

## TAGUNGSBERICHTE

### Conference Report: European China Law Studies Association Conference, Oxford 2013<sup>1</sup>

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*The annual conference on Chinese Law held by the European China Law Studies Association (ECLS) provided insights into the normative and structural underpinnings of the Chinese legal system by reflecting upon China's historic, cultural and socio-economic influences. The conference provides a valuable opportunity to distance oneself from preconceived rigid legal concepts and to develop a flexible and broad-minded approach towards certain features of Chinese legal thinking.*

In 2006 the European China Law Studies Association was formed by academics for the purpose of providing a forum where recent developments in Chinese Law could be discussed. This was the starting point of a series of annual conferences, which would rotate between different cities within Europe and Asia, offering the opportunity of mutual exchange, collaborative research, and gaining an insight into different fields of Chinese legal studies.

From September 18th, to September 20th, 2013, the conference entitled "New Approaches and New Questions in Chinese Law" took place in the historical city of Oxford, England. Scholars, PhD students, legal professionals and persons generally interested in the Chinese legal system, travelled from all over the world, notably the United States (US), China, Italy, Germany, Belgium and the United Kingdom (UK) to gather at one of England's most prestigious law faculties.

#### I. Opening session

The eighth<sup>3</sup> ECLS conference was opened by Rogier Creemers (University of Oxford, host of this

year's conference), Hatla Thelle (Danish Institute for Human Rights, Copenhagen) and Timothy Endicott (Dean of the Faculty of Law, University of Oxford) who warmly welcomed all speakers and participants and gave an introduction to the conference's thematic structure. Methodological and metajuridical questions of how Chinese law operates in its environment and inter-disciplinary perspectives on Chinese law shaped the two day conference. The opening session was formed by a round-table consisting of experts from practice giving an insight of the importance of building knowledge bridges between the academia, policy and the profession providing examples of how knowledge interchange could work, for instance, by reciprocally giving impulses and sharing information across networks and pools, as well as by focusing on the importance of the academic input for the field of practice. The exchange of best practices is particularly important due to the fact that China's legal system is constantly undergoing a rapid development. Cooperative publishing projects were suggested in order to attract more interest in the Chinese legal system and for encouraging contact and exchange between the Chinese and European academia and legal professions. Comments from the audience further focused on adhering to principles of good governance whilst establishing and broadening knowledge-bridges with regards to public and criminal law. The following two sessions dealt with methods and theoretical perspectives on Chinese legal research and Chinese law. These sessions were followed by parallel sessions emphasizing on academic research of Chinese law and the market and China's legal policy in the area of public international procedural law. The second conference day started with sessions presenting new methodological approaches to Chinese law and provided an insight into the development and transition of China's judicial system. The subsequent panels focused on mechanisms and perspectives of implementing policies, legal and judicial reform, and stressing focus on the gradual development of legal consciousness in the Chinese society.

#### II. Method in Chinese Legal Research

Benjamin Liebman (Columbia Law School) talked about his findings in an empirical analysis of Chinese criminal judgements. Since 2009, courts in Henan are ordered to increase the transparency of the judicial system by putting their cases online. Liebman examined the criminal cases of a basic court and an intermediate court and additionally

<sup>1</sup> Due to the fact that the conference included parallel sessions, the authors were not able to attend all panels. Thus, we were not able to consider all presented paper in this report.

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<sup>3</sup> Including the founding meeting in Moelle 2006.

interviewed judges and lawyers from Henan. The findings show that the policy of 'balancing leniency and strictness' plays an especially important role in the work of the courts: while minor cases are often sentenced leniently, serious cases, especially those that involve state interest or those that are a threat to social stability carry comparatively harsh sentences. To achieve the leniency, next to the confession of guilt, compensation for the victim or victim's family is an important factor. Besides, the emphasis on mediation even leads to defendants being pushed to achieve a settlement with the victim's family. Other findings concern the role of lawyers: the number of defendants without legal representation is still high, and lawyers are often confronted with denied access to their clients. At the same time, defendants are pressured not to consult legal assistance. Given that achieving a non-guilty verdict is nearly impossible; the most common used strategy is to confess guilt to achieve a lenient sentence. Other findings suggest that the intermediate court is taking its role to revise judgments seriously. Liebman sees his work as a first step to use the vast amount of data now publicly accessible. Particularly surprising is the broad use of leniency in routine cases, whilst still applying harsh sentences when it comes to state interests or threats to social stability. The emphasis on achieving settlement and mediation show the high importance of social harmony even in criminal cases, while also protecting state stability by means of a strict law and order policy if necessary. Liebmann sees the newly shown transparency as a mechanism to control judges and reducing errors, and thereby strengthen the public confidence in the justice system and the state.

