – including also on *Technology and Legal Culture*.<sup>4</sup> He uses the term meaning

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- 2 Rachel Syme, “This is what happens to couples under stress”: An interview with Esther Perel, *The New Yorker*, May 5, 2020.
  - 3 See Dominique Moïsi, *The Geopolitics of Emotion -- How Cultures of Fear, Humiliation, and Hope Are Reshaping the World* (Anchor Books 2010).
  - 4 Lawrence M. Friedman, *Technology and Legal Culture*, 2007, In *Liber Amicorum Kjell Å Modéer*, Lund: Juristförbundet, p.169-179

‘the general climate of opinion about law, within a given society’, and he claims that ‘momentous social, cultural, political, and economic transformations cannot help but bring about momentous legal transformations.’<sup>5</sup> He describes how the automobile created suburbia, how the birth control pill is related to the sexual revolution (in the West), and how television has altered the nature of politics and political campaigns. – We may now add to that the present transformative role of the smartphone and twitter. Friedman claims that any serious problem, one might mention, be it ‘global warming, the rapid spread of diseases like bird flu, the destruction of rain forests, air and water pollution and the rape of the environment’ can be laid at the door of science and technology or both.<sup>6</sup> There is a general and substantial difference between so-called democratic legal cultures and legal cultures of a mega-one-party state such as the Chinese. Nevertheless, there are also parallels due to a comparability of the technologies – parallels that also existed between technologies of industrial societies, whether they were described and considered as capitalist or socialist before 1989. We do not yet fully know, what kind of social, cultural, political and economic transformations digital technology will lead to, or what legal transformations this may imply, but we can probably begin to glimpse some of these transformations, as some of the contributions here indicate.

China has been and continues to be a frontrunner in the area of digitalization. It has increasingly played an active and contested role in shaping the digital landscape through collaboration and competition with Western and other states. So far, the EU has been a frontrunner in the area of legal regulation, court cases and guidelines to limit the power of the tech giants, as EU is more reluctant than both the US and China regarding the benefits related to digital technologies and their influence on individuals and societies. European countries are, according to Friedman, in general even more concerned with the issue of privacy than the United States,<sup>7</sup> and certainly than the Chinese government. However, Chinese businesses and individuals may increasingly have become concerned about issues of privacy, which will put pressure on top levels of society. These differing views are most likely due to the history of authoritarianism and genocide in Europe during the 20th century. In the 21st century digitalization and the digital revolution is changing the world in terms of communication, (resource) control, censorship, commerce and surveillance of people, organizations, and markets.

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5 *Ibid*, p.169

6 *Ibid* p.173

7 *Ibid*. p.177

Digital surveillance is not limited to China. In her recent book on *'Surveillance Capitalism'* Shoshana Zuboff describes the role of US tech giants in undertaking massive market induced surveillance, which may have a strong impact on individuals.<sup>8</sup> 'Surveillance capitalism' and 'state surveillance' in the form of 'social credit systems' coexist globally. This will very likely increase in the aftermath of the global health crisis.<sup>9</sup> How to maintain data protection and combine it with secure controlling of the COVID19 pandemic will surely be contested. APPs for keeping social distancing are widely used in China, and this has raised concern about personal data and privacy, and the subsequent use of the collected data. They seem to point to a certain ambivalence in both China and Europe regarding the impact and consequences of social and technological developments. Digital technology has clearly been used in the geopolitical struggle between China and the US, and to a somewhat lesser extent between China and the EU. Not surprisingly the global pandemic is also used in this struggle.<sup>10</sup>

A certain common focus upon (diverse) *principles* in regulating digital technology seems to run through several of the articles in this issue. In a world where the major IT & AI powers belong to different political systems, ideologies and legal cultures, and their technologies are both developed and applied according to these different approaches, it may be difficult to agree on 'universal' principles. Nonetheless, principles seem to be an important device for regulation of the complex digital field characterized by rapid development. Some of the articles deal with more technical and specific issues of digitalization, which may not necessarily be easily accessible to the digitally semi-illiterate (legal) reader. Several of these articles only indirectly deal with issues of legal culture. Nevertheless, they demonstrate a difference between a focus on (mostly individual) rights in a Western neo-/ordo-liberal legal culture and a somewhat stronger focus on and concern with public interest, accountability and obligations in a Chinese context. They demonstrate a Chinese interest in minimizing unfair competition, concerns about information asymmetry and the protection of personal information as well as a Chinese perspective on the 'right to be forgotten'.

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8 Shoshana Zuboff, *The Age of Surveillance Capitalism. The Fight for a Human Future at the New Frontier of Power* (PublicAffairs, Hachette Book Group 2019)

9 Naomi Klein writes in *The Intercept*, May 8, 2020 about Screen New Deal. Under Cover of Mass Death, Andrew Cuomo Calls in the Billionaires to Build a High-Tech Dystopia. <https://theintercept.com/2020/05/08/andrew-cuomo-eric-schmidt-coronavirus-tech-shock-doc-trine/>

10 See Niklas Hessel, "Geopolitisk pandemi. Beijing-bashing er i høj kurs i USA, hvor Trump og Biden strides om, hvem der er hårdest". *Weekendavisen*, May 20, 2020

Compared to China, the European Union has not experienced a top-down integration of digitalization as part of a comprehensive development strategy. EU regulation only indirectly touches on market regulations, as it is more concerned about the paradigm of neo-liberal efficiency considerations combined with protection of rights and the right to data privacy especially of consumers. According to Sabatino's article in this issue the EU model, which adheres to an ordo-liberal logic at least theoretically rejects social and ethical interaction between public powers and economic operators. China and Europe share a general trend of public regulation of the internet related to restriction of investments. The emphasis on the *moral* character of the internet in China serves the purpose of reconciling public and national interests with the dynamics of a modern economy, no longer subjected only to vertical political planning. The Chinese choice to interpret digitalization vertically is a way to reaffirm the political pillars of a socialist market economy in online markets.<sup>11</sup> It seems that China is at the forefront of developing a legal framework to deal with the challenges raised by the digital revolution.<sup>12</sup>

The Chinese focus on what may be called a '*moralizing*' approach to law appears in both the articles on digital technology and the initial article on Confucianization in intimate relations, with which we start this issue.

At the start of the special issue, we present three articles on 'intimate' relations, gender, law and the legal profession. The first is by Simona Novaretti, who is both a sinologist and Associate Professor of law at the University of Turin, Italy. Novaretti writes about a global challenge from a Chinese perspective in her article *China's Sustainability: Confucianization of Chinese Law from Intra-Generational, Inter-Generational and Gender Equity Perspectives*. In a world of global warming and climate crisis, we live together even if we seem to be far apart. The 2030 Sustainable Development Goals (SDGs) generally consider three kinds of 'equity' – mentioned in the title of the article. The author asks to what extent, China's recent 'return to Confucius' is paving the way to the use of law as an instrument for '*social moralization*'. Is the 'creative renovation' of Chinese traditional values an attempt to re sew the Chinese social fabric, which has become worn out by the dramatic economic development experienced during the last decades?

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11 See Gianmatteo Sabatino, *Economic Law and the Development of Digital Markets, between Ethics and Efficiency*, in this issue.

12 See Corrado Moriconi, *Recent Evolution of the Personal Privacy Legal Protection in People's Republic of China* in this issue.

Fangfang Pan is a PhD Candidate at CUPL (China University of Political Sciences and Law, Beijing). She was a visiting PhD student at CECS (Center for European and Comparative Legal Studies) at the Faculty of Law, University of Copenhagen during the period of 2019-2020. She writes about the dramatic developments in intimate relations in her article *Family Revolution by Law - Research on Development and Reform of Chinese Marriage Law*. The Marriage law was the first law to be enacted after the establishment of the Peoples' Republic of China, underlining the societal and political importance of intimate relations – as well as the need to create new traditions in this field. The law has been revised three times since reflecting the connection between social change, economic developments, legal revision and considerable changes in the shrinking and changing of the family and the growing importance of its property relations.

Helle Blomquist is a legal historian, who presently works as an external lecturer at the Faculty of Law, UCPH, in both legal history and a subject now called “Law, Morality and Politics”. In her article *Chinese Legal Professionals and Transformation of Gender Roles. A Case Study*, she addresses the potentially modernizing role of lawyers in China in the field of gender equality and changing gender roles. She draws on her own small sample of interviews from a provincial Chinese city, and links them to Talcott Parson's study of the – modernizing – role of lawyers in the US in the 1950s. This theory of the function of lawyers in stabilizing a dynamic society was presented in the context of the Cold War and the bipolar world, of which we now see signs again. She finds both potential and restrictions for such a role. – It is well known that the number of female law students has grown massively in almost every country in the world, including China, during the last decades. It is also a general observation that gender conservative cultures and stereotypes in family, market, politics and state do not change quickly anywhere.

The Faculty of Law at University of Copenhagen held a seminar in November 2019 on *Digitalization and Legal Culture: Western and Chinese Perspectives* organized by two of the editors of this journal, Wen Xiang and Hanne Petersen. Several of the articles in this issue have emerged from this seminar, especially amongst the following ones.

The keynote speaker at the November conference on Digitalization and legal culture was professor He Jiahong from School of Law at Renmin University of China. Besides being a professor, he is also an author of crime novels, most of which have been translated into several Western languages. He gave several lectures during his stay in Copenhagen linking his own personal history to his work as both a professor and an

author of fiction. He described how, in order to be accepted as a son-in-law by his future parents in law, he had to prove that he could pass the entrance examination for Chinese universities. Since law exams seemed the most accessible, He Jiahong chose that venue for his future career. His experiences during the Cultural Revolution in China (1966-69) have inspired several of his novels as well as his academic work. They are also the background for his reflections on the development of legal culture in China in his article entitled *Experiments for Democracy during the Culture Revolution in China*. He claims it gave Chinese people a chance to experience some practices of mass democracy, including democratic supervision in the form of mass criticism, democratic governance in the form of rebellion and usurping, as well as democratic participation. However, the Cultural Revolution became a national disaster. According to He Jiahong these lessons made the Chinese leadership recognize the importance of the rule of law.

Professor Hanne Marie Motzfeldt from the Faculty of law, UCPH, writes in her article *Towards a Legislative Reform in Denmark?* that the digital transformation of the public sector in Denmark has been going on steadily for almost twenty years and has changed the working processes, organization and interaction of Danish public authorities with citizens. National administrative law had developed as a response to comparable changes in the Danish public sector in the period from the 1950s to the 1980s, primarily driven by the need to protect fundamental values embedded in the Danish legal culture. She considers whether this development may continue in the future and whether a legislative reform within administrative law is likely to be initiated and adopted within the next decade.

Denis De Castro Halis was formerly associate professor at University of Macao, China, for more than a decade and now works at the University Estacio de Sa in his home country Brazil. He writes about *Digitalization and Dissent in Legal Cultures. Chinese and other perspectives*. He has been working on the topic of dissent for several years and here he discusses the impact that digitalization, in general and in specific settings, is having on various forms of dissent. His article is based upon a theoretical and empirical socio-legal investigation about dissent, its manifestations, and reactions to it. He argues that the impact of digitalization on dissent is mediated by legal culture and the wider societal context, and discusses examples of new digital technologies and their relations with the idea of dissent in different legal cultures, particularly China and Brazil. This article expresses critical concerns about the consequences of the development of digital technology. Digitalization is used as a tool for mass surveillance in the Chinese State, as well as in the present Brazilian authoritarian regime. His topic addressed a field of continued ideological tension not only between China and the West, but also within

these parts of the world. His description of the digitalization of the court system in Brazil also reveals certain potential for more public insight in this institution and its culture.

Professor Antoni Abat i Ninet, formerly associated with CECS (Centre for European and Comparative Legal Studies) at UCPH, in his article *Protecting the “Homo Digitalis”* writes about the appearance of a new human species, the so-called *Homo Digitalis*, a *Homo Sapiens* permanently interconnected with others through IT devices in an imaginary network. The internet age has provoked new social movements characterised by being more horizontal and deliberative and by including virality (the tendency to circulate rapidly and widely from one internet user to another) as one of their main elements. All these changes also affect our psyche. He writes that the digital era as a universal phenomenon requires a universal answer conducted by a strong regulatory effort and a strict application of basic regulatory principles such as equality, transparency, data protection, and proportionality, right of information, legal certainty and security. As already mentioned, this approach may have difficulties becoming manifest under diverse political and legal systems, as well as cultures.

In their article *Legal Construction of Algorithm Interpretation. Path of Algorithm Accountability* Luo Weiling from Guangdong Polytechnic University and Liang Deng, lawyer and partner of Kingson law firm, Guangdon write that in the increasingly tense man-machine relationship, human ethical demands, such as security, fairness and privacy are raised and that they all point to a crisis of trust. It is one of the approaches of algorithm accountability to stipulate specific legal rights for the relative party of algorithm behaviour. The authors do however, consider it more accurate to replace a ‘right to counter algorithm’ with an ‘algorithm obligation’. Thus, the key to an algorithm accountability process is not to entitle, but to assign obligations including interpretation obligations to the control party of AI algorithm in the relevant legislation. Their final – optimistic – remark is that the ideal scenario of algorithm interpretation should be through dialogue so that all parties of interpretation can blend horizons and reach a consensus of meaning: algorithm interpretation can be understood and accepted by all parties and man-machine trust can be established.

The article on *Unfair Competition Issues of Big Data in China* is written by Huang-Chih Sung, associate professor of intellectual property law in Chengchi University in Taiwan. Since 2015 more and more unfair competition cases concerning big data have occurred in China. A new law from 2017 has significantly improved China’s ability to deal with unfair competition behaviours, but the pattern of such behaviours

is changing and ‘innovating’ quickly, presenting law and legal amendments with a difficulty to catch up. A 2015 OECD white paper pointed out that the data-driven market is much more concentrated than other markets, so the winners often take it all and obtain the dominant position of big data. Issues of competition policy, entry barriers to big data and antitrust are increasingly being discussed. The Paris Convention from 1883 only regulates basic and vague principles of ‘fairness’ and ‘honest practice’ for anti-unfair competition, and thus leaves room for member states to develop their own legal systems according to their special economic, social and cultural conditions. This has later happened both internationally and locally as three concrete Chinese cases demonstrate. According to the author, especially malicious and dishonest practices and harmful behaviour in relation to consumers and a competitive market order should be considered.

Italian scholars seem to have a particular historical and cultural link to China – amongst others due to old missionary and trading relations amongst others. Gianmatteo Sabatino is a PhD candidate in Comparative and European Legal Studies at the University of Trento and has been a visiting scholar at Zhongnan University of Economics and Law in Wuhan, China. His article is entitled *Economic Law and the Development of Digital Markets, between Ethics and Efficiency*. He writes that it is a common view that digitalization did not create a ‘new economy’ but is rather a ‘new tool’ to enable market transactions. It has created stronger ‘consumer sovereignty’ detached from geographical boundaries of the market, but it has also created stronger dominating actors discriminating among users, which may in time reduce efficiency of service and erode state sovereignty. The definition of a new role for economic law in digital markets revolves around at least three critical connections: market efficiency vs public economic policy; contractual rules vs liability regimes; consumer protection vs competition regulation. In China, ‘web-sovereignty’ was developed as a principle functional to protection of public security and interests rather than to economic development. The Chinese model promotes a monitoring role for public authorities, related to the deep integration between cyberspace sovereignty and the coordination of socio-economic development. Its legal system so far, represents the most advanced example of internet sovereignty. Network operators and platforms have close ties with the public powers. This pursues digitalization as a mean to enhance deliberative democracy within the context of a new way of thinking decision-making processes. The ‘modern socialist market economy’ strives for a connection between digitalization and market regulation, which is ultimately serving the purpose of national socio-economic development, and the current struggle against COVID19 bears the sign of such connection. The right to data protection revolves around the position of the individual as a human being,

not as a market operator in line with the ordo-liberal stance on market regulation and competition. Chinese law (also in this field) considers that digital markets, trends such as globalization and sharing, shape and define sets of new moral and ethical rules. The consequence of this approach is the major importance attained by general clauses and broad principles (such as good faith, honesty and credibility). ‘Communicative law-making’ is a typical feature of modern Chinese law.

Corrado Moriconi is another Italian PhD candidate, from Rome but also at Zhongnan University of Economics and Law in Wuhan writing on *Recent Evolution of the Personal Privacy Legal Protection in People’s Republic of China*. His paper aims to set out the current degree of protection that personal information has in China. He writes that China has been slower in developing its own privacy legal model, but that it has in recent years developed a consistent number of regulations. As a global cyber-force, which has undergone a gigantic digital revolution, it has increasingly played an active, sometimes contested role in shaping the digital landscape through collaboration and competition with Western economies. Its policy is different, as is its legislative development. The Cyber Security Law (from 2017) is described as very innovative. It has established principles of consent, of legality, of rightfulness and of necessity, as well as duties and responsibilities for service providers. China’s approach starts from the practical need of developing the data industry but also pays attention to the protection of individual’s right in order to ensure an orderly and healthy environment. The author argues that China can officially aim to become the frontrunner of privacy protection in Asia.

Zeng Chen, is a student from the School of Law at Renmin University in Beijing, who interned at the Renmin Law and Technology Institute at Renmin University of China during 2019-2020. Her article *Chinese Localization of the Right to Be Forgotten* demonstrates the present mutual dialogue and inspiration at different academic, cultural, political and legislative levels between the West, EU and China. The article presents two academic perspectives: viewing the right to be forgotten as a concrete personality right and viewing it as a property right. She further suggests balancing a triangle relationship involving individual-company-government, to analyse regulatory and practical problems in China in relation to the-right-to-be-forgotten. She also draws attention to the principle of informed consent and its possible expansion. Although no right to oblivion appears in the Chinese Penal Code, there is space for constitutional explanations, statutes of administrative efforts, and relevant articles in Civil Law regarding the right to be forgotten. In May 2020 the Chinese Civil Code was adopted strengthening this argument further.

The article *Decoupling Accountability and Liability: Case Study on the Interim Measures for the Opening of Public Data in Shanghai* is the result of a collaboration between assistant professor at the IT University in Copenhagen, Cancan Wang, and her colleague Kalina Staykova, assistant professor at Department of Digitalization at Copenhagen Business School. Their article raises issues of increased demands for accountability, where the procedural steps in achieving accountability are often ignored. They consider the risk of liability for public bodies a barrier to disclosure of data, and present a case study of the link between liability and accountability. They argue that *interim measures* outlining duties for specific entities in data opening may reduce the legal uncertainty around perceived risks of liability, hence potentially contributing to increased accountability. This is another example of the need for and development of novel regulatory approaches in the perhaps emerging global digital legal culture.

Daniel Sprick, a Research Associate at the Chair of Chinese Legal Culture at the University of Cologne addresses the use of technology-led policing in his article on *Predictive Policing in China: An Authoritarian Dream of Public Security*. Predictive policing is frequently criticized in (Western) liberal democracies as an encroachment on civil rights and scrutinized for its limited value because of its inter alia narrow focus on the prevalence of ‘crime’ and its suppression. It may be argued that this critique is less relevant in the Chinese context, as the collective right of security easily supersedes considerations of protection of civil rights and of due process and privacy. The author argues, however, that the application of predictive policing in China is heavily flawed as the systemic risks and pitfalls of predictive policing cannot be mitigated but are rather exacerbated by China’s authoritarian legal system. Predictive policing in China may thus be expected to become mainly a more refined tool for the selective suppression of already targeted groups by the police and does not substantially reduce crime or increase overall security. This view links back to the article by Denis Halis about the concern of dissenters under digitalization.

Marya Akhtar, Senior Legal Advisor at the Danish Institute for Human Rights and External Lecturer at UCPH, Faculty of Law writes on *Police Use of Facial Recognition Technology and the Right to Privacy and Data Protection in Europe*. She examines the human rights challenges of these uses in a European context, and argues that the right to privacy and data protection is fundamentally at risk by this technology. By allowing facial recognition, society allows for an entirely new type of highly intensive surveillance. The use of such technology also entails a risk of a ‘chilling effect’ on e.g. the freedom of assembly, which furthers negative implications on human rights. In both the Council of Europe and the EU ethical and human rights approaches are being

examined and the question of introducing an altogether new legal framework for AI is being raised. This developing cross-disciplinary field explores questions related to ethics vis-à-vis legal obligations – such as state responsibility in relation to product liability; questions related to programming ‘fair’, ‘accountable’ or ‘transparent’ algorithmic models which may ensure human rights in the design, development and deployment of the model. The use of biometric data has been described by the UN Human Rights Commissioner as a paradigm shift due to its dramatic increase in the capacity to identify individuals.

The final article by two authors deals with the use of digital tools by one of the most important institutions of a legal culture, the judiciary. Junlin Peng is a Chinese attorney, who holds a Master of Law, from UCHP, Faculty of Law, while Wen Xiang is assistant Professor, and S.C.Van Fellow of Chinese Law at iCourts, UCPH. In their article *The Rise of Smart Courts in China: Opportunities and Challenges to the Judiciary in a Digital Age* they write that *digitalization* is meant to ‘improve judicial efficiency, contribute to judicial disclosures, provide convenience for people and establish judicial big data’ by carrying out certain litigation activities online. In a Chinese context it aims at facilitating a modernization of trial capacity and trial system. The authors quote President Xi Jinping’s statement that “*there is no modernization without digitalization*”. Judges in China (and elsewhere) experience overload of work, which digitalization is hoped to alleviate. The article describes the use of digital technology and the different steps in the process of digitalization of Chinese courts, which has been going on since 2015. It starts out with the filing stage, and moves on to the (remote) trial stage and alternative dispute resolution online. At the execution state, an electronic delivery system is developed, and a judicial information disclosure platform is established. Live broadcast of (open) court trials are being held online, which make the court trials more accessible to the public. The opportunities of digitalization of China’s courts are described as an improvement of both judicial justice and efficiency. The challenges are described as inconsistencies and restrictions in the e-filing of cases, as well as (insecurity in) e-delivery of documents. Complicated remote online trials may be difficult for litigants to understand, and for judges to handle. However, the authors also write that the concept and theory of law should be viewed and understood in line with the development of the times and technology.

The articles in this issue indicate that major social changes in intimate relation as well as momentous technological changes in relations between humans and technology bring about sometimes quite controversial transformations of values, attitudes and norms as well as a change of the general climate of opinion about law and moral norms.

Combinations of a digital revolution and major as well as rapid social changes may very likely lead to a number of paradigm shifts in both Chinese and Western legal cultures.

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# China's Sustainability Challenges: Confucianization of Chinese Law from Intra- Generational, Inter-Generational and Gender Equity Perspectives

*Simona Novaretti*<sup>1</sup>

**Abstract:** The paper investigates how the leaders of the People's Republic of China (PRC) have re-interpreted the three kinds of "equity" generally considered implicit in the 2030 Sustainable Development Goals (SDGs), namely inter-generational, intra-generational, and inter-gender equity, to fit the country's context. To what extent is China's recent "return to Confucius" paving the way to the use of the law as an instrument of "social moralization"? What impact is this trend having on the achievement of sustainable development within Chinese society? The following sections will answer these questions, showing if, how, and with what consequences, Chinese traditional values have recently undergone a "creative renovation", in order to support, on the one hand, PRC government's commitment to reach SDGs and to back, on the other, its attempt to reweave Chinese social fabric, worn out by the dramatic economic development experienced by the country in the last decades.

## Introduction

The concepts of social inclusion and social exclusion have been introduced in the PRC quite recently, spanning the end of the 20th into the 21st Century (Peng Du, 2013, 44), when the problems connected with the tremendous social-economic development experienced by the PRC after the inauguration of the reform and opening-up policies in 1978 became evident (Peng Du, 2013, 44-45).

The increasing gap between the rich and the poor, the rise of rural/urban and regional disparities, heavy pollution, the unemployed and migrant workers, low coverage of social protection, and - last but not least - the inter-generational gap in living standards, forced the Communist Party of China (hereinafter: CPC) to rethink the development

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pattern, setting up a more sustainable, coordinated, and inclusive model of growth (Peng Du, 2013, *ibid*).

Thus, in 2003 the Third Plenary Session of the 16th CPC Central Committee passed the “Decision upon a Certain Number of Problems with Regard to Consummation of the Socialist Market Economy”, announcing a new policy direction (Hu Angang, 2007, 87) summed up in the notion of “five coordinations” (五个统筹: coordination between urban and rural development, coordinated regional development, overall economic and social development, coordinated harmonious development of men and nature, coordinated domestic development and opening up).<sup>2</sup>

In 2004 the Fourth Plenary Session of the 16th Central Committee of the CPC listed “the capability of building a socialist harmonious society” as one of the five governing capabilities that the CPC endeavors to enhance ([http://cpcchina.chinadaily.com.cn/2010-09/16/content\\_13918117.htm](http://cpcchina.chinadaily.com.cn/2010-09/16/content_13918117.htm)).

Unsurprisingly, it was exactly during those years that Chinese scholars began to show a particular interest in Durkheim’s work.

Indeed, Durkheim’s theory of social solidarity seemed to fit perfectly with the latest Chinese leadership’s catchphrases: the aforementioned “harmonious society”, and “sustainable development”, a notion destined to become, after the enactment of the 11th Five-Year Plan (2006-2011), the model that should have inspired Chinese economic growth, and the way forward for building a moderately prosperous society (小康社会).

According to Chinese scholars, the first use of the latter expression is very ancient, dating back to the Classic of Poetry (诗经 *Shijing*, 11th - 7th century BC). It is also considered the first classical Chinese concept used by the CCP to legitimize its vision for the future of China. Deng Xiaoping mentioned it in December 1979 during a meeting with the Japanese Prime Minister, Masayoshi Ōhira, in which he stated was to “transform China in a well-off society” (中国共产党新闻 *Zhongguo Gongchangdang xinwen*, 1979).

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2 In the “13th Five-Year Plan for Economic and Social Development” (2016-2020), the concept of “five coordinations” was substituted by a new formula, the so-called “five major development concepts” (五大发展理念): innovation, coordination, green, openness and sharing. The full text (in English) of the 13th Five-Year Plan is available online, at: <http://en.ndrc.gov.cn/policyrelease/201612/P020161207645766966662.pdf>.

As remarked by Guo Yingjie:

*“The vision of a ‘xiaokang [moderately prosperous, A/N] society’ is one in which most people are moderately well off and middle class, and in which economic prosperity is sufficient to move most of the population in mainland China into comfortable means, but in which economic advancement is not the sole focus of society. Explicitly incorporated into the concept of a ‘xiaokang society’ is the idea that economic growth needs to be balanced with sometimes conflicting goals of social equality and environmental protection”* (Guo Yingjie, 2008, 52).

Eventually, in December 2014 to “*comprehensively build a moderately prosperous society*” was included by Xi Jinping in the “*four comprehensiveness*” (四个全面战略布局), the new slogan indicating the four main goals that PRC has to reach by 2020 (i.e.: comprehensively build a moderately prosperous society, comprehensively deepen reform, comprehensively govern the nation according to law, and comprehensively strictly govern the Party).

It is worth mentioning, however, that almost in the same period, China had committed itself internationally to reaching other, even more ambitious goals related to sustainable development. I am referring to the “2030 Agenda for Sustainable Development” (hereinafter: 2030 Agenda), adopted by the United Nation Sustainable Summit in September 2015, as the 15-year cycle of anti-poverty Millennium Development Goals (MDGs), signed in 2000, was coming to a conclusion (<http://www.un.org/millenniumgoals/>).

The “2030 Agenda” sets out the 17 Sustainable Development Goals (SDGs) that constitute the guideline and the direction of effort for UN member states to continue over the next fifteen years (2016-2030) (<https://sustainabledevelopment.un.org/post2015/transformingourworld>).

Klaus Bosselmann, in his book on “The Principle of Sustainability. Transforming Law and Governance”, affirms that the principle of equity represents the social dimension of sustainable development (Bosselmann, 2016, 69). According to him, therefore, MDGs’ sustainable development has to be understood as referring to “intra-generational equity” (i.e.: “*the right of people within the current generation of fair access to the Earth’s natural resources*”, or “*the commitment of the states to eradication of poverty*”) and to “inter-generational equity” (i.e.: “*the right of future generations*”).

It is worth noticing, however, that, at least from this point of view, Bosselmann's position is not particularly original. Indeed, in 1987, the World Commission on Environment and Development released the report "On our future" (also known as the Brundtland Report), in which, for the first time, sustainable development was defined as the *"development that meets the needs of the present without compromising the ability of future generations to meet their own needs"* (World Commission on Environment and Development 1987, 41).

Since then, the scholars who dealt with the topic have generally taken for granted the link between the notions of sustainable development and that of equity, not only in the economic and environmental fields, but also in the social one. (Beddler, 2000; Bob, Giddings, Hopwood, O'Brien 2002; Klinsky, Keiner, 2005; Kates, Parris, Leiserowitz 2005; Winkler, 2014; Borowy, 2014).

It is, above all, with regard to the latter that, alongside the intra and intergenerational equity mentioned by Bosselmann, a third type of equity emerges (Bawa, Seidler, 2009, 25). This is inter-gender equity, considered by the "2030 Agenda" as one of the primary sustainable development goals to be globally achieved, to the point to ask UN members to *"adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels"*.

The Chinese leadership fully shares these objectives. Indeed, speaking at the 2015 United Nation Sustainable Summit, Xi Jinping said that *"China makes a solemn commitment that it will shoulder the responsibility of implementing the post-2015 development agenda, and seek solidarity and cooperation to constantly push the cause of global development"* (Ye Jiang, 2017, 120).

The present paper examines the process through which China is pursuing the construction of a "harmonious society", on the one hand, and the implementation of the UN 2030 sustainability goals, on the other.

To this end, it investigates how, in the PRC, the three kinds of "equity" mentioned above have been re-interpreted to fit the local context, with particular reference to the values generally considered at the core of Chinese traditional culture. These are the Confucian principles of 孝 *xiao*, filial piety; 仁 *ren*, benevolence; and 同异/分 *tongyi/fen*, identity and difference/rights and duties.

Indeed, Chinese and Western legal scholars has dedicated many works to the influence exerted by Confucianism on Chinese law and legal practice, from the imperial era to present days (Chen Jianfu 2016, 5-24; Huang 2015; Kang Xiaoguang, Huiqing Liu, 2006). Equally studied is the impact that the diffusion of Confucian ideology in China and in other East-Asian Countries had (and still have) on the role of women within family and society (Martin, 1990; Li Chenyang, 2000; Bell, 2003). Still little known, however, is the effect that the “rediscovery” of Chinese traditional values by the current CPC leadership and the incorporation of them in the most recent PRC legislation have had, and could have, on the implementation of SDGs, especially when it comes to inter-generational equity, intra-generational equity, and – last but not least – inter-gender equity.

The present paper aims to fill this gap, showing if, how, and with what consequences, the above mentioned concepts of 孝 *xiao*, 仁 *ren*, and 同异/分 *tongyi/fen* have recently undergoing a “creative renovation”, in order to support, on the one hand, PRC government’s commitment to reach SDGs and to back, on the other, its attempt to reweave Chinese social fabric, worn out by the dramatic economic development experienced by the country in the last decades. Indeed, without social cohesion, not only the “great rejuvenation of the Chinese nation”, desired by Xi Jinping would remain an impossible dream, but also PRC political stability could be put at risk.

To what extent can China’s “return to Confucius” pave the way to the use of the law as an instrument of “social moralization”? What impact can this trend have on the realization of the mentioned three types of equity within Chinese society?

I will attempt to answer these questions in the following sections. Nevertheless, since the inclusion of the principle of solidarity in Chinese legislation preceded the revival of Confucian values, the analysis of the developments that brought to its incorporation will come first.

## Solidarity and the Law in 21st-Century China: 2004 PRC Constitutional Amendments

As mentioned above, it was at the beginning of the new century that Chinese leaders became aware of the need, for PRC, to shift towards a more sustainable model of development. From a legislative point of view, 2004 proved to be a turning point. Indeed, it was in that year that the National People’s Congress (NPC) amended the PRC Constitution for the fourth time since its enactment, in 1982. This amendment is

well known for its definition of private property as “inviolable”<sup>3</sup> and the introduction of a provision on the protection of human rights (art. 33, paragraph 3).<sup>4</sup>

It is worth noticing, however, that at least one of the 13 changes made to the text also constitutes an answer to the need for social solidarity that had recently emerged from within the people, and a proof of the government’s desire to recast itself as a defender of the poor and the powerless, as repeatedly affirmed by Premier Wen Jiabao and other Chinese top officials during the same annual session of the NPC (Buckley, 2004).

Indeed, the paragraph added to Article 14 of the Constitution says:

*“The state establishes and improves the social security system fitting in with the level of economic development”.*<sup>5</sup>

Following the introduction of this provision many laws and regulations were amended, such as the “Basic Medical and Health Care Law” (2009), the “Social Insurance Law” (2010), the “Law on the Protection of Mental Health” (2012), the “Civil Procedure Law” (2012, 2017), the “Interim Measures for Social Assistance” (2014), the “Environmental Protection Law” (2014), and the “Charity Law” (2016).

One needs only to read the titles of these laws to recall Durkheim’s theory of law as a mechanism of social integration (Corne, 1997, 4 and following pages). According to Durkheim, different forms of law express different forms of cohesion (Corne, 1997, 5). Penal and repressive law as exemplified in the legal system of Imperial China, for example, expresses what he refers to as “mechanical solidarity” - a kind of cohesion based on shared beliefs and values among average members of the same society. In other areas of law or in other ages, however, law can convey what Durkheim calls “organic solidarity”. More precisely, it can work as a “moral agency”, becoming the expression of a pre-existing moral *milieu*, which shapes and governs the principles under which social behaviors occur and are enforced. This seems exactly to be the function attributed to certain provisions passed during the last decade, in particular after 2012 Xi Jinping’s call

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3 See art. 13 of PRC’s Constitution as modified according to art. 22, Amendments to the Constitution of the People’s Republic of China(中华人民共和国宪法修正案 *Zhonghua renmin gongheguo xianfa xiuzheng’an*), adopted at the Second Session of the Tenth National People’s Congress of the People’s Republic of China on March 14, 2004.

4 See art. 33, paragraph 3 of PRC’s Constitution as modified according to art. 24, Amendments to the Constitution of the People’s Republic of China (2004), cit..

5 See art. 14, paragraph 4 as modified according to art. 23, Amendments to the Constitution of the People’s Republic of China (2004).

to “*achieve the Chinese dream of the great rejuvenation of the Chinese nation*” (实现中华民族伟大复兴的中国梦).

This slogan emphasized the link between Chinese tradition and the national interest as interpreted by current Chinese leaders. Undeniably, since Xi Jinping’s accession to power, not only have the official references to China’s glorious past become more frequent, but the knowledge of Confucian classics has also come back into fashion among Chinese bureaucrats, being critical to understanding the messages - explicit or hidden - contained in the speeches of the new leader (Scarpari, 2015, 163-178).

It is worth noticing that, at the present stage, Chinese leaders tend to identify “Chinese traditional culture and values” with those proper of Confucian orthodoxy, with little, if any, attention to the concepts contained in other ancient Chinese philosophers’ books, such as the Han Feizi (Master Han Fei) or the Shangjunshu (The Book of Lord Shang). Indeed, allusions to the latter works (and, more in general, to the concepts elaborated by the so-called legalist thinkers) are rarely mentioned in reference to the “moral basis” of Chinese society. They are, instead, frequently used when it comes to the fight against corruption, being very suitable in reminding Party officials the centrality of the State and the rigidity of the law, to which everyone - and they possibly more than anybody else - is subject (Scarpari, 2015, 39).

From this point of view, the new emphasis on the ancient Chinese-Confucian tradition seems clearly not only a reflection of PRC leaders’ will to reaffirm Chinese “soft-power” and improve the international image of China. It is also a way of re-introducing traditional moral concepts in order to “rebuild” the social cohesion apparently lost with the reforms. To this end, the law plays a key role, as evidenced by the new “Confucianization of law” (T’ung tsu Ch’ü, 1961, 267-279) which has been witnessed in recent years, in particular with reference to the areas linked to sustainable development. As “filial piety” (孝 *xiao*) is considered one of the main Confucian virtues, the analysis of this trend will start with a quick look at the provisions regarding “inter-generational equity” and their relationship with the principle of *xiao* in the present Chinese legal system.

### 3. "Sustainable Development" and Equity in 21st-Century China: Towards a "Moralization" of Chinese Law?

#### Inter-generational Equity

The Xiao Jing (孝经, "Classic of Filial Piety", V-III century BC) defines "filial piety" as: *"the root of (all) virtue, and (the stem) out of which grows (all moral) teaching"* and the *"perfect virtue and all-embracing rule of conduct, through which [the ancient kings] were in accord with all under heaven. By the practice of it the people were brought to live in peace and harmony, and there was no ill-will between superiors and inferiors"* ((孝經, - 開宗明義, Xiao Jing - Kaizong mingyi (Xiao Jing, Scope and meaning of the treatise) paragraph 1).

Therefore, it is not surprising, that CPC's leaders have begun their attempt to use traditional ethics to "re-sew" the Chinese social fabric through a re-evaluation of this virtue, thus filling the ideological vacuum that has eroded the popular consensus towards the Party (Scarpari, 2015 B, 115 – 116).

Indeed, the core of filial piety inherited from traditional Chinese culture refers to the duty of the offspring to provide care, respect, and financial support for their parents, and to please them by showing obedience and regards. Nevertheless, filial piety must not only demonstrate a benevolent heart to take care of the parents' interests: it also requires support for a hierarchically higher status position of the parent versus the child, and the ruler versus his subjects and ministers (Cheung, Kwan, Ng, 2006, 618).

Thus, introducing this principle into the legislation, could help the Chinese government to alleviate the pressure on the welfare system, resolving the problem of senior citizens forced to live in conditions of insecurity and loneliness without adequate forms of assistance, which is becoming particularly serious in the country with the largest amount of older people in the world (Peng Du, 2013, 59). Moreover - and even more importantly - it could be useful to strengthen CPC's authority, preventing it from being overwhelmed by waves of people's protests (Scarpari ,2015 B, 116).

This, of course, does not mean that China is the only country in the world using the law as a tool to bolster filial and family responsibility. On the contrary, over the last few years many governments around the globe have enacted legal and administrative provisions to enforce filial and family responsibility, and sustain solidarity within the family, in order to relieve their responsibility for old people's care (Cheung, Kwan, Ng, 2006, 617).

Nor it is the first time, in Chinese history, in which filial piety is included in legislation. In his recent paper on the combining of morality and law in China's past and present, Philip Huang remarked that in the Qing code, "*filial piety was expressed partly in terms of punishments for those who do not provide maintenance for parents in old age*". Great importance was given to this principle both in the early twentieth century - when, despite the legislators massive copying from the German Civil code, Republican Chinese law retained this essential dimension of the law, so that children were required almost unconditionally to support their parents in their old age - and in the first decade of the "reform and opening up period" (Huang, 2015, 10).

Indeed, according to art. 13, paragraphs 2 and 3 of the Law of Succession of the People's Republic of China (中华人民共和国继承法, 1985):

*"At the time of distributing the estate, successors who have made the predominant contributions in maintaining the decedent or have lived with the decedent may be given a larger share. At the time of distributing the estate, successors who had the ability and were in a position to maintain the decedent but failed to fulfil their duties shall be given no share or a smaller share of the estate".*

The most recent development of Chinese legislation, however, seems to demonstrate a new, original and typically Chinese attitude towards "inter-generational solidarity", interpreted according to the principle of "filial piety".

Consider, for example, the last revisions (2012, 2015, and 2018) of the "Law on the Protection of the Rights and Interest of the Elderly" (中华人民共和国老年人权益保障法, hereafter: *LPRIE*). It is worth noticing that the legislators, since the 2012 revision, have deemed it necessary to almost double the number of its articles (now 85, compared to 50 in the 1996 and 2009 versions), demonstrating the increased importance attributed to the topic by the Chinese leadership. Moreover, the same revision - perhaps not coincidentally passed by the Standing Committee of the NPC after Xi Jinping's rose to power and his aforementioned call to the recovery of traditional values - added to the *LPRIE* provisions, which do not just reaffirm the obligation of children to take care of aged parents from an economic point of view. They also embody other duties (namely: respect, obedience, greeting, and pleasing), traditionally connected to the concept of filial piety (Cheung, Kwan, Ng, 2006, 618), but apparently more relevant to the sphere of private life and morality than to the realm of public regulations and codified norms (Scarpari, 2015 B, 122).

To take a few examples, paragraph 1, art. 18 of LPRIE (2018) states that: “*Family members shall care for the mental needs of the elderly, and shall not ignore or cold-shoulder the elderly*”, while paragraph 2 of the same article establishes the duty, for family members living apart from the elderly to “*frequently visit or greet the elderly*”. It seems rather difficult to check whether Chinese people follow these, quite vague, rules. Besides, to date the law does not provide any sanction in case of failure to follow them. Nevertheless, the pressure exerted by Chinese media on citizens to respect these norms, and consequently the principle of filial piety, is strong (Scarpari, 2015 B, 123). It is evident, however, that the goal is not just the return of respect for one’s family. What is at stake, today as in the imperial era, are the obligations towards the elderly, the superiors and, ultimately, the government and the Party (Scarpari, 2015 B, 123). Regarding inter-generational solidarity, therefore, one can truly say that the law functions as a “moral agency”; but of a morality, and a “solidarity”, once again at the service of power.

### Intra-generational equity

Maurizio Scarpari, in his book on the revival of Confucian principles in today’s China, remarks how, according to Confucian thought, the foundations of filial behavior are love (爱 *ai*) and respect (敬 *jing*). Love and filial respect (孝 *xiao*) and love and respect for the older brothers (悌 *ti*) are the foundations of love for the other human beings (仁 *ren*), which is the ultimate Confucian virtue, born out of the love that individuals show to their fellow humans (Scarpari 2015 B, 67).

As expressed in Confucius’ Analects:

“*Filial piety and fraternal submission are the root of all benevolent actions* (仁之本与 *ren zhi ben yu*)” (孔子, “论语 – 学而”, 1.2, Confucius, “Lunyu (Analects), Xue er, 1.2); “*Benevolence* (仁 *ren*) *is love all men* (爱人 *airen*)” (孔子, “论语 – 颜渊”, 12.22, Confucius, “Lunyu” (Analects), Yan Yuan, 12.22).

Benevolence (or humaneness, as *ren* is sometimes translated into English) stems from filial piety. The prevalence of one principle over the other has been differently interpreted throughout Chinese history; nevertheless, the interdependency of benevolence and filial piety has always been considered as the key of harmony (和 *he*) and social order (治 *zhi*) (Scarpari, 2015 B, 117).

The goal of moralizing Chinese society, making it more harmonious and “moderately prosperous” through a sustainable development which would not threaten the social stability of the PRC, cannot, therefore, be pursued without taking into account these two concepts.

In the preceding section we have seen that, since 2012 LPRIE’s revision, all the components of filial piety, including the most “private” ones, have become legal obligations, in order to bring about through law what can be considered as “inter-generational equity with Chinese characteristics”.

The relevance of filial piety among Chinese fundamental legal principles was, then, definitely affirmed in 2017, with the approval of the General Part of the Civil Code (民法总则, hereinafter: GPCC).

The GPCC, considered as “*the first and foremost step in the ongoing Chinese civil law codification*” (Zhai Tiantian, Chang Yen-chiang, 2019, 2), will become the first book of the forthcoming PRC’s Civil Code, expected to be approved in 2020. Accordingly, the GPCC plays a guiding role for subsequent sections of the Civil Code, including property, contracts, personality rights, torts, marriage, family, and inheritance, and establishes the basic principles of China’s civil law. Among them, we find the principle of *xiao* as expressed in the LPRIE, as GPCC’s art. 26, paragraph 2, states that:

*“Adult children have the obligations of supporting, assistance, and protection of their parents”.*

It is worth noticing, however, that, according to orthodox Confucianism, filial piety does not impose duties only on one part of the relationship: the older generation also has obligations towards the younger.

As remarked by Mencius (IV - III century BC), the philosopher considered the “Second Sage” of Confucianism, after Confucius himself: “*Treat your elders as elders, and extend it to the elders of others; treat your young ones as young ones, and extend it to the young ones of others; then you can turn the whole world in the palm of your hand*”.

In this sense, it is possible to say that the concept of *xiao* is very close to the aforementioned Bosselmann interpretation of “inter-generational equity” as the “rights of future generations<sup>6</sup>”.

The latter expression is generally understood as the “*constraint on a natural inclination to take advantage of our temporary control over the earth’s resources and to use them only for our own benefit without careful regard for what we leave to our children and their descendant*” (Brown Weiss, 1990, 200). In other words, sustainability compels us to look at the earth and its resources not only as a good to be exploited, but as a sort of “trust”, passed to us by our ancestors for our benefit, and to be passed on to our descendants for their use. To employ an effective expression of Edith Brown Weiss, we all are “*both trustees for the planet with obligations to care for it and beneficiaries with rights to use it*” (Brown Weiss, 1992, 19-20).

From this perspective, it is not only easy to understand why sustainable development is generally considered by Western scholars to be “*inherently an inter-generational question as well as an intra-generational question*” (Brown Weiss, 1992, 19).

Looking at the Chinese context, and taking a step forward, it is also possible to see to what extent the traditional concepts of filial piety, benevolence and harmony are bound together, and - most relevant for present purpose - how useful they can be to boost the PRC government’s current policies and goals, especially, but not exclusively, in the environmental field (Pan Yue, 2006).

The concept of *ren*, the idea of being empathic, putting oneself in the place of another, and the Confucian way of extending love and favors, are closely intertwined with the relationship between human beings and nature, individuals and society, self and others (Guo Qiyong, Cui Tao, 2012, 20). Moreover, the Confucian theory and praxis of 仁诚 (*rencheng*, paramount virtue and sincerity) and 仁义礼 (*renyili*, benevolence, righteousness and rites) are traditionally considered beneficial to the regulation and harmonization of individual, community, the Nature and the Supernal Dao, the latter intended, as in the Doctrine of the Mean (中庸 *Zhongyong*, one of the “Four Books” of Confucian philosophy), in the sense of “*sincerity and the born nature of the sage*” (Guo Qiyong, Cui Tao, 2012, 48, 51). Renovating them creatively, therefore, can help the reconstruction of core values in Chinese modern society, promote social stability, and benefit the construction of a harmonious world, as desired by the leaders of the

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6 See *supra*, paragraph 1. Introduction.

PRC. It is not by chance, therefore, that the Chinese legislators incorporated some of the virtues/duties related to *ren* in 2017 GPCC, making this concept one of the principles which inspire basic civil law rules related to “intra-generational equity”, and (consequently) increasing the space given to morality and solidarity in the Chinese legal system.

Let us take some examples, starting from art. 9 of the GPCC.

According to that article:

*“The parties to civil legal relations shall conduct civil activities contributing to the conservation of resources and protection of environment”.*

This provision is certainly part of the effort to build an “ecological civilization” in order to respond to the PRC’s environmental problems, as recommended by the Party since the beginning of the second decade of the XXI century. Through it, for the first time in China, a private law - and not, as usual, an environmental law, or other public laws - adopts the “green principle”, imposing a mandatory requirement for the protection of environmental and natural resources on individuals in their private legal relations/activities (Zhai Tiantian, Chang Yen-chiang, 2019). Art. 9, however, does not look very easy to implement. The experience of the last few years concerning environmental damage lawsuits has shown how, in cases of pollution or disruptions of the ecosystem, it is often very difficult for the judges to quantify the loss, to calculate the compensation and (sometimes) even to decide who should be compensated. From this point of view, one can reasonably expect that the evaluation of whether, and how much, a civil relationship “contributes” to the conservation/protection of the environment will be even more complex, and sometimes probably impossible.

Furthermore - as we have noticed above, with reference to art. 18 of the LPRIE - the GPCC does not provide for any penalty where a civil activity does not bring any benefit to the ecosystem. Of course, the GPCC is only the first book of the forthcoming Chinese Civil Code; therefore, there is still the possibility that the subsequent sections of the Code will contain provisions regarding how art. 9 should be implemented in judicial practice.

At present, however, rather than a binding rule, it appears to be no more than a message, it seems to be a message, intended for the rest of the world as much as for the citizens of the PRC. On the one hand, it shows the determination of China to

fight environmental degradation and pursue sustainable development; on the other, it reminds the Chinese people, in the form of a legal provision, of the traditional Chinese duty to live in harmony with nature as imposed by the principle of benevolence (Anh Tuan Nuhuen, 2011, 555; Yao Xinzhong 2014). According to Confucian eco-ethics, in fact:

*“A man of the virtue of ren 仁 will love everything in Nature on his own initiative rather than cause a wanton destruction to them. Chengwu (诚物, to fulfill others) not only relates to living things, but also to stocks and stones, for every single substance on earth is a part of eco-life” (蒙培元 Meng Peiyuan, 2004, 32-33).*

Indeed, two of the most authoritative books of Confucianism, “The Doctrine of the Mean” and “The Book of Mencius”, have very strong insights into the theory that human nature is similar to the nature of things (Li Tianchen, 2003).

“Similar”, however, does not mean “equal”, at least according to traditional Chinese thought. In Mencius’ words: *“It is the nature of things to be of unequal qualities”*. The Confucian *ren’ai* varies from sphere to sphere in nature: it proceeds from one’s close connections to people generally, and then to every being on earth, with an incremental distance. The principle of human relations, therefore, is more important in comparison to the principle of the relationship among beings. For Confucius, benevolence consists, first of all, in *“loving others”* i.e.: to show compassion and concern for the disadvantaged.

As pointed out by Guo Qiyong and Cui Tao:

*“Confucian benevolence is a moral sense beginning with those who are dear - loved. Above all, one must be filial to his parents and adore his brothers. Then he must branch out from this feeling, considering others and empathizing with the heavens, the earth, with people and things, and with his own heart. Only thus can benevolence become a universal sense compassion and righteousness. As to the import of benevolence, Confucius specified three aspects: “loving others”, “having kindly feelings towards everyone” and “cultivating in oneself the capacity to ease the lot of the whole populace”.*

All these principles are generally considered to be deeply rooted in Chinese culture and tradition, to the point that, during the Maoist era, they have even been able to resist, to some extent, the banishment of the “old ideologies” on which they were originally based. In the last forty years, however, the economic and social changes resulting from the reforms seem to have swept away from Chinese people every remnant of empathy

and solidarity towards the others, replacing them by the desire to get rich at any cost, and by increasing cynicism and individualism (Yan Yunxiang, 2009; Liu Changyuan, Song Wang, 2009).

As noticed by Maurizio Scarpari, Xi Jinping's "Chinese dream" also aims to solve this question, which can potentially threaten harmony and social stability, and - last but not least - the international image of China. The idea is "*to promote the values that have made Chinese civilization great to build a new socialist morality, which can conjugate socialist principles with the humanistic spirit of Confucianism; which can speak the language of man and not only of economy; which can talk of solidarity and not only of individualism [...]*" (Scarpari, 2015 B, 9).

Indeed, the dramatic loss of "compassion" of the people of the PRC has become quite evident in the last decade, mainly due to a series of accidents reported by Chinese and Western media. The most impressive of them is certainly the case of Wang Yue, which took place in Foshan (Guangdong), in October 2011. Wang Yue, a two-year-old girl who wandered around an alley after escaping her mother's surveillance, was run over twice, by two different trucks, while eighteen passers-by, including a woman with her own child, ignored her as she writhed in pain for more than seven minutes. Only a female rubbish scavenger eventually helped and sent her to a hospital for treatment; Wan Yue, however, succumbed to her injuries and died eight days later. The footage of the event, recorded by a closed circuit television installed in the street where the incident occurred, was released on the web, causing a widespread reaction in China and overseas, and becoming a symbol of contemporary Chinese society's growing apathy (Demick, 2011; Chin, 2011; Jiao Haiyang, 2011; Chen Weihua, 2011).

The impression that China was becoming a "nation of 1.4bn cold hearts" (Zhang Lijia, 2011) was further confirmed by several other deaths that occurred around the same time. Among them, the death of a 5-year-old boy, injured by a minivan who eventually died on the way to the hospital, after other drivers and passers-by had refused to help his mother to rescue him (The Sidney Morning Herald, 2012; Zhang Lijia, 2011), and that of an 88-year-old man. The latter - who had fallen over face down at the entrance of a vegetable market near his home and who was ignored by people for almost 90 minutes, before his daughter found him - died because of a respiratory tract clogged by a nosebleed; if anyone had turned him over, he might have survived (Fallows, 2011; Zhang Lijia, 2011).

I am talking about these cases because, according to some legal Chinese scholars, this behavior is not only due to the Chinese people's loss of moral sense, but also to loopholes in Chinese legislation. The "breakdowns in solidarity" that China has experienced in recent years would therefore not be anything other than "anomie" in the Durkheimian sense: the lack of normative regulation necessary to ensure social integration.

This opinion is undoubtedly grounded in legal practice: in several cases, people who had received help had sometimes gone on to sue their rescuer, often in the hopes of winning damages, fuelling the perception that offering assistance was too risky.

One of the most famous cases in this regard occurred in 2006, when Peng Yu, a 26 year-old student in Nanjing (Jiangsu), was sued by a 65-year-old woman for pushing her to the ground at a bus stop.

Peng was ordered by the court to pay 45,877 yuan (HK\$57,600), a large share of the woman's medical bill, in an original ruling in September 2007, despite he insisted he had simply helped the woman after she fell over. The judge decided in favor of the woman based on the assumption that "*Peng must be at fault. Otherwise why would he want to help?*" adding that, if Peng had not felt guilty, his action would have been contrary to common sense (Zhang Lijia, 2011). A similar case, but with an even more tragic epilogue, occurred in 2014, when a man from south China's Guangdong Province aided a senior citizen, and was lately accused of knocking him down. The man committed suicide when faced with demands for compensation (Xiang Bo, 2017).

In order to change public attitudes towards helping others, in the last few years many local governments have started legal experiments, in the hope that the law could accomplish what ethics seemed unable to do (Xinhua, 2017).

The first Chinese provision which tried to promote "solidarity among the people" was probably the "Shenzhen Special Economic Zone good Samaritans' Right Protection Regulation" (深圳经济特区救助人权益保护规定 *Shenzhen jingji tequ jinju ren quanyi baohu guiding*) - more commonly referred to as the "Good Person's Law" - which came into force on August 1, 2013 (Dzodin, 2013; Tang Menyun, 2014).

This very short regulation (only ten articles) liberates good Samaritans from any legal responsibility for the condition of the person they assist, except in cases of gross negligence (art. 4) and shifts the burden of proof from the helper to the person in need

of assistance (arts. 3 and 4). Furthermore, it provides for significant punishment, that includes both fines and imprisonment, for those who falsely accuse those who come to their aid (art. 6). Finally, it provides rewards and other protections for the aiders, to be established by the relevant provisions of other laws and regulations (art. 9).

It is interesting to read the words used on China Daily by a (foreign) advisor of Tsinghua University, Harvey Dzodin, to welcome the enactment of this regulation. After observing that the new “Good Person’s Law” “*brings China back to some of its ancient core values*”, he noticed that it has:

*“the potential to help rejuvenate the nation and the well-being of the people by promoting traditional Chinese values. The law frees good persons from worrying about their liability when coming to the assistance of those who appear to be in difficulty [...]. I’ll be rooting for the law to be a success and used as a model for a national law to help fulfill the Chinese Dream and build a more harmonious society at the same time”.*

The author’s wishes would become reality a few years later, once again through the enactment of the 2017 General Part of the Civil Code.

Art. 184 of the GPCC states that:

*“A person who voluntarily provides emergency assistance and causes harm to the recipient of assistance shall not assume civil liability”.*

It is clear that art. 184 - depicted by Chinese media as a provision that will “*protect people who are ready to help others*” - does not cover all the cases envisaged by the Shenzhen regulation. On the contrary, it applies only to a single, rather infrequent, situation: the one in which well-intentioned people are made liable for injuries they cause in the course of attempting to help a person in danger. Moreover - and, again, differently from what is provided for by the Shenzhen Good Person’s Law - art. 184 provides that the aiders shall never be liable under any circumstances (Donald Clarke, 2017).

As noticed by Donald Clarke, this did not happen by chance: the legislative history makes it clear that this was in fact the desired outcome. Art. 184 CPCC, which in its original version provided that the good Samaritan could be liable for gross negligence, was amended twice in order to remove any reference to liability for aiders. According to some delegates, in fact, even the most remote possibility of being held accountable

for any damage to the person in danger could have discouraged potential saviors from helping.

The result is definitely an original provision, which, for its extreme imbalance in favor of rescuers, seems to have no equal in any other legal system in the world.

The risk, as pointed out by both by Western and Chinese observers, is that, due to the formulation of art. 184 GPCC, good Samaritans who know little about medical treatment could bring serious harm to people in critical condition.

This hazard, though, is probably considered acceptable by Chinese leaders, with respect to the possibility that the Chinese citizens - once freed from the fear of any retaliation thanks to the wording of the article, - can return to acting according to the feeling of “benevolence” in the sense of “loving others”. Once again, the revival (and the incorporation into the law) of a traditional value may help the PRC to achieve two important policy goals: the realization of “intra-generational equity” provided for by the “2030 Agenda”, on the one hand, and the increase in social stability and harmony among the people, on the other.

However, not all the basic principles of traditional Chinese thought may be equally useful to achieve the commitments of sustainable development assumed by PRC at international level. On the contrary, they can sometimes constitute the greatest obstacle to their accomplishment. This is, in my opinion, the case of what we have above considered as the “third pillar” of sustainable development, namely: inter-gender equity. Reaching this goal seems to have become especially problematic for the Country in recent years, in particular due to the re-Confucianization of law and legal practice that, as we have seen above, have characterized Chinese policy in particular since Xi Jinping’s accession to power. It is, therefore, to the analysis of the multifaceted relationship between legality, morality and “inter-gender equity” in PRC of the 21st Century that the next (and last) section will be dedicated. In order to make the context clearer, however, some mention of the connections between traditional values and gender issues will precede the discussion.

## Intergender equity

In his paper on “The Confucian Ideal of Harmony”, Li Chenyang noticed that the word usually translated into English as “harmony”, 和 *he*, pre-dates Confucianism (Li Chengyang, 2006, 583). Indeed, its earliest form can be found in the inscriptions

on bones and tortoise shells from the Shang dynasty (sixteenth to eleventh centuries B.C.E.) and later more frequently in inscriptions on the bronze utensils of the Zhou dynasty (1066-256 B.C.E.) (郭齐, Guo Qi, 2000, 451- 466). In these texts, its meaning generally has to do with sounds, and to how sounds interact with one another. Only later did its significance evolve, passing from “mutual responsiveness” among sounds to “harmony” in the sense of sounds combined in a “appropriate” way. Indeed, the earliest uses of *he* in this sense can be found in the “Guoyu” 国语, a classic text written during the Spring and Autumn period (770-476 B.C.E.), which employed the term to indicate a dynamic state of music rather than simply one sound responding to another. From the rhythmic interplay of various sounds, either in nature or between human, the meaning of *he* was then expanded, by analogous thinking, to mean harmony in other contexts, and hence harmony in general. This is probably the reason why, in pre-Confucian and Confucian scripts, harmony presupposes the existence of different things, and implies a certain favorable relationship among them.

According to Shi Bo, a pre-Confucian scholar-minister who lived toward the end of the Western Zhou period (1066-771 B.C.E.):

*“Harmony (和 he) is indeed productive of things. Sameness (同 tong), on the contrary, does not advance growth. Smoothing one thing with another is called harmony. For this reason, things come together and flourish. If one uses the same thing to complement the same thing, it is a dead end and will become wasted. (国语郑语, 1.5, Guoyu - Zhenyu, 1.5)”*

As noticed by another pre-Confucian scholar-minister, Yan Zi, and reported in the “Commentary of Zuo” (左傳 Zuo zhuan, IV century B.C.E), a harmonious world must be a diverse world. As a symphony requires a variety of sounds, and a good soup needs a variety of ingredients, a harmonious relationship presupposes that the parts have different perspectives and different views on various issues. Sameness without adequate differences precludes harmony: in cooking and making music, *he* (harmony) should not be confused with *tong* (sameness), and the same applies to the relationship between the ruler and the minister (春秋左傳 昭公, 2.7, Chunqiu zouzhan - Shaogong, 2.7).

As is well known, *he* in the sense of harmony would later have become a central concept for Confucianism. Indeed, in the “Analects” Confucius adopts the ideal of harmony, making it a criterion for the “gentleman” (君子 *junzi*). He says that:

*“The gentleman (junzi) acts in harmony with others (he) but does not seek to be like them (tong); the small man seeks to be like others and does not act in harmony”* (孔子, “论语 - 子路”, 13. 23, Confucius, “Lunyu (Analects), Zilu, 13.23).

To sum up, “harmony”, according to Confucian thought, depends on differences, in nature as in social and family life. This idea is reflected in the Confucian “five key relationships” (五伦, i.e.: the relationship between sovereign and subject, father and son, husband and wife, elder and younger son, and the relationship between friends) in which each part of the relation has to follow his/her own *li* (礼, norm of proper social behavior) towards the other, according to their mutual hierarchical status. Moreover, it is the concept underlying all traditional Confucian virtues, whose essential purpose - as pointed out by Mark Elvin - is to “*[to stabilize] a society that was ordered according to a hierarchy of age, and divided into kin-groups based on male dominance and male descent lines*” (Elvin, 1984, 111).

It is not surprising, therefore, that - since the Han era (206 B.C.E. - 219 C. E.), when Confucian thought became the state ideology - the penal sanctions of the law have been adduced to enforce the Confucian morality embodied in the *li*. Since the *li* made fine distinctions based on sex, seniority, and degree of kinship, these distinctions were enshrined in the law as well. As pointed out by Teemu Ruskola: traditional Chinese law was “*essentially a moral code calling for social hierarchy and inequality*” (Ruskola, 1994, 2533).

This had an impact also on gender issues. It is interesting to note that in the “Analects” Confucius mentioned women only once, in chapter XVII, saying that: “*Women and small men are difficult to nurture. If you get too close to them, they become uncompliant, and if you stay too distant, they become resentful*” (孔子, “论语 - 陽貨” 17.25, Confucius, “Lunyu (Analects)”, Yang Huo, 17.25).

In the opinion of Gao Xiongya, from this passage we should conclude that the philosopher considers women as “inferior men”, unable to communicate and to understand. Moreover, he seems to suggest that they are to be forgotten or at least ignored. Whether Gao is right or not, Confucius followers developed “ceremonial rites” (*li*) for women based on the above quote, in order to “*encourage and teach feminine virtues desirable from the male point of view*” (Gao Xiongya, 2003, 115).

During the Han Dynasty, these rites were codified as the Three Obedience (三从 *sancon*), according to which women had to obey to the father before the marriage, to

the husband during marriage and to the first son after the husband's death, and the Four virtues (四德 *side*), namely: (sexual) morality, proper speech, modest manner, and diligent work (Gao Xiongya, 2003, 116). The “*original Confucian indifference for women*” (Ruskola, 1994, 2544), therefore, eventually led to an attitude that has been characterized as misogynist, as exemplified by such sayings as “Starving to death is a small matter, but losing one's chastity is a grave matter” (饿死事小 失节事大 *e si shi xiao shi jie shi da*) (Vivien W. Ng 1987, 60) or “Lack of talent is a virtue in a woman” (女子无才便是德 *nüzi wu cai bian shi de*) (Van Gulik, 1961, 374; Gao Xiongya, 2016, 116 and 120). Due to the “Confucianization of law”, imperial legal rules could not but reflect this approach.

Indeed, marriage and family stood at the very center of traditional society and culture; furthermore, in imperial China there was an overall acknowledgement of the general importance of family to the welfare of the polity. Notwithstanding this (or maybe exactly for this reason) the autonomy of family was well respected (Ruskola, 1994, 2543), in the belief that “*respectable people will be able to settle such matters outside of court*” (Schwartz 1968, 68). Thus, for example in the Qing era (1644 - 1912), marriage was essentially a customary institution, to the point that no bureaucratic registration was required. Besides, even in the cases in which laws regulating marriage and family existed, their enforcement was frequently left to the family, the clan, or other extrajudicial bodies (Teemu Ruskola, 1994, 2543). Both the Qing laws and the clan rules, however, were founded on the assumption of gender inequality; they both reinforced and reflected women's subordination in customary morality, allowing for systematic discrimination against the female members of the family (Teemu Ruskola, 1994, 2546).

It is worth remembering that the first Chinese law to adopt the principle of gender equality was the Guomindang (hereinafter: GMD)'s Civil Code of 1929-1931. The Code for the first time envisioned women as independent free agents. According to its provisions, for example, they inherited property as men did, enjoyed the same rights to marriage and divorce as men did, and they could exercise full control over their lives no less than men (Philip Huang 2001, 59-62). The GMD's law and legal institutions, however, were far from reaching the Chinese people and had no substantial impact on the society at large (Chen Jianfu 2016, 40), since, as it is well known, for political and historical reasons, they had been in practice only applied in large cities or coastal provinces (Walstedt, 1978, 385).

It was, therefore, only after the foundation of the People's Republic of China in 1949 that the principle of inter-gender equality really found its expression in the legal system (Ruskola, 1994, 2538). The Marriage Law of 1950, for example, provided for a complete equality between sexes in marriage and family life, affirmed the right of women as well as men to divorce and to remarry, and allowed women to own property (Walstedt, 1978, 386-7, Yuan Yuan, 2017). All propaganda methods were used, at that time, to spread these (almost) new ideas within Chinese society; the greater part of this material, however, was not directed at making the people aware of their rights, but at their political and moral education (Ruskola, 1994, 2538; Meijer, 1978, 475-476).

In this regard, it is interesting to notice that the government retreated from this campaign and - more generally - from its activist approach to marriage reforms when it became clear that the attempts at implementation of the new Marriage Law were bringing violence and chaos to the Country. In fact - as reported by Sheila Leader in 1973 - in the years immediately following the enactment of the Marriage Law, many women were horribly beaten or tortured by family members, often in complicity with the local cadre, only because they had attempted to obtain divorce. Furthermore, an estimated 70,000 to 80,000 women annually had been murdered or had committed suicide (up to 1,000,000 in 1953), probably as a result of harassment (Leader, 1973, 55-79). Consequently, although the 1950 Marriage Law was never amended before being repealed by the 1980 Marriage Law, divorce became increasingly difficult to obtain and only permitted under the most serious circumstances (Walstedt, 1978, 387).

It seems very probable that, despite the declarations of war on the traditional family structure, CPC leaders considered stability and social harmony to be much more important values than gender equality. Undoubtedly, the result of CPC's emphasis on equality between sexes and the need for women to take active part in socialist reconstruction was to increase the pressure on them. As pointed out by Joyce Walstedt, if, on the one hand, the new ideology urged women to find productive work outside the home in order to help rebuild China, on the other little attempt was made by the government to provide jobs or relieve them of home responsibilities (Walstedt, 1978, 386).

To sum up, due to the aforementioned marked ambivalence shown by both Mao Zedong and the Party towards family reform and equality between gender, the Maoist era represented, for Chinese women, a succession of *“several confusing decades in which they have sometimes gained rights only to lose them”* (Walstedt, 1978, 386-7). .

From this point of view, however, even the beginning of the reform and opening up period would have not substantially changed the situation (Ruskola, 1994, 2564). Certainly, family and marriage laws approved since 1978 reinforced the principle of equality between women and men, and the 1982 Constitution proclaimed it with even more emphasis than the previous three PRC Constitutions.<sup>7</sup> However, traditional notions of gender continued to inform the interpretation and administration of law, while the priority given by Deng Xiaoping to the realization of the “four modernizations” (四个现代化 *sige xiandaihua*) meant that between the reasons of economic development and that of gender equality, the ones of economic development were always the first to prevail (Ruskola, 1994, 2564). As Teemu Ruskola pointed out in 1994 referring to the first two decades of the reforms, it was because of this situation that the aforementioned laws remained, quite frequently, a dead letter, or were applied only in form. It is, for example, the case of the guarantee of equal pay for equal work, provided for by art. 48, paragraph 2 of 1982 Constitution. Although both men and women should have received the same pay for each “workpoint”, women were usually awarded fewer workpoints than men for performing the same tasks (Wolf, 1985, 100-103). At the same time - and just to give another example on how economic reforms impacted over egalitarian aspirations - the “economic revolution” and the privatization of state-owned enterprises gave companies greater latitude in hiring and firing, thereby in practice allowing women to be hired last and fired first (Palmer, 1989-90, 452; Wudunn, 1993).

It is probably for the aforementioned reasons that, in 1985, Margery Wolf said that “*contemporary China proves beyond a doubt that socialism and patriarchy can exist in stable harmony*” (Wolf, 1985, 261)

This statement seems still valid today, and applies perfectly to a socialist market economy that wants to realize the “Chinese dream of the great rejuvenation of the Chinese nation” through the recovery of traditional values, such as PRC after Xi Jinping’s seizure of power.

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7 See arts. 48-49, Constitution of the People’s Republic of China (1982). It is worth noticing that the principle of equality between sex was included in all the Constitutions enacted since PRC’s foundation (i.e.: 1954, 1975, 1978). All these Constitutions, however, give a much more vague definition of it, and dedicate to it only one article or paragraph instead of two. See art. 96, paragraph 1, 1954 Constitution; art. 27, paragraph 5, 1975 Constitution; and art. 53, paragraph 1, 1978 Constitution.

Indeed, as shown in the 2014 United Nations report on “Gender Equality in China’s Economic Transformation” (Liu Bohong, Li Ling, Yang Chunyu, 2014) not all the improvements brought about by the reforms have benefited women.

Certainly, especially in the last twenty years, thanks to China’s economic reform process, personal income and living standards have improved enormously, bringing unprecedented development opportunities for women (Liu Bohong, Li Ling, Yang Chunyu, 2014, 11). Gender equality has become one of the key state policies for social development, to the point to be included, in 2012, into the Report of the Eighteen National Congress of the CCP.<sup>8</sup> Thus, in 2015 the government incorporated the development of women and girls into the “13th Five-Year Plan for Economic and Social Development” (2016-2020)<sup>9</sup> and, through the promulgation and implementation of regulations as “The Plan for Women’s Development in China” (2011-2020) or the “National Human Rights Action Plan of China”, it “*honored its commitment to the international community to lift women’s status in political, economic, social, and cultural areas, as well as in citizenship, marriages and households*” (Liu Bohong, Li Ling, Yang Chunyu, 2014, 11). At the same time, the National People’s Congress and its Standing Committee have enacted/reviewed several laws in order to realize equality between men and women, protect women’s rights and interests and eliminate any kind of discrimination against women for example the “Law of the People’s Republic of China on the Protection of Women’s Rights and Interests” (中华人民共和国妇女权益保障法, 1992, amended in 2005 and 2018) or the “Anti-domestic Violence Law of the People’s Republic of China” (中华人民共和国反家庭暴力法, 2015, hereinafter: AVL), among others.

The situation, however, is much more complicated than it seems.

The data provided for by the World Economic Forum’s (WEF) Gender Gap Index, which measures gender parity based on four criteria: economic achievement, education, health and political empowerment, show how China’s ranking fell sharply from 63rd

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8 See Hu Jintao’s Report at the 18th Party Congress, part. XII (Strengthening Social Development by Improving the People’s Wellbeing and Making Innovations in Management), point 4, and part XII (Making Party Building More Scientific in All Respects), point 2 and 4. The full text (in English) of the Report is available online, at: [http://www.china-embassy.org/eng/zt/18th\\_CPC\\_National\\_Congress\\_Eng/t992917.htm](http://www.china-embassy.org/eng/zt/18th_CPC_National_Congress_Eng/t992917.htm)

9 See “13th Five-Year Plan for Economic and Social Development of the People’s Republic of China (2016-2020)”, part XV, Chapter 66. The full text (in English) of the 13th Five-Year Plan is available online, at: <http://en.ndrc.gov.cn/policyrelease/201612/P020161207645766966662.pdf>

out of 115 countries in 2006 to 103rd out of 149 countries in 2018 (<http://reports.weforum.org/global-gender-gap-report-2018/data-explorer/#economy=CHN>).

This is not surprising, since both judicial reform and political discourse - as well as some provisions inside the laws/regulations mentioned above - appear to be driving the official inter-gender equality efforts in a contrary direction.

As recently noticed by Ethan Michelson in his paper on “Decoupling: Marital Violence and the Struggle to Divorce in China”: *“Although China officially embraces global values of gender equality and women’s rights, and despite an abundance of formal legal mechanisms designed to prevent [abuse and violence against the women] claims of marital violence are by and large irrelevant in Chinese divorce trials. Courts at best ignore and at worst use abuse claims to justify denying women’s divorce petitions”* (Michelson, 2018, 2).

The fact that contested divorce petitions (more often than not initiated by women, and more often than not involving violence or other forms of abuse) usually result in court rulings to preserve rather than to dissolve marriages is not surprising, as courts, like other parts of the state bureaucracy, cannot help but follow the line indicated by the leadership (Michelson, 2018, 1).

Undoubtedly, since his accession to power, Xi Jinping has put the “construction of family civilization” (家庭文明建设) at the core of the agenda of the party committees and governments at all levels (Jiang Jue, 2016).

The concept, in the last few years, has been reaffirmed by the Chinese leader in various ways and in numerous speeches, in which he has always pointed out the fundamental role of traditional Chinese family values in building a harmonious society. In particular, in a speech given in December 2016 and reported by Xinhua Agency, he described the family as “the cell of society” (社会的细胞), so that: *“family harmony is social stability, family happiness is social peace, and family civilization is social civilization”*. Therefore *“the vast majority of families must raise at the same time attachment to one’s family and patriotism, integrate family dreams into national dreams, think with one mind and work with one heart, using the wisdom and enthusiasm of more than 400 million families and more than 1.3 billion people to achieve the goal of “two hundred years” and realize the great rejuvenation of the Chinese nation”*. (新华社, Xinhuashe, 2016)

It is worth remembering that Xi Jinping was not the first to use the biological metaphor of family as the basic cell of society (Michelson, 2018, 18), nor it is the first time that

PRC's leaders and officials attempt to preserve the family by opposing "frivolous" divorce (轻率离婚) (陈小勇 Chen Xiaoyong, 2005, 154-156). As we have seen above, difficulties and limits on divorce characterized the Maoist era as well. The reason why, at that time, divorces (usually requested by women who, very often, were victims of abuse) were not easy to obtain, however, should not only be sought in the need to avoid jeopardizing social stability in a country that was trying to free itself from old habits. It represents also an attempt to follow, even on this point, Marxist ideology, according to which the divorce could not be "arbitrary", but must reflect the "death" of a marriage, and therefore it should only be granted when the relationship is truly unrecoverable (陈小勇 Chen Xiaoyong, 2005, 154). As Wolf and Witke observed in 1975: *"the complicated interaction between the needs of women and the needs of revolution is a chapter in China's history still only half written"* (Wolf & Witke, 1975, 7).

Nevertheless, the insufficient attention (to put it mildly) to the rights of the women who turned to court to get rid of a violent husband, and to whom, often, divorce was often not granted in the name of the higher goal of social harmony, until very recently remained limited to the practice of law. It was only in the last several years, due to the revival of Confucianism, that the discourse on "traditional family virtues" came into the Law as well. One of the most striking examples is, quite ironically, contained in the aforementioned AVL, which at art. 6 states that:

*"The state will carry out family virtues publicity and education, and popularize knowledge of anti-domestic violence to enhance the citizens' anti-domestic violence awareness. Trade unions, communist youth leagues, women's federations, disabled persons' federations shall, within the scope of their work, organize publicity and education on family virtues and anti-domestic violence. Radios, televisions, newspapers, and the Internet, among others, shall conduct publicity on family virtues and anti-domestic violence. Schools and kindergartens shall conduct education on family virtues and anti-domestic violence"*.

It is somehow strange to find the expression *"family virtues publicity and education"* put side by side with *"popularize knowledge of anti-domestic violence"* (Jiang Jue 2016). Indeed, and even though art. 6 does not mention the word "traditional", it is pretty clear that the "family virtues" to which the article refers are the "traditional" ones, namely the virtues which originate from Confucianism. I just mention them briefly. First of all, since harmony depends on differences, in order to maintain harmony at the family level the husband must be superior to the wife. Then, women are "by nature" required to take care of their husband, children, and the family as a whole: those seeking divorce would therefore be ethically stigmatized as selfish or even immoral (Bailey,

1993, 48). Finally, marriage is not a purely private matter. As “the family is the cell of the society”, as stated by Xi Jinping in the aforementioned speech, divorce evinces the relationship among the state, the law and the society.

That the AVL takes for granted the idea that the parties’ rights and needs in family cases are in line with the state’s political objectives of “harmony” and “stability” was made clear by the President of the Supreme People’s Court (henceforward: SPC), Zhou Qiang, during a special meeting dedicated to the reform on the study of family trial methods and work mechanisms held a few months after the enactment of the law.

In it, he pointed out the need to “*vigorously promote the core values of socialism, actively promote the reform of family trials and working mechanisms, give full play to the role of family trials, safeguard family harmony, protect the legitimate rights and interests of minors, women and the elderly, promote social fairness and justice, and maintain overall social stability*” (宁杰 Ning Jie, 2016).

The same concepts would soon have been incorporated in the “Opinions of the Supreme People’s Court on Conducting the Pilot Program of the Reform of the Mode and Working Mechanism of Family Trial” (最高人民法院关于开展家事审判方式和工作机制改革试点工作的意见), published on 2nd April 2016 (henceforward the PRC Opinion 2016), and later reaffirmed by the “Opinions of the Supreme People’s Court on Further Deepening the Reform of Modes and Working Mechanisms of Family Trials” (for Trial Implementation) (最高人民法院关于进一步深化家事审判方式和工作机制改革的意见(试行)) of the 18th July 2018 (henceforward, PRC’s Opinion 2018).

The Program - which mainly entails introducing a new comprehensive coordination resolution mechanism, involving the “*input of family committees, neighborhood committees as well as Women’s Federation in conducting judicial mediation*” - clearly does not take into account the results of vast research on judicial mediation in marriage cases, which have shown, unmistakably, that mediation seriously harm the victims of domestic violence as well as women rights (Jiang Jue, 2016).

This probably did not happen by chance. After all, in Zhou’s speech as in PRC’s Opinions and in courts’ practice, the need to preserve “*harmony and stability of marriage and family*” takes always precedence over the “*rights and interest of minors, women and*

*the elderly*<sup>10</sup>. In this perspective, mediation could really be the best way to achieve the leadership's (new?) goals: to maximize “*diagnosing, repairing, and healing marriage relationships*”, advocate “*civilized and progressive marital and family ethics and concepts*”, and - last but not least - advance “*the building of family tradition and family virtues*<sup>11</sup>”.

## Conclusions

The paper analyzed the ways in which PRC is facing the social challenges arisen in the new millennium, fulfilling, at the same time, the commitment to implement the “2030 Agenda” made by President Xi Jinping during the 2015 United Nation Sustainable Summit.

