

# TAGUNGSBERICHTE

**China Law Studies in Europe  
First Annual Conference, 30 August to  
1 September 2007, Hamburg, Germany**

*Viktor von Essen*<sup>1</sup>

The First Annual Conference of the European China Law Studies Association (ECLS)<sup>2</sup>, held at the Max Planck Institute for Comparative and International Private Law in Hamburg, took place just two days after the Association came into legal existence. More than 60 legal scholars, researchers and students interested in Chinese law from all over the world had followed the invitation of *Christiane Wendehorst* (University of Göttingen) and *Knut Benjamin Pissler* (Max Planck Institute for Comparative and International Private Law) to discuss recent developments in Chinese law. The conference was supported by the Deutsche Forschungsgemeinschaft (German Research Foundation), CCH (a Wolters Kluwer business) and the Free and Hanseatic City of Hamburg.

## Module I: Access to Justice

*CUI Jianyuan* (Tsinghua University) pointed out in his opening remarks that although the quality of Chinese legislation has improved significantly in recent years, one of the main challenges that remains is to transform “the law on paper” into “law in action”.

Under the headline “Access to Justice”, various aspects of this issue were discussed in the first module which was chaired by *Jonas Grimheden* (Lund University). *Benjamin Liebman* (Columbia Law School) shed light on the growing evidence for the creation of new legal rules through Chinese People’s Courts and in particular lower courts. He provided some excellent examples of recent decisions involving legal issues such as a “public person” standard in defamation cases, compensation for medical malpractice, denial of admission to school as denial of a constitutional “right to education” (the famous “Qi Yuling-case”), invalidity of provincial regulations conflicting with a national

“Seed Law”, reduction of sentences for some convicted criminals upon payment of compensation to their victims and expansion of court jurisdiction to allow for the review of administrative actions. These cases highlight the ways in which courts in China are assuming significant roles in determining legal standards and rules. In many of these cases, a court did what a National People’s Congress either would not do or at least has not yet been able to accomplish, thus challenging the authority of the legislature.

It is promising that Chinese courts seem to have begun to explicitly explain how they actually reached their decisions, which is a prerequisite for any earnest comparative legal research in China and helps to reduce popular unhappiness with the courts. Firstly, this is the result of a greater influence of mass media, limited, of course, to cases that are not politically sensitive. Secondly however, *Benjamin Liebman* also noted an influence of Western legal ideas that can be witnessed in the reasoning of some Chinese courts, but only, of course, where judgments have political backing. From the discussion following the presentation it became clear that there is a certain tension between the innovative function of courts on the one hand and desirable legal certainty on the other.

The methods used by poor Chinese citizens in contemporary China to solve their social and legal problems were then analysed by *Hatla Thelle* (Danish Centre for International Studies and Human Rights). She listed and described seven channels which provide these citizens with legal access, namely basic legal services, legal aid centres, mediation committees, the petitioning system (“system of letters and visits”, 信访制度), labour arbitration committees, social organisations and, finally, law firms engaged in pro bono consultations. The interaction of these channels leads to an “access-to-justice-net”: Legal aid workers engage as volunteers in social organisations, lawyers in legal aid centres refer clients to labour arbitration committees, social organisations are, in the official regulations, urged to participate in legal aid work, petition offices can advise a petitioner to seek legal aid or labour arbitration, police officers mediate in petty civil cases, the basic legal services and the legal aid centres belong to the same administrative system and so on. This results in a confusing picture of different institutions doing the same kinds of work without very much coordination. *Hatla Thelle* then drew attention to the discussion about the question of

<sup>1</sup> Student Research Assistant, Max Planck Institute for Comparative and International Private Law, Hamburg, essen@mpipriv.de. I would like to thank Björn Ahl, Riccardo Benussi, Michael Friedman, Randy Peerenboom, Eva Pils, Knut Benjamin Piffler, Benjamin van Rooij, Christiane Trübe, Christiane Wendehorst and Xi Chao for their contributions.

<sup>2</sup> For further information on the Association see [www.ecls.eu](http://www.ecls.eu).

whether traditional and modern channels will continue to co-exist. Because of the complementary function of traditional mechanisms such as the existing petitioning system in respect of the still weak modern dispute resolution mechanisms, she argued that the co-existence will prevail.