Daniel Sprick (University of Cologne) then analysed self-defence based on the question of legal change. He focused little on the legislation and law making process itself, but rather on the dynamics between law and society. Referring to Gunther Teubner's approach of analysing 'the transfer of transferred law in its new habitat' by paradigms of 'binding arrangements', 'legal irritation' and 'indeterminacy'. Sprick explored the indeterminacy of the developing Chinese legal environment. Self-defence is indeterminate per se, consequently able to reveal legal change and its communication and relation with and between law and society. Tracing back, self-defence patterns in traditional Chinese law codes were shaped by the Confucian *li*-system that in a detailed way appoints hierarchy within family relatives and society. Legal transfer then multiple occurred at the end of the Qing Dynasty and throughout the 20th century, consequently involving a continued facing of legal irritation within China's given context. The last 30 years were marked by Yanda campaigns and afterwards continuing

approximation towards a more systematised construction of self-defence within the law code: self-defence can be taken for the protection of one's personal rights, of others rights or of public interest. The infringement of these rights has to be unlawful, immediate and the self-defence action within the scope of proportionality. The following binding arrangements reveal themselves within these indeterminate legal terms: the government's policy of social control shifting between crime control, civil courage and personal autonomy, the active defence against environmental issues, considered as part of the public interest and fatal occurrence of domestic violence.

In the last presentation of this panel TANG Yan (Chongqing University of Technology) and WANG Lieqi (Southwest University of Political Science and Law) elaborated on the fragmentation trends in China law studies under the complex of enlightening. The presenters argued that Chinese jurists often see themselves as enlighteners, rather than as law interpreters, meaning that they think of themselves as introducers of an 'advanced' western concept of 'rule of law' and changers of the political environment and national culture in China. A variety of problems are caused by this ideology: not only consists the western jurisprudence, which is used as a source for legal knowledge, of two systems (case law and civil law system) and a long history, making it hard to construct a consistent legal discourse, when contradicting principles are used to solve legal problems. But the Chinese jurists also do not regard Chinese tradition and local legal practices and norms as a source of legal knowledge. Altogether, a fragmentation of Chinese legal discourse is caused. Not only different legal systems are used in the same department of law (e.g. criminal substantial law is influenced by German law, whereas criminal procedure law is influenced by US law), but the legal scholar knowledge is also often not regarding practical issues, leading to a barrier between legal discourse and practice. The presenters also found a positive aspect in the fragmentation trend: as a starting point for a new approach to the Chinese legal system, addressing the aforementioned problems, it may be able to deliver a better systematic knowledge. In a second step it may be able to deliver an improved, more consistent legal discourse and legal system in China.

### III. Theoretical Perspectives

In the first presentation of this panel, WANG Xigen (Wuhan University School of Law) discussed the 'Yichang Model', named after the town Yichang, in which new innovations on the field of social management are in use. Yichang is divided in 1100 grids.

The so called 'grid administrators' serve as a link between government and citizens in comparably small society-units and use advanced technology, such as mobile phones and databases, to cooperate with special groups in their area. The 'focus group' includes socially weak people like the floating population, orphans or beggars, while the 'special group' consists for example of drug addicts or of persons, who went to prison. While the administrators collect data about the focus group, their function for the special group is to deliver social services. Trying to follow the principles of 'New Constitutionalism', the system gives a tool to the citizens to supervise and protect their rights, while also making government more efficient through the use of advanced technology, for example indicating time limits for the handling of public affairs. By involving volunteers in addition to the administrators, (e. g. to support persons released from prison) a participation of the citizens is made possible, which leads to good governance. In the way this social management system works, the law is not perceived as a rigid dogma, but the acceptance for the 'rule of law' is increased, leading to social justice and increased efficiency of social management.

XING Lijuan (City University of Hong Kong) then shed light on 'Competition and Compromise Between the Rule of Law and Social Harmony under China's Criminal Procedure Law of 2012' analysing two important methods and concepts that govern present political approaches in China: the ideas of establishing a 'socialist rule of law' and building social harmony. He started by commenting the contrapositions of these two political leading ideas and then drew similarities to the Confucian and Legalist concepts of *li* and *fa* in traditional China. Analysing the newly amended provisions of the criminal procedure law he came to the conclusion that even though rule of law is already being perceived as an indispensable part of China's future development and gave already shape to important steps towards basic rule of law institutions within the criminal procedure (such as the exclusion of illegally obtained evidence and the stronger protection of defence rights), an even more important function of the amendments is to serve and contribute to social harmony. Hence, social harmony for its part is understood as a political concept that has started to be legalized equally as rule of law institutions. This can be observed for example within the provisions regulating the role of the lawyers, settlement of cases in public procedures and the application of summary procedures.

#### IV. Law and the Market

During the session "Law and the Market", moderated by Katrin Blasek, Alan Koh (National Univer-

sity of Singapur/Boston University) discussed the enforcement of corporate governance by the China Securities Regulatory Commission (CSRC). After talking about the Thompson-Sale thesis, which core argument is that the enforcement of disclosure obligations in America is a form of enforcement of corporate governance obligations, he focuses on a ground-breaking work of Chinese academics, in which the authors analysed six years of imposing administrative penalties on Chinese listed companies by the CSRC. Koh argues that there are a lot of functional similarities between the disclosure rules in the US and the enforcement of corporate governance obligations by the CSRC in China. Whilst in the US disclosure violations are deterred by civil litigation, a measure against the violation of disclosure obligations in China is the imposition of administrative penalties. The presenter finds that with regards to China, these measures are more suitable in comparison to those used in the US: the CSRC, unlike civil courts in China, does not depend on local governments, which also have the power to control state-owned enterprises that may violate corporate governance obligations. Another advantage of the well-regarded CSRC is its capacity to attract talents and its superior expertise compared to civil courts. Since the class action mechanisms of the US are not available in the Chinese legislation, the more politically acceptable enforcement of disclosure obligations by the administration may ultimately prove to be the best way to handle the problem. Lastly, Koh recommends to improve the CSRC by increasing the penalties and resources of the entity, strengthen measures against internal power abuse, such as an improved separation of administration committee and enforcement divisions and to implement compensation mechanisms for injured private investors.