In particular, it examined how the three kind of equity which are deemed to represent the social dimension of “sustainable development” (namely, inter-generational, intra-generational and inter-gender equity) have recently become part of PRC's legislation. Moreover, it investigated to what extent the PRC's current trend towards a “rediscovery” of traditional (Confucian) values, and the incorporation of such principles in many Chinese legal provisions, have influenced the achievement of the SDGs within the Country.

The analysis started from the introduction of the concept of solidarity in the Chinese legislation. This, as it was shown, occurred in the early 21st century, when the emergence of what Mao could have called (new) “contradictions among the people” forced the PRC to review its development model. Indeed, the growing social disparities and the consequences of serious environmental problems caused by the terrific economic development experienced by PRC after the beginning of the reforms led, in 2004, Chinese lawmakers to amend the Constitution, providing for a social security system to be established and improved by the State. Since then, the concept of social integration has inspired the revision and/or the enactment of many legal provisions, while the law has been used more and more as a “moral agency” in Dunkheim's sense, i.e.: as a tool to shape and govern social behavior.

This trend has become evident especially after 2012 Xi Jinping's accession to power. Indeed, his call to “achieve the Chinese Dream of the great rejuvenation of the Chinese nation” has led to a “re-discovery” of Chinese/Confucian traditional values, in particular

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10 See PRC's Opinion 2018, part I (General Requirement), point 1.

11 See PRC's Opinion 2018, part I (General Requirement), point 2.

of those that have always been considered the basis of social and family relationships, namely the principles of “filial piety” (孝 *xiao*), “benevolence” (仁 *ren*) and “identity and difference/rights and duties” (同异/分 *tongyijifen*). Consequently, in the last few years, these concepts have been absorbed by Chinese legal system, being evoked especially in the laws linked to the achievement, respectively, of inter-generational equity, intra-generational equity, and inter-gender equity.

The last section of the paper investigated the above-mentioned three kind of equity separately, in order to understand what impact this new “Confucianization of Law” had on the implementation of each of them. To make the picture clearer, a brief description of the meaning traditionally attributed to the Confucian value taken as a reference preceded the examination of the legal provisions inspired to it.

The analysis begun from the scrutiny of the relationship between inter-generational equity and filial piety. Indeed, the latter – defined, in the “Classical of Filial Piety” as the “root of virtue” - was the first traditional value “re-discovered” by Chinese legislators in order to bring the behavior of PRC’s citizens back to morality, as perceived and interpreted by the Party-State.

The examination of the quantity and quality of the amendments made to the LPIE – which, it is worth reminding, since 2012 has almost doubled the number of its articles - showed how crucial the issue is considered by the Chinese leadership. Undoubtedly, starting from the beginning of the reforms, the duty to love, assist and support the elderly, and to express respect and submission to them, has been overshadowed by the motto “getting rich is glorious”, following which many young people have left their hometown, abandoning their ageing parents apart.

The calls, now enshrined in law, to practice this virtue, therefore, certainly aims to attribute, at least in part, to individuals the responsibility for the care of the elderly, the weight of which the welfare system is no longer able to bear. However, and as it has been demonstrated by the analysis of the relevant provisions, it could be functional to achieve another goal, even more important from a political point of view: the one to instill, through the respect for the elderly, the obedience to superiors and, ultimately, to the government and to the CPC.

With regard to inter-generational equity it seems, thus, that the demands of sustainable development and the “morality” introduced into the law through the reference to Confucian principles not only do not conflict, but even favor the “strengthening of the

role of the Party” and (consequently) social stability and harmony, at least as they are actually understood by Chinese leaders.

The same can be said about the second kind of equity examined, namely intra-generational equity, and its relationship with the Confucian principle of “benevolence” (仁 *ren*).

This concept, which is traditionally strictly intertwined with that of “filial piety”, requires extending the love towards one’s relatives to his/her community, the society as a whole, and eventually to every single substance on earth. It proved, therefore, to be crucial both for the construction of the “ecological civilization” invoked by Chinese leaders as a solution/tool to remedy, at least in part, the environmental disasters caused by the wild development of the last decades, and for the recovery of the moral feeling of “love for others”. Indeed, as remarked by President Xi Jinping, it was this attitude that made Chinese civilization great; nowadays, however, it is about to be lost, in favor of cynicism and individualism brought by the unbridled race for profit.

In order to overcome the above-mentioned antinomies, the Chinese legislator has inspired some 2017 CPCC’s provisions to the principle of benevolence, thus openly including intra-generational solidarity in PRC’s basic civil law rules. The analysis of art. 9 and 184 GPCC – which are better known, respectively, as the “green principle” and the “Good Samaritan” law – demonstrated how hardly they could find application in legal practice. Their enactment, however, clearly shows Chinese leaders’ intention to use the law as a moralizing agent, capable of directing PRC’s society towards the ethical objectives currently considered by them as priority.

The reference to traditional values and the Confucian moralization of the law, though, do not always facilitate the implementation of SDGs. In particular, this does not happen in reference to inter-gender equity, the achievement of which seems, in recent years, to have become more difficult precisely because of the last traditional principle we have mentioned: the one of “identity and difference/rights and duties” (同昇/分 *tongyi/fen*).

Indeed, the “return” to Confucian principles with its insistence on “traditional family values”, more and more frequently mentioned by Chinese leaders and recently, as we have seen, embodied in some of the legal provisions of the PRC, not only does penalize women who are victims of “extreme” situations, such as, for example, domestic violence. On the contrary, they have an impact on the daily lives of Chinese women in general,

and can jeopardize the possibility that the PRC will achieve the inter-gender equity goal provided for by the “2030 Agenda”.

Undoubtedly, traditional social division of labor and the dual burden of work and family responsibility put women - in the PRC as almost everywhere - in a disadvantaged position in the market economy. Despite the increased opportunities for women’s economic advancement, and the undeniable existence of many successful Chinese business women - as demonstrated by the fact that fifty-six out of eighty-eight self-made female billionaires found around the world are Chinese, making China the best place in the world to be female entrepreneur (Yang, 2017), the situation has not changed much. In recent years the development gap between men and women in the PRC has expanded (Liu Bohong, Li Ling, Yang Chunyu, 2014, 11) while the female participation in the labor force has been declining (Yang, 2017). This condition undoubtedly results from a combination of different factors, in particular gender disparity in employment opportunities, gender disparity in incomes, and gender disparity in unpaid care work, as shown in the UN Women report this paper frequently referred to (Liu Bohong, Li Ling, Yang Chunyu, 2014, 11). All these aspects have been increased by the recent emphasis on Confucian values, on the one hand, and “solidarity”, intended as a substitute for public services, on the other, especially when they are both embodied in the law as, for example, is the case with the aforementioned “Law on the Protection of the Rights and Interests of the Elderly”.

Indeed, paragraph 3, art. 14 of the LPRIE (2015) states that:

*“The spouse (配偶 *pei’ou*) of the supporters shall assist them in fulfilling their obligations to provide for the elderly”.*

Even if “*pei’ou*” in itself has no gender connotation, it is clear that, at least in the current context, women are much more likely to support their husbands’ elderly parents rather than the contrary. Many studies have shown that while women taking care of their own parents have no impact on their participation in the labor force or their working hours, taking care of their parents-in-law reduces both of these two indicators (Liu Bohong, Li Ling, Yang Chunyu, 2014, 11). It is not surprising, therefore, that the implementation of such a policy makes the gender gap wider, and intensifies the conflict between work and family, reproducing in substance the gender inequality that seemed to have been overcome in form.

In short, if, under Mao Zedong, women were deemed to hold up half of the sky (*Funü ding banbiantian* 妇女顶半边天), in Xi Jinping's China they seem to have to carry it all. If and how much this will favor the sustainable development of the country, and the realization of the "Chinese dream of the great rejuvenation of the Chinese nation" can be evaluated only in the future. For now, the only certainty is that is up to women to bear most of the burden of the sustainable development and social harmony with the (new?) "Chinese Characteristics" described above.

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# Family Revolution by Law - Research on Development and Reform of Chinese Marriage Law

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**Abstract:** The basic function of law is to protect, consolidate and develop social relations and social order that are favorable and suitable for the ruling class (Zhu, 1957). As the first law promulgated (April 13, 1950) after the founding of the People's Republic of China (PRC, October 1, 1949), the Marriage Law<sup>2</sup> has undergone three major revisions in 70 years. Based on a comparative analysis of the principles and important rules in the four marriage laws, this article studies the entire historical process of Chinese marriage law systematically. By combining amendments of laws with social changes, including party policies (Communist Party of China, CCP), economic systems and family structure, this article displays the intimate relationship between social change, law revision and family revolution in an interdisciplinary manner. The improvement of Chinese marriage law also provides a lens into Chinese lawmakers' efforts on achieving gender equality, offering special protection for vulnerable groups<sup>3</sup> to pursue substantive justice, protecting personal property and balancing the relationship between individual freedom and family and social stability.

**Keywords:** Marriage Law; Family Revolution; Social Change; Gender Equality; Substantive Justice

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  - 2 It should be noted that the term "marriage law" has been questioned by Chinese and foreign scholars for a long time (Cook, 1986; Xia, 2019). They believe that the name cannot contain all the contents of the law, especially those related to family relations and adoption. Therefore the legislators adopted the name "Marriage and Family Law" in the draft of Civil Code. For consistency of terminology, the full text is collectively referred to as "the year & marriage law".
  - 3 Generally, "vulnerable groups" in Chinese marriage law includewomen, children and the elderly, however, in this paper, which mainly focuses on marriage relationships, the term is used to only refer to the special protection provided to women.

## Introduction

Traditionally, family is the most important social unit in China (Camille W. Cook, 1986; Lee, 1999; Wu & Xia, 2009). The different characteristics of Chinese marriage and family relationships at different ages witness the changes in the Chinese social ideology and values. For example, the entering into and the characteristics of marriage as well as the causes and the rates of divorce in different times show the changes in the concept of marriage and family. Additionally, the main disputes in divorce proceedings indicate people's gradually increased legal awareness, especially regarding individual freedom and property. In order to achieve specific goals and to respond to new social changes, the government often relies on policies and regulations, as routes or resources, to implement desired social change (Sharyn, 2010).

The focus of the legislation differs at different stages, and each version of the marriage law carries China's special mission in different contexts (Yang, 2011).<sup>4</sup> From the first formal law promulgated after the founding of the Public Republic of China (PRC) in 1950 to the first draft of the Civil Code published in 2019,<sup>5</sup> the marriage law has undergone three revisions with four versions in total. This article is divided into five parts whereof the first four parts correspond to the four different versions of the law in chronological order and the last part consists of a conclusion.

The 1950 Marriage Law, rather than the constitution with fundamental legal status in many other countries to be promulgated firstly, might be puzzling to some extent. However, it is reasonable if you take legislative necessity and feasibility into consideration: the necessity stems from the urgent needs of the people and the government; the feasibility stems from the accumulation of theoretical and practical experience. Assumed the mission of “*fei jiu li xin*” (breaking the old and establishing the new), the main purpose of the law is to destroy the feudal social system, and establish neo-democratic marriage and family relationships (Liu, 2014). With gender equality and freedom of marriage being emphasized both in the basic principles and specific provisions, the law was not only a profound revolution to China's marriage and family

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4 In an interview with a Beijing reporter in 2011 Professor Yang stated: “The focus of legislation differs at different stages. In 1950, China's first ‘Marriage Law’ completed the historical mission of abolishing the feudal marriage and family system and implementing the new democratic marriage and family system.” See the details at: [http://www.360doc.com/content/11/0915/09/3556875\\_148371815.shtml](http://www.360doc.com/content/11/0915/09/3556875_148371815.shtml).

5 The first draft of the Civil Code was published by the Chinese People's Congress on December 28, 2019. There are 7 series and 1260 articles in total, including general rules, property, contract, personality, marriage and family, inheritance, tort liability, and supplementary provisions. See the full text of the draft (Chinese) at: <http://www.dffy.com/sitedata/resource/files/201912/20191228092140ns2s.pdf>

system, but it was also regarded as a milestone in the development of women's human rights (Zhang, 2010).

The 1980 Marriage Law undertook the role of “*cheng shang qi xia*” (a connecting link between the preceding and the following) (Yang, 2011). On the one hand, legislators added some new principles and provisions in order to complement the party's policies for economic development and population control. On the other hand, for the purpose of eliminating the negative impact of the political movement on marriage, legislators demonstratively provided the foundation for divorce. There were still some changes left, under the dual effects of policy revolution and social development, the Chinese people's awareness of personal property began to awaken, controversies over property ownership emerged.

The 2001 Marriage Law (Amendment), considered to be an “emergency measure”, was a response to a series of new marriage and family problems which emerged as a consequence of the revolutions, China's economy and society underwent and are characterized by soaring divorce rates and complex property disputes. For this reason, amendments mainly focused on offering guidance of judicial practice.<sup>6</sup> The legislators' efforts to seek a balance between individual freedom and social stability, and their efforts to protect vulnerable groups and personal property were also fully demonstrated in this amendment.

In 2019, with the codification of the Chinese Civil Code, the marriage law ended a long life in turmoil<sup>7</sup> and returned to the civil legal system (Xia, 2014). Realizing the systematization of the Civil Code is the most emphasized goal of this revise, so as to achieve integration with other civil legal norms which mainly focus on property relationship (Ran, 2019). When the third review of the Civil Code (draft) was published, the marriage and family field received the largest number of public

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6 After the promulgation of the 2001 Marriage Law (Amendment), the three judicial interpretations issued by the Supreme People's Court of the People's Republic of China successively, also explained the urgent needs of the courts for the specific rules and instructions to the constantly emerging new family legal disputes, especially property related.

7 Before commencing the civil code, marriage and family law was distinguished from typical civil law norms with property law as its core because of its strong identity, ethics, and public law characteristics. When planning the codification of the civil code, the experts conducted special discussions and debates on whether the content of the marriage and family law should be incorporated into the code, and finally reached an agreement that the marriage and family law should also be part of the civil code, but the interrelated rules between the general rules of civil law, property law and identity law must be adjusted and integrated correspondingly.

comments and letters,<sup>8</sup> and the 2019 marriage law improved in response to part of public proposals. Generally speaking, great progress has been made this time, but unfortunately, there are still shortcomings.

In summary, through the comparative analysis of the four versions of the marriage law, this article reveals that the family reform, social changes, and law revisions are interrelated and inter-conformed, and any slight movement in one part may affect the situation as a whole. More importantly, this article also exhibits the continuous improvement and development of Chinese legislative ideas and legal philosophy, characterized by redesigns in rules and systems.

## The 1950 Marriage Law

### Reasons for being the first promulgated law

According to Marxists, law is the embodiment of the will of the ruling class. It is a rule of conduct that is formulated or recognized by the state, and implemented under national coercion. The purpose of the law is to protect, consolidate and develop social relations and orders that are favorable for the ruling class (Zhang, 2007, p. 79). As a Chinese saying goes, “*mei you gui ju, bu cheng fang yuan*” (no rules, no standards). The Communist Party of China (CCP) abolished all the norms, rules and systems of the old society,<sup>9</sup> and tried to establish an entirely new socialist world from scratch. The state usually defines and reshapes the parameters of citizenship rights and obligations through law and its prescriptions, and then, consolidate the new government and maintain social order and peace (Margaret, 2003), this is the same for China. The reasons why the marriage law became the first formal law of PRC can be interpreted and understood in terms of both necessity and feasibility.

### Necessity: Happy Life and Social development

Law based on values of equality and freedom would satisfy the Chinese public, especially women, as this could give them an equal, free and happy life. After long and miserable war lives with both foreign aggression and domestic political struggle, the Chinese people were finally able to settle down and start a new chapter of life after the founding of the National People’s congress (NPC). In this context ‘happy lives’ means

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8 According to the spokesperson of the NPC Law and Work Committee, the third review of the draft of marriage and family drafts has seen a surge in public opinion. There were a total of 198,891 public comments and letters received from the public online. See:<https://baijiahao.baidu.com/s?id=1653413463992068215&wfr=spider&for=pc>

9 Including rules and systems both from the feudal society and implemented during the Kuomintang’s administration.

two things for the women: material happiness, coming from ownership of their land,<sup>10</sup> and spiritual happiness, coming from a happy family life (Zhao, 2009).

For thousands of years, Chinese people have lived with traditional social customs based on feudal gender perspectives and family systems.<sup>11</sup> Under Confucian ideas, “*nan zun nv bei*” (male superiority and female inferiority) was underscored by custom and belief and gave birth to the patriarchal family system (Camille, 1986). Women must meet the moral requirements of “*san cong si de*” (three obedience and four virtues).<sup>12</sup> Further, children were taught the adage: “*nv zi wu cai bian shi de*” (an ignorant woman is virtuous) (Butterfield, 1982). Women living in that era, have suffered both physical and psychological oppression, exploitation and torture with no rights or dignity at all. Chinese husbands had an expression for the status of their wives: “A wife married is like a pony bought, I will ride her and whip her as I like” (Galas, 1980). Other than that, feudal marriage was based on “*fu mu zhi ming, mei shuo zhi yan*” (parents’ orders, matchmaker’s advice), that means, neither men nor women have the freedom to decide their marriage. Gender inequality and maternity-oriented marriages have spawned “polygamy” and “concubine”. Daughters of the impoverished were sold as kitchen slaves or second wives to the wealthy (Naftulin, 1982). Marriage, without emotional foundations, were a source of pain and unhappiness for a large part of the Chinese public. Breaking the shackles of the traditional marriage system and pursuing a free, equal and happy life became the most basic, urgent and eager aspirations of the Chinese public, especially of the women, who made up more than half of the Chinese population.

The CCP had similar claims. The new regime was established while social customs and marriage systems still bore the strong traces and mark of feudal society. On the one hand, as mentioned above, marriage is the basic of family, and family makes up basic “cell” in Chinese society. Therefore, the stability of marriage and family directly or indirectly influences social stability (Xiao, 2002). On the other hand, law, as social norms formulated by the state, has several normative functions such as guidance, evaluation, prediction, education, and compulsiveness (Shen, 1994, 67). Based on this,

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10 In order to address the farmers’ land needs, China promulgated the “Land Reform Law” in June 1950, and launched a two-year land reform campaign.

11 There is a lot of literature on this topic, some of the references in this article will be listed in the references at the end of this paper.

12 “San cong” (three obedience) means: woman is required to obey her father before marriage, and her husband during married life and her sons in widowhood; “si de” (four virtues) means: women are supposed to be good at morality, proper speech, modest manner, and good needlework.

the Party urgently needed to use the marriage law as a tool to stabilize social order, develop social economy and finally, consolidate the new political power. The 1950 Marriage law came out under such strong demand, both from the CCP and the public.

#### Feasibility: Accumulated Experience both in Theory and Practice

While the urgent demands of the people and the political needs of CCP laid the necessary foundation of the 1950 marriage law, the long-term accumulation of practical, theoretical, and regulatory experience laid a feasible foundation, making it possible for the law to be enacted within one year after the founding of the PRC.

The advanced ideas such as “freedom of marriage”, “gender equality”, and “monogamy”, which consisted of scientific Marxist views, had left a deep mark on the Chinese people already at the beginning of the nineteenth century, when western countries invaded China. As a practitioner of Marxism, gender equality and freedom of marriage have always been one of the goals pursued by the CCP (*Government White Paper*, 1994).<sup>13</sup> In 1922, the second year after the founding, the party lunched the “Resolution on the Woman’s Movement”. It combined woman’s freedom and liberation with the Party’s acquisition of political power together. From 1930 to 1949, various cities formulated and promulgated marriage regulations with both substantive and procedural content (Wang, 2019). On September 29, 1949, the National Committee adopted “People’s Political Consultative Conference Common Program” as the interim constitution. This document clearly stipulated the abolition of the feudal system, proclaimed that women have equal rights with men in all aspects, such as culture, education, and society. Together with some piecemeal local legislations and administrative orders, all of those documents laid the theoretical and textual basis for the promulgation of the marriage law. Guided by specific rules, family courts, set by the regime in the Shanxi-Gansu-Ningxia district, which was the revolutionary base of the CCP, handled a large amount of family cases and accumulated valuable practical experience (Wang, 2008). These trial experiences contributed a lot to the feasibility of promulgation.

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13 In the part “The Situation of Chinese Women”, the document deals with the legal status of Chinese women from the liberation period to the present, their equal rights and important roles in the economic field, their equal status in the family.

### Core Contents

There are 27 articles in total in the 1950 Marriage Law. Generally speaking, it is simple with less specific regulations. However, it had a huge influence at that time.<sup>14</sup> With the mission of “*fei jiu li xin*” (breaking the old and establishing the new), it was expected to realize the goal of “from feudal to democracy”, achieved through basic principles and specific rules.

As the core manifestation of the entire legal purpose, the importance of the basic principles is self-evident, however, we could also see it from the text position of chapter one and articles one and two. “Freedom of marriage”, “monogamous”, “gender equality”, and “protection of the legitimate interests of women and children” were set as the basic principles of the marriage law,<sup>15</sup> and became the most important and core concepts of the marriage systems until now. In order to make the principles more specific and clear, the legislators also enumerated in chapter 1 several phenomena that were prevalent in society but violated the principles. Violations of the “freedom of marriage” included arranged marriages, forced marriages and interference with widows’ freedom of marriage. “Gender equality” is mainly violated by “*nan zun nu bei*” (male superiority); The betrayals of monogamy include bigamy, concubine and “*tong yang xi*” (daughters of the impoverished who were sold as kitchen slaves or second wives to the wealthy). And at the same time, violations of the “freedom of marriage” and “*tong yang xi*” are also violations of “protecting the interests of women and children”. All of these phenomena are explicitly prohibited in the 1950 marriage law.

Guided by basic principles, the law also contained unified regulations and arrangements in the remaining six chapters, including the essential and procedural elements of marriage and divorce, and the legal relationship between husband-wife and parent-child, throughout the entire process before the marriage and after divorce. As Schneider (1992) argues, one of the functions of family law, is to “support social institutions which are thought to serve desirable ends and to channel people into them”. “Institution” here means mutual legal rights and obligations between different entities.

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14 See Notice of the Central Committee of the Communist Party of China on Ensuring the Enforcement of the Marriage Law, issued on May 1, 1950: “the Chinese masses, especially female, were liberated from the barbarous and backward marriage system. The new marriage system, family relations, and social ethics were constructed, which was conducive to promoting political, economic, cultural, and national defense construction and development in a new democratic China.”

15 See the 1950 Marriage Law, article 1, 2 and 3.

On the whole, the promulgation of this marriage law is undoubtedly of historical significance, and is called a “revolution of ideas and systems” in the field of marriage and family (Huang, 2011). Since then, the concepts of gender equality, freedom of love and marriage has been prevalent across the whole country. The Chinese people, especially women, have awakened their sense of human rights, and have begun to use legal weapons to defend their interests. Phenomena like women being able to go out of their homes, receive education and participate in collective activities as men, marry freely without their parent’s interference, was not uncommon any more. Although, compared with later amendments, legislation at this stage is mainly based on the preliminary realization of formal equality between men and women, valuing formal justice and equality over substantive, however, it still greatly improved the status of women in Chinese society at that time (Wu & Xia, 2008). Both individual freedom and social stability are pursued by the regime, while it is clear that legislators valued freedom over stability. After all, “*fei jiu li xin*” (breaking the old and establishing the new) is the core goal of this stage.

## The 1980 Marriage Law

### Motivations for Modification

From 1950 to 1979, 30 years after the promulgation of the 1950 marriage law, many pivotal historic events took place in China: Marriage Law Enforcement Inspection Movements, the Land Reform, the Cultural Revolution,<sup>16</sup> implementation of Family Planning Policy and so on. These dramatic social changes had a great impact on everyone as it spread to all aspects of their life, and the changes contributed to the revision of the 1950 marriage law, and ultimately created huge family revolutions.

In the early days of the founding of the PRC, the lack of living and production resources led to a huge conflict between the dramatic population growth and economic development (*Chinese population and family planning history*, 2007). According to statistics in the early 1980s, China increased with more than 11 million people every year, and billions of kilograms of grain each year needed to be increased to ensure the rations of the new population (Chen, 1981). “In the seven years between 1954 and 1960, there were more than 130 million people having been born. Some of them were married, some of them will enter the marriage and reproductive period in recent years.” (*People’s Daily*, 1981). A series of social problems were caused such as food shortages, insufficient medical and educational resources, limited housing conditions and

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16 Cultural Revolution, was a sociopolitical movement in the People’s Republic of China from 1966 until 1976. To see more details with [HTTP://en.Wikipedia.org/wiki/Cultural\\_Revolution](http://en.Wikipedia.org/wiki/Cultural_Revolution)

depletion of natural resources. The population problem, as one of the important factors affecting China's economic development, was included in the "plan" by the party (Liu & Fei, 2017).

The promulgation of the 1950 Marriage Law and the Marriage Law Enforcement Inspection Movements implemented by all cities under the leadership of the central government, led to a surge in Chinese divorce cases (Zhang, 2010). The CCP launched a series of propaganda and campaigns aimed at accelerating the establishment of the new marriage and family concept. According to statistics, just in January and February 1953, almost 20 million copies of promotional materials were printed throughout the country (Zhang, 2003). People who suffered with arranged or forced marriages, especially women who were oppressed and humiliated, eagerly wanted to get out of the cage based on law. This led to the first climax of divorce in China since the founding of PRC.<sup>17</sup> However, the vague provisions of the 1950 Marriage Law only granted people freedom of marriage (including freedom of marriage and divorce), it did not clarify the legal grounds for divorce.<sup>18</sup> Coupled with the influence of the Cultural Revolution, during which political ideology prevailed for nearly two decades from 1957 to 1976, the marriage of young people showed a tendency of "pan-politicization" (Zhang, 2018), and it was common that they got married or divorced just depending on political factors. The lack of normative guidance on the grounds of divorce, made it difficult for judges to decide whether to grant a divorce and on which grounds.

Judicial difficulties were also reflected in the marital property division. The Land Reform improved the farmers' productivity, and accumulated family wealth aroused people's awareness of personal property. The lack of guidelines on how to address marital property disputes also became a common judicial trial problem.

### Legal Reconstruction

The Marriage Law of 1980 consisted of 5 chapters and 37 articles, and took the task of "*cheng shang qi xia*" (continue from the above and introduce the following). On the basis of inheriting the 1950 Marriage Law, it was modified and supplemented in accordance with social changes, practical experience, and new party policies (Ma, 2008).

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17 According to statistics, divorce cases accounted for 60% of the total number of civil cases in 1952 and reached more than 90% in 1953, most were filed by women. In 1953, divorce lawsuits were greatly increased throughout the country, with a total of 170,000 pairs in the whole year, and 528 divorces in the first half of Guangzhou. From Guangzhou Dairy, 2008.

18 See the 1950 Marriage law, Article 17.

The most noticeable change is the addition of basic principles. In order to effectively guarantee the implementation of the party's policies, legislators added "implementing family planning" to the basic principles and added the elderly into the category of special protection, which originally only included women and children.<sup>19</sup> Besides, in line with the "implement of family planning" principle, lawmakers also set additional three specific provisions: making the "family planning" one of the legal obligations for both spouses;<sup>20</sup> increasing the legal age of marriage to 22 for men and 20 for women, both increasing with two years; encouraging "late marriage and late reproduction" explicitly in the law.<sup>21</sup>

Legislators used "loss of affection (incompatibility)" as the substantial basis for divorce. Legislators explicitly specified "affection" as the only criterion for judges to decide whether the marriage should last, rather than the political factors which were popular during the Cultural Revolution. The legislators also used the abstract expression "loss" to give the judge discretion, and allow them to make decisions case by case (Qin & Li, 2003).

In view of the awakening of property awareness and the addressing of property disputes in divorce proceedings, legislators set common ownership as the legal property system. The new property system stipulated shared ownership over property acquired during the marriage, and simultaneously respected the couples' willingness, allowing them to decide the ownership of property freely.<sup>22</sup>

In conclusion, the main objectives of the regime during this period were to promote economic development and enhance productivity. The surge in population at that time brought some obstacles and challenges to social development. To deal with the negative effects brought by the population pressure, such as food shortage and burdensome economic development, the government introduced the basic family planning policy, which was directly or indirectly reflected in the amendment of the marriage law (Yang, 1979). Those additives related to family planning in the marriage law, shaped the family concept, changed people's attitudes towards marriage and fertility eventually (Wu, 1981). A greater number of couples chose to have only one child, which not only further promoted the concept of equality between men and women, but also replaced the traditional Chinese extended family structure with stem and nuclear families

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19 See the 1980 Marriage Law, Article 2.

20 See the 1980 Marriage Law, Article 12.

21 See the 1980 Marriage Law, Article 5.

22 See the the 1980 marriage law, article 13.

gradually (Xia, 2019).<sup>23</sup> Led by the goal of “*cheng shang qi xia* (continue from the above and introduce the following)”, legislators clarified individual rights and obligations about marriage and property further and explicitly, in order to continue to promote gender equality and freedom of marriage while protecting people’s property rights. Not only did the 1980 Marriage Law respond to the newly occurred social changes, it also reshaped the Chinese marriage, and achieved the social change that lawmakers desired (Sharyn, 2010).

## The 2001 Marriage Law (Amendment)

### Reform and Opening-up: Economic Transformation and Family Turmoil

The 2001 Marriage Law (Amendment) was the first law in China to solicit public opinions after the promulgation of the Chinese Legislation Law.<sup>24</sup> The amendment, made in response to the strong demands of society during China’s huge transformation period, was referred to as “a general census of Chinese national, legal, moral, and marriage, family, sexual concepts in the early 21st century” (Xia, 2019).

The Chinese “reform and opening-up” policies were instituted in 1978. Since then, China has ushered in the “golden age” of the economy. The Party’s work was mainly focused on economic construction, and the entire society had begun a socialist modernization drive with a sustained and stable growth in productivity (Xing & Chen, 2006). Promulgation and implementation of new political policies signaled China’s transition from a command economy to a market economy (Hannum, 2005), which meant the national unification was broken, instead, a dual structure of the state and society gradually took shape. Various new ideas, values and lifestyles were introduced to China, making Chinese people aware of ideas of individualism and liberalism which they increasingly adapted. These new, imported and adapted ideas altered the Chinese society with both positive and negative consequences (Cai, 1999, 315).

As an important mechanism and foundation of a society, the family system could be shaken by social change (Lee, 1999). Rapid economic growth and socialist modernization have changed the Chinese family in many ways, including the family system and practice. For example, traditional extended families have been broken down,

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23 See Legal Report, June 21, 2019, at: <http://ha.people.com.cn/n2/2019/0621/c351638-33064396.html>

24 The Legislative Law of the People’s Republic of China came into effect on July 1, 2000, and was revised in 2015. Article 5: Legislation should reflect the will of the people, carry forward socialist democracy, insist on legislative openness, and ensure that people participate in legislative activities through multiple channels.

and instead stem families and nuclear families have become the fashion ( Lee,1999); With increasing economic freedom and the withdrawal of the Chinese state from people's private lives, China saw a huge rise of different forms of extramarital affairs, such as bigamy, extramarital affairs, and concubines (Woo, 2003). The divorce rate increased continuously and dramatically, and accordingly, an increasing number of divorce cases flooded into courts and the majority of them were related to the division of property (Zang, 2020).

As already mentioned, Chinese families are the basic cells of society (Cook, 1986; Lee, 1999), the stability and harmony of the family directly affect the stability and development of the whole society. Unlike the other countries, Chinese families bear the basic obligations of supporting the elderly and raising children (He & kwai, 2013). The family has been the controlling influence in the life of every man, woman, and child (Camille, 1986), thus the disintegration of a family will have a huge impact on every family member and even the whole society. For these reasons, regulating family behavior by law is of primary importance (Camille, 1986). As the 1980 Marriage Law made divorce easier with the "incompatibility" divorce ground, which led to a significant increase in the divorce rate (Ceello & Kholoussy, 2016), it was time for legislators to take some proportional measures to maintain the stability of family relations.

### Refinements of the Provisions

Both general and specific rules have been greatly refined in this amendment. To begin with, some ethical norms were added to the general rules, including "spouses should be faithful and respectful to each other" and "no cohabitation". These regulations were aimed at "extramarital affairs", which had become more prevalent at that time. In order to reshape people's family behavior and create stable and healthy marriages and family relationships, private behavior which was originally regulated within the scope of moral adjustment, now fell into the scope of legal adjustment (Cai, 2004).

"No Domestic Violence" came into the books for the first time in the Chinese legal system. Proposals to deal with domestic violence squarely, to bring it into the public sphere and place it within the authority of the courts sparked heated public debate, because it broke the Chinese traditional social norm of "*fa bu ru jia men*" (the law should not interfere with private family affairs) which have been around for thousands of years (Margaret, 2003). Simple but significant, this stipulation witnessed the government intervention in pursuit of justice and laid the foundation of ideas and legal sources for the promulgation of the Anti-Domestic Violence Law (Xia, 2019).

Along with the new amendment, many new and specific rules about marital property were implemented. Compared with the original law, the amendment further elaborated on the definition of personal property within marriage and introduced provisions for financial compensation (Margaret, 2003; Palmer, 2007; Emma Zang, 2020). In response to the social realities of an increasing divorce rate and the difficulty of handling property disputes, the 2001 Marriage Law made more detailed provisions on the property matters, by clearly specifying the types and scopes of couples' common property<sup>25</sup> and personal property.<sup>26</sup> Furthermore, according to the amendment, couples could choose their wanted property system among separate, common or part-separate and part-common freely.<sup>27</sup>

Besides, parallel with the changes made to the marriage and family law, the Chinese government also continued to implement new rules to further develop gender equality. At this time gender equality had made significant progress, especially in the educational attainment, where women have achieved near parity with or even surpassed men (Woo, 2003). However, the gender gap was still broad in terms of family status and economics, women were still in a disadvantaged position and they were the main bearers of housework (Woo, 2003; He & Kwai, 2013; Zang, 2020). In response to this social reality, legislators gave special care to women in the divorce property division rules and set up a housework compensation system.<sup>28</sup> Lawmakers also created a divorce damages compensation system, listing several faulty divorce grounds which were very common at that time as the basis for the victims to claim compensation.<sup>29</sup> Lawmakers sought to reduce the incidence of bigamy, cohabitation, and domestic violence through economic means, thereby stabilizing family relationships and providing some economic relief to vulnerable women.

In summary, during the period of radical transformation, Chinese social customs, moral framework and family concepts faced extraordinary challenges and shocks (Whyte, 1996; Wu & Xia, 2009). When stability was threatened by excessive freedom, it was necessary for the legislators to find a new balance between personal freedom and social stability. The divorce damage compensation system, did not only guide the correct marriage behavior to a certain extent, but also provided relief and protection for vulnerable Chinese women, majority of whom were non-faulting parties (Xia & Deng,

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25 See the 2001 Marriage Law (Amendment), Article 17.

26 See the 2001 Marriage Law (Amendment), Article 18.

27 See the 2001 Marriage Law (Amendment), article 19.

28 See the 2001 Marriage Law (Amendment), Article 44.

29 See the 2001 Marriage Law (Amendment), Article 46.

2002). Hence, it can be seen that women's rights protection has been further advanced in this amendment, as well as the substantive gender equality and justice (Xia & Deng, 2005). As for the legal property system, stipulation that spouses can freely choose one of the alternative forms of property ownership is a manifestation of lawmakers' greater respect for individual freedom and private rights. (Wu & Xia, 2009). The detailed rules on property and divorce grounds, stemming from previous judicial experience, provide guidance for future trials, indicating that lawmakers have begun to pay attention to the uniformity and efficiency of practice work from this amendment (Wu & Xia, 2009).

## The 2019 Marriage (and Family) Law (draft)

### Formal and Substantial Improvements under Systematic Requirements

Codification is systematization (Xu & Xiong, 2009). The integration, improvement, unification and systematization of different civil legal norms<sup>30</sup> are the basic demands of the compilation of the Civil Code (Wang, 2001), and also the basic driving force for the refinement of the marriage law. After the party made the codification of the Civil Code one of the important works in the following years in 2014,<sup>31</sup> everything went steadily as planned: the General Principles of the Civil Code were promulgated and implemented in 2017;<sup>32</sup> the other finalized drafts were also collectively released at the end of 2019 after three deliberations.<sup>33</sup> Under the guidance of systematic goal, combined with solutions to new social problems and response to public comments on previous deliberations (Xia, 2017), both the external form and the internal substance of the

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30 Affected by factors such as inadequate legislative skills and the rapid pace of social change, China had never had a unified civil code even after its 70th anniversary. Different civil law norms in the field of private law exist separately according to their different adjustment targets. Separate civil law norms in Chinese lay system including the General Principles of Civil Law, the Marriage Law, the Contract Law, the Property Law, the Tort Law and Inheritance Law.

31 The Fourth Plenary Session of the Eighteenth Central Committee of the CCP adopted the Decision of the Central Committee of the CCP on Several Important Issues Concerning the Comprehensive Advancement of Governing the Country According to Law on October 23, 2014, which explicitly stated that "codification of Chinese Civil Code" was one of the major tasks in the next few years (Guang Ming Daily, 2017).

32 On March 15, 2017, the Fifth Session of the Twelfth National People's Congress adopted the General Principles of the Civil Law of the People's Republic of China. See the full text at: <http://www.npc.gov.cn/npc/c12435/201703/7944f166a8194d788c63cc6610aebb4a.shtml>

33 On December 23, 2019, at the fifteenth meeting of the Standing Committee of the 13th National People's Congress. See the report at: <http://www.npc.gov.cn/npc/c30834/201912/c68dabb916e944cd856ce9e341d26dc1.shtml>

Marriage (and Family) Law (draft) have been amended, which has caused widespread participation and discussion in society.<sup>34</sup>

Formally, there are three main changes in the draft. The first change comes with the conversion of the name from “Marriage Law” to “Marriage and Family Law”, which shows the response of legislators to scholarly criticism. The name of the “Marriage Law” only reflects the marital relationship between husband and wife and does not cover another important component of the law: Parent-child relationship (Ran, 2019; Cook, 1986). In order to be consistent with the newly-added “socialist core values”<sup>35</sup> in the General Principles of Civil Law promulgated in 2017,<sup>36</sup> another ethical norm, “building a good family style”, was incorporated into the marriage law norms.<sup>37</sup> Both lawmakers and experts hope that through this clause, the “core values of socialism” will be implemented in the field of the family and further achieve family stability and harmony (Chinese People’s Congress, 2019). Instead, “Family Planning”, which used to be one of the basic principles derived from the party policy, was deleted to adapt to the recent tendencies of the Chinese population— continuous declining fertility rates, aggravating population aging and imbalanced male to female ratio (Wang & Liu, 2019). Finally, conspicuous but unimportant, the incorporation of the previous separate Adoption Law into the marriage (and family) law is only a matter of systematization.

Essentially, the hot topics that have received responses from lawmakers include the following: The “cooling-off period” of agreement divorce has been added in the chapter of “Divorce” after fierce arguments. This means, that after the couples apply for “contested divorce” (divorce by common agreement) to the Civil Affairs Bureau, the authority will ask them to think carefully about their decision for a month before issuing a divorce certificate. The “cooling-off period” is set to demand the parties to reconsider the divorce and its various consequences carefully, limit frivolous and

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34 The Chinese People’s Congress’ online draft of comments shows that there were 35,314 participants in the Civil Code Marriage and Family Law (Second Review Draft), and a total of 67,388 opinions were solicited; 213,634 people participated in the Third Review, 276,948 opinions were solicited. <https://mp.weixin.qq.com/s/NFc-BKLRGJeLdNGvIRD1Q>

35 In October 2006, for the first time, the Sixth Plenary Session of the 16th Central Committee of the Party clearly put forward the major propositions and strategic tasks of “building a socialist core value system”, clearly proposed the content of the socialist core value system, and pointed out the core of the socialist Values are the core of the socialist core value system. The 18th National Congress of the Communist Party of China has officially defined the “socialist core value body” including: prosperous, strong, democratic, civilized, and harmonious; freedom, equality, justice, the rule of law; Patriotic, dedicated, honest, friendly. <https://baike.baidu.com/item/社会主义核心价值观/3271832#1>

36 See the General Principles of the Civil Law, Article 1.

37 See the Civil Code (Draft), Article 1034.

impulsive divorce, and then, maintain the stability of family relationships. However, determined in the draft does not mean that there are no objections to it, in fact the proportion of opposition is higher than approval according to official survey results.<sup>38</sup> Some scholars also believe that the original intention of legislators is good, but that they should apply it differently according to divorce reasons (Li, 2019). For example, the “cooling-off period” is not suitable for a divorce caused by domestic violence. Generally speaking, there are many different views on the topic, and it is therefore difficult to predict how legislators will respond to criticism.

The housework compensation system, the economic assistance system and the divorce damage compensation system, all aimed at providing women with relief and protection because of the essentially disadvantaged status, have been further improved. According to Article 40 of the 2011 Marriage Law, a party of a divorce has the right to demand the other to compensate for (his or her) sacrifice related to housework such as raising children, caring for the elderly, or assistance of the opponent’s work. However, this article does work on the premise that the couple adopted a separate property system,<sup>39</sup> that is to say, they have made an agreement specifically on separation of ownership of respective income, which is rarely operated by Chinese couples (Xia, 2003). In the absence of prerequisites, the “housework compensation system”, aiming at achieving substantive fairness, has only become a right on paper. The new drafters believed that the value of housework should be valued by compensating the party (women account for the vast majority) for the family donation no matter what form of property system is chosen. Similar improvements have been made to the financial assistance system. The financial assistance system is no longer based on the premise or limitation of “one party suffers extreme economic difficulties (lower than local minimum level) after divorce”, as the economically disadvantaged party can ask the other for financial assistance as long as there is a large gap between the financial situations before and after their divorce. The way to assist is no longer limited to providing a place to live. As for the judgment of

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38 “China Women’s News” once initiated a vote on Weibo: “Agreement on the cool-off period of the divorce, do you agree?” As a result, the voting result was one-sided: only 10,248 thought it was conducive to avoid false and impulse divorce, accounting for 4.2%, while 232,164 votes against it, accounting for 95.1% and the rest 0.7% thought it does not matter. See: Democracy and the Legal Weekly, January 13, 2020 at: <https://mp.weixin.qq.com/s/NFc-BKL-rGJeLdNGvIRDT1Q>

39 According to the Law, there are two forms of couple’s property systems: one is called “separate property system”, which means that they have made an agreement that their respective incomes will be owned by each of them during the marriage; the other one is “community property system”, which is the legal system and will be implemented if the couples do not make a decision on their property. The system stipulates that their individual incomes belong to the family’s community property and this is shared in half when the couple divorce.

“large gap”, it falls into the judge’s discretion, and will be decided on the case-by-case basis.

The “damage compensation system” has been criticized for its limited scope of application (Xia & Zheng, 2007), which merely take “bigamy”, “living with the third party”, “domestic violence”, “abuse and abandonment of family members” as a manifestation of “fault”.<sup>40</sup> However, in daily life, the forms of “fault” that lead to divorce are far more diverse from the four types listed above, especially “extramarital sexual relations”, which is widespread in society but has not received enough attention. (Xia, 2003). In accordance with the recommendations of experts, the draft has added a flexible and inclusive “other major faults” as the pocket clause and the normative basis for compensation (Xia & Zheng, 2007). With this pocket clause, judges are given flexible space to adopt other possible fault forms into the damage compensation scope.

## Unresolved Problems

However, apart from these advances of the draft, there are still some new and controversial issues unresolved. Firstly, lawmakers failed to respond to the fierce discussion of whether same-sex couples should be legalized, even though the call for the legalization of same-sex marriage is pretty high and a large part of the public opinion collected on the review draft was about this issue.<sup>41</sup> Academic scholars hold different views on this issue: some think that freedom of marriage is a basic human right, and that legislators should give same-sex couples a legal marriage status to protect their rights and interests equally and universally (Sun, 2002). On the contrary, others believe that same-sex couples have subverted traditional Chinese cultural practices and social norms, and the majority of the public will not accept the legalization of same-sex marriage at this stage (Jiang, 2007). A compromise proposal to set a separate law to regulate the “cohabitation relationship” which is also protected by law but is different from marriage was also put forward by some scholars, as they believe this “indirect approach” is more easily accepted by society (He, 2010). Unfortunately, the legislators did not respond to those opinions in the end. Moreover, legal issues related to artificial reproduction, such as artificial insemination, IVF and surrogacy, which have been

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40 See the 2001 Marriage Law (Amendment), article 46.

41 Yue Zhongming, spokesman for the Standing Committee of the National People’s Congress of the People’s Republic of China, introduced that they received a total of 237,057 comments and 5,635 letters from the public on the Internet, and “the opinions are mainly focused on the scope of close relatives, the revocation of revokable marriages, the further improvement of joint debts between husband and wife, and legalization of same-sex marriages.” See more details at: <https://baijiahao.baidu.com/s?id=1653416399392818767&wfr=spider&for=pc>

regular targets in scholarly articles for a long time, were not mentioned at all. Besides, issues like how to calculate relatives, whether the best interests of children should be viewed as a basic principle, and how to solve the left-behind children's custody problems, haven't been resolved in the draft.

To sum up, under the dual effects of technological development and the promotion of rights awareness, a considerable number of the public have participated in the revision of this law and made recommendations for reviewing the draft. The final version of the draft has both progress and shortcomings. The improvement of the three economic-related systems is another step forward for legislators in their pursuit of substantial equality and justice, while the change of name and the adoption of the adoption law are requirements for achieving systematization. However, under the core pursuit of "harmonious society", legislators created a cooling-off period to stabilize social relations, and also avoided some radical issues in order to avoid social unrest. As Lee asserted (1999), any proposal of legal reform has to be made with sensitivity to cultural practices and recognition of the power structure within the family, market and society. The legislators have carefully avoided new issues that have been hotly debated but not yet accepted by the general public in the draft. Possibly, they prefer to regulate them after public comments become clearer, through special legislation or judicial interpretation in the future.

## Conclusion

Changes in family structure and concepts are the epitome of social change, and social change is related to and influenced by policies and laws (Wu & Xia, 2009). Through a comparative analysis of the systems and rules of different versions of the marriage law, we can see the symbiotic relationship between family concepts, social changes, and laws at specific stages. In addition, law must be rooted in specific social soils, blended with the customs and traditions of this society (Lee, 1999). Also, it is eternal that law is designed by legislators intentionally to meet the expectations of power owner (Ding, 2013). Therefore, from the initial "breaking the tradition" to the "economic development" in the middle stage to the "harmonious society" in recent years, the alterations in the core pursuit of power owners are not only reflected in policy reconstructions, but also step by step, reflected in the revisions of law.

The changes in systems and rules are a reflection of the revolution in the concept of legislation in marriage law. Therefore, the research in this article also reveals in depth the changes and development of the concept of legislation in China as a whole. As

mentioned before, all of this progress, such as the goal shift from formal to substantive equality and justice, the focal change from state regulation to respect of individual freedom, the protection of individual private rights and the mastery of balance between individual freedom and social stability in different social contexts, have witnessed the continuous improvement of China's legislative philosophy (Xia, 2019).

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# Chinese Legal Professionals and Transformation of Gender Roles. A Case Study

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**Abstract:** Gender equality is a part of global policy, as specified for instance in The UN Convention on the Elimination of Discrimination against Women. The Committee on the Elimination of Discrimination against Women (CEDAW) is the body of independent experts that monitor the implementation of the convention. China has reported her initiatives to advance the rights of women to CEDAW. However, China studies indicate that there is a link missing between traditional Chinese values rooted in Confucianism on the one hand and Marxist political policy on the other. This deficiency could be a barrier to gender equality. Inspired by classical feminist theory and sociology of law, the article explores how members of the legal profession in a Chinese provincial city function when they deal with gender roles. The article builds on a small sample of qualitative data. It concludes that legal professionals may seek to get an effect on the construction of gender roles and equality for women. In their professional work, they have a potential for forging a link between Marxist modernization and commercialization on the one hand and traditional values on the other. Their function may depend on their individual awareness of their role, their support of gender equality, and their position vis-à-vis the state and party.

## Exploring Gender Equality in a Chinese Provincial City

Under the UN Convention on All Forms of Discrimination Against Women China has had focus on equality in education, career options for women, and educational programs to strengthen the knowledge of rule of law among citizens. See point 20, 22, 28 and 38 in China's report of 2012 to CEDAW (Committee on the Elimination of Discrimination Against Women). (United Nations 2013. 6, 8 - 11).

China's report has inspired me to take up the three themes of (1) equality in education; (2) career options for women; (3) and rule of law instruction. I have discussed the themes with a small sample of Chinese legal professionals. I shall present their

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reflections on their own work practice involving gender relations against a backdrop of political science analyses of Chinese society reforms, advancing the thesis that legal professionals may function as a link between traditional patriarchal culture and socialist ideology of equality.

## Traditions, Ideology and Practice

The aim is not to explore the progress of the official Chinese policy concerning gender equality. Rather, I shall try to identify how traditional ideology – as phrased in ‘socialist harmonious society’ (United Nations 2013. 6) - may work its way into and leave an effect on the daily practice among legal practitioners and how they deal with this effect. Finally, I shall discuss if their working practice holds potential for change of the traditional ideology.

Marxism is a revolutionary ideology and practice supporting the oppressed masses in their conflicting revolution against the ruling elite. It wears also the cloak of a science, historical materialism, of the inevitable progress of society toward communism. Hence, it is a theory of society modernization and the equalizing reduction of rank and classes. Equality between the sexes will be a result, as asserted by Simone de Beauvoir in the feminist classic *The Second Sex*. (de Beauvoir 1998. 55-63; 134-35 on the Soviet Union). In the opposite corner, the Confucian tradition of Chinese law is a conservative, consensus-seeking culture encouraging mediation and compromise. (Zweigert and Kötz 1993. 293) Moreover, the culture holds an ideal of staying your proper behavior through understanding your own place in the social structure and hierarchy, for instance in that of the family. (Zweigert and Kötz 1993. 288) Thus, the Confucian outlook on life will run counter to progress of gender equality.

Political studies have investigated the equality issue and discussed the possible influence of ideology and values. In 2006, Jude Howell examined the influence of women in local politics. She found that women were generally under-represented on the committees of the three provinces she examined. Professor Howell showed that top-level political management in practice leads to gender inequality, since it regards gender equality as part-and-parcel of socialist society development. However, the failure of women to take part in public life is partly due to traditional prejudice against women. (Howell 2006. 603-04) In other sectors of society, traditional values have a great influence. When analyzing business management, Min Chen found that the key to Chinese management reform lies in the success of combining the market system with positive elements of Confucian values. (Chen 1992. 86-98) Hence, a result could be a closure to

women. When turning to the labor market, Maurer-Fazio, Rawski and Zhang suggest that inequality in wages for men and women in urban areas, in opposition to official ideology, reflects a complex interplay with a patriarchal Confucian legacy with its tradition of male dominance. (Maurer-Fazio, Rawski and Zhang 1999. 55-57; 85-88)

Data from three surveys in Zhejiang province during the period from 1999 to 2006 show that while men and women have obtained a very similar level of self-awareness and motivation in terms of political participation, China's patriarchal system, embedded in various forms of mindset and political practice, continues to constrain rural women's political involvement in a substantial way. They show that there is no causal linkage between economic development and the improvement of women's political participation, and hence the lack of political and other systemic supports leads to the low proportion of women in local power structures. (Guo, Zheng and Yang 2009. 145-46)

Interestingly enough, there seems to be indication of global dynamics advancing the equality process in China. In a UN program, the global women's movement provides a mechanism for the globalization of equality ideas, aided more recently by the internet. (Kaufman 2010. 585-586) Supplementing this idea of a global rights approach, research indicates Chinese women would benefit if more women's legal aid organizations were developed and supported. (Lee and Regan 2009. 541-42) Chinese women's organizations seem to converge with the global discourse of women's rights, thus showing a relationship between a global and a local perspective. (Jacka 2006. 585 ) Though by no means providing an in-depth analysis, this overview seems to indicate that China will not automatically establish gender equality with the implementation of Marxist modernization or economic commercialization, simply because equality runs counter to an already firmly established ideology and because of few programs targeting the issue.

## Legal professionals

### The function of Lawyers

I now turn to the question if the legal profession may provide a link the political science studies found missing in the Chinese implementation of gender equality. Lawyers hold a specific position in society. In Talcott Parsons' understanding, US lawyers of the 1950s took an intermediary role between the citizen and the state. In doing so, they had a function in stabilizing a dynamic society. (Parsons 1954. 370-386) Parsons presented his theory in the context of the cold war and the bipolar world with the Western free

professional, as opposed to the socialist, state employed specialist who enacted the law bound by economic structures and the party. I do not wish to claim that the situation of the American lawyer of the 1950s is comparable to that of lawyers in contemporary China, with its strong state and party and a weak civil society. However, for the last ten years, China has undergone profound changes with structural development and growth, just as was the case with the USA in the 1950s. Would it be unreasonable to suggest that Parsons' inspiration to see the legal profession as an intermediary between state and citizen could be relevant also in the Chinese case? After all, Parsons inspired Scandinavian socio-legal studies in their analyses of the Scandinavian lawyer as the jack-of-all-trades in the process of society transformation of the 19th and early 20th centuries in a situation when society changed from a traditional close structure to modern anonymous relations. The value system of the lawyer transformed abstract rules to concrete behavior, thus providing a new source of trust in human transactions. (Bertilsson 2013. 663-666) Thus, I find it helpful, as a theme for my examination to ask if the Chinese lawyer in some respects may function as an intermediary and consequently communicate values on gender equality? If the legal professional may function as such, this could be a missing link in the modernization process. However, the intermediary position places the lawyer under a certain pressure. He may seek to relieve himself of this and in guarding himself display malfunctioning of his role. Parsons identifies the following strategies: Self-seeking interests, a tendency to formalism, and a sentimental exaggeration of the client's case. (Parsons 1954. 372-373) I shall address the possible pressures on contemporary Chinese lawyers and discuss, if the pressures they experience provoke similar malfunctions.

### Respondents and Setting

My sample of respondents includes five members of the legal profession in a large and growing Chinese provincial city. When the interviews took place, the city saw a rapid construction of high rises, both near the urban center and in suburban or rural areas. A law student assisting me, told me that she wondered who ever would move into those high rises: *'the cost of living is so high here. How will I be able to pay for that? When I have my exam, I shall settle down in my hometown. Here it is too expensive.'* My respondents are by no means representative, not even for their own group, since my host, the local university, had provided me with the contacts. I interviewed a practicing male lawyer in his 40s, a young female judge of 27, a law professor in her 40s, and two female project consultants in their 30s. All interviews were in English, apart from the one with the practicing lawyer, where a young professor from the law school acted as a translator. During the same period, I had numerous encounters with other legal professionals and students. They offered me reflections and comments. In these brief encounters, I

sometimes took the position close to the participant observer, as when I took part in the class of the gender studies professor, or when I sat in on meetings with Chinese professionals.

I have not been able systematically to validate the information, I received. However, I found that much information corresponded with other sources. Considering that the professionals have offered me an insight into their multiple experiences, I find that the interviews render information of some value concerning the professional practice, viewpoints and values for legal professionals in the city, just as each of the professionals from his or her vantage point as a professional possessed considerable knowledge in the field. The practicing lawyer was a leading attorney in a private law firm. He had experience in both criminal and civil cases and he had acquaintances among professors at the university. The judge presided over a local court, deciding more complicated divorce cases. The law professor was a leading specialist in gender studies. She also was the director of the law school legal clinic. In that capacity, she had contact to a wide segment of citizens seeking legal advice. The project consultants had contacts to both grass-root level advisors and official institutions. When studying law, they had been students of excellence and they had studied at Western universities. They worked at a small center collaborating with a foreign Institute of Human Rights accredited by GANHRI (Global Alliance of National Human Rights Institutions) under UN.

The setting, selection of sample, and the language limitation to English are factors that limit the perspective of my inquiry and analysis. Besides, my own background in the tradition of Western law and choice of theory will limit my range of perception and create a bias.

### The Law Firm

The law firm was located in an office high rise in the city center. We met the lawyer in his office. Prior to his present position, he had conducted cases at the law faculty legal clinic. At the time of the interview, he handled criminal cases. His position was independent. However, his information that Chinese practice required a yearly renewal of his license left no doubt of a thorough state control, of which he was highly aware. (Blomquist 2016. 98) It left the impression of a professional under a certain pressure, underscored by his information that presently he was representing a former fellow law student of his, indicted for corruption.

Given the Chinese tradition of mediation, it was natural to ask the lawyer if mediation or litigation is more common in his work: *'In the cases that I have, there is seldom*

*mediation. The business clients of this law firm want to take the case to court. Litigation has become a large part of a lawyer's work. Mediation is more common among plain, simple people, for instance in the cases I dealt with when I worked at the legal clinic.'* Thereby he identified two different groups of Chinese society with different relations to the legal system, one being a target group for traditional conflict resolution and one in demand of a rule-oriented approach.

When asked about the typical career path of a practicing lawyer he made this observation: *'A lot of both men and women start at the courts. However, after a number of years, the men will leave the court and start working as lawyers. The women will stay at the court.'*

His initial explanation for this divide was graphic, employing the well-known argument in feminist theory of the physical insufficiency of women, degrading them as 'the other' and hence the incompetent sex (de Beauvoir 1993. 165-68): *'It is tough to be a lawyer. You have to be able to carry the burden of heavy papers.'* When stating this, he nodded to the full binders on his table. They represented the papers in the criminal case he was undertaking. He subsequently commented: *'And also I work late hours, nights and weekends. I doubt a woman could do that.'*

The argument made an impression on the female student guide following our company from the office: *'I have always thought that I would like to be a practicing lawyer. Now, I am worried that I won't be able to do it'*. His remark had clearly had a gatekeeping function., Although possibly unaware of this, he communicated the social norms of the sector to a potential applicant of the other gender. Norms which were hardly in accordance with the spirit of the Chinese report to CEDAW of advancing female career options. I did not ask directly, whether he had a positive interest in keeping this status quo,. However, he seemed to have no regrets about the situation, and his remarks could border on a self-serving initiative to support his own interest, as identified by Parsons (Parsons 1954. 372-373)

### The judge

My interview with the judge took place over an evening dinner at a restaurant in city center. She met no prejudice against women in her work as a judge, she told me. And after dinner she would go to court and prepare her cases. To document her position as a modern woman, she showed me snapshots of a table of fine Chinese cooking, prepared by her husband. Moreover, she reported that she enjoyed a great deal of autonomy

in her work: *'It is my decision if I find the case uncomplicated enough to be decided by a people's court, or if I should decide it by myself.'*

When telling me about the material law, however, other norms came to the fore: *'Chinese family law has a problem and that is that it is to the disadvantage of the woman who typically will do the work in the home. The two parties, man and wife are not treated equally, since Chinese law does not recognize the job in the family as work.'* She enjoyed a wide range of independence in her work: *'there is a certain amount of discretion. I have to make my decision in the best interest of the child, but within this range, I have a certain discretion. This is in opposition to many cases in contract law, where the judge will be more constrained by the phrasing of the contract. Often the words of the contract will be clear. In family law the judge interprets according to the spirit of the law.'*

One could ask if it would be possible to think of the court as an agent of change in the direction of gender equality. My material does not allow me to offer any conclusions on this in general. However, when regulation does not value equal rights, it seems to me that 'the spirit of the law' would not be likely to do so either. Moreover, the procedure and function of the court may support traditional values. In the judge's explanation: *'An important part of my work is to try to mediate. This is the idea of the harmonious society. And if an agreement is made between the parties, I shall not pass a verdict.'* The judge left me with the understanding that a judge, rather than communicating equal rights, administers traditional values as laid down in the law. In the particular case of the respondent, this could be the source of some tension, since obviously she personally adhered to other norms. Seen through Parsons' lens, I interpret the formalism laid down in her response as a malfunction of the tension. (Parsons 1954. 372-373)

### The Law Professor and the Legal Clinic

The professor in gender issues invited me to join her class of administrative law. I had a chance to look at the classrooms with technological equipment and furniture setting that encourages students to enter into discussions, rather than passively listening to lectures.

The gender ratio on this afternoon was 13 young women to four men, a balance that told me that women at least were not rare in some law school classes, but also that recruitment perhaps could be uneven. I noticed that she appointed a female student to translate for me and she was firm, even when the student protested and with her body language showed great surprise and insecurity about the situation, a recruitment situation in minuscule. This little intermezzo for me was a demonstration of how gender

bias may produce lack of confidence in the group being discriminated against. It also showed how a legal professional and educator could work to overcome it, guided by her own norms of gender equality. The young men and women participated on an equal footing, yet there was a difference, where the young men were more eager to ask questions and engage in discussion after my presentation.

I touched upon this, although indirectly, in my subsequent exchange with the professor. In her response, she referred to the general value of equality vis-à-vis practice. *‘In principle, we have equality. Both men and women go out to work. In that sense, they are equal. However, in reality they are not equal. There is a difference. The women also have to work at home. They do the work with the home, the children. This is extra work.’*

She took me to the premises of the legal clinic. The furniture had some similarity to a courtroom, with a podium and spectator seats. However, at the seats were computers and at the sides along the walls of the room, were bookshelves with binders. Students could work at the computers and with the binders. The parties to the cases were encouraged to find the regulation applying to their case, be it family law, rent of housing, or employment law. The practice was a part-and- parcel to the idea of empowerment of the citizens involved in the conflict: *‘People seeking help here expect that we take over and solve their problem. However, they have to learn ways to their own solutions. We provide them with help to find the relevant regulation instead of just doing mediation.’*

The law professor also took some time to explain how this rights approach ran counter to making a decision according to custom or simply mediating according to tradition. She did not see the clinic as a complaints board for the husband feeling dissatisfied with his wife’s performance as a housewife. She referred to a case from the legal clinic: *‘We had a case when the man went to the provincial Women’s Federation and complained about his wife. His wife was happy at work but not happy at home. At home, there was nothing to eat and she didn’t take care of him. Then conflict started to build up. He would follow her, check her text messages on the phone; he would tell her to change work, tell her to come home directly after work, tell her to report every day about what she had been doing... The third step in the case was divorce.’* The man had expected to get support from the Women’s Federation (The All-China Women’s Federation, the official state sponsored organization for women). Thanks to his wife’s perseverance and the work in the legal clinic, he did not succeed to find a mediation solution based on the traditional gender roles. So, would there be a preferred solution, according to the professor? *‘No, Equality does not mean the same in different contexts. Men and women are different and this means*

*that we should not treat them in the same way. You should give the woman choices. There is not just one choice, as for instance the choice of going out to work or staying at home... there are a number of choices, and the women should be equal to make their choices as are men in each case'*

When lifestyle is not a one-way street, the partners will have to negotiate and agree upon a number of different options. This in itself challenges a harmonious, organic outlook and stresses an individualistic one with an emphasis on explicit agreements, based on equal rights.

To the walls of the clinic were pinned large banners with Chinese characters. When I asked what they signified, the law professor smiled and told me that they were gifts from parties to some of the cases they had at the clinic, thanking the clinic for helping the person to find his or her way in their conflict: *'It is a tradition that people involved in cases bring their thanks. They are expensive to have made, and most of our clients are poor. During the first year, we told them not to do this, since we want them to know that we work without a fee... Nevertheless, they just went on coming with them. So now, we post them on the walls.'*

Mediation may be a part of the caseload in the legal clinic. However, the focus point was on equal rights as a part of the formal law and how to transmit this value to the concrete decision in each case. Contrary to the formal reply from the judge who stressed the restrictions of formal law, the legal clinic director could apply a principle of equality in advising her clients. Her embrace of the banners emphasized her activity as an intermediary one between modernity and tradition.

### The Empowerment Project

The University hosted an empowerment project, referring to the third point of the CEDAW report, educational programs to strengthen the knowledge of rule of law among citizens.

When the two female lawyers told me about the initiation of their project, it shed a new light on the recruitment to female carrier options: *'We were in the legal clinic program when we studied law. In this class, we talked to people who came to the legal aid center. To this center also came migrants from an autonomous region to ask for help. This inspired us to do a program in the region'*. Hence, the recruitment to their project went via the director of the legal clinic.

Their story urged me to ask about the rights of women in different areas. *‘Women are more equal in the cities than they are in the rural area, women in the rural areas suffer more, but still, even here in the city and at the law school, the professors prefer boys to girls.’* It is interesting to experience the dual message in this observation. The modernization project of the city is a levelling force that has softened the rigid gender roles. Education options offer themselves to both sexes and physical force is no longer of relevance. Women come to the fore, but perception and preference still linger, bound by traditional mental barriers that catch both sexes behind them.

It makes sense, then, to go into the didactic framework for transcending the barriers. The two young lawyers told me: *‘Working with women’s empowerment is influencing the mindset and making people open to gender awareness. There are links between the mindset and social patterns. We can see when they [course participants] communicate that there is a hierarchy. Men are more important than women are. Older women are more important than younger ones. The younger women look to the older ones before they say anything, as if to wait for a sort of a sign from them.’*

So how to influence the specific power hierarchy and open up for the individuals to contribute?

*‘At first, they will sit down with the people they know. They arrive from different villages, and they feel comfortable with those they know. However, we’ll change that right away by giving them a game, so that they have to move around [She smiles]. They will get to talk to others and on the second day they are more relaxed.’* The work to tear down the hierarchy continues in the conference room. On the one hand, they have traditional ex cathedra lecturing. On the other hand, the project consultants will facilitate active discussion and thereby implement equality in practice: *‘There will be a podium with the president presiding over the seminar. Here also the participants will make their presentations, more or less traditional style, with one-way speech and presentation slides. We will be in the middle of the room going from one table to the other, facilitating the discussions. .... They will discuss examples, cases that we present to them and we ask them to volunteer some cases that they have experienced. During the breaks, we will let them do games. They love that and it will ease them up.’*

A first reaction could be to see the empowerment perspective as one tied to a certain, defined field, sector, or discipline, as family law. However, the project consultants directed their attention to how equality played out in practice: *‘We don’t think of some problems as being specific women’s problems. Rather we tend to take the women’s perspective*

*on each problem we encounter.' Or: 'Our program concerns the training of women leaders. In the program will be men as well as women, younger persons as well as older. We could start the program because it is about providing legal aid to people who cannot afford it.'*

In other words, they integrate empowerment of women in daily life. While they do not define their work by a specific discipline of law or to formal procedures, they still stress the rights approach: *'During the course we will show them how they can do internet search of regulation so that they will be able to find the relevant regulation after the course.'* This practice affirmed Kaufman's findings that internet search in combination with international awareness of equality programs may be helpful in facilitating equality. (Kaufman 2010. 585-586) In their evaluation of the rights approach, vis-à-vis mediation in family cases the empowerment project workers had no doubts about this: *'Mediation is a common way of solving conflicts in the villages. Not so infrequently, mediation will be to the disfavor of the woman in the conflict. By providing a rights perspective we can secure a better outcome for the woman.'*

The interview established that the project consultants took upon them the function of providing a link between urban modernization processes and rights. Moreover, they encouraged for this link to reproduce itself into local society: *'The challenge in general is to reach as many people as possible with limited funds. This has initiated a working method where we instruct local paralegals. Rather than spending all the time with practical consulting of the citizens with legal problems. We work more on the institutional level with the local legal aid worker. In our training course are grassroots lawyers and with them we try to institutionalize the work, so that they continue. They work at different levels of administration, both township, village, regional.'*

The next question could be if this function is prone to place the project consultants under pressure from the state or institutions integrated in the state, as for instance the All-China Women's Federation. In the words of the program lawyers: *'The Federation's programs are built around the idea of harmonious society, how to be a good housewife, not exactly the kind of thing that we do.'* Interestingly, however, the consultant also had positive experiences with the activities of the Federation: *and yes, they do have programs of children awareness... to be aware of children not being hurt or injured or slapped. 'That's good... sounds like a really good program.... Parents and children slap children. They are not supposed to, but they do.'*

Being able to collaborate with official structures is of vast importance for an empowerment project in terms of resources, recognition and impact. For one thing, the project needs financing. Access to certain facilities can be crucial and may be tied to a

personal relationship. This will place certain pressures on the project consultants. Thus, they told me of the advantages when their first course took place at the headquarters of the local party: *'The party premises were better than the hotel where we did our second course. The party building had an aircon, and they had a great playground where we could go and do games.'* The support of a dedicated party member can be a valuable asset. In some cases, it can be a precondition for support of the initiation of an empowerment program: *'...a women party member wanted the course. She arranged so that the course could be there [at party headquarters]. She was a strong, intelligent woman and she later became the deputy leader of the local party organization, which is a high post. She was in charge of the whole seminar and you could tell that she was good. [She smiles] At that time, she was the temporary leader of the Women's Federation here. After she left her position, we haven't had collaboration with the Federation.'* In spite of this top-level influence, the project consultants reported that they had influence on the course, on both the dimensions of the course, the activities and the setting, hence attesting to the pressure on negotiating the individual projects: *'At first, they told us that they wanted a representative from each village in the course. That would be around 200 people. We said that this would be impossible. We cannot train this many at one time and it is too much organization and too expensive. Consequently, they changed it to 30.'*

Keeping Kaufman's work in mind, (Kaufman 2010. 585-586) I would expect that a paper like the Chinese CEDAW reports could be instrumental for forming the work in the empowerment project. However, that did not seem to be the case. The project consultants did not refer to CEDAW reports and they did not seem to seek support there. Consequently, while their international education and their internet search for sources obviously formed their practice, they did not see themselves as a direct instrument of implementation of this particular program. In spite of a certain pressure from power structures, their focus was on the needs and wishes of their own clients, without seeming to, in front of me, to exaggerate their client's situation, as could be the malfunction in their case. (Parsons 1954. 372-373).

## The Missing Link?

From my modest sample of interviews, class participation, and conversations, I can draw no general conclusion on Chinese lawyers and their influence on gender equality. Neither can I claim that Chinese lawyers as a whole function as intermediaries between general equality norms and individual citizens in transmitting equality norms and that they perform a function as such in the modernization process. However, I found that lawyers do transmit values on gender equality grounded on their knowledge of society.

The practicing lawyer in my sample transmitted a powerful message of traditional gender values. His remark left an impression on my student helper and made her doubt her previous decision to become a practicing lawyer. Thus, it had a potential for making (negative) impact on recruitment of women to the profession. Would positive impact in the case of the opposite communication be unlikely? Hardly. The law professor and project consultants reported concrete examples of implementing equal values in the instruction and advising process, not as a manifest function of their work that would be directed towards counselling within a broad spectrum of law. It was a latent, but not random function of their task. The judge stood out in that respect. On the one hand, she herself supported equal rights values and had a certain amount of discretion to form her decision. On the other, she also administered a state system with traditional values, and it made me wonder, if she found the full and entire support for the principles of equal rights here that she could have wanted. It may suggest that a structural effect is at play here, and whether the part of the profession under lesser state pressure is more likely to have an equalizing effect. Global equal rights reports and the norms laid down in them did not seem to be directly instrumental in the communication of equal rights to the clients. However, the ones to communicate equal rights most directly were also the professionals more oriented towards the international community. Teaching clients to search their rights on the internet served as a means of this communication. With the limitations of my material, I conclude that some Chinese lawyers may be able to function as the missing link towards modernization that political science research identifies, partly because of their individual preference and position in society and partly, because as lawyers they fit the role of professionals transforming modern abstract values of equality to specific, concrete solutions.

My findings are biased, partly as a result of the limitations in setting and language, partly due to my own professional bias as based in a Western rule-of-law tradition. In both cases the bias will tend to produce a focus on the rights aspect and perhaps a tendency among the respondents to call the rights aspect to the fore when reporting from their practice. This does not alter the fact that the respondents did function as intermediaries between state regulation and citizens and this function gave them a vantage point in which to communicate equal rights.

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# Experiments for Democracy during the Culture Revolution in China

He Jiahong<sup>1</sup>

**Abstract:** The democratic system based on political consultation and the people's congress in PRC belongs to the category of indirect democracy, in which the key is to guarantee those in power represent the public's interests. The Cultural Revolution was an attempt for this purpose and gave Chinese people a chance to experience some practices of mass democracy, including the democratic supervision in the form of mass criticism, the democratic governance in the form of rebellion and usurping, and the democratic participation in the form of Trinity. However, the Culture Revolution became a national disaster. With lessons learned, the Chinese leadership recognized the importance of the rule of law.

**Keywords:** democracy, culture revolution, rule of law

## Introduction

The People's Republic of China (PRC) established a democratic system based on political consultation and the people's congress when it was founded in 1949. The first plenary session of the Chinese People's Political Consultative Conference (CPPCC) was held in Beijing in September 1949. The first general election took place in China in 1953. The top-down election created local people's congresses at each level, including township level, county level, municipal level, and provincial level. In 1954, as a result of indirect election, the first National People's Congress (NPC) had its maiden session in Beijing, marking the country-wide rollout of the people's congress system.<sup>2</sup>

According to the constitution of the PRC, China is a people-centered country. Article 2 of the Constitution clearly stipulates: "All power in the People's Republic of China belongs to the people."<sup>3</sup> The Chinese people are familiar with such statements that the

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2 Yu Keping (Editor in Chief), *China: Modernizing State Governance*, 2018, p.8-17

3 *The Constitution of the People's Republic of China*, 2012, p.77.

people are masters of the country, while the officials are public servants. In other words, the people are masters of government officials.

China is a country with a vast territory and a large population, and significant regional imbalances and differences make it difficult to apply a direct democracy model throughout. A political system with people's congresses at its core, supported by multi-party cooperation and political consultation under the leadership of the CPC, falls under the indirect democracy category. The key and also the challenge of realizing democracy lies in appropriate representation; that is, how to make sure those in power represent the public's interests. Generally speaking, there are two guarantees for this purpose. The first is ex-ante guarantee; that is, a democratic election that is run to select deputies who are trusted by the people to decide on state affairs. The second is ex-post guarantee, or democratic supervision that enables the people to check whether the decisions made by the deputies are in the people's best interests.

The leadership of the Communist Party of China (CPC) has attached great importance to democratic supervision by the people. Article 3 of the Constitution reads "All administrative, judicial, and procuratorial organs of the state are created by the people's congresses to which they are responsible and under whose supervision they operate."<sup>4</sup> For this purpose, several channels of democratic supervision have been put in place in China, including supervision by democratic parties<sup>5</sup>(democratic supervision in a narrow sense), supervision by social groups, supervision by individual citizens, and supervision by the media and the press. However, these channels of supervision do not always work properly owing to the absence of an effective supporting system. As such, democratic supervision somehow belies its name.

Following the founding of the PRC, the top leadership group led by Mao Zedong kept their promise that "the people are masters of the country" and requested all officials at every level of government to be down-to-earth, to do research and investigation, to widely listen to and base decisions on public opinions, and to stick to the route of "coming from and going into the mass." Mao Zedong also emphasized ideological education and requested that all officials keep in mind that they are "public servants" and must "serve the people heart and soul." However, the check of the power and the control of the officials has long-standing challenges to human society. Faced with resurging bureaucracy and other growing evils, Mao Zedong tried to tighten public

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4 *Constitution of the People's Republic of China*, 2012, p.7.

5 Besides CPC, there are eight political parties, considered as democratic parties, in China.

supervision by means of mass movements, and finally launched “the unprecedented Great Proletarian Cultural Revolution” in 1966.

At that time, Mao Zedong believed that revisionism was rising in the central organ of the Party, and that the Party and the country were threatened by the restoration of capitalism. He believed that unswerving actions must be taken to mobilize the masses in an open, widespread, and bottom-up manner to uncover the ugly fact of life of the party and the country and recapture the power usurped by capitalists. An enlarged session of the Political Bureau held in May 1966 and the Eleventh Plenary Session of the Eighth CPC Central Committee held in August of the same year kickstarted the full-scale Cultural Revolution. *Notice from the CPC Central Committee* (or The May 16th Notice) was issued at the former session, and *Decision of the CPC Central Committee on the Great Proletarian Cultural Revolution* (or the Sixteen Rules) at the latter. And the central governing body was revamped.<sup>6</sup> In a sense, the Cultural Revolution was an attempt at achieving socialist democracy and gave Chinese people a chance to experience some practices of mass democracy.

#### Democratic Supervision in the Form of Mass Criticism

The Cultural Revolution started with mass criticism, and mass criticism prevailed with the use of big-character posters. By big-character posters, we mean wall posters written in big characters. Anyone could write such a poster and put it up on any wall in a public space. That was one way the public could express themselves. It had existed back in the 1950s but did not last long. On 25 May 1966, Nie Yuanzi, General Secretary of the CPC Committee of the Department of Philosophy, Peking University, together with six other faculty members, wrote a poster criticizing heads of the university. The poster, titled “*What have Song Shuo, Lu Ping and Peng Peiyun done during the Cultural Revolution?*”, was put up in the university canteen and caused a stir. Mao Zedong admired their move and called it “the country’s first Marxist-Leninist poster.” On 1 June, China National Radio aired the full text of the poster to audiences across the country. On 2 June, Kang Sheng, then advisor to the Central Taskforce for Cultural Revolution, visited Peking University, giving support to Nie Yuanzi and praising the poster, saying it was “a declaration comparable to that by the Paris Commune.” After that, many teachers and students at universities and middle schools produced posters condemning their leaders. The Cultural Revolution spread unchecked. Then in charge of the front line of the work of the central government, Liu Shaoqi convened a central

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<sup>6</sup> ‘Cultural Revolution’ entry at Baidu Encyclopedia, <https://baike.baidu.com/item/%E6%96%87%E5%8C%96%E5%A4%A7%E9%9D%A9%E5%91%BD/117740?fr=aladdin> [visited on January 7, 2018].

meeting and decided to dispatch task forces to universities and middle schools that were taking leadership of the Cultural Revolution in an effort to rein in the mass revolutionary fever catalyzed by the big-character posters. According to statistics from 24 universities and colleges in Beijing, these task forces accused 10,211 students of being righty, and 2,591 teachers of being counter-revolutionary. Mao Zedong was upset by these task forces and ordered them to be dismissed. In fact, he wrote a poster in person during the Eleventh Plenary Session of the Eighth CPC Central Committee, which was published on *The People's Daily* dated 5 August 1966 under the title “*Bomb the Headquarters (A Poster by Me)*.” The full text is shown below:

*Bomb the Headquarters (A Poster by Me)*

The country's first Marxist-Leninist poster and the review by the commentator at *The People's Daily* were very well written! Please read the poster and the review again. However, over more than 50 days, some comrades, from the central to local levels, did exactly the opposite, took the capitalist side, practiced dictatorship of bourgeoisie trying to suppress the Great Proletarian Cultural Revolution. They actually confounded right and wrong, turned things upside down, encircled and annihilated revolutionists, suppressed different voices, and created a white terror. And they are complacent about doing this, boosting up the capitalist class and demoralizing the proletariat. How evil they are! It reminds me of the right-wing inclination in 1962 and the seemingly left-wing but actually right-wing inclination in 1964. Isn't it thought-provoking?