## Module II: Civil Rights

The question of the enforceability of constitutional rights through Chinese People's Courts, a topic heavily discussed in academic circles in China and beyond, was addressed by *Otto Malmgren* (University of Oslo) in the first paper of the "Civil Rights" module chaired by *Marina Svensson* (Lund University). He gave an insightful introduction to the Chinese Marxist view of the nature of constitutional rights, reflecting a "unity of rights and duties", and on traditional Chinese political theory, under which state interests are placed before an individual's rights and a harmonious relationship between the state and the individual is emphasised. Coming to his topic, the right to liberty of persons, *Otto Malmgren* outlined the exemptions from the right to liberty but ultimately conceded that the question is generally not whether there exists a legal basis for measures used to deprive one of one's liberty. Rather, the focus needs to be upon unimplemented legal restraints and on the lack of an efficient supervisory system for public security organs and the People's Procuratorate.

In the second presentation of the "Civil Rights" module, *Flora Sapio* (Lund University) provided some illuminating information gathered in the course of her research on extra-legal detention in China. She explained that the measures of detention taken by the Commission for Discipline Inspection had, for a long time, occurred outside any legal framework. She analysed a large number of cases in order to understand what actually happens when the measures of *shuanggui* (双规) are used, outlining what *shuanggui* means for the person taken into detention: for all practical purposes, torture. *Flora Sapio* described how, after *lianggui* (两规) had been introduced in 1990 by the Regulations on Administrative Supervision as a first step, the practice of *shuanggui* became the focus of an increasing number of regulations and PRC laws. She concluded that the practice of *shuanggui* has produced one important outcome in that party members have become potential targets of the most severe of all discipline mechanisms, namely detention. Therefore, some of the privileges party members had enjoyed since the very foundation of the CCP seem to have been removed.

## Module III: Politics and the Law

*Leila Choukroune* (HEC Paris) opened the third module on "Politics and Law" chaired by *Uwe Blau-rock* (University of Freiburg). She gave a report about promising research on the problems faced by Chinese judges when referring to international and foreign law. First of all, she stated that the status of international law in the Chinese domestic legal order was unclear. She considered this problem to be linked to the principle of sovereignty, which is thought in China to be the key to the respect of independence and territorial integrity. Her research is aimed at analysing this understanding through the use of empirical studies on whether and how Chinese judges draw on international norms.

*Benjamin van Rooij* (Leiden University) shed light on law enforcement campaigns, focusing on periods of swifter, stricter and concentrated punishment of violations of law, in particular corruption, organised crime, pollution, piracy, drug use, unsafe products and forced labour. His presentation concentrated on explaining the causes and effects of the campaigns while also placing them in an historical, future, and comparative perspective. Campaigns are organised in reaction to the weak law enforcement which results from local protectionism. In addition, campaigns serve political goals as they offer a way for China's central leadership to maintain legitimacy by showing a willingness to act against public incidents. Although short term effects have been reported, there is little evidence to show that any of the campaigns have had much lasting effect on enhancing compliance. *Van Rooij* suggested that this shortcoming stems from the simple deterrent approach used in the campaigns coupled with the failure to address structural problems underlying weak enforcement and widespread violations of law. At the same time, campaigns have at times led to human rights abuses and violations of procedural laws. While there are some historical ties, the campaign approach to law enforcement is not just a communist Chinese phenomenon; moreover, in the West one can also observe political meddling in law enforcement with little effect other than creating tensions in regard to due process requirements. In the near future, the recentralisation of the various enforcement bureaucracies as well as evolving opinions about campaigns seem nevertheless unlikely to affect the use of campaigns to enforce the law in China. In his concluding remarks, *van Rooij* pointed out that campaigns are good in so far as they help the state to concentrate law enforcement upon certain violations for a certain period of time, yet he criticised the swiftness and severity of campaigns which have only a limited effect on com-

pliance and undermine rights protection and due process.