Next, Wendy Ng (University of Melbourne Law School) used a political economic approach to analyse Chinese competition law. The presenter used Milhaupt's and Pistor's framework for the analysis of legal systems and their relation to markets to examine China's main competition statute, the Anti-Monopoly Law (AML), or, precisely, the area of mergers in the AML. In a first step, the main actors conducting the merger review were examined. Besides the Ministry of Commerce (MOFCOM) and state-owned enterprises (SOEs), other government departments are of special interest when it comes to mergers: They bring industrial policy into the review process, sign off certain requirements or establish informal agreements that need to be made to address the concerns of the departments and therefore gain approval to conduct the merger. SOEs on the other hand generally do not report merger activities to the MOFCOM, and the MOFCOM, due to political and institutional barriers (e.g. lack of

resources, a lower rank in the political system compared to SOEs or better 'connections' to political decision makers on the side of the SOEs) has only a limited capability to impose penalties and take action against such behaviour. In the next step, Ng analysed the coordination between AML and other government policies: she detected a changing attitude of the government in the area of variable interest entity structures, which are used to bypass regulations for foreign enterprises in certain areas, for example by adding conditions to mergers in these areas. A similar development can be seen in the area of restricted industries, such as telecommunication and agriculture. Last she argued that the imposition of behavioural conditions, for example to stop expanding after the merger has taken place, can be seen as the government's use of the AML as a macroeconomic tool.

During his lecture, "China's state capitalism and world trade law", DU Ming Michael from Lancaster University explained that China has adopted the concept of state capitalism due to the wide spread influence of the government in the market. Despite the fact that private enterprises enjoy significant economic leeway in business performance, the Chinese economic model can be considered to be unique since state-owned enterprises (SOEs) still dominate China's economy. The government is also the largest shareholder of commercial banks. This demonstrates that state capital plays a leading role, especially with regard to production subsidies flowing to SOEs, in enhancing export performance. Here the WTO agreement on Subsidies and Countervailing Measures (SCM Agreement) comes into play. DU pointed out that the SCM Agreement – with its aim of controlling the allocation of subsidies in order to prevent trade distorting effects – constitutes a powerful weapon against state capitalism by evaluating whether the subsidies granted are prohibited, thus restricting state intervention.

## **V. The national, the international and the transnational**

Vivienne Bath (University of Sydney) then talked about the Chinese government and litigation overseas. She observed how and why the Chinese government got involved in some overseas litigation over the last few years, which is not state to state litigation. By examining the role of the Chinese government within these cases, the analysis of this bilateral litigation, which in its nature is rooted in private business to business conflicts, provided a new starting point in the exploration of China's future approach to the international justice and litigation stage. Besides, the Chinese government wants to push for outbound investments, while supervis-

ing and supporting national businesses and protecting its own business and trade interests. The future developments of these court actions are still to be determined.

KONG Qingjing (Chinese University of Political Science and Law) also focused on China's attitude and approach towards international dispute settlement. Depending on the issue involved, China either through political or judicial methods chooses to address international disputes. With regards to disputes that tackle territorial or sovereignty questions China is not willing to accede to a third party's decision on the international stage, but rather prefers to give a solution by negotiating and consultation with its opposing part, thereby addressing the conflict by political tools. China strictly refuses to bind itself to arbitration clauses in international treaties or to recognize any judicial mechanisms where the previously mentioned issues may be involved. An example to be mentioned is the ongoing arbitration with the Philippines: Even though the United Nations Convention on the Law of the Sea (UNCLOS) does not require the involved party's consent to initiate a process but grants the International Tribunal for the Law of the Sea (ITLOS) this power, China up to now is not willing to recognize any actions taken by the court so far. This political approximation is in line with China's understanding of inter-state relations: In order to be able to act upon the maxim of peacefully settling inter-state disputes, every state has to respect sovereignty and territorial integrity, meaning not getting involved in either sovereignty or territorial integrity questions. Then again, regarding issues that don't concern sovereignty and territorial integrity, especially in the broad area of commerce, trade and environment China has adopted a more open and flexible position and became more involved with judicial solutions of international disputes, e.g. arbitration. Within the WTO it is an active party of bringing disputes to the Dispute Settlement Body (DSB). Equally, China has become more involved with neighbouring Asian countries as trading partners and concluded multilateral treaty agreements that involve binding dispute settlement clauses. On the ground of commerce and trade the position towards the ILC in this realm has been become more relaxed as well.