By Mao Zedong

On 5 August 1966.<sup>7</sup>

The mass criticism movement in the form of big-character posters could have served as democratic supervision of the officials. Those posters were composed mainly for two purposes: disclosing and criticizing. The former could satisfy the public's need to know, while the latter satisfied the need to speak. The action was indeed instrumental in public supervision of the officials. In that social environment, abuse of power and corruption were rarely seen among officials. That said, there was no control over how those posters were written and where they were placed. As a result, some people could easily use this tool for rumor-mongering, disgracing, and frame-up purposes, while others could deliberately misinterpret the text and lodge groundless and exaggerated charges. During

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<sup>7</sup> ‘*Bomb the Headquarters (A Poster By Me)*’ entry at Baidu Encyclopedia, <https://baike.baidu.com/item/炮打司令部——我的一张大字报> [visited on March 2, 2018].

the Cultural Revolution, the abuse of posters created numerous wrong and unjust cases and stirred up social turmoil.

### Democratic Governance in the Form of Rebellion and Usurping

On 1 June 1966, The People's Daily published an editorial titled "*Wipe out all monsters and demons,*" blowing the horn for the Cultural Revolution. Then, some college and middle school students in Beijing spontaneously formed Red Guard groups and attacked "capitalists in power" in all organizations and entities in a violent revolution. On 18 August, Mao Zedong met representatives of the Red Guards at Tiananmen and gave an affirmative nod to their act of violent revolution. Henceforth, campus violence escalated quickly and spread on a mass scale. Red Guards went to the streets and stormed into neighborhoods, claiming to mop up "landowners, rich peasants, counter-revolutionists, bad elements and righties." A horrible Red August ensued. Suddenly, bloody violence became the keynote of the Cultural Revolution.

With the encouragement or tacit consent of the state leaders, college and middle school students across the country put together numerous Red Guard groups and workers formed rebellious gangs. These mass groups that were formed spontaneously soon took over the leadership of their organizations. The struggle for power escalated, even to the provincial government level. On 6 January 1967, 32 rebellious gangs in Shanghai aligned and seized the power of the party and the government, whipping up the so-called January Storm. Numerous rebellious gangs in other provinces, municipalities, and autonomous regions followed suit and formed "Revolutionary Committees" to take power by force.<sup>8</sup> That seemed to be the democratic model of ruling by the masses.

Meanwhile, different Red Guard groups and rebellious gangs fought against each other for power and even resorted to violence. After Jiang Qing, among others, put forward the slogan, "Attack verbally but defend by force," violence among mass groups continued to spread and escalate. Large-scale violence and armed confrontation happened in some regions. In an environment full of violence, it was not uncommon to see youngsters engaging in gang fights and robbery. Citizens in many places felt unsafe.<sup>9</sup> With "the Red Glory sweeping the country," many government organs were shut

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8 'Cultural Revolution' entry at Baidu Encyclopedia, <https://baike.baidu.com/item/%E6%96%87%E5%8C%96%E5%A4%A7%E9%9D%A9%E5%91%BD/117740?fr=aladdin> [visited on January 7, 2018].

9 I was a timid middle school student and stayed out of fight, but once my waist was stabbed and my cap was taken away.

down totally or partially; society was in turmoil, and mass democracy degraded into a country-wide unrest.

### Democratic Participation in the Form of Trinity

The cabinet decided to have military officers suppress the social turmoil created by the rebellious gangs. On 23 January 1967, the CPC Central Committee, the State Council, the Central Military Commission, and the Central Taskforce for Cultural Revolution released the Decision on Unswerving Support to the Left-wing People from the People's Liberation Army, requesting the People's Liberation Army (PLA) to send officers to "support the fight of the mass left-wing people for power locally." Thus, the pro-left-wing officers of the PLA became members of local Revolutionary Committees. This contingency measure led to the Trinity model of democratic participation in politics.

On 25 January, The People's Daily carried an editorial titled, "*The Victory of the Great Proletarian Cultural Revolution in Shanxi Province*." It said: "The revolution community in Shanxi has created new experience for the country-wide fight for power among proletarian revolutionists. The leaders of the CPC Committee of Shanxi have set a good example for revolution leaders across the country. The PLA in Shanxi military region has erected a red flag for all PLA commandants in the country." The editorial applauded this new state organizational structure; that is, a governing body made up of heads of mass revolution groups, heads of local military forces, and pro-revolution officials of the government and the party.

On 2 February, The People's Daily published another editorial, titled "*New Dawn in Northeast China*." It summarized the experience in Heilongjiang as a Trinitarian provisional governing body made up of heads of mass revolution groups, heads of local military forces, and pro-revolution officials of the government and the party. This editorial brought the Trinity concept forward explicitly for the first time. Then another editorial on The People's Daily titled "*A Good Example of The Fight for Power Among Proletarian Revolutionists*" praised the experience of the Heilongjiang Revolutionary Committee in the implementation of the Trinity and suggested it be rolled out countrywide.

The People's Daily published another editorial, "*Defend the Correct Trinity Approach Unswervingly*" on 17 February, and another one, "*The Trinity of Revolution Can Assure Victory in the Fight for Power*" on 21 March. In 1967, *On the Trinity of Revolution* was published on Hongqi, Issue 5. It conveyed Mao Zedong's latest instructions: "In

those locations and organizations where a fight for power is mandatory, the trinity of revolution approach must be followed and a revolutionary provisional governing body that represents and asserts the power of the proletariat must be established. This governing body is called Revolutionary Committee.”<sup>10</sup> The Trinity leadership bringing representatives of the people on board was a product of mass movements under special historical conditions, but it was after all an expedient byproduct of the fight for power and might not be institutionalized as a pattern of democracy.

The Cultural Revolution once inspired the world because it was a revolution launched by the top leader of a state against the government under his leadership. This was indeed unprecedented! The Cultural Revolution was an attempt to socialize a special form of mass democracy, one that encouraged the general public to fulfill their right to speak, to participate, and to supervise by uttering and venting their thoughts and feelings, writing big-character posters, and engaging in open debates. However, this model of mass democracy went unchecked and unfettered and ultimately devastated the whole society. In a word, the Culture Revolution became a national disaster.

The Great Revolution originating in the cultural circle caused particularly serious damage to and had far-reaching impact on Chinese culture. Culture dislocation, science and technology dislocation, and talent dislocation occurred as a result. Society’s cultural heritages were wrecked; schools and institutes were abused; and cultural retrogression resulted. More than 230 million persons, or one-fourth of the total population, were illiterate or semi-illiterate, according to a census conducted in 1982.<sup>11</sup> Moreover, as a result of the Cultural Revolution, the Chinese nation lost faith, was ideologically confused, and became morally corrupt. As a matter of fact, after the founding of the RC, good morals and rightful conduct had dominated, and mutual help and benefit were valued. But the bloody Cultural Revolution distorted the Chinese people’s behavior. Many people developed habits of cheating and hurting each other amidst merciless and heartless fights. Even now, its negative impact lingers.

December 1978 witnessed the convening of the Third Plenary Session of the Eleventh CPC Central Committee, a milestone in its history. According to the Communiqué of the session, its agenda contained the topics of democracy and rule of law, and both were

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10 *‘Trinity’* entry at Baidu Encyclopedia, <https://baike.baidu.com/item/%E4%B8%89%E7%B%B%93%E5%90%88/3743523?fr=aladdin> [visited on January 7, 2018].

11 *‘Cultural Revolution’* entry at Baidu Encyclopedia, <https://baike.baidu.com/item/%E6%96%87%E5%8C%96%E5%A4%A7%E9%9D%A9%E5%91%BD/117740?fr=aladdin> [visited on January 7, 2018].

given serious consideration. “Over the past period of time, the principle of democratic centralism was not put into effect. Centralism was all being talked about, while democracy was undervalued or ignored. At the moment, it is particularly important to underscore democracy, and highlight the dialectical relationship between democracy and centralism, so that central leadership by the party and effective command of all production organizations could be built on the mass line.” It was emphasized that “To protect democracy, the rule of law must be enforced, and democracy must be institutionalized and legislated to deliver stability, continuity and supreme authority of the institution and law and make sure the law is available and strictly observed and enforced and lawbreakers are punished.”<sup>12</sup> Following this session, the party and the government began to shift their focus from class warfare to economic development and resumed their pursuit of modernization. In the political vocabulary of China, *Reform* replaced *Revolution* as a buzz word. Unlike revolution, reform is intended to optimize the existing system rather than destroy it.

In March 1980, *Several Principles Governing the Political Life in the Party* was passed at the Fifth Plenary Session of the Eleventh CPC Central Committee to reinforce democracy combining collective leadership with individual accountability in the party. In June 1981, the *Resolution on Several Historical Issues of the Party Since the Founding of the PRC*, adopted at the Sixth Plenary Session of the Eleventh CPC Central Committee, pointed out: “During the Cultural Revolution that took place between May 1966 and October 1976, the party, the country and the people suffered the worst setback and loss ever since the founding of the PRC. The Cultural Revolution was a civil riot started by the top leader by mistake and taken advantage of by the counter-revolutionary gang, a major catastrophe suffered by the party, the country and the people of all ethnic groups.” Deng Xiaoping stated: “We are totally negative about the Cultural Revolution, but it did make one single positive contribution, teaching us a lesson. But for the lesson learned from the Cultural Revolution, we could not have possibly mapped out the ideological, political and organization routes and a series of policies after the Third Plenary Session of the Eleventh CPC Central Committee.”<sup>13</sup>

The lesson learned from the Cultural Revolution made the Chinese keenly aware of the importance of democracy. Democracy is the surest way to revive the great Chinese nation and is a responsibility the CPC has for the Chinese nation. The level of

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12 Zhuo Zeyuan, *Rule of Law in China*, 2018, p.70.

13 Cited from ‘*Cultural Revolution*’ entry at Baidu Encyclopedia, July 25, 2016, <https://baike.baidu.com/item/%E6%96%87%E5%8C%96%E5%A4%A7%E9%9D%A9%E5%91%B-D/117740?fr=aladdin> [Visited January 7, 2018].

democracy is closely related to the level of economic and cultural development of the society. Democracy should neither lag behind advancement of the economy and the culture, nor be divorced from real-world economic and cultural conditions. Therefore, to drive democracy in China, it is necessary to draw upon other countries' successful experiences and to take the reality in China into consideration; that is, it should be a progressive process. China must not engage in democratic reform as if it were shock treatment; rather, it should make breakthroughs and improvements in the existing democracy so as to keep it growing.

During the Cultural Revolution, the Chinese also identified the peril associated with mass democracy. From this, they learned that elite democracy should be the fundamental approach and one that is best suited to China. The people are masters of the country, but if everyone is trying to hold the power, the country will be a mess. The only way to avoid this is to enable a few people to exercise power on behalf of the general public.

## Conclusion

The CPC is a party that shares a common faith in communism. The ultimate aim of communism is to foster good morals predicated upon a superabundance of material wealth and to create an ideal society wherein all human beings are equal, are able to do what they can, and to take what they need. This is a beautiful dream and that faith is lofty. And beautiful dreams and lofty faith can raise men's moral standards. In this sense, the CPC is supposed to be a virtuous party. Every member of the party should be a moral paragon who values justice above material gains and acts for public interests rather than personal ones. Over the course of fighting for power, many members of the CPC were inspired and motivated by their aspirations and faith; they gave up their personal interests, joined the revolution, and even sacrificed their lives.

After coming to power, the CPC continued to uphold its aspiration and faith, demanding the highest moral standards from its officials. All officials were required to "serve the people heart and soul" and selfless behavior was promoted. For a period of time after the founding of the PRC, the moral standards based the aspiration and faith did succeed in making officials behave properly and foster good morals in the whole society. A person promoted to a leading role was usually a man of virtue who would continue to behave in line with high moral standards. Hence, elites with state power in their hands would act in the people's best interests, while the people could still feel they were masters. That is, to some extent, China realized democracy based on morals.

However, power is highly corruptive. The material interests attached to power are extremely appealing. They may undermine one's aspirations and faith and slacken men's moral constraints. The faith in communism has gradually faded away over time and become an illusionary slogan. Many people joined the CPC for a better career rather than to work for communism. It is true that there are selfless righteous men and men who pursue commonweal wholeheartedly, but such men are rare in any society. The effectiveness of moral constraints on the officials has weakened. "The people are masters of the officials" is a tongue-in-cheek comment. Many public servants forget the true meaning of the word *public*.<sup>14</sup> In their eyes, the leaders are paramount, while the people are nothing. This is consistent with a truth in politics that says that you are responsible for those who delegate power to you. So, some officials unconsciously take a side opposite from the people, bullying and domineering them. Some officials talk about democracy but do not mean it. When talking about serving the people, they are thinking about ruling the people. Other officials claim that they represent the people and that they are ruling the country for the people.

Apparently, democracy must be built on law, not on morals. The CPC started legislation work after coming to power, but the progress has been slow and there have been headwinds. The reason is that they were not well prepared theoretically and they were inexperienced. And there some leaders' personal factors affected progress.

In 1956, at its Eighth National Congress, the CPC decided to refocus on socialist construction and made it clear that "one of our top priorities currently is to create a relatively complete legal system and improve the rule of law." However, the top leadership headed by Mao Zedong unexpectedly started a political campaign against the right-wing in the summer of 1957. This large-scale Anti-rightist Campaign not only wronged many intellectuals, but also led to a retrogression of legal system development in China. For example, the Ministry of Justice was dismissed, and the legal system was abolished.

On 21 August 1958, Mao Zedong said frankly in his address to a meeting at Beidaihe: "Law, well, we need it, but we will have our own way. The Civil Law and the Criminal

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14 In contemporary China, Renmin (the people) is a widely used and very important word. All names beginning with the People are often the best or the most important ones, for example, the people's government, the Peoples' Court, the People's Procuratorate, the People's Liberation Army, the People's Bank, the Great Hall of the People, and Renminbi. All these names were designed to assert that the people are masters, but the result is not satisfactory. Frequently used words do not always strengthen the public's awareness. Particularly with semantic generalization, some familiar notional words may become ambiguous form words.

Law have so many clauses, but who can remember all of them? I was involved in making the Constitution, and I cannot remember it now. We seldom rely on the legal stuff, but mainly rely on resolutions and meetings which were held four times a year. We must not rely on the Civil Law and the Criminal Law to maintain order. Every resolution we made is a law, and every meeting we had is a law. ... We should rule by men, not by law. An editorial on the People's Daily is followed by the whole country. Why do we need the law?"<sup>15</sup>

In 1959, Liu Shaoqi was elected as President of PRC by the Second NPC, and Mao Zedong was elected as Chairman of the CPC by the Central Committee. In doing his job, Liu Shaoqi became aware of the importance of legal work, and reflected on the lessons learned from having the police, the procuratorate and the court work under the same roof since 1958. On 23 May 1962, Liu Shaoqi called heads of the central leadership group for legal work together and gave a speech. He, who once thought the court should be a tool tamed by the Party, stated clearly at that meeting: "It is right that the court should try and adjudicate cases independently. The Constitution requires that. Neither the Party nor the government shall intervene. We should never say that the legal organs should be absolutely obedient to leaders of the Party at all levels. If they go against the law, the legal organs must not submit themselves to them." In this respect, Mao Zedong did not have much expertise, but he wanted to hold the power to say and be the decision-maker, so he needed to draw the Party's and the country's attention to the issue of political struggles which he was better at. In August 1962, Mao Zedong reiterated the importance of class struggles in Beidaihe and emphasized that "it should be repeated every year, every month and every day." Four years later, the Cultural Revolution that devastated the legal system was started.<sup>16</sup>

With lessons learned from the Cultural Revolution, the leadership group of the CPC recognized the importance of the legal system. Then, at the Third Plenary Session of the Eleventh CPC Central Committee, this proposal was made: "The rule of law must be enforced in order to protect democracy." Deng Xiaoping emphatically said: "Democracy must be institutionalized and legislated for, so that the institution and law will not change with leaders or with leaders' viewpoints and attention."<sup>17</sup> Democracy should

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15 Cui Min, *Redressing Political and Legal Malpractices during the Great Leap in 1962*, Teahouse for Jurists, Issue 4, 2012, p. 81.

16 Cui Min, *Redressing Political and Legal Malpractices during the Great Leap in 1962*, Teahouse for Jurists, Issue 4, 2012, pp. 84-86.

17 Liu Junjie, *A Study of Checks and Balances of Power in the Contemporary China*, 2012, p. 165.

be governed, protected, and realized by the legal system. This is the most important political heritage Deng Xiaoping left to the Chinese people and should be a guiding principle for the improvement and advancement of socialist democracy in China.

In 1979, seven laws were promulgated at the Second Session of the Fifth NPC in 1979,<sup>18</sup> marking the restoration of legal system in China. In 1982, the revised Constitution was adopted at the Fifth Session of the Fifth NPC, Article 79 of which provided that the president of PRC shall serve for no more than two terms. In 1997, “Ruling the country by law and building a socialist country under the rule of law” was proposed as a general strategy for the country at the Fifteenth National Congress of the CPC, and, for the first time, the wording *Legal System* was replaced by *Rule of Law*. In 2002, at its Sixteenth National Congress, the CPC further elaborated on the requirements and specified the targets for building a country under the rule of law, and for the first time, a leadership transition was completed based on the Constitution. In 2007, at its Seventeenth National Congress, the CPC ordered an increase in pace for building a socialist country under the rule of law. In 2012, the CPC decided to comprehensively promote the rule of law at its Eighteenth National Congress. In 2014, the *Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law* adopted at the Fourth Plenary Session of the Eighteenth CPC Central Committee made it clear that the overall goal of promoting the rule of law was to create a socialist legal system with Chinese characteristics and to build a socialist country under the rule of law.<sup>19</sup>

However, the most important yardstick by which we measure the level of rule of law in a country is not legislation or the completeness of available laws, but enforcement, or the implementation of the law in real life. Without the legislation, the rule of law is of course impossible. With the legislation, the rule of law is still not necessarily in place. Now the key problem facing China is not that there are not enough laws, but that they do not work. This means that all efforts on the rule of law should refocus on enforcement instead of on legislation. And a key objective of the rule of law is to govern the officials and to rein the power. In another word, without the rule of law as the cornerstone, democracy will remain castles in the air.

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18 The Criminal Law, The Code of Criminal Procedure, The Organization Law for Local People’s Congresses at All Levels and Local People’s Governments at All Levels, The Election Law for the National People’s Congress and Local People’s Congresses at All Levels, The Organization law of the People’s Court, The Organization law of the People’s Procuratorate, and The Law on Sino-Foreign Equity Joint Ventures.

19 Zhuo Zeyuan, *Rule of Law in China*, 2018, pp. 108, 116, 143, 156.

In conclusion, political democratization should be the main goal for China's development. Over the 40 years of reform and opening up, Chinese people have gained experience and learned lessons in exploring the road to democracy. Some achievements have been made, but there is still a lot of work we need to do. We have to face the current challenges with a positive attitude and explore the road to a "Chinese democracy", in an effort to create a better social system for future Chinese generations.

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# Towards a Legislative Reform in Denmark?

*Hanne Marie Motzfeldt*<sup>1</sup>

**Abstract:** The digital transformation of the public sector in Denmark has been going on steadily for almost twenty years and has changed the Danish public authorities' working processes, organization and interaction with citizens. In this article, it is briefly described how national administrative law developed as a response to comparable changes in the Danish public sector in the 1950s to the 1980s. It is assumed that this past development primarily was driven by the need to protect fundamental values embedded in the Danish legal culture. Further, it is examined whether there is any trace of a similar development related to the present digital transformation. Finally, as such a development in Danish case law can be observed, it is assessed whether a legislative reform within administrative law is likely to be initiated and adopted within the next decade.

## Introduction

One of the tasks of legal scholars is to observe and analyze changes and developments within legal systems, or if possible, even identify factors driving adjustments and patterns of development in times of change within society and technology. The identification of such “drivers” and characteristic patterns for a defined area of regulation within a given legal culture, allows for a better understanding of the past and the present and the similarities they bear. It might even form the basis for speculation on whether historical patterns will repeat themselves in the future.

In the following, the chosen area is Danish Administrative Law and the focus is on the drivers and patterns of development and adjustments in this area of regulation when the public administration undergoes major changes due to societal, technical and political factors.

The Parliamentary Ombudsman has played a significant role in the development of Danish Administrative Law within the last 60 years. Therefore, this institution will be briefly introduced in section 2. In section 3, an important element of the Danish

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legal culture related to public administration is examined; the relationship between the legislature and the executive power. Section 4.1 describes the transformation that Danish public administration underwent in the 1960s and 1970s. This historical review continues in section 4.2, but the focus turns towards the developments of administrative law in (especially) the 1970s. Section 5 introduces the current transformation of the Danish public sector, caused by digitalization. In section 6, it is concluded that the main and long-term driver for development within Danish administrative law is closely linked to the element of Danish legal culture described in section 3. This culture consists – straightforward and simple – of the interest of ensuring that the executive power (the public administration) acts in accordance with the will of the legislative power.

## The Danish Ombudsman

Article 55 of the Danish Constitution states that the legislative power will establish an Ombudsman institution, whose leader is to be elected by the Parliament.<sup>2</sup> This promise is fulfilled via the Danish Ombudsman Act.<sup>3</sup>

According to the act, the Ombudsman's task is to supervise the public administration (the executive power) on behalf of the Danish Parliament, cf. article 21 (1) of the Ombudsman Act. The Ombudsman is empowered to comment on all legal matters related to the public administration's behavior, hereunder ministers' actions as head of government. However, the Ombudsman is also granted the use of a nonbinding norm of good administration as a supplementary assessment standard. This unique standard is a comprehensive set of mixed legal and ethical funded norms, constantly evolving via a dialogue with citizens and public authorities.<sup>4</sup>

Danish administrative law has traditionally developed as an interaction between supervisory authorities, courts and jurisprudence. It is widely recognized that the Danish Ombudsman plays an essential role in this interaction. Even though the personality and ideals of the assigned ombudsmen have played a significant role, structural elements have contributed as well. First, lawsuits against public authorities are rather rare in Denmark, which is probably related to the combination of high

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2 [https://www.ft.dk/~media/sites/ft/pdf/publikationer/engelske-publikationer-pdf/grundloven\\_samlet\\_2018\\_uk\\_web.ashx](https://www.ft.dk/~media/sites/ft/pdf/publikationer/engelske-publikationer-pdf/grundloven_samlet_2018_uk_web.ashx)

3 <http://en.ombudsmanden.dk/loven/>

4 [http://www.ombudsmanden.dk/myndighedsguiden/generel\\_forvaltningret/god\\_forvaltningssskik/](http://www.ombudsmanden.dk/myndighedsguiden/generel_forvaltningret/god_forvaltningssskik/) (Danish)

expenses and time-consuming processes. In comparison, it is free to go to the Ombudsman, cf. section 13 of the Ombudsman's Act. Second, the Ombudsman's influence is linked to the number of cases handled by the institution, and, thereby, insight into the behavior and development of public administration. Third and a bit tricky, the Danish Ombudsman can only express his opinion and comment on the administration's behavior. Any recommendations are nonbinding according to section 22 of the Ombudsman's Act. Therefore, and opposite the Danish courts, the Ombudsman is forced to explain opinions and recommendations in order to convince the public authorities and achieve the necessary acceptance. This thorough explanation and reasoning serve as a fertile ground for the interaction between the Ombudsman and legal scholars. Fourth, as a very important contributor, as described above, the Ombudsman's office is not limited to strictly legal norms. The nonbinding norm of good administration is a perfect simmering pot for adjusting administrative law for changes within the administration.<sup>5</sup>

### Relevant elements of Danish legislative culture

A dominant theme in the recent public debate concerning public digitization is the relationship between citizens and authorities. The focus is on citizens' rights. This unilateral approach is sympathetic, but not necessarily useful in order to understand Danish Administrative Law – and is not true to the core values of Danish legal culture related to the public sector. To understand the importance and full meaning of the rights of the citizen, one must turn to the relationship between the legislature and the executive power (the public administration).

The bills and parliamentary debates related to the 35-year-old Danish Public Administration Act reveal that the provisions stating citizens' rights serve dual purposes. One purpose is to support and secure citizen's trust by granting them rights. Another purpose (justification) is, however, that such rights contribute to thoroughness within the public administration. Further, it is argued, this ensures that the decisions of the authorities are in accordance with the legislation. In other words, the provisions also aim to ensure that the legislature can control the actions of the administration (the executive power) – and ensure respect for the principle of legality.<sup>6</sup>

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5 Kaj Larsen, *The Parliamentary Ombudsman*, in Hans Gammeltoft-Hansen and Jens Olsen (eds), *The Danish Ombudsman* (Folketingets Ombudsmand, 2005), pp. 107–111.

6 [http://webarkiv.ft.dk/Samling/19851/lovforslag\\_som\\_fremsat/L4.htm](http://webarkiv.ft.dk/Samling/19851/lovforslag_som_fremsat/L4.htm)

The principle of legality (compliance) is an overall principle of Danish administrative law. As a summarized description, under article 3 of the Constitution, the administration's (only) task is to apply the rules laid down by the legislature (under the control and supervision of the courts and the Ombudsman). The legislature decides what behavior is acceptable and unacceptable in society. This is not for the administration to decide. The administration is only to implement the regulation.

The relationship between legislative power and executive power requires generally that the decisions of the administration must be based on the legislation and the legislation must be applied loyally according to the legislature's will. One prominent Danish researcher within the field of administrative law recently wrote:

“The legislative power thus determines the legal framework for what the administration can do, and if the administration violates the principle of legality, it is a violation of the basic principle of the democratic rule of law, because at least the administration lacks democratic legitimacy - in the worst case it has acted contrary to what the Parliament has passed, and the government has confirmed and announced. Therefore, a decision contrary to the principle of legality cannot be upheld.”<sup>7</sup>

The principle of legality has, over the years, led to the development of several unwritten principles of Danish Administrative Law. The common denominator is to support or contribute to compliance with and realization of the principle of legality; in the last 50 years often with the Ombudsman's case law at the forefront. The latter makes good sense as the Ombudsman is appointed by and attached to Parliament, which is part of the legislative power.

## The development in the 1960-70s

### The dawn of the Scandinavian model (the welfare state)

The concepts of the Scandinavian welfare states emerged mainly in the political and social science during the 1950s. The rationale of the welfare state is that, for the benefit of society as a whole, its individuals must be given the best opportunities. Thereby – is the assumption – an ever greater societal and economic wealth develops. At least, the citizens must be guaranteed a certain level of social security, e.g. free access to education and health care services. Deeply rooted in the mindset of the welfare state is the

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7 Højgaard Mørup, Søren. Fenger, Niels (ed.), *Administrative Law (Forvaltningsret)*, 2018, DJØF, p. 299 f.

expectation that the state is to interfere actively in the lives and behavior of its citizens to ensure their wellbeing and, thereby, the societal and economic growth.

The development of the Danish welfare state took place over a long period but was particularly intense from the mid-1960s to the mid-1970s. During that decade, Denmark was given an extensive health care system and many social services to provide citizens with a wide range of public services and a safety net in the event of illness, disability etc.<sup>8</sup>

This system – which still exists – is mainly established as a universal service, the tax-financed benefits are granted according to criteria laid down in the legislation, which, in principle, apply for all citizens. For the major parts, this is organized and processed via the citizens applying for the services, the public administration evaluates the applications, and the services being awarded if the conditions are met as laid down in the relevant legislation. As long as the citizen receives benefits, the authorities will – in principle – systematically review whether the person in question continues to fulfill these conditions. In other words, the development of the welfare state largely followed the ‘normal’ governance structure in Denmark; the legislature lay down rules for the activities in question and allocates the necessary funding, while the administration (the executive power) carries out the practicalities (perform the task).

At the same time as the welfare state was formed, the regulatory intensity in Denmark also developed in other areas. Detailed legislation was given for differing objects and activities, from product security to environmental matters. Often the regulations were structured in such ways, that citizens were to apply for permits and/or accept regular supervision. Public administration, thus, also gained a far greater influence on the living conditions of natural persons and business environment through this extensive production of regulation.

In other words, the tasks of the Danish public sector surged over those decades, and the public authorities’ decisions based on interpretations of the legislation, directed at citizens, interfered increasingly with citizen’s lives.

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8 <https://danmarkshistorien.dk/leksikon-og-kilder/vis/materiale/velfaerdsstaten-og-de-universelle-rettigheder/>

### The development within administrative law

In line with the developments described above, administrative law developed via case law, especially in the 1970s. The pattern of this development was the Danish Ombudsman applying the above-mentioned standard on good administration or adapting existing unwritten principles of administrative law to the many new regulatory situations in the growing welfare state. Legal scholars examined this development, and the courts accepted, to a minor degree, the adjustments to the unwritten principles. Here, focus was on the procedural framework for the increased decision-making activity rather than the content of the decisions. In other words, the dawning case law laid down procedural requirements which in general were able to support a higher degree of compliance with the legislation within the administration. An example is the development of the principles on the citizens' rights to be heard before decisions were made concerning their affairs.

During the same period, preliminary initiatives were taken to adapt legislation to the changes and to safeguard rule of law by assembling some elements of the developed case law in a Public Administration Act. This was reflected in several white papers, for example, white paper No. 657 of 1972 on the duty to ensure an explanation for an administrative decision directed at a citizen and the right to file a complaint to a higher public authority in the administrative hierarchy of public bodies, white paper No. 857 of 1973 on the revision of the Freedom of Information Act and White paper No. 998 on the duty of confidentiality.

It was not until 1984, however, that a bill was set forward to codify the developed case law. The first bills were not adopted, and changes had to be made to meet the Parliament's positions. In this process, the influence from the other Scandinavian countries, which had undergone the same transition into welfare states and already had passed similar legislation, showed itself clearly.

For example, the Danish white paper No. 657 of 1972 advised against a duty for explanations, on the grounds that such procedure would be too burdensome for the public authorities. Therefore, the Danish Government's first proposal did not contain provisions on explanations. Nevertheless, the other Scandinavian countries had introduced such a duty – and therefore the Danish Parliament wanted similar provisions added to the Danish bill during the legislative process.

After several failed attempts, the revised bill finally passed through the Parliament, and the Danish Public Administration Act entered into force on January 1, 1987. The

outcome was a mixture of codified national case law and the provisions inspired by similar legislation in Norway, Sweden and Finland.

To summarize: the transformation of the Danish public administration in the 1960s and 1970s caused developments within administrative law, which contained the following elements: 1) Case law developed new principles of administrative law and requirements of good administration 2) Legal scholars analyzed the development 3) Various committees worked on white papers 4) Bills were put forward, but not adopted 5) The other Scandinavian countries adopted regulation, which inspired changes during the Danish legislative process 6) The bills were eventually adopted. The outcome was legislation which laid down procedural requirements able to support a higher degree of compliance with the legislation within the administration (executive power)

## The present development

### Digitalization of the public sector in Denmark

Denmark went from purchasing digital tools (EDB) to the digitalization of processes and decisions at an early stage. Since 2001, public digitalization in Denmark has been driven, projects funded and prioritized via 4-year digitization strategies. The current strategy covers the period 2016-2020.<sup>9</sup> In addition, in 2019, another strategy emerged: The national strategy for artificial intelligence.<sup>10</sup> The national strategy for artificial intelligence also contains general objectives, priorities and funding initiatives (projects).

For many years, the priority was to construct the public digital infrastructure, i.e. ensuring that citizens had a digital signature and an official public mailbox. This development was supported by legislation. For example, the Danish act on Mandatory Public Digital Mail imposes a duty on the citizens of Denmark to communicate with public authorities via this (official) mail system.<sup>11</sup> The risk of not being aware of the content of mail in this system rests with the addressee (the citizen). This construction of a public, digital infrastructure also includes the establishment of huge databases, which can be used for automated processes. An example of the latter is the database on the income of all Danes.

The UN regards the public sector in Denmark as the world's most digitized - and the many diverse solutions have massively influenced public authorities' working processes,

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9 <https://digst.dk/strategier/digitaliseringsstrategien/>

10 [https://eng.em.dk/media/13081/305755-gb-version\\_4k.pdf](https://eng.em.dk/media/13081/305755-gb-version_4k.pdf)

11 <https://www.retsinformation.dk/Forms/R0710.aspx?id=181901>

organization and interaction with citizens. As an example of the impact on working processes, a large part of the administration related to taxing and social services as financial benefits are partly or even fully automated. An example of the influence on the interaction between authorities and citizens is the above mentioned public digital mailbox and hundreds of digital self-service solutions for applications etc.

Whether the digitalization of communication or working processes constitute such a change in the public sector in Denmark that it can be compared with the major changes in the 1970s is for future researchers to assess. Presently, however, digitalization is referred to as a 'transformation' of the public sector's organization, workflows etc. Unfortunately, this transformation has not been without challenges. There have been quite a few cases of digitalization causing non-compliance with legislation.

#### The dawning development within Danish administrative law

At the dawn of implementing ICT in the Danish public administration, the Danish Parliamentary Ombudsman's office stated a relatively simple premise: the present regulation also applies 'when computers replace paper'. In other words, public authorities are obliged to perform their duties in compliance with the existing legal requirements, regardless of the technology used.<sup>12</sup>

From this starting point, the developing case law has been debated among legal scholars in Denmark. A few court decisions seem to support the Ombudsman's point of view. Today, case law, analyses and other contributions are summarized in the Ombudsman's Guide for Public Authorities related to public digitalization. Here it is stated, that:

*"It is a fundamental requirement that public ITC-systems can support compliance with the relevant legislation - including administrative law. This compliance can best be ensured by early identification and implementation of the relevant legal requirements. Thus, accountable development of new systems for the public sector requires, inter alia:*

- *From the very outset, an overview of the cases and processes, which will be affected by the new system, is to be established.*
- *The legal requirements that apply to the cases and proceedings in question must be clarified, including whether legislation needs to be changed before automation.*

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12 [http://www.ombudsmanden.dk/myndighedsguiden/specifikke\\_sagsomraader/generelle\\_forvaltningsretlige\\_krav\\_til\\_offentlige\\_it-systemer/](http://www.ombudsmanden.dk/myndighedsguiden/specifikke_sagsomraader/generelle_forvaltningsretlige_krav_til_offentlige_it-systemer/)

- *Public authorities have to be extremely careful when the design of the new system is decided in order to be able to comply with the relevant regulation in all the various processes.*
- *Legal expertise has to be available at all essential stages in the development process, e.g. when drawing up specifications and designs and by conducting tests etc.”*

The above-cited guide is – so to speak – the Ombudsman’s reaction to the (relatively many) cases of flawed systems, causing violation of relevant regulation or principles of good administration. Further, it is striking that the office does not go into the specific designs or programming. Instead, the focus is on the requirements for organizing the development and use of the different systems.

ICT should not be used for public administration unless the digital processes, design and programming support compliance with the legal requirements and promote the principles of good administration. There is an obvious need for studying, mapping, and describing how implementing a new technology will affect the area in question. Such procedures for mapping and evaluating the impact of digitalization’s processes seem slowly, step-by-step, to turn into an obligation in Denmark due to the Ombudsman’s case law – hindering unlawful administration.

In 2019, a Danish political agreement was signed on digitization-ready legislation.<sup>13</sup> The agreement states that a committee is to investigate whether there is a need to change the Danish Public Administration Act. A pre-bill was submitted for public consultation in 2019. However, the pre-bill met a storm of criticism for being poor handwork, and never made it before the national Parliament.<sup>14</sup>

On the other hand, in 2018 in Sweden and in 2019 in Norway, white papers on legislative reforms to adjust administrative law in the said Scandinavian countries were published.<sup>15</sup> These white papers constitute a thorough review of the challenges of digitalization related to rule of law and the need for adjustments – and are strikingly similar. Particularly noteworthy is that the committees from both countries propose an increased degree of documentation of the technologies used within the public sector. A

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13 <https://www.fm.dk/nyheder/pressemeddelelser/2018/01/digitaliseringsklar-1>

14 <https://hoeringsportalen.dk/Hearing/Details/62638>

15 <https://www.regjeringen.no/no/dokumenter/nou-2019-5/id2632006/sec46> and <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2018/03/sou-201825/>

similar mindset is embedded in some of the ethical principles in the Danish national strategy for artificial intelligence.

## The future

As hopefully shown above, there were certain - very roughly and broadly described - characteristics of the development of administrative law in Denmark during the transformation to the modern welfare state in the 1960s and 1970s. The Ombudsman's case law was in front, case law was analyzed by legal scholars, and to some extent accepted by courts. In parallel, various committees were established in order to assess the need for altered or new legislation, including codification of the Ombudsman's case law. Bills were subsequently put forward, but not adopted before elements of legislation from other Scandinavian countries were added. The result of this process was legislation setting up procedural requirements aiming to ensure that the many administrative decisions would be compliant with the relevant legislation. In other words, a core element of the Danish legal culture had to be supported; public authorities are to realize the will of the legislature - and it must be ensured (at almost all costs) that the authorities can be governed by the law.

The fragments of a similar pattern might be dawning in connection with the current transformation of the Danish administration into a digital administration. The Parliamentary Ombudsman's case law is developing in order to ensure the design and programming of technologies used in the public sector support administration in compliance with relevant regulation. Legal scholars have analyzed this case law, committees established etc. If the pattern of the 1960s and 1970s recurs, a bill that codifies the Ombudsman's case law and adds elements from the other Nordic countries will be drafted within the next decade. This outcome is likely as it is deeply imbedded into the Danish legal culture to adapt existing principles of administrative law in order to protect and ensure that the executive power acts following the will of the legislative power.

# Digitalization and Dissent in Legal Cultures. Chinese and Other Perspectives<sup>1</sup>

*Denis de Castro Halis<sup>2</sup>*

**Abstract:** The concept and the dynamics of dissent (e.g. how manifestations of dissent are formed, channeled, promoted or stifled) are not sufficiently studied despite their tremendous importance in times of digitalization of social life. This article discusses the impact that digitalization, in general and in specific settings, is having on various forms of dissent. It is built from a theoretical and empirical socio-legal investigation about dissent, its manifestations, and reactions to it. It reflects the author's effort to categorize dissent, address its importance, and formulate a comprehensive concept that remains missing in the literature. The article shall illustrate the argument that the impact of digitalization on dissent is mediated by legal culture and the wider societal context. It discusses examples of new digital technologies and their relations with the idea of dissent in different legal cultures. The focus is on greater China (the mainland, Macau and Hong Kong) and Brazil.

## Introduction

The dynamics of dissent (e.g. how dissent is formed, channeled, promoted or stifled) are not sufficiently studied despite their tremendous importance in times of digitalization of social life. This article offers data and discusses the impact that digitalization, in general and in specific settings, is having on various forms of dissent. It is built from a theoretical and empirical socio-legal investigation about dissent, its manifestations,

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and reactions to it. Moreover, it reflects an ongoing effort to categorize dissent, address its importance, and formulate a comprehensive concept that remains missing in the literature. The article shall illustrate the argument that the impact of digitalization on dissent is mediated by legal culture and the wider societal context. Furthermore, the increasing level of digitalization witnessed today raises serious threats to dissent and this affects the possibility as well as the courage to dissent.

Convenient new ways to do ordinary things (e.g. to shop, order and have food delivered, communicate, pass through immigration) leave digital traces. Massive data is collected and can be used to control people and dissenting behavior. The increasing adoption of digital technologies is changing social interactions, governance, as well as dissent with the use of Artificial Intelligence (AI), biometrics, and big data in combined processes. In addition, digitalization provides new types and channels for the expression of people's ideas, new forms of surveillance, and new ways of reacting in relation to dissenting behavior. That technology raises questions on how to balance new individual and societal benefits against rights and freedoms that protect dissent as an engine of innovation and error correction.

The article discusses examples of new digital technologies and their relations with the idea of dissent in different legal cultures<sup>3</sup>. The focus will be on greater China (the mainland, Macau and Hong Kong) and Brazil. The goal of the focus on those two regions is not to compare them, but to describe cases that illuminate the previous relations mentioned. China and Brazil are countries with vast territories, among the largest world economies, and holding similarities that led them to mutually cooperate under the umbrella of the "BRICS countries" group. In spite of their advances and fallbacks, they are important global players and emerging economies at different levels of development and their cooperation might be indicative of new forms of global cooperation that has not been dependent on formal institutionalization. The analysis of these two complex countries, with large populations, and world importance is, thus, important to see practical examples of dissent, their effects, and how different institutional structures address dissenters.

China is at the forefront of digitalization of social life and this has meant great innovations, an increase in convenience and benefits of all sorts. Added security has also meant unprecedented surveillance and control of people and civil society. To investigate today's China is to investigate what the future of many societies might be. China is not

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3 For a discussion on the expression's meanings, see: Nelken, David. "Using the concept of legal culture." *Austl. J. Leg. Phil.* 29 (2004).

alone though, and many other countries have their own areas of intensive digitalization and corresponding control on behalf of security, fight against corruption and tax evasion, and so forth. Brazil offers a good illustration of digitalization in government institutions (especially in the judiciary) and how rapid digitalization is allowing new forms of whistleblowing and dissemination of information that otherwise would remain secretive.

### Conceptualizing Dissent

To dissent implies having a possibility and the courage to make a choice to divergently speak out or behave in face of the opinions or conduct of others. The inherent divergence, an essential part of the concept, can offer important alternatives to existing perspectives or strengthen the grounds of existing ones by questioning people's assumptions.<sup>4</sup> I consider "dissent" as the initiative of a behavior that offers another view<sup>5</sup>, another sense, or another way of feeling to existing behavior and reality, rather than merely implying a rebellious or transgressive behavior. The term "behavior" is more appropriate than that of "action" because dissent can also happen by means of an omission (i.e. a non-action) that collapses usual expectations for a given action. In a rally of Nazi supporters, for instance, a person who consciously refused to salute the Fuhrer and stood still to show her disapproval would be dissenting by not following the expected action of the crowd. That is an example of dissent by omission.

Dissenters fostering changes across the world are often perceived as troublemakers and often pay a high price for their opinions or behavior – even when dissent is formally protected by legal rules. With their individual or collective behaviors, dissenters can be important catalysts of social changes that benefit many (i.e. Nobel peace prize winners usually started as dissenters). Authors have argued the value of dissenters even for conformists. Cass Sunstein has argued that,

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4 As illustrated in Hans Christian Andersen's fable, "The Emperor's New Clothes," by the child who forces all conformist adults to review their assumptions about the emperor's clothes. In *Why societies need dissent*, Cass Sunstein invokes this tale: "Conformists follow others and silence themselves, without disclosing knowledge from which others would benefit. (...) 'The Emperor's New Clothes' is an ingenious illustration; because everyone follows everyone else, people do not reveal what their eyes plainly perceive (...) When injustice, oppression, and mass violence are able to continue, it is almost always because good people are holding their tongues" (Cambridge, Mass.: Harvard University Press, 2003. p. 6).

5 See e.g.: Daube, David. "Dissent in Bible and Talmud". *Calif. L. Rev.* 59 (1971): 784-794.

conformity can lead individuals and societies in unfortunate and even catastrophic directions. The most serious danger is that by following others we fail to disclose what we actually know and believe. Our silence deprives society of important information. (...) Those who dissent, and who reject the pressures imposed by others, perform valuable social functions, frequently at their own expense. (Sunstein, 2003, p. v).

A long tradition of socio-legal theorists, however, has developed ideas around or as a means to reach different forms of “consensus”, “order”, and “unity”. These theorists include the Contractualists, Auguste Comte, Émile Durkheim, John Rawls, and Jürgen Habermas. They have all, to a higher or lesser degree, emphasized the idea of consensus rather than that of dissent. Both ideas, however, need to co-exist and are crucial for societies wishing to advance democratic ideals.

The fact that several scholars use the term “dissent”, even in the titles of their works, does not make a world of difference though. The term remains ambivalent and rather undistinguished from several other concepts, which are only coincidentally equivalent. The term is frequently used without a proper characterization and as a synonym of many other notions, including disobedience, protest, resistance, deviance, social movement, transgression, freedom of speech, and conflict. Even objects have been labeled as “dissenting objects”, as seen in a 2018 exhibition on dissent at the British Museum<sup>6</sup>, in London, UK. To add to the existing confusion, “dissent” can be a verb (to dissent), with its corresponding antonym being “consent” (to consent), or it can be a noun with a meaning that is the opposite of consensus. Indeed, if a group cannot reach a consensus on a given topic, then we would say there is dissent within the group. Hence, the conceptual confusion does not help to highlight the role of dissenters and the innovation that many dissents bring about.

Little has been written on the attributes and different forms of dissent though<sup>7</sup>, and contemporary authors only analyze specific forms and types of dissent.<sup>8</sup> To tackle those

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6 “1 Object: Ian Hislop’s Search for Dissent”. For the details on the exhibition, see: [http://britishmuseum.org/whats\\_on/exhibitions/i\\_object.aspx](http://britishmuseum.org/whats_on/exhibitions/i_object.aspx), last accessed Aug. 02, 2018.

7 An exception is: Collins, Ronald KL; Skover, David M. *On dissent: Its meaning in America*. New York: CUP, 2013.

8 See e.g.: Young, Ralph F. *Dissent: the history of an American idea*. New York; London: NYUP, 2015; Lal, V. 2014; Bleiker, Roland. *Popular dissent, human agency, and global politics*. Cambridge (England): CUP, 2000; Demaske, Chris. “Free speech zones: Silencing the political dissident.” *Dem. Communiqué* 22, no. 1: 41-59; Com. & Mass Media Complete, 2008.

gaps in the literature, I have been developing and offering a classificatory framework of dissent, a typology, based on a range of factors.<sup>9</sup> Among other factors, they include its type (e.g. political, religious, judicial), motivation (e.g. altruistic, egoistic), goal (e.g. disruptive, constructive), form of expression (e.g. peaceful, violent, concealed, overt, by action or by omission), its promoter (e.g. individual, a movement, an institution, a minority or a majority), outcome (e.g. successful, non-successful), and reaction (e.g. suppressive, supportive). It is a work in development, not entirely elaborated in this paper (given its limitations), and it might contain imperfections and issues to be refined.

Table 1 offers an initial classification regarding the broad type of dissent.

Table 1

<b>TYPES</b>	
(Usually Combined in Reality)	
Predominant Nature / Substance of the Dissent	
1. Legal	8. Philosophical
2. Judicial	9. Academic
3. Economic	10. Epistemological
4. Political	11. Gender related
5. Cultural	12. Ethical
6. Scientific	13. Technological
7. Religious	14. Ecological

The table offers fourteen broad types of dissent (and the list can likely be expanded), which in fact appear mixed or with some degree of overlap. A couple of the types can be used to demonstrate how the study is being developed from cases/situations.

The Sea Shepherd Conservation Society, with its actions to protect whales, the Greenpeace and, more recently, Swedish young activist Greta Thunberg’s campaign calling for immediate action to combat climate change are illustrations of ecological dissent. Some might argue that these parties that I am calling ecological dissenters are not true dissenters given that their declared goals and causes are popular, well-accepted, and shared by many across the world. To those, I would reply that Greta, for one,

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<sup>9</sup> Results of the investigation have been presented in three editions of the International Association for Philosophy of Law and Social Philosophy (IVR) World Congress, in 2015, 2017 and 2019.

might be a dissenter more because of the methods she proposes (e.g. skipping school to protest, leading by example, demanding immediate action, embarrassing leaders by showing how contradictory their speeches and actions are), rather than by the goals she embraces. The same could be said about the Sea Shepherd, who organizes direct actions to try, for instance, to stop the annual whale hunting event on the Faroe Islands, or about the radical members of Greenpeace in radical actions to defend nature or animals.

China's "Feminist Five", especially active between 2012 and 2015, undertook initiatives and campaigned against sexual harassment, and the advocacy of Malala Yousafzai for the education of girls in Pakistan are illustrations of gender-related dissent. The five Chinese women activists were jailed and suffered persecution from their government. Yousafzai was first seen as an inconvenient girl, defiant of custom and culture – a traitor of some sort in the religious setting she was in. At fifteen years-old she was shot in her face and barely escaped death. Her efforts and continuous work have led to a Nobel Peace Prize and worldwide recognition.

Those manifestations of dissent and their study illuminate the dynamics of dissent. In particular: how dissent is produced, externalized, which results it can produce, and how it is received and incorporated (or not) into mainstream narratives and how it can affect societal behavior. Some of those cases exemplify how dissent is relational and contextual. Dissent exists not in isolation. A behavior only becomes a dissenting one when it occupies a specific position within a given expected order of things (political, social, cultural...) and power struggles of a given time and context.

In Pakistan's religiously fundamentalist and patriarchal regions, Yousafzai had to be silenced – even by means of extreme violence. Out of that context, however, she became an inspiration to many and, thus, got that prestigious prize. Indeed, space and time are important factors to locate the position of the behavior within a context. I exemplify. In today's China, an academic can be considered a "potentially dangerous dissenter" and attract attention for investigating dissent and for talking to political dissenters. The same person, however, can be considered a harmless academic, doing her job while speaking at an international conference and offering ideas for discussion. Further scholarly treatment of cases can increase our insight into the efforts and conditions of dissent and perhaps partly modify that common view of dissenters as troublemakers. The same relational characteristic can be seen in those cases of ecological dissent. It might be that within the confines of the Faroe Islands society, the Sea Shepherd is indeed a most vilified dissenter, going against an old local tradition. Outside of that society, however,

it might be that many, if not most people, support the Sea Shepherd’s actions due to the horrifying images of bloody whales and dolphins at the beaches at those islands.

The study of the motivation of dissenters can lead to the perception of the different predominant grounds guiding their behavior. A politically weakened President dissenting from a parliament who launched impeachment procedures against him would likely have egoistic grounds (i.e. to maintain his position) as the immediate and most direct motivation to dissent. The well-known case of Edward Snowden, on the other hand, could arguably be interpreted as one of altruistic motivation, arising from the knowledge of wrongdoings by his own government. Even though Snowden knew that by raising the alarm and becoming a whistleblower, his life, career, and freedom would be in jeopardy, he did what he saw as a moral duty for the sake of the rights of millions of people and for corrective action of his own government. Had he conformed with the situation he knew and done nothing, he would still have the choice of living in his own country would still have his career, and would not have undergone what must have been (and perhaps is) a horrific period after blowing the whistle.

Dissenters can also be motivated by progressive or reactionary (or conservative) reasons. As for progressive or reactionary, I do not mean to use these categories from a moral or political angle, judging behaviors in tones of bad or good. “Progressive” dissent is to propose a change for something new (not necessarily good), while “reactionary” is any dissent wishing in favor of a return to what existed or that opposes a transforming reality. In recent times, the government of Brazil (labeled by many as “neoliberal” in terms of economy) has been deregulating the labor relations and turning long-guaranteed labor rights into a matter of negotiation between employers and workers. Workers are increasingly without formal legal protection when compared with what they had in the past. Those who are against this trend, however, have been dissenting and theirs is, thus, a reactionary dissent. It is a reaction to those changes that they did not wish for and that they have been fighting against for long. I offer the classificatory table below with those and other categories to broadly classify the predominant reasons that motivate dissenters.

Table 2

<b>MOTIVATION</b>
<b>CATEGORIES</b>
Altruistic
Egoistic

Progressive
Reactionary (or Conservative)
Ideological (based on values/convictio)

The motivations of dissenters are not identical to the different goals they have, despite possible links. The goals may fall within at least four broad categories, as indicated in the following Table 3.

*Table 3*

<b>GOAL</b>
<b>CATEGORIES</b>
Disruptive/Destructive
Constructive/Cooperative
Obstructive of Aims
Promotive of Aims

Dissenting judges in a paneled court may be in disaccord regarding the grounds (or justification) of a given decision while agreeing on its subject-matter. Thus, there is a disagreement among the judges but one that exists under the constructive (or cooperative) goal of finding the strongest grounds for the decision they agree upon. Extreme political adversaries, on the other hand, who radically disagree with each other's plans and ideas might express their dissent with disruptive or destructive goals. They might do all they can to obstruct the aims of the other.

Another important factor to evaluate, classify and understand dissenting behavior concerns its practical outcome. In this sense, it can be classified as successful, non-successful, or even partially successful.

*Table 4*

<b>OUTCOME</b>
<b>CATEGORIES</b>
Successful
Non-Successful
Partially Successful

In clear-cut situations, those categories could be used without great controversy. A dissenting initiative such as a collective movement against a decision to increase public transportation fares would be successful if it managed to revert that decision, and non-successful if that outcome was not achieved. The classification might not involve such clear-cut cases, however. History has shown that many dissenting initiatives led to the ostracism or some form of punishment of dissenters – including their death. Those initiatives, however, might be considered successful if looked under the light of a different epoch or timeframe. An initially unsuccessful judicial dissent that convinced no other judge in a panel and remained as a mere record in the judicial proceedings, might be reevaluated by others and become the mainstream opinion years or decades later. In such a case, would the dissent be successful? Not in the short term. If considered, however, in the long run, then it would be successful. Hanne Petersen<sup>10</sup> has raised the important historical example of Joan of Arc (Jeanne d’Arc) to demonstrate that time and circumstances are important references to understand the concept of dissent, the role of dissenters (during their lives and after their deaths), and the judgment about the success of their behavior. Born in 1412 in France, Joan of Arc was burnt alive as a heretic in 1431 and, almost 500 years later, in 1920, was made a Saint by the same Church. The life of Joan of Arc has been since celebrated and her actions and strength became an inspiration to many. By recalling the life of Joan of Arc, Petersen reminds us to bring forgotten instances of dissent back into the light and to learn how our predecessors have viewed dissenters and dissent so that we can critically analyze our own views about today’s dissenters.

Indeed, people’s, governments’, and institutions’ views about dissent and dissenters can vary. Those views can promote, encourage, censor, or restrain manifestations of dissent. China’s government and officials encourage moderate popular political and collective dissent against Japan through nationalistic documentaries and TV programs that highlight the acts of invasion and crimes of Japan in occupied parts of China during World War II. This anti-Japanese feeling can be exploited in the form of popular collective dissent whenever the two governments’ political and commercial tensions escalate, with that of China allowing small nationalistic anti-Japanese protests to take place. This was seen in August and September of 2012, in a series of public demonstrations across several Chinese cities due to the territorial dispute between Japan and China over uninhabited islands in the East China Sea. The Chinese government

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10 Petersen, Hanne. *Jeanne d’Arc, #MeToo and Greta Thunberg - female resistance in history and in the 21st Century*. Paper presented in the IVR Special Workshop Resistance, dissent and innovation: perspectives from around the world. 29th IVR World Congress, Luzern, Switzerland, Jul. 07-12, 2019.

allowed its citizens to voice their dissent against Japan's territorial claims and the state media reported on that. The protesters and anti-Japanese feelings led to a level of boycott to Japan-made products and services, as well as the temporary cancelation of Chinese tours to Japan. This example illustrates a supportive reaction to dissent. Hence, reactions to dissent can be considered within two broad categories: supportive or suppressive.

At a major public demonstration led by students in 2014 in Hong Kong, police decided to use pepper spray against the political dissenters. In this attempt to tackle the protest, discipline the population, and repress political dissent, the police stirred more radical dissent, and in the following days, an increasing number of people joined subsequent protests by coming out and blocking streets. Many set up tents and literally camped in main avenues and streets in downtown Hong Kong, the financial center of the region. The mass political dissent became known as the Umbrella Movement. In this example, the government security forces' suppressive reaction of political dissent led to the general public's supportive reaction of that dissent. During the demonstrations, a popular slogan written in many protest signs was, "You are spraying, we are staying".

Besides political reasons related to the fact that dissent is the core of political rights and freedoms (e.g. freedom of expression and demonstration) and democratic deliberation, there are conceptual and epistemological reasons for a renewed attention to it. I follow the lead of Gaston Bachelard's idea of epistemological rupture – i.e. that rupture with existing knowledge rather than accumulation in a juxtaposition process is the main force that drives scientific knowledge.<sup>11</sup> In Bachelard's framework, existing knowledge is an "epistemological obstacle". Dissent, thus, can be a way to overcome that obstacle, triggering technical, social, political, and theoretical innovation, and being a catalyst for changes. Innovation implies some degree of rupture with what already exists: be it forms of thought and behavior, traditional ways, or accepted standards. Hence, insight into the dynamics of dissent may enhance the possibility of important future innovation. Dissenting judicial opinions, for instance, might indicate innovative ways of thought that could be later appropriated and become the new standard (as has been the case regarding, for instance, the famous US Supreme Court Justice Oliver Wendell Holmes, who became known as "the great dissenter"). Political dissent can force greater accountability from authorities and provoke decisions in touch with the wishes of the people by raising issues, by questioning, by offering alternative proposals. It can also provoke stronger repressive reactions from authorities in power, as seen in Hong Kong

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11 Bachelard, Gaston. *La formation de l'esprit scientifique: contribution à une psychanalyse de la connaissance*. Paris: Vrin, 1993.

and in many other places where political power is secured mainly by violence rather than by legitimate means.

Scholars have argued and maintained that, by challenging social conformity, dissent has the potential to correct errors and break up wrongful informational cascades (e.g. fake news) easily seen due to the popularization of social media, and operate against polarization and extremism.<sup>12</sup> Some argue that by encouraging dissent, heterogeneity, and exchange of viewpoints, institutions can improve their internal deliberation processes. Encouraging channels of dissent and protection of dissenters may allow maximum disclosure of information (e.g. whistleblowing) and this can result in sound policy decisions.<sup>13</sup> Overall, some argue that the existence of dissent enhances democratic consensus.<sup>14</sup>

To support the argument that the increasing level of digitalization brings numerous societal changes and those include serious threats to dissent because of the impact on people's possibility and courage to dissent, the following section discusses the meaning and important practical aspects of digitalization.

## Digitalization in practice

Digitalization can be understood as an ongoing and continuous process that is transforming people's daily lives. There is no end in sight to developing processes of digitalization and, thus, it is relevant to study their relationship with socio-legal phenomena. Digital innovations implemented by public and private entities are changing governance and having a profound impact on dynamics of dissent (e.g. how dissent is formed, channeled, promoted or stifled) and democratic ideals. Digitalization intersects a range of themes including new forms of offering and consuming goods and services, the roles of social media, new forms of surveillance and control, and new information technologies that help to create ideological bubbles facilitating fundamentalism, polarization and radicalization of all sorts.

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12 Sunstein, Cass R. *Going to extremes: How like minds unite and divide*. New York: Oxford Univ. Press, 2009; Sunstein, 2003, op cit. p. v;

13 de Melo-Martín, Inmaculada, and Kristen Intemann. "Scientific dissent and public policy: Is targeting dissent a reasonable way to protect sound policy decisions?" *EMBO reports* 14.3 (2013): 231-235.

14 See: Leppänen, Joonas. "A political theory of dissent: dissent at the core of radical democracy". *Valtiotieteellisen tiedekunnan julkaisu*. Helsinki, 2016.

Digital control and surveillance via facial detection, biometrics, collection of personal and big data, and new communication technologies have brought societal benefits (e.g. increased convenience and personalization of services) as well as risks (e.g. perfect tools for authoritarian forces and censorship). To bring light and to understand the balance between those benefits and their risks to societal developments, it is valuable to look at how digitalization is used in practice both for mobilizing and controlling people.

China and Brazil are part of a group of emerging countries, which includes the BRICS countries, which are worth continuous analyses in a world order with significant developments and attempts of power shifts.<sup>15</sup> Besides their importance and complexity, developments in China and Brazil have been chosen because of my especial connection and knowledge about the two countries. I have worked as a scholar in greater China for fourteen consecutive years. I am a native of Brazil with years of interdisciplinary studies and work carried out in the country. Hence, I have privileged access to those countries' actors and realities. Their study offers lessons to global challenges of authoritarianism, intolerance, and populist and patriarchal forces. The choice of China and Brazil does not mean, however, that the USA, the European countries or others do not lead in certain areas of digital advances and do not use them, for instance, to control their people. In fact, it can be argued that China is replicating a surveillance shown to be exerted by the US Government over people and even foreign dignitaries, organizations, and institutions. Edward Snowden and Julian Assange are just two examples of people – whistleblowers – who remain paying a high price for revealing governments' wrongdoings.

### China's Unparalleled Use of Digital Technologies

There is no shortage of examples to support and illustrate the statement that China is at the forefront of the world's digital transformation. A combination of economic development, resources and means of production, qualified experts, strong government, and government stimulus has led to innovations that range from the most ordinary acts of online shopping to a large citizens' DNA database and to all sorts of devices using Artificial Intelligence (AI).

The innovations include the development and the use, by millions of people, of all sorts of "super apps" (mobile applications such as "WeChat" that serve as platforms that host a wide variety of other apps). People use them to communicate and share content, to order food, to have personalized online shopping experiences, and to pay

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15 See: Neuwirth, Rostam J., Alexandr Svetlicinii, and Denis De Castro Halis, eds. *The BRICS-lawyers' guide to global cooperation*. Cambridge University Press, 2017.

for all sorts of products and services. Hard currency (cash) is quickly becoming obsolete by the generalized use of mobile payment. The use of those digital resources produces traceable data, though, which can be accessed not only by the relevant companies but also by the government. The collection and use of the data have produced advances and tackled serious problems within Chinese society. Among the most important is the heartbreaking one of child abduction and human trafficking. The combination of data, digitally stored, fed, and disseminated, alongside the collection and use of DNA has contributed to returning thousands of kidnapped children to their parents.<sup>16</sup>

Indeed, the list of innovations more closely related to security, surveillance, and control include millions of cameras with AI features that can identify, surveil people's behaviors, and locate them using facial and gait recognition (i.e. identify people by the way they walk and move); monitoring of communication through social media and internet; unified police centers that can process the big data and specific information received by cameras and by the use of people's mobile devices; the use of robotic doves – bird-like drones for surveillance, and the use of those technologies in a variety of settings. In some schools, cameras are being used to analyze facial expressions and determine whether students are paying attention or sleeping in class, are present or absent, and to allow their entry into gates and spaces. At immigration and border control checkpoints, everyone who enters mainland China has their face and fingerprints recorded. In brief, biometrics are used in private as well as public spaces and people's behavior and whereabouts can be traced and determined. Chinese citizens and foreigners in the country can be monitored and controlled like never due to the use of digital technology.

Besides the intensive high-tech surveillance, a fledgling point-based social credit system under implementation is having an impact on the way people channel objections and alternative views. Points can be attributed to people (or extracted from them) based on what government agents define as good/acceptable or bad/unacceptable behavior. Those points added or subtracted from one's personal social score. The system imposes constraints that are both internal (self-control and censorship) as well as external (penalties for those breaching the desired standards). All of that is justified on behalf of security, convenience, and social engineering.

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16 There are no official figures released regarding those criminal practices in China. There are reports by state media news outlets, however, that offer data and indicate the seriousness and extension of those problems. See: China Daily, *2,000 abducted children identified via DNA bank*, Mar 01, 2012, [https://www.chinadaily.com.cn/china/2012-03/01/content\\_14727447.htm](https://www.chinadaily.com.cn/china/2012-03/01/content_14727447.htm), accessed Jan. 10, 2020; Also: Chen, Jia. *Police use DNA against human trafficking*. China Daily. July 28, 2010., [http://www.chinadaily.com.cn/cndy/2010-07/28/content\\_11058249.htm](http://www.chinadaily.com.cn/cndy/2010-07/28/content_11058249.htm), accessed Jan. 10, 2020.

### China's Special Administrative Regions (SARs) of Macau and Hong Kong

In spite of their relatively high economic prosperity and their high degree of autonomy from mainland China under the political-legal principle of “One Country, Two Systems”, Macau and Hong Kong have considerable democratic issues, significant wealth and gender disparities, and are extremely hierarchical due to those factors and a Confucianist background. Their legal and overall culture and societal characteristics reflect different blends and hybrid forms due to their historical links with Europe. They are Chinese regions in Asia, a part of China, but they are also special bridges and platforms of various forms of exchange with non-Asian realities.

The “One Country, Two Systems” arrangement is to (formally) last, though, only until 2047, in the case of Hong Kong, and 2049, in the case of Macau. By those years in the future, their formally secured high degree of autonomy can be legally ended if the Chinese Central Government decides to do so. All sorts of concerns, issues, and tensions are flaring up as time passes and the Central Government is continuously accused of increasingly interfering in the affairs of those two semi-autonomous regions. This arguable interference by Beijing has been producing effects in the way dissenters are formed and behave as well as in the institutional reactions they receive.

Both regions (Macau initially and then Hong Kong) have been filtering people who can enter their borders according to political-ideological criteria. This has taken place regarding academics, social activists, journalists, and politicians. Many cases gained great visibility due to media reports. Digital advances and data storage not only help this sort of government's control of insiders by the exclusion of “dangerous” outsiders, but also might serve as tools to track dissenters and, eventually, punish them on apparently neutral-technical grounds. In the case of denying entry to people, the usual explanations given by officials (upon media provocation) are apparently neutral and technical. They either loosely refer to the internal security laws, stating that they have the legal power to deny entry and control the borders; or they state that all countries who control their countries do like that and, Macau in that sense, is doing nothing differently from those countries. Currently, all bank ATMs in Macau include “Know Your Customer” (KYC) technology that can identify, block or limit transactions, and have the face record of the mainland citizens that withdraw money in the region. Officially, that was implemented to tackle illegal transfer of money across the borders between the mainland and Macau and fight money laundering. Dissenter's movement of money can easily be tracked now, and technical-legal issues not related to their dissenting behavior can be used to silence them.

The Hong Kong mass demonstrations against the government initiated in 2019 represent, however, the perfect case to see the relationship between the wide use of digital resources and its impact on dissent. Media reports have referred to the demonstrations as “leaderless” and as “the most coordinated massive protest in history”. How could those two apparently oxymoronic statements coexist? Through digital apps and real-time encrypted communication tools, new channels of dissent and the protesters’ organization have been possible. Images and videos posted online in social media platforms, the creation of a Hong Kong anthem, digital fora for the exchange of information have all strengthened dissent and even created a network of supporters. So, it may be a leaderless movement, but it is a well-coordinated one. Digital companies, such as Apple, saw themselves involved in the protests. An application (app) available on the Apple store could indicate on a map the real-time location of police squads and, by using it, protesters could quickly move from one place to another avoiding the security forces, in a sort of modern and guerrilla warfare. In a sequence of decisions and reversal of decisions, among criticism from the different parties, Apple took the app down from its digital store and put it back up, before taking it down again and continuing with the cycle.<sup>17</sup>

The protesters’ use of umbrellas, which became the symbol of the “Umbrella Movement” of 2014, acquired a new function. Not only they would serve as shields for police pepper spray, but also, and most importantly, served to hide protesters’ faces and to avoid them being identified by surveillance cameras with or without facial recognition. Indeed, facial recognition, DNA samples collection and analysis, and the tracking of suspects’ whereabouts through the records left by the use of people’s transportation and payment cards (“octopus cards”) were all used by the police to gather evidence, make their cases, and prosecute the suspects of the “unlawful protests”. DNA samples were collected from helmets and face masks left by protesters in government buildings. In a high-profile and widely reported event, when protesters stormed the Legislative Council of Hong Kong, police forensics teams conducted DNA collection and testing alongside with the collection and matching of fingerprints.<sup>18</sup> A few days

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17 For one media report describing the situation up to October 2019 (later developments took place), see: Deng, Iris. *Apple allows Hong Kong protest map app that can track police and protester locations*. South China Morning Post. Oct. 8, 2019, <https://www.scmp.com/tech/apps-social/article/3032001/apple-allows-hong-kong-protest-map-app-can-track-police-and>, last accessed on Dec. 15, 2019.

18 Lo, Clifford; Mok, Danny. *First arrest as Hong Kong police prepare citywide raids to hunt down protesters who stormed and vandalised Legislative Council complex*. South China Morning Post. Jul. 3, 2019, <https://www.scmp.com/news/hong-kong/law-and-crime/article/3017166/hong-kong-police-prepare-citywide-raids-hunt-down-and>, last accessed on Dec. 15, 2019.

later, the first citywide arrests started, with the police going to the homes of the identified suspects.

As techniques by the police evolved so did the defensive strategies of the protesters. Besides hiding and covering their faces behind umbrellas and masks (the government later invoked an old Colonial legal rule prohibiting the use of masks in public), protesters started using non-identifiable single-use transportation cards (freely offered by supporters), started changing clothes before heading back to their homes and only using encrypted software to communicate. These evolving dynamics are far from over. As facial recognition, for instance, becomes widespread in China and many other countries, a few companies started developing means to safeguard people's facial identities bypassing those AI technologies.<sup>19</sup>

The end of the cycle cannot be seen at this point. If social media has been used to galvanize and spread dissent, and that helped movements against authoritarianism, fake accounts and robots have entered that digital space with counter-information and activism favoring the government.<sup>20</sup> Fake news, exaggerations, distorted and partial information have been used by both sides. As algorithms greatly define the information that we receive in social media platforms, doing so according to what they detect to be our preferences, we receive an increasing number of data that creates informational bubbles and reinforces our views.

### Digitalization in Brazil

The idea that machines can never replace judges in deciding legal cases is no longer a certainty. New Information and Communication Technologies (ICTs) have the potential of creating a revolution in the classical ways of administering judicial systems and providing judicial output to legal disputes. This is particularly true in the context of Brazil where new theories, models of logic, software, and technologies were and continued to be implemented to reduce the time for the judiciary's response to legal disputes and eliminate its serious "clogs".

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19 Holmes, Aaron. *These clothes use outlandish designs to trick facial recognition software into thinking you're not human*. Business Insider. Jan. 17, 2020, <https://www.businessinsider.com/clothes-accessories-that-outsmart-facial-recognition-tech-2019-10>, last accessed Jan. 30, 2020.

20 In the context of the Hong Kong protests, see: Zhang, Phoebe; Chen, Laurie. *The emergence and evolution of China's internet warriors going to battle over Hong Kong protests*. South China Morning Post. Sep. 9, 2019.

The Brazilian judiciary has started a pioneer – but still relatively silent and unknown internationally - radical change in the way that lawyers, judges, and parties relate with each other and with the judicial bureaucracy. Digital innovations were behind that change, which was greatly needed to tackle issues that include a constant increase in judicial litigation, an enormous number of cases meaning that courts decide on millions of cases annually, a high-level of variation of decisions in similar cases, and accusations and revelations of corruption practices and scandals.

The use of technology led to a reality where the judiciary expanded the number of channels to disseminate data, news and its practices. Television, radio and YouTube channels, podcasts, along with judiciary and courts' websites and e-newsletters are those main channels. Judiciary organs are increasingly paperless with different forms of e-processes ("e-lawsuits"), electronic petitioning, case-law databases, oral arguments via videoconference, selective use of WhatsApp to summon litigants, and digital signatures. Judges have access to cross-referenced databases linking courts, financial institutions, movable and immovable properties registries which allows those judiciary's agents to obtain information about litigants and enforce with immediate effect their decisions through, for instance, real-time or automatic seizure of debtors' assets. The new channels of dissemination are particularly important in the context of Brazil because of the country's unique feature of public deliberation of courts. In other words, in most judgments (i.e. there are a few exceptions legally foreseen) people can witness in person (i.e. as a member of the audience) or via digital means the exchange of arguments, appraisals, criticism, among judges in paneled courts of appeal. One can actually see the decision-making process in which judges concur or dissent with each other, as well as processes in which distinct alliances or feuds between judges take place. As written before, this can be seen or heard through the channels that are now available to all – experts and general public. Hence, judicial and legal dissent found new ways to be known and to be successful or non-successful either in the judiciary's realm or in the overall public space. That transparency and publicity apply even to the country's highest constitutional court, the "Supreme Federal Court", with people following the judicial deliberation process in controversial cases in real-time. Therefore, it is possible to argue that the Brazilian judiciary stands out in relation to the other two political powers (the Executive and the Legislative) in terms of their insertion on the digital environment and publicity of its decision-making. Moreover, Brazil's judiciary offers more forms to obtain empirical data about deliberation and decision-making of the courts than the judiciaries of other jurisdictions. In these other jurisdictions, studies are based on the composition and the recruitment of members of courts as well as on court decisions. In Brazil,

ethnographies and participant observation are also possible given that unique feature of publicity.

The scope of this societal knowledge about the Brazilian judiciary, its members, their opinions, and their decisions have also nurtured different reactions. Political dissent against decisions, judges, and courts have been encouraged by different political forces. Some of those manifestations of political dissent were reactionary (or conservative), while others were progressive (supporting the changes brought about by the judiciary or some of its organs or members). Most dissenters instigated against the courts or specific decisions that affected their values, convictions, or interests acting with goals of disrupting or obstructing the aims of those judicial organs. Not rarely in the recent history of Brazil, there were movements and collective dissent in favor of closing Brazil's Supreme Court or in favor of impeaching some of its members.

A valuable event for this article is, however, connected to one single federal judge of the first instance and one leading criminal prosecutor involved with the most comprehensive, long-lasting, and high-profile operation against corruption in the history of Brazil. The judge, Sérgio Moro, became internationally famous for ruling on cases related to corruption and especially for sentencing and sending former President Lula to prison. Lula was internationally acclaimed and remains popular amongst many in Brazil. The prosecutor, Deltan Dallagnol, was the leading prosecutorial figure behind the operation and the main person in charge of building the accusation against Lula.

The criminal conviction and imprisonment of Lula came at a moment of presidential elections in Brazil (in 2018). Lula was the frontrunner and his conviction aborted his candidacy. Without Lula in the dispute (and he had won the presidency in 2002 and 2006), an extreme right-wing and former federal lawmaker called Bolsonaro, without great significance or merit, won the presidency. Once elected, president Bolsonaro appointed Sérgio Moro, who by then resigned as a judge, as Justice Minister with extensive powers (labeled as a "super minister").

It is noteworthy that at the time of the accusation and following judgment, Moro had repeatedly stated his impartiality as a judge, which is legally required. During the presidential campaign, however, Bolsonaro (then a candidate) had already mentioned he would either invite Moro for the Justice Ministry or appoint him for the position of judge of the Brazilian Supreme Court (the Federal Supreme Court, which is the Constitutional Court). Moreover, in 2019 a digital news platform called "Intercept", founded by Glenn Greenwald (the journalist who had revealed Edward Snowden's

whistleblowing story), initiated a series of reports disclosing private dialogues between judge Moro and prosecutor Dallagnol and between this and other prosecutors. The dialogues were from the period when they were the judge and the prosecutors in charge of Lula's case. One of those Intercept reports states that "For the first time, the public will learn what these judges and prosecutors were saying and doing when they thought nobody was listening".<sup>21</sup>

If digital technologies facilitated the private communication between those parties (acclaimed as heroes against corruption), it also allowed the record and the leaks of their conversation. Rather than face-to-face meetings, which would hardly leave traces about what had been discussed, the messages exchanged were hacked, revealed, and were nothing short of scandalous. The digital leaks revealed evidence of wrongdoings which otherwise would not be known. There were moments in their conversation when the prosecutor asks the judge for advice and others when the judge, allegedly impartial, instructed the prosecutor about the course of action needed for Lula to be convicted. In brief: illegal, unethical, and deceitful behavior of the two reached the daylight of the mass media and general public due to digital communication and leaks.

The journalistic revelations vindicated the positions of many who had for long dissented from the practices observed in the investigations of Lula and others while affirming those to be driven by political motives. The revelations were, thus, a robust evidence of how the political dissent of legal actors occupying high-level or key positions was channeled and converted into institutional repressive actions against political leaders they disliked. Those institutional actions, which masked personal political dissent of key legal actors (i.e. the judges and prosecutors formally in charge of combatting corruption) concerning politicians, were successful in their aim.

## Dissent, Digitalization, and Legal Culture

The previous sections described practical aspects and illustrations of the ongoing digitalization processes in greater China and Brazil. Grounded on those experiences, I want to sustain that predominant aspects of a legal culture effectively condition digital innovation and related practice of legal rights and freedoms, which include rights and freedoms related to dissent. If it is correct to think that law is embedded in larger

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21 Greenwald, Glenn; Demori, Leandro; ReedHow, Betsy. *Why the Intercept is reporting on a vast trove of materials about Brazil's Operation Car Wash and Justice Minister Sergio Moro*. The Intercept. June 9, 2019. Last accessed on Jan. 20, 2020.

frameworks of social structure and culture<sup>22</sup>, it might also be correct to argue that the development, regulation, implementation, and even the impact of digital technologies in a society and on dissent are strongly connected to that society's legal culture and wider context. Predominant or usual views about dissenters, encouragement or restriction of dissent, usual and institutional reactions to it are *de facto* regulators of the legal treatment that dissenters receive.

The concept of legal culture is taken here in a most general sense. Nelken<sup>23</sup> indicates the wide applicable scope of the expression by referring to stable patterns of legally oriented social behavior, which might refer to several elements:

The identifying elements of legal culture range from facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behaviour such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are not just what we do. (Nelken, 2004, p.1)

In greater China (as well as many places in East Asia), Confucianism and predominant cultural traits related to the social values of harmony, hierarchy, and conformity contribute to a context where people are not encouraged to stand out and go against the crowd. This can be seen in a variety of settings: from students in schools and universities who are not keen on answering teachers' questions or debating, to citizens who do not question authorities' commands or tradition, to reputable senior scholars who silence themselves and vote in favor of any and all of their leaders' proposals in collegiate meetings. The popular adage "the nail that sticks out gets hammered down" is revealing and an evidence in words suggesting that conformity is valued while dissent can meet resistance. Another evidence in a well-known image is that of the "three wise monkeys", who stand side-by-side with the first covering his eyes, the second covering his ears, and the third covering his mouth. The image of the three monkeys is often used as a reminder for people not to acknowledge (and act upon) impropriety, wrongdoings, or injustice, which can also suggest lack of moral responsibility for witnessing those acts and doing nothing. In brief: to conform to the existing reality despite its shortcomings

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22 Nelken, David. "Comparing legal cultures". *The Blackwell companion to law and society* (2004): 113; Friedman, Lawrence M. *The legal system: A social science perspective*. Russell Sage Foundation, 1975.

23 Nelken, David. "Using the concept of legal culture." *Austl. J. Leg. Phil.* 29 (2004): 1.

rather than to object to it and possibly suffer a negative consequence. These cultural and societal features are also seen in Hong Kong and Macau, despite reflecting own special blends of Asian and Western cultures. Those two regions have physical, historical, ethnic, economic, political and populational links with the mainland China.

Important features within authoritarian political regimes and legal cultures (e.g. weak separation of powers, lack of government accountability and transparency) also play a role in the way that digital innovations are used and impact the lives of citizens. Mainland China has become the number one place with cameras and digital surveillance. Security, control, order, and harmony are values and ideas that effectively trump important others such as privacy, plural behavior, and political contestation. When asked, many Chinese citizens will affirm not minding the constant surveillance because they do not break laws or commit wrongdoings. Others, who think differently, affirm they do mind and concern with that surveillance but cannot do anything against rules and the official policies.

As a result of that wider context and legal culture broadly presented, dissenters are often perceived as selfish and troublemakers, and often pay a price for their opinions or behavior. Dissenters, including whistleblowers, who react to illegalities, injustices, and wrongdoings can be punished even when attempting to foster much-needed changes and without really and directly posing a threat to the government or without advocating a cause that is unpopular. The previously referred case of the “Feminist Five” in the mainland is an example of a dissenting initiative that attracted a repressive reaction by the Chinese government, in spite of not being a direct challenge to it and in spite of a legal framework that formally protects rights and freedoms connected to dissent and equality. Indeed, even the Chinese Constitution, the apex of China’s legal system, contains express provisions safeguarding people’s challenges to the government. The provisions’ level of detail – which could even favor their practical implementation - is not commonly seen in the Constitutions of many advanced democracies. Article 41 of the Constitution illustrates my point:

Citizens of the People’s Republic of China have the right to criticize and make suggestions regarding any State organ or functionary. Citizens have the right to make to relevant State organs complaints or charges against, or exposures of, any State organ or functionary for violation of law or dereliction of duty; (...) but fabrication or distortion of facts for purposes of libel or false incrimination is prohibited.