#### Module IV: Comparative Law

The Saturday session started with module four, "Comparative Law" chaired by *Gianmaria Ajani* (University of Turin). *Xi Chao* (Chinese University of Hong Kong) illustrated the evolution of "agreed takeover" regulation in China and how these regulations were inspired by the (London) City Code on Takeovers and Mergers. He showed that takeover regulation in China has failed to function as a governance device that protects the interest of the target's minority shareholders in control transactions. *Xi Chao* initially explained the pre-1998 regulation of takeovers and the regulatory barriers to contested takeovers and the consequent emergence of the agreed takeover. He then outlined factors that contributed to the rise of agreed takeovers as the primary form of control transactions and discussed the incentive structure of the parties involved in the private sale of control. Further, he explored the extent to which the rules that the 1998 Securities Law and 2002 Takeover Measures introduced have functioned to protect holders of tradable shares of the target. *Xi Chao* also discussed the effectiveness of the new rules that the 2005 Securities Law and 2006 Takeover Measures have introduced, in encouraging efficient control transactions and thwarting the bad ones. Finally he concentrated on an analysis of the implications of his research for the ongoing debates on the convergence of national corporate governance systems and on legal transplant.

*Marina Timoteo* (University of Bologna) gave the last presentation of the morning session before the participants split for further discussions in four working groups. Taking up the conclusion of *Benjamin Liebman*, *Otto Malmgren* and *Leila Choukroune*, *Marina Timoteo* also concluded that in the last few years there has been a strong increase in the role of the courts. By asking about the "*heli* (合理)"- or "reasonableness"- standard in court practice, she focused on the function of Chinese courts in shaping legal rules through the interpretation of vague formulas and standards. She first provided participants with the semantic dimension and the linguistic uses of the word "*heli*". She concluded that "*heli*" is a matter of balancing by means of the appropriate combination between authoritative prescriptions (法, *fa*) and relevant circumstances (情, *qing*) and therefore something between law and circumstances (or practice). She also analysed a number of cases found in two case-law databases. *Marina Timoteo* discovered that the *heli*-standard in court practice serves as an instrument for rescinding or

modifying a contract after the occurrence of an unpredictable change of circumstances on which the contract is based. This is especially interesting because the Chinese legislature consciously restrained from introducing a rule of *clausula rebus sic stantibus* in the contract law of 1999. In other cases, courts use the *heli*-standard to balance the rights and obligations of the parties, thereby mixing it with the principle of good faith. *Marina Timoteo* concluded that the vagueness of the term "*heli*" makes it a plastic receptor and vehicle of diverse ideas and legal rules. It is also affected by concerns of economic efficiency and new understandings of the economic effects of the civil private law rules.

#### Working Group Sessions

The fourth module was followed by four parallel working group sessions chaired by *Randy Peerenboom* (Oxford Foundation for Law, Justice and Society), *Eva Pils* (Chinese University of Hong Kong), *Björn Ahl* (City University of Hong Kong) and *ZHU Sanzhu* (School of Oriental and African Studies, University of London). The group chaired by *Randy Peerenboom* discussed several issues relating to "Access to Justice". Firstly, questions arose such as the history of this term, when did it emerge, who instigated it and why. While unclear about the exact origins, the group thought the term originated in the human rights/donor community, with Ford playing a significant role in popularising the term and funding related projects. Secondly, the contrast between the donor agency approach that focuses on individualised justice and access to formal state institutions, especially the courts, was discussed, as well as a broader conception which focuses on the role of the state as provider of the material and other conditions for social justice, which tends not to focus so much on particular individuals or dispute resolution. Members pondered briefly what the comparative experiences of other successful East Asian states (and unsuccessful states more generally) would tell them about these different approaches. Thirdly it was considered to what extent this is an "activist" issue versus a subject for academics, and noted that while some of the members were working on legal/institutional reforms more generally, they did not focus on access to justice in the same way as some of the more "activist" reform projects did.

*Eva Pils* led the discussion in the "Civil Rights" working group which focused on the papers by *Flora Sapio* and *Otto Malmgren*. Covered were aspects such as the question whether there were legal remedies for *shuanggui*, similarities between *shuanggui* (双规) and *ruanjin* (软禁), imposed for example on dissidents and human rights defenders,

or between *shuanggui* and *xuexiban* ( 学习班 ), imposed for example on petitioners, and the attitude of the central state and party to illegal detention measures (in this context, *Flora Sapio* mentioned Deng Xiaoping's 1978 statement condemning illegal incommunicado detention under the name of *geli shencha* [ 隔离审查 ]). The working group further considered potential topics for future events such as: detention (administrative, pre-trial, illegal), status of the constitution in civil law systems and common law systems respectively, China's attitudes to international law, the judiciary in the Chinese countryside (reference was made to the work done by *Stéphanie Balme*), and research on the coverage of the human rights situation in China by the media, by scholars as well as by other institutions in different European countries.