## **VI. Towards a Renewed Approach to Chinese Law: Rethinking Law and Justice Paradigms (I)**

The second day started with two consecutive panels that formed part of an introduction of mindsets that presented new paradigms of how to approach and study Chinese law and the Chinese legal system. Flora Sapio (Chinese University of Hong Kong) gave the introductory thoughts of this

new approach. Firstly, she reflected and contrasted already existing paradigms in the field of Chinese law: The liberal cosmopolitan paradigm takes the principles of equality of human beings, rule of law, and liberal democracy as subject-matter and purpose at the same time for its approach towards the Chinese legal system. Paradigms that try to overcome the problems resulting from the former, such as marginalizing Chinese law as unlawful, because it is not grounded on democratic legitimation and constantly concluding and asking how, when and if China will be able to establish a Western shaped democracy, try to consider the tied band, between law, morality, politics and society. A new paradigm's aim would be to approach Chinese legal studies by focusing more on human agency. The actors of law shall function as discursive and institutionalist filters. By considering law in its broadest sense, normative boundaries of law and the interaction with the political and social have to be observed. A further requirement is to reject the uniqueness of China's legal system. Key terms of these proposed paradigms are the 'political' and the 'legal', as two concepts that are not autonomous from each other, but rather mutually influencing, interacting and driving legal reform.

Susan Traveskas (Griffith University) then spoke about the law-politics nexus in criminal sentencing and judicial reform illustrated by the capital crime of transporting drugs. Drug mules can be executed for transporting more than 50 grams of heroin or methamphetamines. Under certain circumstances leniency can be given. Within this capital crime Traveskas contrasted and observed the interplay between national policies (e. g. social harmony), work of the judiciary (e. g. guiding mechanisms) and written law (e. g. general clauses). These three spaces all contribute to what is referred to as criminal law and its practice by building different channels of shaping the former.

Adele Carrai (Hong Kong University) then gave an overview of the sovereignty question. Recent scholarly paradigms, such as selective adaptation, try to capture China's active approach to the international society while simultaneously focusing more precisely on the discourse of international and national policies and the society within China. Hence, as outlined by Carrai, selective adaptation still takes the 'liberal model' of international law and sovereignty discourse for granted and for that reason is not able to examine China's approach to international law beyond the comparison and measurement of its compliance with the liberal system. As proposed by her, paradigms analysing China's approach to international law should be able to shift to a more integral paradigm that considers different concepts of sovereignty discourse and their histori-

cal development. China's way of establishing links with the international legal order, approaching and accessing it, should not be evaluated by its degree of complying with the liberal model of sovereignty and international law, but rather concentrate on how China itself influences the international order.

## VII. The judicial system in transition

Vincenzo R. Palmisano (Hunan University) talked about the '*Xinfang* System'. According to Palmisano, today's primary system of dispute resolution in China is used to complain about court decisions or administrative acts at local-level bureaus or, if that failed, at bureaus on the provincial level. The number of petitions is also a factor with influence on the career of officials, regardless of the nature of such petitions. There are several reasons, why people prefer to petition instead of filing a law suit: citizens see the real power not at the courts, but at the local government that nominates and appoints judges, is able to remove them and decides their salary. It is seen as a comparatively cheap way to justice, and, since judges also face the responsibility system according to the number of petitions filed against their sentences, as a measure to impose pressure onto judges. While originally designed as a last resort to achieve justice, it is commonly used simultaneously or instead of complaints through formal legal channels. At the same time, it overlaps with administrative consideration and court decisions. Conclusively, the presenter argues that, while filing a lawsuit is gaining justice by solid legal arguments, filing a petition is asking a higher authority for help. Hence, its success largely depends on the willingness of the official receiving the petition. Because it replaces trials, it can be seen as a threat to the legal system and the formal rules it consists of. Measures against this tendency proposed by the presenter include to change or even abolish the responsibility system and to make the filing of a lawsuit to a condition to petition against unfavourable measures. From the presenter's point of view, since the '*Xinfang* System' serves social stability as a security valve, a complete abolition of the system would have negative consequences.

A whole session was also devoted to the topic "The judicial system in transition": The Chinese Judicial State Exam, reformed in 2001, was at the centre of discussion. Rebecka Zinser from the Sino-German Institute of Legal Studies, Nanjing, illustrated the structure and content of the Exam and thus analysed the Exam is capable to strengthen legal reasoning skills and to what extent the interaction between the Communist Party and the judiciary still exists, hampering the candidates' discretion, independence and interpretation of law. She based her analy-

sis on the following questions: (1) who is able to undertake the exam, (2) which fields of law are subject to the exam and (3) which legal skills are required. The exploration of these questions reveals the standard of knowledge and legal skills legal professionals are required to exercise judicial work and therefore can answer whether the judicial exam is improving the judicial system. Nowadays, any Chinese citizen holding a Bachelor's degree is allowed to take the exam. The exam itself does not only cover general fields of law, but also requires basic knowledge in specialized topics, such as in practice-oriented fields as IP law and commercial law. Besides, it also requires knowledge of ideology and history of law, presenting fields of law that are more easily subject to political ideology. Especially revealing is the way in which the candidates are tested; multiple-choice questions constitute a significant part of the exam, which are formulated in way the candidates are required to apply instead of reproducing legal knowledge. However, they are not required to demonstrate argumentation skills. Similar abilities require the case analysis, which confront the candidate with complex legal issues but then due to concrete questions there is no requirement of showing abilities of further reaching argumentation. Furthermore, essay questions tend to already predetermine possible argumentation. Zinser stated that the exam does require legal knowledge and ability of applying the law, but lacks the requirement for legal reasoning skills. As a result, law can easily be understood as 'nothing to argue' about, but given facts. Hence, legal professionals tend to understand themselves as implementers of law rather than law interpreters. In this way it is doubtful to state the judicial exam as a tool of pushing forward the transition of the Chinese judicial system.

