ECLS 2014 Annual Conference

Making, Enforcing and Accessing the Law

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Abstracts

Session 1: Law, Politics and Law Making

Chair: Knut Pissler, Max Planck Institute for Comparative and International Private Law and ECLS

The Role of Campaigns in Law Making
Sarah Biddulph, University of Melbourne

This paper explores the role of enforcement campaigns in drafting legislation and interpretation of law. Enforcement campaigns are employed on a regular basis to deal with problems that regular enforcement strategies have failed to address. They are often a response to perceived crises where regulatory failures have impacted negatively on social order. Whilst campaigns are well known for their impact on enforcement, this paper documents the ways they also impact on the production of law. It uses as an example the campaign waged between 2004 and 2007 to redress chronic failure to pay wages, particularly in the construction sector. This campaign strengthened central leadership over lawmaking and enforcement in the areas of payment of wages and resolving disputes about unpaid wages. In doing so it speeded up the iterative process of lawmaking, interpretation and implementation of law and was instrumental in the drafting and passage of significant reforms to labour legislation in 2007 and 2008. It argues that studies of law making need also to take account of the impact of law interpretation and enforcement strategies on setting the law making agendas and on the ultimate content of legislation.

Law-making in China: Systemic Normative Pluralism, Reactive Legislation
Ignazio Castellucci, University of Trento

The traditional concept of legislation within the State powers, or functions, seen as the source of primary legal norms and accompanied by a number of secondary sources and legal formants seems to be challenged in the Chinese context: legislation here has a doctrinal and declamatory status even higher than in the West legal tradition, due to theoretical lack of any power of courts or other norm-producing entities and mechanisms to produce legal rules.

On the other hand, the fast evolution of the Chinese legal system and legal environment, especially in private and market economy matters, features a very vibrant synergy of many norm-producing or interacting/formant entities and mechanisms, working both on different hierarchical and institutional levels, and in a territorial sense according to the different areas of the country, to participate in a fast process of system-building within a very complex, plural environment.

Beyond is monolith-like theoretical description, the Chinese legislation is just one part, thus, of the normative environment, interacting with other normative forces in the realm of private and market-economy-related interests (I have already discussed in a previous ECLS presentation in Helsinki, 2012, how the Chinese law may be characterized as displaying "variable geometries" according to the different kind of interests regulated, making this discourse only fully applicable to private and market-related-interests – leaving public interest and sensitive issues more consistent with a more conservative mode of functioning of political and legal mechanisms).

In this process, legislation very often plays an instrumental, governance role, attributing spheres of competence, enforcing principles and policy lines, guiding other normative forces, providing sanctions; and a reactive role, that of assessing results achieved through other mechanisms and that of endorsing their results or correcting them – rather than playing the theoretical role of laying the rules first in a more stable fashion and in a long-term-perspective, for other institutions, entities, circles, mechanisms and society at large, to follow suit with implementation/enforcement/interpretation/explanation.

Law Making in China. The Example of Laws affecting Civil Society

Karla W. Simon, New York University

Making laws, or in the case we are speaking about, regulations and laws in China is a complex process, just as it is in other countries. What makes the law-making process with respect to civil society even more complex than most is that the most activity in that regard has been regulatory and thus under the State Council. There has been some actual NPC activity in recent years, including the Public Welfare Law of 1998, the Trust Law of 2001 (which includes charitable trusts), the Corporate Tax Law of 2008 (which deals with both tax exemptions and tax deductions), and the currently pending Charity Law. But the most activity as of now is now being carried out by the State Council, which is due to amend the national regulations, and by the Ministry of Civil Affairs, which is allowing direct registration of CSOs in almost all provinces and self-governing municipalities. This paper explores those issues.