(...) No one may suppress such complaints, charges and exposures or retaliate against the citizens making them.

Citizens who have suffered losses as a result of infringement of their civic rights by any State organ or functionary have the right to compensation in accordance with the provisions of law.<sup>24</sup>

The specific right to criticize officials and State organs and make suggestions is the essence of a citizens' right of dissent against the government. Moreover, the provision goes further in protecting potential dissenters and not only expressly prohibits their suppression and retaliation due to their behavior, but also prescribes a right to compensation.

The reality, however, does not reflect the provision's text. The formal legal protection of rights and freedoms connected to dissent does not mean a real and automatic protection of those who dissent. Why? First, because there are other constitutional law provisions<sup>25</sup> that can neutralize the exercise of peoples' civic rights (as those within Article 41), by conditioning that exercise to "interests of the state, of society or of the collective" (Article 51) or to the duty to "observe labor discipline and public order and respect social ethics" (Article 53). Second, because the scope, interpretation, and implementation of formal legal rules depend on power co-relations as well as predominant political, cultural, economic, and moral imperatives.

It is not surprising, thus, that digitalization in greater China is commonly linked to people's control and surveillance by the government as well as censorship on freedom of expression and a "high-tech dystopia".<sup>26</sup> Dissent, as it seems, has found new digital channels to be formed and manifested but, at the same time, those channels can be surveilled, censored, and enable dissenters to be tracked and punished.

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24 Constitution of the People's Republic of China, 1982. Website of the National People's Congress: [http://www.npc.gov.cn/englishnpc/Constitution/node\\_2824.htm](http://www.npc.gov.cn/englishnpc/Constitution/node_2824.htm), accessed Oct. 15, 2010.

25 Such as Article 51, mentioning the; Article 52, "safeguard the unification of the country"; Article 53, "keep state secrets, (...) observe labor discipline and public order and respect social ethics"; and Article 54, "safeguard the security, honor and interests of the motherland; they must not commit acts detrimental to the security,

26 Mozur, Paul. *Inside China's Dystopian Dreams: A.I., Shame and Lots of Cameras*. The New York Times. Jul. 8, 2018, <https://www.nytimes.com/2018/07/08/business/china-surveillance-technology.html>, accessed Jan. 15, 2020; O'Neil, Cathy. *Want to see your dystopian future? Look at China*. Nov. 17, 2018. <https://www.bloomberg.com/opinion/articles/2018-11-17/want-to-see-your-dystopian-future-look-at-china>, accessed Jan. 15, 2020.

How about the Brazilian reality? The previous section briefly described “Brazil’s hidden plot”, in which hackers were able to obtain access to the secret conversations between a judge and prosecutors during investigations and trials involving businesspeople and politicians, including former President Lula.<sup>27</sup> That showed evidence of their partiality towards defendants – including the former president. The hackers were later identified, and they were prosecuted. Glenn Greenwald, Intercept’s founder and lead journalist, was also criminally denounced by prosecutors for reporting on the leak and disseminating it – despite formal constitutional and infra-constitutional rules concerning freedom of press and the right of journalists to keep their sources confidential.

Former judge Moro, appointed as Justice Minister, and the prosecutors, including lead prosecutor Dallagnol, offered contradictory explanations and lines of defense. The final one was to naturalize their leaked conversation as usual and normal communication between judges and prosecutors and as normal exchange of ideas among prosecutors. This surprised many because it implied their recognition that those conversations did take place and that the content leaked was genuine. This led to assumptions that Moro would be dismissed, and that Lula’s trials would be voided. The story took a different turn, though.

In Brazil’s unequal and fractured society, with a legal culture that safeguards and reflects privileges, the explanations given (especially by Justice Minister Moro) were largely accepted. Many were quick and glad to confirm that, in practice, judges and prosecutors tend to work in close harmony in many cases, relationships are built, and that type of conversation, even if unethical or illegal, was not atypical. Hence, the formal legal rules aimed at restraining and prohibiting such close relationship, important to differentiate the legal roles of those two professions and important to guarantee an impartial justice system, contrasted with the actual practices that are pervasive in the judiciary. The whistleblowing effort of the hackers and journalists had limited impact despite the digital evidence revealed.

In the struggle between the formality of rules and their actual functioning, the first was seen under a soft approach. Indeed, in the political dispute of legal narratives, Moro’s explanations and popularity prevailed over those of his adversaries. The result from the power struggles in a polarized political environment and politicized legal culture favored Moro and the naturalization of his illegalities. The scandal of a partial and

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27 The Intercept. *Secret Brazil Archive*. [a sequence of reports with various dates] <https://theintercept.com/series/secret-brazil-archive/>, accessed Jan 15, 2020.

politically oriented judge doing all to incarcerate the charismatic political leader that he disliked was diluted into a matter of common practice in which, in day-to-day practice, “everyone does the same”.

Hence, despite the initial scandal and critical media reports and editorials, Moro was able to keep his position of Minister of Justice, while Dallagnol and the other prosecutors also kept their positions. Lula’s trial remained valid and he remained in prison for over a year until a new interpretive twist of the Constitution by the Supreme Court – not directly related to those leaks – opened a legal way for him to be released while having pending appeals awaiting judgment.

## Conclusions

The previous four sections were meant to tell a story. One of dissenters as important catalysts of societal changes. To view them merely as troublemakers, selfish, disloyal implies a lack of knowledge about important factors such as their roles, motivation, goals and, very importantly, the context in which their behavior is evaluated. Instances of dissent proposing changes and innovation, and the reactions they produce are relevant topics of an interdisciplinary field of research that this article aims to contribute with.

The article attempts to disseminate the value of dissent and discussed its conceptualization and argued it to be relational and contextual. Dissent is not necessarily an act of subversion and not necessarily an act of individual nature or not individual on its basis. In sociological terms, it is more of a social fact than an individualized behavior. It can only be truly understood and even practically defined within a set of societal circumstances rather than in detachment from a specific reality. The same dissenting initiative can be considered a much needed and heroic behavior in a given context or a hateful behavior of disconformity in another.

The article’s development offered a sample of a comprehensive and innovative categorization to categorize manifestations of dissent and offered some illustrations connected to the adoption of digital technologies in the contrasting political and cultural realities of Greater China and Brazil. The development and use of technology reflect choices of values that are strongly intertwined with the wider moral, legal, political, economic, and normative fields.

The mainland's legal system in which courts are closely intertwined to the political structure under the communist party's structure allows little or no legal dissent (i.e. dissent in the legal arena or concerning legal arguments or viewpoints). Formal legal provisions allow several ways to supervise and frame the actions of judges and courts. Additionally, there are plenty of examples of lawyers who have been controlled, constrained or punished for causes they have embraced, for the clients they have defended, or for the arguments they have used (especially concerning the human rights formally prescribed). The adoption of technology can strengthen those sorts of control over legal dissent.

In the special administrative regions of Macau and Hong Kong, the two Chinese SARs, however, the legal systems reflect different legal traditions, political structures, and legal values. The SARs' legal actors have had different legal training and the ways they argue and justify their actions and decisions are different from those seen in the mainland. In spite of the Chinese Central Government in Beijing arguably increasing its intervention in the two SARs' affairs (which is simultaneously a catalyst and a reaction to the recent waves of protests in Hong Kong), the legal systems and judiciaries of the two regions still preserve an appearance of autonomy and independence. Though the increase in the use of technology strengthened the investigative and surveillance capacities of the security forces, legal dissent can still be seen within the legal realm: in lawyers' associations, among judges, and within legal academia.

Comparatively, China has a far greater number of cameras to control and surveil people than Brazil. In part this can be explained by economic and technological reasons, but the discrepancy is likely due in great part to political and cultural reasons (e.g. less acceptance of surveillance cameras in semi-private spaces). On the other hand, Brazil is undergoing a period of great political polarization and instability, and the struggles for political power are very evident alongside with the strong disputes for the interpretation of the laws and for the monopoly of the legal narratives. This allows even the naturalization of scandals revealing unethical and illegal conduct of relevant public officials, who were motivated for political reasons and personal ambitions.

Had the Brazilian political scandal described in this article taken place in China with the same degree of visibility, the consequences for those involved would likely be dire. China's strong government, with its desire to curtail opposition and impose harmony (obedience?), and the lack of an intense political and public debate among antagonistic forces would likely require an exemplary punishment for those involved in unethical or illegal behavior – once that became widely known by the public.

The manifestations of dissent and the way digital technologies are being used in the two places have shown that the acceptance of dissenters, their success, their legal and institutional treatment varies greatly due to important attributes of the legal culture and wider societal context. The article's final part underscored the fact that seemingly strong and structured legal frameworks to guarantee dissent and whistleblowing may actually fail to protect them in cases of criticism of governments or in case of counter-majoritarian views.

# Protecting the “*Homo Digitalis*”

Antoni Abat Ninet<sup>1</sup>

Abstract: This paper analyses from a legal and philosophical perspective the appearance of a new human species, the so-called *Homo Digitalis*, a *Homo Sapiens* permanently interconnected with others throughout I.T devices. Twenty-four hours a day. Three hundred and sixty-five days a year, living in a world of ones and zeros. We all are inexorably the new-born *Homo Digitalis*, or as some authors define it, post-humans, and there is no possible opposition to this Darwinist evolution, or between the *Homo digitalis* and other citizens. The first section deals with the relationship between technique (*τεχνη*), technology and humanity, a relation that is ancient as philosophy. The starting point is the pre-Socratic philosophers, Plato and Aristotle, and it ends by analysing the relation of the three concepts in modernity and post-modernity (Weber, Heidegger and Marcuse). The second section deals with the definition of the *Homo Digitalis* from an evolution of Sartori’s *Homo Videns*. The paper ends by exposing the latest judicial decisions, domestic and international legislation to protecting citizens (as new-born *Homo Digitalis*) from wrongful use of technology.

## Technē, Technology and Humanity.

The novels of Jules Verne or Isaac Asimov, Hollywood productions such as Blade Runner, Terminator or I-Robot, are fictions and predict some of the effects that technology produces in human beings and human nature. The fact is that the effects, opportunities and challenges that I.T. and digital (r)evolution produces in human nature have been a major topic in several fields of knowledge and it has been widely analysed, (and demonised) through centuries and millennia of history. It is not necessary to mention the role that the three monotheistic confessions of the book have been playing in evolution and innovation, change and rupture.

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The word technology is composed by technē (τεχνή) and logos (λογία) and it can be defined as the set of knowledge, practices, and procedural techniques, to manufacture objects, devices and systems or modify the human environment to meet their needs. The *technē* as technique covers the ways that humans have been created to adapt the environment to his needs. Due to this fact, the philosophical reflections on technique and its logos are as ancient as philosophy.<sup>2</sup> However, theoretical research within technology has often come to be indistinguishable from theoretical research in science, making engineering science largely continuous with ‘ordinary’ or ‘pure’ science. This is a relatively recent development, which started around the middle of the nineteenth century, and is responsible for great differences between modern technology and traditional, craft-like techniques.<sup>3</sup>

According to this broad definition of technology, everything has technology and we, as human beings, have always been related to it. We are living in a world where technology reaches into every aspect of our lives where the technological devices are with us from the minute we wake up until the moment we fall asleep. However, it has always been so. Technology has always been employed by humans onto the environment. Certainly, nowadays the influence and effects of technology are more evident and absolute, a sentence that each generation of humans have been stating since time immemorial and that technological evolution has progressively contradicted.

The current I.T. and digital tyranny and pan-effect reopen again similar ethical and moral questions that ancient technological progress posed. It is sort of Nietzsche’s eternal return. Luckily, there is not a Spanish Inquisition burning witches and heretics who dare to say that the earth is round after using a devil’s device, but we do have global companies, states, banks, the I.M.F and others somehow reinventing the role of the Tribunal of the Holy office.

The approach and analysis of the phenomenon of technology that this paper takes, was well established by Martin Heidegger’s reference to technology as a kind of cognition and theoretical conduct.<sup>4</sup> Heidegger pointed out that the essence and the dominance of technology consist in a process of objectification of nature, which is arranged by the

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2 Fransen, Maarten, Lokhorst, Gert-Jan and van de Poel, Ibo, ‘Philosophy of Technology’, *The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition), Edward N. Zalta (ed.), online: <https://plato.stanford.edu/archives/fall2018/entries/technology/>

3 Ibid.

4 Heidegger, Martin, Gesamtausgabe, Vol.77, Feldweg-Gespräche (1944/45), Ingrid Schübler (ed.), *Vitorio Klostermann*, 1995.

human to make it liable to him.<sup>5</sup> In this sense, it is not casual that economic elites are escaping from the digital world. Current digitalisation is focusing on the lower social class. In the upper social class, even in Silicon Valley, time on screens is increasingly seen as unhealthy.<sup>6</sup> As more screens appear in the lives of the poor, screens are disappearing from the lives of the rich. The richer you are, the more you spend your time offscreen.<sup>7</sup>

### Technê and Epistêmê

The etymologic composition and the eidetic relation of both components of the word technology (*tecnos* and *logos*) has been changing and evolving in the course of history. Since its origins, *technê* was associated with other virtues and concepts, such as *episteme* (knowledge). The first section of the paper focuses on the relation between *technê* and *episteme* for topical reasons and because of the transcendence that this conceptual association/dissociation had in the antiquity and in contemporary authors, such as Heidegger, Arendt, Adorno or Marcuse.

The terms “technical” and “technological” has been used as synonyms, this equivalence and inaccurate practice may have its origins in the ancient ambivalence and multiple relationships that *technê* (as technique) had with other concepts. Despite that, the technique could be understood as a procedure to modify reality, based on the information provided by sciences; on the other hand, technology is a set of knowledge about technical procedures.<sup>8</sup> As Aristotle poses it in the opening paragraphs of the *Nicomachean Ethics*, there are ends apart from the actions and that it is the nature of the products to do better than the activities.<sup>9</sup>

Plato defined the concept of *technê* as a virtue related to the ruling, and the creation of the cosmos. As the concept of *technê* develops, the role of reflective knowledge (*epistêmê*) is emphasized. Plato uses *technê* and *epistêmê* alternatively, or as Nussbaum poses it, there is no clear and systemic difference between both concepts.<sup>10</sup>

Despite Plato, Aristotle analyses more consciously the concept of *technê* when he distinguishes between the five virtues of thought: *technê*, *epistêmê*, *phronêsis*, *sophia*,

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5 Ibid.

6 Bowies, Nellie, 'Human Contact Is Now a Luxury Good', *The New York Times*, 23.4.2019, at: <https://www.nytimes.com/2019/03/23/sunday-review/human-contact-luxury-screens.html>

7 Ibid.

8 Fullat, Octavi, *Filosofía de la educación, Síntesis*, 2000, p.164.

9 Aristotle, *Nicomachean Ethics*, Batoche Books (trans. W.D. Ross), 1999, p.3.

10 Nussbaum, Martha, *The Therapie of Desire*, Princeton University Press, 1994.

and *nous*.<sup>11</sup> In his distinction, the last form of knowledge appears to be a rational kind, specifically linked to humans and our rational capacity.<sup>12</sup> Dealing concretely with the distinction of the two first virtues of thought, *technê* is distinct from *episteme* in the strict sense. The former is confined to the world of contingencies; the domain of the latter is what is necessary.<sup>13</sup>

Aristotle considers that *technê* (craft, art, capacity) is artificial, not a natural activity; the technique is the *know-how* to do things according to an *eidos* (idea) that the *technetites* (artisan, artist) knows and reproduces in reality.<sup>14</sup> The way that Stoic's notion of *technê* works is illustrated in another widely held Stoic teaching, i.e., the unity of the virtues.<sup>15</sup>

This traditional concept of *technê* was used under the progressive transformation of our societies and individuals throughout the process of modernisation.

### Technology and Modernity

As Max Weber pointed out and Parsons later developed, throughout the process of modernization, or the transition from a traditional to a modern society, a new kind of logic and a technical-scientific rationality rules.<sup>16</sup> The process of rationalisation was gradually introduced and affected the society in an intangible way; first, it affected social actions and relations, and lately the individual ones. Weber defines the spirit of capitalism as a mentality or attitude that aims systemically and professionally at achieving to the rational legitimate profit.<sup>17</sup>

This "Geist" (spirit) is a psychic disposition of the individual manifested in its behaviour standards. This new economic mentality was made against the dominant traditionalism to rule of the acts of the lifeworld (*Lebenswelt*).<sup>18</sup> The appearance of modern science, and its instrumental essence within the capitalist system, caused the evolution and

11 Parry, Richard, 'Episteme and Techne', *The Stanford Encyclopedia of Philosophy* (Summer 2020 Edition), Edward N. Zalta (ed.), forthcoming, available at: <https://plato.stanford.edu/archives/sum2020/entries/episteme-techne/>

12 Aristotle, *Metafisics*, *Penguin Classics*, 1998 and Aristotle, *Physics*, *Penguin Classics*, 1998.

13 Parry, 2020

14 Fullat, op.cit. p.164.

15 Ibid.

16 Weber, Max, *Die protestantische Ethik und der „Geist“ des Kapitalismus*, *Archiv für Sozialwissenschaft und Sozialpolitik*, (1st ed. 1904), *Springer Verlag*, 2019.

17 Ibid in p. 74

18 Ibid in p. 18.

progressive replacement of the traditional concept of *technê* by the new concepts of technique and technology.

Heidegger analyses the link between Greek *technê* and modern technology when he explores the relating of being and man taking place within it.<sup>19</sup> Heidegger offered a prescient critique of modern technology. The two most salient philosophical terms in Heidegger's account of technology are enframing (*Gestell*) and releasement (*Gelassenheit*).<sup>20</sup> Enframing is Heidegger's term for the essence of modern technology, the human orientation towards making everything, including ourselves, part of a system ready to be called on at a moment's notice in the service of technology.<sup>21</sup> The antidote to this condition is releasement (*Gelassenheit*), a mode of being that is open to the world and which forestalls the imposition of a dominating will on other things.<sup>22</sup>

The modern instrumental technique lies on western man's attitude to manipulate the essence and understanding of nature by imposing a mathematical model. This mathematical process consisted in a sort of "objectivisation" of nature throughout an imposition of mathematical logics to exploit it.<sup>23</sup>

Heidegger concludes that the main difference between the ancient concept of *technê* and modern technology lies in the fact that the first did not aim at a practical purpose of production but a contemplative attitude, whereas the second pursues the production of a valuable object.<sup>24</sup> As a matter of example, and to simplify the distinction, *technê* was employed to create a vase of the Ming dynasty, looking for a perfect art, whereas modern technology is used in Ikea factories to produce *Återtåg* vases.

Herbert Marcuse defined the characters, types and effects that technological rationalisation causes in human freedom. He exposes how to contest this alienating rationalisation in order to maintain the necessary ideal of freedom. There is no doubt about the political Heideggerian implications of Marcuse's predictions, which are very

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19 Lovitt, William, 'Techne and Technology, Heidegger's perspective on what is happening today', *Philosophy Today*, 24.1.1980, p.62.

20 Wendland, Aaron James, Merwin, Christopher and Hadjioannou, Christos, 'Introduction' in Aaron James Wendland, Christopher Merwin, Christos Hadjioannou (eds.), *Heidegger on Technology*, Routledge, 2018, p. 3.

21 Ibid

22 Ibid

23 Heidegger, Martin, *Country Path conversations*, Indiana University Press, 2016.

24 Ibid

timely relevant in the current era of digitalisation; or the last episode of a technological wave that humanity is facing.

In a very sceptical approach to technology, the author of the Second Generation of the *Frankfurter School* focuses on the unavoidable degeneration that society experiences through the rationalisation that technology imposes. A system of social control, domination and totalitarianism emerges as a consequence of technological rationalisation.<sup>25</sup>

Marcuse believes that a constituted society may be analysed from its social, political and cultural structures, but also it requires a revision of the logic of domination and the social unconscious articulated throughout the repressive de-sublimation in which reality and the subject are reduced to simple tools of production and consumption.<sup>26</sup> In terms of methodology, the Hegelian dialectic arises when Marcuse defines the appearance of the *One-dimensional man* because of the domination and rationality imposed by technology in our means of life.<sup>27</sup>

Marcuse remarks that technological rationalisation thrusts human alienation and a process of de-aesthetics is like a deformation of the senses that makes possible the repression and the manipulation of humankind. Education, no culture (absorbed a-critically by the one-dimension man) is the only mean to struggle against this process of rationalisation.<sup>28</sup>

What worried Marcuse and other thinkers in the decade of '40s of the last century, i.e. the aerosol spray, the transistor radio, the microwave, the birth of the first electronic computer; concerned, as the last technological progress and devices may worry us. In Marcuse's times, the Nazi regime was alive, the nuclear bomb and the rocket-powered missiles were the last technological innovations; nowadays, drones, satellites, robots and algorithms are used in war and pre-war contests and to annihilate "enemies".

Marcuse uses a simple example to illustrate how technology affects human nature and our cognitive faculties. A man driving a car to a distant place chooses his route from

25 Jay, Martin, *The Dialectical Imagination, a history of the Frankfurter School and the Institute of Social Research, 1923-1950*, University of California Press, 1973, p.78.

26 Ibid in p. 79.

27 Marcuse, Herbert, *One-dimensional Man*, Routledge Classics, 1991.

28 Horkheimer, Max und Adorno, Theodor, *Dialektik der Aufklärung*. Philosophische Fragmente, S. Fischer, 1986.

the highway maps. In this journey, towns, lakes and mountains appear as obstacles and the countryside is shaped and organised by the highway.<sup>29</sup> Numerous signs and posters tell the traveller what to do and think; they even request his attention to the beauties of nature or the hallmarks of history. He will fare best by following its directions, subordinating his spontaneity to the anonymous wisdom which ordered everything for him. What Marcuse wants to remark is that “*others have done the thinking for him, and perhaps for the better*”.<sup>30</sup> Under the impact of this technological apparatus: individualistic rationality; has been transformed into technological rationality undermining the main source of individual freedom, the critical reason.<sup>31</sup>

An update of this simple example can enlighten us on the different situations that the driver (if it is not a self-driving car) will face along the trip in 2020. A vast majority of drivers, in this kind of journeys or when navigating unfamiliar cities, will employ a GPS (Global Position System) using satellite data to find the better route (according to the preferences of the driver) to reach the destination.

Following the rationale of Marcuse in his example, the use of the GPS or self-driving car increases exponentially the use of the anonymous wisdom and the alienation of individuals. The effects and huge impact of the GPS on our society are evidently affecting our way of communicating and living. GPS is used in nearly every aspect of life in today’s world.<sup>32</sup>

These systems have revolutionized today’s technology by becoming more interactive and useful in multiple industries. Some of the most evident effects are positive such as real-time data helping multiple organizations including the entertainment sector, law enforcement, government entities and consumers, locating missing people through signal detection, safety while boating.<sup>33</sup> Essentially, GPS technology is making the happenings of the world detectable, capable of being tracked and more preventable.<sup>34</sup>

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29 Ibid, in p.143.

30 Ibid.

31 Ibid

32 Agrawal, AJ, ‘How GPS Revolutionized Technology Today’, *Huffpost*, 12.5.2017, at: [https://www.huffpost.com/entry/how-gps-revolutionized-te\\_b\\_9917232?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_referrer\\_sig=AQAAAB9sqJ9rMAll-1Wgeh7M9HBjH\\_mDN0YenOd3Yw9mMZTe1QyajJEChr\\_gTswkuxB1xw5y5BgUlJyjindL-h1VRvChSzcR\\_n\\_Agff10Oa0CvPqp9rBfB4J5-NYV852aSN86FZLxjjix2lyr8a08CRgCokX-hLuVnfHN2hinn4xEfHtL](https://www.huffpost.com/entry/how-gps-revolutionized-te_b_9917232?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAB9sqJ9rMAll-1Wgeh7M9HBjH_mDN0YenOd3Yw9mMZTe1QyajJEChr_gTswkuxB1xw5y5BgUlJyjindL-h1VRvChSzcR_n_Agff10Oa0CvPqp9rBfB4J5-NYV852aSN86FZLxjjix2lyr8a08CRgCokX-hLuVnfHN2hinn4xEfHtL)

33 Ibid

34 Ibid.

On the other hand, the GPS technology undermines individual freedom and our critical sense. It has pernicious effects on our cognitive capabilities and it is affecting our perception and judgement. Navigation in urban environments requires complex cognitive abilities. We need to focus on both spatial overview and we have to process information related to details of surroundings and places.<sup>35</sup>

When people are told which way to turn, it relieves them of the need to create their own routes and remember them. They pay less attention to their surroundings. Neuroscientists can now see brain behaviour changes when people rely on turn-by-turn directions.<sup>36</sup> In a study published in *Nature Communications* in 2017,<sup>37</sup> researchers asked subjects to navigate a virtual simulation of London's Soho neighbourhood and monitored their brain activity, specifically the hippocampus, which is integral to spatial navigation.<sup>38</sup>

The hippocampus makes an internal map of the environment and this map becomes active only when you are engaged in navigating and not using GPS.<sup>39</sup> The hippocampus allows us to orient in space and know where we are by creating cognitive maps. It also allows us to recall events from the past, what is known as episodic memory. And, remarkably, it is the part of the brain that neuroscientists believe gives us the ability to imagine ourselves in the future.<sup>40</sup>

Those who were guided by directions showed less activity in this part of the brain than participants who navigated without the device. Studies have long shown the hippocampus is highly susceptible to experience. Meanwhile, atrophy in that part of the brain is linked to devastating conditions, including post-traumatic stress disorder and Alzheimer's disease. Stress and depression have been shown to dampen neurogenesis —

35 Farcas, Zsuzsanna, János, Réka and Maoir, Edit, 'Spatial orientation: Effects of GPS usage on Cognitive Map forming'; Conference: 11th AlpsAdria Psychology Conference, Pécs, Hungary, At Pécs, Hungary, Volume: ABSTRACTS Review of Psychology, *International Journal of Psychological Association* 21(1), 51-107. UCD 159.9/ ISSN 1330-6812.

36 O'Conner, M.R., 'Ditch the GPS. It's ruining your brain,' *The Washington Post*, 5.6.2019, at: [https://www.washingtonpost.com/opinions/ditch-the-gps-its-ruining-your-brain/2019/06/05/29a3170e-87af-11e9-98c1-e945ae5db8fb\\_story.html](https://www.washingtonpost.com/opinions/ditch-the-gps-its-ruining-your-brain/2019/06/05/29a3170e-87af-11e9-98c1-e945ae5db8fb_story.html)

37 Javadi, A., Emo, B., Howard, L. *et al.*, 'Hippocampal and prefrontal processing of network topology to simulate the future', *Nat Commun* 8, 14652, 2017, available at: <https://doi.org/10.1038/ncomms14652>

38 O'Conner

39 Ibid

40 Ibid.

the growth of new neurons — in the hippocampal circuit.<sup>41</sup> Atrophy that may affect our potential responses to GPS failures, estimated every year in more than 300,000 car accidents in the United Kingdom alone.<sup>42</sup>

The following point analysed in this paper lies on these cognitive effects that technology is causing in human nature to the point that it is appropriate to talk about a new sort of human evolution the *Homo Digitalis* or, as some authors (Foucault, Judith Butler, Humberto Maturana, Donna Haraway or Stefano Rodotà among others) are claiming, a post-human reality.

## The Homo Digitalis or a Post-Human Reality.

### Homo Videns

The expansion of the mass media brings some innovations to control these masses. The appearance of television and its great implementation and impact in public and private sphere interrupted the evolution of the human nature, and the *Homo Sapiens* (product of written culture) was substituted by the *Homo Videns* (product of the image). The author claims that television at the time would not only be an instrument, but it is a “*paideia*”, that generates a new “*anthropos*”, a new type of human being, more “credulous and naïve”.<sup>43</sup> Sartori’s pessimistic approach is focused on the effects that the television first, and the new technologies have in the capacity of the crowds, of the demos and therefore, in the role that the demos might play in the political system.

Sartori, follows arguing that the main difference between the television and the new technologies (what he defines as the two visible means), is that the first show’s images of real things, it is photography and cinematography of what exists.<sup>44</sup> On the other hand, the cybernetic computer shows us imaginary images, the so-called virtual reality is an unreality.<sup>45</sup> It also remarked the tremendous possibilities and risks that the internet implies but his view is pessimistic about the effects (public’s inability of getting itself together, citizens are not interested in learning, they are superficially informed and dependent on the judgments offered by the media) that the television and the

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41 Ibid

42 Staver, Jared, ‘Chicago Personal Injury Blog: Have In-Car Navigation Units Increased Accidents?’, *Staver*, at: <https://www.chicagolawyer.com/have-in-car-navigation-units-increased-accidents/>

43 Sartori, Giovanni, *Home Videns, Televisione e post-pensiero*, *Laterza*, 2000.

44 Ibid in p.34.

45 Ibid.

cybernetic computer produce to the mass and the democracy. In this sense, technology remarks the Platonic criticism to democratic citizens, a mass of ignorant ruling and taking their decisions based on opinion (Doxa) and not knowledge (episteme). TV plays the role of the white wall of the Platonic cavern.

The definition of the post-human field no longer refers only to innovations linked to biology and genetics, but is the result of the convergence of various disciplines and experiences, ranging from electronics to artificial intelligence, robotics, nanotechnologies and neurosciences.<sup>46</sup> Many transformations are already visible and justify the consideration of the body as “a new connected object”, even presented as a “nano-bio-info-neuromachine”, recalling that *homme machine* that La Mettrie and D’Holbach spoke of in the century.<sup>47</sup>

The result of this process of transformations end in an update of the *homo humanus* and not in a post-human condition where the time to come is described as the one of our final invention, the artificial intelligence and the end of the human age.<sup>48</sup> Even that we acknowledge that the construction of the identity increasingly lies in algorithms, subtracting it from individual decision and knowledge.<sup>49</sup> This reality is related with Marcuse’s position on machines making decisions instead of humans. However, a central point of the paper is that the *Homo Digitalis* still is a human being and not a post-human reality. Therefore, the *Homo Sapiens Digitalis* is subject of human rights and obligations.

### Homo Digitalis

The digital era has transformed the *Homo Videns* into a new sort of human, the *Homo Digitalis*, a Sapiens surrounded and dependent on I.T. devices; Smartphones, desktops, e-Books, tablets, GPS, universal serial bus (USB) and computers are not simply accessories but necessary elements of our lives.

The *Homo Digitalis* lives permanently connected to an imaginary network. The internet age has incited new social movements characterised to be more horizontal and deliberative and including virality (as the tendency to circulate rapidly and widely from

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46 Rodotà, Stefano, ‘Del ser humano al posthumano’ in De la Quadra Salcedo, Tomás, Piñar Mañas, José Luis, et al, Sociedad Digital y Derecho, *Boletín Oficial del Estado*, 2018, p.87.

47 Ibid in p.88

48 Barrat, J., *Our Final Invention: Artificial Intelligence and the End of the Human Era*; *Dunne Books*, 2013.

49 Rodotà, op. cit, p.90.

one internet user to another) as one of their main elements.<sup>50</sup> All these changes also have effects in our Psyche to an extent that some authors define the current humans as *Homo Digitalis*.<sup>51</sup>

From a social perspective, the online crowd is encompassing the social internet networks, as spaces of autonomy, largely beyond the control of governments, corporations and Big Tech that had monopolised the channels of communications as the foundation of their power, throughout history.<sup>52</sup> In the safety of cyberspace, people from all ages and conditions moved toward occupying urban space, on a blind date with each other in a display of self-awareness that has always characterised major social movements.<sup>53</sup>

By constructing a free community in a symbolic place, social movements create a public space, a space for deliberation, which ultimately becomes a political space, a space for sovereign assemblies to meet and to recover their rights of representation, which have been captured in political institutions predominantly tailored for the convenience of the dominant interests and values.<sup>54</sup>

Crowds are now at the heart of digital networks as evidenced by the multiplicity of their appearances and aspects, such as the flash mobs that describe express gatherings of individuals connected by mobile terminals, the smart crowds designate all the users connected to the capacities increased by the networking on the Internet and Crowdsourcing.<sup>55</sup> Citizens are concerned about political matters and want to defend their interest, influence the behaviour of authorities, look for like-minded others, or simply express their opinion in a public manner.<sup>56</sup>

Continuous electronic messages, tweets, notifications on Facebook, forces the new man to remain in a state of permanent alert, a state of over excitation that lends itself

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- 50 Gill Moreno, Elena, 'Nuevos abismos sociales en la era digital: de las masas al crowd', *Política y Sociedad*, 2015, 192.
- 51 Montag, Christian, *Vom Homo Sapiens zum Homo Digitalis*, Springer, 2017. See also Cuartas Arias, Jorge Mauricio, 'Homo Digitalis and Contemporary Psychology', *International Journal of Psychological Research* 12(2), 2019.
- 52 Castells, Manuel, *Network of Outrage and hope, social movements in the internet age*, Polity Press, 2013, p.3.
- 53 Ibid in p.3.
- 54 Ibid in p.11.
- 55 Ibid.
- 56 Theocharis, Yannis and Van Deth, Jan W., *Political Participation in a Changing World. Conceptual and Empirical Challenges in the study of Citizen Engagement*, Routledge, 2018, p. 19.

to developing addictive behaviours and obsessive-compulsive disorders. Sufficient as an example are people who cannot attend a movie session, a play, a concert, or even a religious service, without consulting their mobile phone.<sup>57</sup> The *Homo Digitalis* comprises both a new form of collective coherence, which allows different voices to be represented across borders but also an adverse effect on the psyche particularly because of the all-encompassing role of the Internet of Things.

The massive amount of works in different fields defining and analysing this so-called “*Homo Digitalis*” evidence this last evolutionary stage of humans. In this sense, it is as Pérez Tapias defines this new Sapiens who is an up-dated version of Cicero’s *Homo Humanus* and an illusory *Homo Deus*.<sup>58</sup>

Now, as jurists and lawyers, we need to think how to protect the *Homo Digitalis* that as a *Nasciturus* or new-born child needs to be legally protected in the face of the dangers and threats that its new environment causes.

### Protecting the Homo Digitalis, protecting us.

I.T. and digitalisation imply new opportunities, risks and threats to our understanding of freedom of speech, right to dignity, privacy, etc. As other emergent or “new” social fields that need to be juridified, the digital era as a universal phenomenon requires a universal answer conducted by a strong regulatory effort and a strict application of the regulatory principles. It should rely on basic principles such as equality, transparency, data protection, proportionality, right of information, legal certainty and security. In terms of data protection of the Homo Digitalis, Moerel and Corien Prins of the University of Tilburg University, proposed an impressive framework of regulation.<sup>59</sup> Andrés Boix Palop also remarks the need to consider algorithmic models used by the Public Administrations for the effective adoption of decisions as administrative regulations from a legal point of view, because they fulfil a function which is strictly

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57 Bachiller, Rafael, ‘Homo Digitalis’, *El Mundo*, 22.4.2015, at: <https://www.elmundo.es/opinion/2015/04/22/5537d316e2704ef0498b4570.html>

58 Pérez Tapias, José Antonio, *Ser Humano: Cuestión de dignidad en todas las culturas*, Trotta, 2019.

59 Moerel, Lokke and Prins, Corien, ‘Privacy for the homo digitalis. Proposal for a new regulatory framework for data protection in the light of Big data and the Internet of Things’, 2016, Available at SSRN: <https://ssrn.com/abstract=2784123>

equivalent to that of legal norms, i.e. to regulate and predetermine the action of the public powers.<sup>60</sup>

We have seen very recently, that domestic and international courts are starting to implement these principles to digitalisation. As a matter of example, the Hague District Court (The Netherlands) delivered a Judgment in February 2020, ruling that a system (SyRI) established by the Dutch government to assess the level of risk of fraud of citizens, does not meet the requirements of proportionality, lacks transparency and violates the provisions on respect for private life recognized by the Article 8 of the European Convention on Human Rights.<sup>61</sup>

The court assessed whether the SyRI legislation complies with Article 8 paragraph 2 ECHR. This particular provision requires striking a fair balance between the interests of the community as a whole, which the legislation serves, and the right of the individuals affected by the legislation to respect for their private life and home.<sup>62</sup>

There are already court decisions in Europe in which an algorithmic model evaluating the personal characteristics of citizens is declared illegal. The principle of transparency is the guiding principle of data protection that underlies and is enshrined in the ECHR. In this sense, the District court of The Hague considers that the Dutch government has not disclosed the type of algorithms used in the risk model, nor provided information on the risk analysis method used, with the excuse of preventing citizens from being able to adjust their behaviour accordingly.<sup>63</sup>

Besides, it appreciates that the regulatory regulations of algorithms do not provide any obligation of information to the people whose data is processed so that it cannot reasonably be expected that those people know that their data is used or has been used for that purpose. Additionally, these regulations also do not provide any obligation

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60 Boix Palop, Andrés, 'Los algoritmos son reglamentos: la necesidad de extender las garantías propias de las normas reglamentarias a los programas empleados por la administración para la adopción de decisiones', *Teoría y Método, revista de derecho público* 1, 2020.

61 Kluwer, Wolters, 'Primera sentencia europea que declara ilegal un algoritmo de evaluación de características personales de los ciudadanos', *Diariolaley*, 3.2.2020, at: <https://diariolaley.laleynext.es/Content/Documento.aspx?params=H4sIAAAAAEAMtMSbH1czUwMDAyN-Da3NDJUK0stKs7Mz7M1MjACC6rI5aekhrG425bmpaSmZealpoCUZKZVuuQnh1QWpNqm-JeYUp6qJJuXnZ6OYFA8zAQCfSdKrYwAAAA==WKE>

62 Court Decision C-09-550982-HA ZA 18-388, available in English at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:1878>

63 European Commission, COM (2020) 65 Final, The WHITE PAPER On Artificial Intelligence - A European approach to excellence and trust [https://ec.europa.eu/info/sites/info/files/comp\\_mission-white-paper-artificial-intelligence-feb2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/comp_mission-white-paper-artificial-intelligence-feb2020_en.pdf)

to inform interested parties individually, when appropriate, of the fact that their risk assessment has been positive.

In the court's opinion, the principle of transparency has not been sufficiently observed in the SyRI legislation in light of Article 8 (2) of the ECHR. The court finds that the SyRI legislation in no way provides information about the factual data that may justify the presence of a particular circumstance, or what objective data may justify the conclusion that there is an increased risk. In the documentation provided, it is added, only some examples of indicators that may indicate a greater risk and a possible impact are given.

On 19 February 2020, the European Commission launched a Consultation on Artificial Intelligence. Citizens and stakeholders are invited to provide their feedback by 14 June 2020. The objective of this document was to prepare a set of proposals to establish a European regulatory framework for artificial intelligence. The document aims to promote the development of this technology in Europe while ensuring respect for the values and principles of the Union.

The White paper on Artificial Intelligence - An European approach to excellence and trust is structured in six sections: Introduction; Current regulatory framework; Policies to support and adopt artificial intelligence; Facilitate access to data; Regulatory Framework for AI and Conclusion. It pays special attention to seizing opportunities and risks for safety and effective functioning of the liability regime.<sup>64</sup>

Certainly, these are important steps forward to provide a safe framework to protect the *Homo Digitalis* from the risks that digitalisation implies. However, a universal effort is needed while emphasising effective measures and not merely declaratory statements. Otherwise, our safety, human rights and even our human nature are going to be at risk.

## Conclusion

Would Marcuse have a Facebook account and use I.T. devices? Definitely. And, probably not only because of the same reason that Aristotle and Plato will probably state that we are political animals, *Zoon Politikon*. A month of confinement because of Covid-19 has evidenced this fact again but also that online crowds are not enough to fulfil our social needs. However, if in this century, we need online networks to interact,

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64 Ibid.

Plato, Aristotle and Marcuse would probably have an online social media account and username.

For better or worse, there is no way to escape from digitalisation. Therefore, the relevant question is not whether we accept A.I and digitalisation but to be aware of the potential threats that this technology may imply. As Pérez Tapias brilliantly remarks, the protection of the Homo Digitalis is a question of dignity,<sup>65</sup> but also it is necessary to enhance universal legal and political effective responses to ensure the tremendous benefits of the digital era. Even that it is a paradoxical to use law, which implies always an extreme degree of rationalisation, to protect the new *Homo Sapiens Digitalis* from the rationalisation and alienation that digitalisation imposes.

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65 Pérez Tapias, José Antonio, op.cit.

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# Legal Construction of Algorithm Interpretation: Path of Algorithm Accountability

Luo Weiling<sup>1</sup> and Liang Deng<sup>2</sup>

**Abstract:** Nowadays the development of AI technology is not yet mature, let alone the legal definition and regulation of its type, even the type of technology itself is full of uncertain factors. Because of the rapid development of technology and the openness of theories, scientists have not yet formed a unified consensus and system on cutting-edge technical issues. Therefore, at present, governments all over the world are actively formulating the development plans of AI, but the supervision and regulation of AI are scattered and lagging behind. There is nothing wrong with encouraging the development of new technologies, but the application of technologies requires a responsible response to various ethical demands from human society. No matter what form of AI technology and its application are inseparable from the algorithm and the issue of “algorithm accountability” may probably be a focus of legal regulations on AI and the path of accountability is algorithm interpretation. It is desirable but regrettable that the EU’s GDPR stipulates the non-binding “right to explanation”. But the stop of GDPR is exactly the starting point of constructing the algorithm interpretation mechanism in law.

## The Necessity and Approach of Algorithm Accountability

With the development of AI technology, algorithms are increasingly affecting all aspects of human life. While technology improves efficiency and convenience, it also raises concerns about being “ruled” by algorithms. In the increasingly tense man-machine relationship, human ethical demands, such as security, fairness and privacy, are raised.

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These ethical demands are progressively one by one, but all point to the crisis of trust. The response to these ethical demands lies in the establishment of man-machine trust, which is based on the accountability of AI algorithm.

The above ethical demands are protected by law, and rights can be created. To be specific, the safety claims can generate civil rights such as the right to life, the right to body and the right to health. The demands for fairness and equal opportunity can generate the basic civil and political rights, such as the right to equality, the right to education, the right to be free from gender discrimination, and consumer rights and interest protection, such as the right to know. Privacy claims can generate civil rights such as right of reputation, right of honor and right of privacy, as well as inviolability of personal dignity. Therefore, it is one of the approaches of algorithm accountability to stipulate specific legal rights for the relative party<sup>3</sup> of algorithm behavior. However, rights that algorithm accountability refers to cover the whole field of public law, private law and social law. And the span and depth of the law involved in these rights determine that it is impossible to create a specific right called “right to counter algorithm”.

Thus, it can be seen that the method of algorithm accountability through stipulating legal rights is general but not specific and clear. Since the right can only be remedied by proving that it has been infringed and damaged, and the algorithm liability party can be sued. However, it is extremely difficult to prove that the right has been infringed and the subject of the right has been damaged under the existing legal regulation mode. We understand that the existing legal regulation has its realistic considerations: the logic of AI algorithm operation is difficult to understand, especially for unsupervised learning algorithm, regardless of ordinary people, even its developers cannot predict the results of algorithmic decision-making, the algorithm itself is like a “black box”, and trying to open the “black box” falls into the so-called “transparency fallacy”.<sup>4</sup> We argue that neither “black box” nor “transparency fallacy” is the reason for avoiding

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3 Here the concept of “relative party” is similar to the concept of administrative relative party in administrative law. Because AI algorithm is not only used in commercial field, but also in public sector, even in commercial application scenarios, algorithmic decision-making in big data environment also has the public function of resource allocation, so the person affected by algorithmic decision-making may be the user of algorithmic decision-making or the party affected by algorithmic decision-making. Specifically, the driver of an autopilot with AI algorithm is affected by the algorithm decision, and belongs to the user of the algorithm instead of relative party. In the scene where the institutions or agencies use algorithmic decision-making to recruit students, loan approval and so on, the influence of algorithmic decision is the relative party of the algorithm application instead of the user.

4 See, Lilian Edwards, Michael Veale: *Slave to the Algorithm? Why a ‘Right to an Explanation’ is Probably Not the Remedy You are Looking For*, *Duke Law & Technology Review* 16(14), 2017, pp. 43, 65-67.

the regulation of AI algorithms. If “black box” cannot be justified by “transparency” or other methods, does it mean that the law will give up restricting a system that may be “out of control”? How do we choose between realism and a responsible attitude? Undoubtedly, the former seems more “economic” in the short term, because it does not need to consider the cost of opening the “black box” or other methods. But in the long run, AI practitioners will be at a loss due to the uncertainty of the basis of behavioral accountability and unclear regulatory boundaries, which is not conducive to the development of science and technology and industry. In our opinion, when analyzing the issue of algorithm accountability, it seems more accurate to replace “right to counter algorithm” with “algorithm obligation” from the perspective of right-holder to the perspective of responsible person. In fact, rights mentioned above are “activated” by clarifying the responsibilities and obligations of the product or service providers and the algorithm developers in the specific scenarios where the AI algorithm works. Thus, the key of algorithm accountability process is not to entitle but to assign obligation, that is, to add and clarify the interpretation obligations of the control party of AI algorithm in the relevant legislation.

## The Essentials of Algorithm Interpretation

### The Necessity of Algorithm Interpretation

The algorithm disclosure mechanism helps solve the problem of algorithm transparency and further implement the algorithmic responsibility. One of the most attractive and controversial issues in GDPR (General Data Protection Regulations) is the introduction of the concept of algorithm interpretation, which is a useful attempt in our opinion, but the task of GDPR to construct the “right to explanation” has not been successful. Point (71) of the preamble paragraph of GDPR deals with the “right to explanation”, and this legislative idea is to protect data subjects from the negative impact of “wrong” automated decision-making. When faced with the adverse results of automated decision-making output, data subjects can correct the conclusions by requiring interpretation and manual intervention, and refuse to accept the adverse results of automated decision-making when the “right to explanation” is not effectively exercised. This is an ideal picture of algorithm responsibility legal regulation, but these provisions are made in the preamble paragraph of GDPR, which is not legally binding. And in the main body of GDPR, we find that articles 12, 13 and 14 deal with algorithmic “transparency” and algorithmic “information providing”. It can be seen that the obligation to provide information stipulated in the text of GDPR is limited to making automated decisions (i.e., algorithm processing). It means that the so-called “right to explanation” here refers to the unanalyzed personal data rather than the output results

after algorithm processing. The obligation of providing information stipulated in the text of GDPR is completely different from the mechanism of algorithm interpretation that the preamble paragraph attempts to construct. Therefore, the concept of preamble paragraph and text in GDPR is inconsistent with the “right to explanation” of the algorithm, and the deficiency of GDPR lies in its reluctance to express and its failure to establish an effective mechanism of algorithm interpretation. However, the idea of the preamble paragraph of GDPR is worthy of reference. It can be said that the stop of GDPR is exactly the starting point of constructing the algorithm interpretation mechanism in law.

However, some scholars have questioned that it may be futile not only to open the “black box”, but also that the so-called “right to explanation” is not what the data subject needs and “in some cases transparency or explanation rights may be overrated or even irrelevant”.<sup>5</sup> By analyzing some current cases in the EU, the questioners argue that the right to explanation is often not a remedy sought. Among them, the case of Google in Spain introduced the “right to be forgotten”. Questioners believe that the case shows that remedy of the data subject’s personal rights can completely replace the “right to explain” with “the right to be forgotten”. In the case, the plaintiff asked Google to delete the top search result link related to his name, which pointed to an outdated page of a newspaper file that recorded that he was repaying the government’s long-term debt (in fact, he had already repaid it). The plaintiff’s appeal in court was to delete “inaccurate” data, and he was not interested in why Google’s search algorithm continued to put obsolete data at the top of its rankings. As the case of Google in Spain shows, interpretation does not really mitigate or compensate for the emotional or financial loss suffered by the data subject, it may only serve as a warning to algorithm developers not to make the same mistakes again.<sup>6</sup>

The two factors which were mentioned above, “prevention” and “remedy”, are the criteria for determining whether an accountability mechanism is effective. This perspective is meaningful. However, we do not agree with the conclusion that “right to be forgotten” can replace the function of “right to explanation”. The questioners think that the algorithm interpretation only has the function of “prevention” but not

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5 Lilian Edwards, Michael Veale: Slave to the Algorithm? Why a ‘Right to an Explanation’ is Probably Not the Remedy You are Looking For, *Duke Law & Technology Review* 16(14), 2017, p. 43.

6 See, Lilian Edwards, Michael Veale: Slave to the Algorithm? Why a ‘Right to an Explanation’ is Probably Not the Remedy You are Looking For, *Duke Law & Technology Review* 16(14), 2017, pp. 41-43.

“remedy”, which is exactly the defect of the “right to be forgotten” advocated by the questioners in the algorithm accountability. Let’s extend the case of Google in Spain to see whether the plaintiff can get remedy when facing AI algorithm decision-making under the regulatory framework of the “right to be forgotten”. Assuming that the outdated data related to the plaintiff’s name has not been deleted, when the plaintiff applies for commercial loans, big data will include the “inaccurate” information as a factor into the algorithm, resulting in the rejection of the plaintiff’s loan application by the AI algorithm decision system. In this case, the plaintiff claims to delete the relevant information of personal data according to the “right to be forgotten”. The result of “remedy” is that the outdated information related to his name is deleted in the relevant web pages, but it will be impossible for the plaintiff to analyze and process the data related to the outdated and “inaccurate” information in the subsequent algorithmic decision-making, so as to avoid the similar situation in the future. It actually reflects the “prevention” function, but the “remedy” function proved by the questioners cannot be satisfied in this situation. Because the object of the “right to be forgotten” is privacy, in the case of Google in Spain exemplified by the questioners, as long as the relevant information is deleted, the remedy function will be realized; but in the scenario extended here by this paper, the plaintiff’s claim is to overturn the result of improper algorithmic decision-making, and at this moment resort to the “right to be forgotten” cannot change the result of commercial loan rejection and achieve the goal of “remedy”. In addition, due to the lack of algorithm interpretation mechanism, the data subject can only claim the “right to be forgotten” or other data protection rights in the face of adverse results of algorithm decision-making, and such rights only relate to the data itself, which is the input information of algorithm decision-making, and have nothing to do with the algorithm process or algorithm results. In this right- accountability mode, it inevitably leads to the question of the legitimacy of the data source of the data controller, which intensifies the antagonism and contradiction between human and algorithm (or data controller), and damages the shaky foundation of man-machine trust.

### The Possibility of Algorithm Interpretation

If algorithm interpretation is necessary, how to solve the obstacles it faces? Faced with the technical and legal constraints of the algorithm interpretation proposed by the questioners, we argue that it is necessary to clarify that such constraints and obstacles only deny the possibility of algorithm transparency or opening the “black box” of the algorithm, while algorithm interpretation is not the same as algorithm transparency or opening the “black box” of the algorithm. In other words, the difficulty of opening

the “black box” of the algorithm does not necessarily mean that the feasibility of the algorithm interpretation is low.

Several legal scholars, computer scientists and cognitive science experts from Harvard University published a paper in 2017 to demonstrate the possibility of using algorithmic interpretation for legal accountability.<sup>7</sup> Before discussing the operation of algorithm interpretation, they first make it clear that “explanation does not require knowing the flow of bits through an AI system”. Subsequently, they introduced two technical ideas that make interpretation possible. One is “local explanation”, which refers to the interpretation of specific decisions in the field of AI, rather than the interpretation of the overall behavior of the system. Algorithm interpretation is often done by systematically exploring (external) inputs to determine what factors have the greatest impact on decision results. This explanation is local because the important factors may vary from case to case. For example, for one person, a repayment record may be the reason his loan was rejected, and for another it may be the reason his income was not up to par. In fact, technology has developed a tool called “Local Interpretable Model-Agnostic Explanations” (LIME), which can be used to interpret the predictions of any machine learning classifier.<sup>8</sup> The second technical idea is “Counterfactual Faithfulness”, which helps us to answer this question: Is it a factor that determines the output? And related question: What factors lead to the difference in results? “For example, if a person was told that their income was the determining factor for their loan denial, and then their income increases, they might reasonably expect that the system would now deem them worthy of getting the loan”. “Counterfactual Faithfulness” actually draws on the theoretical resources of philosophy of science and logic on “counterfactual conditionals”. “Counterfactual conditionals are also called ‘virtual implication propositions’. They have the form of ‘if P then Q’, and their preconditions express a situation that does not conform to reality. For example, ‘If the sun does not rise today, there will be no day today’ is a counterfactual conditional sentence.”<sup>9</sup> At the same time, other scholars have made use of this theory to prove the possibility of “Counterfactual explanation” in AI

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7 The analysis of this paragraph, unless otherwise marked, is mainly referred to as: Finale Doshi-Velez, F, Mason Kortz: Accountability of AI Under the Law: The Role of Explanation, Berkman Klein Center Working Group on Explanation and the Law, Berkman Klein Center for Internet & Society working paper, 2017. Website: <http://nrs.harvard.edu/urn-3:HUL.InstRepos:34372584>, visited on 21 February, 2019.

8 Talk about LIME, see Marco Tulio Ribeiro, Sameer Singh, Carlos Guestrin, “Why Should I Trust You?”: Explaining the Predictions of Any Classifier, 2017. Website: <http://nrs.harvard.edu/urn-3:HUL.InstRepos:34372584>, visited on 21 February, 2019.

9 Chen Xiaoping: Scientific Laws and Counterfactual Conditionals on the New Riddle of Induction, *Journal of Sun Yat-sen University (Social Science Edition) Supplement*, 2003, p. 67.

and machine learning.<sup>10</sup> The two technical ideas have one thing in common: neither operation requires an understanding of how an algorithm system makes decisions, or opens an algorithm “black box”. In addition, numerous algorithm interpretation practices have also proved the possibility of algorithm interpretation. For example, a team of technology business and medical experts published an article in the *Harvard Business Review* in August 2018 about the potential for preventing discrimination of machine learning algorithm from a product design perspective.<sup>11</sup>

### The Hermeneutic Characteristics of Algorithm Interpretation

We find that the essence of “interpretation” elucidated by philosophical hermeneutics has many merits in improving and enriching the connotation of AI algorithm interpretation. According to the position of philosophical hermeneutics, “interpretation and understanding can never discover and completely reproduce the ‘author’s original intention’, and furthermore, the purpose of understanding is not to discover the original intention”.<sup>12</sup> Therefore, the “meaning” of interpretation is not a definite existence prior to interpretation and understanding. “Interpretation is recreation in a specific sense, but this recreation is based not on a preceding creative act, but on the interpreter’s expression of the image according to the meaning he found in it.”<sup>13</sup> Because “prejudice” is an open rather than a closed existence, the interpreting parties can enter the other side’s horizon through “understanding” to form a consensus network of “meanings”, from which the interpretation can be completed jointly by the parties.

The AI algorithm interpretation is not to seek a definite and priori “solution” but point to the understanding and meaning consensus of participants (including product or service providers, algorithm technology developers and users). We argue that in the specific context of AI algorithm, it refers to the man-machine trust. As Roland Barthes, a French literary critic of the 19th century, said, the author died when the work was born.<sup>14</sup> When AI algorithm was born and put into application, even the developers

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- 10 See, Sandra Wachter, Brent Mittelstadt, Chris Russell: Counterfactual Explanations Without Opening the Black Box: Automated Decisions and the GDPR, *Harvard Journal of Law & Technology* 31(2), 2017, pp. 23-43.
- 11 See, Ahmed Abbasi, Li Jingjing, Clifford Gari, Herman Taylor: Make “Fairness by Design” Part of *Machine Learning*, website: <https://hbr.org/2018/08/make-fairness-by-design-part-of-machine-learning>, visited on 21 February, 2019.
- 12 Yin Ding: *Fate of Understanding*, Beijing: SDX Joint Publishing Company, 1988, p. 50.
- 13 Hans-Georg Gadamer: *Truth and Method: Basic Characteristics of Philosophical Hermeneutics*, Chinese Version translated by Hong Handing, Shanghai: Shanghai Translation Publishing House, 1999, p. 155.
- 14 See, Roland Barthes: *Death of the Author*, Selected Essays by Roland Barthes, Chinese Version translated by Huaiyu, Tianjin: Baihua Literature and Art Publishing House, 2005.

of algorithm technology could not fully and accurately interpret the principle, goal, ethical value and potential risks of algorithm application in the way of “restoration” and “reproduction”. The interpretation of these factors is more from the inner conviction of users. Does this mean the shift of interpretation from “author-centered” to “reader-centered”? Does “There are a thousand Hamlets in a thousand people’s eyes” lead to AI algorithm interpretation falling into obscure subjective cognition? The answer of this paper is no, because even if the phenomenon of “a thousand hamlets” cannot be avoided at the beginning of the interpretation, “Hamlet” is ultimately “Hamlet”, which is the basic category and starting point of the interpretation, and also the image that needs to be reshaped by all parties in the final consensus of meaning. According to the approach of philosophical hermeneutics, the interpretation of AI algorithm is not an arbitrary and one-way interpretation, but a dialogue and multiple interpretations. To be specific, interpretation first means that the service providers or algorithm technology developers re-understand and convey the meaning of the algorithm to the users. Meanwhile, the users start from their “prejudice” to engage in confrontation and integration with the meaning conveyed by the service providers or developers, and finally form the users’ inner conviction and reach the consensus of the meaning of all parties.

## The Focus of Legal Construction of Algorithm Interpretation

### The Relation between Algorithm Interpretation and Legal Interpretation

We believe that algorithm interpretation is an effective path for algorithm accountability. But if the task of algorithm interpretation only aims at algorithm accountability in law, can we use the mature technology of legal interpretation to replace the algorithm which is facing many problems and challenges? To answer this question, it is necessary to sort out the relation between algorithm interpretation and legal interpretation. This section will be carried out from the following two aspects.

**Firstly, algorithm interpretation and legal interpretation are different approaches but lead to similar satisfactory results.** Comparing algorithm interpretation with the legal interpretation, it can be found that they have a lot in common. Since the extension of the two is too broad, it is necessary to limit the scope of the two before discussing them. Algorithm interpretation refers only to the legally constructed algorithm interpretation for algorithm accountability. And legal interpretation only refers to the authorized interpretation about the algorithm or the algorithm accountability, not including the theoretical interpretation and other informal interpretation. As mentioned above, the algorithm interpretation is multi-dimensional interpretation, while the legal

interpretation seems “arbitrary”<sup>15</sup> to some extent. Because the legal interpretation is a “power” rather than a “right”, the power of interpretation can only be exercised by the legislator or the judiciary. Yet these differences between algorithm interpretation and legal interpretation do not prevent them from achieving the same effect: both algorithmic interpretation and legal interpretation point to accountability. The purpose of algorithm interpretation is to respond to ethical demands from the perspective of overall social utility. In specific cases, it is to provide remedial measures for users or relatives parties of algorithmic products or services when facing erroneous, harmful and biased algorithmic output. And the other side of the remedy is the responsibility of the product or service providers or algorithm technology developers. Therefore, no matter from the perspective of overall utility or specific case, the ultimate direction of algorithm interpretation is accountability. The purpose of legal interpretation is generally regarded as seeking certainty to ensure the stability and consistency of law application. According to Dworkin, legal interpretation can make the best interpretation of the overall legal practice according to various existing legal materials, from which a consistent or integral principle system can be explained, and then, on this basis, make the best judgment of the practice in law. This best judgment is the “One Right Answer”.<sup>16</sup> The pursuit of “One Right Answer” in legal interpretation is also for the purpose of accountability. Hart believed that there was an “open texture” in the law that needs to be interpreted. For example, “No vehicles in the park” plainly means an automobile is forbidden, but what about bicycles, roller skates, toy automobiles and airplanes?<sup>17</sup> The key point of the interpretation of this specification is the responsibility of the owners or users of the “vehicles”. Therefore, the purpose of both legal interpretation and algorithm interpretation is to solve the problem of accountability.

**Secondly, algorithm interpretation and legal interpretation cannot replace each other.** On the one hand, algorithm interpretation cannot replace legal interpretation. As mentioned above, legal norms have an “open texture”, so that limitations of language (including everyday language and legal language) make it impossible for legal norms to contain all facts. Legal interpretation will always play an important role. It is because in practice “most cases (*Citation note: here should be references to difficult cases*) cannot obtain certainty”,<sup>18</sup> so whether to obtain the “One Right Answer” is still a theoretical

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15 Chen Jinzhao: Rule of Law and Legal Methods, Jinan: Shandong People’s Publishing House, 2003, p. 216.

16 See, Ronald Myles Dworkin: A Matter of Principle, Harvard University Press, 1985, pp. 136-137.

17 See, H. L. A. Hart: The Concept of Law, 2nd ed., Oxford: Clarendon Press, 1994, p. 128.

18 Richard A. Posner: The Problems of Jurisprudence, Chinese Version translated by Su Li, Beijing: China University of Political Science and Law Press, 2001, p. 265.

problem and there is no “correct answer” in itself. This means that even though the algorithm interpretation mechanism will be perfected in law in the future, the legal interpretation will still play a role in the process of law application at that time. On the other hand, legal interpretation cannot replace algorithm interpretation. At present, legal interpretation is playing a role in the legal regulation of algorithm responsibility. For example, the FTC (the Federal Trade Commission) through the case processing of consent orders to form a common law-like “precedent” rule, which reflects the application of common law reasoning techniques. The fundamental difference between common law and statute law is that “one is a conceptual system and the other a textual system... As far as common law is concerned, interpretation is marginal or irrelevant... Interpretation... probably means to function within a tradition... It could mean less”.<sup>19</sup> Therefore, the conceptual system reasoning in common law can be understood as a broad interpretation of law. Another example is the application and interpretation of GDPR in France. French data protection authority (CNIL) ruled on January 22, 2019 that Google provided insufficient information to users, distributed information on multiple pages, and did not obtain valid permission on the issue of personalized advertising. Therefore, Google was fined 50 million euros according to GDPR.<sup>20</sup> A key issue in the case is whether Google’s behavior of obtaining user’s consent to collect data by ticking options in advance meets the requirement of GDPR on consent. CNIL held that Google’s approach was inconsistent with the definitions of “specific”, “unambiguous” and “statement”, “action” and “signify” defined in terms of GDPR.<sup>21</sup> Therefore, the data collection for Google personalized advertising in this case is illegitimate. This is a typical restrictive interpretation of “restrictive legal meaning, limited to the core”,<sup>22</sup> which excludes implied consent from consent. As defined above, the legal interpretation of the above two examples is about the legal interpretation of algorithm responsibility, rather than the algorithm interpretation constructed in law. The objects of legal interpretation are normative texts, legal facts and value factors of conceptual system (the former two correspond to the textual system of enactment law, the latter to the conceptual system of common law), and the objects of algorithm interpretation are the process or output results of algorithm decision-making. Algorithm interpretation, said by its opponents, is something that involves the “black box” or at least the external data of the “black box”. In addition, if the facts, acts, conditions and

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19 Richard A. Posner: *The Problems of Jurisprudence*, Chinese Version translated by Su Li, Beijing: China University of Political Science and Law Press, 2001, pp. 311-312.

20 See SINA News, website: <http://news.sina.com.cn/sf/2019-01-22/doc-ihrfqziz9975281.shtml>, visited on 21 February, 2019.

21 See point (11) of Article 4 of GDPR.

22 Yang Renshou: *Methodology of Law*, Beijing: China University of Political Science and Law Press, 1999, p. 148.

standards have been understood outside the legal system before they are interpreted, and a consensus of meaning has been formed, then the non-legal factors have been clarified and the starting point of legal interpretation will be improved, which will help to improve the accuracy of legal interpretation. For this reason, we can say that algorithm interpretation promotes legal interpretation to be closer to the “One Right Answer” in algorithm accountability.

### Substantive Composition of Algorithm Interpretation

As discussed above, the legal construction of algorithm interpretation is mainly completed by adding the obligation of algorithm interpretation to algorithm controllers. The obligation of algorithm interpretation in this paper should include at least two aspects:

**The first is the obligation of general interpretation.** It mainly refers to the pre-regulation of algorithm product/service providers or algorithm technology developers before the algorithm decision is made. Specifically speaking, it is required to respond to the possible ethical appeals of the algorithm one by one in the research and development of algorithm products, namely the so-called Safety by Design, Fairness by Design, Privacy by Design, and others. For example, in the application scenario of autopilot cars, should autonomous driving algorithm distinguish products of different styles, such as positive and decisive type or prudent and steady type, according to people’s driving habits? Common sense is that prudent and steady type is safer. But on the road with dense traffic, will the conservative style of autopilot affect the overall efficiency of the road? In addition, as for the ethical appeal of safety, autopilot algorithm also has to “face the great value question of ‘whose safety’. If collision cannot be avoided, should this ‘safety’ be the car’s first or related to the possible collision party? Is the relevant algorithm centered on the ‘self’ of the car, or on the other side, to protect others?”<sup>23</sup> Such ethical conflicts as “Trolley Problem” may be debated endlessly in academic circles, but it will not affect the development and commercial deployment of AI products relying on algorithmic decision-making such as autopilot. Instead, discussions of ethical and value issues prompt AI products developers to think more about these issues during the products blueprint design phase. More importantly, the ethics and value embedding of each product need to be clearly defined in the legislation that it must be disclosed in the product specification, so that consumers, users and the

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23 See Gao Zhaoming, Gao Hao: Information Security Risk Prevention and the Value Principle of Algorithm Law - Two Practical Philosophical Problems of R&D of Autopilot vehicle, *Philosophical Dynamics* 9, 2017, p. 81.

relative parties can know the different “personalities” and value orientations contained in the products of different manufacturers.

**Secondly, the obligation of algorithm interpretation includes the obligation of concrete interpretation.** It mainly refers to the obligation of the product/service providers or the algorithm technology developers to disclose the factors related to the algorithm or the output result of the algorithm at the request of the specific user or the other party after the algorithm decision is made. In addition to the main obligation to disclose the factors related to the algorithm, the concrete interpretation obligation should also include the collateral obligation to perform in order to remedy the damage suffered by the users or the relative party of the algorithm due to the “improper” decision-making of the algorithm, otherwise the simple disclosure algorithm will lose its significance. The collateral obligations of specific interpretation should include: (a) The obligation to correct, that is, the relevant factors in the algorithm should be corrected and adjusted by the algorithm application service provider or the algorithm technology developer after the damage made by algorithm decision-making has been identified by the relevant authority; (b) Re-decision obligation, that is, the algorithm application service provider or algorithm technology developer shall re-make decisions according to the adjusted and corrected algorithm for the relative party affected by the “wrong” and “improper” algorithm decisions; (c) Stop infringement and compensation obligation, that is, if it is unnecessary or impossible to correct the algorithm or make a new decision, the algorithm application service provider or algorithm technology developer shall assume the obligation to stop infringement and compensate for the loss of the affected relative party of algorithm decision. The above-mentioned collateral obligations are applicable to different situations, and legislation should be adopted to define the joint responsibility, separate responsibility, or supplementary responsibility of the algorithm product/service provider and the algorithm technology developer according to the scenario of exercising specific rights and the principles conducive to remedy.

### Procedural Composition of Algorithm Interpretation

We consider that there are at least three main points to consider in the procedural composition of algorithm interpretation.

**First, the enforceability or justiciability of algorithm interpretation.** The algorithm interpretation is implemented by adding the interpretation obligation, which requires the intervention of public power as a guarantee of coercive force. There are two forms of public power intervention: One is the mode of administrative power. The unified administrative law enforcement department is responsible for filing and investigating

AI algorithm problems, and through similar process of hearings, it is expounded and debated by the algorithm product/service provider, the algorithm technology developer and the algorithm application user or the relative party, on the basis of which, the administrative law enforcement department determines the algorithm responsibility and supervise the implementation of the algorithm interpretation obligation. Another is the judicial mode, that is, the users or the relative party of the algorithm apply to initiate litigation or arbitration on the basis of the specific right of claim, and the disputes of algorithm interpretation are settled by the judicial organ, and the oblige applies for compulsory enforcement, requiring the specific body responsible to fulfil the obligation of protecting the relative party.

**Second, the trigger condition of algorithm interpretation.** The previous analysis shows that algorithm interpretation is necessary and feasible. However, it cannot be ignored that algorithm interpretation is costly and expensive. It not only consumes technical resources, but also occupies administrative and judicial resources. Therefore, in order to avoid the abuse of algorithm interpretation mechanism by obligee, legislation should set the trigger condition of algorithm interpretation, so as to ensure the efficiency of algorithm interpretation. On the one hand, since the purpose of algorithm interpretation is to assign responsibility and remedy the party who suffers from the loss of right, the obligee who makes the request for algorithm interpretation should be the party who suffers from the adverse impact of algorithm decision. Taking the automated decision-making of loan approval algorithm as an example again, if the applicant's loan has been approved, and the law should not support his request, which is merely to satisfy his curiosity, for algorithm interpretation. On the other hand, it is suggested to introduce GDPR regulations on automated decision-making.<sup>24</sup> In this paper, the authors think that the requester of algorithm interpretation should suffer direct and legal effects due to the algorithm decision. Specifically, it is necessary to eliminate the uncontrollable indirect losses. If the loan apply based on automated decision is rejected and the house purchase is affected, the loss of deposit, penalty and commission fee caused by the failure to continue the house purchase transaction can be counted as the loss directly affected, and the increase of house re-purchase cost caused by house price rise is not directly affected. The principle of "legal effects" specifically refers to the influence of "improper" automatic decisions is based on the violation of specific rights. If the objects of damage are not specific rights but non-statutory interests, the request for algorithm interpretation should not be supported. For example, in the blind

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24 According to Article 22 of GDPR, "data subjects have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her".

date matching based on automatic decision screening, in the case the relative party is not satisfied with the object of machine matching or fails in the blind date caused by the wrong matching of the machine, the relative party suffers no specific right of legal protection, and the relative party shall not get legal support when he asks for algorithm explanation.

**Third, the proof standard of algorithm interpretation.** Coercive force is the guarantee to enforceability or justiciability of the algorithm interpretation, and the prerequisite for coercive force is the legitimacy and rationality of the implementation of the algorithm accountability, which is based on “due process”.<sup>25</sup> It means that the user or the relative party of the algorithm application can resist the validity of the algorithm decision-making by inquiring and questioning the relevant factors of the algorithm decision-making within the framework of due process, while the provider of the algorithm product/service or the developer of the algorithm technology can respond to the heckling by interpreting the relevant factors to prove the validity of the algorithm decision-making. In due process, algorithm product/service providers or algorithm technology developers bear more burden of proof. They need to prove that algorithm decision-making conforms to the interpretation standards recognized by law, otherwise they should provide remedy measures to algorithm users or the relative parties. Since algorithm interpretation is not equal to algorithm transparency or open algorithm “black box”, it is unnecessary to require algorithm product/service provider or algorithm technology developer to interpret all input data, interpret the whole algorithm logic, open source code, etc. With regard to the interpretation criteria that should be stipulated in legislation, this paper basically agrees with the following views: “For the purpose of remedy, the content of the interpretation should meet two criteria: first, the relevance, that is, it must be related to the specific automated decision-making of the relative person; second, the relative person can understand. The ultimate goal is to prove that automated decision-making can be trusted. In addition to comprehensibility and relevance, different interpretation criteria should be formulated for different automated decision-making contents...”<sup>26</sup> Relevance criterion embodies the principle of local interpretation and ensures the feasibility of algorithm interpretation; and comprehensibility criterion embodies the non-arbitrary pluralism advocated by philosophical hermeneutics, that is, algorithm product/service providers, algorithmic

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25 See, Danielle Keats Citron: Technological Due Process, *Washington University Law Review* 85(6), 2008, p. 1249; Danielle Keats Citron, Frank Pasquale: The Scored Society: Due Process for Automated Predictions, *Washington Law Review* 89(1), 2014.

26 Zhang Linghan: Research on Right to Explanation of Auto Decision-Making, *Law Science (Journal of Northwest University of Political Science and Law)* 3, 2018, p. 72.

technology developers, algorithm application users and the relative parties are all interpreters and have the right to understand a specific algorithm decision-making. The ideal scenario of algorithm interpretation should be through dialogue, so that all parties of interpretation can blend horizons and reach a consensus of meaning: algorithm interpretation can be understood and accepted by all parties, and man-machine trust can be established.

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# Unfair Competition Issues of Big Data in China

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**Abstract:** The sound development of the market in the data-driven economy depends on the free and fair competition of big data in the industries. Since 2015, more and more unfair competition cases concerning big data have occurred in China, such as masking advertisement, click fraud, malicious incompatibility, and gathering user's personal data from competitors by unfair means, which can be categorized to unfair competition about illegal collection/use of competitors' big data and about network traffic. Whether China's current legal system of anti-unfair competition can resolve the above-mentioned disputes is concerned in this article. As the Paris Convention only regulates the basic principles of "fairness" and "honest practice" for anti-unfair competition, member states have room to develop their own legal systems according to their special economic, social and cultural conditions. In order to usher in the era of digital economy and big data and to regulate more and more unfair competition events, China amended the Anti-Unfair Competitive Law in 2017 in which a new provision for regulating the operation of e-commerce was added. This article finds that the 2017 Amendment, which is far more specific and clearer than the Paris Convention, has significantly improved China's ability to deal with unfair competition behaviors regarding big data. However, since the patterns of unfair competition in big data are changing and "innovating" quickly and constantly, law amendments will hardly or even never catch up with the changes, so judgement of unfair competition is inherently difficult. The court cannot determine that a company constitutes unfair competition simply because its business operations have substantially reduced the performance or operating effectiveness of its competitors. When judging whether an enterprise's competitive behavior constitutes unfair competition, no matter the court is applying one of the specific provisions or the general provision, it is essential to consider whether the enterprise has malicious and dishonest practices.

Keywords: big data, data-driven economy, unfair competition, network traffic hijacking

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## Introduction

Big data, thought as “new oil”,<sup>2</sup> is the most important driver in the data-driven economy.<sup>3</sup> As the data-driven economy is rapidly booming, the acquisition and use of big data has become the most critical factor in corporate competition. The sound development of the market in the data-driven economy depends on the free and fair competition of big data in the industries. Accordingly, the maintenance of free and fair competition order in the big data-related market has become the most essential topic for the healthy development of the digital economy. Since the issues of restrictive competition and unfair competition derived from big data increase significantly, academic studies on the subject of competition law in the data-driven market becomes an urgent task.

The competition authorities in the globe paid attention earlier to the topics whether the collection and use of big data would raise restrictive competition or unfair competition issues. The European Data Protection Supervisor published a white paper on privacy and competitiveness in the age of big data in 2014, exploring the interaction between data protection, competition law, and consumer protection in the digital economy.<sup>4</sup> In a white paper published in 2015 that explored big data growth and data-driven market innovation, the OECD pointed out that the data-driven market is much more concentrated than other markets, so the winners often take it all and obtain the dominant position of big data.<sup>5</sup> The French Autorité de la concurrence and the German Bundeskartellamt jointly issued a report called “Competition Law and Data” in 2016, stating its position regarding the competition law issues of big data.<sup>6</sup> Margrethe Vestager, the Executive Committee chairman of European Commission, also issued a statement in 2016, stating that the European Commission will carefully consider the

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2 Perry Rotella, *Is Data the New Oil?* Forbes (Apr. 2, 2012), <https://www.forbes.com/sites/perry-rotella/2012/04/02/is-data-the-new-oil/#2bd9dcd97db3> (last visited Dec. 13, 2019).

3 Nathan Newman, *Search, Antitrust and the Economics of the Control of User Data*, 31 Yale J. on Regulation 401, 403 (2014).

4 European Data Protection Supervisor, *Privacy and Competitiveness in the Age of Bit Data: the Interplay between Data Protection, Competition Law and Consumer Protection in the Digital Economy* (2014). Available at: [https://edps.europa.eu/sites/edp/files/publication/14-03-26\\_competition\\_law\\_big\\_data\\_ex\\_sum\\_en\\_0.pdf](https://edps.europa.eu/sites/edp/files/publication/14-03-26_competition_law_big_data_ex_sum_en_0.pdf) (last visited Dec. 15, 2018).

5 OECD, *White Paper, Data-Driven Innovation: Big Data for Growth and Well-Being* 7 (2014). Available at: <https://www.oecd.org/sti/inno/data-driven-innovation-interim-synthesis.pdf> (last visited Dec. 13, 2019).

6 Autorité de la concurrence & Bundeskartellamt, *Competition Law and Big Data* (2016). Available at: <http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf> (last visited Dec. 13, 2019).

issue of competition law for big data.<sup>7</sup> Since 2017, legal academic papers have also begun to discuss competition issues on big data, including the competition policy in the data-driven economy,<sup>8</sup> the entry barriers to big data,<sup>9</sup> the antitrust problems and regulation of big data,<sup>10</sup> and the interaction between IP Laws and data protection.<sup>11</sup>

Since 2015, more and more unfair competition cases concerning big data have occurred in China, such as masking advertisement, click fraud, malicious incompatibility, and gathering user's personal data from competitors by unfair means. Because the types of cases and the legal system regarding anti-unfair competition in China are different from those in Western countries, none of the above issues was discussed in previous literature. This article is aiming at filling this research gap. Whether China's current legal system of anti-unfair competition can resolve the above-mentioned disputes is concerned in this article. I study the cases of unfair competition in China and explore their significances under the "Anti-Unfair Competition Law", which was amended in 2017 to cope with the unfair competition issues in the digital economy era. This article develops the theory of unfair competition issues in big data and hopes to contribute to both academic development and practical operations.

Chapter 2 of this article introduces the development history of anti-unfair competition law. From 1883 to 1958, the norms for regulating unfair competition have gradually evolved with the development of the Paris Convention, from merely declaring the general principles to slightly more specific norms. As the Paris Convention only regulates the basic principles of "fairness" and "honest practice" for anti-unfair competition, member states have room to develop their own legal systems according to their special economic, social and cultural conditions. China's Anti-Unfair Competition

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- 7 Margrethe Vestager, Prepared Remarks, *Making Data Work for Us - Data Ethics Event on Data as Power* (Sept. 9, 2016).
- 8 Justus Haucap, *Competition and Competition Policy in a Data-Driven Economy*, 54 *Intereconomics* 201 (2019); Mira Burri, *Understanding the Implications of Big Data and Big Data Analytics for Competition Law—An Attempt for a Primer*, in Klaus Mithis & Avishalom Tor (eds), *New Developments in Competition Behavioral Law and Economics* (2018); Roberto Augusto Castellanos Pfeiffer, *Digital Economy, Big Data and Competition Law*, 3 *Market and Competition Law Review* 53, 73 (2019).
- 9 Daniel L. Rubinfeld & Michal S. Gal, *Access Barriers to Big Data*, 59 *Ariz. L. Rev.* 339 (2017).
- 10 John M. Yun, *Antitrust After Big Data*, *Baltic Yearbook of International Law* 19-24 (2019); D. Daniel Sokol & Roisin Comerford, *Antitrust and Regulating Big Data*, 23 *Geo. Mason L. Rev.* 1139 (2016); Joshua D. Wright & Elyse Dorsey, *Antitrust Analysis of Big Data*, *CLPD* 2, 35, 36 (2016).
- 11 Francesco Banterle, *The Interface Between Data Protection and IP Law: The Case of Trade Secrets and the Database sui generis Right in Marketing Operations, and the Ownership of Raw Data in Big Data Analysis*, in *Personal Data in Competition, Consumer Protection and Intellectual Property Law: Towards a Holistic Approach?* 411, 422 (2018).