Björn Ahl (University of Cologne) shed light on the 're-politicization' of the Chinese Judicial exam. During the time that Zhou Yongkang's was leading the CCP's Commission of Politics and Law (2007–2012) politicization of the judicial system could be observed. Ahl analysed whether and how the judicial exam itself became re-politicized and how this re-politicization affected the selection of legal professionals. Therefore, he explored the exam questions during this period of time and official documents and scholarly comments concerning these exam questions. Furthermore, he examined university education itself regarding the question of whether re-politicization could also be observed in general law-school curricula. Thus, by taking the judicial exam as an example, Ahl draw an integral picture of the politicization of the judicial system that came along with institutional changes. Analysing the exam questions also revealed further going aspects, such as the exam makers' perception of the

relationship between law and politics. Even though the Party line may have changed since 2012, institutional changes the judicial exam had undergone will still continue to have impacts on legal education.

### VIII. Guiding Cases Project

The panel for the 'China Guiding Cases Project' was lead by Mei Gechlik (Stanford Law School), who also initiated and leads the project.<sup>4</sup> Together with other members of the project, namely Oma Lee (Chinese University of Hong Kong), Dimitri Phillips (Stanford Law School) and Jeremy Schlosser (Dorssey & Whitney LLP), she was joined by HUANG Huifang (Kaohsiung District Court, Taiwan), LI-ANG Jianchao (Dongguan Municipality No. 2 People's Court, Guangdong Province) and YIN Shaobin (No. 1 Civil Division, Dongguan Municipality No. 2 People's Court, Guangdong Province) to talk about China's Guiding Case System. Since December 2011, the Supreme People's Court (SPC) has released four groups of Guiding Cases, each consisting of four cases. The cases consist of several fields of law, thereunder criminal law, company law, administrative procedure law and one case concerning the maritime law. Courts of all levels shall "refer to" the Guiding Cases, which are selected by the adjudication committee of the SPC. Their aim is to unify the jurisprudence, to increase the quality of the judgments and to guarantee justice in the judicial system of the PRC. By giving people connected to Chinese law the opportunity to leave comments on the website, the Stanford Guiding Cases Project sees itself as a platform for discussion of this innovative measure of the Chinese legal system. Interviews with judges, lawyers and professors in China were conducted by the members of the project. The evolution of the Guiding Case System was demonstrated, and the differences between the system of case judgement in common law on the one side and the standardization of judicial acts under Chinese statutory law on the other side were ascertained. Though not shedding light on the significance of the Guiding Cases for substantive law in China, the results of the interviews, which were aimed at clarifying the importance of the cases for Chinese law, were shown as a statistic during the presentation.

### IX. Mechanisms of implementation (I)

Ronald Brown (University of Hawaii) analysed the diffusion and deffusion of labour disputes in China. He first gave an overview of the existing dispute mechanisms, which are collective negotiations, strikes, mediation, arbitration and proceedings before court. Further, he shed light on how these have

<sup>4</sup> For further information see: <http://cgc.law.stanford.edu/>.

been developed by enacted regulations and laws and to which extent they actually have been put into practice in order to diffuse labour disputes. He then discussed how recent policies and enacted regulations try to defuse labour disputes: While a strong focus is laid on dispute resolution at enterprise level by promoting knowledge and effects of social harmony, court litigation has not been decreasing. Taking this into consideration, law making actors that are willing to defuse dispute, will have to decide, whether labour disputes through consultation, mediation and arbitration are going to embrace more final dispute settlement mechanisms or whether litigation before court constitute an always existing path to go. Hence, work is to be awaited in adjusting, improving and clarifying the path and interaction of the different mechanisms and stating clear their legal effect.

XIN Xin (City University of Hong Kong) presented her research about judicial mediation policy based on fieldwork in a basic level court in China. The purpose of the research was to examine the structure of the coordination, interaction and interdependency of policy goals, social needs and the role of the judiciary. She first presented official views of the aims the judicial has to fulfil, namely contributing to social needs and political stability. XIN then took the court and judge evaluation system as object matter to contextualise these aims. Outcome was a detailed set of further reaching questions comprehending the evaluation system as being highly pragmatic by its structure, content and remuneration system and largely paying attention to judicial mediation as the key factor contributing to social harmony, hence questioning the actual enforcement of justice, namely rights enforcement before the judicial organs.

Li Silfverberg (University of Stockholm) explored rule of law with regard to court and civil mediation. After an outline of theoretical concepts of rule of law, namely 'thin' and 'thick' rule of law concepts, discussed both among western and Chinese scholars, she analysed current viewpoints in respect to civil and court mediation in China. Commentaries holding the viewpoint that mediation is rather a step backwards from rule of law, point out that courts have a crucial function by building rule of law, as they are a public sphere for rights enforcement and embodiment of generally binding legal norms. Opposing commentaries hold the view that mediation - with its specific Chinese shape - can be able to encourage rights and peaceful dispute settlement consciousness among people. Mediation ought to have the ability to achieve a more nuanced interpretation of what is regarded to be just. Silfverberg concluded her analysis by arguing that China is able to have both rule of law and mediation at

the same time. To further embed this argument, new strings of search terms have to be set up.