Inter-Ministry Politics on Law-making: Legislating Private Equity in China

Xiao Yu and Zhao Ranran, East China University of Political Science And Law

Based on interviews with officials, professional insiders and secondary materials, this paper documents the conflicts of two ministries and analyzes the underlying reasons in the legislating process of Private Equity Funds （PE）in China. Despite the fact that Private Equity Funds have developed rapidly for the last two decades, the law-making process has been stranded. An important reason for such a delay is that two ministries under the State Council have been fighting for the regulation power, one is the national development and reform commission（NDRC）, the other is China Securities Regulatory Commission（CSRC）. Over the years, the NDRC has launched three departmental rules, and the CSRC has twice tried to push the PE into the jurisdiction of the Securities Investment Fund Law. But all the attempts failed for the strong opposition of each other. The stalemate might be broken until Feb 2014, when the State Council made it clear that CSRC will play a leading role in regulating PE. This long delay in the legislation process has led to many chaotic situations and thus impeded the development of PE. This study provides insights into the legislating process in transitional China, which would help understand its future trajectories and the relationship between politics and legislation more generally.

Session 2: Mediation, Law and Justice

Chair: Michael Palmer, Shantou University and SOAS, University of London

Session 3: Regulating the Business Sector

Chair: Lutz-Christian Wolff, Chinese University of Hong Kong

Enforcement with Chinese Characteristics: Competition Law and Consumer Protection Law in China

Thomas Kristie and Qianlan Wu, University of Nottingham

The establishment of the Chinese legal system with socialist characteristics in 2011 lays one of its foundations on the promulgation of comprehensive sets of laws and regulations, as a result of China's thirty years reform since 1978. However, in spite of its rapid making of laws, China's legal system faces persistent constraints in terms of enforcement. In the sphere of market regulation, the constraint can be observed as the tension between the fragmented administrative enforcement vis-à-vis weak judicial enforcement of the law. The paper focuses on the enforcement of competition law and of consumer protection law, as two key legal instruments for China's construction of a market economy. It aims to examine the public and private enforcement of the two laws, analyse the common challenges faced by the enforcement and to analyse to what extent the enforcement with Chinese characteristics has impacted on the development of the two legal instrument and market regulation in China.

Notices, Enforcement and the Making of the Hong Kong Competition Ordinance

Felix Mezzanotte, Hong Kong Polytechnic University

Created by the Hong Kong Competition Ordinance 2012 (Ordinance), the infringement notice and the warning notice are novel tools of competition law enforcement. Their use, however, involves serious tradeoffs. On the one hand, the notices promote a speedier, more flexible and cheaper enforcement of the Ordinance. On the other hand, they curtail the Ordinance's deterrent effects while injecting greater discretion and uncertainty into the enforcement process. In this article we investigate to what extent these tradeoffs had been identified and weighed by the designers of the notices in the lawmaking process. Written records of the legislative debates on the Ordinance were collected and their content analysed systematically. The findings suggest that although the participating actors largely agreed upon and fluently articulated the benefits of the notices, they either ignored or neglected their potential risks. The development of competitive markets in Hong Kong requires that those risks be well understood and managed.

Competition Law Making Process and Implementation in China

Lea Murphy, China Greatway Advisory

On August 30, 2007, the National People's Congress adopted the People's Republic of China's Anti-Monopoly Law (AML), which came into force on August 1, 2008. This law delineates the objectives of the Chinese competition policy. Indeed, it includes 8 chapters, divided into 57 articles, which set up the institutions and mechanisms to fight against anti-competition practices. From an institutional point of view, the AML has established a merger control and set up a jurisdictional framework to sanction any abuse of dominant position, monopole situations or abuse of administrative powers that restrict competition. After almost six years of existence, how is the AML enforced?

To encourage its widest application, the AML has created an enforcement structure with an Anti-Monopoly Committee and an Anti-Monopoly Enforcement Authority under the State Council. According to the article 9 and 10 of the AML, the Committee is responsible for developing the competition policy and the Anti-Monopoly Enforcement Authority is in charge of enforcing the AML. It appears that the

European Commission of Brussels and the Directorate general for competition inspired those competences.

The Anti-Monopoly Enforcement Authority is composed by three agencies. The first one is the Ministry of Commerce (MOFCOM) and is in charge of enforcing the merger control regime. The second one, the National Development and Reform Commission (NDRC), enforces the AML price regulations. The last one is the State Administration for Industry and Commerce, (SAIC). This latter administration has to enforce the unfair competition related rules of the AML and regulations against the abuse of administrative powers.

If the enforcement powers seem well allocated between the NDRC and SAIC, some problems remain. Indeed, the AML and the secondary rules issued by those institutions do not specify which agency has jurisdiction when a single case involve price and non- price related elements. In addition, there is an important overlap between the rules issued by those two agencies.