Law enacted in 1993 is then introduced and analyzed. In 1996, the international bureau of World Intellectual Property Organization (WIPO) released the “Model Provisions on Protection Against Unfair Competition” to further implement the obligation for member states of Paris Convention Union to provide protection against unfair competition. However, the aforementioned regulations were all formulated before the development of the digital economy. In order to usher in the era of digital economy and big data and to regulate more and more unfair competition events, China amended the Anti-Unfair Competitive Law in 2017 in which a new provision for regulating the operation of e-commerce was added. Whether they can be used to regulate the fair competition of big data is an essential legal issue that must be faced.

The unfair competition behaviors regarding big data in China can be divided into two categories: unfair competition about illegal collection and use of competitors’ big data and about network traffic. Unfair competition about illegal collection and use of competitors’ big data are explained and analyzed in Chapter 3, and Unfair competition about network traffic is explained and analyzed in Chapter 4.

## Development History of Anti-Unfair Competition Law

The regulation of unfair competition began in the Paris Convention in 1883. Unlike the regulations of restrictive competition that are relatively clear and focus on abuse of monopolistic position and merger applications, the concept and norms of unfair competition have always been unclear and ambiguous. As a result, it is difficult for the courts to make decisions because they lack a clear legal ground for the anti-unfair competition cases. Moreover, operators have no clear norm of conduct, such that the uncertainty and risks of business operations significantly increase. With the emergence of a variety of unfair competition practices in the era of big data, the incompleteness of the legal system of anti-unfair competition has become more apparent. To interpret the incompleteness of the legal system of anti-unfair competition, it is necessary to start with the Paris Convention.

### Paris Convention: Origin of the Anti-Unfair Competition Norms

The Paris Convention, established in 1883 and amended seven times, is the first and most important international convention for the protection of industrial property rights.<sup>12</sup> From not only the perspectives of establishment time but also the number of member states, the Paris Convention that established many essential principles of

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12 Gustavo Bravo, *From Paris Convention to TRIPs: A Brief History*, 12 *J. of Contemporary Legal Issues*, 445, 445-446 (2001).

intellectual property rights is the most representative conventions governed by the World Intellectual Property Organization (WIPO).<sup>13</sup> However, the original version of the Paris Convention in 1883 did not contain any provision regarding the prohibition of unfair competition.

Until 1900, the Revision Conference of Brussels inserted Article 10*bis* to introduce the national treatment principle with respect to unfair competition.<sup>14</sup> The current Sentence (1) of Article 10*bis*<sup>15</sup> was introduced in the Revision Conference of Washington in 1911 by obligating all member states to assure effective protections to nationals of the countries of the Union against unfair competition.<sup>16, 17</sup> However, there was no clear definition of unfair competition at that time. The concept of “unfairness” reflects the values of a particular society at a particular point in time and thus varies from country to country.<sup>18</sup> Therefore, the definition of “unfairness” must be further clarified, otherwise the internationalized understanding and implementation of this clause cannot be reached.

The first definition of unfair competition was introduced in the Revision Conference of The Hague in 1925,<sup>19</sup> which stipulated that any competition act contrary to honest practices in industry or commerce constitutes unfair competition.<sup>20</sup> The Revision Conference of The Hague also provided an example of unfair competition, regulating that the member states shall prohibit any activity to create confusion by any means in

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13 Hans Peter Kunz-Hallstein, *The United States Proposal for a GATT Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property*, 22 *Vanderbilt J. of Transnational L.* 265, 265-266 (1989).

14 *Actes de Bruxelles*, pp. 164 (proposal of France), 187/8, 310; 382/3 (discussions and adoption).

15 Article 10*bis* (1) of Paris Convention: “The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition”.

16 *Actes de Washington*, pp. 53 (proposal), 105, 224 (observations), 305 (report of Committee), 310 (report to Plenary Committee), 255 (discussion and adoption in Third Plenary Session).

17 Patricia V. Norton, *Effect of Article 10bis of the Paris Convention on American Unfair Competition Law*, 68 *Fordham L. Rev.* 225, 225 (1999).

18 Carlos María Correa, *Unfair Competition Under the TRIPS Agreement: Protection of Data Submitted for the Registration of Pharmaceuticals*, 3 *Chicago Journal of International Law* 69, 77 (2002).

19 *Actes de la Haye*, pp. 252/5 (proposal), 348/51 (observations), 472/8 (report of Fourth Sub-Committee), 525 (report of General Committee), 546/7 (report of Drafting Committee), 578/81 (discussion and adoption in Second Plenary Session). 1 *Actes de Londres*, pp. 197/8 (proposal), 287/90 (observations), 411/22 (report of Fourth Sub-Committee), 469/70 (report of Drafting Committee), 519 (adoption in Second Plenary Session).

20 Article 10*bis* (2) of Paris Convention: “Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition”.

respect to the establishment, the goods, or the commercial activities of a competitor.<sup>21</sup> Later, the Revision Conference of Lisbon in 1958 added two further examples of unfair competition,<sup>22</sup> namely the acts of false allegation and misleading the public about the products or services of competitors.<sup>23</sup>

In sum, under the Paris Convention, all member states have the obligation of assuring effective protection against unfair competition, which is defined as a competition act contrary to honest practices in industry or commerce. However, the meaning of “honest practices” is still an abstract and vague concept, and varies from country to country.<sup>24</sup> Therefore, the legal system of unfair competition is destined to be difficult to achieve international harmonization, and each country may choose its own way. Fortunately, there have been already three specific examples of unfair competition acts for countries to use for making legislation to reflect their own moral, sociological and economical principles, including creating confusion, false allegation and misleading the public about the products or services of competitors.

### China’s Anti-Unfair Competition Law in 1993

Based on the Paris Convention, China enacted Anti-unfair Competition Law in 1993 (the “1993 Anti-Unfair Competition Law”). The purpose of this law was to encourage and protect fair competition, prevent acts of unfair competition, and protect the legitimate rights and interests of business operators and consumers.<sup>25</sup> The term “operators” means individuals, legal persons, and other economic organizations that are engaged in the operation of goods or for-profit services.<sup>26</sup> The term “unfair competition” refers to acts in which a business operator violates the provisions of this law, damages

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21 Article 10*bis* (3.1) of Paris Convention: “The following in particular shall be prohibited: 1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor”.

22 *Actes de Lisbonne*, pp.725, 784 (proposal of Austria), 725/6 (discussion in Third Committee), 789/90 (discussion in Fourth Committee), 852 (report of Fourth Committee), 726/7, 790 (discussion in General Committee), 106 (adoption in Second Plenary Session), 118 (General Report).

23 Article 10*bis* (3.2) of Paris Convention: “2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor”; Article 10*bis* (3.3) of Paris Convention: “3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods”.

24 Correa, *supra* note 17, at 81.

25 Article 1 of the 1993 Anti-unfair Competition Law.

26 Article 2(3) of the 1993 Anti-unfair Competition Law.

the legitimate rights and interests of other operators, and disrupts the social and economic order.<sup>27</sup>

The 1993 Anti-Unfair Competition Law stipulated some regulations regarding trademark and authentication mark infringements,<sup>28</sup> trade secret infringements,<sup>29</sup> bribery and off-the-book rebate,<sup>30</sup> misleading or false advertising,<sup>31</sup> and lottery-attached sale activities.<sup>32</sup> Nevertheless, since it was developed much earlier than the development of the digital economy, the 1993 Anti-Unfair Competition Law did not specifically regulate any acts of unfair competition related to big data. For the unfair competition issues regarding big data, this law only provided the basic principles of anti-unfair competition on the ground of the Paris Convention, stipulating that operators in market transactions should follow the principles of voluntariness, equality, fairness, and honesty, and observe the generally accepted business ethics.<sup>33</sup> As a result, while adjudicating the cases concerning unfair competition, China's courts could only expansionary interpret such general principles as the legal basis for their judgments.<sup>34</sup> On the one hand, it was difficult for the courts to make decisions because they lacked a clear legal ground for the anti-unfair competition cases. On the other hand, operators did not have a clear norm of conduct, such that the uncertainty and risks of business operations significantly increased. In the era of the digital-driven economy, this law was more inadequate to regulate the unfair competition acts related to big data collections and uses.

### The WIPO Model Provisions in 1996

In order to provide a standard for member states to implement protection against unfair competition on the ground of Article 10*bis* of the Paris Convention,<sup>35</sup> the international bureau of WIPO released "Model Provisions on Protection Against Unfair

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27 Article 2(2) of the 1993 Anti-unfair Competition Law.

28 Article 5 of the 1993 Anti-unfair Competition Law.

29 Article 10 of the 1993 Anti-unfair Competition Law.

30 Article 8 of the 1993 Anti-unfair Competition Law.

31 Article 9 of the 1993 Anti-unfair Competition Law.

32 Article 13 of the 1993 Anti-unfair Competition Law.

33 Article 2(1) of the 1993 Anti-unfair Competition Law.

34 See Lanfang Fei & Peng Zhou, *Technological Interference, Public Interest and Unfair Competition – A Critical Review of China's Practice*, 48 IIC-International Review of Intellectual Property and Competition Law 436, 439 (2017).

35 Marcus Höpferger & Martin Sentleben, *Protection Against Unfair Competition at the International Level – The Paris Convention, the 1996 Model Provisions and the Current Work of the World Intellectual Property Organisation*, in Reto M. Hilty & Frauke Henning-Bodewig (eds.), *Law Against Unfair Competition-Towards a New Paradigm in Europe?* 61, 72 (2019).

Competition” (hereinafter the “WIPO Model Provisions”) in 1996, which further implemented the obligation for member states of Paris Convention Union to provide for protection against unfair competition.<sup>36</sup> WIPO specifically regulates five acts of unfair competition, namely: (1) causing confusion with respect to another’s enterprise or its activities; (2) damaging another’s goodwill or reputation; (3) misleading the public; (4) discrediting another’s enterprise or its activities; (5) unfair competition in respect of secret information. The first two are related to the protection of trademark or goodwill, and the last one is regarding the protection of trade secret, all of which are not relevant to big data and thus beyond the scope of this article.

Under Article 4 of the WIPO Model Provisions, any act during commercial activities that misleads the public in respect of the products or services offered by another’s enterprise constitutes unfair competition.<sup>37</sup> It also lists some types of misleading activities that may arise out of promotion or advertising, such as misleading the quality, quantity, or conditions of the products or services provided by the competitors.<sup>38</sup> Article 5 of the WIPO Model Provisions stipulates that any unjustifiable or false allegation during commercial activities that discredits the products or services offered by another’s enterprise constitutes unfair competition.<sup>39</sup> Some types of discrediting activities are also listed that may arise out of promotion or advertising, such as misleading the quality, quantity, or conditions of the products or services provided by the competitors.<sup>40</sup> Both provisions may apply to unfair competition issues regarding big data, especially advertising-related behaviors.

The greatest contribution of the WIPO Model Provisions is to list five behaviors that may constitute unfair competition together with examples. However, the WIPO Model Provisions are neither an international treaty nor a soft law, so they have no legal binding on governments in the world.<sup>41</sup> Instead, they are only a reference for court decisions and a model for legislative activities.<sup>42</sup> Furthermore, these regulations are still not specific enough, and need to be interpreted and supplemented by competition authorities and courts of various countries. Especially, all of the aforementioned regulations were enacted before the development of data-driven economy. Whether they

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36 Notes on Article 1 of the WIPO Model Provisions.

37 Article 4(1) of the WIPO Model Provisions.

38 Article 4(2) of the WIPO Model Provisions.

39 Article 5(1) of the WIPO Model Provisions.

40 Article 5(2) of the WIPO Model Provisions.

41 Höpperger & Senftleben, *supra* note 34, at 83.

42 *Id.*

can be suitably applied to regulate the fair competition order of big data is an essential legal issue to be studied.

### 2017 Amendment of Anti-Unfair Competitive Law

As mentioned, the Paris Convention only regulates the basic principles of “fairness” and “honest practice” for anti-unfair competition, leaving countries with room to develop their own legal systems according to their special economic, social and cultural conditions. In order to usher in the era of digital economy and big data and to regulate more and more unfair competition events, China amended the Anti-Unfair Competitive Law in 2017 (“2017 Amendment”), in which a new provision for regulating the operation of e-commerce was added. Article 12 of the 2017 Amendment stipulates that any business operator who conducts business activities on the Internet shall follow the Anti-Unfair Competitive Law. They shall not use any technical measures to influence Internet users’ choices to perform the following acts that could hinder or disrupt the normal operation of online products or services provided by other operators: (1) without the consent of other e-business operators, inserting links and forcibly performing target jumps in the network products or services they legally provide; (2) deceiving, misleading, or forcing users to modify, shut down, or uninstall online products or services legally provided by other e-business operators; (3) malicious implementation of incompatible online products or services legally provided by other e-business operators; (4) other acts that obstruct or disrupt the normal operation of online products or services provided by other e-business operators.

This new law amendment specifically lists four types of unfair competition acts that often occur in China in the era of e-commerce. This article will discuss whether these new regulations will help solve China’s problems of unfair competition in big data.

## Illegal Collection and Use of Competitors’ Big Data

### Unfair Competition Caused by Illegally Collecting Competitors’ Big Data

A company may constitute unfair competition if it uses unfair and illegal technical means to crawl data on the websites of competitors without their consents and then uses it for its own goods or services for competition or business transactions in an apparently unfair manner. *Weimeng v. Taoyou*<sup>43</sup> is the first case in China that a company was held in violation of the Anti-Unfair Competition Law by illegally grabbing competitor’s big data.

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43 Weimeng v. Taoyou, 2016 Judgement No. 588 of Beijing 73 Min Zhong (2016).

Sina Weibo, operated by Beijing Weimeng Chuangke Network Technology Co., Ltd. (hereinafter “Weimeng”), is a large microblogging website in China. Weimeng filed a lawsuit against the defendant companies (Beijing Taoyou Tianxia Technology Development Co., Ltd. and Beijing Taoyou Tianxia Technology Co., Ltd.; collectively “Taoyou”) in Beijing Haidian District Court in 2016, claiming that the social media MeiMei operated by the defendants Taoyou constituted unfair competition by using illegal means to capture the user profiles of its members.<sup>44</sup> After adjudication, the court held that the defendants had violated the Anti-Unfair Competition Law so they should stop conducting unfair competition behavior and compensate the plaintiff for damages.<sup>45</sup> The defendants appealed to the Beijing Intellectual Property Court. The Beijing Intellectual Property Court found that Taoyou had captured the user profiles of non-MeiMei’s Weibo members without the approval of Weimeng.<sup>46</sup> The Beijing Intellectual Property Court thus dismissed the appeal in December 2016, holding that the defendants did not only constitute unfair competition but also violate the principle of good faith and the business ethics of e-commerce.<sup>47</sup>

In details, Weimeng operates Sina Weibo, which is both a social media network platform and an open platform for providing interfaces to third-party applications. MeiMei, the software provided by the defendants, is a mobile social application software. Since Taoyou signed a cooperation agreement with Weimeng in the beginning stage, the users could register MeiMei by using their Sina Weibo’s accounts and mobile phone numbers. When a user was registering a MeiMei account, he also needed to upload the contact list in his mobile phone. Due to Sina Weibo’s poor management of the Open Application Programming Interface (Open API), Taoyou could capture the personal data of its members without the authorization of Sina Weibo, including name, occupation, and education level. Since the defendants had owned the contact lists in MeiMei user’s mobile phones, they could discover non-MeiMei’s Weibo members by finding the mobile phone numbers in the contact list of MeiMei’s users and then identify the non-MeiMei’s Weibo members by indexing the mobile phone numbers to Weibo’s database. Taoyou then captured the personal data of the non-MeiMei’s Weibo members without the approvals of the members and Sina Weibo.<sup>48</sup> The court thus noted that Taoyou’s behaviors endangered the information security of the Sina Weibo platform

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44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

and harmed the legitimate competitive interests of Weimeng Company.<sup>49</sup> Therefore, the Beijing Intellectual Property Court concluded that Taoyou's illegal scrawling of Sina Weibo's data had constituted unfair competition and must compensate Weimeng for its economic loss.<sup>50</sup>

### Unfair Competition Caused by Illegally Using Competitors' Big Data

After the cooperation between Weimeng and Taoyou had been terminated, Taoyou did not delete the avatar, name, occupation, education, and personal tags of Sina Weibo's users obtained from Weimeng in time but continued to use them. The Beijing Intellectual Property Court in the *Weimeng v. Taoyou* case also held that Taoyou's illegal use of Sina Weibo's data not only endangered the cyber security of Sina Weibo's users on the platform, but also damaged the legitimate competition interests of Weimeng.<sup>51</sup> Therefore, the Beijing Intellectual Property Court concluded that Taoyou's illegal use of Sina Weibo's data had also constituted unfair competition and must compensate Weimeng for its economic loss.<sup>52</sup>

### Analysis

Without the consent of data owners, the behavior of hacking into other's websites or databases to illegally crawl and use data is becoming more frequent. Illegal crawling and use of other's data may not only endanger the personal data privacy of the data subjects, but also damage the legitimate competition interests of the owner of the websites or databases. Such conducts are indeed "unfair" and "dishonest practice" under the Paris Convention. Since big data usually cannot be protected by the traditional intellectual property rights, Anti-Unfair Competition Law may become the last mechanism for data owners to protect their interests and claim damages. However, these two behaviors do not suffice the four types of unfair competition acts regulated by China's 2017 Amendment of Anti-Unfair Competitive Law. Therefore, the court can only apply the general provisions of Article 2 as the basis for judgment.

In addition to civil liability, the defendants in the aforementioned case may also commit a crime of trespassing to computer information systems under Article 285 of the Chinese Criminal Law, in which the behavior of hacking into others' computer systems to obtain data stored, processed or transmitted in the computer systems could be punished by imprisonment for up to three years. In the European Union and America,

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49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

such conducts are also punishable by criminal law. For example, Directive 2013/40/EU on attacks against information systems establishes regulations concerning the definition of sanctions and criminal offences in the field of attacks against information system.<sup>53</sup> Intentionally illegal access to other's information system without permission is punishable as a criminal offence under Directive 2013/40/EU.<sup>54</sup> Moreover, Computer Fraud and Abuse Act of the United States (18 U.S.C. § 1030), an amendment to previous Computer Fraud Law, was enacted in 1986 to establish rules to punish frauds and related activities in connection with computers.<sup>55</sup> Under the Computer Fraud and Abuse Act, whoever with knowingly accessed other's computer without or exceeding authorization is punishable as a criminal offence.<sup>56</sup> However, the constitution of a criminal offense is premised on the "knowingly and with intent" of the defendant. It is generally not easy for the prosecutor to prove that. Therefore, the use of anti-unfair competition law to resolve such disputes from civil liability still has its significance and value.

## Unfair Competition about Network Traffic

The unfair competition behaviors regarding network traffic can be divided into two categories: unfair competition caused by click fraud and by network traffic hijacking.

### Unfair Competition Caused by Click Fraud

In the data-driven market, pay-per-click is the mostly used mode for advertisement release on the web. Accordingly, web traffic<sup>57</sup> and online advertising clicks<sup>58</sup> are important indicators of webpage management. For the operators of webpages such as blogs and live videos, the greater the number of clicks, the more attractive it is for the advertisers to release advertisements and the greater the incomes they receive.

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53 Article 1 of the Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (hereinafter "Directive 2013/40/EU").

54 Article 3 of the Directive 2013/40/EU.

55 18 U.S.C. § 1030. Fraud and related activity in connection with computers.

56 Article 1 of 18 U.S.C. § 1030.

57 Radovan MadleĚáka, Lucia MadleĚáková, Libor Madleňák & Daniel Salava, *Analysis of website traffic dependence on use of selected internet marketing tools*, 23 *Procedia economics and finance* 123, 124 (2015).

58 Yu (Jeffrey) Hu, Jiwoong Shin & Zhulei Tang, *Incentive Problems in Performance-Based Online Advertising Pricing: Cost per Click vs. Cost per Action*, 62 *Management Science* 2022, 2022 (2016).

The platform operators run the data-driven market based on data such as the network IP address of the Internet readers, the number of webpage's clicks, and the time of reader's stay. On the one hand, they recommend the best websites and web contents to the network readers, and on the other hand, they provide the click number of each website to the advertisers as an important basis to release advertisements and calculate the advertising fee. Therefore, the real and correct click number of each website is essential for both platform operators and advertisers.

Because the number of clicks are almost equivalent to revenue, some businesses use unfair means to help webpage operators or content providers fraudulently click the webpages, including the creation of many fake accounts and constant change of the network IP addresses. Click fraud is an active deception for both advertisers and platform operators. It may not only damage the rights of advertisers, but also affect the competition order of the digital-driven market so as to constitute unfair competition.

Beijing iQiYi Technology (hereinafter "iQiYi") is the largest video service provider in China. iQiYi found in 2017 that the number of clicks on several videos had increased abnormally. After tracing the source of the abnormal visits, iQiYi found that the defendants were engaged in the click-farming services for their clients. iQiYi filed a lawsuit against the defendant company and its representatives in Shanghai Xuhui Court in early 2018, claiming that the defendants constituted unfair competition by maliciously increasing the number of clicks on certain websites to obtain illegitimate interests from iQiYi's website.<sup>59</sup>

In details, the plaintiff iQiYi's website provides lots of licensed videos and channels. By paying a fee monthly or annually, its members can watch all of the videos on iQiYi's website. For each video, on the one hand, iQiYi pays licensing fee to the copyright owner based on the number of times the video is watched. On the other hand, advertisers pay iQiYi for advertising also based on the number of times the video is watched.<sup>60</sup> Therefore, correctly calculating the number of times that each movie is viewed is the most fundamental and important task in the business of iQiYi. In addition to helping video providers and advertisers decide the cooperation modes with iQiYi, these traffic data also enable iQiYi accurately evaluate the popularity of each video and analyze the watching hobbies and time period of members from different regions, so as to make business decisions about video procurements and advertising cooperation.<sup>61</sup>

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59 iQiYi v. Feiyi, 2017 Shanghai District Court 0104 Civil Judgment No. 18960 (2017).

60 *Id.*

61 *Id.*

The defendant Hangzhou Feiyi Information Technology Co., Ltd. (hereinafter “Feiyi Information”) was providing click-farming service to assist increasing video visits and enhancing video popularity.<sup>62</sup> According to the court’s decision, Feiyi Information helped its clients visit iQiYi’s website to rapidly increase the number of views of some specific videos in a short period of time by continuously changing IP addresses through multiple domain names. The price is 15 RMB per 10,000 times of views. From February 1st to June 1st, Feiyi Information made at least 950 million false visits on the iQiYi website, and illegally benefited about one million RMB. iQiYi claimed for damages of RMB 5 million.<sup>63</sup>

After adjudication, the Shanghai Xuhui District Court held that the defendants’ excessive increase in the number of clicks on certain webpages was not only in violation of the competition order of the relevant market, but also harmed the interests of iQiYi and its consumers.<sup>64</sup> For iQiYi, the false number of video visits caused it to pay more copyright license fees to the video providers, and to make incorrect business decisions which resulted in the loss of competitive advantage.<sup>65</sup> For consumers, the video ranking derived from false number of visits did not truly reflect their needs. The misled consumers might have bad user experiences and no longer trust the business reputation of iQiYi, so as to choose other service providers and cause the loss of the economic interests of iQiYi.<sup>66</sup> Shanghai Xuhui District Court thus concluded that the defendants constituted unfair competition and should jointly compensate iQiYi for RMB 500,000.<sup>67</sup>

Both plaintiff and defendants appealed to Shanghai Intellectual Property Court. iQiYi claimed that RMB 500,000 were insufficient to compensate its loss and far lower than the benefits obtained by the defendants. The defendants asserted that the click-farming service had never damaged the legal rights of iQiYi.<sup>68</sup> The Shanghai Intellectual Property Court held that the act of false video clicks had substantially increased the customers’ false perceptions of the quality and popularity of the falsified videos and thus belonged to a “false propaganda” as regulated by the Anti-Unfair Competition Law.<sup>69</sup> For iQiYi’s request, the court held that it had already had technical means to

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62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *iQiYi v. Feiyi*, 2019 Shanghai Intellectual Property Court 73 Civil Final Judgment No. 4 (2017).

69 *Id.*

block some of the fictional video clicks, so the damages were not as severe as it claimed. Therefore, the Shanghai Intellectual Property Court rejected the appeals of both parties and upheld the original judgment.<sup>70</sup>

### Unfair Competition Caused by Network Traffic Hijacking

The so-called traffic hijacking refers to the use of malicious computer programs to control and change the online behavior of innocent users, so that they open different pages than originally expected, install apps that are different from the original expectations, or see advertisements that they do not want to see. There are many kinds of behaviors in traffic hijacking, wherein DNS hijacking is the most common one.

Each node on the Internet is given an IP address to facilitate the transmission of network information and data.<sup>71</sup> Internet users who want to browse information on a website must open a web browser to connect to the IP address of the website. However, because the IP Address is a long string of numbers, such as 168.95.192.1, it is nearly impossible for users to memorize. Accordingly, the concept of domain name was invented and some domain service providers (DSPs), such as Amazon and Google, provide a correspondence table between the domain names and IP addresses. As long as the user enters the domain name of a website, the Internet service provider (ISP) will send a request to DSP to request the corresponding IP address of the website, so that the ISP can direct the user to the website.<sup>72</sup> DNS hijacking means a hacker's invasion of the DNS relay to change the DNS settings, to correspond the domain name of a target website to a specific IP address other than that of the target website.<sup>73</sup> Accordingly, when a user searches the target website by using its domain name, the hacked DSP will provide a wrong IP address and thus direct the user to a wrong website.<sup>74</sup>

The Shanghai Pudong New District Court made a criminal verdict in 2015, which is the first verdict on traffic hijacking in China.<sup>75</sup> The defendants used malicious code to

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70 *Id.*

71 Asam Ali Zare Hudaib, *DNS Advanced Attacks and Analysis*, 8 *International Journal of Computer Science and Security* 63, 64 (2014).

72 Sameena Naaz & Firdoos Ahmad Badroo, *Investigating DHCP and DNS Protocols Using Wireshark*, 18 *IOSR Journal of Computer Engineering* 1, 1 (2016).

73 Hudaib, *supra* note 65, at 67-68.

74 Nikolaos Alexiou, Stylianos Basagiannis, Panagiotis Katsaros, Tushar Deshpande & Scott A. Smolka, *Formal Analysis of the Kaminsky DNS Cache-Poisoning Attack Using Probabilistic Model Checking*, 2010 *IEEE 12th International Symposium on High Assurance systems Engineering*, 94, 94 (2010).

75 2345.com v. 5w.com, Shanghai Pudong New District Court (2015).

tamper with the DNS settings of Internet user routers from 2013 to 2014, so that when users log in to the portal site “2345.com”, they will be automatically directed to the unexpected portal site “5w.com”. The defendants then sold the acquired Internet user traffic to their client “5w.com” and made an illegal profit of about RMB 750,000.<sup>76</sup> The defendants were sentenced to three years in prison because the Shanghai Pudong New District Court held that the behavior of the defendants of modifying the data stored in the computer information system was to constitute a crime of damaging the computer information system.<sup>77</sup>

### Analysis

For the *iQiYi v. Feiyi* case, the Shanghai Intellectual Property Court made the decision in 2019, so it seems that the 2017 Amendment should be adopted as legal ground for judgment. However, since *iQiYi* filed the lawsuit prior to the effective date of the 2017 amendment (January 1, 2018), the Shanghai Intellectual Property Court still needed to make the judgment on the ground of the general provision of the 1993 Anti-Unfair Competition Law. In this case, because Feiyi assisted its client to fraudulently click some webpages to defraud advertising fees, it may have also constituted a criminal fraud.<sup>78</sup> Therefore, it is reasonable for the Shanghai Intellectual Property Court to hold that the act of false video clicks has substantially increased the customers’ false perceptions of the quality and popularity of the falsified videos and thus belonged to a “false propaganda” as being regulated by the Anti-Unfair Competition Law. If there are similar cases in the future, the courts can adopt the fourth sentence of the 2017 Amendment to make judgments. From this perspective, the 2017 Amendment has significantly improved the maturity of China’s legal system of anti-unfair competition.

In addition to criminal responsibility, DNS hijacking may cause great damages to users. For instance, a user originally wants to visit Website A, but is directed to Website B because of an illegal DNS hijacking. If the user interface of Website B is very similar to Website A, the user may mistakenly believe that Website B is Website A, and thus enters his account number, password, or other personal data such as credit card number, resulting in important personal information being illegally obtained by Website B. In addition, DNS hijacking may also cause great damages to website operators. For instance, the aforementioned user originally expects to visit Website A, but is directed to Website B by an unlawful DNS hijacking. Website A would lose the network traffic that it could originally obtain, thereby losing the business opportunities or advertising

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76 *Id.*

77 *Id.*

78 Article 266 of China’s Criminal Law.

benefits that it might have obtained. Therefore, DNS hijacking may also constitute unfair competition for websites that have been hijacked. If there are similar cases in the future, the courts can adopt the first sentence of the 2017 Amendment to make judgments. This confirms again that the 2017 Amendment, which is far more specific and clearer than the Paris Convention, has significantly improved China's ability to deal with unfair competition behaviors regarding big data.

However, since the patterns of unfair competition in big data era are changing and "innovating" quickly and constantly, law amendments will hardly or even never catch up with the changes. For this reason, it is inherently difficult for the courts to judge unfair competition cases. Based on the spirit and principles of the Paris Convention, this article suggests that a company should not be held unfair competition simply because its business operations have substantially reduced the performance or operating effectiveness of its competitors. When judging whether a company's competitive conduct constitutes unfair competition, no matter the court is applying one of the specific provisions or the general provision, it is essential to consider whether the company has malicious and dishonest practices and whether its behavior harms the consumers and market competition order.

## Conclusion

As the data-driven economy is rapidly booming, the collection and use of big data have become the most essential factor in company competition. The sound development of the market in the data-driven economy depends on the free and fair competition among the industries. Since 2015, more and more unfair competition cases concerning big data have occurred in China, such as masking advertisement, click fraud, malicious incompatibility, and gathering user's personal data from competitors by unfair means. This article categorizes them into unfair competition about illegal collection/use of competitors' big data and about network traffic fraud. Whether China's current legal system of anti-unfair competition can resolve the above-mentioned disputes is concerned in this article.

As the Paris Convention only regulates the basic principles of "fairness" and "honest practice" for anti-unfair competition, countries have room to develop their own legal systems according to their special social, economic, and cultural conditions. Based on the Paris Convention, China enacted the Anti-Unfair Competition Law in 1993. Since it was developed much earlier than the development of the digital economy, the 1993 Anti-Unfair Competition Law did not specifically regulate any acts of unfair

competition related to big data or e-commerce. For the unfair competition issues regarding big data, this law only provided the basic principles of anti-unfair competition on the ground of the Paris Convention, stipulating that operators in market transactions should follow the principles of voluntariness, equality, fairness, and honesty, and observe the generally accepted business ethics. As a result, while adjudicating the cases concerning unfair competition, China's courts could only provide expansionary interpretation of such general principles as the legal basis for their judgments.

In order to promote the progress of data-driven economy and to regulate more and more unfair competition events, China amended the Anti-Unfair Competitive Law in 2017 in which a new provision with four sentences was added for regulating the operation of e-commerce. The unfair competition caused by network traffic hijacking could be regulated by the first sentence. Other unfair competition behaviors such as unfair competition caused by click fraud and by illegal collection/use of Competitors' big data can be handled by the general clauses of the fourth sentence. This article finds that the 2017 Amendment, which is far more specific and clearer than the Paris Convention, has significantly enhanced China's ability to deal with unfair competition behaviors regarding big data.

However, since the conducts of unfair competition in big data are changing quickly and constantly, law amendments will hardly or even never catch up with the changes, so judgement of unfair competition cases is inherently difficult to the courts. Based on the principles raised in the Paris Convention, this article finds that the courts should not determine a company constituting unfair competition simply because its business operations have substantially reduced the performance or operating effectiveness of its competitors. When judging whether an enterprise's competitive behavior constitutes unfair competition, it is essential to consider whether the enterprise has malicious and dishonest practices and whether its behavior harms the consumers and market competition order.

# Economic Law and The Development of Digital Markets, between Ethics and Efficiency

Gianmatteo Sabatino<sup>1</sup>

**Abstract:** Market digitalisation leads law to transpose traditional concepts of economic regulation to another theoretical and practical level. Through the legal balance among *ordo-liberal* and protectionist approaches, public powers seek to functionalize digital economy to socio-economic development purposes. However, such functionalization is inherently connected to supervision and control over online markets. The object of such evolutionary processes comes to be the relationship between legal subjects. The orientation and the transparency of the online legal relationship represent one of the most advanced goals of modern economic law, attempting to neutralize, through regulation, the inevitable information asymmetry distancing each of the subjects involved from the whole system.

The paper, mainly focusing on certain recent developments in the legal systems of the PRC and the EU will attempt to sketch the relevant issues and some possible solutions.

## Introduction – Market Regulation and the Development of Digital Markets

Digitalisation is an epiphany of the fragmented character of modern global law (Backer, 2012). This assumption, though hardly disputable, stimulates the search for logically feasible legal regimes, fit to sustain the burden of a digital economy. The *fil rouge* of one of these (possible) regimes echoes a well-known approach to economic law: the institutional one (Romano, 1945; Di Gaspare, 2015).

In the era of de-codification (Irti, 1979), economic regulation, partly denying the assumptions already held by Sumner Maine (Sumner Maine, 1861) – who associated the development of modern law with the transition from status to contract – relied

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more and more on *statutes* to create sets of differentiated legal provisions targeting different subjects, i.e. consumers, financial institutions, etc.

Within this pattern, digital economy is no exception. The main regulatory efforts of several legislatures have produced special laws, defining the right and duties of such subjects with regard to economic activities such as e-commerce or, more in general, internet operation, as it happens with cybersecurity regulations. The emergence of digital transactions, however, also changed the spatial dimension of modern economy, reshaping the geography of markets and urging national and supranational legislature to either remove borders or setting new ones.

Economic law contributes to such process through its institutional dynamics. The legal norm, in the economy, is not a mere representation of the legislature's will, but arises from the evolutionary relations involving economic operators, public authorities and consumers. To define a role for the law in this context is no easy task.

It is a common view that digitalisation did not create a “new economy” but is rather a “new tool” to enable market transactions (Pénard, 2006). Such transactions, however, when carried out online, function according to behavioural patterns affected by the detachment of economic actors (e.g. consumers, retailers, etc.) from the geo-physical “space” of traditional markets.

In light of such premises, the main critical relation shaping the evolution of economic law in the digital world is that between digitalisation and competition.

The impact of digitalisation on competition law was already recognized at the end of the last century, when legal scholars realized that the “consumer sovereignty” was indeed expanded by the increase in choice and information provided by electronic trade (Balto, 2000) but, on the other hand, was counterbalanced by other relevant aspects. In the first place, the increasing importance acquired by the role of the intermediary (Balto, 2000), in light of a notion of the internet as an “ensemble of platforms” (Pénard, 2006).

The capacity to process larger and larger quantities of data and transactions, coupled with the detachment from the geographical boundaries of markets led to the creation of huge blocks of market power. As noted by Chinese scholars (Chen Bing, 2018), big data processing bears both incentives and risks for market competition. On the one hand, through data processing economic operators are able to effectively respond to changes in consumers' demands, by enhancing product quality and entering into virtuous

competition cycles with other operators. However, the concentration of such power of processing data into the hands of trans-national operators and platforms – such as social media, online trade platform, etc. – poses a relevant regulatory issue. Furthermore, such concentration is not reflected by a simplification of relational links, which, in the modern internet, are increasingly complex and numerous, so that internet economy is essentially both decentralized and de-structured (Chen Bing, 2019).

The consolidation of dominant position through the management of big data may therefore rely on the variable uses of such data, depending on the individual characteristics of customers. It is a process of domination based on discrimination toward users (Pénard, 2006).

From the perspective of data protection, the main necessity is obviously that of preventing abuses and improper usage of personal data. However, from the perspective of competition regulation, the main issue of how to avoid high barriers to entry the relevant markets (Chen Bing, 2018, Balto, 2000) created, directly or indirectly, by such dominant operators. Furthermore, in long-term perspective, dominant positions could reduce the efficiency of the service provided as well as of consumers' actual freedom of choice.

Even the position of search engines raises complex issues concerning competition. The issue of “neutrality” in internet economic governance (Rotchild, 2016) concerns the (possible) manipulation of data and online research paths, carried out by search engines, in order to direct the netizens towards certain websites or web products (Körber, 2014). Save for global and easily recognizable brands, economic operators may be penalized by their absence from search results connected to specific terms. On the other hand, the algorithms which determine search results have been invoked by web giants such as Google to exclude a direct intervention in the data processing. In other words, the exclusion of certain results would be the natural outcome of a competitive process where most innovative operators are able to provide better websites which are then classified by algorithms according to a quality score (Körber, 2014). It is easy to see how the boundaries between competition, innovation and abuse of dominance are fuzzy.

That of online advertising is a classic example. Search engines function as intermediaries between advertisers and other online publishers. The commercial use of keywords and search paths has been known since the late 1990s. Rapid processes of concentration and acquisitions further consolidated the dominance of a few giants. Acting between

advertisers and consumers the search engine centralizes transactions and matches advertisements with consumers' profiles (Spulber, 2009).

Finally, yet importantly, dominant positions revolving around control of big data enhances the trans-national regulatory powers of digital market operators (e.g. Amazon) over their suppliers. In other words, global operators' codes of conduct (often explicitly addressed to suppliers) directly affect the content of supply contracts stipulated along the global production chains. Moreover, data processing facilitates the elaboration of centrally planned strategies while reducing the costs of strategic displacement of resources.

These issues pertain to the regulatory dimension of globalization (Ruggie, 2017, Milhaupt, 2003, Oshionebo, 2009) and are common to many Multinational Corporations. However, in the digital economy, the phenomenon may be amplified, and the exercise of market powers may be more intense.

Such circumstance, indeed, might also bear positive externalities, such as the diffusion of ethical standards sponsored by such global operators (Riziki Majinge, 2011). On the other hand, there is a clear erosion of states' sovereignty.

As just seen, many issues arising from the digitalisation of modern economy are common all over the world. However, other considerations must be diversified according to the national contexts. In particular, while the prevention of market barriers and dominant positions reflects a static efficiency-driven liberal-democratic view of competition regulation, digitalisation is, on the other hand, also a policy tool. In other words, the establishment of strong and even "dominant" operators may respond to strategic objectives pursued by national governments, especially in developing countries where the digitalisation of economic transactions is an important social development driver.<sup>2</sup>

How does economic law respond to these complex and multi-faceted stimuli?

When faced with the emergence of e-trade contracts, national legislatures, for the most part, proceeded to adapt traditional rules on contracts to the new instruments of economic commerce (Rotchild, 2016). Where the focus of the legislative effort is consumer protection, as in the EU, legislation tends to balance the inherent asymmetry

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2 See the 1st Report by the BRICS Competition Authorities Working Group on Digital Economy, *BRICS in the Digital Economy*.

of the contractual relationship in favour of the consumer, thus emphasizing the transparency dimension and laying out information which are required to be provided, as in the EC Directive 2000/31 on e-commerce.

However, in a digital economy where the status of the operators (intermediaries, search engines, platforms, etc.) increases the divergence between behavioural patterns in economic transactions, market balance cannot rely solely on contractual rules. In particular, the general regimes of market regulation in fields as competition and liability seems to require a diversified effort (Rotchild, 2016), which legislatures have rarely carried out.

Even international law does not offer solid references. The U.N. development vision conceives the digital space as a communication instrument, thus raising the issue of the access to the internet (Sustainable Development Goals – Goal no. 9), but does seek to make digitalisation directly functional to a comprehensive vision of market development. Furthermore, bilateral or regional trade agreements, when including provisions about e-commerce or digital markets, only provide broad promotional measures and do not aim at regulating the phenomenon in a comprehensive manner.

The definition of a new role for economic law in digital markets revolves around at least three critical connections:

- That between market efficiency and public economic policy
- That between contractual rules and liability regimes
- That between consumer protection and competition regulation

It would be impossible to extensively address each one of such points; however, some useful remarks may be drawn thanks to the comparative analysis of those experiences which integrated digital economy in their development doctrines and strategies. By verifying the correspondence or divergence between the theoretical-political view of digital development and the concrete applications of legal rules designed to regulate it, we may be able to comprehend which “poles” of the aforementioned connections are emphasized.

The models selected for the analysis are the Chinese one and the European one. Both of them explicitly upheld and promoted a strategy of “sustainable digital development”.

In paragraph 2, the analysis will focus on the macro-dimension of such strategy, trying to explain the theoretical premises of the integration between digitalisation and development doctrines. In paragraph 3, I will describe how the premises laid out in the discourse of socialist market economy (社会主义市场经济 – *shehuizhuyishichangjingi*) have been interpreted and applied through specific provisions of Chinese economic law. In paragraph 4, I will concentrate on EU law and try to identify some legal rules which are functional to the promotion of a single digital market. In paragraph 5, I will draw some brief conclusions.

## Digitalisation and economic development doctrines in China and Europe

The global debate on digitalisation and economic development gained momentum with the dawn of this century. Its functionalization to sustainable development purposes has, however, been a fragmented and incomplete process.

It was, nonetheless, expectable that a higher level of integration was to be reached by those experiences already emphasizing the public role in development coordination, such as the Chinese one.

Today, the great significance of the Chinese internet in terms of people connected – more than 800 million in 2018 – and revenues generated – almost 500 billion yuan per quarter in 2018 – is a common place among scholars (Chen Bing, 2019).

However, the political discourse as well as the attention of foreign studies focused on the assessment of China as a cyber-power in terms of capacity to process and supervise information flowing (Xi Jinping, 2013; Stevens, 2017). Web sovereignty was thus developed as a principle functional to the protection of public security and public interests rather than to economic development, as also emphasized by Art. 1 of the Cybersecurity law. The notion itself of “cyberspace sovereignty” is somewhat uncertain. Those who oppose it (Mueller, 2019) highlight the pure “open” dimension of certain key features of the internet, such as the internet protocols (IPs).

The Chinese model challenges this view, not by denying the “sharing” character of the internet, but instead by actively promoting a monitoring role for public authorities.

The Chinese legal system, so far, represents the most advanced example of internet sovereignty (Jinghan Zeng, Stevens, Yaru Chen, 2017), not only on account of its

restrictions and boundaries, but also thanks to a complex regulatory settings now revolving around the Cybersecurity Law and, above all, its Art. 37<sup>3</sup> (Moriconi, 2019).

What a superficial interpretation of the political discourse may overlook is, however, the deep integration between cyberspace sovereignty and the coordination of socio-economic development.

This point is less emphasized by foreign scholars, but is clear from the text of the 13th Five-Year Plan, where it states that “we will ensure a thorough understanding of developmental trends in information technology, implement the national cyber development strategy, accelerate the development of digital technology, deepen the integration of information technology into economic and social development, and accelerate the expansion of the information economy”.<sup>4</sup>

It is not possible to address the issue of legal governance of internet in China without clarifying some of those institutional relations pertaining to the “deeper structures” of the Chinese legal system (Kischel, 2019). Network operators and platforms have close ties with the public powers and put some of their information process capacity at disposal of development strategies. Public polls on WeChat have been used to collect opinions of policy fields to be included in long-term development plans.

Social networks are involved in public consultation processes which are now rendered mandatory by the Interim Regulation on Major Administrative Decision-Making Procedures.<sup>5</sup> This legal development actively pursues digitalisation as a mean to enhance deliberative democracy, within the context of a new way of thinking decision-making processes (Wang Shaoguang, Yan Yilong, 2016).

Chinese internet operators are thus viewed as national champions, whose power in the market may be indeed promoted, within the context of a new phase of China’s industrial policy (Hempill, White III, 2013).

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3 The article states that “Personal information and important data collected and produced by critical information infrastructure operators during their operations within the territory of the People’s Republic of China shall be stored within China. If it is indeed necessary to provide such information and data to overseas parties due to business requirements, security assessment shall be conducted in accordance with the measures developed by the national cyberspace administration in conjunction with relevant departments of the State Council, unless it is otherwise prescribed by any law or administrative regulation”.

4 Part VI, Preamble

5 重大行政决策程序暂行条例 (*zhongdaxingzhengjuecechengxuzanxingtiaoli*), see in particular Section 2

Such vision is reflected by the gradual implementation of a national information strategy, aimed at fostering the establishment of great and strong domestic operators (Kalathil, 2017) capable not only to offer new services on a large scale to Chinese citizens but also to operate on foreign markets.

This stance is justified, from a legal perspective, by the affirmation of a notion of economic law upholding the non-neutrality of competition rules, in the sense that market regulation may (or must) respond to considerations pertaining not only to efficiency (both static and dynamic) but also to social issues and national strategies (Shi Jichun, Luo Weiheng, 2019).

Modern socialist market economy, therefore, strives for a connection between digitalisation and market regulation which is ultimately serving the purpose of national socio-economic development. The current struggle against the COVID-19 bears the signs of such connection: online platforms of food delivery (e.g. 美团 – *meituan*) as well as other kinds of trade platforms, social networks and web communication services have been crucial in the daily-life of Chinese quarantined people, limiting to the maximum possible extent the circulation of people buying supplies. However, the diffusion of such online services has reflected, in the past, the promotion of an integrated development strategy based on the digitalisation of Chinese society.

From this perspective, even the critical issue of internet censorship may be interpreted in light of a socio-economic policy pattern, meaning that the exclusion of certain foreign operators from the Chinese web (Google and its subsidiaries above all) fostered the growth of domestic providers of web services, such as Baidu, Youku, Tencent, etc.

The inclusion of digitalisation in the “discourse” of Chinese socio-economic development persuaded the legislature to treat the digital economy as a different theoretical block, to be governed by a separate adjudication system. This is the premise justifying the establishment of the Internet Courts (互联网法院 – *hulianwangfayuan*), which have been given a broad jurisdiction and in fact represent a distinguished branch of the judiciary.<sup>6</sup> To such distinction in the courts’ system does not correspond, however, a special set of substantive rules. In other words, apart from the e-commerce law of 2018, the Chinese legislature did not seek to create a comprehensive body of “internet law”. This is especially true in the field of competition, where internet-related

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6 See the Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of Cases by Internet Courts (最高人民法院关于互联网法院审理案件若干问题的规定) of September 2018

disputes are growing but the rules to be applied by judges, in most cases, those designed for traditional competition disputes (Chen Bing, 2019).

The main problem, for Chinese policymakers, in the governance of digital economy is therefore to harmonize the theory with the practice or, in other words, to shape legal standards in order to judge internet-related disputes reconciling the integrated development view with existing legal provisions.

Compared to China, the European Union did not experience a top-down integration of digitalisation into a comprehensive development strategy. While it is certainly true that the Digital Single Market Strategy is in line with wide policy initiatives such as Europe 2020, the promotion and regulation of digital markets, in the European legal culture, stem from consideration of economic efficiency, i.e. benefits for consumers, derived from the *ordo-liberal* notion of social market economy. Productivity gains, reduced transaction costs, innovation and global competitiveness have been considered as the key links between the digitalisation of the EU economy and the single market frameworks (Marcus, Petropoulos, Yeung, 2019).

The Digital Single Market Strategy, as laid out by the Commission, reflects such stance, interpreting the “mission” of EU legislation as the removal of existing regulatory and fiscal barriers preventing a full integration of national digital spaces. On the other hand, the Commission also points out that the dimension of trust is essential for a balanced development of the digital market. On such premise, legislation should reflect upon specific regimes of liability. The Digital Single Market Strategy, as laid out in a 2015 Commission Communication,<sup>7</sup> focused on the role of online platforms, raising doubts about the efficacy of the existing legal regime (that of the e-commerce Directive) in order to enhance the level of responsibility of platforms in monitoring flows of data and information shared. In a subsequent communication,<sup>8</sup> the Commission acknowledged the fact that the e-commerce directive was designed in a period where the role of online platforms was very different from today, but did not support the idea of a comprehensive reassessment of their liability, instead favouring a spot approach focused on specific and sensible areas (such as protection of minors from harmful contents or protection from incitement to hatred).

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7 COM(2015) 192 final.

8 COM(2016) 288 final.

With regard to liability regimes for digital markets operators, further results have been achieved through the adjustment of traditional pillars of EU law (such as producer's liability) to the dynamics of digital economies (Marcus, Petropoulos, Yeung, 2019), as happened with the EU Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. As already noted, EU legislation touches on market regulation only indirectly. Being mostly preoccupied with efficiency considerations, it seeks to ensure the protection of "weaker parties" in economic transactions and most of all consumers. This stance reflects the underlying logic of the social market economy (Art. 3 TFEU) which interprets regulatory efforts in light of the relations between producers and consumers (Somma, 2016). Some authors pointed out that within this framework social instances are not relevant *per se* but only when functional to the realization of economic efficiency in the producer-consumer relation (Somma, 2016). This view may be somewhat extreme, but it helps explaining that the sustainability of the economic regulation of EU digital markets is mainly intended as the removal of internal barriers and the pursuit of the maximum efficiency in terms of consumer benefits regarding prices, services' conditions, etc.

In European law, it is the fundamental right to data protection which alters the purely efficiency-driven approach (Rodotà, 1995; Angiolini, 2020). In particular, Art. 8 of the ECHR and Art. 7 and 8 of the CFREU provided judges and scholars with a basis to test the legitimacy of web operators' behaviours. However, the right to data protection revolves around the position of the individual as a human being (not as a market operator) and does not pursue an integration with a doctrine of socio-economic development, nor does it functionalize digitalisation to an economic policy. Instead, it provides a platform of values against which to balance market freedoms, in light of the principle of proportionality.

Such conclusion is, indeed, in line with the *ordo-liberal* stance on market regulation and competition, which is, however, increasingly challenged by those scholars, who emphasize the porous nature of antitrust law, always exposed to socio-political considerations (Ezrachi, 2017).

In a comparative perspective, the position of digitalisation in economic law shifts between the strive for a balanced socio-economic development and the strive towards market efficiency. Although not mutually exclusive, the two positions characterize the theoretical doctrines underlying the Chinese and European strategies for the development of digital markets.

Now, the analysis must focus on the specific solutions that each one of the two legal orders shaped in order to pursue the goals laid out in their long-term visions.

## The Chinese model and the moral characterization of the internet economy

Three recently issued documents represent, ideally, three pillars of the Chinese system of internet governance: the Cybersecurity Law<sup>9</sup>; the Economic Commerce Law<sup>10</sup> and the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Cases by Internet Courts.<sup>11</sup>

The implementation of a specific substantive internet law, however, necessarily relies on the basic institutional structure of the socialist market economy and, in the first place, on the system of development planning. Both in the cybersecurity law and in the e-commerce law the commitment to include the addressed activities into development planning activities is one of the core points of the promotional strategy.<sup>12</sup> This means that key projects concerning those fields are, more likely than other projects, to be financed and subsidized through public funds (Sabatino, 2019).

Therefore, relevant operators (network operators, online economic operators) are privileged actors in the macro-economic arena.

Even the establishment of a separate system of internet courts (of first instance) serves the purpose of promoting digitalisation, through the definition of an online procedure law, so that disputes heard by internet courts are, for the most part, dealt with exclusively online or through digital channels.

The core of Chinese internet governance is therefore contained in public law provisions, displaying a strong promotional and organizational nature. The attribution of rights and the definition of specific regimes of liability seems to come second.

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9 中华人民共和国网络安全法 (*zhonghuarenmingongheguowangluoanquanfa*), effective since the 1st of June, 2017.

10 中华人民共和国电子商务法 (*zhonghuagongheguodianshangwufa*), adopted in August, 2018.

11 最高人民法院关于互联网法院审理案件若干问题的规定 (*zuigaorenminfayuanguanquanyuhulianwangfayuanshenlianjianruoganwentideguiding*), effective since the 7th of September, 2018

12 Art. 64 of the e-commerce law; Art. 8 of the cybersecurity law

However, if on the one hand existing legislation adopts a functional view of digital markets, on the other hand, it must develop specific principles in order to regulate the behaviour of digital markets operators for the benefit of socio-economic development of the nation (Zhou Qiang, 2017),

Chinese law addresses the issue by defining sets of moral and ethical rules directed at the relevant actors in the digital markets. In the cybersecurity law, Art. 9 states that “Network operators shall (...) abide by laws and administrative regulations, respect social morality, observe business ethics, have good faith, perform the cybersecurity protection obligation, accept supervision by the government and the public, and undertake social responsibilities”.

Such provision finds a sort of specification in economic legislation such as, for example, the new Art. 12 of the Anti-Unfair Competition Law, which exemplifies conducts of online operators colliding with competition rules.

With specific regard to competition law, Chinese legal scholars questioned the adaptation of traditional legal categories and concepts to the new forms of online competition. In particular, some authors believe that the de-structured nature of digital markets prevents a clear and logic definition of market boundaries and of competitive relationships in the market (Chen Bing, 2019). Therefore, the anti-competitive nature of certain conducts cannot be assessed in a purely objective way, from the perspective of the effects on the disputed relation, thus hindering the effectiveness of competition law. A change of perspective is therefore required. The focus of the judge’s evaluation should be on the behavioural patterns, i.e. the potential that certain behaviours have to hinder competition and damage other parties’ interests (Chen Bing, 2019). According to this author, the “competitive behaviour” (竞争行为 – *jingzhengxingwei*) absorbs the relevance of the “competitive relationship” (竞争关系 – *jingzhengguanxi*). In other words, it is not important to assess whether or not a specific competitive relation exists among the operators, but rather whether or not the behaviour of certain operators is able to endanger market balance.

The theoretical basis for such stance is that in digital markets trends such as globalization and sharing shape new ethical rules (Xie Lanfang, Huang Xijiang, 2018) which guide the conducts of economic operators.

What is the practical consequence of this theory? The most relevant one is the importance acquired by general clauses and broad principles.

So far, Chinese courts appear to rely much more on the adaptation of general principles and clauses than on the specific provisions for the internet (Chen Bing, Xu Wen, 2019). With regard to disputes concerning the unfair online competition, judicial decisions often refer to public interests and business ethics but connect them to general clauses, especially that of Art. 2 of the Anti-Unfair Competition Law, rather than to Art. 12 (Xie Lanfang, Huang Xijian, 2018).

Furthermore, the principles of good faith, honesty and credibility function as “umbrella clauses” to guide the interpretation of online conducts. The judicial practice confirms the theoretical stances of several scholars.

In this context, the task of a specified regulatory effort is assigned by the legislature to the industrial associations. Art. 8 of the E-commerce law and Art. 11 of the Cybersecurity law design an active role for industrial organizations, aimed at self-regulation and improvement, through the issuance of code of conducts and standards as well as through the management of disputes.<sup>13</sup> These provisions, obviously, must be interpreted in light of the particular status of industrial organizations in the Chinese legal system (Xi Jianming, 2010, Yao Xu, Che Liuchang, 2011). Such entities function as connection links between economic operators and public authorities; they follow centrally-planned development strategies and determine business initiative and conditions also in dialogue with public authorities (Sabatino, 2019).

The high degree of affiliation between entrepreneurs and the Communist Party (Xiaojun Yan, Jie Huang, 2017; Melnik, 2019) is well-known. This aspect explains how such institutional relations may support the scheme of internet governance, within the context of the so-called “communicative law-making”, a typical feature of modern Chinese law (Peng He, 2014).

If, the ethical characterization of the digital market in general connects fairly well with the general clauses of economic legislation, the definition of specific liability regimes undergoes continuous struggles. Chinese law, with regard to online transactions, favours, in principle, liability rules rather than validity rules. Therefore, it aims at the subject and not at the contract, whose legal force remains, in principle, untouched by infringements.

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13 Art. 60 of e-commerce law

A particularly strong concept of joint liability is introduced for network operators acting as intermediaries in economic transactions. Art. 38 of the e-commerce law establishes a joint liability for those e-commerce platforms which “know or should know that the goods sold or services provided by operators on platform are not in compliance with the requirements for safeguarding personal and property safety or otherwise infringe upon the legitimate rights and interests of consumers, but fails to take necessary measures”.

However, so far this provision was not really embraced by judges, who are reluctant to fully apply it and, in particular, to recognize the fault of negligence of the intermediaries,<sup>14</sup> thus saving them from joint liability.

It is, nonetheless, a relevant legislative indicator, that shows the tendency of the system toward a special regulatory setting revolving around the acknowledgment of the social function of network operators. On the other hand, the judicial practice shows that while judges easily refer to general provisions in order to develop concrete decisions to new types of economic transactions, with more specific rules the situation is different. Such occurrence, while hindering the practical value of provisions such as Art. 38 of the e-commerce law, reinforces the idea that the development of balanced digital markets is a goal pursued, in the first place, through public law instruments and, in particular, through the coordinative effort of the public authorities condensed in planning directives.

It is therefore, once again, a policy effort directed at the behaviour rather than at market, at the subjects rather than at the object. The same logic applies with regard to provisions about foreign investment, which preserve the national characters of strategic operators on the Chinese internet.

Both the negative list for foreign investments<sup>15</sup> and the negative list for investment in free trade zones<sup>16</sup> explicitly prohibit FDIs in “Internet news information services, Internet publication services, Internet video and audio program services, Internet cultural business (except music), and Internet social networking services”. Though e-commerce platforms are excluded from this negative list, the provisions, in essence,

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14 See, for instance, Decision of August 12th, 2019 of the Wuhan Intermediate People's Court n. 7131/2019; Decision of 28th of June, 2019 of the Beijing Second Intermediate People's Court n. 7852/2019

15 See the Special Administrative Measures (Negative List) for the Access of Foreign Investment (2019 version)

16 See the Special Administrative Measures (Negative List) for the Access of Foreign Investment in Pilot Free Trade Zones (2019 version)

ensure that the major internet operators and major data processing operators are Chinese.

The principle of internet sovereignty, in the digital markets, becomes a fluid concept which is not easily detectable by looking at just one regulatory set. Several economic law rules display an underlying logic supporting such regulatory effort. The institutional logic of economic law could, however, help to comprehend and interpret the complex legal framework of Chinese internet governance.

### The European stance, its ordo-liberal core and its recent evolutions

The assessment of digital market regulation in EU law is to be interpreted in light of adherence or deviation from an ordo-liberal approach. As far as the development of digital markets is concerned, EU law did not emphasize the programming dimension of the phenomenon, as it instead does with regard to other sensible policy sectors such as circular economy.

EU law, for the regulation of digital markets, relies on a consolidated set of both statutory and case law concerning mainly consumer protection. Provisions about unfair clauses and practices have been easily adapted to electronic commerce.<sup>17</sup> Moreover, the key concept of effectiveness, intended as effectiveness of EU law and effectiveness of judicial protection (Art. 47 CFREU) functions as a useful interpretative tool, for the CJEU and the national courts, to ensure high levels of protection for consumers (Navarretta, 2017).

Therefore, the legislative efforts have been directed mostly at specifying duties of online operators in terms of information, disclosure and transparency.

According to such approach, both Directive n. 1993/13 (as modified by Directive n. 2011/83) on consumer rights and Directive n. 2005/29 on unfair commercial practices may be applied with a certain efficiency to online transactions (Rotchild, 2016).

In 2019, Directive n. 770 introduced instead a set of special provisions related to contracts for the supply of digital content. The directive, acting upon the legal background concerning producer's liability (Benacchio, 2016), tries to shape a legal

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17 See, for instance, CJEU C-191/15 *Amazon*

regime revolving around the objective aspect of the economic transaction, i.e. the product.

The directive shapes the whole regime of liability of the trader on the basis of the notion of conformity. The legislative technique employed, as well as the remedies provided (bringing the product into conformity, termination of contract and price reduction) are all examples of legislative adaptation.

In other words, the market structures are the same, the only things that change are the material instrument to carry out the transactions.

EU law does not emphasize the ethical dimension of the internet as it happens in China. The regulation of the behaviour of network operators mainly stems from the protection of rights already incorporated in the EU legal order, such as, above all, the right to data privacy.<sup>18</sup>

On the other hand, the protection of intellectual property rights justifies the presence, in the e-commerce directive, of the so-called notice and takedown procedure (Wang, 2018).

In both cases, however, the duty imposed on the network operators is eminently passive. Network operators are not obliged to actively look for infringing materials, but must act upon notice of the interested party. Furthermore, the degree of detail of the notice required by national provisions may be particularly high as well as the burden of proof for the claimant, so that, for instance, ISPs are often asked to expeditiously remove materials contested only when they are manifestly unlawful (Wang, 2018).

In other circumstances, the passive role exercised by network operators is what, in EU law, exempts them from liability. This is the case of the Directive n. 2000/31 on E-commerce, whose Art. 12 and 14 provide for a general exemption from liability for service providers. The CJEU recently clarified<sup>19</sup> that the exemption is, in essence, connected to a purely technical, automatic and passive role of the e-commerce service provider. In other words, to be exempted from liability the provider must not have “control over the information transmitted or cached by his customers” and must not “play an active role in allowing those customers to optimise their online sales activity”.

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18 See CJEU C-131/12 *Google Spain*

19 CJEU C-521/17 *Coöperatieve Vereniging SNB-REACT U.A.*

These aspects are for the national judges to assess. However, the CJEU decision introduces a flexible double concept: the passive role on the one hand and the not-active role on the other, meaning that service providers must not carry out any activity which may imply a processing or management of consumers' data so to influence their freedom of choice.

The efficiency-driven approach is even stronger in the competition field.

In terms of policy, the first goal emphasized by the Digital Single Market Strategy is, obviously, that of creating harmonized market conditions within the Union. Articles 101 and 102 of the TFEU provided a legal basis flexible enough to pursue such objective in the enforcement of competition law (Jozwiak-Gorny, Jozwiak, 2017).

In the seminal decision *Pierre-Fabre*,<sup>20</sup> the CJEU ruled that a business contract clause prohibiting the use of internet as a marketing method is contrary to Art. 101 of the TFEU and not covered by the Block-Exemption Regulation.<sup>21</sup> The exceptions to such rule have been, subsequently, specified by the Court, so that the use of mainstream trade platform (such as, for instance, Amazon) in retail activities may be contractually impeded in order to preserve the image of certain goods, provided that the restrictive clause is proportionate and not discriminatory.<sup>22</sup>

The main preoccupation of the Court has been, therefore, that of harmonizing online market activities with the logic of a diversified free internal market. This was the stance taken by the EU Commission in its 2017 report on the E-commerce Sector Inquiry. Among competition concerns raised by the development of e-commerce, the Commission listed selective distribution agreements and other vertical restraints aimed at restricting online selling and/or advertising.<sup>23</sup>

It only briefly addressed competition issues related to the management of big data by online operators, stating that “the exchange of competitively sensitive data, such as on prices and sold quantities, between marketplaces and third party sellers or manufacturers with own shops and retailers may lead to competition concerns where the same players are in direct competition for the sale of certain products or services”.<sup>24</sup>

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20 CJEU C-409/09

21 Reg. 330/2010

22 CJEU C-230/16 *Coty Germany*

23 See 3.1.1; 3.1.2

24 Point 3.1.3

The EU legislation moves along the same policy lines and recently produced a Regulation to counteract the phenomenon of geo-blocking as well as other forms of discriminatory treatment. The rationale of the intervention is well expressed by Recital n. 1: “In order to realize the full potential of the internal market (...) it is not sufficient to abolish, between Member States, State barriers alone. Such abolition can be undermined by private parties putting in place obstacles inconsistent with internal market freedoms. That occurs where traders operating in one Member State block or limit access to their online interfaces, such as websites and apps, by customers from other Member States wishing to engage in cross-border transactions (...) It also occurs when certain traders apply different general conditions of access to their goods and services with respect to such customers from other Member States, both online and offline”.

However, the variable geometries of competition law allow for interpretative interventions scrutinizing certain critical aspects of online operators’ market power in light of their effects on consumers’ benefits.

It is, in particular, Art. 101 and 102 of the TFEU which empower both the Commission and the National Competition Authorities (NCAs) to assess typical clauses set in online contracts by relevant e-commerce platforms. The most relevant example is undoubtedly that of the Most Favoured Nation (MFN)<sup>25</sup> clauses in online hotel bookings.

Such clauses, in essence, required hotels not to apply, in direct transactions with customers, booking conditions more favourable than the ones provided through an online booking network (such as Booking.com or Expedia) (Colangelo, 2017, Cistaro, 2015).

Certain NCAs, the German *Bundeskartellamt* in first place, insisted upon the infringement of Art. 101 brought on by such clauses (Galli, 2018). According to such view, MFN clauses are by all regards a restrictive vertical agreement, which on one hand diminishes competition among Online Travel Agencies (OTAs) with regard to booking conditions decided by hotels. Consequently, the competition among OTAs concerning fees practiced over hotels is also diminished whereas such fees are instead gradually

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25 The term “Most Favored Nation” is derived from International Economic Law and refers to a clause of a bilateral agreement where a State guarantees to another State that it applies to an agreement the most favorable conditions it applies in the international economic agreements which it takes part in.

increased. In the third place, MFN clauses employed by existing operators constitute barriers for new online platforms to enter the market.

Apart from the *Bundeskartellamt*, which repeatedly ruled for the invalidity of such clauses, other NCAs have often accepted OTAs commitments to restrict the application of such clauses or to counterbalance their effect by offering discounts for consumers (Colangelo, 2017).

However, certain national legislatures have decided to prevent by statutory means the applications of such clauses, by upholding their nullity.<sup>26</sup>

In some cases, as for instance in Italy,<sup>27</sup> the formulation of the legal rule is particularly harsh but at the same time not so clear and has therefore raised criticism. In particular, it does not take into account that MFN clauses may be employed in different forms and may not only prevent *tout cour* hotels from applying better conditions in transactions outside the online platform. They may also require that the better conditions offered to third parties are also offered to the OTAs (Galli, 2018).

The legislatures should therefore ponder deeply the effects that different clauses may have on competition before ruling for their invalidity.

The discussion upon MFN clauses, however, offers at least two arguments up for debate. In the first place, NCAs realized and assessed, in light of Art. 101 of the TFEU, the effects on competition derived from relevant market positions of network operators. Such consideration suggests a gradual shift of paradigm, from a purely promotional one (save for data protection rules) to a mixed one, comprising protection from unjustified restrictions but also evaluation of anti-competitive effects as well as other negative effects for consumers.

In the second place, EU provisions on competition, as well as those on consumer protection, offer a wide set of rules empowering public authorities to intervene on the validity of the contracts through which the online operators exercise their market power.

The connotation of online operators' behaviour is not ethical but "technical", interpreted in light of efficiency and consumers' economic welfare. The result is clear:

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26 For instance, France with the so-called "Loi Macron"

27 Law n. 124/2017, Art. 1 § 166

economic operators may not be compelled to align their strategies to public policies. Their conduct is illegitimate only when it alters market dynamics causing harm to consumers. The focus, here, is on the competitive relation (operator-operator) and on the operator-consumer connection.

Adhering to an *ordo-liberal* logic, the EU model rejects, at least theoretically, the social and ethical interaction between public powers and economic operators. The increasing presence, in the European market, of foreign online operators holding extremely powerful positions, however, inevitably raises concerns. Both consumer law and competition law closely adhere to the paradigm of neo-liberal efficiency. It is instead the new legal framework for foreign investments which displays some interesting developments.

EU Regulation n. 452/2019 required member states to adopt a screening mechanism for foreign investment on grounds of public security and public order (Amicarelli, 2019).

Art. 4 of the Reg. lists factors that may be taken into account when evaluating such broad criteria. Among them are the potential effect of the foreign investments over “critical infrastructure, whether physical or virtual, including (...) media, data processing or storage (...) critical technologies (...) access to sensitive information, including personal data, or the ability to control such information”.

Para. 2 of the article is even more interesting, since it lists the direct or indirect control by the government of a third country, including through ownership or significant funding, as a criterion to assess the effect of FDIs on public security and order.

Even if so far the provision has not led to relevant decisions, its application potential is huge, especially if the notion of indirect control should include subsidies (e.g. tax reductions or preferential credit policies) and selective competition law enforcement practices as it happens with China’s “national champions”, including some of the biggest operators on the global digital market.

Art. 4 of Reg. 452/2019, if compared to the Chinese legislation prohibiting foreign investments in relevant online activities, is certainly much more lenient and liberal and its approach. However, it introduces a standard of evaluation at the European level, common for all member states, which points out economic sectors where foreign presence may be critical. Moreover, Recital n. 36 of Reg. 452/2019 calls for a

“consistent application” of this new Regulation and Reg. n. 139/2004 (i.e. the “Merger Regulation”), in particular its Art. 21(4), according to which “Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law”.

Reg. 452/2019, together with the recently issued PRC Foreign Investment Law (and the subsequent lists) follows, indeed, a general trend of public regulation of the internet, i.e. that of investment regulation. In other words, the public interests connected to the diffusion of transnational online operators must, in the first place, be scrutinized from the perspective of foreign investment.

### Comparative Remarks and Conclusions

In a comparative perspective, the approach based on efficiency challenges the approach based on conduct rules and social ethics. In principle, as already noted, the two models may coexist, but in practice, while efficiency-driven models tend to regulate the object of the economic relation (e.g. the competitive relationship, the product, etc.), the ethics-driven model focuses on the behaviour of the subjects involved, widely employing general and even vague clauses, whose interpretation is obviously subjected to variations. This second approach is, in other words, less prone to ensure uniform standards, and is therefore fit to serve the goals of a market system where regulation is not “neutral” and is instead receptive of socio-political instances.

Ideally, an *ordo-liberal* model should embrace competitive neutrality at its highest and regulate digital markets in light of the maximum benefits achievable by consumers when concluding transactions. On the other hand, a socialist market economy should make digital markets functional to public policies. The emphasis on the moral character of the internet, as derived in China not only by the legal literature but also, in the first place, by the Cybersecurity Law, serves the purpose of reconciling public and national interests with the dynamics of a modern economy not anymore subjected to vertical planning.

On such premises, the presence of digitalisation within the discourse of the development doctrines in China and Europe assumes divergent meanings, with divergent practical consequences and divergent roles for economic law. The only field where, both in China and in Europe, the legislative formant aims at scrutinizing online operators’ conducts in light of public policy considerations is that of foreign investments. However, the concrete impact of the newly issued European legislation is

to be seen. Indeed, foreign investments law has been, in recent years, a testing field for the regulation of the online market in other countries such as India, which developed a particularly strict rule<sup>28</sup> regarding foreign investments in the e-commerce sector, prohibiting FDIs in the so-called “inventory model” of e-commerce, that is the model “where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly”.

In other words, such provision wants foreign e-commerce operators (e.g. Amazon) to rely on domestic sellers and act as a mere intermediary or facilitator between the consumer and the producer/retailer.<sup>29</sup> This is, therefore, the field which, more than the others, will keep on emphasizing the principle of internet sovereignty, connected to a coordinated development of digital markets. It seems to be a global trend, in a sector where regulatory efforts are otherwise divergent.

Digital markets are, by definition, fluid and so is their regulation, which does not offer solid grounds to design fully coherent models of governance. The risk of detachment between statutory and living law could be quite high. The selection of a specific perspective to frame the regulation of the internet space is therefore a necessary choice. The Chinese choice to interpret digitalisation ethically is, in the end, a way to reaffirm the political pillars of a socialist market economy in online markets,

In Europe there is no such necessity, nor a comprehensive and legally binding system of socio-economic planning. Digitalisation is therefore sustainable as long as it pursues the very same logic which inspired the whole system of European private law.

This brief comparative overview highlighted how a discussion about “re-thinking” economic law can be inappropriate, since digitalisation has not urged legal orders to shape new instruments nor to alter the balance among existing concepts, with the exception of foreign investment law. It has instead affected the interpretation of the operational standards of the existing norms. In this way, the different socio-legal models mark their political orientation.

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28 See Indian Ministry of Commerce & Industry, Review of policy on Foreign Direct Investment (FDI) in e-commerce, 26th December, 2018

29 The rule was indeed also defined as “Anti-Amazon”

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# Recent Evolution of the Personal Privacy Legal Protection in People's Republic of China

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**Abstract:** This article explores the current legal protection of personal information in the People's Republic of China. The P.R.C. has rapidly developed legislatively and academically with comprehensive Chinese data protection regulation closely integrated with all new developments. Currently, the legal framework appeared to be fragmented in that it is composed of widely varying laws and regulations. This article will offer a description of the evolution of the modern concept of privacy within the context of Chinese political and societal norms. The relevant regulations and their development will be addressed relative to significant cases. Conclusions and perspectives on possible future improvements are described in a general summary.

## Introduction

Privacy is (as) old as mankind. On the contrary, the right to privacy is a recent development. The right of personal privacy was first theorized and conceptualized by Samuel Warren and Louis Brandeis in the 1890 article, *The Right to Privacy*. This milestone has been described as 'one of the most influential law review articles of all time' (Kalven, 1966, 326) and praised as a 'brilliant excursions in the field of theoretical jurisprudence' (Adams, 1905, 37). Later on, Prosser, in 1960, established four privacy torts in his article *Privacy*. Another crucial step in the elaboration of the concept was reached in 1968 with the publication of Alan Westin's *Privacy and Freedom* in which he defined privacy in terms of self-determination.

Recently, the history of privacy has made clear that there is a strong relationship between privacy and the development of technologies. The sharing of our data has turned out to be massive and the way technology is used by both government and tech giants shows the economic and strategic value of this resource. While the phenomenon

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of digitalization tends to be a global trend, instead, its legal implications are perceived differently by each culture. This is clear in the different ways United States and Europe regulate privacy. Both sides of the Atlantic have different approaches that lead to differences in their legal models. In the EU, privacy and the protection of personal information are seen as fundamental rights and protected by comprehensive regulations which provide the individual with strong guarantees. In the U.S., there is no federal law covering the protection of data and local regulations typically establish less requirements and offer less protection than in the EU.

China has been slower in developing its own privacy legal model compared to the West, for complex historical and cultural differences. However, in recent years, China has sharply developed a consistent number of regulations. The country has the biggest Internet community and is a frontrunner in the area of digitalization. As a global cyber-force, it has increasingly played an active, even sometimes contested role in shaping the digital landscape through collaboration and competitiveness with Western economies. Nevertheless, China's policy regarding the regulation of cyberspace is different from policies adopted in the Western world. This affects the way Chinese policymakers perceive the value of privacy and its protection. Currently, the country is still in a process of legislative development, distinguished by its own characteristics. This article will clarify the current legal framework regarding personal data protection in China.

## The Evolution of Privacy in the P.R.C.

### Reform, Opening, and Digital Influence

As the distinguished Roman *prudens* Gaius taught, the *principium* is the most important part of the whole<sup>2</sup> (Diliberto, 2012, 53; Schipani, 2005, 80). Consequently, in order to address the current legal status of privacy in China, we will first attempt to historically contextualize the object of our research to be better informed about its origin and genesis.

It is argued that traditional Chinese culture was the cause of lack of privacy protections (Cao, 2005, 2). In the past, people tended to be more concerned about collective entities (the country and the family) than individuals. Enlightened by the principles of Confucian theories (Barrington Moore, 1984), people emphasized their interpersonal relationships (Fei, 1992), and privacy was deemed a negative word, a synonym of ‘secret’.

A completely different concept of privacy arose with the reform and opening policies of Deng Xiaoping in 1978. Since then, the whole of Chinese society has experienced deep changes, caused transformations in every corner of society.<sup>3</sup>

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2 Digest 1.2.1 (Gaius, XII Tables, book 1): *facturus legum vetustarum interpretationem necessario prius ab urbis initiis repetendum existimavi, non quia velim verbosos commentarios facere, sed quod in omnibus rebus animadverto id perfectum esse, quod ex omnibus suis partibus constaret: et certe cuiusque rei potissima pars principium est. Deinde si in foro causas dicentibus nefas ut ita dixerim videtur esse nulla praefatione facta iudici rem exponere: quanto magis interpretationem promittentibus inconveniens erit omissis initiis atque origine non repetita atque illotis ut ita dixerim manibus protinus materiam interpretationis tractare? namque nisi fallor istae praefationes et libentius nos ad lectionem propositae materiae producunt et cum ibi venerimus, evidentior praestant intellectum* ('since I am aiming to give an interpretation of the ancient laws, I have concluded that I must trace the law of the Roman people from the very beginnings of their city. This is not because I like making excessively wordy commentaries, but because I can see that in every subject a perfect job is one whose parts hang together properly. **And to be sure the most important part of anything is its beginning.** Moreover, if it is regarded as a sin for people arguing cases in court to launch straight into an exposition of the case to the judge without having made any prefatory remarks, will it not be all the more unfitting for people who promise an interpretation of a subject to deal straight off with that subject matter, leaving out its beginnings, failing to trace its origin, not even, as I might say, giving their hands a preliminary wash? In fact, if I mistake not, such introductions both lead us more willingly into our reading of the proposed subject matter, and, when we have got to the point, give us a far clearer grasp of it').

3 After the reform a new legal system with Chinese characteristics had been established with civil and commercial law as one of its major components where many national laws and numerous government regulations had been adopted in this regard. See Office of the State Council of China, 'The Socialist Legal System with Chinese Characteristics' (Oct. 27, 2011), available at [http://english.www.gov.cn/archive/white\\_paper/2014/09/09/content\\_281474986284659.htm](http://english.www.gov.cn/archive/white_paper/2014/09/09/content_281474986284659.htm)

The effects of the economic reform had a great impact on the new idea of privacy. As the traditional planned economy system was replaced by a new socialist market economy, Chinese society started shifting from one in which a crucial domination of collective interests was paramount to a society in which the individual was regarded as an independent subject and individual interests more valued. As a result, pursuing individual economic interests was no longer seen as taboo and individual rights and interests achieved a more prominent position, giving the individual, a more effective protection of their individual rights.

Reform and Opening Up also had an impact on cultural perspectives. Through the 'open gate', Western values, habits and practices gradually permeated throughout the society and progressively influenced people's lifestyles. Moreover, an increasing number of Chinese scholars began studying overseas in order to broaden their horizons and enhance their knowledge. When they returned to their homeland, they inexorably shared their experiences. Western ideals advocate individual personality and praise development of individual characteristics. That tendency supports a more individualistic consideration of individuals and of their rights. Due to the rapid development of urban areas, more and more people from rural regions migrated into dense urban environments. Consequently, people that were accustomed to living in intimate conditions with their family members and neighbours began living in a diverse environment and experiencing other individuals with differing regional traditions and cultures. One result was that citizens were more reticent to share their privacy with others but also, they were not interested in others private affairs as they were in their home villages.