## **X. Influences and Perspectives on Legislation and Rulemaking**

Current legislative developments, such as the delicate national regulations on the household registration (called Hukou system) which were enacted in 1958 in order to restrict undesirable rural-to-urban migratory flows, were discussed at the panel session entitled "Influences and perspectives on legislation and rulemaking". Implementation of the Hukou system differs throughout the country. One of the panellists, Paola Pasquali, PhD candidate at the University of London, focused primarily on Shenzhen, being China's largest migrant labour city and enjoying the status of a Special Economic Zone with considerable economic and legislative autonomy. It was pointed out that Shenzhen does not strictly impose the Hukou regulations which can be seen as a harsh restriction of freedom of movement. Instead, since Shenzhen's immense economic growth has triggered migration, Shenzhen's implementation of the Hukou regulation constitutes a relaxation of the harsh policies towards migrants. This serves as an example of "legal instrumentalism" - a concept denoting that law is a tool to achieve specific purposes and must be modified in such a way that it best suits the fulfilment of ambitious goals such as social welfare or economic development.

## **XI. Legal History**

In the Legal History Panel, PENG Chun (University of Oxford) talked about the taking clause in the Chinese Constitution. In the first part of his presentation, Peng criticized the prevalent approach to compare the Chinese land taking clause with the Fifth Amendment of the US constitution. He points out that, while the three elements public interest, compensation and legal process can be found in both cases, the content of these elements differ in the Chinese and US system. Furthermore, since the US land taking system is neither perfect nor consistent in every case it should not be presumed to use the comparative approach to US law to explain the Chinese taking clause. In his next step, the presenter debunks the myth of the same origin of both clauses by figuring out the actual origins of Art. 13 in the Chinese Constitution of 1954. Most likely this clause was constructed in reference to Art. 23 of the East German constitution, though there are several differences, such as different objects (the East German constitution refers to 'private property', while the Chinese constitution of 1954 talks about 'urban land, rural land and other means of production' as object of the taking) and different kind of taking powers

that can be explained by the past experiences and future visions of the creators of the 1954 Chinese constitution. PENG concluded that a better understanding of the Chinese land taking clause, which can be seen as a microcosm of the constitution as a whole by combining past experiences and future visions as well as domestic and foreign influences, can be gained by not only relying on 'indigenous resources', but also by taking lessons from the US, German and other states' experiences.

Hermann Aubié (University of Turku) then analysed the Crime of Inciting Subversion of the State Power in relation to the right to freedom of expression in the Chinese Constitution and International Human Rights Law. Therefore, he used contextual history of this crime, as now stipulated in Art. 105 para. 2 of the Chinese Criminal Law, as a methodical approach. Underlain by this historical approach and by reference to court decisions and the current definition of what is meant by 'inciting subversion of state power' he contextualised the scope and limits of freedom of expression in China. This then gave substance to further embed the current debates of freedom of expression in the Chinese Internet. Furthermore, Aubié shed light on how the right to freedom of expression as established by the Chinese Constitution and International Human Rights Law is driven into action by citizens and human rights defence lawyers. Finally, he raised further reaching research questions regarding the right to freedom of expression as a nexus between politics and law.

## **XII. Mechanisms of Implementation (2)**

In the first presentation ZHAO Yuhong (Chinese University of Hong Kong) talked about innovative measures to improve environmental law enforcement in China. She focused on the collaborative enforcement measures, such as collaboration between the Environmental Protection Bureau (EPB) and the police, a compulsory case transfer and a multi-party collaboration through environmental courts. As a local response to the weak enforcement powers of the EPB, a jointly enforcement of the EPB and the police emerged, while the compulsory case transfer is trying to solve the problem of substituting administrative penalties for criminal liability. By strictly limiting administrative discretion, the mechanism of compulsory case transfer seeks to ensure that environmental violations are prosecuted and penalized, thus increasing the cost of violations which otherwise may not have been sanctioned due to administrative inactivity. The multi-party collaboration is seen as controversial, but innovative. It is seen as controversial, since the collaboration of the EPB, the police, procurators and courts has blurred the boundaries of administration, investigation,

procuration and adjudication. The formation of specialized courts with civil, criminal and administrative jurisdiction, the participation of NGOs and the alleviation of financial burdens for the plaintiffs to promote more and better use of public interest litigation to protect the environment are innovative. Summing up, the presenter argued that these measures will not solve all problems in the area of environmental protection, but promise improved and strengthened environmental law enforcement in the short to medium term.