In addition to the AML, the enforcement agencies have adopted numerous rules implementing its provisions, to clarify some key issues of the law. For example, China's Ministry of Commerce (MOFCOM) issued the Interim Regulation on the Application of Simple Case Criteria to Concentrations of Undertakings on February 13th,2014, which came into force immediately. Simple mergers are concentrations that are unlikely to raise competitive concerns. The main goal of this new regulation is to accelerate the clearance procedure of simple mergers. The SAIC has also promulgated secondary rules in its field of competence and NDRC issued Anti-price Monopoly regulations and rules to support the AMF enforcement. For instance, the rule on the Administrative Law Enforcement Procedure for Anti-Price Monopoly provides more information on the leniency system, forceseen in the AML.

Moreover, those three agencies conduct investigations to prevent and sanction anti-competitive behaviours. Indeed, the SAIC has been carrying out investigations in about 20 antitrust cases. Most of them involved Industry associations so this might lead to an increase of their awareness regarding the importance and the enforcement of AML. In the last years, MOFCOM has granted unconditional clearances for the vast majority of the cases. But his ministry has also imposed remedies in more than twenty cases and blocked the $2.4 billions Coca-cola's planned acquisition of the Chinese group Huiyuan Juice on March 18, 2009. For its parts, the NDCR adopted decisions with sanctions in many cases including a very important one regarding the two Chinese telecom giants China Mobile and China Unicom for abuse of dominant market, and more specifically for refusal of deal and price discrimination. Accordingly, the two-telecom companies have done some improvements by reducing Internet fees and improving Internet speed. Plus, in 2014, the NDCR has conducted more than 34, 400 investigations that led to the repayment of RMB 632 millions to consumers, confiscation of almost RMB 1 billion in illegal gains and the imposition of RMB 1.58 billion in fines. Those numbers demonstrate certain effectiveness in the AML enforcement.

Furthermore, the AML provides a framework for civil litigation. The article 50 of the AMF is also regarded as an important way to enforce the AML because it gives the basis for private litigations regarding competition cases. This article states that the business operators who engaged in monopolistic conduct and cause damages to others shall bear civil liabilities.

Chinese courts had to deal with several antitrust cases with big impact such as Johnson & Johnson Medical case where Rainbow Medical, it's Chinese distributor brought the action before the court. However, in most of the cases, the plaintiffs lose their private law suits because the burden of the proof that is upon them is too high. This is one of the reasons why, on May 3, 2014, the PRC Supreme People's Court issued a judicial interpretation which aim is to provide a guideline to Chinese courts for those kind of law suits. Indeed, the burden of proof has been re-allocated between the plaintiff and the defendant. The Supreme Court judges regularly enact, without direct reference to any specific proceedings pending in a court, judicial interpretations that have a greater authority than the laws interpreted.

Chinese courts and agencies have proven that they are confident in competition law enforcement with the effect of encouraging international firms doing business in China to comply with the law and to be ready for MOFCOM review process in case of International Merger and Acquisition transaction.

Company Law Implementation in the PRC in the Shadow of Culture and the State

Roman Tomasic, University of South Australia

Company Law reform has been occurring in China for many years, with the first such law being passed as early as 1904. Although there were a number of prior experiments with corporatization, the first modern PRC company law was enacted in 1993, over two decades ago. This Law was amended several times and then replaced by a new Company Law in 2005. Efforts will no doubt continue to be made to modernise China's company laws, as company law reform is an on-going process and as such is commonplace in other parts of the world. Whilst China has become adept at formulating new bodies of commercial or economic law since Deng's opening up of the country to new rule of law influences that were seen as beneficial, it is important to look beyond the formulation of elegant new laws that can easily be compared with comparable western bodies of company law.

The implementation of new corporate law principles and practices in China has been a more difficult project. Implementation of new laws is always problematic and takes time and well trained professional intermediaries; this is especially so in large countries such as China. But China's laws have also faced other problems. Not only have new corporate law ideas had to accommodate well-established Chinese cultural attitudes, company law has also been shaped by political factors that are unique to China. The political determinants of company law reform have influenced the implementation of these laws in China. Whilst company law always operates in the shadow of the state, the powerful state has cast a large shadow in China. Drawing upon available empirical material, this paper reviews Chinese company law reforms since the early 1990s and provides a narrative of how the implementation of these laws has been shaped by cultural and political factors.

