Rezensionen

"Experimentalism" and Law in China – "Experimental Legislation in China between Efficiency and Legality: The Delegated Legislative Power of the Shenzhen Special Economic Zone" by Madeleine Martinek, Springer, 2018

Minjie Hu [1]

I Introduction

Madeleine Martinek is one of the first students to graduate from the LLM program at Nanjing University Law School. This book is based on her doctoral thesis, a work that adopts a comparative method and focuses on the case study of Shenzhen. The analysis is structured as follows: Introduction; Social-Economic and Legal Foundations of Modern China; China's Experimentalist Approach to Reform; Delegated Legislative Power of the Shenzhen Special Economic Zone (SEZ); Major Achievements in Experimenting with Novel Regulatory Approaches; Legality versus Efficiency of Reform; Summary.

SEZ legislation is a component of the SEZ policy package and is also one of the principal bases for SEZ policies. It is necessary to balance the relationship between stable legislation and flexible reform. We can regard SEZ legislation as Chinese *"experimentalism"*.

II "Experimentalism" in China

Experimentalism takes its name from John Dewey's political philosophy, which aims to accommodate the continuous change and variation that is seen as the most pervasive challenge to public administration. The key norms in experimentalist regimes are designed to induce local actors to participate in the regime.[2] The author of this book points out that the method of experimentation has played a significant role in successfully overcoming the eventful and turbulent socio-economic challenges of the past few decades in China.[3] She describes the evolution of reform experiments, including the "*point-to-surface*" technique; decentralization of legislative competence; and *crossing the river by feeling for the stones*. In view of this, a generation of institutional and policy innovation has been driven by local initiative with the support of higher-level policy makers. SEZs are an example of this experience.

Of course, before discussing SEZs, the author analyzes the basic characteristics of China's current legal system. As the author writes in her interim conclusion at the end of Chapter 2: "*The legislative trials performed in these local spots constitute an illustrative example for the increasingly strong local legislation which, due to its own particular profile and innovative force, forms an important part of the Chinese legislative system.*"[4]

In China, the *Legislation Law of 2000* generally provides that local legislatures can (1) enact implementing laws and administrative regulations; (2) legislate on matters that need to be regulated according to the special circumstances of the localities; and (3) pass legislation on matters pertaining to local affairs. Under this Law, legislative power was extended to cities where the people's government of a province or an autonomous region is located and to cities that host a SEZ.[5]

Furthermore, the author differentiates the delegation of legislative power in China from how it is done in western countries, especially Germany. In western countries, consistent with the separation of powers, legislative powers can be conferred to the executive, albeit under strict conditions. In China, however, the NPC and the NPCSC have issued numerous empowerment resolutions and decisions.[6] Thus, many Chinese scholars use the two labels of "delegated legislation" (授权立法) and "authorized legislation" (职权立法). In other words, formal "delegated legislation" is actually a kind of "authorized legislation". In contrasting this legislation with western countries' legislation, the author argues that the delegation of legislative power in Chinese law is seen as a political tool to encourage socio-economic goals and to create regulations designed to facilitate socio-economic development.

The *Empowerment Decision of 1981*[7] and the *Empowerment Decision of 1992* are the products of economic and social development in a special historical time. The Shenzhen SEZ was one of the spots selected to be a "*window to the world*" as well as an "*experimentation field*" for a series of reforms designed to allow the creation of a more market-oriented regulatory environment in China. The special economic zones of the Fujian and Guangdong provinces, having been created by the central authorities to provide two of the PRC's more independent provinces great latitude in drawing foreign investment and trade, can be expected to be given careful attention and support from Beijing. Both provincial and national authorities are aware that the

1 Minjie Hu, Professor, Guanghua Law School of Zhejiang University.

2 *Charles F. Sabel/William H. Simon*, Minimalism and Experimentalism in the Administrative State, 100 Georgetown Law Journal (2011), p 53.

3 *Madeleine Martinek*, Experimental Legislation in China between Efficiency and Legality: The Delegated Legislative Power of the Shenzhen Special Economic Zone, Springer (2018), p. 59.

4 Supra note 2, p. 49.

5 Supra note 2, p. 40.

6 Supra note 2, p. 130.

7 The 21st Meeting of the Standing Committee of the Fifth National People's Congress resolves that the People's Congresses of Guangdong and Fujian provinces and their standing committees shall be authorized to formulate separate economic regulations for the special economic zones in accordance with the principles provided in relevant laws, decrees and policies in the light of the specific conditions and actual needs in the special economic zones.

zones not only represent a Chinese economic experiment but also a legislative experiment. Furthermore, the *Empowerment Decision of 1992* extends legislative power to Shenzhen.