Moreover, China has been through a gigantic digital revolution. New technologies and popularization of the Internet made possible entering into a new dimension, the cyberspace. Indeed, with China's embrace of digital economy, an understanding of privacy's importance has followed and as a consequence, the concept of privacy evolved as well.

### The Academic Development

Following the social and cultural trend and the promulgation of relevant judicial interpretations of the Supreme Court in 1988,<sup>4</sup> legal scholars, having as a parameter the

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4 The judicial interpretation is 'Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (for Trial Implementation) 1988'.

precedent experience of Western colleagues, began developing their own explanation of the right to privacy.

In 1997, two scholars, professor Wang and professor Yang defined the right to privacy as the ‘right enjoyed by natural persons, under which the person is free from publicity and any other interference by others regarding personal matters related to the person or to his personal information such as affairs in the area of personal life’ (Cao, 2005, p. 147). This idea of privacy is strongly affected by the private-public dichotomy and has been a first attempt to introduce a modern notion of privacy into the Chinese legal debate. In the following years, many other speculative attempts were implemented. In the description provided by Professor Yang Lixin, the right to privacy is the ‘right that allows the protection of private information, private activities and private space, which cannot be interpreted as arbitrary expansion or restriction’ (Yang, 2000, p. 26). In a different but similar way, Professor Zhang states that ‘the right to privacy is the personality right enjoyed by citizens and protected by law, and other people shall not illegally disturb, know, collect, use and make public’ (Zhang, 2002, p. 41). Another significant delineation was offered by Professor Wang Liming, who affirms that ‘the right of privacy is a right of personality, enjoyed by a natural person, under which he can dispose of all personal information, private activities and private areas which only belongs to the person and have no relation to public interest’ (Wang, 2005, p. 4). All those speculations make clear the inclusion of the right to privacy into the category of personal rights and the difficulty of giving a single monolithic definition of the right itself, but they also show the increasing attention given to the problem and the will of the scholars to find a theoretical solution.

In the following decades, an increasing number of scholars began developing the study of information statutes and discussing its impact on data protection laws and they joined in conferences and seminars to study these new ideas.<sup>5</sup> The Chinese academy has committed itself to formally determine its legal paradigm of personal information protection.

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5 In Fall 2017, the theme of the ‘Forum of Legal Study’ was ‘Legal Mechanisms for the Use and Protection of Personal Information’.

## Legislative Framework

### From the Early Stage to the Present

The first normative document which explicitly states the protection of personal information was promulgated in 1994 by the State Council.<sup>6</sup> In December 2002, the 16th Congress of the Chinese Communist Party approved a new draft of civil code that guaranteed legal protection to human dignity, including the right to privacy. In 2004 the ‘Implementation Opinions on Information Security Level Protection’ (*guanyu xinxi anquan dengji baohu gongzuo de shishi yijian*, 关于信息安全等级保护工作的实施意见) and in 2007 the ‘Information Security Level Protection Management Measures’ (*xinxi anquan dengji baohu guanli banfa*, 信息安全等级保护管理办法) were published. In both documents, protection of personal information was not well integrated into the system as a legal category. Privacy was still a nebulous concept in the legal discussion and the protection of personal information was not yet well established.

In 2009, the Tort Law of People’s Republic of China prescribed for the first time a tort for the violation of the right to privacy. In the same year, with the seventh amendment to the Criminal Law, two new crimes concerning the protection of personal information were introduced: illegal selling or providing of personal information (article 253, paragraph 1) and illegal theft or obtaining personal information in any matter (article 253, paragraph 3). From 2010 through 2020, several important policies were implemented to strengthen personal privacy protections.

In 2010, the Government published a white paper<sup>7</sup> entitled ‘Internet in China’ (*zhongguo hulianwang zhuangkuang*, 中国互联网状况). In the document, the importance of protections of citizen’s online privacy that is ‘closely connected with people’s sense of security and confidence in the Internet’ was highlighted, and the paradigm that ‘Internet service providers are responsible for protecting users’ privacy’ was established.

In late 2012, the Standing Committee of the National People’s Congress, in order to guarantee people’s online privacy, published the ‘Decision on Strengthening Protection of Online Information’ (*guanyu jiaqiang wangluo xinxi baohu de jue ding*, 关于加强网

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6 I am referring to the ‘Regulations of the People’s Republic of China on Computer Information System Security Protection’ (*jisuanji xinxi xitong anquan baohu tiaoli*, 见《计算机信息系统安全保护条例》).

7 The ‘White paper’ has been published the 8 June 2010 by the Information Office of the State Council of the People’s Republic of China.

络信息保护的決定). The primary purpose of this document was to protect citizen's personal online information and online privacy and to safeguard the public interest.

In 2013, an amendment to the Consumer Protection Law introduced new dispositions regarding the protection of personal information by providing special legal protections for the consumers (article 14), by setting up rules, principles and limits for their collection (article 29) and by establishing compensation modalities (articles 50 and 56).

In 2015, the ninth amendment to the Criminal Law established heavier penalties for violations of personal information protection duty for those people who committed the crime while performing work-related activities or while providing services.

On 27 July 2016, the General Office of the State Council and the General Office of the Central Committee of the Communist Party of China published the 'Outline of National Information Development Strategy' (*guojia xinxihua fazhan zhanlue gangyao*, 国家信息化发展战略纲要) which provided for 'moving forward with the construction of a rule of law in the cyberspace' by 'strengthening the protection of network users' rights, researching the formulation of a personal information protection law, and regulations to protect minors online' and to 'comprehensively standardize acts by enterprises involving in the collection, storage and use of personal information, and prevent information abuse'.

In 2017, the National People Congress promulgated the General Principles of Civil Law, where, in Article 111, it prescribed that 'any organization or individual needing to obtain the personal information of other persons shall legally obtain and ensure the security of such information, and shall not illegally collect, use, process, or transmit the personal information of other persons, nor illegally buy, sell, provide or publish them'. In the same year, the freshly promulgated Cybersecurity Law (*zhonghua renmin gongheguo wangluo anquan fa*, 中华人民共和国网络安全法) addressed data and personal information protection comprehensively at a national law level for the first time, with an unprecedented detailed regulation.

In 2018, the 'Personal Information Security Specification' (*geren xinxi anquan guifan*, 个人信息安全规范) was officially published.

In 2019, the 'Provisions on Cyber Protection of Children's Personal Information' (*ertong geren xinxi wangluo baohu guiding*, 儿童个人信息网络保护规定) were issued.

In the official draft of the future Civil Code, which will hopefully be promulgated in 2020, in the Third Part concerning the personal rights, the Sixth Chapter is entitled 'Right to privacy and personal information' and contains several meticulous dispositions in such matters.

As it is clearly shown in the brief outline above, Chinese efforts in regulating the legal framework of protection of personal information has been substantially increased in the past decades. The legislators' approach seems multidisciplinary, many provisions are disseminated in multiple levels and in different area documents. It is not just laws, but also white papers and administrative regulations, and new standards are aligned with the legal tools used to implement the rules.

### Privacy and Personal Information Protection Discipline

The Constitution of the People's Republic of China, doesn't provide a direct protection for privacy as understood in its broad meaning of a 'right to be alone' or a 'right to control your own personal information'.<sup>8</sup> According to some scholars, consequently, the Constitution provides inadequate protection, which can serve, at most, as a foundation for further developments (Cao, 2005, p. 660). The constitutional protection for privacy in China is currently very limited (Hao, 2011, p. 65). Comparatively, not

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8 The *Constitution*, instead, after prescribing, in its Article 37, that the freedom of the person of citizen is inviolable and that unlawful detention or deprivation or restrictions of citizen freedom same as unlawful search of the person is prohibited and affirming, in its Article 38, that '*the personal dignity of citizens of the People's Republic of China is inviolable*', clearly refers to the traditional 'right of confidentiality'; in its Article 39, by providing that '*the home of citizens of the People's Republic of China is inviolable. Unlawful search of, or intrusion into, a citizen's home is prohibited*', and to the 'right of privacy of correspondence', by its Article 40, providing that '*the freedom and privacy of correspondence of citizens of the People's Republic of China are protected by law. No organization or individual may, on any ground, infringe upon the freedom and privacy of citizens' correspondence except in cases where, to meet the needs of state security or of investigation into criminal offenses, public security or procuratorial organs are permitted to censor correspondence in accordance with procedures prescribed by law*'. Another interpretation could be the one that affirms that the *right of privacy* could be guaranteed in the Chinese legal system through the general clause contained in the Article 33 of the *Constitution* ('*The state respects and protects human rights*'), especially considering how the *right of privacy* has nowadays transcending the dimension of civil law (the *Universal Declaration of Human Rights*, in its Article 12 states that '*no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour or reputation. Everyone has the right to protection of the law against such interference or attacks*').

many Constitutions among those in force on the planet protect the right of privacy as intended in this extensive meaning.<sup>9</sup>

A notable legal development for data protection was made 1 June 2017 with the entering into force of the Cybersecurity Law<sup>10</sup> (hereinafter ‘CSL’) which provides, at the time of its adoption, the most widespread and comprehensive discipline regarding privacy and personal data protection in China. Its content is innovative and aligns the degree of protection to the highest standards by considering other countries’ legislations (*in primis* the European GDPR and the U.S. laws).

The CSL is a piece of legislation which has to be seen as a ‘part’ of wider plan of the Chinese legislator for establishing national security rules (Moriconi, 2019, 98). The purpose of the law is ‘guaranteeing cybersecurity, safeguarding cyberspace sovereignty, national security and public interest, protecting the lawful rights and interests of citizens, legal persons and other organizations, and promoting the sound development of economic and social informatization’ (Article 1). The Fourth Chapter is related to ‘Network Information Security’ but other provisions concerning the protection of data can be found in other dispositions of the law.

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9 According to a comparative analysis, made by checking in how many Constitutions of other countries is present the syntagma ‘right to privacy’, it can be found that it is present in 180 Constitutions of countries in the World. However, some of them just mention it relating its meaning to the traditional concepts of ‘privacy of correspondence’ or ‘domicile or home inviolability’ (like the *Constitution of Germany, 1949, rev. 2014*, the *Constitution of Italy, 1947, rev. 2012*, the *Constitution of the Democratic People’s Republic of Korea, 1972, rev. 2016*, the *Constitution of the Republic of Korea, 1948, rev. 1987*, the *Constitution of the Russian Federation, 1993, rev. 2014*, ) and some other legal systems, even if they don’t include it expressly in the Constitution, provide the guarantee of the right by other means (like the *Constitution of the United States of America, 1789, rev. 1992*, by using the *Amendment 9 – Construction of Constitution of the Constitution*, that clearly states that ‘*the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people*’). Very few countries clearly mention the protection of personal data (like the *Constitution of Portugal, 1976, rev. 2005*, in its Article 35: Use of Computers, the *Constitution of Spain, 1978, rev. 2011*, in its Section 18.4, the *Constitution of Switzerland, 1999, rev. 2014*, in its Article 13 – Right to privacy).

10 For completeness, regarding the legal framework prescribed by the CSL, it has to be pointed out how some other legal documents, guidelines and national standards, weekly published, are functional as a support to help organizations to comply with data protection obligations imposed under the Law, those are: the Draft Guidelines on Multi-Level Protection Scheme for Information Systems (released on June 27, 2018), the Draft National Standard of Information Security Technology – Guidelines for Personal Information Security Impact Assessment (released on June 11, 2018), the Draft National Standard of Information Security Technology – Guidelines on Data Security Capability Maturity Model (released on September 29, 2018) and the Draft Guideline for Internet Personal Information Security Protection (released on November 30, 2018).

The CSL defines personal information as ‘all kinds of information recorded in electronic or other forms, which can be used, independently or in combination with other information, to identify a natural’s person personal identity, including but not limited to the natural person’s name, date of birth, identity certificate number, biology-identified personal information, address and telephone number’ (Article 76.5) and what constitutes ‘network data’ (‘all kind of electronic data collected, stored, transmitted, processed and generated through the network’, Article 7.4).

Article 22 of the CSL prescribes the general duty, for all the products and services providers that collect user’s information, to explicitly notify their users and to necessarily obtain their consent. In the case where personal information is involved, there is a duty to comply with all the relevant law and administrative regulations regarding the protection of personal information. Article 37 sets another duty, but this time just for critical information infrastructure operators which collect or produce personal information or ‘important data’,<sup>11</sup> to store those inside the country, and in case that information and data are needed to be provided abroad for business reasons, it is necessary to conduct a security assessment, according to the measures provided by the Cybersecurity Administration of China in accordance with the relevant department of the State Council.

The Fourth Chapter (from Article 40 to Article 50), as previously discussed, is the core of the regulation regarding the protection of personal information. Specific requirements within each Article are described in the following:

Article 41 and Article 42 recognize the three essential features of the information (confidentiality, necessity and integrity), and in order to assure the safety of the collection of the information, ensure the guarantee of its legitimate use and of their subsequent protection.

Article 41 provides principles that must be followed by network operators while collecting and using information: the principle of legality (*hefa de yuanze*, 合法的原则), the principle of rightfulness (*zhengdang de yuanze*, 正当的原则) and the principle of necessity (*biyao de yuanze*, 必要的原则). Moreover, the CSL recognizes to any subject of ‘data treatment’ the right to asking the network operator to delete personal information which are collected or used ‘against the law’ (*contra legem*) and also the

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11 The meaning of ‘important data’ is not specified in the CSL, but according to the Cyberspace Administration of China, are those ‘data closely related to national security, economic development and social public interest’.

right to ask for corrections in case the personal information contains any error or mistake (Article 43).

Article 45 sets the duty for staff members of departments that assume cybersecurity supervision and administration functions to keep strictly confidential any personal information, privacy and commercial secrets to which they have access while performing their functions and the duty of not divulging, selling or providing such information to any other entity.

The CSL sets sanctions that must be applied in case of violations of the abovementioned disposition. The range is wide. In case of lighter violations, the authority can force to take corrective actions, give it a warning, confiscate the illegal income and impose a fine up to RMB 1.000.000 (approximately Euro 130.000) plus a fine from RMB 10.000 up to RMB 100.000 to the person directly responsible or another directly liable person (approximately Euro 1.300 and Euro 13.000 respectively). In case the circumstances are more serious, the authority can take measures such as suspending the relevant business operation, ceasing business operation for rectification, closing down the website or revoking the relevant business permit or business license.

In substance, the law is very innovative. It introduces into the Chinese legal system many new rules that push forward the framework of personal information protections and put them into a systematic order. It introduces for the first time the duty for service providers who collect personal information to explicitly notify and obtain the consent of the user in order to collect data. It officially recognizes three main structural elements of the data (confidentiality, necessity and integrity), it postulates the principles (of legality, rightfulness and necessity) that must be followed by operators that threaten data and recognise two important rights, the 'right to ask the deletion of an information illegally obtained' and the 'right to ask for modifying incorrect information' that make the safeguard of the individual more effective.

Other significant legal documents providing a detailed layout of the many aspects concerning the protection of personal information are: the 'Decision of Strengthening Online Information Protection' (effective from 28 December 2012), the 'National Standard of Information Security Technology – Guideline for Personal Information Protection within Information System for Public and Commercial Services' (effective from 1 February 2013) and the recent 'National Standard of Information Security Technology – Personal Information Security Specification' (effective from 1 May 2018, hereinafter, the 'Standard').

Looking from the perspective of the legal effects that those documents have within the Chinese legal system, it is worth noting that while the Decision has the same legal effect of a law and primarily provides a general overview of the guiding principles relating to data protection, the Guidelines and the Standard are ‘technical guides’, in the sense that they are not legally binding and that they cover by regulating in details, key issues such as data transfers, sensitive personal information and data subject rights.

Specifically, we will proceed by analysing the Standard,<sup>12</sup> which lays out granular guidelines for obtaining the consent for how personal information should be collected, stored, used, shared and transferred. In fact, the Standard is the most extensive document to date regarding the protection of personal information in China. In order to achieve a comprehensive understanding and to pursue a complete interpretation of the relevant dispositions, it has to be analysed as one of the systems created through the CSL.<sup>13</sup>

The Standard is composed of ten ‘chapters’ that include a total of forty-six points. The first two ‘chapters’ are respectively ‘The scope’ and ‘Normative references’, while the following section concerns the terms and definitions that are used in the legal document itself. By reading the provisions, is immediately clear how the Standard provides more detailed and meticulous rules than those in the CSL. Comparing the definition of personal information provided by the two documents, we find that the wording is the same, but in the Standard, and specifically in its Appendix A, a very extensive list of

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12 The most important legal act regarding the discipline of standards in China is the ‘Standardization Law of the People’s Republic of China’, promulgated the December 29th, 1988 and amended the January 1st, 2018. According to their binding force, the Law set four type of standards: ‘national standards’, ‘recommended national standards’, ‘group standards’ and ‘completely voluntary standards’. As shown in the classification of ‘GB/T’ of the ‘Personal Information Security Specification’, it falls in the category of ‘recommended national standards’, which, in terms of actual effectiveness, is between ‘compulsory’ and ‘voluntarily’.

13 Other systems are the ‘Content Management System’, the ‘Critical Information Infrastructure Protection System’, the ‘Network Product and Services Management System’, etc. Together they form the framework that regulates the Information and Communication Technologies (ICT) in China.

prototype of personal information<sup>14</sup> with the logic of the procedure of recognition of those information is provided.<sup>15</sup> This double approach allows inclusion of information into the category of personal information through two different patterns: some information is 'by definition' personal information, and another way, some information that may not be included in the list is 'reached' and then included into the category throughout a logical process.

Furthermore, the Standard, differently from the CSL, creates a sub-category of the general personal information that is constituted by that information that is 'sensitive'. According to Point 3.2, 'personal sensitive information' are those that 'once leaked, illegally provided, or abused, can threaten personal and property security and/or

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- 14 The list is very detailed and includes: **personal profile** (personal name, birthday, gender, nationality, nationality, family relationship, address, personal phone number, e-mail, etc.), **personal identity information** (ID card, officer card, passport, driver's license, work permit, pass, social security card, residence permit, etc.), **personal biometric information** (personal gene, fingerprint, voiceprint, palmpoint, auricle, iris, facial features, etc.); **network identity information** (system account, IP address, email address and password, passwords, password protection answer, etc.), **personal health physiological information** (relevant records generated by personal illness treatment, such as disease, hospitalization records, medical orders, inspection reports, operation and anaesthesia records, nursing records, medication records, drug and food allergy information, birth information, previous medical history, diagnosis and treatment, family history, current medical history, infectious disease history, etc., as well as relevant information generated by personal physical health, weight and height, vital capacity, etc.), **personal education information** (personal occupation, position, work unit, education background, degree, education experience, work experience, training record, report card, etc.), **personal property information** (bank account number, identification information, password, deposit information including fund quantity, payment and collection record, real estate information, credit record, credit information, transaction and consumption record, flow record, etc., as well as virtual property information such as virtual currency, virtual transaction, game exchange code, etc.), **personal communication information** (communication records and contents, SMS, MMS, e-mail, data describing personal communication, metadata, etc.), **contact information** (address book, friends list, group list, email address list, etc.), **personal online record** (it refers to the user's operation records stored through the log, including website browsing records, software use records, click records, etc.), **personal common device information** (it refers to the information describing the basic situation of personal common equipment, including hardware serial number, MAC address of equipment, software list, unique equipment identification code, such as IMEI/android ID/IDFA/OPENUDID/GUID, SIM card IMSI information, etc.), **personal location information** (including track, precise positioning information, accommodation information, latitude and longitude, etc.), **other information** (marriage history, religious belief, sexual orientation, unpublished criminal record, etc.).
- 15 The process is quite logic and coherent, in fact, in order to conclude that an information is a personal information there are two ways: the first one, through a process of 'identification', that is from information to individuals, from the particularity of the information itself to identify a specific natural person, in this case personal information should be helpful to identify a specific individual; the second one, through a process of 'association', that is from individuals to information, that is when, if a natural person is known, the information generated by the specific natural person in its activities is personal information. An information meeting one of those two conditions shall be determined as personal information.

easily cause personal reputational damage, physical and mental health damage, or discrimination'. For that kind of information, the focus is on the relevance of the interest that needs to be protected, that is to say, the individual and his properties that may be damaged by the uncontrolled spread of such information. Appendix B of the Standards indicates a general approach in order to recognize those types of information and provides a list of examples.<sup>16</sup>

Also, the Standard defines two main subjects of the collection of information: the personal information subject ('the natural person identified by personal information', Point 3.3) and the personal information controller ('an organization or individual that has the authority to determine the purposes and/or method of processing personal information', Point 3.4). After setting those two definitions, the discipline of some key-activities follows, such as the collection (Point 3.5), the acquisition of explicit consent (Point 3.6), the user profiling (Point 3.7), the personal information security impact assessment (Point 3.8), the deletion (Point 3.9), the public disclosure (Point 3.10), the transfer of control (Point 3.11), the sharing (Point 3.12), the anonymization (Point 3.13) and the de-identification (Point 3.14).

Some fundamental principles regarding the security of personal information security that should be followed by controllers are prescribed in Point 4 (the commensurability of power and responsibilities principle (that impose to bear the responsibility for the damages cause to the lawful rights and interests of the personal information subject caused by the personal information process); the purpose specification principle (that impose that the purposes of the process must be legal, justified, necessary and specified); the consent principle (in force of which is necessary to obtain the consent of the

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16 The list includes: **personal property information** (bank account number, identification information, password, deposit information, like fund quantity, payment and collection record, real estate information, credit record, credit information, transaction and consumption record, flow record, etc., as well as virtual property information such as virtual currency, virtual transaction, game exchange code, etc.), **personal health physiological information** (relevant records generated by personal illness treatment, such as disease, hospitalization record, medical order sheet, inspection report, operation and anaesthesia record, nursing record, medication record, drug and food allergy information, birth information, previous medical history, diagnosis and treatment situation, family medical history, current medical history, infectious disease history, and relevant information generated by personal physical health status, etc.), **personal biometric information** (personal gene, fingerprint, voiceprint, palmprint, auricle, iris, facial recognition features, etc.), **personal identity information** (ID card, officer card, passport, driver's license, work card, social security card, residence card, etc.), **network identity information** (system account, email address and password, password, password protection answer, user's personal digital certificate related to the above), other information (personal phone number, sexual orientation, marriage history, religious belief, unpublished criminal record, communication record and content, track, web browsing record, accommodation information, accurate positioning information, etc.).

personal information subject after expressly providing him with the purpose, method, scope and rules of the processing); the minimization principle (according to which only minimum type and quantities of personal information must be processed); the openness and transparency principle (by which the scope, purposes, rules of personal information should be open to public in an explicit, intelligible, and reasonable manner, and the outside supervision should be accepted); the ensuring security principle (by which is needed to possess the appropriate security capacity to safeguard the confidentiality, integrity and availability of personal information); the subject participation principle (by which means to access, correct and delete the personal information, to withdraw consent and to close accounts must be provided to the personal information subject). The Point 5 is related to the collection of personal information, provide requirements in order to operate a legitimate collection, rules about how to obtain the consent and some exceptional cases in which the consent is not required, it also sets guidelines regarding the request of explicit consent for the collection of personal sensitive information and for the publication of privacy policy.

The final points contain rules for the correct retention of personal information by collectors (Point 6), about the use (Point 7), about the delegated processing, sharing, transfer, and public disclosure of personal information (Point 8), on how to handle incidents (Point 9) and on the requirements for the organizational management (for example, it required to appoint a person responsible for PI protection and to designate a department in charge of PI protection, or to carry out PI security impact assessment, etc., Point 10).

As clearly stated, the Standard laid out a meticulous regime relating to personal information protection, in which the true will of the personal information subject is respected, and his interests are strongly protected. An objection can be made in the way that even if the rules provided by the Standard are more detailed and wide-ranged, they still don't have a binding force as the CSL does. Considering the specific legal and social system in which those rules are based, I will note that those rules can easily result in being implemented in force of the voluntary compliance of the enterprises and that, moreover, when laws, administrative regulations, mandatory standards, court or administrative decisions invoke them by quoting or by referring to them, they will gain a legally binding effect indirectly, and they will produce the same binding force as the documents that cite them. In determining the usefulness of the Standard, one can see this regulation as an important signal in releasing the will of Chinese government and legislators in striving to protect the security of personal information.

## A Case Analysis

In order to better understand the degree of protection accorded to the right of protection of personal information, it may be useful to have a look at some cases concerning the privacy right violation.

With the rapid development of technologies and the fast dissemination of information, a large number of issues concerning the protection of personal information starts to occur in the Chinese daily life. The improper spreading and use of personal information have gradually become a social issue harming the civil rights of citizens. Logically, most of the cases arise when customers buy goods or services by using an online platform.

In the ‘Pang Lipeng v. China Eastern Airlines Co. Ltd. and Beijing Qunar Information Technology Co. Ltd.’, a case of 2017, the dispute was over an infringement upon citizen’ right to privacy arising from online ticketing involving an airline company (China Eastern Airlines) and a famous online ticketing platform (Qunar). The plaintiff, having booked a flight through the online platform, received from an unknown mobile number fake information about his flight. He sued the company for having not assured an adequate protection of his personal information and let strangers access them. In this case, the divulged information of Pang Lipeng (name, mobile phone number and flight schedule) were caused by the airline and ticketing platform company’s negligence to take adequate precautions. Therefore, the judge decided they were at fault and that they shall assume their liability for the infringement.

In a similar case, the plaintiff ordered a flight ticket through a mobile phone app platform but his information (traveller’s name, flight date, landing place, flight number and reservation phone number) were leaked and consequently the customer was defrauded. The Court identified two relevant principles, the one that in the protection of personal information, the focus has to be in information identification relationship and not in the information itself and the other that in disputes arising from the companies’ use of personal information for business activities, individuals are in a weak position and so declared that the company in such a case has not fulfilled its obligation to keep and prevent leakage of personal information and should bear liability.

In another case, ‘Yan v. Beijing Sina Interconnection Information Service Co., Ltd. and Beijing Baidu Netcom Technology Co., Ltd.’, some Sina bloggers published articles in which a plaintiff’s personal information was disclosed to the public. The plaintiff sent to the two companies (Sina and Baidu) two letters and required them to take necessary measures such as deletion of those articles and providing the authors’ information.

But while Baidu did take such measures, Sina didn't. The People's Court of Haidian District, Beijing Municipality held that Sina should assume the legal consequences of this behaviour. This case is quite interesting in the way it shows how to find a balance between the interest of determining the identity of an infringer for allowing the plaintiff to maintain his right and the opposing interest of the Internet company to fulfil its duty of keeping confidential the information of its network users.

Since the CSL entered into effect, one of the largest fines targeted the operator Luoyang Beikong Water Group. When the company's remote data monitoring platform was hacked, law enforcement determined that their data had not been sufficiently secured, and subsequently the company was fined for RMB 80.000 and three managers a total of RMB 35.000.

Baidu, Alibaba and Tencent and other big players in China's internet have seen trouble over content moderation policies. In September 2017, the Cyberspace Administration of China fined Baidu and Tencent for failing to manage pornographic and violent content on their platform. In January 2019, Baidu, Alibaba and Bytedance's Toutiao were asked to meet with authorities for failing to respect their user right to know what data was collected.

By analysing the judgements concerning the application of CSL and other regulations it seems that the jurisdictional protection is quite efficient in the way it implements the rules.

## Conclusion and Perspectives

In order to draw some conclusions, it may help to address some reflections.

Firstly, the Western discussion on the right to privacy has in some degree influenced the discussion in China. Chinese laws and regulations on data privacy arrives some decades after than in the U.S. or in EU, but that doesn't have to be perceived negatively. In fact, Chinese scholars took Western experiences as a model giving them a factual advantage providing a solid basement for their original theorization and development. That is exactly what happened since the beginning: China started to develop its own framework through sectorial laws (like in the U.S.) while now, the country is on the path of enacting a comprehensive data protection law (like the EU).

Considering the theoretical development of the data protection scholarship, from a comparative perspective, American law pays more attention to the use of personal information to promote the development of data industry, and on the opposite European law is more focused on the protection of individual rights. China seems to follow a third way: it starts from the practical need of developing the data industry but also pays attention to the protection of individual's right in order to ensure an orderly and healthy development (Wang, 2019, 56).

Foreign experience is important but is not the only element of the process. As a well-known Chinese idiom says, it is important to adopt the Western knowledge for its practical uses while keeping Chinese values as the core. This idea is reflected in the way Chinese scholars are attempting to find the best legal approach to this phenomenon. In fact, during the academic discussion, some original ideas emerged. An example is the theory of the principle of “two-headed strengthening, three way-balance”<sup>17</sup>. Another unique pattern of the Chinese approach is evident in the way it affirms the principle of ‘cyberspace sovereignty’. One of the consequences of the application of this principle in the field of privacy and data protection is the regime of cross-border data transfer of personal information processed by critical information infrastructure (CSL, Article 37). In fact, those can be transferred out of the country only when it is strictly necessary and after passing a security assessment. A similar obligation to store personal information within the country is not found in either U.S. or EU law.

It is important to understand these policies are still developing. Currently, China doesn't have a comprehensive data protection law but the will of the government to work for it has been made clear on 10 September 2018, when the Standing Committee of the National People's Congress of China updated its legislative agenda and planned to enact it by March 2022. However, even without it, the general legal framework can be described as very effective and well-structured even if it lacks a systemic and cohesive approach. A good turning point has been made with the promulgation of the CSL; with its promulgation the protection of the online user's personal information entered into a new stage and this can be considered a valid temporary measure. It is innovatively, in that it separates personal information rights from privacy rights; it includes the

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17 In which ‘two-headed strengthening’ refers to differentiating between personal information and sensitive personal information in order to create value, in fact it allow to support the exploitation of the former and at the same time to strengthen the protection of the latter and ‘three way-balance’, refers to the necessary balance that has to be found between the interests of the individuals in the protection of personal information (which core is the freedom of personality and the respect of personal dignity), the interests of information collectors in the use of personal information (the core is to obtain economic benefits through business activities), and the public interest of the state management society.

protection of personal online information as a fundamental civil right and leverages its legal *status quo* and it seeks to establish the paradigm that Internet service providers, either individual or organizations, must undertake the responsibility for data protection.

While the CSL is currently the most authoritative law protecting personal information (it can be considered a milestone of data protection law in China), the Standard is the regulation that provides the most detailed guidance for compliance in information processing. The discussion on the effectiveness and function of Standards, fully reveals the complexity of personal information protection in China. Unlike the CSL that applies only to network operators, the Standard applies to all types of entities in China using information system to process personal data. Furthermore, with the Standard the stereotype that ‘Chinese government and companies are committed to collect personal data in order to create a social credit score for everyone’ falls and China can officially aim to become the frontrunner of privacy protection in Asia.

Moreover, the new adopted Civil Code of People’s Republic of China, approved on May 28, 2020 by the Third Session of the 13th National People Congress, specifically disciplines privacy and personal information protection. In the part of the code that regulates the personality rights (Book Fourth of the Civil Code), in the Chapter VI, there are eight articles (from Article 1032 up to Article 1039) in such matters. The new code prescribed protection for personality rights as an independent compiled part. That is an innovation that maximizes and strengthen the protection of those rights within the Chinese civil law system. From the substantial perspective the provisions of the Code don’t prescribe anything different from what the CSL and the Standards stipulate. They are innovative in the way they find a systematic position within the Chinese Civil law system for those rights (to privacy and to personal information protection).

Finally, even if it is right to look into the future of personal information protection, it is also important to give attention to the unsolved issues that are still on going. For example, the interpretation of Article 111 of the General Principles of Civil Code; for some, the enactment of this Article implies that China endorses citizen’s fundamental right to ‘information self-determination’, others argue that this article only admits the need for personal information protection and does not mention the right to personal information as a fundamental right.

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# Chinese Localization of the Right to Be Forgotten

Chen Zeng<sup>1</sup>

**Abstract:** The right to be forgotten is a new trending right that originated from the European Union and is transferring to China. To break down the Bentham's panopticon of comprehensive digital memory, it is necessary for China to adopt the right to be forgotten. While the Chinese legal framework of personal information has not been completed yet, the Draft of Personal Information Law implies a focus on duties of controllers and interests of minors. By analysing possible legal attributes of the right to be forgotten, it can be noted that typifying the right to be forgotten is essential, but the problem of exercising limitation and of the asymmetric information market have not been solved. To tackle these problems, one solution is to specify the requirements of the government, the organization and the information subject with balance; the other is to perfect the right to be forgotten referring to the Informed Consent Principle and complement other principles to support the entire personal information protection system.

**Keywords:** the right to be forgotten; China; asymmetric information market; Informed Consent Principle

In 2014, the European Court of Justice (ECJ) entitled a Spanish citizen the right to make his old bankruptcy records forgotten from the Internet and ordered Google Spain to adopt measures to de-index personal data.<sup>2</sup> This event marked the establishment of the right to be forgotten and enabled individuals in the European Union (EU) to require search engines to clear out links containing personal data. In 2019, the ECJ added that Google assumed no obligation to practice the European right to be forgotten worldwide,<sup>3</sup> which restricted the territorial scope of the right to be forgotten within the EU.

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2 Infocuria-Case-Law of the Court of Justice. (2014). *Google Spain SL v. Agencia Española De Protección De Datos*. [online] Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN>.

3 Infocuria-Case-Law of the Court of Justice. (2019). *Google v. CNIL Case C-507/17*. [online] Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=218105&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6915504>

Although the right to be forgotten mainly takes effect in the EU, it has far-reaching influence globally, including upon China. Therefore, this paper aims to assess the Chinese adoption of the right to be forgotten, to reflect on legislative problems and to put suggestions forward.

## Reasons for Chinese Adoption of the Right to be Forgotten

### Narrow and Broad Right to Be Forgotten

David Lindsay explains that the right to be forgotten is “reserved for a right to have online personal data removed, or to have access to that data restricted... and incorporates rights relating to the removal of data from search indexes and digital archives.”<sup>4</sup>

Nonetheless, the generalized right to be forgotten goes well beyond the narrow form established by the ECJ. The legal sense of “to be forgotten” first appeared in criminal law. Take the UK Rehabilitation of Offenders Act 1974, for example. Offenders who committed misdemeanours and performed well in prison could have their criminal records expunged upon the completion of their sentences. Additionally, the right to deletion,<sup>5</sup> a passive right, may also be considered as part of the right to be forgotten in a broad sense. The main differences between the right to deletion and the narrow right to be forgotten lie in the conditions of exercise, the forms of exercise and the degrees

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4 See Normann Witzleb (2014). *Emerging challenges in privacy law: comparative perspectives*. Cambridge, United Kingdom: Cambridge University Press.

5 According to Organization for Economic Cooperation and Development (“OECD”), the right to deletion provides individuals to “challenge data relating to him and, if the challenge is successful to have the data erased, rectified, completed or amended.” Oecd.org. (2013). *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data - OECD*. [online] Available at: <https://www.oecd.org/internet/ieconomy/oecdguidelinesonthe-protectionofprivacyandtransborderflowsofpersonaldata.htm> [Accessed 27 Nov. 2019]. Also, Cac.gov.cn. (2012). *Cyberspace Administration of China: Decision of the Standing Committee of the National People’s Congress on Strengthening Network Information Protection*. [online] Available at: [http://www.cac.gov.cn/2012-12/29/c\\_133353262.htm](http://www.cac.gov.cn/2012-12/29/c_133353262.htm) [Accessed 27 Nov. 2019]. Article 8 provides the definition of the right to deletion: “Where a citizen finds any network information that discloses his or her personal identity, spreads personal privacy or infringes upon his or her lawful rights and interests, or is disturbed by commercial electronic information, he or she shall have the right to ask the Internet service provider to delete the relevant information or take other necessary measures to stop it.”

of implementation.<sup>6</sup> The connotation of the right to be forgotten is still in the stage of being enriched and developed. For instance, scholars in the United States once set the right to obscurity,<sup>7</sup> which makes information difficult to find through a series of complex technologies rather than directly erase or block information, to avoid the risk that the European right to be forgotten is unconstitutional. Due to the various forms of the right to be forgotten, this paper will distinguish between the broad and the narrow right to be forgotten for examination.

### China's Necessity to Adopt the Narrow Right to Be Forgotten

China has in fact already implemented the right to deletion,<sup>8</sup> in the broad sense of the right to be forgotten. This shows that realistic demands of the broad right to be forgotten have been embodied in the legislation. Thus, the question is this: "Why is it necessary for China to adopt the narrow right to be forgotten?"

The rationale starts with the human instinct to forget. Human beings have been accustomed to forget as time flies, but digitalization makes it possible for all information to be stored in the digital index, motivating people's ability to remember to a permanent extent.

As Mayer-Schonberger claimed,<sup>9</sup> information in the digital index is associated with power. It is "accessible, durable and comprehensive." Indeed, data subjects lose their power to control personal information because everyone can approach it. Wide accessibility and long duration of digital information generate Mathew Effects between the information rich and information poor, even negating the latter's perception of their past. Comprehensive digital memory would impound people in Bentham's panopticon, where they have no idea whether their utterance is accessed. As a result, they have to

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6 From the perspective of conditions of exercise, the right to be deletion requires the data subject to provide evidence that the data controller violates laws, regulations or agreements, while the exercise of the narrow right to be forgotten is to prove that the personal information are inadequate, irrelevant and harmful, and that the data to be forgotten does not harm the public interests. From the perspective of the forms of exercise, the right to deletion is a passive right when the individual's rights and interests are infringed, while the narrow right to be forgotten is an active right that an individual can exercise spontaneously. From the perspective of the degrees of implementation, the right to deletion requires the data controller to completely wipe out the original data, while the narrow right to be forgotten only requires the data controller to prevent others from accessing the personal information.

7 See Selinger, E. and Woodrow, H. (2014). *Obscurity and Privacy. Routledge Companion to Philosophy of Technology.*

8 *Supra* note 4.

9 See Viktor Mayer-Schönberger (2011). *Delete: the virtue of forgetting in the digital age.* Princeton (New Jersey): Princeton University.

assume the worst situation that whatever they post on the Internet has already been accessed. Internet users are aware they are “living with a historical record” and take care of “how they talk, how they interact, what they offer of themselves to others.”<sup>10</sup> The demise of forgetting could alter the whole society to a censored society which has a chilling effect on free expression.

Unfortunately, Chinese Internet users, numbering 854 million as of 2019,<sup>11</sup> are now facing Bentham’s panopticon due to the rising populist sentiment and nationalist sentiment in the recent decade.

As Liu Xiaolong described, China’s Internet populism is a result of drastic social transformation, lack of political trust, growth of emotions of resentment, and cyberspace-revelry catharsis.<sup>12</sup> The unfortunate and the poor always have a louder voice in public opinion, because they constitute a large population and are more easily to elicit resonance. Expressing hostility to the elite is a way for them to unite and search for common topics. They like to accuse the elite without distinguishing wrong and right, thus causing a Tacitus Effect: if the subject involved is elite, to speak the truth or to lie, to do good or to do evil, is to be regarded as lying and doing evil. People like to uncover the elite’s past, searching for any tiny trace, in order to vent their anger through criticisms. For example, in 2020, Mars Q, a famous debater who graduated from the Chinese University of Hong Kong, was exposed to deliver an inappropriate speech in 2013, at the time of Occupy Central.<sup>13</sup> However, back then, she just expressed her anger about misinterpretation by mainlanders by saying they used menopausal-woman logic. If the elite has a right to be forgotten, they will not be afraid to freely express their opinions about public issues and to promote social progress. The narrow right to be forgotten will guarantee the elite’s safety of free expression and help them escape from Bentham’s panopticon.

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10 Personal democracy.com. (2013). *Personal Democracy Forum 2007 | Personal Democracy Forum*. [online] Available at: <https://personaldemocracy.com/conferences/nyc/2007> [Accessed 27 Nov. 2019].

11 China Internet Network Information Centre. (2019), *Statistical Report on Internet Development in China*. [online] Available at: <http://www.cac.gov.cn/2019zt/44/index.htm> [Accessed 12 May. 2020].

12 See Liu, X. (2019). Multiple Causes and Network Aggregation: The Mechanism of the Generation of China’s current Internet Populism. *Theory and Reform*, (4), pp.47–57.

13 Occupy Central was an occupation protest, which took place in Central, Hong Kong and lasted from 15 October 2011 to 11 September 2012. The Occupy movement is an international protest movement against social and economic inequality. Its primary goal is to make society’s economic structure and power relations more fair. Available at: [https://en.wikipedia.org/wiki/Occupy\\_Central\\_\(2011%E2%80%932012\)](https://en.wikipedia.org/wiki/Occupy_Central_(2011%E2%80%932012)), [Accessed 9 July. 2020].

Because of rising nationalism, tracing personal history is not only for the elite, but also for common people. Lots of “Big Reports” referring to “unpatriotic” people have emerged in recent years.<sup>14</sup> Patriotism could become a tool for personal revenge, even though the accused person conducted no unpatriotic behaviours. For instance, in 2018 Chen Yifa, a popular live-broadcast host, was reported to have joked about the Nanjing Massacre in 2016, before she was well known. Nationalist reports prevent free discussions of social problems, deteriorate the democratic atmosphere and appeal to hatred. Therefore, the narrow right to be forgotten is a remedy to confront soaring personal reports.

Considering the function of the narrow right to be forgotten to secure free voices and hold back nationalist reports, it is necessary for China to adopt the right to be forgotten.

### Chinese Legal Framework of the Right to be Forgotten

As mentioned in part 1, the right to be forgotten should allow people to freely express and prevent private reports of “unpatriotic” speeches. This section will assess what the current Chinese legal structure of the right to be forgotten is and see whether it is well-rounded.

Chinese Constitutional Law established the norm of the right to information protection in two Articles regarding human rights and the right to personal dignity. Article 33 claims “the state respects and protects human rights,” which empowers people to protect personal information based on the nature of human beings. Furthermore, Article 38 provides “the personal dignity of citizens of the People’s Republic of China is inviolable,” which permits people to claim personal dignity of information self-determination. Based on the constitutional value, Sun Ping proposed that the personal information right should be set as a fundamental right to prevent the infringement of personal information by power and adjust the structure of law and power.<sup>15</sup>

Nevertheless, Chinese lawmakers concentrate more on the government as a supervisor in relation to the information subject and the enterprise controller, ignoring the need for restrictions of its own information-using behaviour regarding administrative

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14 See Mei, X. (2019). *Big Report Era Is Coming*. [online]. Available at: <http://www.21join.com/index.php?m=content&c=index&a=show&catid=9&id=1458>, [Accessed 12 May, 2020].

15 See Sun, P. (2016). Systematically Construction of Legislation about Personal Information Protection in a Fundamental Right Model. *Law Science*, 4, pp.67–68.

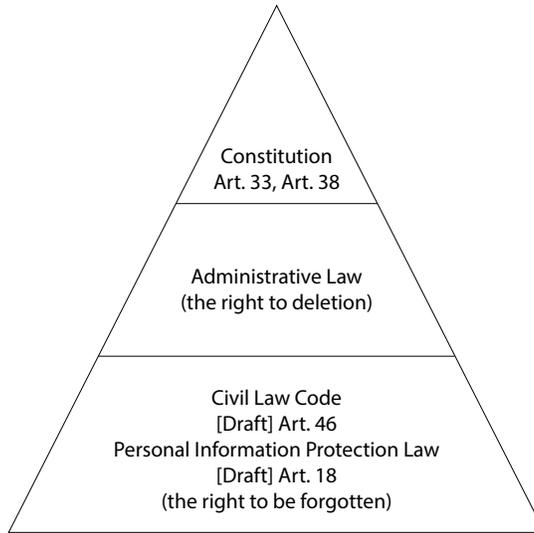


Figure 1. The Legal Structure of the Right to Be Forgotten.

regulations. For example, the lawmakers regulate the right to deletion in *Decision of the Standing Committee of the National People's Congress on Strengthening Network Information Protection*,<sup>16</sup> governing enterprise information controllers without governing the administration itself.

Additionally, Chinese civil legislation highlights the adoption of the right to be forgotten. In 2017, the draft of the personality right part in the Chinese Civil Code regulated a right in Article 46 resembling the right to be forgotten.<sup>17</sup> On Sept 10, 2018, the coming Personal Information Protection Law Draft also recognized the right to be forgotten in Article 18: "With the satisfaction of the statutory or prescribed conditions, the information subject can request the information processor to unconditionally

16 *Supra* note 4.

17 See Law-lib.com. (2020). *Civil code of National People's Congress of China*. [online] Available at: [http://www.law-lib.com/law/law\\_view.asp?id=689068](http://www.law-lib.com/law/law_view.asp?id=689068) [Accessed 28 May. 2020]. "Under any of the following circumstances, a natural person may, according to law, require the information holder to take such necessary measures as deleting his/her personal information in a timely manner: (1) the information holder illegally collects or uses his personal information; (2) information holders hold information that infringes upon their legitimate rights and interests; (3) there is an expiration of the information storage period prescribed by laws and administrative regulations; (4) it is no longer necessary for the information holder to hold his personal information according to the specific purpose for which the information is collected or used; (5) other circumstances as provided for by laws or administrative rules and regulations or with justifiable reasons."

disconnect any link with the personal information and destroy the copies of the personal information.”

The precondition of Article 18 in the Draft is incomplete and ambiguous. On one hand, the draft did not mention any clear statutory conditions of implementation of the right to be forgotten. Perhaps it is because the draft is not a developed thought. On the other hand, and more importantly, it implies that the information subject and the information processor could prescribe the conditions of exercising the right to be forgotten in the agreement, which could give information subjects more space to apply the right to be forgotten.

Moreover, the expert proposal gives an insight into the whole scale of the Chinese right to be forgotten.<sup>18</sup> First, it distinguishes between information practitioners of platform service and search engine, and it delegates more notification obligation to the former. Furthermore, it is particularly concerned about interests of minors and writes clear requirements about this in the text of expert proposal. Therefore, it is suggested that information practitioners should bear weighty responsibility for the erasure of personal information, and in particular, children are key protected targets.

## Problems in View of the Legal Attribute

Now that China's necessity to adoption of the right to be forgotten and Chinese current legal structure has been discussed, the following section focuses on the review of

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18 “In the following situations, if the information subject believes that the personal information on the Internet is inaccurate, irrelevant or infringes his or her legitimate rights and interests, and is unrelated to the public interest, the information subject shall have the right to request the information practitioner to take necessary measures such as deleting, blocking or disconnecting:

- (a) Upon receipt of notice from the information subject, information practitioners that work on platform service, once affirm the personal information is unrelated to public interests, shall take timely measures to delete, block, or disconnect the information content, and help the information subject to inform other links or information practitioners that copied the information to take the necessary measures.
- (b) Upon receipt of notice from the information subject, information practitioners that work on search engine, once affirm the personal information is unrelated to public interests, shall take timely measures to delete, block, or disconnect the information content
- (c) Where a minor or the guardian requests the information practitioners to delete or block the minor's personal information on the Internet, the information practitioner shall promptly take such necessary measures as deleting, blocking or disconnecting the minor's personal information.”

See Zhang, X and Ge, X. (2019). *Personal Information Protection Law (Expert Proposal)* [online]. Available at: <http://www.mpaypass.com.cn/news/201910/18093801.html> [Accessed 12 May, 2020].

possible legal attributes of the right to be forgotten in order to figure out the problem of use-limitation and asymmetric information market.

### First Case: Viewing the Right to Be Forgotten as a General Personality Right

In July 2015, Ren Jiayu, a senior human resources specialist, filed a lawsuit against the search engine Baidu in Haidian District People's Court (Haidian Court) in Beijing, accusing Baidu of violating his right to reputation, right to name and "right to be forgotten." This is the first case of the right to be forgotten in China.<sup>19</sup> When the plaintiff entered his name into the Baidu search engine, the words "Tao Education Ren Jiayu" appeared at the bottom of the search page. In light of the bad reputation of Tao Education, such an associated keyword will cause great damage to Ren Jiayu, so the plaintiff asked Baidu to delete it and compensate for his losses. However, the first and second instance courts did not support the plaintiff's claim.

When it comes to the "right to be forgotten" claimed by the plaintiff, the court held that although the right to be forgotten was not a concrete personality right, it could be assessed with the elements of the general personality right: (1) it was not a concrete personality right; (2) the legitimacy of its interests; and (3) the necessity for protection. With condition (1) met, the court was unable to approve the plaintiff's subjective evaluation of Tao Education's goodwill and believed that Ren's intention to conceal his business experiences from potential clients on the Internet did not have the legitimacy or necessity of protection, so the court rejected the plaintiff's claim.

Whether the court's logic was sound is debatable.<sup>20</sup> In terms of a general personality right, the argumentation structure of the right to be forgotten should include the following: (1) judging whether it constitutes a tort according to the corresponding elements, and (2) determining whether the other party's defence constitutes the exemption. In *Ren Jiayu v. Baidu* case, the court took the defence of the customer's right to know as the corresponding element to constitute a tort and denied the necessity of protection of the right to be forgotten, which actually confuses the aforementioned logical reasons.

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19 See Beijing No. 1 Intermediate People's Court. (2015). *Ren Jiayu v. Baidu*. Available at: <http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=789e76ed-c08441bb8e75a092cba58912>; Beijing Haidian District People's Court. (2015). *Ren Jiayu v. Baidu*. Available at: <http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=43d8366cc47f41beba7769f1ce688973>. [Accessed 12 May. 2020].

20 See Yu, Y. (2018). The Logical Deduction and Reasoning Construction of the Right to be Forgotten from the Perspective of Judicial Judgment—Based on the First Chinese the Right to be Forgotten Case. *Northern Legal Science*, (2), pp.34–44.

The court also begged a problem that should be addressed: Is the plaintiff's right to be forgotten justified? This is a problem that needs to be interpreted in context of the constitution,<sup>21</sup> but Haidian Court, as a primary court, does not have the power to interpret the constitution, so the judge avoided assessing a justification of the right to be forgotten in the judgment document.

As a result, *Ren Jiayu v. Baidu* reveals that viewing the right to be forgotten as a general personality right would not provide adequate protection of personal information for individuals, not only because the distribution of the burden of burden is unbalanced, but also because courts are unable to examine the legitimacy of the interests. It shows that classifying the right to be forgotten, maybe as a part of the concrete personality right, is very necessary with respect to protection of interests.

#### Major Academic Perspective: Viewing the Right to Be Forgotten as a Concrete Personality Right

In regard of the problem that viewing the right to be forgotten as a general personality right could not protect personal information subjects, the majority of Chinese academics assume that the right to be forgotten should be recognized as the right to personal information<sup>22</sup> and that the personal information right should be a concrete

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21 According to the EU case of *Google Spain SL v. Agencia Española De Protección De Datos*, in view of the legitimacy of the right to be forgotten, the court discussed the two human right values of privacy and information self-determination in accordance with Article 7 and 8 of the European Convention on Human Rights.

Before there were search engines, personal information was not easy to capture. The intervention of search engine enables any network user to identify a data subject completely by searching information. For example, the results of a name search can potentially reflect every aspect of someone's life, which proves that the operation of search engine processing data is easy to violate the fundamental rights of data subjects such as privacy right and freedom of expression. In addition, a search engine plays an important role in the dissemination of information in modern society. It makes information ubiquitous and thus enhances the interference with individuals' rights. Such interference is potentially so serious that the economic interests of the search engine cannot balance its negative impact.

22 Because in China, personal information right is analogous to European data right, similarly the right to be forgotten is mostly considered as a type of personal information right.

personality right,<sup>23</sup> so it is important to examine relationships of these rights and privacy rights in civil law.

American Scholars Warren and Brandeis in 1890 described “privacy right” as the right to enjoy life and the right to be let alone.<sup>24</sup> This right to privacy was later elevated by the Supreme Court of the United States to a constitutional right to privacy.<sup>25</sup> However, the Chinese privacy right is not a constitutional right in a strict sense, but only a concrete personality civil right. It only emphasizes privacy interests such as preventing disturbance or the privacy of physiological information and family life, but excludes some interests protected by other Chinese concrete personality rights, such as right to name<sup>26</sup> (protecting name privacy) or right to portrait<sup>27</sup> (protecting portrait privacy).

Although Chinese right to privacy comprises a small scope, a behaviour could violate the right to privacy and the right to personal information at the same time. However, the privacy right is a negative and defensive right that mainly stresses mental rest. Before

- 23 See Wang, L. (2012). The Status of Individual Information Right in Person Right Law. *Suzhou University Journal (Philosophy and Social Science)*, 33(6), pp.68–75. “Individual information cannot be divided from individual personality, and it shows various personalities, so individual information right is a new personality right.” Wang thinks the main features of personal information right is its personality attribute, instead of property attribute: on the one hand, personal information is identifiable, reflecting the personality characteristics, like name, gender, phone number, or family address; on the other hand, many organisations collect personal information not for the purpose of property use, but for the public interest or other non-financial interests. Furthermore, he claims personal information right should be protected as a concrete right of personality. First, personal information right has the concrete right object, personal information. Secondly, the object of the right of personal information is so rich that should not be generalized by other rights including right to name, right to portrait or right to privacy. Thirdly, specifying personal information right is beneficial to provide effective legal protection. If the right to personal information is regarded as a property right, when it is infringed, the calculation of damages will vary according to different individual identities. This will not happen when it comes to a concrete personality right. Last, Wang believes that viewing personal information right as a concrete personality right is helpful to respect people’s dignity.
- 24 Warren, S.D. and Brandeis, L.D. (1890). The Right to Privacy. *Harvard Law Review*, 4(5), p.193.
- 25 Supreme Court of the United States: *Griswold v. Connecticut*, [online]. Available at: <https://supreme.justia.com/cases/federal/us/381/479/> [Accessed 12 May, 2020]
- 26 See Article 99 of General Principles of the Civil Law of the People’s Republic of China: “Citizens shall enjoy the right of personal name and shall be entitled to determine, use or change their personal names in accordance with relevant provisions. Interference with, usurpation of and false representation of personal names shall be prohibited. Legal persons, individual business and individual partnerships shall enjoy the right to name. Enterprises as legal persons, individual businesses and individual partnerships shall have the right to use and lawfully assign their own names.” Available at: [http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content\\_4470.htm](http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4470.htm). [Accessed 9 July, 2020]
- 27 *Ibid.* Article 100: “Citizens shall enjoy the right to portrait. The use of a citizen’s portrait for profit without his consent shall be prohibited.”

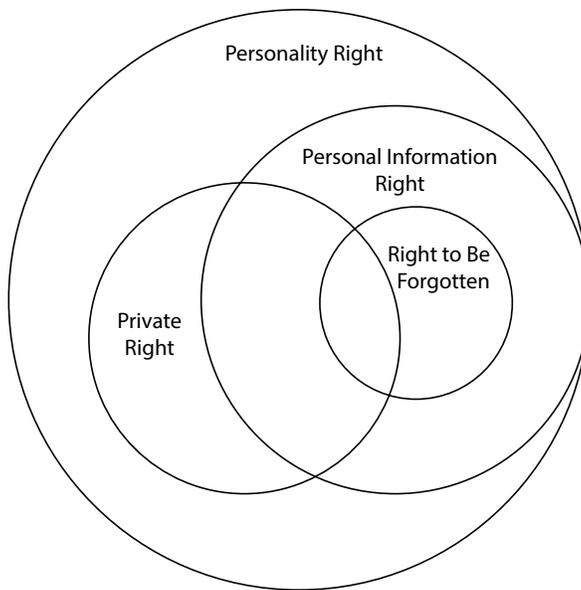


Figure 2. Relationships among Chinese Right to Be Forgotten, Personal Information Right, Personality Right and Privacy Right.

the infringement, a person cannot actively exercise the right. By contrast, the personal information right refers to the control of self-information and is an active right that affirms both personality interests and privacy interests.<sup>28</sup>

Therefore, Duan Weili offered a compatible interpretation of the position of the right to be forgotten by citing Wang Liming's theory about the relationship between privacy right and personal information right.<sup>29</sup>

This interpretation, which reconciles some theoretical contradictions in the civil law, limits the use of the right to be forgotten, reducing the necessity of its existence. Scholars Yang Lixin and Han Xu believe that the Chinese right to be forgotten applies the principle of fault liability, and that the judgment of the right to be forgotten should rest on four elements (illegal act, loss, causality and fault), which is similar to

28 *Supra* note 21.

29 Duan Weili (2016). How to Protect the Right to Be Forgotten\_The Position of the Right to Be Forgotten in Personality Right System. *Study & Explore*, 4(1002–462X).

the judgment of other concrete personality rights.<sup>30</sup> Similarity leads to the restraint of the exercise of rights. When the infringed interests are the overlapping interests of the right to be forgotten and the right to privacy (or other concrete personality right), the infringed can choose the right to privacy as the basis of the right to claim, so as to improve the probability of winning. Furthermore, if the infringed interests do not belong to the protection scope of other concrete personality rights but only in the protection scope of the right to be forgotten, the plaintiff's burden of proof could be as heavy as Ren Jiayu had. To be more specific, the four elements of the right to be forgotten should be satisfied, and the negative condition that the interests do not belong to the right to reputation, right to name, right to privacy or other concrete personality rights should also be satisfied, which restrains the application space of the right to be forgotten. There is neither simplicity of operation nor significance of effect. Therefore, the limited scope of the right to be forgotten needs further theories to explicitly regulate the elements of the right to be forgotten and make up for this limitation.

Also, due to the restraint of the specific information subject, the right to be forgotten, as a post-remedy to a particular object, has its limitations. The exercise of the right to be forgotten relies on the specific information subject to identify the damage caused by infringement, which tends to be independent and a one-time relief. However, network infringement is usually systematic and complex. The infringement process is not easy to identify, and the infringed information is often uncertain of multiple subjects.

First of all, the information subject's cognition of information processing is limited, and they may not know that they can or should exercise the right to be forgotten. Most information subjects do not know their personal information has been collected when they use the website, and even if they do, they do not understand how personal

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30 See Yang, L. and Han, X. (2015). Chinese Localization and Law Application of the Right to Be Forgotten. *Journal of Law Application*, (2), pp.24–34.

"Illegal act: the infringer is the information controller who violates the act obligation of the right to be forgotten.

Loss: the information that should be deleted is not deleted in time, so that the continued existence of the information on the network has caused lasting damage to the reputation and social evaluation of the information subject.

Causality: before the right to be forgotten is exercised, the inadequate and outdated information about the information subject already existed on the Internet has caused the occurrence of damaging results; after the information subject exercises the right to be forgotten and requests the information controller to delete the relevant information, the information controller fails to delete due to the omission of the information controller, which results in the "further" expansion of losses and continues to reduce the social evaluation of the information subject.

Fault: a deliberate or negligent fault."

information is collected, transferred or shared.<sup>31</sup> This knowledge blindness of information processing makes the information subject uncertain whether he or she can exercise the right to be forgotten, which leads to the failure of the relief of the right to be forgotten.

Secondly, there is information asymmetry between the information collector and the collected, and the holder of the right to be forgotten may not know the scope of his rights and applicable conditions. Information collectors do have the potential to engage in “smokescreen tactics”<sup>32</sup> that make it difficult for individuals to know exactly how data is being processed or used. For example, they could design long, difficult and complex sentences and paragraphs in the “privacy agreement” that users must check in advance to make the agreement less readable.<sup>33</sup> In order to use the site as quickly as possible, users are likely to scan through the contents of the privacy agreement without knowing when, where or how they could practice the right to be forgotten.

Therefore, setting four elements of the right to be forgotten referring to the liability fault principle narrows the use of right to be forgotten. As the right to be forgotten should be exercised by a particular information subject, it is essential to expand the applicable conditions of the right to be forgotten by explicitly classifying the constitutive elements.

### Minor Academic Perspective: Viewing the Right to Be Forgotten as a Property Right

Some scholars have paid attention to the property attribute of personal information.<sup>34</sup> For example, they categorize personal information as basic personal information,

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31 See Solove, D.J. (2013). Privacy Self-Management and the Consent Dilemma. *Harvard Law Review*, 126, pp.1880–1903.

32 See Janger, E.J. and Schwartz, P.M. (2002). The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules. *Minnesota Law Review*, 86, p.1219.

33 Take Taobao Privacy Agreement for instance. It has 13953 Chinese characters, which is almost equivalent to that of Chinese Constitutional Law.

34 Representative essay see: Xing, H. (2019). Mechanisms for Distribution and Realization of Personal Information Property Rights Under Background of Big Data Transactions. *Law Review*, 37(6), pp.98-110.

associated personal information, and anticipated personal information and make a distinction of ownerships.<sup>35</sup>

In fact, the idea of viewing personal information as property mainly comes from the United States. The information privacy right<sup>36</sup> is the right granted to the information subject in order to protect the public good of the “privacy community.”<sup>37</sup> In the “privacy community,” anonymous and semi-anonymous information interact, and people exchange information with each other, which is conducive to promoting democratic consultation and increasing individual autonomy. Scholar Paul Schwartz proposed that in order to establish a healthy privacy market, information privacy should be regarded as “a bundle of interests,” which should be shaped through legal attention to five areas: inalienability, defaults, rights of exit, damages and institutions.<sup>38</sup> He thought the information subject should have the right of exit in the privacy market. As far as the privacy market is concerned, the right of exit is conducive to increasing people’s opportunities to protect privacy and to preventing deceptive information controllers. At the same time, the right of exit also makes it possible for personal information to re-enter the market, reducing the costs of information repeatedly entering and leaving the market. From this perspective, the right to be forgotten can also be regarded as a right of exit, enabling the information subject to withdraw personal information from the public space and correcting the imbalance of power between buyers and sellers in the privacy market.

Nevertheless, this paper holds that the to-be-forgotten right of exit still faces risks. First, information subjects have different expectations on the transactional price of personal information, so the degree of willingness to exercise the right to be forgotten is also different. In the seller’s market, some people care about information privacy and consider the price of personal information as “A.” Other people do not care about information privacy, and the price of their personal information is “B” (lower than that

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35 *ibid.* “The property rights of Basic Personal Data belong to individuals wholly, while the property rights of Associated Personal Data and Anticipated Personal Data are shared between individuals and information companies; however, in the property rights of Associated Personal Data, the share of individuals is greater than that of information companies; in the property rights of Anticipated Personal Data, the share of the information companies is greater than that of individuals.

36 In the United States, they usually call the personal data right or personal information right as information privacy right.

37 See Schwartz, P.M. (2013). The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures. *Harvard Law Review*, 126, pp.1966–2009.

38 See Schwartz, P.M. (2004). Property, Privacy, and Personal Data. *Harvard Law Review*, 117, p.2056.

of A). In the real information privacy market, the buyer obtains all the sellers' personal information at the price of B with the help of technical means, thus causing the seller's deadweight loss at the macro level and the failure of information privacy market. The same proportional relationship appears in the exercise of the right to be forgotten, so when more concerned about the privacy of information, people are more likely to exercise the right to be forgotten. Conversely, the person who originally sold the personal information at a lower price is less likely to exercise the right to be forgotten, and therefore, the failure to raise the minimum seller's price will not rebalance the unequal market between the buyer and seller. Secondly, in terms of the public welfare "privacy community," the purpose of the right to be forgotten is to reduce the circulation of personal information in the public domain, which may cause damage to the "privacy community" constituted by anonymous or semi-anonymous information.

It seems that if some information subjects do not raise their awareness of data protection, the information subjects as a whole cannot guarantee a fair information price. In the game between the information collector and the collected, consciousness of personal information protection affects the collective rights and interests of the information subjects. When the information collector intends to obtain personal information at a low price, those with a weak sense of personal information protection become the target. At the same time, when the information collector is able to obtain personal information at below-market prices, they tend to invest less in technology and services, further weakening sellers. Behavioural economics argues that consumers' general inertia to default terms is a pervasive and severe constraint on free choice.<sup>39</sup> Thus, the sloth of some information subjects in exercising the right to be forgotten could not change the imbalance between buyers and sellers.

In light of economic analysis, the establishment of the right to be forgotten has little effect on rebalancing the privacy information market, and there needs to be some supports from higher-level laws or principles.

## Solution

To solve the problem mentioned above, this section puts forward two suggestions that would promote the practical implication of the Chinese right to be forgotten.

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39 See Kahneman, D., Knetsch, J.L. and Thaler, R.H. (1990). Experimental Tests of the Endowment Effect and the Coase Theorem. *Journal of Political Economy*, 98(6), pp.1325–1348.

### Balancing the Triangle Relationship

Traditionally, the government often acts as a mediator to determine the damage and compensation between the infringer and the infringed. However, the discussion of personal information right should start from the tripartite relationship among the government, the organization and the information subject, since the government and the organization may become both protector and infringer of personal information. Therefore, when the right to be forgotten is in discussion of different ways, its applicable conditions and the exemption conditions of personal information controllers should be different.

The “Balancing Three Parts” theory proposed by professor Zhang Xinbao<sup>40</sup> provides an analytical approach – that is, a balance should be reached among the personal dignity interests of individuals on personal information, the economic interests of organizations in the use of personal information, and the public interests of the state in the management of society.

In regards to “government-personal information subject,” there is a confrontation between public management and individual fundamental rights. This paper claims that in the face of information processors of public power, the information subject should have the right to exercise the right to be forgotten, but conditions for the exercise should be tightly limited due to public interests. The government usually uses citizens’ personal information for administrative purposes, so as to improve administrative efficiency and maintain social security. Unless the administrative subject’s use of personal information exceeds the administrative purpose, the information subject should not enjoy too many interests or rights of to-be-forgotten.

Regarding “organization-personal information subject,” there is a game between commercial interests and individual freedom. At this point, it is best to categorize the personal information. One category is the classification of personal information into sensitive and non-sensitive information. The protection of sensitive information that involves privacy or brings the individual great sense of offense should be strengthened, and the involved personal dignity should be protected at a higher level. For non-sensitive personal information, the information subject can make a certain power-transfer so that the information processor has more space to take advantage of personal information, which is not only conducive to the operation of the information practitioners, but also conducive to providing better services for the information

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40 See Zhang, X. (2015). From Privacy to Personal Information: Theory and Institutional Arrangements for the Re-balance of Interest. *China Legal Science*, (3), p.52.

subject. Another classification is to divide personal information into identified personal information, identifiable personal information and unidentifiable personal information.<sup>41</sup> This paper argues that the law should provide the strongest protection for identified personal information, and all provisions written in Personal Information Protection Law apply; for identifiable (semi-anonymous) personal information, the application of some provisions can be exempted;<sup>42</sup> for unidentifiable personal information, the provisions of the Personal Information Protection Law only apply under certain conditions. Such classification contributes to promoting anonymous processing by information collectors and processors, which not only ensures the security of personal information, but also protects the commercial interests of enterprises.

Concerning “government-organization,” there is a competition between the national administrative power and the organization’s independent management right. This paper argues (1) that China is in the midst of a rapid growth of the Internet industry and (2) that attaching the obligation of “the right to be forgotten” to emerging companies with sky-high compensation<sup>43</sup> may be too hasty. Without allowing companies to arbitrarily violate the right to personal information, the Chinese government can appropriately reduce the number of penalties for violation of Personal Information Law and maintain the price within a range that enterprises dare not easily violate and can still afford.

It is crucial to determine the constitutive elements of the right to be forgotten in more detail with respect to the above theory. It will not only remove the right to be forgotten from the elements of civil law infringement and release more space for application, but also take the regulation of the government into account, which is helpful to stabilize the interests of the three parties.

### Perfecting the Right to Be Forgotten Referring to the Informed Consent Principle and Expanding the Principle

Although the rights and obligations of three information participants have been pointed out above, the legal-system problem of the right to be forgotten – that the establishment of the right to be forgotten cannot change the unequal relationship between the

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41 See Schwartz, P.M. and Solove, D.J. (2011). PII 2.0: Privacy and a New Approach to Personal Information. *New York University Law Review*, 86, p.1864.

42 For example, customers’ right to be deletion from the semi-anonymous financial list published by a commercial bank should be limited, this situation does not usually exist in other fields.

43 For example, on January 22, 2019, the French Data Protection Authority imposed the first GDPR fine on Google, amounting to 50 million euros. It is unclear whether China’s Internet companies can afford such pain.

information controller and the information subject – has not been solved from the part 4.1. To address this systematic problem, the solution must start from the principle of personal information protection.

The informed consent principle means that, in view of the information subject's right to self-determination and control over personal information, any collection, use, disclosure or deletion of information must be subject to the consent of the information subject. In theory, the right to be forgotten embodies the principle of informed consent. It can be used as a remedy to enable information subjects to withdraw personal information from the public domain and to withdraw "consent" made when the information was previously collected.

If the right to be forgotten is to achieve the purpose of the informed consent principle and guarantee the individual's control and self-determination of information, it still needs to be further confirmed by the legal object, target object and manners of exercise.

With regard to the legal object, for which information individuals can exercise the right to be forgotten, Peter Fleischer, Google's global privacy counsel, offers three scenarios: first, whether an individual can delete information he/she posted; second, whether an individual can delete the information forwarded by others; third, can individuals delete information about themselves posted by others?<sup>44</sup> This thesis suggests that the answer can be determined by combining the reasonable expectations of society with the reasonable expectations of individuals. In the first scenario, there should be no dispute that individuals should be given the right to be forgotten, as individuals could reasonably expect to delete personal information they sent out. In the second scenario, when publishing personal information, the publisher should anticipate the possibility that such information will be copied and forwarded and should bear the risks associated with it. Thus, the answer is that the personal information subject should be restricted to exercise the right to be forgotten in the second scenario. In the third situation, because information comes from others at first, individuals have less expectations of the flow of such information or the risks associated with it, so information controllers should consider individual requests of removal more than in the second scenario.

As for the target object, to whom can the information subject exercise the right to be forgotten? The right to personal information was originally aimed at information

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44 See Fleischer, P. (2011). *Foggy thinking about the Right to Oblivion*. [online] Peter Fleischer. Available at: <http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html> [Accessed 29 May 2020].

collectors with strong information collection and processing ability,<sup>45</sup> so governments, institutions, enterprises and other organizations may become the target object of the right to be forgotten. However, when it comes to ordinary people, they do not pose an urgent and substantial danger to individual personal information rights. This paper holds that ordinary people should not be considered as the target of the right to be forgotten unless they meet the conditions like holding strong information collection or processing abilities.

Furthermore, how is the personal information forgotten from the Internet: by invalidating the link or by completely deleting the data code from the original database? This paper advises that, considering Chinese developing Internet enterprises, as long as the information could be forgotten from the public, it is the freedom for the information controller to take measures of delisting or completely deleting.

It is noted that even if the right to be forgotten can carry out the purpose of the informed consent principle, the informed consent principle itself is still confined in the individualism and cannot independently support the entire personal information protection system. For example, in the case of Ren Jiayu (as Ren Jiayu sued Baidu because of the associated term), the number of people whose names are linked with other terms to become search terms is countless, and the number of people whose names are linked with offensive terms is large. However, Ren Jiayu is the only person in China who has taken Baidu to court. It exposes the limitations of the informed consent principle. From the cognitive point of view, there are risks in the information subject's decision on personal information. First, with notification rules, such as long and difficult privacy agreements, the subject may not read them at all. According to a survey by iMedia, 14.9% of China's mobile Internet users never read the privacy agreement in 2020, while 48.7% did not read it carefully.<sup>46</sup> Second, even if the subject reads the privacy agreement, they may not be able to understand its meaning – that is, they may not be fully informed. Thirdly, even if the information subject reads the privacy agreement carefully and fully understands the content, he/she may make irrational decisions due to the misunderstanding of the process of collecting, using, converting and deleting personal information, wrongly evaluating the costs and benefits. In addition, information collectors themselves will induce the information subject to unconsciously agree to the privacy agreement and avoid responsibility through

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45 See the Draft of Personal Information Protection Law, [https://www.sohu.com/a/203902011\\_500652](https://www.sohu.com/a/203902011_500652)

46 Imedia (2020). *2020 China Mobile APP Privacy Rights Evaluation Report*. [online] [www.iimedia.cn](http://www.iimedia.cn). Available at: <https://www.iimedia.cn/c1061/69373.html> [Accessed 30 May 2020].

commercial means, which increases the cognitive difficulties of the information subject. From the perspective of information market structure, even if each information subjects are fully informed and are rational decision-makers, they cannot predict how much value their information will have in the hands of the collector after reprocessing or after being transferred to other collectors. The informed consent principle cannot reverse the weakness of the market structure of personal information, and therefore, it cannot guarantee the right of information subject to control or self-determinate personal information.

It seems that due to the cognitive and structural problems, it is not easy for the informed consent principle to protect the information subject effectively, so it must be supported by other corresponding principles. Take the U.S. experience for instance. According to the principle of Fair Information Practice, the information subject can be rigidly or flexibly empowered, and other supporting principles including Accountability Principle, Individual Participation Principle, Use Limitation Principle and so on<sup>47</sup> may help.

## Conclusion

This contribution has provided an overview of Chinese localization of the right to be forgotten.

The chapter goes beyond the right to be forgotten established by the European Court of Justice and starts the discussion with broad and narrow definitions of the right to be forgotten. With the previous legislation of the broad right to be forgotten, Part 1 focuses on why China needs a narrow right to be forgotten. In recent years during the era of digitalization, China's rising nationalism and populism has imposed Chinese people into Bentham's panopticon, where they are anxious about their utterances. The right to be forgotten as an active right could be a remedy against this.

The Chinese legal framework of personal information protection and right to be forgotten has not been completed yet. While the constitutional law lays the basis of information protection, the administrative law only offers a patchwork of rules and regulations, which emphasize the enterprises' responsibilities but neglect that of the government as an information controller. Furthermore, the draft of Personal

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47 The Privacy Protection Study Commission (1977). *The Relationship Between Citizen and Government: Chapter 13 of 1977 Report on The Privacy Act of 1974*. [online]. Available at: <https://epic.org/privacy/ppsc1977report/c13.htm> [Accessed 29 May 2020].

Information Protection shows the legislators' attention to the duties of information controllers and protection of minors regarding the right to be forgotten.

Although the draft seems useful, there are lots of problems assessing different legal attributes of the right to be forgotten. If viewing the right to be forgotten as a general personality right, the first Chinese case of this right reveals that it is hard for the interest subject to safeguard its forgotten interests because of the heavy burden of proof and the helplessness of primary courts. Nevertheless, judging the right to be forgotten as a concrete personality right is the major academic viewpoint. While Chinese scholars managed to paint the relationship map of the right to be forgotten, right to privacy, right to personal information and right to personality, the problem is the limitation of the use of the right to be forgotten. Other voices suggest that considering the right to be forgotten as a property right could be a solution, but associated with economic theories, the establishment of the right to be forgotten could not change the unequal positions between the information controller and the information subject.

No matter which legal attributes are assigned to a Chinese right to be forgotten, the solutions mentioned above lie in the balance of a triangle relationships among the government, the organizations and the information subject as well as the extension of the Informed Consent Principle.

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# Decoupling Accountability and Liability: Case Study on the Interim Measures for the Opening of Public Data in Shanghai

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**Abstract:** As open public data initiatives have become prevalent among local and national governments across the globe with promises of benefits such as increased accountability, challenges, especially the governments' lack of willingness to open public data, have also begun to emerge. Existing governance research on open public data primarily focuses on how open public data can increase the accountability of public bodies. The important steps in achieving accountability are, however, ignored. In this paper, we view the perceived risk of liability as a barrier for the public bodies to disclose their data in the first place, and hence to achieve accountability as a desired outcome. We explore the link between perceived risk of liability and accountability by looking into the recently announced *Interim Measures for the Opening of Public Data in Shanghai* as an example of a local regulatory initiative of open public data. Our findings show that by identifying the specific data entities and outlining their corresponding duties, the interim measures clarify the roles of different public bodies and under what conditions they can incur liability. By introducing an exemption clause, they also provide public bodies with legal flexibility to cope with uncertain consequences of data utilization. In this way, we argue that the interim measures, outlining duties for specific entities in data opening in accounting for the consequences of data utilization while remaining flexible due to their temporality, constitute a novel regulatory approach towards reducing the legal uncertainty around perceived risks of liability in the area of open public data, hence potentially contributing to increased accountability.

**Keywords:** open public data, China, accountability, liability, interim measures

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## Introduction

In 2019, the standing committee of the Shanghai Municipal People's Government passed *Interim Measures for the Opening of Public Data in Shanghai*, which constitute the first local government rules on open public data in China (Shanghai Municipal People's Government 2019a; 2019b). It is hardly surprising that Shanghai, as one of the very first Chinese local governments that have embarked on the open public data movement, is the birthplace of such regulation. The interim measures were celebrated by various major Chinese media outlets (e.g., Jiefang Daily 2019; Southern Metropolis Daily 2019) for their pioneering role in legislating open public data in China, among which one of the interviews with the legislators of the interim measures, titled "Shanghai legislates public data opening, introducing an "exemption clause" to unburden government departments" (Southern Metropolis Daily 2019), has caught our attention.

In the interview, one of the legislators, Qiu Wei, from the Shanghai Municipal Commission of Economy and Informatization, highlighted that one of the aims of the interim measures is to encourage the local authorities' willingness to make their data available by identifying the specific data entities, outlining their corresponding duties, and the conditions under which local public data entities can incur and be exempted from liability. The interim and detailed nature of the legislation constitutes a novel approach towards regulating open public data initiatives, which contrasts with approaches emphasizing on hard law and lack of concreteness (e.g., the European Union's Directive 2019/1024 on open data and the reuse of public-sector information). Furthermore, the measures were introduced by the Shanghai Municipal People's Government as a local regulatory initiative, in contrast to the majority of existing regulations on a supra-national and national level.

Inspired by this recent development, the purpose of this paper is to provide insights into the regulatory approach undertaken by the Shanghai Municipal People's Government, which aims at increasing public accountability by providing more clarity around potential liability issues that may rise for public bodies as a result of disclosing their data. In particular, we are interested in understanding how liability and accountability are linked in the context of open public data and how regulators can address them. Hence, we pose the following research question: *How can interim regulatory measures reduce the perceived risk of liability among public bodies and contribute to public accountability in open public data initiatives?*

To this end, we chose to study both the content of the *Interim Measures for the Opening of Public Data in Shanghai* and their interpretations as revealed by their authors. We

argue that the interim measures, outlining specific rules, constitute a novel regulatory approach towards reducing the legal uncertainty around public bodies' liability, which is one of the barriers preventing public bodies from participating in a meaningful way in open public data initiatives, and hence from achieving increased accountability as a desired outcome.

Before we present the details of the development of open public data in Shanghai and the emergence of the interim measures, we first position our study in relation to the existing knowledge on open public data in relation to governance, law and the relations between public accountability and liability. We then introduce our research design and present our findings. In the Discussion section, we outline the contributions of this study in relation to the existing research gaps.