Another presentation in this panel discussed special tribunals in China. WEI Shuai (City University of Hong Kong) empirically assessed the winning rates of One-Shooters and Repeat Players in a Civil Trial Court and the Finance Court of a city in China in the years 2008 and 2010-12. The presenter also examined the literature regarding the topic. In contrast to traditional courts, Special Courts concentrate on one kind of lawsuits, e.g. tax cases or Intellectual Property processes, and handle them - in theory - with an increased efficiency and with high expertise. On the other hand, cases in reality often touch a variety of legal fields, demanding a solid understanding of each of the areas. WEI examined more closely the Special Court for finances in an economically highly active district of an east Chinese city. The ill-defined scope of accepted law suits ranges from credit card debts and insurance claims to disputes over automobile loans. Compared to the winning rates at the Civil Trial Court, where the weaker party tends to enjoy better winning rates, the One Shooters lost almost every case in the Finance Court. WEI argued that the judges see themselves as promoters of the economic development of the city, hence often decide in favour of the business entities, the Repeat Players. Additionally, the One-Shooters are not able to choose the court, hence being forced to step in front of the special court. Therefore the weaker party's interest may often be jeopardized by the Special Court.

In the last presentation of this panel, Nicholas Howson (University of Michigan) discussed the ultra-vires enforcement of the insider trading prohibition by the China Securities Regulatory Commission (CSRC). The presenter focused on a 2007 guidance provision that was internally issued at the CSRC and is used to vastly expand the definition insider trading in the PRC Securities Law of 2006. While Art. 74 (vii) PRC Securities Law allows the CSRC to issue regulations regarding further acts of insider trading, the provision is not public in the legal sense and hence should be regarded as illegal and unenforceable. Adding to the problem is that said provision not only fails to fulfill the requirements formulated in the Securities Law, but also vastly increases the scope of insider trading prohibition and even

redefining the term itself, for example by introducing the term 'insider' as a person being liable under the provision. By doing so, the provision creates a liability for persons in the mere possession of insider information in certain price sensitive times, who would not be liable under the formal law. The presenter concludes that the CSRC is acting ultra-vires, and points out several measures that could be taken to challenge the enforcement, but also adds that to his knowledge such measures have not been taken yet. Regarding the tolerance to the ultra - vires - acting of a state organ, the author also sees negative implications for the status of the rule of law in China. Interestingly, after the article the presentation is based on has been published, there have been declarations of the CSRC stressing the importance to administrate according to the law, which can be seen as positive signs to avoid such ultra-vires-acting in the future.

### XIII. Legal Consciousness

WANG Xinhong (University of Turku, winner of this year's student paper) examined open environmental information administrative litigation in China. Since an open government information legislation was enacted in 2008, plaintiffs can file a suit against state agencies claiming for disclosing required information. The possibility to file lawsuits against administrative organs is seen as a possibility to raise public awareness and put pressure on state agencies. Though, in the first place, filing an environmental lawsuit has to pass the hurdle of being accepted by the court. As the local court depends on the local government to a certain extent and local enterprises depend on government and vice versa, the first burden is to overcome this triangle, which will in most cases depend on whether the local government approves the filing. Once the lawsuit is filed, the second step is to pass admissibility. Crucial for environmental litigation is whether a judicially recognized casual relationship exists between the plaintiffs and the required disclosure of information. WANG observed that during the first filed lawsuits casual relationship was only recognized restrictively, even though interests of production, livelihood and scientific research were tackled directly. Nevertheless, at the end of 2011 a filed lawsuit by the All Chinese Environmental Federation passed admissibility and thereby recognized a public interest itself as constituting a casual relationship. Passing the admissibility, interesting questions rise with regards to: (1) whether the information about environmental issues is regarded as an actual right and (2) which the scope of information to be disclosed is. Even though policy of non-open mediation and prior consultation of the local government overlap and overshadow environmental litigation, these liti-

gations embody legal mobilization; the citizen uses law to participate in public processes and active participation by the plaintiffs is required. Furthermore, these litigations have the capability of raising legal consciousness regarding environmental issues.

Simona Novaretti (University of Torino) shared an interesting analysis of haunted house cases in the PRC. As after 1949 the belief in haunted houses and similar phenomena were regarded as feudal superstition, since the early 2000 some cases involving the claim for compensation of moral damage or economic losses because of concluded contracts of haunted houses have been brought before courts. The question is how the courts deal with these cases. Normally, a house is haunted if the plaintiff can burden an objective element (death), which happened in an abnormal way and evokes feelings of dread in the majority. The courts are presented with the challenge to attend with legal reasoning to cases where, for example, the plaintiff argues that the house seller withhold the information of the house being haunted. Starting point in former judgements have been Article 7 of the General Principles of Civil Law and Article 6 of the Contract Law, implying the respect of social ethics, public interest and the principle of good faith. Simona Novaretti pointed out that precisely these cases confront the courts with the relationship of a liberal market economy, traditional values regaining importance after years of negating any sort of 'feudal thinking' and legal reasoning.