The question arises as to how one should understand the nature of this Empowerment Decision. Chinese scholars have three opinions:

1. *Principal-Agent Theory*: It is proposed that the legislative power extended to special economic zones is essentially supreme power being transferred to the special economic zones. In other words, this legislative authority derives from the legislative power of the National People's Congress and goes beyond the scope of general local legislation. Thus, enacted legislation has the same hierarchical status as legislation of the National People's Congress.
2. *Legislative Power's Transfer Theory*: It is proposed that the national legislature transfers its legislative power to a local organ without such statutory legislative power by an act of authorization. The transfer of legislative power means that SEZ legislation has the same hierarchical status as the local legislation formulated by *larger cities* in SEZs.
3. *"New Type of Legislation" Theory*: Some scholars have proposed that SEZ legislation is a whole new type of authorized legislation. It is a type of local legislative power and distinct from the national legislative power or the local legislative power.

Dr. Martinek adopts the third opinion on the nature of the SEZ legislation. She argues that in German law, delegated legislation refers only to executive lawmaking. But the concept of delegated legislation in Chinese law is still at a nascent stage.[8]

Shenzhen SEZ legislation has a temporary character. This character means that such legislation is *Experimental Legislation.* Experimental legislation is one of many legislative techniques or instruments in the area of temporal legislation. In EU law, experimental legislation is often used differently than a sunset clause (or review clause).[9] A sunset clause often sets an expiration date for the provisional specification. The effect of a sunset clause should be maintained or continued if some of the provisions or the bill is proven to be effective in the light of the circumstances, or if the content of the clauses or the bill itself can be updated in a timely manner through judicial interpretation, periodic assessment or review.

Accordingly, she explains that:

> "*One special feature of the empowerment decisions is the so-called deviation power of SEZ regulations (biantong quan), reflecting their experimental character [...]. Despite the risks of operating within an opaquely defined field, innovation and experimentation are still encouraged and given full play to challenge and reform the existing legal system in order to enhance public welfare and to handle the problems brought about by the current period of socio-economic transformation."*[10]

Furthermore, the author examines the legislative achievements of the Shenzhen Special Economic Zone in Chapter 5. For example, the Shenzhen SEZ has implemented ground-breaking reforms in land management, allowing it to become an experimental field for establishing a land market. In addition, the adoption of the Legislation Law (2000) marks the beginning of a twofold legislative power being vested in the Shenzhen SEZ: The delegated legislative power based on the two Empowerment Decisions of 1981 and 1992 has been institutionalized in Article 65 and Article 81. Firstly, Article 65 states that the people's congresses or the standing committees of the provinces and cities where SEZs are located may, upon authorization by a decision of the National People's Congress, formulate regulations and enforce them within the limits of the special economic zones. Secondly, according to Article 81, if the regulations of SEZs lay down adaptive provisions for the laws, which constitute administrative regulations upon authorization, their provisions will apply in the SEZs concerned.

With the development of the economy, we can find many regulations that have been stipulated, regarding matters such as a *National Independent Innovation Demonstration Zones, Food Safety,* and *Social Security*.[11] Dr. Martinek has also mentioned the reforms put in place for the registration of commercial enterprises.

III Stable Legislation vs Flexible Experimentalism: The Relationship between *Reform* and the *Rule of Law*

Chapter 6 discusses the contradiction between efficiency and legality, which is the title and core thesis of this book. This part mainly revolves around constitutional law. Dr. Martinek explores this core topic in terms of three aspects: the constitution in authoritarian systems; constitutional disputes; and solution approaches.

Firstly, she contrasts the Chinese Constitution with that of the US and western Europe as follows:

	US and Western European Constitutional Law	**Chinese Constitution**
Nature	A bulwark against the possible tyranny of an otherwise absolute sovereign.	Political declaration, dominated by the penetrative power of the CCP.[12]
Constitutionality Review System	Courts play a distinctive role in interpreting Western Constitutions	Courts do not address issues of constitutionality.

8 Supra note 2, p. 137.

9 *Mario Esposito,* Constitutional Sunsets and Experimental Legislation: A Comparative Perspective, 6 Europe Journal of Risk Regulation (2015), p. 677.

10 Supra note 2, p. 175.

11 Work Report of Shenzhen Municipal People's Congress Standing Committee (2016).

As a result, she identifies the paradox of "*benign unconstitutionality*", a widely observed feature of legal reform in contemporary China. The term was first introduced by Tiechuan Hao.[13] It refers to a situation where certain reform measures are considered to be positive and necessary in a fast-changing society, even though their formal legality is questionable given that their breach of the written law (including the Constitution) is not expressly acknowledged or justified. Tong Zhiwei takes the opposite position on this question; he has pointed out that "*benign unconstitutionality*" is also unconstitutional. Ten years after commencement of the debate on "benign unconstitutionality", Zhang Qianfan published a paper on "Constitutional Modification and Local Experiments".[14] He reevaluated the theory of "benign unconstitutionality" and attempted to employ the term "constitutional change". This more objective and neutral concept replaces "benign unconstitutionality".