### Open Public Data, Public Accountability and Liability

In the past decade, open public data, defined as, “non-privacy-restricted and non-confidential data which is produced with public money and is made available without any restrictions on its usage or distribution” (Janssen et al. 2012: 258), have become widespread across the globe. An increasing number of local and national governments are making various datasets publicly available for public scrutiny and re-use (OECD 2020). Practitioners and governance researchers argue that open public data can bring several benefits, such as increased transparency, civil participation and innovation, and accountability (Lourenço et al. 2017; Peixoto 2013; Reggi and Dawes 2016; OECD 2020). Some researchers, however, have also pointed out that the availability of open public data does not necessarily lead to the achievement of all intended benefits (Cerrillo-i-Martinez 2012; Lourenço et al. 2017; Peixoto 2013, Reggi and Dawes 2016). For example, while the provision of open public data may increase transparency, it does not necessarily translate into increased accountability (Lourenço et al. 2017; Peixoto 2013; Reggi and Dawes 2016). In particular, several researchers have pointed out that while public bodies disclose data to the public, they have the discretion to select which datasets to make available and, as a result, often the open public data cannot be used to hold the disclosing public bodies accountable (Peixoto 2013; Reggi and Dawes 2016).

Public accountability is a desired, but not guaranteed, outcome linked to data being made available (Peixoto 2013; Reggi and Dawes 2016). In particular, public accountability is achieved through a process involving several steps, such as disclosure of data, discussion around the available data, followed by the realization of certain

consequences (Bovens 2007; Lourenço et al. 2017; Schillemans, Van Twist and Vanhommerig 2013). Thus, for example, after data has been disclosed, relevant members of the public can review it and decide a course of action to ensure public accountability, which includes identifying issues, responsible parties and outlining consequences (Bovens 2007; Lourenço et al. 2017). These consequences can be both non-legal (e.g., negative publicity, submitting petitions; see Lourenço et al. 2017), which emphasize the social aspect of accountability, or legal (e.g., public bodies can be held liable, in some cases, where the data they provide are inaccurate, misused, or not updated; see Dulong de Rosnay and Janssen 2014). As public bodies can be held accountable, facing both legal and non-legal consequences, they may restrain from providing meaningful datasets and instead grant access to datasets “irrelevant for the purposes of accountability” (Reggi and Dawes 2016: 75). By doing so, public bodies try to manage the risk of being held socially accountable, but even more so legally liable. Thus, to mitigate the risks, public authorities may limit their participation in open public data initiatives, thus diminishing the overall benefits, which such initiatives can bring (Zuiderwijk and Janssen 2014).

Current research on open public data, however, seems to equate accountability solely with transparency, thus ignoring discussion and consequences as important steps in achieving public accountability (Lourenço et al. 2017; Peixoto 2013; Reggi and Dawes 2016). In this paper, we argue that it is important to understand better the link between public accountability as a desired outcome of open public data initiatives and the perceived risk of liability by public bodies as a barrier to fully participate in such initiatives.

Researchers have pointed out that the perceived risk stems from the lack of sufficiently clear legal rules, which outline under what conditions public bodies will be held liable when opening their data to the public (Dulong de Rosnay and Janssen 2014). Instead, there are various regulatory approaches, which not only are characterized by a lack of specific rules, but also are not harmonized, thus increasing the legal uncertainty. For example, under the newly amended European Union *Directive 2019/1024 on open data and the reuse of public-sector information*, public bodies are allowed to use licenses, which can contain liability waivers when offering their data for re-use by third parties, depending on the concrete liability provisions in the EU and in the relevant national law (Directive 2019/1024, para 44). Thus, each Member State has its own licensing rules, which can vary in terms of their strictness. Dulong de Rosnay and Janssen (2014), for example, observe that in some countries, such as the UK, the rules may prevent third-parties from misusing the provided open data, while other countries, such as

France, may take stricter approach by explicitly prohibiting any modification of the publicly available dataset.

Recently, we have observed that local regulators in China, such as the Shanghai Municipal People's Government, have adopted a novel approach towards encouraging public bodies to disclose more purposeful data by providing clear guidance in order to reduce the legal uncertainty around the situations in which they will be held liable. This is particularly interesting, as China's institutional and policy innovations are characterised by experimental governance, in which local officials are encouraged to experiment with new ways of problem-solving and their experiences are fed into the national problem solving (Heilmann 2008). Understanding the emergence of the interim measures in Shanghai, hence can shed light on an alternative law-making process for evolving technological phenomena, like open public data.

## Method

Governance concepts, such as accountability and liability, manifest largely in institutionalized documents such as existing laws, regulations, rules and official statements (Bovens 2007), but also non-institutionalized interpretations among the regulators and legislators (Schillemans, Twist and Vanhommerig 2013). In the case of the local regulations on open public data in China, there have been recent experiments on the regulation of open public data at the municipal level, such as the *Interim Measures for the Opening of Public Data in Shanghai*, which was passed on August 16, 2019, by the standing committee of Shanghai Municipal People's Government. The interim measures, which took effect on October 1, 2019, are the first local government regulations on open public data in China (Shanghai Municipal People's Government 2019b). Prior to the interim measures, the Shanghai Municipal People's Government has also engaged in consecutive years of active collaboration with private organizations and universities to explore the opening and utilization of public data, i.e., Shanghai Open Data Apps 2015-2020 (Shanghai Open Data Apps, 2019), which also yielded evaluation reports assessing the overall development of open public data in different areas of public authorities (Fudan DMG Lab 2017a; 2017b; 2018a; 2018b; 2019), and open forum with different stakeholders exchanging opinions and interests on open public data (Fudan DMG Lab 2019).

We have thus drawn on two primary data sources for this study: First, the Interim Measures for the Opening of Public Data in Shanghai; and, Second, available online resources such as official statements, reports of the open forums and interviews with the

main legislators of the interim measures. The interim measures and official statements that were collected through the official website of the Shanghai Municipal People's Government (<http://www.shanghai.gov.cn>), only exist in the Chinese version. The quotes have been translated into English by one of the authors. The reports of the open forums and the interviews with the main legislators of the interim measures are drawn from major Chinese media including Xinhuanet (<http://www.xinhuanet.com/>), Jiefang Daily (<https://www.jfdaily.com/>), China.org.cn (<http://www.china.org.cn>), Sohu (<http://www.sohu.com>), and official website of the forum “Yan Do Xian (腌do鲜高汤讲坛)” (<http://www.dmg.fudan.edu.cn/?p=7065>). We paid particular attention to the reports, speeches and interviews of key stakeholders from Shanghai Municipal Commission of Economy and Informatization (SMCEI), Shanghai Big Data Center (SBDC), and Shanghai Municipal Bureau of Justice (SMBJ) as these local authorities played distinctive and important roles in coordinating, promoting, utilizing and regulating open public data. More specifically, SMCEI is among the first local authorities in Shanghai that has been promoting and coordinating opening public data since 2012. SMCEI is responsible for directing, coordinating and making overall arrangements on promoting the opening and utilization of public data and the development of relevant industries in the Municipality. SBDC is responsible for building, operating and maintaining the Shanghai Open Public Data platform, as well as for setting up relevant technical standards. SMBJ is part of the working groups that drafted the interim measures. In addition, we have also drawn upon the reports that detail the development of open data movement in Shanghai to set the stage for the emergence of the interim measures (Gao 2018; Wang et al. 2018).

Given the exploratory nature of this study, the interim measures, official statements, reports, and interviews with the key stakeholders of the interim measures are analysed through qualitative coding using a hermeneutic approach (Bos & Tarnai 1999). Our coding entailed a two-step process in which the empirical material was first discussed and coded by both authors using an inductive coding scheme. This part of the analysis was conducted with an emphasis on how notions of liability were articulated in the different materials. We then used the existing definitions of concepts on accountability, liability and governance (Bovens 2007; Lourenco et al. 2007) as sensitizing devices (Bowen 2006) to make sense of the first-order codes.

## The Shanghai Case and The Interim Measures for the Opening of Public Data in Shanghai

To answer our research question: *how interim regulatory measures can reduce the perceived risk of liability among public bodies and contribute to public accountability in open public data initiatives*, in this section, we start by presenting the development of open public data movement in Shanghai in the past decade and the challenges in pursuing local authorities to open their data, which paved the way for the making of the *Interim Measures for the Opening of Public Data in Shanghai*. We then look into the interim measures and regulators' interpretations of the measures to illustrate the way in which the municipal legislative bodies address the local authorities' unwillingness through the liability-related articles in the interim measures.

### Open Public Data in Shanghai: Development

In the past decade, China has seen exponential growth in the availability of public data and the amount of open public data programmes across the country, including dedicated initiatives and policies (Open Data Barometer 2015; 2018; Fudan DMG Lab 2017a; 2017b; 2018a; 2018b; 2019a). For example, since the launch of the Shanghai Government Data Portal in 2012 as the first open public data platform in China, there were 81 new open public data platforms launched by a range of provincial, sub-provincial, and prefectural level governments by March 2019 (Fudan DMG Lab 2019). The development of China's open data movement is strongly linked to the development of big data and is primarily driven by the need to increase government effectiveness and efficiency (Barometer 2015), as well as innovation and entrepreneurship (Gao 2018).

While open public data is gradually being institutionalised as a sustainable practice across governments in China today, it was anything but mainstream when Shanghai embarked on the movement. In 2011, Shanghai pioneered in broadening data access in China, but had very little effects: the accessible data did not meet the demands of the programmers, and very little valuable data was released. In 2012, a research project was funded by the Shanghai Municipal Committee to explore ways to organize around open public data by studying cities that have already started to open their data to the public, such as New York, London and Singapore (China.org.cn 2019; Jiefang Daily 2019; XinhuaNet 2019). While these experiences may have provided inspiration for how to create value with public data, Shanghai's challenge at the time was primarily about how to increase data accessibility (Gao 2018).

To tackle this challenge, Zhang Baijun, the Vice President of China Industrial Design Institute, who is a former civil servant that worked primarily with publishing information and data in Shanghai, gathered a group of researchers, entrepreneurs and open data advocates to organize a contest to help Shanghai Municipality to publish its public data, and in a way that makes sense to the market. The committee introduced the concept of “data crowdsourcing” to have different parties contribute to a virtual data pool, in the hope that the public can generate valuable ideas, and that, in turn, these ideas can push the local authorities to publish more data. In 2015, Shanghai launched the open public data-based application contest - Shanghai Open Data Apps (SODA) with 10 datasets from the local governments, public institutions and private companies. The results took the organizers and the data providing organizations by surprise: not only the contest had drawn 823 teams and more than 500 proposals across the country, many of the proposals were in fact applicable new business models, policy guidance and solutions to the problems of the data providing organizations. The results have, for the first time, showed the value of open public data and in this way drove the local governments and public institutions to make their data available (Gao 2018).

Today, with a distinct focus area of public data each year, SODA has continued as an annual contest, drawing more than 1500 teams, 6700 citizens to participate in the contest and generating 1470 innovative services based on open public data in Shanghai (Shanghai Open Data Apps 2019). As recognized by the Shanghai People’s Municipal Government, open public data is becoming an organic part of the local open environment, and an important driving force for promoting the development of the digital economy and protecting people’s well-being in Shanghai. Open public data is also seen as an inherent requirement to enhance the local government’s management philosophy, and to modernize its governance capabilities (Shanghai People’s Municipal Government 2019). Driven by this view, in recent years, the Shanghai People’s Municipal Government has carried out a series of work in classifying and opening public data, strengthening data security management and control, and promoting the cooperation of multiple data subjects. At the moment, Shanghai has ranked first in data openness among the local governments in China for three consecutive years since 2017, according to the China Open Data Index published by the Lab for Digital and Mobile Governance (DMG Lab) of Fudan University (Fudan DMG Lab 2019).

These local experiments and initiatives in the opening and utilization of public data in Shanghai have also paved the way for national push around open public data. As a result, in January 2018, Shanghai alongside four other provinces/municipalities, i.e., Beijing, Zhejiang, Fujian, and Guizhou, has been appointed as a pilot municipality to

open its local public information resources, that is, to make available the local public data (Shanghai Municipal Economic and Informatization Commission 2019; Xinhua Daily Telegraph 2018).

## Open Public Data in Shanghai: Challenges and Motivations for Legislation

During the development of the open public data movement in Shanghai, there were also issues and challenges revealed in the extent and the way in which public data was open among the authorities in the Shanghai Municipality. For example, according to the Shanghai People's Municipal Government's reports, the governance mechanism of opening public data was still yet to be streamlined, there lacked access mechanism of public data; and the quality of data in some areas needed to be improved (Shanghai Municipal People's Government 2019b). More specifically, key stakeholders from public data opening and management bodies, such as SBDC and SMCEI, have mentioned in multiple public outlets, different challenges that they have experienced in coordinating open public data in Shanghai, which centered around the unwillingness of the local authorities to open high-quality public data (Fudan DMG Lab 2019; Southern Metropolis Daily 2019).

*Wang Xiaomei*, division director at the Shanghai Big Data Center, for instance, emphasized in an open forum on open public data that there are two major challenges in the opening of public data in Shanghai: the first relates to the overall data quality, and the second relates to local authorities' concerns about the risks of third-parties utilization of the open public data (Fudan DMG Lab 2019). According to Wang, the value of some public data that has been opened so far was low due to poor data quality. She further contended that the challenge with data quality should be tackled through fostering accountability, that is a sense of shared social responsibilities, between all government departments that collect, integrate and open data. Wang saw the local authorities' fear towards opening public data as one of the reasons why the quality of some open public data was low. But rather than enforcing shared social responsibilities, Wang contended that the challenge of local authorities' fear towards opening public data should be tackled through more formal institutional mechanisms, especially through legislation.

In the same open public data forum, *Qiu Wei*, division director at the SMCEI, argued, more specifically based on her experience in coordinating opening public data since 2012, why legislation, such as the interim measures, was viewed as an important

way to tackle the challenges in promoting open public data among local authorities (Fudan DMG Lab, 2019). Firstly, Qiu argued that since 2012 SMCEI mainly relied on administrative measures to impose rules and policies on local authorities to open public data. These administrative measures required the support of a legal basis in order to push for the next step in opening public data of higher quality, standardization and efficiency. Secondly, Qiu argued that the interim measures are also introduced to consolidate the municipality's accumulated experiences on open public data since 2012, for example, using the interim measures to institutionalize the best practices of data rating and categorization.

Last but not the least, legislation was seen as a way to fulfil the need for formally implementing accountability, including specifying the role of data opening entities and their responsibilities. According to Qiu, before the legislation took place, it was common that local authorities and departments perceived open data as a service rather than a duty (Fudan DMG Lab 2019). Some local authorities and departments were not even aware that they were in fact data opening entities. Some departments were reluctant to open their data, partly because they had little to no understanding of the value of the data, and partly because they were also afraid of the far-reaching effects and consequences of data quality issues. In addition, Qiu also saw data quality as a manifestation of the level of the administrative capacity of the local authorities and departments. By formally institutionalizing the roles and responsibilities of data opening entities, legislation is seen as a way to improve the data governance capacity in the Shanghai Municipality.

Along this line, reading from the Shanghai People's Municipal Government reports and the key stakeholders' accounts of open public data in Shanghai, it appears that there are in general two inter-related challenges with open public data in Shanghai - one has to do with the low data quality in the currently opened public data, and the other has to do with the lack of willingness among local authorities and departments in open public data due to the public bodies' fear of the third-party risks in data utilisation, as well as the lack of awareness of roles and responsibilities. In tackling these two challenges, it seems that the Shanghai People's Municipal Government had primarily invested in establishing a shared sense of accountability to foster the understanding of the roles and responsibilities among the local authorities and departments in open public data, as well as using administrative measures to enforce the actions needed to be done. Nonetheless, as the development of open public data furthers, the Shanghai People's Municipal Government is motivated to formally institutionalize the roles and responsibilities

through legislation to further promote the local authorities and departments' capacity of data governance.

Interestingly, the legislation was not only motivated by the coordination needs of the municipality, but also by the private stakeholders' interests in data utilization. In October 2018, the extent of openness of public data in Shanghai was highlighted in the consultation conference between the mayor Ying Yong and the international entrepreneurs in Shanghai. At the conference, the CEOs/presidents of a number of multinational corporations suggested the Shanghai People's Municipal Government should further improve the access of public data to stimulate industrial development in Shanghai. The vested interests from the private stakeholders in utilizing data for industrial growth also pushed the legislation to put emphasis on liability issues that stemmed from the utilization of open public data. Soon after the consultation conference in October 2018, Shanghai Mayor Ying Yong gave clear instructions to carry out the legislation on the openness of public data (Shanghai Municipal People's Government, 2019).

### The Interim Measures: Main Content and Liability Clauses

Motivated by the institutional need to clarify the roles and responsibilities of local authorities and departments in open public data in Shanghai, as well as the private stakeholders' interests in utilizing open public data for driving industrial growth in the area, the Shanghai People's Municipal Government has decided to legislate different areas that are associated with open public data.

On August 16th, 2019, the Standing Committee of the Shanghai Municipal People's Government passed the *Interim Measures for the Opening of Public Data in Shanghai*. The interim measures, which took effect on October 1, 2019, are the first *local government rules* (地方政府规章) on open public data in China. Here, local government rules generally refer to administrative regulations issued by the local government within the scope of their administrative powers and their contents are specific to a certain matter (Shenyang Municipal People's Congress 2017), in this case, the opening of public data in Shanghai. The local government rules mainly concern the functions and responsibilities of administrative subjects, and the rights and obligations of administrative counterparts. It is important to note that *local government rules* and *local regulations* (地方性法规) are both treated as law with binding force according to the Legislation Law of the People's Republic of China (2015 Amendment). While the *local regulations* are issued by the local people's congress and its standing committee,

the *local government rules* are issued by local governments. According to the legislation law, when there are existing national laws and local regulations of a specific matter, the national laws and local regulations prevail over local government rules at the same level (Zou, 2006). If not, local government rules can be issued first in response to the administrative needs of the local government (Shenyang Municipal People's Congress 2017) and used as experiments that precede local regulations and national laws (The Central People's Government of the People's Republic of China 2020). In the latter case, according to Article 82 in the Legislation Law, two years after the local government rules are issued, local governments can propose to the local people's congress or its standing committee to make local regulations when the local governments need to continue to implement administrative measures.

The interim measures consist of 8 chapters, 48 articles, which include general provisions, opening mechanism, platform construction, data utilization, diversified data opening, supervision and protection, liability, and supplementary rules. The interim measures primarily cover 6 areas of open public data, including clarifying the management mechanism for opening public data; establishing a long-term mechanism for opening public data; optimising the construction of open public platform; ensuring the legitimacy of public data utilization; creating a diversified system for opening public data, and strengthening the supervision and protection of opening public data (Shanghai Municipal People's Government 2019b). The interim measures have categorized four different types of entities, including data opening entities (数据开放主体), data utilization entities (数据利用主体), platform management entities (平台管理主体), and security management entities (安全管理主体). In Chapter 7, the interim measures specify the corresponding liabilities of the four entities, that are the range of behaviours the different entities are legally responsible for, which we present below.

Starting with the data opening entities, which are all departments of the Shanghai Municipal People's Government, district people's governments and other public administration and service institutions, these entities are held liable if they:

- fail to open and update the public data of the unit in accordance with regulations
- fail to desensitize and declassify open data in accordance with regulations
- do not meet the unified standards; establish new independent open channels; or fail to incorporate existing open channels into the municipal open platform in accordance with regulations

- fail to handle the objections or notifications from natural person, legal person, or unincorporated organizations in accordance with regulations
- have other behaviours that do not fulfil the data opening duties in accordance with regulations

In these cases, the people's government at the same level and the competent department shall command a correction to the data opening entities. If the circumstances are serious, the person in charge directly responsible and other persons directly responsible shall be punished according to law.

Second, the data utilization entities are held liable if the entities:

- fail to fulfil its obligations listed in the data utilization agreement
- violate other people's legal rights, including trade secrets and individual privacy
- utilize public data to obtain illegal gains
- fail to take security measures in accordance with regulations, causing incidents that endanger information security
- have other behaviours that violate the provisions of the interim measures

Third, the platform management entity (i.e., the Municipal Big Data Center) is held liable if the entity:

- fails to document the entire opening and utilization process of the public data in the open platform in accordance with regulations
- fails to deal with the objections or notifications of natural person, legal person and unincorporated organizations in accordance with regulations
- fails to perform other platform management duties in accordance with regulations

In these cases, the competent authority shall command a correction. If the circumstances are serious, the person in charge directly responsible and other persons directly responsible shall be punished by the competent authority.

Fourth, the interim measures also specify four types of security management entities, including the Municipal Cyber Security and Public Security Department, Municipal Big Data Center, Data Opening Entities and other departments with network security management functions and their staff. According to the interim measures, if the security management entities fail to perform security management duties in accordance with regulations, the people's government at the same level or the competent department at the higher level shall order correction. And if the circumstances are serious, the person-in-charge as well as other directly responsible persons shall be punished according to law.

In addition, as we have mentioned above, the interim measures also specified an exemption clause for the data opening entities. According to the interim measures, in cases where the data opening entities opened their public data and performed the duties of supervision, management, and reasonable care according to laws, regulations and rules, the data opening entities are not held liable or exempted from the corresponding liabilities for the loss of data utilization entities or other third parties caused by issues such as data quality.

In an interview with a major Chinese media outlet, Southern Metropolis Daily, Qiu, division director at the SMCEI, revealed one of the primary motivations to introduce the interim measures was to improve the coordination of the local authorities and departments in opening public data by specifying the four types of entities, their duties and the legal consequences in case the entities failed to fulfil their duties (Southern Metropolis Daily, 2019). In addition, the exemption clause, according to Qiu, was introduced to further improve the willingness of the local authorities and government departments to open their data by providing legal waiver for the local authorities and government departments in cases of data quality issues causing economic loss of the data utilization entities. As Qiu explained in the interview with Southern Metropolis Daily:

Private enterprises utilize the public data to make data service products or business plan layout, which may actually cause economic loss. In the interim measures, we don't encourage enterprises to hold government departments accountable because the enterprises believe the failure of their product is caused by the data provided by governments. The exemption clause is thus introduced to unload the burden of government departments to the maximum extent through legislation.

In addition, Qiu also emphasized that the liability measures, which are the specified legal consequences, are not the only driver for local authorities and government departments to open public data of better quality. Informal institutional pressures, such as organizational reputation, is also an important driver for the local authorities and government departments to improve their data quality, as Qiu explained:

From a government's perspective, once their data is open to the public, the data can only be of better quality. That is to say, it is not possible that the government departments open data of problematic quality to the public. Even if the government departments can get exempted from their liabilities, the consequences of opening problematic data can still cause damage to their organizational reputation, which will not be good for to these government departments.

Along this line, the liability measures in the *Interim Measures for the Opening of Public Data in Shanghai* appear to emerge from the need to solve the coordination challenges in opening public data in the Shanghai Municipality - more specifically, on the local authorities and government departments' willingness to open public data of high quality. While formal institutional acts such as liability clauses offer guidelines on who should be held accountable for what, information institutional pressures also push public bodies to open high-quality datasets in order to preserve their organizational reputation.

## Discussion

The overview of the development of open public data initiatives in Shanghai helps us identify the lack of willingness of the local authorities and government departments to open public data as a key barrier that emerged in the coordination among the data opening entities as well as the demands of data utilization entities. Seeing the unwillingness of the local authorities and government departments as a reflection of unclear recognition of roles and duties, lack of understanding of the value of open public data, as well as limited administrative capacity, the Shanghai Municipal People's Government used legislation, i.e., the *Interim Measures for the Opening of Public Data in Shanghai*, as a way to reduce legal uncertainties around liability and formally institutionalize the roles and duties of different stakeholders of open public data in the municipality. In the meantime, the Shanghai Municipal People's Government also helps the data opening entities to cope with uncertain consequences of data utilization by introducing the exemption clause.

Our findings make four contributions to the existing governance studies on open public data. First, we present a Chinese case on open public data that is new and emergent and has not been explored among the governance research community. Currently, there have been scattered studies focusing on achieving accountability of open public data and investigating the legal and non-legal consequences associated with it (Cerrillo-i-Martinez 2012; Lourenço et al. 2017; Peixoto 2013; Reggi and Dawes 2016). In terms of legal consequences, these studies primarily focus on liability measures on national level (e.g., UK, USA, and so on) and supra-national level (the EU). To the best of our knowledge, this paper is among the first studies that explore the local legislative measures on open public data (i.e., at municipal level) and in a Chinese context. Our findings show that the Shanghai Municipal People's Government chose to issue *Interim Measures for the Opening of Public Data in Shanghai* as *local government rules* that are issued by the local governments, instead of *local regulations* that are issued by the local people's congress and its standing committee. This choice can have some interesting implications, when it comes to the implementation of the interim measures. As we have mentioned before, there are some differences between the local government rules and the local regulations, but the distinction is not as clear, especially when there is no existing national law or regulation of a specific matter. Nevertheless, in practice, existing study shows there is a common perception among the local governments in China that local regulations have a higher legal status than local government rules, which may compromise the authority and effectiveness of local government rules (Liu, 2015). In this sense, future studies should follow up on the implementation of the *Interim Measures for the Opening of Public Data in Shanghai* and investigate what are the perceptions of the interim measures among the local authorities, especially considering their different positions, pressures and perceptions of risks, and if there is any interplay between the perceived legal status of the interim measures and the effects of implementation. Based on studies as such, one can look further into whether the *local government rules* are suitable legal instruments for regulating open public data in the long run in the Chinese context.

Moreover, as we have mentioned above, China's institutional and policy innovations during the economic reform are observed to be characterised by experimental governance, in which the central policymaking relies on the experiences of local experimentation to address uncertainty (Heilmann 2008a; 2008b; 2009). While our findings on the making of the *Interim Measures for the Opening of Public Data in Shanghai* confirm a similar pattern of law-making in an evolving technological area like open public data, there are also nuances. This is mainly considering the open public data movement and the SODA contest that preceded the making of the regulation was

not developed under the top-down mandate of the central government. Rather, it was only after the Shanghai Municipality became successful in organizing the contest and exploring open public data that, in 2018, the central government appointed the four cities, including Shanghai, as pilot areas. Future studies should look into whether such hybrid patterns between a bottom-up experiment and a top-down recognition would be an emerging experiment governance mode in China to address uncertainties in technological innovation, such as artificial intelligence or blockchain.

Second, from the case analysis, we have identified that reducing legal uncertainty around different stakeholders' liabilities constitutes a new way to increase the accountability of the stakeholders, participating in open public data initiatives. As we have mentioned previously, several governance researchers have argued that open public data can bring benefits such as increased government accountability (Lourenço et al. 2017; Peixoto 2013; Reggi and Dawes 2016). Nonetheless, other scholars have also pointed out that the availability of open data to the public does not necessarily lead to the achievement of all intended benefits (Peixoto 2013; Reggi and Dawes 2016). Rather, accountability is achieved through a process involving several steps, such as disclosure of data, followed by discussion around the open data and the realization of certain consequences (Bovens 2007; Lourenço et al. 2017; Schillemans, Van Twist and Vanhommerig 2013). Our finding shows that the Shanghai Municipality sees governments' accountability in open public data initiative as a process that is achieved through multiple types of entities (i.e., data opening entities, data utilization entities, platform management entities, and security management entities) with a specific range of duties. Through legislation under the form of interim measures, the Shanghai Municipal People's Government manages to reduce legal uncertainty around the liabilities, which these four different types of entities can incur, and in this way removing one of the barriers preventing public bodies to participate fully in open government initiative, consequently leading to increased accountability.

The interviews with the legislators also reveal organizational reputation as an important driver for local governments to open high quality data. Apart from legal consequences (i.e., liability), open data initiatives can also lead to non-legal consequences such as negative public image (Lourenço et al. 2017). In particular, the increased visibility of actions by public bodies can reveal poor decision-making and judgement (Lourenço et al. 2017). In addition, as our case reveals, the opening of public data in Shanghai is a process that starts from local authorities and then expands to the other authorities. During this process, the data opening level of local authorities that have already made available their high-quality data and benefited from the citizen participation may

become an informal institutional pressure (DiMaggio and Powell 1991) for the other authorities to conform due to changes of expectations on the norms of public service provision among both the citizens and the local authorities. Future studies should extend the focus on liability measures as formal institutional measures to achieve accountability and investigate the informal institutional measures that motivate public bodies to act in order to achieve better accountability.

Third, we argue that the interim nature of the measures is critical for experimenting with legislation around emergent and uncertain technological phenomena, such as open public data, which leaves space for changes in case the phenomena evolve. Existing studies have looked into regulatory instruments such as Directives (on EU level), and national laws (e.g., Dulong de Rosnay and Janssen 2014) to guide implementation of open data initiatives, with limited degree of success. The introduction of such hard law legal instruments prematurely, however, can lead to negative repercussions such as curbing innovation efforts (Mandel 2017). In addition, in the context of uncertainty brought by new technologies, legal scholars have also advocated for the use of certain principles, which are mainly technology-neutral, and which outline broad recommendations on how to address the emerging uncertainty (Mosses 2017). While these principles have their own merits, due to their broad scope and relative vagueness (also in relation to incurred liability), they may lead to local authorities complying with them in a minimal manner or altogether circumventing them. In response to this concern, one of the implied findings of the Shanghai case is the interim nature of the regulatory instrument that the Shanghai Municipal People's Government uses, which, while providing concrete recommendations, also leaves room for adjustment. Thus, we rather argue that it may be more beneficial for regulators to reduce uncertainty around liability by adopting rather specific measures, which are at the same time temporary, hence flexible. While the current interim measures are being tested and implemented into formal measures in Shanghai, future research should embark on investigating the relation between the adopted regulatory instrument and its impact on successfully addressing the uncertainty of technological development.

In addition, our study sheds further light on the appropriate level to regulate open data initiatives in order to ensure that such initiatives can achieve the desired benefits. Scholars have already investigated whether supra-national level, national or local authorities should regulate given open public data initiative in order to make it successful (see, e.g., Dulong de Rosnay and Janssen 2014; Schillemans, Van Twist and Vanhommerig 2013). Our study contributes further to this debate by drawing attention to the importance of local measures to guide specific open public data initiatives. As

the local measures can be targeted towards specific characteristics of a given open public data initiative and can be drafted and passed through a relatively simplified legal process, we argue that, for some initiatives, regulating on local level, rather than national level, may be more beneficial for ensuring broader, high-quality participation. We further argue that, faced with the need to reduce legal uncertainty around liability issues in connection to open public data, legislators may benefit not only from regulating at a local level, but also by adopting interim measures, thus allowing for more flexibility in case the adopted measures are not suitable for achieving the desired benefits. We urge researchers to investigate in detail examples of regulatory measures around open public data initiatives at a local level in order to map the different approaches and estimate their effectiveness. Scholars can also study the perception of different local authorities towards the introduced interim measures and further analyze their willingness to comply with them and their degree of compliance. As the different local authorities differ in terms of their goals, structures, risk attitude, and so on, we could expect some variations in their perceptions and responses to the interim measures. In addition, we call for researchers to further compare and contrast regulatory measures on supra-national, national and local levels in order to point out under what circumstances, authorities at each level should regulate and to what degree.

## Conclusion

In this paper, we have explored the link between public accountability as a desired outcome of open public data initiatives and the perceived risk of liability by public bodies by looking into the contexts of emergence as well as the contents of the recently announced *Interim Measures for the Opening of Public Data in Shanghai*. We particularly focused on the clauses around liability and the motivations for introducing them. Our findings show that the interim measures are a formal way to institutionalize the roles and duties of different stakeholders of open public data in the Shanghai municipality. Meanwhile, they also protect the data opening entities to cope with uncertain consequences of data utilization by introducing the exemption clause. In this way, we argue that the interim measures, outlining duties for specific entities in data opening while remaining flexible in accounting for the consequences of data utilization, constitute a novel regulatory approach towards reducing the legal uncertainty around perceived risks of liability in the area of open public data. This approach can potentially influence public bodies to participate in a meaningful way in open public data initiatives.

This paper makes four contributions to the understanding of open public data legislation: first, we present a Chinese case on open public data that is new and emergent and has not been explored among the governance research community. The case raises interesting discussions on the implications of implementing local government rules, as well as on the mode of experimental governance to address evolving technological phenomena in a Chinese context. Second, from the case analysis, we have identified reducing legal uncertainty around different stakeholders' liabilities as a way to improve data opening entities' willingness to open public data, hence potentially increasing the accountability of these public bodies. Third, we have also emphasized the interim nature of the measures as key to experiment legislation around emergent and uncertain technological phenomena, such as open public data, which leaves space for changes in case of technological development. Last, we have drawn further attention to the importance for authorities to regulate at a local level, as opposed to national and supra-national levels, in order to ensure more efficient realization of the benefits related to open public data initiatives.

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# Predictive Policing in China: An Authoritarian Dream of Public Security

Daniel Sprick<sup>1</sup>

**Abstract:** China's public security forces are employing more and more technology in their push for an 'informatization (信息化)' of their police work. The application of analytical techniques for solving past crimes or preventing future crimes based on big data analysis is thereby a key component of China's approach for technology-led policing. China's holistic policy approach for the purpose of maintaining social stability that is encompassing an ever-growing range of societal issues, the vast investments of its police forces in new technologies and its paramount objective of security, that clearly supersedes *inter alia* concerns of privacy or transparency, may be considered extremely conducive to the establishment of effective predictive policing in China. This paper however argues, that the application of predictive policing in China is heavily flawed as the systemic risks and pitfalls of predictive policing cannot be mitigated but are rather exacerbated by China's approach towards policing and its criminal justice system. It is therefore to be expected that predictive policing in China will mainly be a more refined tool for the selective suppression of already targeted groups by the police and does not substantially reduce crime or increase overall security.

## Introduction

The Chinese police are often heavily criticized by the Chinese public for its lack of effectiveness and its deficient work style (Wong 2012, 152-6; Yang 2017, 78). In recent years, however, security forces in China were able to at least partly refute this criticism, when they were repeatedly able to apprehend long-time fugitives and finally bring them to justice. One example is a certain Mr. Ding, who went missing after he allegedly committed a murder in 2001. In early 2017, a facial recognition tool found a matching Mr. Ma on the internet, which led to telecommunication surveillance and finally his arrest in Korla, Xinjiang Province. Reportedly, the murderous Mr. Ding was one of more than 43.000 fugitives arrested by the Chinese police with the help of data technology between March and December 2017 alone (Chen 2019).

The rising use of big data analysis by the police in its investigations is however just a first step of a larger agenda envisioned by the Chinese regime. The final goal is to develop

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instruments and methodologies that can not only ex post enforce the (criminal) law but that are also devices to ultimately predict and prevent crimes. This development gained substantial momentum in China when Xi Jinping announced at a security conference in 2016:

‘We shall attach additional importance to an integrated harmonization and to a reformed public policy, attach additional importance to the democratic rule of law and to technological innovation; we shall raise the socialization, the level of the rule of law, the smartness and the professionalism of our social governance and raise the ability to predict, warn against and prevent any kind of risks. [...] We shall perfect our social governance mechanisms for public security and speedily work on the integration and informatization of the prevention and control system for our public security. - 要更加注重联动融合、开放共治，更加注重民主法治、科技创新，提高社会治理社会化、法治化、智能化、专业化水平，提高预测预警预防各类风险能力。[...]要完善社会治安综合治理体制机制，加快建设立体化、信息化社会治安防控体系.’ (Xi Jinping 2016).

In this speech, Xi outlines a highly integrated framework of public security measures that are not limited to police measures but are rather part of a larger policy approach for which his administration coined the phrase ‘social governance (社会治理)’. Its central goal of ‘maintaining stability (维稳)’ is neither new nor innovative as it has been at the heart of China’s domestic policies since the Hu Jintao administration (2003-2013) under the term of ‘social management (社会管理)’, which according to Piekie (2012, 159-60) aligned itself with corporatist ideas of indirect regulation while still maintaining a socialist approach that entails the feasibility of social engineering. The gradual shift towards more ‘governance’ instead of ‘management’ under Xi Jinping widened the scope of active government involvement again (Wei 2019) and thereby also broadened the regime’s demand for information through extensive surveillance. The most notorious example of this overarching policy approach is the establishment of China’s Social Credit System (社会信用体系), which is meant to process a plethora of data from different areas to assess the trustworthiness of persons and corporations for the purpose of enhancing their obedience to legal and even ethical norms (Chen, Cheung 2014).

The recent efforts of digitalization and automatization in the prevention of any kind of deviance, as seen in the Social Credit System, are manifestations of a larger trajectory

in China's public security. More and more areas are considered relevant issues for maintaining social stability in China, so that not only the security forces as such were constantly growing in size and importance, but this also means that an ever-increasing number of policy fields are drawn into what Wang and Minzer (2015, 357) describe as a 'pluralization of security work'. This expansion of competence and workload is met by the Chinese police by a serious push towards 'informatization of policing (警务信息化)', which is generally describing the comprehensive use of information technologies in all areas of the police work and the collection and processing of high volumes of data (Schwarck 2018, 9-11; Zheng 2019, 15-6). Given these developments, China may be in the position to establish a highly efficient system of predictive policing.

Conceptualizations, problematizations and definitions of predictive policing in the English-language literature are mainly based on a handful of trailblazing examples that were set up in the US. These analyses are most often highly contextualized in that the specific predictive policing tool as well as the police culture and approach towards policing of the respective police departments, especially regarding transparency and potential racial bias, are taken into account and discussed from the perspective of the US' constitutional order (Hunt et al. 2014, Saunders et al. 2016, Selbst 2017, Ferguson 2017b, Griffard 2019). The most prevalent definition can thereby probably be found in the RAND Corporation's early study on the matter, which defines predictive policing as the 'application of analytical techniques—particularly quantitative techniques—to identify likely targets for police intervention and prevent crime or solve past crimes by making statistical predictions' (Perry et al. 2013, XIII). A more recent definition was proposed by Meijer and Wessels, who based their analysis on a literature review and summarize predictive policing as 'the collection and analysis of data about previous crimes for identification and statistical prediction of individuals or geospatial areas with an increased probability of criminal activity to help to develop policing intervention and prevention strategies and tactics' (2019, 1037). While none of these definitions included observations of the Chinese efforts in predictive policing and may not be entirely apt to encompass the Chinese approaches in this field, the more abstract considerations presented in this English-language scholarship may still be particularly instructive in assessing the possibility for effective predictive policing in China. A core question of this paper is therefore, if China can overcome the problems and drawbacks frequently discussed in the context of predictive policing in general. Particularly, China's 'pluralized' approach to security work and the apparent ability of its police to use a wide array of data as the 'prediction stage' of the criminal procedure in China is not limited by law (Pei Wei 2018, 56) may have the potential to bring forth a more holistic predictive policing regime that not only relies on previous

crimes to forecast future crimes but encompasses many issues that could lead to the occurrence of crime. Such an approach would then be very well equipped to mitigate the problem of not clearly distinguishing correlation and causation, which Chan and Bennet Moses describe as the latent fallacy of Big Data analysis in criminology (2016, 34). China's broad perspective on social stability could make the surveillance of a broad range of (social) issues operational for its version of predictive policing and thereby could avoid what Bennet Moses and Chan more specifically criticize as an 'exclusive focus on crime prevention' (2018, 815), which may counterproductively block out other factors that influence public order as the overarching goal of effective policing (Dixon 2005, 17-8). Even more importantly, China's police may have broad access to any kind of data without substantial restrictions concerning due process standards (generally on this issue in China, e.g. Nesossi 2019, 495-6), which, from solely a public security perspective, would allow a far more effective form of data-led policing. Schwarck therefore argues that China will create a 'public security apparatus more adept at reading the causes of criminality and disorder, and responding accordingly' (2018, 19). This paper however argues that China's efforts to build-up its capacities in predictive policing are systemically flawed. Success in this area is not only depended on the volume of accessible data and the installed computing power, but it hinges also on the quality of the available data (Ferguson 2017b, 1145-50) and the ability to critically evaluate procedures and outcomes without fixed expectations regarding the results (Bennet Moses, Chan 2018, 815-7). While police data in general appears to be already inherently biased (Joh 2017, 295-302), Chinese crime data is also heavily influenced by political considerations (Xu 2018, 166-170) and even the underlying police dossiers on criminal cases may very easily not reflect the actual situation (Mou 2017, 85). Using this kind of data as a basis for a predictive model certainly cannot safeguard accurate forecasting of crime that guides police strategies and tactics. Additionally, legal oversight and scrutiny of police operations are notoriously weak in China (Schwarck 2018, 20), intra-departmental conflicts regarding the value of computerized data analysis for the policing strategy and operational tactics (Guan, Sun 2020, 75-6) and the enormous propaganda value of predictive policing for the regime's legitimacy may render any efforts to critically evaluate China's use of big data in its policing moot and futile.

While there is still no nationwide program or concept for predictive policing in China, there are however local projects that make use of analytical data technology (e.g. in Zhongshan, Guangzhou and Hangzhou, Zhejiang) and several specific crimes (e.g. drug-related crimes and telecommunication fraud) are targeted by predictive policing measures in China. Additionally, the pervasive surveillance of the entire (Muslim) population in Xinjiang produces high volumes of data that are used for operational

purposes in China's 'People's War against Terror', which is at times also described as predictive policing (Human Rights Watch 2019). In the following, this article will give an overview of ongoing predictive policing programs and related technology- and data-driven undertakings of the Chinese security apparatus in the context of China's comprehensive approach towards maintaining order. Based on these observations, China's potential for an effective predictive policing will be analyzed by scrutinizing the availability of possible solutions for the inherent flaws of predictive policing that are frequently conceptualized in the existing English-language literature on the matter.

### Technology, Big Data and the Chinese Police

The promise of faster, more cost-effective and efficient policing by using technology (Brayne 2017, 981-2; Ferguson 2017a, 31-3) is certainly also a driving force for the establishment of predictive policing tools in China. This Chapter outlines early and ongoing undertakings of the Chinese police to integrate information and communications technologies in their operations and develop strategies that are based on Big data analysis. While not every project in this field in China can be mentioned here, the aim of the following discussion is to illustrate a trajectory towards a comprehensive and nationwide solution for a technology-aided or even technology-led policing that would fundamentally change police practices in China and is ultimately conducive to a shift from reactive to predictive policing.

The growth in size and importance of the Chinese public security apparatus in at least the last fifteen years (Wang, Minzer 2015, 342) was accompanied by a substantial investment in modern technologies and 'the emergence of the Ministry of Public Security (MPS) as a powerhouse in computerized surveillance' (Schwarck 2018, 21). The extensive employment of data and technology by the Chinese police is described by several interconnected terms, which use a slightly shifting focus from 'intelligence-led [in the sense of effectively using information] policing (情报指导警务)' to an 'informatization [in the sense of using information technologies] of policing (警务信息化)' and finally an integrated notion of 'intelligent policing (智慧警务)'. The latter approach is fairly comprehensively outlined in a normative document jointly issued by the Central Committee of the Chinese Communist Party and the State Council in 2015 titled 'Opinions on the further development of a prevention and control system of public security':<sup>2</sup>

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2 中共中央办公厅、国务院办公厅印发《关于加强社会治安防控体系建设的意见》, 13-04-2015, <http://politics.people.com.cn/n/2015/0414/c1001-26839083.html> (Accessed 23-02-20).

‘The informatization of public security prevention and control will be incorporated in the overall plan for the development of intelligent cities. [We will make] ample use of technologies such as the internet of a new age, the internet of things, Big Data, cloud computing and systems for smart sensing, remote sensing, satellite positioning and geographic information. [We will] innovate tools for public security prevention and control, and thusly raise the level of digitalization, interconnectedness and smartness of the public security management and create a number of organically fused model projects. - 将社会治安防控信息化纳入智慧城市建设总体规划，充分运用新一代互联网、物联网、大数据、云计算和智能传感、遥感、卫星定位、地理信息系统等技术，创新社会治安防控手段，提升公共安全管理数字化、网络化、智能化水平，打造一批有机融合的示范工程。’

This documents also puts forward a vision for the ultimate purpose of this build-up of the Chinese police’s technological arsenal by explicitly pointing towards predictive policing:

‘[We will] strengthen the deeply coordinated use of information resources and make ample use of modern technologies, so that our abilities of automated prevention and suppression of crime are heightened. - 强化信息资源深度整合应用，充分运用现代信息技术，增强主动预防和打击犯罪的能力。’

When in 2016 Meng Jianzhu still headed the Commission for Politics and Law (政法委员会) of the Chinese Communist Party (CCP), which is the central oversight organ in all legal matters of the one-party state (Fu 2013, 76-88), he already lined out more specific notions of predictive policing:

‘We have to improve our use of smart tools and in real-time analyze, process and unearth from Big Data behavioral trajectories of criminal suspects, thereby finding crime patterns and trends so that we push for a transformation from retracing after the fact towards predicting, forewarning and preventing before the fact. - 我们要善于运用智能化手段，对大数据进行分析、处理、挖掘，实时关联犯罪嫌疑人的行为轨迹，从中找到犯罪规律或趋势，推动由事后追溯向事前预测预警预防转变。’ (Meng Jianzhu 2016, 14).

Meng's successor since 2017 and former Minister of Public Security, Guo Shengkun, further elaborated in 2019 on the new focus of the Chinese security forces on predictive and preventive measures and specifically pointed towards three areas that should receive the most vigilant attention:

‘Prediction, forewarning and prevention shall be a core task [of the *zhengfa*-Organs (i.e. courts, procuratorates, police, supervision commissions)] and [they shall] conscientiously work at bringing to light the roots and circumstances of serious dangers so that their realization can be precisely predicted and meticulously warned against and accurately prevented. [They shall] focus on the hidden dangers of prominent risks, take correct measures and firmly be on guard against, dissolve and handle every kind of risk in the field of political security violent terrorism and social stability. - 要把预测预警预防作为根本任务，切实做到对重大风险底数清、情况明，实现精确预测、精细预警、精准预防。要聚焦突出风险隐患，精准施策，坚决防范化解处置各类政治安全风险、暴力恐怖风险、社会稳定风险.’ (Guo Shengkun 2019).

While Guo also sees predictive policing as an instrument for maintaining stability, he additionally aligns this new form of policing with China's authoritarian notion of public security by singling out political crimes and terrorism as the most important targets of predictive policing in China. As crimes against the political system as defined by the Chinese criminal law are regularly used to convict human rights lawyers (CHRLCG 2016) or political dissidents like the late Liu Xiaobo and China's 'People's War on Terror' is a highly discriminatory criminal justice campaign that overwhelmingly targets its Muslim minority (Sprick 2020), Guo reaffirms that China will use its emerging capabilities of predictive policing against certain groups of people and not as a general tool for the reduction of crime.

### China Behind the Golden Shield in the Safe City and Under Sharp Eyes

The implementation of new policies in China is frequently introduced by a catchphrase that was coined by a leading politician or during a related working group meeting. In the field of public security and its technological turn, the three most important national policies are called 'Golden Shield Project (金盾工程)', 'Safe City (平安城市)' and 'Sharp Eyes Project (雪亮工程)', which will be exemplified here and illustrate some of China's most ambitious public security reform projects of the last 30 years. These undertakings mainly aim at binding together previously separate areas of public security

and thereby also create a broad information basis that may in the future be employed for a nationwide predictive policing database.

Probably the best-known policy with regard to the digitalization of the Chinese police is the Golden Shield Project, which is mostly - but not entirely accurately - associated with China's national firewall and its censorship of the Internet (Bolsover 2017, 9-11). Internet safety and security was just one of many objectives this project wanted to achieve. Its overall approach was to find policing solutions for a more and more digitalized world, that is policing the emerging social realms of digital networks as well as using the digitalization of relevant information and its conversion in machine-readable data. The most fundamental aim of the Golden Shield Project was to establish an operational data hub that integrates local, municipal, provincial and national networks of already existing security-related databases and equip those agencies, which were still disconnected either from digitally generating or retrieving relevant data with appropriate technological solutions (Li Runsen 2002, 7-11). The Golden Shield Project was originally designed to have two phases (2003-2006 and 2008-2015), but an additional third phase started in 2014 with a further investment of 10 Billion RMB (ca. 1.3 Billion Euro) and the goal to streamline and reform existing processes and thusly establishing a comprehensive national network (Wan Yanan 2020). Ideally, the Golden Shield Project was meant to establish a coherent platform that provides public security organs with automatic analysis of retained bulk data and live information from video or electronic surveillance that could support the police in on-going investigations and additionally monitoring the general security situation in real-time (Schwarck 2018, 11). While the data collection and management envisioned by the Golden Shield Project would thereby have been extremely conducive to the development of predictive policing in China, the necessity of an enormous subsequent investment in this project indicates substantial problems in the implementation of this policy. A section chief for technology at the Hangzhou police department recently summarized his experiences with the Golden Shield Project and elaborated on the existing problems, which – apart from serious trouble with the bandwidth capacity of his network – he primarily identified as deficiencies in the still existing data walls between different administrative units and lack of cooperation in data sharing and data use, many redundancies in a still too small data set, deficient search queries, too many platforms - as there were 8 databases and 23 different networks with different data sets - and too little expertise and knowledge with regard to data tools among the police officers (Zou Xinyi 2010, 44-5). While solely technical problems may be easily solved by further investments, an administrative culture that is predominantly occupied with retaining control over its domain may be a fairly unsurmountable obstacle. One of the 8 databases to be

integrated under the Golden Shield is the China Crime Information Center Database (全国违法犯罪信息中心查询索引库), which is modeled after the FBI's National Crime Information Center. While information on this database is scarce, comprehensive data from criminal records would certainly be essential to its quality and operability. Currently however, there is no unified system for criminal records, but these records are governed by a plethora of different local normative documents, doubtlessly producing a highly inconsistent data set of this quintessential information on criminal offenders (Yu Zhigang 2019, 73-5). The Golden Shield Project may one day become the backbone of China's predictive policing, but its current state appears to be not yet feasible for such an endeavor.

Two other important projects in the field of public security are the 'Safe City (平安城市)' Project and the 'Sharp Eyes Project (雪亮工程)'. Both projects use mass (video) surveillance measures for the purpose of constantly monitoring security- and safety-related aspects. Safe City started on an experimental basis in 2005 and has expanded since into almost every major municipality in China. Its main goal is to extensively use video surveillance technology for different aspects of public security and safety. Criminal investigation and crime prevention are just one issue of many other aspects covered by this policy such as traffic control and management, emergency response operations or even safe production by surveilling construction sites. (Deng Ye 2016, Wan Yanan 2020). Another feature of Safe City is the integration of the Internet of Things into the surveillance grid so that the public security forces have even more access by using e.g. privately installed surveillance cameras or car-mounted IP-cameras (Huawei 2015). Similarly to the Safe City, the Sharp Eyes Project, which was launched in 2015 and is currently implemented in 48 areas, is predominantly build on video surveillance technology but is not so much aiming at urban areas and instead focusses on covering the smaller cities and rural China. Additionally, and again just like Safe City, the Sharp Eyes Project uses mobile networks, cloud computing, centralized command centers and handheld devices. Under the Sharp Eyes Project the users of the latter are however not public security officers but mostly ordinary citizens who are using an app on their mobile devices to report on anything suspicious that they spotted on their television set, which can be tuned to the surveillance feed in their neighborhood, or that they encountered outside of their own home (Gao Guojun 2018, 125-6. Rudolph 2019). While oscillating between promoting neighborhood watches and facilitating community suspicion and denunciation, the Sharp Eyes Project allows mass surveillance with very little human resources and only requires police forces, if their dispatch is absolutely necessary, so that technology here is not the least seen as a cost-efficient tool for effective policing. Furthermore, the Sharp Eyes Project clearly demonstrates that

privacy concerns are hardly relevant in the area of public security in China, so that any future form of predictive policing will certainly not significantly be hampered by deliberations of this kind but can rather freely be built on a huge amount of surveillance data.

### Big Data and Experiments of Predictive Policing

In the absence of a national predictive policing scheme in China, the recent establishment and operation of some local experimentation in this field are the focus of this section. Not every aspect discussed here strictly falls within the definitions of predictive poling used above, but these local projects are either advertised as predictive policing or must be understood as building blocks for a future predictive policing system.

One regional hotspot for using Big Data and Predictive Policing tools is the province of Zhejiang and especially its capital Hangzhou. By quantitatively analyzing date from e.g. police intelligence or occurrence rates of certain cases, Zhejiang is committed to establish a ‘Public Security Assessment and Warning (社会治安评估预警)’ scheme so that hidden public security risks are recognized and prevented (Ministry of Public Security 2016). For this purpose, Zhejiang is building an enormous database, which in late 2019 already consisted of more than 600 different data categories, held more than 1.6 Trillion data points, and is constantly fed by almost 250 cloud-based services across the province so that the central data center of the police daily has to compile traffic of 1 Billion real-time data points. An early test of the new technologies employed by the Zhejiang security forces came when its capital Hangzhou hosted the G20 summit in 2016. This Police Cloud (警务云), that was in operation here, can be used to retrieve a wide array of personal data that can be linked to the national identification number (身份证号码), which according to Human Rights Watch includes medical records, delivery histories, hotel stays or travelling companions (HRW 2017). What appeared to Western commentators as an utterly disproportionate show of force during the G20 summit in Hangzhou and thus painted a bleak picture of personal freedoms (Yoon 2016) was portrayed by Chinese officials as a full-blown success of its ‘Intelligent Public Security (智慧公安)’ based on its Big Data capabilities (Zhejiang Police Department 2019). One core objective of the G20 operation was evidently keeping away petitioners, who would have intended to use an internationalized stage to voice their dissent and bring forward their grievances about the regime’s many injustices (RFI 2016). Later court cases subsequently showed that the police had stopped and fined many potential petitioners before they could have staged their protest in Hangzhou (e.g. Hefei Intermediate Court 2018), so that, from the perspective of the Chinese authorities, the

predictive and preventing policing tactics must be considered successful. This example however also highlights that the aforementioned purpose of predictive policing in China, namely preventing 'political crimes' and 'maintaining social stability', has to be understood as an extremely effective tool for the suppression of dissidents in China.

A particularly hot topic in China is the crime of telecommunication fraud, of which more than 200.000 cases were registered in 2019 alone (Beijing Daily 2019). Subsequently, the Ministry of Public Security orchestrated a criminal justice campaign titled 'Cloud Sword (云剑)' that targeted this particular crime and once again it was the province of Zhejiang, which was particularly successful, so that in this province alone 160 Million RMB in fraudulently acquired assets were seized until December 2019 (Zhu Ziyang 2019). Zhejiang had established specific models for the prediction and prevention of telecommunication fraud on municipal levels that involves strict surveillance of any suspicious online or telecommunication activities and close coordination down to the local police station so that real-time monitoring of fraudulent activities and immediate warnings of potential victims seems to be possible (Wang Shujing 2019). The police forces thereby also rely on the active participation of private companies such as the Zhejiang-based Alibaba Group for e.g. the identification of possible suspects (Wu Yuewen 2019, 93). A similar approach in targeting telecommunication fraud is reported from the city of Zhongshan in Guangdong province, which is another area for experimental predictive policing measures. In one instance, the Zhongshan police were able to warn a potential victim and apprehend the corresponding suspect in less than four hours after the attempted fraud commenced. A telephone card, flagged for possible connections with drug-related crimes and mafia-related money laundering, came on the radar of the automated system when the cardholder had sent a text message to a Mrs. Zheng directing her to a website that asked *inter alia* for her national identification and banking card numbers. Because Mrs. Zheng could not be reached by phone at the time, police officers from the local station were immediately dispatched and arrived before she disclosed her sensitive information. Within just the year 2018, the Zhongshan police had placed 9120 warning calls of this kind (Mai Wanhua 2019, 23) in a city of roughly 3 Million people which again illustrates the enormous dimensions of telecommunication fraud in China and also highlights the vast extent of this predictive policing operation. In this instance, actual security concerns of the population are the driving force of predictive policing in China, while privacy issues are much less relevant in this mass surveillance effort, which can be seen by the fact that the Zhongshan police intercepted more than 13000 telephone calls and more than 30000 text messages in 2017 alone (Zhongshan Daily 2018).

The Zhongshan police force is also using another rather innovative method for its version of predictive policing as it employs wastewater analysis in its fight against drug crimes. In collaboration with Peking University, Zhongshan was the first municipality in China to systematically test sewage water across the city since 2017 and started to build a data analysis model that also included water and electricity use for the purpose of identifying hot spots for drug crimes. Until 2019, this approach led to the arrest of 341 suspects in 45 different criminal investigations (Zhongshan Daily 2018). When one particular district in Zhongshan produced suspicious data in its electricity use, the wastewater analysis however falsified drug-related crimes so that the Zhongshan then successfully shifted its focus and found a hotspot for telecommunication fraud (Zheng Zehui 2019, 18). Such a nuanced approach is however not always maintained as the Zhongshan police force also followed up on its wastewater analysis by simply conducting hair-sample tests of 22530 persons working in the local nightlife industry, which produced 356 positive tests for substance abuse and led to the arrest of 17 people (Mai Wanhua 2019, 24). The European Monitoring Centre for Drugs and Drug Addiction recently commissioned a study which assessed the applicability and potential advantages of ‘wastewater-based epidemiology’ (WBE) and found it highly useful for determining and addressing public health issues, while the study also ascertained that the use of WBE for law enforcement purposes should be primarily as a tool to evaluate its effectiveness and warned against ‘ethical risks’ of targeting certain communities (EMCDDA 2020, 7-9). The latter concerns were obviously not relevant in Zhongshan as exhibited by targeting an entire group of people, which was clearly intended to boost the perceived effectiveness of its innovative methods.

Reports on predictive policing in China by Western commentators mainly focus on China’s pervasive mass surveillance campaign against its Muslim population in Xinjiang (Yuan Yang 2019). As mentioned above, this correlates with many assertions from China that the fight against terrorism is one of the main scopes of application for high-tech policing so that future terrorist attacks may be predicted and prevented (e.g. Guo 2019). Information on the on-going operation in Xinjiang is however scarce and rather deal with conceptual issues of terrorism in the crosshair of predictive policing methods (e.g. Li Zhiheng, Yao Bo 2019). While the true predictive facilities of the Chinese authorities are unclear, the scope and intrusiveness of its surveillance measures were *inter alia* exposed by the China Cables of the International Consortium of Investigative Journalists (ICIJ) or related reports from Human Rights Watch (HRW). The ICIJ revealed, e.g., that more than 40.000 users of a file-sharing app (Zapya – 快牙) who used the app to share religious content were further investigated under the ominous ‘de-extremization (去极端化)’ policy that could easily lead to ‘assisted or

placed education 帮教、安置教育’ or the like in one of China’s internment camps (Alecci 2019). HRW was also able to obtain a police app that connects to the Integrated Joint Operations Platform (一体化联合作战平台), which is a core infrastructure of the mass surveillance in Xinjiang. Reverse engineering of said app showed that Chinese authorities are collecting a huge amount of personal data that even encompass aspects like ‘not socializing with the neighbors, often avoiding using the front door’, it appears to flag certain targets (persons), follows their movement and even may dispatch the police if these targets enter certain geographies (HRW 2019). While the underlying algorithms and their more nuanced predictive capabilities remain unclear, it is evident that China’s security forces enhanced their real-time response skills that are based on data collected through mass surveillance.

### Systemic Pitfalls for Predictive Policing in China

China is doubtlessly heavily investing in its predictive policing capabilities. This follows a well-established implementation course that entails the highest political support and declarations of intent, which feed into local trials and experimentation and will probably lead up to a galvanized national strategy. Predictive Policing fits very well into China’s greater scheme of using technology to update and bolster its approach of social governance and public security. China’s authoritarian regime may be considered extremely conducive to the establishment of predictive policing models as its paramount objective of security will always trump any concerns regarding privacy issues, due process or an unduly amount of false-positives. Additionally, the use of presumably unbiased technology may support the regime’s recent efforts to raise its legitimacy by suppressing corruptive practices of its administration. This chapter will however discuss substantial and systemic flaws and risks which predictive policing may face in China. Its underlying data cannot be trusted and effective as well as appropriate police operations and interventions that sustainably reduce crime and not only target certain groups may be almost impossible to establish. Especially, the imperative of constant evaluation of the established predictive policing mechanisms, which has to be based on critical reflection, transparency and the willingness to engage in an open-ended process without fixed expectations regarding the results (Ferguson 2017b, 1165-80), may not be an approach available to the Chinese system.

### Predictive Policing and Chinese Police Data

An old saying in information technologies is ‘garbage in, garbage out’ and describes the limitation of computerized data management systems, which are highly dependent on the quality of their input. In her seminal work, O’Neill reiterates the validity of this

notion for automated scoring systems and highlights their affinity to error (2016, 150-1), which may then sustain feedback loops that lock in doubtful decisions and even exponentiate their harmful consequences as the first erroneous decision may trigger a cascade of additional errors in interlinked areas that the respective system also monitors (Robinson 2017, 320-2). In the field of predictive policing, Bennet Moses and Chan point out that 'predictions can accordingly become self-affirming' (2018, 810) as more policing of certain areas or communities produces more, corresponding data that is fed into the machine. Barocas and Selbst argue that 'data mining can reproduce existing patterns of discrimination, inherit the prejudice of prior decision-makers, or simply reflect the widespread biases that persist in society' (2016, 674). Effective and fair predictive policing therefore requires high quality data and data management schemes that are unreservedly acknowledging their errors and putting a lot of effort in addressing and mitigating these errors (Ferguson 2017b, 1151-2).

If China currently holds or is able to produce such a data set in the future is highly questionable. Not the least because official crime data in China is a matter of highest political sensitivity. From the perspective of the central government, crime rates are not only an issue discussed in terms of safety and security but also pose a threat to the regime's legitimacy and undermine, in the words of Dutton and Xu, its 'socialist face' (2005, 125). Additionally, Xu Jianhua was able to show that crime statistics are seriously manipulated locally as the number of reported crimes are part of the police's evaluation so that newly established police commissioners first artificially inflated their local crime rates so that they could then show their success by a distinctive downward trend in reported crime (2018, 166-9). Furthermore, in an empirical study, Mou Yu demonstrated that the police in China can easily manipulate its dossiers, which are hardly ever successfully challenged in court, and thus make them fit their version of the truth which may 'relate to stereotyping, intuition or imagination in specific circumstances' and is predominantly 'based upon the probability of conviction (2017, 77). The lack of reliable official data is also frequently acknowledged by Chinese criminologists, who additionally encounter many difficulties collecting their own data and conducting their research in China (Zhang 2013, 171-77). Quite tellingly, it is therefore not surprising that a recent study published in Chinese in a Chinese journal by Chinese academics on a possible algorithm for crime prediction is using data from Chicago and not from any Chinese locality (Tang, Shi, Zhang 2018, 223).

It may be possible that the high volume of data collected through nearly ubiquitous surveillance by the police could create an extremely valuable data set for predictive policing in China. But as truly raw data generally does not exist and given the

aforementioned problems in the collection, production and interpretation of crime-related data in China, it is highly doubtful that a database can be constructed in China that allows for an effective (in the sense of crime reducing) and fair (in the sense of minimizing errors) predictive policing in the foreseeable future. This is not to say that China will not be able to establish its version of predictive policing, but this will rather perpetuate and probably even exponentiate its already highly problematic policing practices as discussed below.

### Predictive Policing and Chinese Police Operation

Putting predictive policing into practice does not only involve data management and coding predictive algorithms, but it is also a question of the appropriate police operation. Even if a specific crime or crime pattern is predicted for a certain area or yet more advanced, if a specific person is identified as a likely criminal offender for certain crimes about to happen, this does not necessarily entail that the right police intervention is also available (Bennet Moses, Chan 2016, 813). Simple police deployment may be considered the prime intervention to prevent the crime and thereby satisfy the system's own logic so that 'the metrics being established may be consistent with the technology, but not the ultimate goal of crime reduction' (Ferguson 2017b, 1176). Problem-oriented responses may in contrast more comprehensively target the predicted crime and its root causes, but this requires extremely adaptive police tactics that proficiently use its predictive tools in the sense of understanding the technology's mechanisms and critically reflect on its analytical output (Bennet Moses, Chan 2016, 814-5).

The complexities of Big Data and predictive policing technologies are a huge stumbling block for their implementation in China as elsewhere in the world. Introducing data-driven policing and intelligence-led police work requires not only investments into the equipment but also in the training of the new and already existing police force. Additionally, the Chinese police are already struggling with the implementation of new policing tactics (Wang, Zhao 2016, 534) as many police officers are already highly frustrated with their ever changing role and duties over the last 40 years of criminal justice reform, the high pressure from above and their very limited influence on the course of police reforms (Scoggins, O'Brien 2016, 227-8). A common theme in the Chinese literature on the core problems of the implementation of Big Data approaches to contemporary policing during the last ten years is therefore the assertion that neither beat cops nor the commanding officers had sufficient data literacy (Zou Xinyi 2010, 44-5, Wu Zhihui et al. 2017, 103; Lin Guan, Hao Sun 2020, 75-6). This gives also rise to the problem that existing command structures may perceive themselves challenged

by the new technology or the newly established operators and would try to retain full control over the actual police operation (Lin Guan, Hao Sun 2020, 76). This kind of internal competition can also be seen in the field of data sharing. While this issue was among the core objectives since the implementation of the Golden Shield Project in 2003, corresponding problems have not yet disappeared so that data sharing among different levels of the police hierarchy as well as among the public security apparatus and other administrative organs is still highly deficient (Wu Zhiui et al. 2017, 103; Lin Guan, Hao Sun 2020, 76).

As mentioned above, the Chinese police are heavily guided by its constant evaluation and the establishment of specific predictive policing metrics will certainly have significant impact on police operation. The two most common police tactics in China are still its socialist version of community policing (Wong 2001) and campaign-style policing that leads to 'severe and swift punishments' by identifying the targets of the campaign, by accelerating the responses and by bolstering the campaign with a propaganda blitz (Trevaskes 2010, 64-6). Hot-spot policing as the most accepted police tactic for geographical predictive policing does however not belong to the arsenal of the Chinese police, because, according to Wang and Zhao, there are simply no significant crime hot spots in China (2016, 532-3). Predictive policing in general is still far from being a ubiquitous panacea but very selectively and discretionary employed by the police (Joh 2016, 30-1), so that China's approach of targeting specific crimes as seen in its current experiments and respective political statements will be the prevailing practice for the foreseeable future. Terrorism and political crimes are repeatedly identified targets of China's predictive policing and thereby complement its campaign-style police operation in these areas, so that this new technology is most certainly used further suppress dissent in China (HRW 2017). Furthermore, in the case of drug-related crimes, China's use of WBE will predict crimes and the police will have to prevent (those) crimes in order to meet the corresponding evaluation metrics, even if this entails a campaign-style drug testing operation of an entire community as seen in Zhongshan. Ticking the boxes of the predictive policing tool and thereby fulfilling the requirement of effectively using the new technology will be more important than crime reduction. This effect will be further exacerbated as the Chinese police do generally not engage in problem-oriented policing (Wang, Zhao 2016, 532), which would make use of the WBE in also addressing drug problems as a public health issue and thereby respond to the underlying root problem of drug-related crimes. While the predictive policing against telecommunication fraud by the Chinese police should also be understood as campaign-style policing, this operation demonstrates that the seemingly unfettered surveillance of private (telecommunication) data of its citizens can be extremely helpful

in predicting and preventing this kind of crime. From this perspective, China would be in the position to very effectively employ predictive policing methods at least in areas, where data flows can be monitored and where the flow of data is part of the criminal activity.

### Policing Predictive Policing in China

The single most important issue stressed in many publications on predictive policing is the need to establish rigorous evaluation mechanisms and clarify accountability for technology-led police operations. This is especially true as the experiences in the US with predictive policing so far produced inconclusive results regarding their effectiveness (Bennet Moses, Chan 2016, 815-6) and are easily corrupted by ‘self-reinforcing or self-fulfilling predictions’ (Ferguson 2017b, 1178). There may also be the tendency that the high publicity value of establishing ‘smart policing’ based on modern technology and Big Data analysis, that will advance the efficiency and cost-effectiveness of the police force, may cloud the judgement of decision-makers and prevents critical reflection and evaluation of predictive policing (Ferguson 2017a, 28-31). Additionally, using predictive policing tools may ‘outsource aspects of the decision-making process, and thus responsibility and accountability for the decision itself’ (Bennet Moses, Chan 2016, 817). The machine could be easily blamed for every fraught or erroneous police intervention without holding the police itself accountable. Taking accountability, however, requires transparency regarding the methodology of the prediction and its impact on the corresponding police operation as well as technological expertise of at least the commanding officers, who need to fully understand the computed output of the prediction tool (Ferguson 2017, 1166-9).

Full accountability and transparency for internal police mechanism is not only in China hard to achieve. Chinese police culture is however extremely averse to external or internal oversight. The Chinese police law (Art. 42) establishes the procuratorate as the primary supervisory body of the police in China, but ‘in reality, the prosecutor and the police are closely aligned and collaborate with one another’ (Mou Yu 2017, 83) and the police are generally accepted as being more powerful than the procuratorate or even the courts in China (Xu Jianhua 2013, 1110). Given the nature of predictive policing as a tool to inform police tactics and operations, internal oversight would appear to be more suitable to create accountability. While such a system exists in China, Wong provides a disastrous summary of its efficacy as it is conducted ‘most of the time [...] in a very superficial and perfunctory manner’ and the respective inspection teams are ‘grossly understaffed, undertrained, and inadequately resourced’ (2013, 333). Such a weak internal police supervision is described as still in its nascent state and it has certainly

not yet the ability to effectively reign in a public security apparatus, that is built on a culture of defending the socialist revolution against its enemies (Ma Yue 2008, 50-1). This gross lack of accountability may even fuel the use of computerized decision-making processes in police operations as the technology can be portrayed as unbiased and incorruptible. The employment of predictive policing tools may be propagandized as a means to reduce human error or misconduct, which then again positively reflects on the police's and by association the regime's legitimacy. A critical evaluation of predictive policing would be counterproductive to this particular cause. Given the fact, that the technological expertise in the commanding levels of the Chinese police, as mentioned above, additionally appears to be still highly deficient, a nuanced supervision of predictive policing tools in China appears illusionary. Predictive policing can therefore easily become more of a propaganda instrument than a means for crime reduction.

## Conclusion

China's future in predictive policing is fraught with substantial risks regarding its effectiveness in reducing crime. In technologically upgrading its system of social governance in general and its public security apparatus in particular, the Chinese regime envisions a boost in legitimacy as seemingly unbiased and incorruptible systems promise fairness and justice within the allowed parameters of the one-party state. The propagandistic value of predictive policing may however be the single most important end possibly even unsurmountable obstacle in establishing an effective crime reducing system of this kind in China. The Chinese security apparatus appears systemically unfit to critically evaluate, acknowledge error, re-adjust methodologies and adapt responses, which is an indispensable process in making predictive policing work. If predictive policing is however not only seen as a tool for the general reduction of crime but used as an instrument to further target specific (dissident) groups, China may be able to successfully employ Big Data technology for this particular objective. Furthermore, while actual crime data in China is significantly flawed so that systemic crime predictions seem at the moment impossible, China's huge surveillance operations produce an enormous flow of data that could be tapped into for specific campaign-style police interventions as seen in the fight against telecommunication fraud. It is safe to assume that predictions will be made on a large scale in China and the police will respond to these predictions. It is however not conceivable that this technology will substantially change police operation and police culture in China, it will rather amplify pervasiveness and bias of its practices.

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# Police use of facial recognition technology and the right to privacy and data protection in Europe

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**Abstract:** This article examines the human rights challenges of police use of facial recognition technology from a European perspective. Based on both international human rights law, the European Convention on Human Rights and EU law, the article argues that the technology challenges human rights. The focus of the article is on the right to privacy and data protection, as this right is fundamentally at risk by the technology. Acknowledging that other rights and guarantees are also negatively impacted by the use of facial recognition technology, the article makes reference to the risk of discrimination, and the unregulated cooperation between State and the surveillance technology industry. However, a central point in the article is that *irrespective* of whether the technology can be refined to eliminate risk of discrimination, and *even if* sufficient safeguards for cooperation between State and the industry are put in place, *fundamental* challenges remain in relation to the right to privacy and data protection. The technology captures the unique facial features of an individual known as biometric data which is highly sensitive data and creates an interference with the right to privacy and data protection. By allowing facial recognition, society allows for an entirely new type of intensive surveillance. The use of the technology also entails a risk of chilling effect on e.g. freedom of assembly which furthers negative implications on human rights. The article concludes that when it comes to police use of facial recognition technologies, States should tread carefully and ensure that a sufficient human rights-based regulatory framework and adequate safeguards are in place before considering using the technology.

## Introduction

The use of facial recognition technology has been debated extensively in many parts of the world during the last couple of years. The technology is based on Artificial Intelligence (AI) and can be used for *identifying* or *verifying* the identity of individuals

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1 Senior Legal Advisor at the Danish Institute for Human Rights and External Lecturer at the University of Copenhagen, Faculty of Law. Parts of the article are based on legal analysis by the author in Overview on Facial Recognition to Combat Crime, Danish Institute for Human Rights, December 2019 available here: [https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/overblik\\_ansigtsgenkendelse\\_uk\\_02.pdf](https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/overblik_ansigtsgenkendelse_uk_02.pdf)

or for *categorisation* where information about an individual's characteristics (such as e.g. sex, age or ethnicity) are extracted.

The focus of this article is on *police* use of the technology and the human rights challenges which this raises. Whilst the technology is used for different commercial or public purposes ranging from unlocking smartphones (Pardes 2018) to automatic border control gates (so-called ABC gates) in airports<sup>2</sup>, and more recently, has also been discussed in the wake of Covid-19<sup>3</sup>, specific challenges arise when police make use of the technology for investigations. This is so because by enforcing law – if necessary, by use of force – the police are empowered with far-reaching public authority (and assume a major responsibility) in society. Consequently, any technological measures which they make use of must be viewed considering both the important societal task and the responsibility placed upon them.

Furthermore, the article deals with police use of the technology from a *European* human rights perspective. Thus, the article deals with rights and freedoms ensured not only in the international human rights regime, but also by the regional regimes established by the Council of Europe and the European Union, including case law of the two regional European courts – the European Court of Human Rights and the European Court of Justice. Particularly EU law provides comprehensive protection of personal data and is legally binding directly within the Member States (differing from international public law in this supranational – binding – character). Because of this established regional human rights regime, if European countries decide to use of facial recognition technology, they will have to argue compliance with established rules and principles in European law.

Another distinct characteristic which forms the backdrop for discussions related to facial recognition technology in this article, is the on-going work on *AI and human rights* both within the Council of Europe and the European Union. Here, ethical and human rights approaches (and combinations of both) to AI are being examined and the question of introducing an altogether new legal framework for AI is being raised. This developing cross-disciplinary field explores questions related to ethics vis-à-vis legal obligations; State responsibility vis-à-vis product liability and questions related to programming “fair”, “accountable” or “transparent” algorithmic models vis-à-vis ensuring human

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2 European Union Fundamental Rights Agency in “Facial Recognition Technology: fundamental rights considerations in the context of law enforcement” November 2019

3 COVID-19 opens door to Facial Recognition Technology, 11 May 2020DLA Piper, available here: <https://denmark.dlapiper.com/da/pdf/news/2357>

rights in the design, development and deployment of the model.<sup>4</sup> For the purpose of this article, it suffices to highlight that the lack of a clear position on the legal implications of AI is a consequence of the many-faceted and far-reaching challenges posed by AI, many of which society is yet to identify and understand fully.

Lastly, the focus of the article is on the *right to privacy and data protection*. This does not mean that other human rights are not impacted by the technology; other rights are undoubtedly at risk and risks pertaining to non-discrimination (and general errors in the technology) and poorly regulated cooperation between State and the surveillance technology industry are particularly highlighted in the article. However, the position in this article is that serious impacts on privacy and data protection are *inherent* in the very technology itself. This is the case because the technology captures biometric data (comparable in terms of sensitivity with DNA), making it possible to carry out surveillance on a much more detailed and ubiquitous manner than ever before. This entails not only an increase in surveillance possibilities but can risk fundamentally altering the nature of the public space creating monumental changes in society and in the very concept of privacy (Bauman and Lyon 2013; Lyon, 2008; Murakami Wood 2003). Whilst other challenges (such as risk of discrimination and State collaborations with surveillance technology companies) can *theoretically* be mitigated, the privacy concerns are ingrained in the nature and purpose of the technology itself.

The rest of the article is structured as follows: in Section 2, a brief overview of the technology and perspectives on its use globally and in Europe are provided; in Section 3, risks pertaining to discrimination are presented followed by Section 4 in which main concerns regarding the collaboration between State and the private surveillance technology industry are described. In Section 5 the fundamental challenges to privacy

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4 To name a few initiatives where these and other questions are posed, see e.g. from the European Union: High-Level Expert Group on AI established under the EU Commission and their Ethics Guidelines for Trustworthy Artificial Intelligence from April 2019; Paper on EU guidelines on ethics in artificial intelligence: Context and implementation, PE 640.163 by the European Parliamentary Research Service, September 2019 and EU Commission White Paper on Artificial Intelligence – A European approach to excellence and trust, COM(2020) 65 final, February 2020. From the Council of Europe, see e.g. the so-called Wagner report, Study on the Human Rights Dimensions of Automated Data processing Techniques (in particular Algorithms) and possible regulatory implications, DGI(2017)12 prepared by the Expert Committee on human rights dimensions of automated data processing and different forms of artificial intelligence (MSI-AUT), March 2018; by the same Expert Committee: Study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework, DGI(2019)05, September 2019 and Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems, adopted by the April 2020 at the 1373rd meeting of the Ministers' Deputies.

and data protection are dealt with in detail and specific issues highlighted in relation to mass surveillance and the risk of “chilling effects” on other rights. Section 6 provides some concluding remarks and perspectives.

## An overview of the technology and its use

Facial recognition is based on so-called AI (which remains subject to many differing definitions<sup>5</sup>) and captures the unique facial features (biometric data) of individuals to identify them. The technology has many uses, ranging from verifying an image with an individual (so-called “one-to-one” comparison) to recognising facial images against large databases (“one-to-many” comparison). Facial recognition can be used to scan material on the internet and to surveil individuals in public spaces.<sup>6</sup> The technology can be used without a person reviewing the material (fully automated), or by ensuring “human control” during or after the automated process. One-to-one comparison is used for *verification* (also called authentication). In these cases, the technology compares the two facial images and if the likelihood that the two images show the same person is above a certain threshold, the identity is verified.<sup>7</sup> One-to-many comparison is used for *identification* which entails that the facial image of an individual is compared to many other images in a database to find a possible match. Sometimes images are checked against databases, where it is known that the reference person is in the database (closed-set identification), and sometimes, where this is not known (open-set identification).<sup>8</sup> In addition, *categorisation* entails matching general characteristics such as sex, age and ethnic origin without necessarily identifying the individual.<sup>9</sup>

The technology has led to research into e.g. emotional recognition (see e.g. Barrett, et. al. 2019)<sup>10</sup> and – as a somewhat perplexing retrogression back to 17th century criminologist Lombroso – research claiming that facial recognition can be used to detect

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5 See e.g. the paper by the AI High Level Expert Group set up by the EU Commission, “A definition of AI: Main capabilities and scientific disciplines”, 8 April 2019

6 For a general overview on the use of the technology and its implications on Human Rights, see the European Union Fundamental Rights Agency in “Facial Recognition Technology: fundamental rights considerations in the context of law enforcement” November 2019

7 Ibid

8 Ibid

9 Ibid

10 European Commission, “Smart lie-detection system to tighten EU’s busy borders,” 24 October 2018, and the website of iBorderCtrl.

if someone is “likely going to be a criminal”.<sup>11</sup> Such highly controversial (and mostly unsubstantiated) claims raise great concerns both on a legal and ethical level. However, even if these novel and worrisome claims are put aside, police use of the technology in its “simple” form, challenges the rights of individuals. This is the case when the technology is deployed by the police for *identification* based on watchlists (in order to identify specific individuals) or for general surveillance in the public space (mass surveillance e.g. for intelligence purposes). *Verification* (particularly if put under “human control”) does not raise the same type of concerns. *Categorisation* can be problematic particularly if deployed in a discriminatory manner.