Corporate Reorganisation in China: Recent Developments and Challenges

Zhang Zinian, Singapore Management University

This paper investigates the corporate reorganization of the Chinese public companies listed on its Shanghai and Shenzhen Stock Exchanges, which took place between 1 June 2007 and 31 December 2013. These cases arose within the corporate reorganization regime enshrined in China's newly-enacted Enterprise Bankruptcy Law 2006 (The EBL 2006).

By examining forty-three listed company reorganizations, this paper challenges the assertion made in most of these corporate reorganization plans that the major beneficiaries of such reorganizations are the company's creditors, employees and general public shareholders.
Through an analysis of the statistics derived from these company reorganization plans, annual reports, public notices and the media reports, this research found that creditors, employees and general public shareholders do not actually benefit much from such corporate reorganizations on the following grounds.

First, the data suggests that creditors, especially unsecured creditors could have received 62.90% more if the fundamental value distribution principle – the absolute priority norm, which makes creditors be paid before shareholders – was complied with; second, on average 77.29% of employees lost jobs during and before reorganization; and third, substantial losses were incurred by general public shareholders, as they had to give up part of their shares under these reorganization plans, 85.37% of

them could have been avoided if the general-public-shareholder-protection scheme issued by China's Supreme People Court was rigorously applied.

This paper concludes that instead of maximizing the interests of creditors, employees and general public shareholders, most of listed company reorganizations in China seemed to mainly benefit local government, controlling shareholders and strategic investors. This paper suggests that only by stringently applying basic insolvency value distribution norms and by improving transparency will the reorganization procedure involving China's listed companies be strengthened so as to ensure greater legal certainty for their stakeholders.

Session 4: Law and Economic Globalization

Chair: Zhang Xianchu, University of Hong Kong

Law-making, Enforcement and Access to Law: International Sales of Goods and Chinese Corporations

Vivienne Bath, University of Sydney

China acceded to the Vienna Convention on Contracts for the International Sale of Goods (CISG) effective 1 January 1988. At that time, it entered reservations relating to the application of the Convention where only one party was a contracting state, and requiring that contracts for the sale of goods be in writing in order to be recognized as valid (a reservation which was withdrawn in 2013). Since the CISG came into force, there have been numerous international arbitrations and cases, primarily in China but increasingly outside China, relating to sales contracts involving China and Chinese companies. Since 2000, the Supreme People's Court has also issued a number of interpretations, and recently approved several guiding cases, explaining and developing the application of the Chinese Contract Law to contracts for the sale of goods. The close relationship between the provisions of the Chinese Contract Law on the sale of goods and the provisions of the CISG has been the subject of commentary since 1999, when the Contract Law came into effect. The aim of this paper is to consider the way in which Chinese law related to contracts for the sale of goods is made and modified through judicial interpretations and cases and to examine these developments in the light of Chinese and international practice related to the CISG.

'Ship' under the Chinese Maritime Code: I Know It When I See It?

Liu Shuo, Erasmus University

For centuries, the shipping industry has been working under its own set of rules. And all maritime legal relations take place on board of, or in connection with, the ships. The Chinese Maritime Code, although tackles various legal aspects around ships like the case of many other countries, leaves the very concept of 'ship' undefined, which leads the legal status of many artificial structures to uncharted water. This paper aims to conceptualize the notion of ship through comparative and dynamic analysis. First, various approaches of different jurisdictions will be reviewed. To be specific, the merits and demerits of identifying a ship based on (a) its buoyancy property (Dutch approach), (b) its pattern of movement (UK approach), (c) its capability to serve its function (US approach) or a hybrid of the above (Belgian approach) will be elaborated. Secondly, considering the internationality nature and uniformity trend of maritime law, a study of the definition of ship under different maritime conventions, either included by compromise or omitted deliberately, will shed a light on the evolution of the concept under domestic law. Thirdly, the author will proceed to address the role of the Chinese court in enriching the concept of ship, through judicial interpretation, guiding cases as well as the adjudication process. Especially, the relation between the piecemeal solutions in judicial practice and the overarching definition in theory

will be further discussed. Finally, it leads to a multifaceted definition of ship, which is proposed to fulfill the diversified purposes in maritime context.