The working group on "Comparative Law", chaired by *ZHU Sanzhu*, revealed that a wide range of topics are currently being researched. Attention was drawn in particular to civil law questions such as torts, property law, consumer protection law, labour law, securities regulations and corporate governance. Procedural aspects worth consideration range from bankruptcy law to enforcement questions in the field of intellectual property or legal aid. There was common ground on the importance of comparative legal studies in the field of Chinese law due to the fact that the legal system itself presents a combination of influences from common and civil law systems.

After introducing the individual research projects of the participants, the members of the working group "Politics and the Law", chaired by *Björn Ahl*, first discussed the implications of the distinction between politics and law in China law studies. The discussion then turned to the question of achieving political change through international legal co-operation. Members asked to what extent the representatives of Chinese institutions are aware of the political agenda behind legal co-operation projects. The experiences made with a number of national and EU projects were explored in regard to this question. Further, it was discussed whether political campaigns, like the campaign supporting the Olympic Games of 2008 in Beijing, may have positive outcomes for the development of the legal system. It was suggested that positive outcomes may be expected in the fields of intellectual property protection and the protection of the environment. Members of the group exchanged their experiences in collecting empirical data in politically sensitive areas in China and discussed measures which may help to protect Chinese sources. In relation to this question, the group discussed whether self-censorship is an issue for Chinese

legal scholars only or for Western scholars doing research in China as well.

### Future Development of the European China Law Studies Association

Discussion concerning institutional improvements of the European China Law Studies Association was an integral part of the conference. The working group headed by *Randy Peerenboom*, for example, collected the following thoughts and suggestions: (1) Starting the conference with a presentation of information or talks possessing broad interest for everyone and then splitting into panels sorted by topic, thus allowing for more papers to be presented and more focused feedback/commentary from those working specifically in that area. (2) Providing a brief overview of recent works (e.g. based on the bibliography that *Knut Benjamin Piffler* compiles for researchers in the field of Chinese law<sup>3</sup>), of works in progress or in the publishing pipeline (e.g. based on brief summaries submitted by ECLS members before the conference), and of the most important works in Chinese published during the last year for certain subject areas (e.g. compiled by Chinese PhD students or collaborating legal scholars). (3) As for panel organisation, one suggestion was simply to put out a call for papers, and then to organise the panels based on the topics that came in (rather than setting the topics in advance).

The civil rights working group also suggested the facilitation of scholarly communication, for example, by the installation of web-links on Chinese law, an e-mail discussion group, a database of ECLS members and their research interests and activities and an Association journal. *Marina Svensson* suggested that institutions with which ECLS members are affiliated should be encouraged to consider applying for ERASMUS funding for a special postgraduate programme in Chinese law. In order to focus even more on specific topics, the creation of smaller networks within the ECLS was foreseen. Particularly from a civil rights perspective, collaboration with certain NGOs might prove to be highly effective.

### Common Finding: Increasing Importance of Judgments

During these two days of comprehensive presentations and lively discussions, a rising tide of Chinese legal studies in Europe and beyond became apparent. One of the common findings is the increasing importance of Chinese court judg-

<sup>3</sup> See e.g. Bibliography of Academic Writings in the Field of Chinese Law in Western Languages in 2006 in: ZChinR 2007, p. 224 et seq.

ments in the research of Chinese law. In the first place, this is due to the fact that access to judgments is becoming much easier. *Marina Timoteo*, for example, had based her research on two legal databases reporting court decisions. The quality of the judgments passed by Chinese courts has also improved, in particular as judges now more often explain in court opinions how a decision was reached (*Benjamin Liebman*). One main reason for this development is a better professional qualification of judges; another is perhaps the judiciary's growing awareness of the role it plays in the Chinese legal system.

The First Annual Conference of the European China Law Studies Association brought together legal scholars from European countries and from all over the world. The success of the Conference indicates that ECLS is set to become the meeting point for the promotion of research and teaching of Chinese law and for the exchange of information among those involved in organising China law studies. It also provides an excellent forum for the development and presentation of individual research projects.