People’s faces are – for the most part – visible, but facial features constitute unique biometric data comparable in sensitivity to DNA. There is a historically strong focus on privacy, data protection and protection against mass surveillance in Europe, but the human rights challenges of the technology are not by any means limited to Europe.<sup>12</sup> The lawfulness of facial recognition technology for law enforcement purposes has been put into question because of its serious implications on human rights. Use of the technology has been met with criticism from a wide range of NGO’s and civil rights organisations<sup>13</sup>, the UN<sup>14</sup> and even some of the companies which develop the technology.<sup>15</sup>

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11 The claim from scientists from Harrisburg University led to an outcry amongst data scientists and lawyers alike. See description of the research here <https://web.archive.org/web/20200506013352/https://harrisburgu.edu/hu-facial-recognition-software-identifies-potential-criminals/> and a statement from the University about halting the publishing of the paper here: <https://harrisburgu.edu/hu-facial-recognition-software-identifies-potential-criminals/>

12 For more on the historical background for the European perspective on privacy, see e.g. Grabenwarter 2014; For more on the history of human rights and arguments which counter the traditional narrative of human rights (civil and political rights in particular) as “Western” concepts see e.g. Jensen, S., 2016.

13 See e.g. Amnesty International, Amnesty International Calls for Ban on the Use of Facial Recognition Technology for Mass Surveillance, 11 June 2020.

14 See e.g. UN Human Rights Commissioner, Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peace protests, 24 June 2020, A/HRC/44/24; the United Nations Human Rights Council, “Surveillance and human rights - Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression”, 28 May 2019, A/HRC/41/35; and The United Nations Human Rights Council, “Rights to freedom of peaceful assembly and of association - Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association”, 17 May 2019, A/HRC/41/41

15 See e.g. the letter from IBM June 8, 2020 addressed to Congress on Racial Justice Reform; press release from Amazon June 10 2020 “We are implementing a one-year moratorium on police use of Rekognition”; and statement from Microsoft President Brad Smith June 11 on Washington Post Live, The Path Forward: Technology & Society

Troublesome use of facial recognition technology has already been demonstrated in the United States and in China where the technology has been deployed widely. Distinct issues have been raised in the current US debate on facial recognition – particularly with reference to the Black Lives Matter movement and the risk of discrimination in the technology.<sup>16</sup> Similarly, use of the technology in China is to be viewed in its own national and regional context.<sup>17</sup> Experiences from both countries show that the technology can be deployed with considerable harmful impacts on human rights. While comprehensive examples from the two countries and their contexts fall outside the scope of this article, one case may serve to illustrate the global impacts of the technology:

The Chinese government's alleged counterterrorism actions against minorities in the Xinjiang region has led to accusations of mass surveillance<sup>18</sup> in which the technology has supposedly been deployed for racial profiling (*categorisation*).<sup>19</sup> The mass surveillances in Xinjiang with the help of advanced surveillance technology has raised concerns on

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- 16 For further reading, see e.g. Report by Algorithmic Justice League, "Facial Recognition Technologies in the Wild: a Call for a Federal Office", 29 May 2020; Kashmir Hill, "Wrongfully Accused by an Algorithm", 24 June 2020, *The New York Times*; and WCPO Statement 24 June 2020 in Response to *The New York Times* Article.
- 17 Denis de Castro Halis elaborates more on the use of facial recognition technology during the Hong Kong protests in his article, *Digitalization and Dissent in Legal Cultures. Chinese and Other Perspectives* in this issue of the journal. For more on Chinese police surveillance, see also Daniel Sprick, *Predictive Policing in China: An Authoritarian Dream of Public Security*, in this issue of the journal.
- 18 See Human Rights Watch, *Data Leviathan: China's Burgeoning Surveillance State*, 16 August 2019. For more on Chinese police surveillance, see also Daniel Sprick, *Predictive Policing in China: An Authoritarian Dream of Public Security*, in this issue of the journal.
- 19 See Mozur, "One month, 500,000 face scans: how China is using A.I. to profile a minority", *The New York Times*, 14 April 2019; and Thomas Phillips, *China testing facial-recognition surveillance system in Xinjiang*, 18 January 2018, *The Guardian*.

an international level.<sup>20</sup> One of the companies whose systems have evidently been used in Xinjiang is Hikvision<sup>21</sup> whose surveillance products are also purchased by European countries.<sup>22</sup> Furthermore, some of the company's technology is designed and developed in Europe.<sup>23</sup> Large surveillance technology companies have a global reach and their commercial interests may collide with human rights and aid potential violations of human rights. This raises principle issues related to collaborations between State and private companies; the case illustrates the question if and how State responsibility is applicable to companies enabling human rights violations elsewhere in the world. This question is explored more below in Section 4.

In Europe, facial recognition technology has yet mostly been used on trial basis.<sup>24</sup> In its White Paper on Artificial Intelligence from February 2020, the EU Commission announced that in order to address possible societal concerns relating to technology such as facial recognition, the Commission will launch a broad European debate on the specific circumstances, if any, which might justify such use, and continued that there is a need for a European debate on the necessary legal guarantees if the technology

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- 20 See e.g. Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China) by the Committee on the Elimination of Racial Discrimination, CERD/C/CHN/CO/14-17, 19 September 2018; joint letter by Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the right to education; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on minority issues; the Special Rapporteur on the right to privacy; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, OL CHN 18/2019, 1 November 2019; Human Rights Watch, China: Big Data Fuels Crackdown in Minority Region Predictive Policing Program Flags Individuals for Investigations, Detentions, 26 February 2018; and Human Rights Watch "Eradicating Ideological Viruses" China's Campaign of Repression Against Xinjiang's Muslims, 9 September 2018.
- 21 Buckley and Mozur, "How China Uses High-Tech Surveillance to Subdue Minorities"; The New York Times, 22 May 2019; and Cadell, "Hikvision, a surveillance powerhouse, walks U.S.-China tightrope", Reuters, 29 August 2019
- 22 Seidelin and Broberg, "Overvågningsudstyr fra omstridt kinesisk firma bruges i Danmark", Jyllandsposten, 19 June 2020
- 23 Kjeldtoft, "Aalborg Universitet hjalp kontroversielt kinesisk overvågningsfirma", Politiken, 23 June 2020
- 24 European Union Fundamental Rights Agency in "Facial Recognition Technology: fundamental rights considerations in the context of law enforcement" November 2019

is used.<sup>25</sup> So far, there has been no judicial review of the legality of facial recognition by the regional human rights courts in Europe and the question of the legality of the technology remains unanswered on a European level.<sup>26</sup>

Above all, facial recognition is an interference with the right to privacy and protection of personal data. Historically, privacy implies a negative relation between the individual and State which is that of non-interference unless necessity is demonstrated. Technology which introduces new and intensive forms of ubiquitous surveillance raises the principle question whether the nature of being in a public space is changing altogether and with that, the notion of privacy (Timan et al 2017).

Before turning to the question about privacy and data protection, some remarks on the risk of discrimination and the lack of safeguards in State-company collaborations within the surveillance technology industry are provided in the following two sections.

### Flawed technology leads to risk of discrimination

Even the most advanced facial recognition technology has margins of error. In addition, the technology has been criticised for having particularly high error rates for women and people with a non-western appearance. This firstly diminishes the effectiveness and adequacy of the technology (by creating a risk of false positives or false negatives) but more importantly creates a risk of discrimination insofar as the ability to identify or recognise individuals correctly is worse for women and people with a non-western appearance (See e.g. Joy. 2018; Inioluwa et al. 2019).

For this reason alone, the human rights framework entails that States should be very careful in using the technology, especially when it comes to police use. Flawed and discriminatory technology used for investigatory purposes will create serious challenges to the non-discrimination principle which follows from e.g. the freestanding rights in

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25 COM(2020) 65 final, White Paper on Artificial Intelligence - A European approach to excellence and trust p. 22

26 The question of legality of police use of the technology is being tried in the UK where the High Court ruled on a case in September 2019 and found that South Wales Police's use of the technology was consistent with the requirements of the Human Rights Act 1998 (HRA) and data protection legislation, see *Bridges, R (On Application of) v The Chief Constable of South Wales Police* [2019] EWHC 2341 (Admin) (04 September 2019). The case was appealed and on 11 August 2020, the Court of Appeal rules firstly that the criteria that interferences with the right to privacy shall be "in accordance with law" had not been met and secondly that authorities had failed to investigate whether the technology exhibited any race or gender bias, see [2020] EWCA Civ 1058, Case No: C1/2019/2670.

Article 26 of the International Covenant on Civil and Political Rights and Article 21 of the Charter of Fundamental Rights of the European Union.

Furthermore, flawed technology (irrespective of whether it is discriminatory) will have trouble meeting the criteria of necessity and adequacy ensured in most provisions in the international human rights framework including the right to privacy dealt with in further detail below in Section 5. Similarly, considerations related to rule of law would make police use of flawed surveillance technology highly problematic.

However, *even if*, at some point, the technology reaches a point where it no longer shows a considerable (discriminatory) error rates *and* adequate safeguards are put in place to mitigate the risk, fundamental issues related to the right to privacy and protection of personal data remain unresolved.

### Lack of clear rules in cooperation between State and the surveillance technology industry

Turning to the more structural challenges with surveillance technologies (which facial recognition is a part of), State cooperation with the industry gives rise to concern from a democratic and human rights perspective (see e.g. Murray 2020; and on public opinion of police use of the technology, see Ben el al. 2020). This is the case both in relation to State *purchase* of surveillance technologies, and State regulation of *design, development and export* of the technology.

The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has examined the challenges and has stated in relation to *purchase* that “Governments and the private sector are close collaborators in the market for digital surveillance tools. Governments have requirements that their own departments and agencies may be unable to satisfy. Private companies have the incentives, the expertise and the resources to meet those needs. They meet at global and regional trade shows designed, like dating services, to bring them together. From there, they determine whether they are a match.”<sup>27</sup>

Moving on to the *design and development* side, human rights obligations are also lacking. Similarly, considerations on whether States can (and should) control research which

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27 The United Nations Human Rights Council, “Surveillance and human rights - Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression”, 28 May 2019, A/HRC/41/35.

contributes to surveillance technology are lacking. With regards to *exports*, the UN Special Rapporteur states that export controls are an important element of the effort to reduce risks caused by the surveillance industry and the repressive use of its technology but are vaguely regulated. Additionally, the UN Special Rapporteur raises concerns regarding problematic influences on State regulation of export and gives an example from the EU: “During recent negotiations on the European Union export control regime, business interests were alleged to have influenced the decision to significantly curtail the inclusion of human rights safeguards in proposed regulatory changes, despite broad agreement on their adoption in the European Parliament (Daniel 2018; Lucie 2017; Catherine 2018).<sup>28</sup>

One of the main problems is that State-company cooperation is not adequately regulated neither in relation to State responsibility nor company due diligence. There are no international or European rules that *effectively* control the purchase, or design, development and export of surveillance technology for police purposes. While public procurement rules may refer to human rights compliance, the criteria for such compliance are vague and no rules ensure *thorough* human rights impact assessments by the State in public procurements of surveillance technology.<sup>29</sup> Private actors such as companies developing or selling surveillance technology for their part are not bound by international human rights rules or regulations. They are encouraged to observe the UN Guiding Principles on Business and Human Rights but ultimately, State responsibility is the measure through which human rights are effectively enforced. Pursuant to the Guiding Principles, States are urged to exercise adequate oversight to meet their international human rights obligations when they contract with or legislate for companies to provide services that may have an impact on the enjoyment of human rights (For more on State responsibility and the responsibility of private actors, see e.g. Lagoutte, et. al 2016).

The overall problem is so serious that the UN Special Rapporteur recommends an immediate moratorium on the global sale and transfer of the technology from the

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28 The United Nations Human Rights Council, “Surveillance and human rights - Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression”, 28 May 2019, A/HRC/41/35. See also European Commission, “Proposal for a regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast)”, 28 September 2016.

29 See item 52 in the UN Special Rapporteur report. In regard to EU public procurement rules, see Directive 2009/81/EC of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security.

surveillance industry until rigorous human rights safeguards are put in place to regulate such practices and guarantee that States and non-State actors use the technology in legitimate ways.

However, *even if* an adequate human rights framework is set in place for the cooperation between State and surveillance technology companies, we are yet again left with serious challenges to the right to privacy and the protection of personal data which are examined in the following Section.

## Privacy and data protection challenges form an inherent part of the technology

Whilst rigorous control and legislation and an explicit human rights impact assessment in the design, development, purchase and deployment of the technology *may* theoretically solve (or minimise) the challenges related to non-discrimination and unregulated State-company cooperation in the area, the issues related to privacy are harder to solve.

Facial recognition technology captures the unique facial features of individuals. This type of data is categorised as biometric data and the use of this (for *verification, identification or categorisation*) is inherent in the technology.

This use of biometric data fundamentally changes the nature of the surveillance – in fact, that is the entire point of the technology. The UN Human Rights Commissioner has described it as a paradigm shift compared to regular CCTV, as it dramatically increases the capacity to identify individuals. This, the Commissioner stated, is particularly problematic if live facial recognition technology is deployed, permitting real-time identification as well as targeted surveillance and tracking of individuals.<sup>30</sup>

The former Article 29 Data Protection Working Party (now replaced by the European Data Protection Board) under the EU stated in its Opinion 4/2007 on the concept of personal data (p. 8) that a particularity of biometric data is that they can be considered both as content of the information about a particular individual (this is the facial features of person X) as well as an element to establish a link between one piece of information and the individual (these facial features correspond to person X who is thus

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30 UN Human Rights Commissioner, Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peace protests, 24 June 2020, A/HRC/44/24

identified). As such, they can work as “identifiers”. This dual character simultaneously provides information about the human body and allows for identification of a person.

The collection of biometric data is protected in various rules within international human rights law and European law: police use of biometric data is covered both by the right to privacy and the protection of personal data.

The right to privacy follows *inter alia* from Article 17 of the International Covenant on Civil and Political Rights and is furthermore protected in Article 8 of the European Convention on Human Rights. The right is also protected in Article 7 of the EU Charter of Fundamental Rights.

The right is spelled out in detail in Article 8 of the European Convention on Human Rights (and other rules generally provide the same scope of protection). The provision entails that there is no interference with the right by a public authority except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. With smaller variations, this generally entails a threefold test of i) Legitimacy, ii) Necessity and iii) Proportionality.

The protection of personal data will in most instances, where police collect the data, be covered by the right to privacy. However, a specific protection of personal data also follows from Article 8 of the EU Charter of Fundamental Rights pursuant to which everyone has the right to protection of personal data concerning themselves. The data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or on a legitimate basis laid down by law.

Furthermore, the Council of Europe’s Convention 108+ (a modernised version of Convention 108) on the Protection of Individuals with Regard to Processing of Personal Data provides certain rights. In Article 6 it states that the processing of e.g. biometric data that uniquely identifies a person is allowed only where appropriate safeguards are enshrined in the law. Additionally, Article 6 states that such safeguards must guard against the risks that the processing of sensitive data may present for the interests, rights and fundamental freedoms of the individual, notably a risk of discrimination.

In relation to personal data collected by the police in particular, the EU Directive on the processing of personal data for the purposes of the prevention, investigation,

detection or prosecution of criminal offences, sets forth certain rights for individuals as well. In a somewhat similar manner as Convention 108+, it follows from Article 10 of the Directive that the processing of e.g. biometric data for the purpose of uniquely identifying an individual is only allowed where it is strictly necessary, subject to appropriate safeguards for the rights and freedoms of the data subject. Furthermore, processing is only allowed where authorised by law; to protect the vital interests of the data subject or of another person; or where the processing relates to data which are manifestly made public by the data subject.

So, whilst no rules regulate the use of facial recognition technology by the police explicitly, the fundamental human rights rules of course all apply. This leaves us with the question whether police use of the technology is in accordance with these rules or not.

As mentioned in Section 3, insofar as the technology is flawed (irrespective of whether it is in addition to that also discriminatory), it would not meet the criteria of adequacy which is a prerequisite for any interference with the right to privacy to be lawful. Thus, a technology which interferes with the right to privacy and has an error rate which makes it inadequate for achieving the legitimate aim (which in this case would be law enforcement), would violate the right to privacy as it would not meet the conditions of the threefold test.

If we assume that the technology could with time be refined or developed in such a manner that its error rate would diminish, two main distinctions need to be made: is the technology used for mass surveillance<sup>31</sup> capturing the biometric data of everyone irrespective of whether the individuals are under suspicion? Or is the technology used on one or more specific individuals e.g. functioning as watchlists or deployed for manhunts?

Depending on how facial recognition is used, it may lead to more or less intensive interferences with the right to privacy. The more intensive the interference, the more compelling the justification for applying such a measure needs to be.

As mentioned above, the European regional courts have not ruled on the use of facial recognition technology yet. The courts have, however, ruled on police use of mass surveillance by other technological means:

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31 See more on mass surveillance in the judgment by the European Court of Justice in Joined Cases C-203/15 and C-698/15, *Tele2 Watson*, 21 December 2016

The European Court of Justice has stated that general and indiscriminate retention of data on citizens may lead to a violation of the right to privacy. Legislation which allowed mass surveillance of electronic communications for fighting crime violated the right to privacy and the right to data protection according to the Court.<sup>32</sup> Currently, a number of cases are pending before the Court on the consequences of this landmark ruling on mass surveillance.<sup>33</sup>

The European Court of Human Rights has stated that secret surveillance of citizens by the authorities is only compatible with human rights law if the surveillance is strictly necessary and that the mere threat of surveillance, even when secret, coupled with a lack of remedy, can constitute an interference with the right to privacy.<sup>34</sup> Additionally, a number of cases regarding mass surveillance (by bulk interception into communication) are pending before the Court.<sup>35</sup>

Taking into consideration the invasive nature of the technology – including risks related to how and when biometric data is captured and stored – it is not an unlikely outcome that the European courts may find mass surveillance based on facial recognition technology unlawful.<sup>36</sup> This assumption is further supported by the chilling effect which mass surveillance by facial recognition technology may give rise to (see more on this below).

The second question; whether the technology may be used to help locate individuals on watchlists or during manhunts, cannot be answered as simply.

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32 Judgment by the European Court of Justice in Joined Cases C-203/15 and C-698/15, *Tele2 Watson*, 21 December 2016, paragraph 100.

33 See Case C-623/17, joint cases C-511/18 and C-512/18, case 520/18 and case C-746/18.

34 See judgment by the European Court of Human Rights in the case of *Rotaru v. Romania*, 4 May 2000, paragraph 47 and para. 171. See also *A/HRC/27/37*, para. 20.

35 See an overview of the Court's case law, including pending cases, in the European Court of Human Rights Factsheet on Mass Surveillance, September 2019.

36 On the illegality of the technology for mass surveillance see *Overview on Facial Recognition to Combat Crime*, Danish Institute for Human Rights, December 2019 available here: [https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/overblik\\_ansigtsgenkendelse\\_uk\\_02.pdf](https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/overblik_ansigtsgenkendelse_uk_02.pdf) and European Digital Rights (EDRI) report, "Ban Biometric Mass Surveillance – a set of fundamental rights demands for the European Commission and EU Member States on the use of technology for the untargeted mass processing of special categories of personal data in public spaces" May 2020. See also European Union Fundamental Rights Agency in "Facial Recognition Technology: fundamental rights considerations in the context of law enforcement" November 2019

In these cases, principles related to necessity, adequacy and proportionality of the interference may lead to different degrees of risk of violation and a number of factors will in and of themselves or taken together provide different outcomes. These factors include whether there are adequate legal safeguards in place to prevent unlawful interferences; whether the technology is used to solve serious crimes or minor offences; whether the use of facial recognition technology will be restricted in terms of time and geographical location or be generally available to the police. Indeed, the assessment would also take into account whether there is a risk of security breach or other risks related to the cooperation between State and companies mentioned in Section 4.

To sum up, the answer to the second question cannot be given clear-cut but will depend on a case-by-case basis. For this reason, certain minimum guarantees have been suggested by various actors.<sup>37</sup> Such guarantees include, e.g. systematic human rights due diligence before deploying the technology and throughout the entire life cycle of the tools and effective, independent and impartial oversight mechanisms for the use of facial recognition technology.

#### The risk of a chilling effect on the freedom of assembly

A consequence of the considerable interference with the right to privacy is that it can create a chilling effect on other rights, most notably freedom of assembly.<sup>38</sup> Freedom of assembly is protected under Article 21 of the International Covenant on Civil and Political Rights, Article 11 of the European Convention on Human Rights as well as Article 12 of the European Union's Charter of Fundamental Rights.

Intensive surveillance by the police with the use of facial recognition technology during a demonstration, can potentially reveal information about individuals, including sensitive data such as their political affiliation and thus create a so-called chilling effect on individuals' willingness to take part in demonstrations.

Most recently, the UN Human Rights Commissioner recommended never to use facial recognition technology to identify those who are peacefully participating in an

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37 European Union Fundamental Rights Agency in "Facial Recognition Technology: fundamental rights considerations in the context of law enforcement" November 2019; UN Human Rights Commissioner, Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peace protests, 24 June 2020, A/HRC/44/24; and Overview on Facial Recognition to Combat Crime, Danish Institute for Human Rights, December 2019

38 UN Human Rights Commissioner, Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peace protests, 24 June 2020, A/HRC/44/24

assembly. Furthermore, it was recommended that States refrain from recording footage of assembly participants, unless there are concrete indications that participants are engaging in, or will engage in, serious criminal activity, and such recording is provided by law, with the necessary robust safeguards. Lastly, the Commissioner recommended a moratorium on the use of facial recognition technology in the context of peaceful assemblies, at least until the authorities responsible can demonstrate compliance with privacy and data protection standards as well as the absence of significant accuracy issues and discriminatory impacts.<sup>39</sup>

The UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association has stated that the use of surveillance techniques for arbitrary surveillance of individuals exercising their freedom of assembly should be prohibited. This is because identification and data collection rule out the possibility of anonymity in public spaces and can have a chilling effect on the willingness to take part in public assemblies. For example, citizens may fear that their participation will be registered in a police database. The Special Rapporteur notes that this chilling effect may be aggravated if the demonstration concerns views that differ from the majority view.<sup>40</sup>

These chilling effects are present if the technology is used for mass surveillance (rather than for locating a specific individual). As mentioned above, mass surveillance gives rise to serious concerns based on privacy alone. However, these concerns are amplified, when the concern of chilling effect is added to the matter. This makes it very hard to imagine that the technology could be deployed for mass surveillance in a manner which would not violate the rights and freedoms of individuals.

## Concluding remarks and perspectives

There are compelling arguments for deeming the use of facial recognition technology as a violation of human rights law, especially when the cumulative sum of adverse effects on non-discrimination, privacy and freedom of assembly as well as problems related to State-company cooperation are taken into account. The case of Hikvision shows that the technology and its challenges are global. However, law does not provide a clear-

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39 UN Human Rights Commissioner, *Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peace protests*, 24 June 2020, A/HRC/44/24

40 The United Nations Human Rights Council, "Rights to freedom of peaceful assembly and of association - Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association", 17 May 2019, A/HRC/41/41, items 56- 57 and 76

cut answer in terms of the illegality of the technology which cannot be said to violate human rights *per se*.

Nevertheless, it is true that the use of the technology for *mass surveillance* technology, for example, in demonstrations, can hardly be in accordance with human rights. Whilst no judicial review on a European or international level has yet been undertaken, it may also be assumed based on the provisions in the international human rights framework as well as case law from the European courts that use of *flawed* facial recognition technology with high error rates will most likely amount to violations of the right to privacy and the protection of personal data. In other than these cases, the answer is somewhat murky and rests on whether sufficient safeguards are ensured.

This lack of clarity calls for caution. The fact that not all police use of the technology is illegal *per se* should not necessarily be an argument towards introducing the technology but rather an argument for States to tread carefully so long as the wide-reaching human rights implications of the technology cannot be mitigated, and sufficient safeguards cannot be ensured. This is particularly the case because law enforcement plays a crucial role in society and entails intensive use of public authority. Furthermore, facial recognition technology changes the nature of surveillance as it dramatically increases the capacity to identify individuals in the public space.

On a more ethical level, the enhanced surveillance by facial recognition technology can put into question the very concept of identity (Bauman and Lyon, 2013; Lyon 2008; Murakami Wood 2003; Hayles 2003) which will serve as a concluding perspective here: Biometric data is data *about* us but does not comprise the entirety of our being. This distinction risks being lost e.g. when States control populations and regulate bodies through *classification* or by extensive and constant *identification* in the public space. David Lyon, an expert on surveillance societies puts it this way: “Surveillance contributes to how the state ‘sees’ its citizens [...]. Surveillance processes thus contribute to [...] the ‘disappearance of disappearance’ as being ‘invisible’ (or anonymous for that matter) in a surveillance-saturated world becomes increasingly difficult. Biometrics takes this process even further, implicating ‘body data’ in the surveillant visibility of ‘who we are’ at a very basic but highly consequential level” (Lyon 2008).

Consequently, the intensity and ubiquitous manner of biometric surveillance can risk fundamentally altering the nature of the public sphere creating monumental changes in society which are not easily mitigated. Such changes need to be identified and addressed before deploying the technology any further.

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Raji, Inioluwa Deborah and Buolamwini, Joy (2019) "Actionable auditing: investigating the impact of publicly naming biased performance results of commercial AI products", Conference on Artificial Intelligence, Ethics and Society.

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# The Rise of Smart Courts in China: Opportunities and Challenges to the Judiciary in a Digital Age

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**Abstract:** Information and communication technology has increasingly played an important role in judicial activities. In recent years, digitalization of courts has been explored actively in theory and practice in China. Generally, digitalization of courts refers to that litigation activities like case-filing, court trial, execution, service and preservation can be carried out online to a certain degree, with the help of modern technology like big data, cloud computing, artificial intelligence and high-tech equipment. Digitalization of courts is considered to help to improve judicial efficiency, contribute to judicial disclosures, provide convenience for people and to establish judicial big data. However, lack of consistent guidelines might undermine the application of digital means in the judiciary. The purpose of this paper is to investigate the progress made so far with regard to digitalization of courts in China, and to analyze the opportunities and challenges during the digitalized process of Chinese courts.

**Keywords:** digitalization of courts, artificial intelligence, judicial reform, China

## Introduction

In recent years, digitalization of Chinese courts has hit the headlines and been heatedly discussed among academics and legal practitioners. In China, the concept of digitalization of courts is to some extent similar to concepts like “smart court” or “intelligent court”. It appears that scholars and academics are not unanimous on what the standard definition of digitalization of court should mean. Digitalization of Chinese court means that litigation activities like case-filing, court trial, execution, service and preservation can be carried out online to a certain degree, with the help of modern technology like big data, cloud computing, artificial intelligence and

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high-tech equipment. Digitalization of courts is aimed, among others, at facilitating modernization of trial capability and trial system.<sup>3</sup>

Information and communication technology is establishing a new-type of court and litigation system in recent years. It is imperative for Chinese courts to join the rest of the world by digitally transforming its court practice and procedure. China's President Xi Jinping once stated, "*there is no modernization without digitalization*"<sup>4</sup>. Similarly, Zhou Qiang, the Chief Justice and President of the Supreme People's Court of China (*Supreme Court hereinafter*), has emphasized that judicial reform and information construction, contributing to the modernization of judgment capability and system, are "*two wheels of cars and a pair of wings of birds*".<sup>5</sup> Thus, digitalization becomes necessary to address some problems presently faced in China during litigation.

Suffice to note that a large number of cases need to be dealt with by a relatively small number of judges in China. With the rapid development of economy and increasing consciousness of rights, people tend to resort to law to solve their disputes.<sup>6</sup> Therefore, judges are frequently overloaded having to deal with large number of cases, and the lack of capacity inevitably affects efficiency of case-handling. In addition to handling cases, judges are also saddled with administrative responsibilities, which may result in distraction in the handling of cases. This is also coupled with the fact that the traditional way of collecting, collating and delivering information appears to be too slow to improve the judicial efficiency. Digitalization of courts is seen as useful to improve judicial efficiency.

There is no doubt that litigants care about how cases are proceeding. In the past, it was not easy for litigants and the public to be updated on litigation processes in China. In pre-digitalization times, litigants would try every means to contact judges about information on the progression of their cases. However, judges were and are often

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- 3 Rule of Law Index Innovation Project Team of Institute of Law in Academy of Social Sciences. The development of informatization of Chinese courts in 2017 and outlook in 2018. *Annual Report on Informatization of Chinese Courts no.2*. 2018.  
中国社会科学院法学研究所法治指数创新工程项目组. 2017中国法院信息化发展与2018展望. 中国法院信息化发展报告No.2. 2018.
  - 4 Xi Jinping. *First meeting of the central cyber security and informatization*. 2014. 习近平. 中央网络安全和信息化领导小组第一次会议. 2014.
  - 5 Zhou Qiang. *National symposium of provosts of high courts*. 2014. 周强. 全国高级法院院长座谈会. 2014.
  - 6 Wu Tao & Chen Man. On the Construction of Intelligent Court: Value Orientation and System Design. *Social Science*. 2019 (5) 吴涛, 陈曼: 论智慧法院的建设-价值取向与制度设计, 社会科学, 2019年第5期.

too busy to reply to litigants timely. This leads to misunderstanding and distrust. In addition, platforms for disclosure of judicial information rarely existed in pre-digitalization times. Hence, people were inclined to regard litigation activities as non-transparent and inaccessible, which severely undermines judicial credibility. Litigation activities are usually time and energy consuming for both litigants and lawyers. In order to file a case, they may have to go to court several times to manually file their court processes. What's more, litigants, witnesses and judicial appraisers have to appear before court several times even though the facts and legal rules in support of the case are simple and clear.<sup>7</sup>

In principle, digitalization of courts, if well adopted and practiced, may be crucial to solving the problems existing in litigation activities, such as low efficiency, weak judicial credibility and inconvenience. This paper is aimed at addressing opportunities and challenges associated with digitalized processes. It will analyze the legitimacy and legality of certain technological innovations applied in digitalization of courts. It will further examine the questions whether remote trials go against the principle of direct and verbal trial, and whether automation of courts ensure a better quality of justice in China.

## Steps of Digitalization of Chinese courts

### Case-filing stage

#### *Electronic Case-filing (E-filing)*

From 1st May, 2015, all courts in China had to start accepting cases based on a case-filing registration system instead of case-filing scrutiny system.<sup>8</sup> The traditional way of case-filing scrutiny requires the judge to scrutinize essential facts and issues to decide whether the court should accept the case or not. Conversely, according to the case-filing registration system, the court must accept the case as long as the case meets the formal requirements of the system. Due to the application of the case-filing registration system, the threshold of filing a case becomes lower and the case number has been increasing significantly since 2015. The reports of the Supreme Court show that courts in China

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7 Zhang Shuqin. Make Best Use of the Advantages and Bypass the Disadvantages: A Right Attitude of Judicial Artificial Intelligence. *Journal of Shanghai Normal University (Philosophy and Social Sciences)*, 2020 (1). 张书勤, 人工智能在审判中的应用, 上海师范大学学报(哲学社会科学版), 2020 (1).

8 Supreme People's Court Monitor, June 18, 2015, at: <https://supremepeoplescourtmonitor.com/2015/06/18/new-docketing-procedures-come-to-the-chinese-courts/>.

have accepted 14.38 million cases in 2014<sup>9</sup>, 17.66 million cases in 2015<sup>10</sup> and 19.99 million cases in 2016<sup>11</sup>, which means the case number increases at a relatively high rate. The large number of cases puts a heavy burden on judges who deal with case-filing affairs.

According to Article 14 of *Rules of Supreme People's Court on Several Issues on Case-Filing Registration System*, in order to facilitate litigants to exercise litigious rights, courts provide litigation services such as case-filing online systems.<sup>12</sup> So far, many courts in China have actively explored and established an E-filing system. In general, E-filing in China can be divided into two modes: filing a case directly online and making an appointment online to file a case. To file a case directly online, as the name suggests, litigants or lawyers submit an electronic version of litigation materials online and judges then assess them online. If those litigation materials meet formal requirements, judges can decide to accept the case directly online. As for making an appointment online to file a case, it means litigants or lawyers can upload an electronic version of litigation materials online. If there are some materials missing, the judge will ask litigants or lawyers to provide supplements. When all the litigation materials are complete, clients or lawyers can go to the court to file a case with a paper version of litigation materials, which can help clients or lawyers avoid going to court several times. A study shows that so far about 2479 courts (as of 2018) in China have begun to establish E-filing systems. Beijing, Shanghai, Zhejiang, Anhui, Hunan, Jilin and Guangxi have established E-filing systems in all courts of those provinces.<sup>13</sup> Case filing online is still explored in practice and there is no consistent guideline on it, therefore different courts have different rules about E-filing. In Beijing, for example, only lawyers can upload the electronic version of litigation materials to file a case directly online. If those materials go through formal assessment, lawyers are required to send paper versions by couriers to courts. Both litigants and lawyers can make an appointment online to file a case in Beijing. Only

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9 The Supreme Court of People's Republic of China. Judicial statistics bulletin of national courts in 2015. 2015. 中华人民共和国最高人民法院. 2015年全国法院司法统计公报.2015.

10 The Supreme Court of People's Republic of China. judicial statistics bulletin of national courts in 2016. 2016. 中华人民共和国最高人民法院. 2016年全国法院司法统计公报.2016.

11 The Supreme Court of People's Republic of China. Judicial statistics bulletin of national courts in 2017. 2017. 中华人民共和国最高人民法院. 2017年全国法院司法统计公报.2017.

12 Article 14. Rules of Supreme People's Court on Several Issues on Case-Filing Registration System. 第十四条. 最高人民法院关于人民法院登记立案若干问题的规定.

13 Rule of Law Index Innovation Project Team of Institute of Law in Academy of Social Sciences. Third party assessment report about informatization of Chinese courts (2017). *Annual Report on Informatization of Chinese Courts no.2(2018)*. 2018. 中国社会科学院法学研究所法治指数创新工程项目组. 中国法院信息化第三方评估报告 (2017). 中国法院信息化发展报告 No.2(2018). 2018.

three types of cases can be filed online including first instance of civil and commercial cases, intellectual property cases and some execution cases.<sup>14</sup>

Establishing E-filing system is of great significance in relation to an improvement of filing efficiency and convenience for clients. Clients and lawyers can follow the instructions step by step to file a case online, which can reduce judges' workload of providing consultation services. In addition, case-filing online eliminates the drawback of the traditional filing model that judges can only censor and accept the case at a fixed place. Instead, judges in filing courts can deal with filing affairs online anywhere, which indeed has improved filing efficiency. What's more, the advent of a case-filing online system brings convenience to litigants and lawyers because they can file a case even without leaving home. Compared to the traditional filing model, E-filing helps litigants and lawyers to save some transportation fees, time and energy. For plaintiffs who live far from places in which courts are located, the value of E-filing becomes more obvious. On 4th May, 2017, Mr. Hong who lives in Fujian Province filed a case successfully online to Huangyan People's Court in Zhejiang Province and the first trans-province E-filing in China took only half an hour.<sup>15</sup> However, the design of a case-filing online system is not excellent enough to fully reflect its values. The main concern about E-filing is false litigation. Some judges' concern relates to the fact that people might abuse litigation rights because they cannot verify the identification of parties and censor the authenticity of litigation materials.

Legal services provided by robot guide

*"Hello, I am a robot guide Xiaoyu. How may I help you?"*

*"I want to consult about filing a case. Can you help me?"*

*"Of course! What kind of case are you going to file?"*

*"About contract disputes. What materials do I need to prepare?"*

*"Your case belongs to civil and commercial matters. You need to prepare: statement of claims, identification materials, evidence materials. If you have a lawyer, you should submit the letter of authorization. If you are a company, you need to provide basic business information."*

*"Ok, I get it. Thank you so much!"<sup>16</sup>*

14 <http://www.bjcourt.gov.cn/ssfw/index.htm>, Last accessed: 15th May, 2019.

15 [http://www.legaldaily.com.cn/zfzz/content/2017-05/04/content\\_7133580.htm?node=81122](http://www.legaldaily.com.cn/zfzz/content/2017-05/04/content_7133580.htm?node=81122), Last accessed: 16 May 2019

16 <http://news.sina.com.cn/o/2017-03-12/doc-ifychavf2500227.shtml>. Last accessed: 16th May, 2019

The above conversation happened between a famous host Beining Sa and the first robot guide Xiaoyu in Shanyu People's Court of Anhui Province. In recent years, litigation service halls of many courts in China have introduced robot guides to provide legal services for people. Robot guides are expected to help reduce the service workload of staff in the litigation service hall through taking on the work of legal lecturing and guidance. Robot guides can lead people to corresponding counters to file a case and pay litigation fees. Moreover, they are equipped with massive knowledge to provide introduction of the court, legal consultation service, real-time query of case information. For example, the robot guide Xiaofa in Gaochun People's Court, has learned one hundred thousand legal provisions and regulations, fifty thousand common legal issues and thirty thousand typical cases.<sup>17</sup> Apart from providing legal services, the robot guides can help relieve a serious atmosphere in litigation service halls, because some robot guides can speak in a witty way with a childish sound.<sup>18</sup> Many people may feel nervous when they step into court and the robot guide can help them reduce psychological stress.

## Court trial stage

### *Remote trial*

A remote trial means that litigants can participate in litigation, witnesses testify and judicial appraisers provide expert opinions through audiovisual transmission technology. Through transmission channels of sound, video and image and terminal equipment established by network technology, judges, litigants and participants in the proceedings can simultaneously participate in the trial at the court and at the remote trial point facilitated with internet and relevant apps.<sup>19</sup>

Relevant legislation about remote trial is limited in China. Article 259<sup>20</sup> of *Judicial Interpretation of Civil Procedure Law of People's Republic of China* (Hereinafter referred to as *Interpretation of Civil Procedure Law*) stipulates that in summary procedure, with the consent of both parties and permission of the People's Court, the audiovisual

17 [http://www.js.xinhuanet.com/2017-09/12/c\\_1121650325.htm](http://www.js.xinhuanet.com/2017-09/12/c_1121650325.htm), Last accessed: 5th June, 2019

18 Wang Y. The first robot guide debut Minhou People's Court. *Legal Daily*. 8/6/2018. 王莹. 首位机器人亮相闽侯法院. 法制日报. 8/6/2018. 003版.

19 Shanghai Second Intermediate People's Court. Several Provisions on the Remote Trial of Cases(Trial). 2008. 上海市第二中级人民法院. 《关于案件远程审理工作的若干规定（试行）》 2008.

20 Judicial interpretation of Civil Procedure Law of People's Republic of China (Hereinafter referred to as Interpretation of Civil Procedure law) 最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释

transmission technology may be used to open a court session. According to Article 73 of *Civil Procedure Law of People's Republic of China*, (Hereinafter referred to as *Civil Procedure Law*) with the permission of the People's Court, witnesses may testify through audiovisual transmission technology under the following circumstances: failure to attend court due to health reasons, traffic inconvenience, force majeure such as natural disasters and other valid causes. However, there is no provision relevant to remote trial in *Criminal Procedure Law of People's Republic of China* (Hereinafter referred to as *Criminal Procedure Law*). In 2011, the Supreme People's Court and the Ministry of Public Security jointly issued the *Notice on Establishing a Remote video Interrogation Room at the Detention Center*. Courts in some areas such as Shanghai have issued specific rules for remote trial of criminal cases.

At present, practices about remote trial across the country are in the lead of theory. Therefore, remote trial lacks legislative support and theoretical research. Due to the fact that the practice of courts in various areas is not completely consistent, the remote trial shall be introduced roughly by taking Jilin Province as an example. Jilin e-court is equipped with cloud conference system which can be used for remote trial in case where litigants, witnesses and appraisers fail to go to the court. Before the beginning of remote trial, the litigants are expected to log on the website of Jilin e-court and enter into the cloud conference system at appointed time. The judge will initiate the cloud conference on the court intranet. There are no strict requirements for the types of cases which remote trials apply to. Remote trial is mainly applied in the summary procedure and it is also applied in first instance of ordinary procedure and special procedure.<sup>21</sup> In addition, there is no need for both parties to reach an agreement; either party can apply for a remote trial.<sup>22</sup> Thus, one party can participate in court trial through cloud conference system and the other party may go to the court to attend the trial in the traditional way.

#### *Alternative dispute resolution online*

Some courts attach great importance to the construction of alternative dispute resolution online. At a visit to Hechuan People's Court in Chongqing Province, a judge explained the online platform for mediation. The platform is aimed at resolving disputes related to divorce, succession, adjacent relation, road accident and medical dispute.<sup>23</sup>

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21 Chen Shufang. An empirical study of remote trial in electronic litigation. *Journal of Jiangsu University of Science and Technology*. 2017. 17(4). 陈树芳. 电子诉讼中远程庭审的实证研究. *江苏科技大学学报*. 2017. 第17卷第4期.

22 Ibid.

23 Interview of a judge at Hechuan People's Court, Chongqing, China. 20 August 2018.

The parties involved in the dispute can log on to the platform and choose the mediators who are from People's Mediation Committee, Insurance Industry Association, Mediation Committee for Medical Disputes, Lawyers' Association, Public Security Agency etc. Mediators can organize offline mediation or online remote mediation based on the parties' applications. If the case is mediated successfully, the mediation document shall be transmitted to the court through the platform to get judicial confirmation. Since July 2017, 303 cases were mediated on this platform which accounts for 10% of civil and commercial cases accepted by the court in the same time.<sup>24</sup>

It is to be noted that car accidents account for a large proportion in civil cases and people injured in the traffic accidents have to wait for a long time to get compensation. Yuhang People's Court in Zhejiang Province has carried out a significant innovation, the "Yuhang model" in handling road accidents. The "Yuhang model" is actually a pre-litigation mediation platform for road accidents and the platform is established by the joint efforts of the court, insurance company, insurance industry association, insurance regulatory commission and public security agency. With a uniform and transparent mediation standard and compensation calculator in the platform, the parties can quickly reach an agreement with the help of the mediator. Mediation results confirmed by the court will be immediately transmitted to the system of an insurance company. People injured in road accident can get compensation from the insurance company by triggering "one click settlement". Through the platform, judicial confirmation of mediation documents can be finished within 30 minutes and "one click settlement" can shorten the time of getting compensation to even 28 minutes.<sup>25</sup>

## Execution stage

### *Electronic delivery system*

Whether the legal documents are successfully delivered affects the exercise of the litigants' rights and progression of litigation activities. However, it is not easy to deliver legal documents to litigants successfully in China. Even in case of being informed of the accurate address for service, the court has to spend a lot of time on travelling to the address of service if the litigants live far from the court. In addition, population

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24 Chongqing High People's Court research group. Chongqing High People's Court creates "6 E" E-court in Internet era. *Annual Report on Informatization of Chinese Courts no.2*. 2018. 重庆市高级人民法院课题组. 重庆市高级人民法院"六E"打造互联网时代电子法院. 中国法院信息化发展报告No.2. 2018.

25 Dai Mengxi Yuhang mode: let data run more and people injured run less. *Financial Times*. 19/7/2017. 010. 戴梦希. 余杭模式: 让数据多跑路, 客户伤者少跑路. 金融时报. 19/7/2017. 第010版.

mobility continues to increase in China, so frequent change of residence also poses serious challenge to service. Electronic service is a great innovation in the information era to solve the difficulty of service.

Legislation on electronic service in China is summarized as follows. In 2003, Article 6 of *Rules of the Supreme Court on the Application of Summary Procedure for Civil Cases*<sup>26</sup> stipulates that in summary procedure, after the plaintiff files a lawsuit, the court may summon the two parties to court through oral message, telephone, fax, email etc. Article 87, paragraph 1, of the *Civil Procedure Law* stipulates that subject to the consent of the person to whom a procedural document is to be served, the document may be served by way of fax, email or any other means through which the receipt of the document may be acknowledged, except for judgments, rulings and mediation documents. At this point, *Civil Procedure Law* legally and officially incorporated electronic service. Article 136 of *Interpretation of Civil Procedure Law* requires the served to confirm the way of service in the confirmation of address for service if he or she accepts electronic service.

Courts in Chongqing province are establishing the platform on “intelligent service and quick arrival”. The platform provides electronic service through email, text message, Wechat etc. and completes the construction of a special electronic delivery system.<sup>27</sup>

Yantian People’s Court in Guangdong Province takes advantage of social media like WeChat to realize electronic delivery of legal documents. After entering the name, ID number and mobile phone number through WeChat,<sup>28</sup> the served can enter face recognition system. When the face of the served is in front of the camera, the verification of identification can be finished within minutes.<sup>29</sup> The served can receive legal documents like summons to court, notice of filing, notice of adducing evidence

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26 Article 6. Rules of the Supreme Court on the Application of Summary Procedure for Civil Case. 第六条. 最高人民法院关于适用简易程序审理民事案件的若干规定.

27 Chongqing High People’s Court research group. Chongqing High People’s Court creates “6 E” E-court in Internet era. *Annual Report on Informatization of Chinese Courts no.2*. 2018. 重庆市高级人民法院课题组. 重庆市高级人民法院“六E”打造互联网时代电子法院. 中国法院信息化发展报告No.2(2018). 2018.

28 WeChat (Chinese: 微信; pinyin) is a “Chinese multi-purpose messaging, social media and mobile payment app developed by Tencent. It was first released in 2011 and became one of the world’s largest standalone mobile apps in 2018,[8][9] with over 1 billion monthly active users. WeChat has been described as China’s “app for everything” and a “super app” because of its wide range of functions”. <https://en.wikipedia.org/wiki/WeChat>

29 Shenzhen Yantian People’s Court Research Group. The constricton of informatization of courts oriented on judges’ needs. *Annual Report on Informatization of Chinese Courts no.2*. 2018. 深圳市盐田区人民法院调研课题组. 以法官需求为主导的法院信息化建设. 中国法院信息化发展报告No.2. 2018.

through WeChat. Indeed, the “mobile court” option on WeChat ‘allows users to complete case filings, hearings and evidence exchange without physically appearing in court.’<sup>30</sup> The WeChat app which employs Artificial Intelligence (AI) for decision making, allow litigants appear by video as Artificial Intelligence Judge with on-screen avatar that prompts them to present their cases. Notwithstanding that AI Judges have been proactive, it has been criticized that it is dangerous to hand over legal disputes to virtual Judge using online interface with verdicts given via webchat.<sup>31</sup> In addition, it is contended that since parties involved in the litigation can participate in the trial anywhere they can access the internet (shopping malls, internet café, plazas and any other public place) and can dress in any way, it might diminish the seriousness involved in traditional trials.<sup>32</sup> In answer to these criticisms, Guangzhou Internet Court has issued new rules specifically to ensure that online trials remain as serious as traditional trials.<sup>33</sup> There are also human Judges monitoring the entire procedure, and are the ones making the major ruling to obviating the perceived injustice.

#### *Intelligent execution*

Difficulty of execution of decisions has always been a problem faced by Chinese courts. The first and essential part of execution is to find the property targeted for execution. The executable property of the executed person exists in many forms, such as savings in different banks, real estate, car, security and so on. Therefore, the judge has to go to different agencies like banks, real estate registration center, vehicle administration office, stock exchange etc. to search executable property one by one. The system of searching executable property online is designed to solve the difficulty of searching and controlling the property of the executed person. The system is established by courts cooperating with the agencies the report mentioned above. By the end of 2017, the courts have searched 16 items of information about executable property online like account information, bank deposit information, vehicle information, foreign

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30 AFP-JJJI, In brave new world of China’s digital courts, judges are AI and verdicts come via chat app, at: <https://www.japantimes.co.jp/news/2019/12/07/asia-pacific/crime-le-gal-asia-pacific/ai-judges-verdicts-via-chat-app-brave-new-world-chinas-digital-courts>, last accessed June 2020.

31 WDD. China’s WeChat Mobile Courts are Driving Innovation in the Judicial System, Wedo Deisgn, 19 December 2019, at: <https://wedodesign.com.au/wechat-mobile-courts-driving-innovation-justice-system/>

32 Guodong Du (杜国栋) & Meng Yu (余萌). How to Litigate Before the Internet Courts in China: Inside China’s Internet Courts Series -02, China Justice Observer, 25 January 2019, at <https://www.chinajusticeobserver.com/a/how-to-litigate-before-the-internet-courts-in-china>

33 *Ibid*

investment information, security information etc.<sup>34</sup>The establishment of the system shows that judges can quickly and accurately locate the executable property online without leaving the office. Searching executable property online improves the efficiency of execution work and shortens the time for the executed person to transfer property to evade execution.

For civil and commercial cases, the successful conclusion of most cases will depend on the execution of the court. As the final step of execution, the effect of the judicial auction is closely related with whether the creditor's claims can be protected. The traditional judicial auction is conducted by auction agency entrusted by courts, and traditional judicial auctions tend to breed judicial corruption. Selected auction houses are designated to proceed with judicial auction in a costly and less transparent manner. In China, of the cases of judicial corruption, 80%-90% appear in the field of execution, and 80%-90% of corruption in the field of execution appears in judicial auctions.<sup>35</sup> If the parties waive the right to choose auction agency, the court has the right to entrust auction agency to implement judicial auction. Driven by high commission interest, the auction agency may distribute 40% of the commission to the judge in order to be entrusted by the court.<sup>36</sup> Besides, the traditional way of judicial auction leads to a limited range of auction information dissemination, so that only a few people obtain auction information and participate in judicial auctions in designated places. A small number of people participating in judicial auctions and a relative short auction time results in low hammer price, which impairs the legitimate interests of the creditor and the executed person. In order to eliminate the drawbacks of traditional judicial auction, courts in Shanghai, Chongqing and Zhejiang are actively exploring online judicial auction (E-auction). E-auction refers to a new judicial auction model where courts can dispose of executable property publicly by means of online electronic auction through Internet auction platform.<sup>37</sup> Courts across the country explored mainly three modes of online judicial auction among which the mode where courts carry out judicial auctions directly on an Internet auction platform without the participation of an auction agency is most widely used. Since June 2012, more than 1400 courts in 28 provinces

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34 Rule of Law Index Innovation Project Team of Institute of Law in Academy of Social Sciences. Chinese court "intelligent execution" development report. *Annual Report on Informatization of Chinese Courts no.2(2018)*. 2018. 中国社会科学院法学研究所法治指数创新工程项目组. 中国法院"智慧执行"发展报告. 中国法院信息化发展报告No.2(2018). 2018.

35 Liu Yingtuan. Connection between corruption in judicial auction and bid rigging. *China Bidding*. 2015. 12. 刘英团. 司法拍卖中的腐败应与串通投标罪对接. 中国招标, 2015年12期

36 Ibid.

37 Article 1. Provisions of the Supreme Court on certain issues concerning judicial auction online. 第1条. 最高人民法院关于人民法院网络司法拍卖若干问题的规定.

have independently conducted judicial auctions online, carrying out 250,000 judicial auctions online and the value of the executed property amounting to 150 billion Yuan.<sup>38</sup> According to Article 12 of *Regulations on Judicial Auction Online*, the judicial auction online should be announced in advance: the auction of movable property shall be announced 15 days before the auction and auction of immovable property shall be announced 30 days before the auction.<sup>39</sup> To ensure bidders' full participation in bidding, the *Regulations of the Supreme People's Court on Issues Concerning Judicial Auction Online (Herein referred as Regulations on Judicial Auction Online)* requires that the bidding time is no less than 24 hours. Judicial auction online not only facilitates more people to participate in bidding fully but also promotes the transparency and justice of judicial auction. Article 3 of *Regulations on Judicial Auction Online* stipulates that the judicial auction online should be open to the public on the Internet auction platform and accept social supervision. The public can supervise the entire auction process online, so the doubts on the injustice of judicial auction can be eliminated to some extent. Judicial auction online can reduce the tendency for judges to become corrupt and may achieve a more transparent and fair judicial auction.

#### Judicial information disclosure platform

The social civilization of a country is closely related to judicial civilization. The judicial activities in a harmonious and civilized society should be open to the public. So far, several electronic platforms have been established to realize judicial disclosure. Judicial disclosure guarantees people's right to know, right of supervision and right of participation.

#### Online judgments

The judicial documents can show the whole process of the trial and the quality of the judicial documents can objectively reflect the judge's professional quality and sense of responsibility. The disclosure of judicial documents is the basic content of judicial disclosure. In July 2013, the website China Judgments Online was officially put into operation. From the operation of China Judgments Online to May 6, 2018, the visit volume reaches 1.5 billion and the total number of judicial documents disclosed on the website is 45 million.<sup>40</sup> During the two years 2014 and 2015, about 14.6 million judicial documents have been uploaded on the website China Judgments Online and 30.5 million lawsuits have been settled, hence, the number of disclosed documents

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38 [http://finance.ifeng.com/a/20160803/14676218\\_0.shtml](http://finance.ifeng.com/a/20160803/14676218_0.shtml), Last accessed: 12th August, 2019.

39 Article 12. Provisions of the Supreme Court on certain issues concerning judicial auction online. 第12条. 最高人民法院关于人民法院网络司法拍卖若干问题的规定.

40 <http://wenshu.court.gov.cn/>, Last accessed: 12th August, 2019.

accounts for about 50% of settled lawsuits.<sup>41</sup> Although the portion of disclosure should be greatly improved in the future, the portion of 50% during the period is still commendable and encouraging. In principle, all judicial documents should be disclosed to the public except those involving state secrets, business secrets and personal privacy. Fully advancing disclosure of judicial documents is beneficial in protecting the public's right to know and right of supervision, though it has excluded the cases related to state secrets, commercial secrets, personal privacy and other information prohibited from disclosure by law. Uploading the judicial documents means that those judicial documents are under the most rigorous supervision environment. The public will speak highly of judicial documents of high quality. On the contrary, documents of low quality will be criticized by the public, which undoubtedly will prompt the judges to be cautious about the trial and adjudication. Under the supervision of the public, the judges may devote more time and energy to improving the quality of judicial documents and preventing abuse of discretion.

#### *Live broadcast of online court trial*

The principle of open trial is an important principle in the *Constitution of People's Republic of China*<sup>42</sup>, *Criminal Procedure Law* and *Civil Procedure Law*. According to *Civil Procedure Law*, court trial about civil cases, except those involving state secrets, personal privacy, or as otherwise stipulated by law, shall be heard in public.<sup>43</sup> According to *Criminal Procedure Law*, criminal cases shall be heard in public, except cases where suspects are under 18 at the time of trial and cases involving state secrets and personal secrets.<sup>44</sup> Usually, courts will announce the time and place of trial on the electronic bulletin board so that people who go to the court with their identification cards can watch the trial. On 11th December 2013, the platform live broadcast of court trial online was officially operated, which enables people to watch court trial online even without leaving home. From the operation of the platform on 6th May, 2018, 0.83 million cases have been live broadcasted and the visit volume reaches about 60 billion.<sup>45</sup> Since 1st July, 2016, all open trials of the Supreme Court, in principle, shall

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- 41 Ma Chao, Yu Xiaohong, & He Haibo. Big data analysis: public report about China judgments online. *Chinese Law Review*. 2016. 4. 马超, 于晓红, 何海波. 大数据分析: 中国司法裁判文书上网公开报告. *中国法律评论*. 2016. 第4期.
- 42 Article 125. Constitution of People's Republic of China. 第125条. 中华人民共和国宪法.
- 43 Article 134. Civil Procedure Law of People's Republic of China. 第134条. 中华人民共和国民事诉讼法.
- 44 Article 183. Article 274. Criminal Procedure Law of People's Republic of China. 第183条. 第274条. 中华人民共和国刑事诉讼法.
- 45 <http://tingshen.court.gov.cn>, Last accessed: 2nd September, 2019.

be broadcasted on the platform.<sup>46</sup> Live broadcasting court trials online makes the court trials more accessible to the public, which ensure the public's right to know and right of supervision. Moreover, watching court trial online is a good way of disseminating legal knowledge, enhancing the legal awareness of members of the public, encouraging the public to be law-abiding. In addition, under the pressure of being supervised by the public, the judge will pay attention to their language usage, their behavior and maintain a fair and impartial position. Cases broadcasted online will become first-hand information on the Chinese trial system and precious resources to promote the rule of law in China.

## Opportunities of digitalization of China's courts

### To improve judicial justice

Digitalization of courts provides strong technical support for judicial justice. Judicial disclosure is the premise of judicial justice and judicial credibility is the outcome of judicial justice. Judicial disclosure is just a means and judicial justice is the ultimate goal. Therefore, the court must actively expand the channels for judicial disclosure, increase the degree of judicial disclosure and enhance the transparency of judicial activities. The popularization of the internet has provided the public with a broader space for supervising and participating in judicial activities. The four judicial information disclosure platforms are good examples to illustrate how digitalization of courts contributes to judicial disclosure. People can obtain the judicial process information and execution information online so that people's right to know is guaranteed; judicial documents are open to the public online to increase the transparency of the judiciary; the whole process of court trial is live broadcasted online to accept the supervision of the public<sup>47</sup>. In a transparent judicial environment, any hint of unfairness of the trial process may be exposed to the public, which prompts the judges to maintain a neutral and impartial position. Digitalization of courts enables the judicial power to run under the "sunshine" and accept the supervision of the public, which will definitely reduce judicial injustice. Besides, some intelligent auxiliary case handling systems, with the functions of reminding the judgment's deviation from legitimacy and providing evidence scrutinization, help to prevent criminals from being unjustly and falsely charged or sentenced. If the existing evidence cannot form

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46 Zhi Zhenfeng. Live broadcast: a new mode of judicial disclosure and Chinese paradigm. *Journal of Law Application*. 10. 支振锋. 庭审网络直播-司法公开的新型方式与中国范式. 法律适用. 2016. 第10期.

47 Cheng Jinhua. Human Resource, Technology Innovation, and the Great Transformation of Courts. *Journal of Shanghai Jiaotong University (Philosophy and Social Sciences)*. 2019. 12(27). 程金华, 人工、智能与法院大转型, 上海交通大学学报(哲学社会科学版), 2019 12(27)

a complete evidence chain or the actual penalty deviates from forecast penalty, the intelligent auxiliary case handling system will remind the judge to consider whether the judgment is just or not. In conclusion, digitalization of courts provides strong technical support for improving judicial justice and making people believing in courts and judges more and more.

#### To improve judicial efficiency

“*Justice delayed is justice denied*”, fully demonstrates that efficiency is one of inherent values of justice. The judicial activities are in pursuit of not only justice but also efficiency. Disputes should be resolved timely so that the legitimate rights can be protected in time. With the rapid development of economics and improvement of people’s consciousness of protecting rights, the number of cases handled by courts has been increasing rapidly. Thus, courts at all levels generally face the dilemma that a limited number of judges have to deal with an overload of cases. The digitalization of courts provides an opportunity to improve judicial efficiency to solve such a dilemma which courts in China are encountered with. The informatization of courts brings convenience to the daily work of the judges. It also greatly enhances the judicial efficiency and ensures that the litigation can be carried out without undue delay.<sup>48</sup> For example, the trial process management system in courts’ intranet has a reminder function which can remind the judge that the case is approaching the deadline and judge should handle the case within the period stipulated by law. Besides, the current analysis of the state of affairs due to digitalization of courts points to the fact that digitalization indeed contributes to improving judicial efficiency from different aspects. Intelligent voice conversion system accelerates the speed of trial because judges, litigants and lawyers do not need to speak slowly deliberately to cooperate with clerks’ record speed. Some intelligent auxiliary case handling systems can generate basic information of legal documents automatically and push relevant laws and similar cases to judges as a reference, which enables the judge to concentrate on the case itself to improve trial efficiency. Electronic delivery is a great way to avoid clerks spending a lot of time on serving legal documents, and thus improve service efficiency. The system of searching executable property online enhances execution efficiency because it is much easier for judges to find the executable property online compared to the traditional way of searching by resorting to different banks, real estate registration center, vehicle administration office, stock exchange etc. in person. In a word, an important feature of

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48 Wang Ran. Trial-Centered Litigation System Reform: Justice System of Big Data. *Jinan Journal* (Philosophy and Social Sciences). 2018 (234). 王燃, 以审判为中心的诉讼制度改革 大数据司法路径, 暨南学报 (哲学社会科学版), 2018 (234)

judicial activities is timeliness, and digitalization of courts is expected to contribute to improving judicial efficiency and achieving judicial timeliness.<sup>49</sup>

## Challenges of digitalization of courts in China

### E-filing

Although according to article 120 of *Civil Procedure Law*, when bringing a lawsuit, a statement of claim shall be submitted to the people's court, together with a number of copies corresponding to the number of defendants.<sup>50</sup> From the expression of the article, a statement of claim should be submitted in paper version, but plaintiffs only need to submit the electronic version of a statement of a claim by filing a case online. The question whether the electronic version of a statement of a claim has legal validity is not stipulated clearly in the *Civil Procedural Law*. Even though the courts in different regions such as Beijing, Shanghai and Guangzhou have issued relevant rules for E-filing, these rules only appear in internal documents of the courts and do not have legal effects across the country. Therefore, to provide a legal basis for E-filing across the country, laws about E-filing shall be formulated by the National People's Congress or judicial interpretations shall be issued by the Supreme Court to confirm the legitimacy of E-filing and stipulate specific procedures for E-filing<sup>51</sup>.

As discussed earlier, there have been inconsistencies across the country on who can file cases online. In most areas, only lawyers can file a case online directly; ordinary people only can make an appointment online to file a case. Filing a case directly online, as the name suggests, litigants or lawyers submit electronic version of litigation materials online and judges assess those online. If those litigation materials meet formal requirements, judges can decide to accept the case directly online. Making an appointment online to file a case means litigants or lawyers can upload electronic version of litigation materials online. If there are some materials missing, the judge will let litigants or lawyers provide supplementary documentations. When all the litigation materials are complete, clients or lawyers can bring cases to courts with paper version of litigation materials, which can help clients or lawyers avoid going to court several

49 Zhang Jiyu. The main opportunities and challenges for China's judiciary in era of big data. *Development of Judicial System and Society*. 2016. 6. 张吉豫. 大数据时代中国司法面临的主要挑战和机遇——兼论大数据时代司法对法学研究及人才培养的需求. 法制与社会发展. 2016. 第6期.

50 Article 120. Civil Procedure Law of the People's Republic of China. 第120条. 中华人民共和国民事诉讼法.

51 Zhan Shangang & Wang Yi, Examination on Internet Court Online Trial System. *Jiangnan Forum*. 2019 (6). 占善刚, 王译, 互联网法院在线审理机制之检讨, 江汉论坛, 2019(6).

times. Most courts restrict the subjects to lawyers based on such considerations: lawyers, generally, have stronger professional skills and better ability of network operations than ordinary people; some people may use the E-filing platform to abuse litigation rights like filing a false lawsuit, but lawyers will abide by the legal professional ethics<sup>52</sup>. However, in China, there is no system of compulsory procuration with lawyers in civil litigation, which means most people in China can choose to participate in civil litigation on their own without the procuration of lawyers. Therefore, according to the practice of most courts, people without the procuration of lawyers cannot file a case online directly. Arguably, this practice is contrary to the original intention of establishing E-filing platform which is aimed at providing facilitation for people and improving efficiency of filing<sup>53</sup>. Therefore, it may not be appropriate to limit the subjects of who can file a case directly online only to lawyers. The right of filing a case directly online is a part of rights of litigation, which nobody shall ordinarily be deprived of. In order to guarantee such rights to people, it is legitimate to extend the subjects, who may file online to ordinary people.

### Remote trial

Legislation about remote trial is incomplete in China. Article 259 of *Interpretation of Civil Procedure Law* stipulates that in summary procedure, with the consent of both parties and permit of people's court, the audiovisual transmission technology may be used to open a court session.<sup>54</sup> According to this article, it is stipulated that remote trial can be applied in summary procedure, which means remote trial can be applied in civil cases with simple facts and clear legal relationships. However, there is no provision relevant to remote trial in *Criminal Procedure Law*. The application of remote trial is a manifestation of the exercise of judicial power. The exercise of judicial power must strictly abide by the law. Although, article 259 in *Interpretation of Civil Procedure Law* provides certain legality for remote trial, it is far from being enough to provide a legal basis for remote trial. Therefore, legality and legitimacy of remote trial and its specific application procedures should be clearly stipulated and approved by the legislature through laws.

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52 Fuhua Wang. E-Court: from Internal to External Construction. *Contemporary Law Review*. 2016 (5). 王福华 电子法院：由内部到外部的构建, 当代法学, 2016 (5).

53 Yu Zhigang & Li Huaisheng. On Its Historical Significance, Judicial Responsibility and Time Mission of the Hangzhou Internet Court. *Journal of Comparative Law*. 2018 (3). 于志刚, 李怀胜, 杭州互联网法院的历史意义、司法责任与时代使命, 比较法研究, 2018年第3期

54 Article 259. Interpretation of the Supreme People's Court on Application of the Civil Procedure Law of the People's Republic of China. 第259条. 最高人民法院关于适用中华人民共和国民事诉讼法的解释.

First of all, the issues concerning the scope of application of remote trial is worth a discussion. The remote trial in different regions is in the exploratory stage and there is no consistent scope of application of remote trial. Even though the regulations about remote trial are rare, the practice is still in full swing all over the country. In practice, remote trial is generally applied in simple civil cases such as online disputes, criminal cases of second instance and cases about commutation and parole. With regard to the scope of application of remote trial, the paramount premise is that the case can be judged rightly even in remote trial. The following factors may affect the justice of remote trial: Firstly, if the legal relationships of the case are very complicated, remote trial is not conducive to figuring out the truth; Secondly, if the number of the litigants is too large, it is hard for the judge to maintain order of the court through remote trial and the court trial may seem to be chaotic; Thirdly, if the litigants are disabled physically like mute, blind and deaf or litigants are juveniles, remote trial may not be sufficient for them to exercise their litigation rights and the communication between litigants and judge will become difficult in remote trial; Fourthly, if the evidence needs to be cross-examined by touching, smelling or observing carefully, it may not be completed in remote trial<sup>55</sup>. Based on the analysis above, the scope of application of remote trial can include civil cases of first instance in summary procedure, cases of second instance only dealing with legal issues and cases about commutation and parole. Simple civil cases of first instance in summary procedure refer to those cases with facts which the parties do not have controversies over and the legal relationships between the parties are clear. Cases of second instance only dealing with legal issues refer to the civil, criminal and administrative cases of second cases where the parties acknowledge the facts ascertained by trial of first instance but they have controversies over the application of laws. The reason is that facts are ascertained in trial of first instance and parties will not adduce evidence and go on cross-examination, judge only needs to adjudicate whether the application of laws in trial of first instance is right or not. Cases about commutation or parole refer to whether the judge will commute or grant parole to the criminals according to their behaviors and attitudes in prisons. The reason why criminal cases of first trial are not covered by the scope of remote trial is that criminal trial is closely related to the criminal's freedom and the physical evidence such as weapons of offence need to be carefully identified in court. In addition, the judge cannot tell the authenticity of the criminal's statement and the witness's testimony by observing their subtle facial expressions and moods by remote trial. In short, given that the audiovisual

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55 Min Shijun. Integration, Development and Refinement in Artificial Intelligence and Execution of Courts: A Perspective of Wuhan Court Intelligence Execution System. *Journal of Law Application*. 2019 (23). 闵仕君, 人工智能技术与法院执行领域的融合,发展和完善:以无锡法院智慧执行系统为视角,法律适用. 2019 (23).

transmission technology is not perfect and the remote trial is under exploration, the scope of application of remote trial should not be too broad<sup>56</sup>.

Further, there is need to stipulate clearly how to initiate remote trial. The initiation of remote trial should abide by principle of voluntariness. If the case falls into the scope of application of remote trial, plaintiffs or defendants can apply for participating in the court trial by remote trial based on their personal reasons, for instance, if the applicants live far from the court or have serious illness. Consent of both parties shall not be compulsorily required to activate remote trial because it will not produce negative effects if one party participates in court trial through audiovisual transmission technology while the other party appears in court in personal<sup>57</sup>. After getting the permission of the judge, it is legitimate for the applicant to participate in court trial through audiovisual transmission technology. During the court trial, if the parties or judges think the remote trial is not suitable for the case, the judge can decide to transfer the remote trial into the traditional way of trial.

In addition, the question about whether remote trial is contradictory to the principle of direct and verbal trial or not have been discussed<sup>58</sup>. Principle of direct and verbal trial requires that litigants, other participants and judges should appear in court in person to participate in the court trial and judges must directly engage in court investigation and evidence adoption through verbal trial. Hence, the issue whether litigants' participation in trial through audiovisual transmission technology can be called "appear in court" is the key point about whether remote trial is contrary to the principle of direct and verbal trial. Some people think "appear in court" requires judges and the parties to appear together in a specific physical place - the court.<sup>59</sup> According to literal interpretation, "appear in court" may indeed refer to "appear in the physical court" as a narrow sense definition. According to purposive interpretation, the principle of direct and verbal trial is aimed at avoiding indirect written trial and making sure that the judge can listen to the parties' statements personally. When the principle of direct and verbal trial was introduced, the legislature did not foresee that information technology can develop so rapidly that the parties even can participate in court trial without going to the court but

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56 Wang Lusheng. Research on Discourse Conflict in the Practice of Judicial Big Data and Artificial Intelligence. *Legal Forum*. 2018.5 (33). 王禄生, 大数据与人工智能司法应用的话语冲突及其理论解读, 法学论坛, 2018.5 (33).

57 Xu Jianfeng, Huang Guodong, & Liu Ye. Building Smart Court and Promoting the Modernization of Trial System and Trial Capability. *Reform on Administrative Management*. 2019 (5). 许建峰, 黄国栋, 柳叶, 全面建设智慧法院促进审判体系和审判能力现代化, 2019年5月.

58 Ibid.

59 Ibid.

to “appear in court” in another way. The concept and theory of law should be viewed and understood in line with the development of the times and technology.<sup>60</sup> Remote trial enables the physical space of the court to be virtually expanded. Therefore, the connotation of “appear in court” could be extended by including participation in court trial by audiovisual transmission technology, although consent from both parties are required to proceed with such a choice of remote trial. In addition, it should be carefully examined for application of remote trial to criminal trials, as in practice, it has proved to be the cases. The legal uncertainty and inconsistent regional regulations could undermine the credibility of ambition of digitized process of courts.

### Electronic delivery system

First of all, it is important to understand the scope of the application of electronic delivery system. As pointed out earlier, Article 87, paragraph 1, of the *Civil Procedure Law* stipulates that, subject to the consent of the person on which a procedural document is to be served, the document may be delivered by way of fax, email or any other means through which the receipt of the document may be acknowledged, except for judgments, rulings and mediation documents<sup>61</sup>. It can be seen that the legislation exempts judgments, rulings and mediation documents compulsorily from the scope of application of electronic service.<sup>62</sup> This article, by way of exemption, delimits the scope of application of electronic service. It is reasonable to preclude judgments, rulings and mediation documents because these three kinds of legal documents are the results of the trials and closely related to the substantive rights and obligations of the parties. Therefore, the article implies that legal documents, except for judgments, rulings and mediation documents, can be served by electronic service, including notification of accepting the case, bill of defense, notification of opening a court session, notification of adducing evidence, court summons, etc. However, three situations should be precluded from the scope of application of electronic service: cases about dissolving marriage relationship, writ for payment in proceedings for supervising and urging the clearance of debt, and bill of statement. Electronic delivery system can produce dual effects on procedural law and substantive law. Failure of service is a severe procedural flaw which is a reason to activate retrial procedure to remedy the right. Pursuant to article 202 of *Civil Procedure Law*, the parties can not apply for a retrial on the judgment or

60 Xu Jianfeng, Huang Guodong, & Liu Ye. Building Smart Court and Promoting the Modernization of Trial System and Trial Capability. *Reform on Administrative Management*. 2019 (5). 许建峰, 黄国栋, 柳叶, 全面建设智慧法院促进审判体系和审判能力现代化, 2019年5月.

61 Article 87, Civil Procedure Law of the People's Republic of China. 第87条. 中华人民共和国民事诉讼法.

62 Ibid.

mediation agreement on the dissolution of marriage that has already taken effect.<sup>63</sup> This article implies that procedural flaws including failure of service can not activate retrial about cases concerning dissolving marriage relationship. Hence, electronic service should not be applied in cases concerning dissolution of marriage. Besides, according to article 136 of *Interpretation of Civil Procedure Law*, the served must confirm the way of service in the confirmation of service address if he or she accepts electronic service. In another word, electronic service only can be used with explicit consent of the served.<sup>64</sup> Thus, statement of claim should not be served on defendants through electronic service because, before getting the copy of statement of claim, the defendants may likely not know that they are involve in a lawsuit, let alone be able to confirm the way of electronic service in the confirmation of service address. The same reasoning can be used to elaborate on why writ for payment should not be served on the debtor by electronic delivery system in proceedings for supervising and urging the clearance of debt. The reason is that the court cannot get the debtor's consent about electronic service before the service of writ for payment. It is submitted that cases about dissolution of marriage relationship, writ for payment and bill of statement are not suitable for the electronic delivery system.

The application of electronic delivery system is actually a balance between strong judicial efficiency and weak guarantee of fair procedure. The obvious limitation may weaken fair procedure. It is hard for courts to confirm whether the served receive the legal documents or not through the system. Situations may arise that others instead of the served receive the legal documents through fax, email, etc. Under such situations, the served may not actually and genuinely see the legal documents. Unsuccessful delivery may deprive litigants of litigious rights, which even may result in retrial. Even though the traditional ways of service are time-consuming, the written proof of service signed by the served and videos or pictures recording the service procedure are helpful to prove that the served indeed receives the legal documents. Therefore, it is important to establish standards for the court to confirm whether the served receive legal documents served electronically. Pursuant to article 87, paragraph 2, of *Civil Procedure Law*, in the case of electronic service, the date of arrival of fax, email, etc. reached the designated system of the party shall be the date of service.<sup>65</sup> It is obvious that legislation

63 Article 202. Civil Procedure Law of the People's Republic of China. 第202条. 中华人民共和国民事诉讼法.

64 Article 136. Interpretation of the Supreme People's Court on Application of the Civil Procedure Law of the People's Republic of China. 第136条. 最高人民法院关于适用中华人民共和国民事诉讼法的解释.

65 Article 87. Civil Procedure Law of the People's Republic of China. 第87条. 中华人民共和国民事诉讼法.

in China sets the standard according to arrival theory, which means the electronic delivery is acknowledged as long as the legal documents enter the served's specific electronic system. The fact whether the served have been aware of the legal documents or have read it or not is irrelevant. Adopting arrival theory is efficiency-oriented but it is detrimental to guarantee fair procedure. Arriving into specific electronic system is not equal to arriving in the address in traditional ways of service. Through traditional ways of service, the served at least know the arrival of the legal document even though they may not read it. However, people may not know the arrival of the legal document simultaneously if they do not check specific electronic system frequently. The standard should not be arrival in specific electronic system but whether the served have been aware of the arrival or not<sup>66</sup>. Then, the question about how to confirm the served's awareness of the arrival of legal documents needs to be further discussed. If the served agree to receive legal documents through the special electronic platform for service established and managed by courts, it can be speculated that the service is successful when the served log on the platform with verification of identification such as face recognition. Upon logging on the platform, the served must be aware of the arrival of the legal documents. If the served agree to receive the legal documents through the personal electronic system, the served should be required to sign and mail back the written proof of service to the court upon noticing the arrival of legal documents<sup>67</sup>. It is expected that electronic delivery system contributes to solving the difficulty of service and maximizing service efficiency. A nation-wide system is needed to for electronic delivery of legal documents, and some pilot projects were launched in several regions since 2017.<sup>68</sup>

## Conclusion

In conclusion, some achievements have been made in terms of digitalization of courts, but it is still in its infancy in China. Much is still needed to be done to address some of the identified challenges in this paper as it relates to the inconsistencies in e-filing system; the scope of application of remote trial coupled with the uncertainty and inconsistent regional regulations on the application of remote trial; the challenge of streaming of judicial proceedings; among others. This becomes imperative as

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66 Wu Tao & Chen Man. On the Construction of Intelligent Court: Value Orientation and System Design. *Social Science*. 2019. (5). 吴涛, 陈曼: 论智慧法院的建设: 价值取向与制度设计, 社会科学, 2019年第5期.

67 Wang Ran. Trial-Centered Litigation System Reform: Justice System of Big Data. *Jinan Journal (Philosophy and Social Sciences)*. 2018 (234). 王燃, 以审判为中心的诉讼制度改革 大数据司法路径, 暨南学报 (哲学社会科学版), 2018 (234)

68 <http://songda.court.gov.cn/>

E-filing system, remote trial and alternative disputes resolution online system provide convenience for people as it helps them save a lot of time and energy. Intelligent voice conversion system, intelligent auxiliary case handling system, system of searching executable property online and electronic service contributes to improving judicial efficiency. In addition, the judicial disclosure platforms guarantee the public's right to know and right of supervision. Full judicial disclosure is conducive to restricting judicial power, improving judicial justice and strengthening judicial credibility. Even though the significance of digitalization of courts is noticeable, the challenges that come with it might not be ignored. Although some pilot programme are introduced in several regions in China, it is noted that a set of clear-cut guidelines are missing for application of remote trial, electronic delivery system and other aspects of digitalization of courts in China.

Practice precedes law, which means there is a lack of legislative support and theoretical research in the field of digitalization of courts. Technological innovations and the scope of their applications require further debate, or else, it will undermine the legitimacy of digitalization of courts. It is necessary for the judiciary in China to develop consistent systems in order to achieve compatibility and adequate information sharing in the pursuit of rule of law in a digital world. With the global effects of the COVID-19 pandemic, there might be an additional need to accelerate the digitalization of the administration of justice in China with the further exploration of AI technology and cyber-courts in order to streamline case handling within the sprawling court system in China.

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Articles should also be accompanied by an abstract of 100-150 words and a brief biographical paragraph describing each author's current affiliation.

Articles usually are expected to be in the range of 3000 to 6000 words and presented double-spaced in Times New Roman 12pt. Longer or shorter articles can be considered.

Please use British English orthography (of course, do not change orthography in quotations or book/article titles originally in English). Use the ending *-ize* for the relevant verbs and their derivatives, as in 'realize' and 'organization'.

Italics are used only for foreign words, titles of books, periodicals, and the names of organizations in the original language (except when the original is in English).

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Please use the Harvard system of referencing which has grown in popularity in academic writing in education and the social sciences. In the main text, a reference or quotation is annotated in parentheses with the surname of the author, the date of publication of the work and the page number from which the quotation was taken. The full bibliographic details are then provided in a list of the references at the end of the work.

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