As Dr. Martinek discusses, because of this constitutional law crisis, Chinese scholars nowadays increasingly engage in debates on the "judicialization of the constitution" as a safeguard against the prevailing disparity between law and reality. Furthermore, the Constitution can also be developed through legislation. As Lin Yan observes, it is also worth noting that this important constitutional system has been built and improved through legislation, something also describing the legislation of the National People's Congress and its Standing Committee. Through this legislation, the adjustment of relationships between horizontal and vertical state organs and the coordination of relationships between local state organs benefit from clearer principles and rules.[15]

Thus, the Empowerment Decision is the basis for experimental legislation in the form of delegated legislation that is, in most cases, ground-breaking and that represents an innovation of the existing legal system as undergoing reform in China. In recent years, as the author describes, many scholars have recognized that promoting the socialist rule of law while simultaneously focusing on legal reform also requires respecting the supreme law, namely the Constitution. Han Dayuan summarized the development of the Chinese Constitution and has pointed out:

> *"On the one hand, as a fundamental law embodying the spirit of reform and opening up, the 1982 Constitution hasn't been comprehensively and effectively implemented, and the supply and norms of reform and opening up are insufficient. On the other hand, the concept of reform and opening up clearly stipulated in the Constitution has not been strictly enforced. The phenomenon of surpassing the Constitution in name, disregarding the Constitution, and even breaking the Constitution still exists. These issues need to be taken seriously."*[16]

Secondly, Dr. Martinek discusses two disputes, particularly the *lack of legislative competence to transfer legislative powers* and *excessive deviation power.* She argues that both the 1981 and 1992 Empowerment Decisions lack a firm constitutional basis and cannot claim a legal underpinning in the *Legislation Law.* After analyzing the formal constitutionality of the Empowerment Decisions of 1981 and 1992, she points out that the requirements of enacting regulations "in light of the specific conditions and actual need" and complying with the "basic principles of national laws and administrative regulations" are excessively vague. They render it easy to deviate from the national law. Excessive deviation power endangers the uniformity of law and brings a collision of general local legislative power and delegated legislative power. At the same time, Dr. Martinek also discusses the challenges posed to the principle of equal treatment which arise in connection with experimental legislation. In China, the principle of equality has still many flaws.

Finally, she explores the insufficient means of supervision. In response to the above problems, a solution strategy is proposed:

1. The debate on "benign unconstitutionality" will subside only when the deficiencies inherent to the Chinese political system are removed.

2. SEZ legislation should protect legal certainty. Dr. Martinek is of the view that an SEZ's unique position justifies the existence of a blanket authorization. Furthermore, SEZ legislation should adhere to the theory of essentialness, which imposes efficient restrictions and heightens the awareness of and the ability to reflect upon the importance of affected fundamental rights. At the same time, SEZ legislation should consider whether the envisaged temporary regulations, potentially affecting individual rights, are proportionate to the determined objective.

3. Fixed expiration dates, substantive legal review and evaluation systems can curb excesses in SEZ legislation.

V. Conclusions

It can be said that Madeleine Martinek's book is a systematic restatement of a series of previous studies at Nanjing University. In the Preface she refers to her "passion and fascination for Chinese Law", and her book indeed reflects this *passion* and *fascination.* This

[13] For a general discussion on the topic, *Chun Peng,* Rural Land Takings Law in Modern China: Origin and Evolution, Cambridge University Press 2018, footnote 1 in Chapter 3, p. 57. See also *Tiechuan Hao,* On Benign Violations of the Constitution, 2 Legal Studies (1996).

[14] *Zhang Qianfan,* Constitutional Modification and Local Experiments, 1 Legal Studies (2007).

[15] *Lin Yan,* To develop legislation through legislation: On the institutional competition among the constitutional development procedures, 2 Tsinghua Law Review (2013).

[16] *Han Dayuan,* The Response and Contribution of Chinese Constitutional Law for 40 Years, 5 Chinese Law Review (2018).

book is a superb publication and makes a wonderful contribution to Chinese law.

On the one side, Chinese law, particularly Chinese constitutional law and administrative law, encompasses a complicated system with many vague concepts, principles and theories. On the other side, Chinese constitutional law and administrative law have a number of close relationships with the Chinese political climate and economic developments. Based on this complex background, the author compares the different legal systems and theories as existing between China and other western countries, looking especially at Germany.

This study is attributable to her love of Chinese law. Her work will allow readers to build a *bridge of knowledge* between Chinese law and foreign law.