FENG Yuqing (City University of Hong Kong, 2nd winner of this year's student paper; the paper was written together with Cao Qing) then explored the facets of legal consciousness among people living in rural areas. The methodology was an empirical study of a Chinese basic court in a rural area of Jiangsu province. Among other aspects, he contrasted the attitudes of people towards courts that already had filed a lawsuit and people that had not. People not having been party to a lawsuit generally revealed a 'fearing' and sceptical attitude towards court work and the 'legal' was construed as 'abstract concepts'. People that had undergone a court filing were more comfortable to get in touch with court work and were mostly satisfied by its outcome. In a further step, FENG analysed the courts attitude towards the people. Noticeable were patterns of the so called 'mother and father tribunals', due to policies that want to achieve that the litigants feel comfortable with their litigation results and to broaden popularity of the courts. While a more positive attitude towards courts can be observed once the litigants go through a trial, a question remains whether simultaneously this embraces to broaden legal consciousness as well. FENG observed that in many cases the court itself took extra-legal mechanisms to satisfy the litigants. As such, e.g. in

divorce cases legal statutes were not fully applied, but instead mechanisms applied that are not to be found in legal statutes in order to salvage broken relationships. Hence, legal consciousness according to a definition approaching legal concepts of the western shaped rule of law could only hardly been observed. Consequently, a concluding question was to further explore whether local court costumes can be combined with western legal professionalism in order to strengthen legal consciousness among the people.

#### XIV. Concluding Remarks

After two days dedicated to focusing on the environment in which Chinese law operates, the different panels discussed a variety of new methodological and metajudicial questions.

(1) The availability of new data to examine the legal system, the use of indeterminate legal terms to analyse the change of law throughout history, and the relation of law and society deserve special mention. Additionally, it was encouraged to intensify the consideration of different legal families and focus on the actual legal practice to gain an improved systematic knowledge of Chinese law.

(2) Furthermore, new theoretical perspectives for the participants were opened: the 'Yichang model' was used as an example of how to put the principle of 'New Constitutionalism' into practice by improving the efficiency of governance, while at the same time, strengthening the participation of citizens. Moreover, using the amendment of the criminal procedure law as an example, the relationship between socialist rule of law and the building of social harmony was analysed: besides the ongoing codification of rule of law mechanisms within criminal procedure, it can be observed that institutions that strengthen social harmony also found their way into the amended law.

(3) Focusing on how law operates within the market system, it was outlined that disclosure obligation enforcement through administrative means presents an alternative to civil litigation in this field. Regarding Chinese competition law, the use of informal agreements in merger control procedure and the use of the AML as a macroeconomic tool were explained to the participants, while the regulation of the highly dynamic IIS market still poses problems, that may be solved by applying the lessons other states already experienced.

(4) In another panel, China's 'juridical' approach to the international community was examined. The Chinese government started to get involved in oversea business-to-business litigation in order to encourage the interests of Chinese business abroad.

In the field of public international disputes China has developed mainly two methods to approach disputes: If the dispute involves territorial or sovereignty questions, China mainly chooses to adopt a 'political' solution, meaning dissolving the dispute through state to state consultation and negotiation. If the dispute involves trade related questions, China is eager to adopt 'judicial' approaches, meaning the acceptance of international arbitration bodies.

(5) Two sessions examined the development of scientific approaches to Chinese law. Analysing China's legal system with tools of the 'liberal model' of international law and national law is especially problematic, as these see China through their 'western lenses', and are not fully able to capture China's actual legal environment. By taking criminal sentencing and China's approach to international public law as examples, new integral and interdisciplinary approaches were presented.

(6) Focus was also put on the transition of the judicial system and legal history. The current prevalent comparison of Chinese land taking clause to its counterpart in US law served as an example of legal history research. As an example for the transition of the judicial system, it could be observed how the 'Xinfang System' may negatively influence the power of the courts by replacing trials and weaken the position of the courts in the Chinese legal system. Moreover, in the area of legal education the Chinese judicial exam was explored. During the last years, it has been observed that the exams were partly used to politicize the judiciary. After analysing its content and structure, it is not (yet) deemed an effective tool for transition of the legal judiciary.

(7) While examining implementation mechanisms, the role of mediation was controversially discussed: on the one hand it might be a tool to stabilize society and it can encourage the consciousness of rights and peaceful dispute settlement. On the other hand, its compatibility with rule of law is arguable, as it might shift the focus away from courts, which have an important role in building rule of law. Innovative and collaborative environmental law enforcement measures, which can improve the implementation of legislation in this field, were presented as well. Besides, the appearance of special courts and their negative influence in the realm of supporting law implementation was critically examined. Lastly, the focus was laid on ultra-vires actions of the CSRC, which pose an obstacle for a fair implementation of the judicial system.

(8) Moreover, the legal consciousness of Chinese citizens was examined: new enactments, like the measures regarding the environmental information administrative litigation, which give citizens the opportunity to file suits against state agencies are able

to raise legal consciousness. Furthermore, it could also be observed that there was a change in the attitude towards the legal system and judiciary among rural people before and after experiences with the court.

After two days of extremely interesting presentations of research papers and intense discussions, the aim of this year's conference to broaden the perspectives on, and approaches to Chinese law, was fully achieved. Particularly enriching was that academics and practitioners from different disciplinary backgrounds came together to share their knowledge of the Chinese legal system and jointly explore developments in the Chinese legal environment. The opportunity to network with scholars and PhD students alike is a valuable experience allowing for further discussion and the interchange of perspectives and viewpoints. Undoubtedly, the ECLS is strengthening its purpose of bringing together the potential for mutual exchange and joint research and for creating a broad network of expertise for Chinese Law Studies. The use of Internet platforms, such as Facebook and LinkedIn improve this communication and present an important step towards the commitment of connecting practitioners and academics.

The forthcoming ECLS conference in 2014 will be held in Hong Kong and should not be missed!