Problematic Domicile Principle in Proscribing "Foreign Investor" in M&A National Security Review of Mainland China

Yue Ying, Peking University

National Security Review in investment activities is a crucial system in regulating foreign investment in hundreds of countries. Though it varies in each country, it plays a role as a buffer between foreign investor's interest and domestic interests. Mainland China has opened the pre-establishment national treatment with negative list investment model to foreign investor first in Shanghai FTZ. However, in M&A area, the country still applies 2011 National Security Review regulation which is obsolete and obscure both in legal sources and scope.

In this article, I will use comparative method based on more than 20 counties National Security Review System in Investment Law. I mainly discuss the definition of "foreign investor", which is one of the important parts of its legal scope. The Review System fails to define "foreign investor". Neither does other relating law. Moreover, law conflict with each other which will make investor confused. Domicile Principle cannot meet the requirement of this special law. However, almost every country has delicate design for non-nationals or similar scope defines. One episode is the constantly transfers of power in regulating the system between two departments of Mainland China. Lacking of conformity in law also is caused by undefined department responsibility. In the end, I will give my advice on designing the new "foreign investor" criterion and provide suggestions on perfecting Mainland China's National Security Review System in Investment Law as well as its law making regime.

Session 5: Law, Energy and Environment

Chair: Bryan Mercurio, Chinese University of Hong Kong

A Comparison between Shale Gas in China and Unconventional Fuel Development in the United States: Health, Water and Environmental Risks

Paolo Farah, West Virginia University

China is appraised to have the world's largest exploitable reserves of shale gas, although several legal, regulatory, environmental and investment-related issues will likely restrain its scope. China's capacity to successfully face these hurdles and produce commercial shale gas will have a crucial impact on the regional gas market and on China's energy mix, as Beijing strives to decrease reliance on imported oil and coal, while attempting to meet growing energy demand and maintain a certain level of resource autonomy. The development of the unconventional natural gas extractive industry will also endow China with further negotiating power to obtain more advantageous prices for gas. This paper, adopting a comparative perspective, underlines the trends learned from unconventional fuel development in the United States, emphasizing their potential application to the Chinese context in light of recently signed production-sharing agreements between qualified foreign investors and China. The wide range of regulatory and enforcement problems in this matter are accrued by an extremely limited liberalization of gas prices, lack of technological development, and barriers to market access curbing the opening of resource extraction to private investors. . This study analyzes the legal tools that can play a role in shale gas development while assessing the new legal and fiscal policies that should be created or reinforced. The paper also examines the institutional settings' fragmentation and conflicts, highlighting how processes and outcomes are indeed path dependent. Moreover, the possibilities of cooperation and coordination (also through US-China common initiatives), and the role of transparency and disclosure

of environmental data are assessed. These issues are exacerbated by concerns related to the risk of water pollution deriving from mismanaged drilling and fracturing, absence of adequate predictive evaluation regulatory instruments and industry standards, entailing consequences on social stability and environmental degradation which are inconsistent with the purposes of sustainable development.

Towards an Ecological Civilization: Environmental Policymaking in China

Fernando Dias Simões, University of Macau

The unparalleled economic ascendance of China brought along equally impressive environmental problems. The Chinese government is now faced with the delicate question of how to deal with environmental issues without disturbing the country's economic growth. Public policy approaches to environmental issues have traditionally relied on different tools – namely regulation, economic incentives, and technological solutions. Taking into account the magnitude of the environmental problems faced by China, these traditional tools are clearly insufficient. A growing body of legal scholarship criticizes the failure of traditional environmental policies to speak directly to individuals as sources of environmental harm. Using law to change how individuals impact the environment through their behaviours requires a reorientation of environmental law and policy.

A new policy approach argues that policymakers should design policies that reflect on how people really behave instead of just seeking to change people's behaviour through rules and regulations. Richard Thaler and Cass Sunstein's influential book Nudge: Improving decisions about health, wealth, and happiness draws on behavioural economics and social psychology to explain why people often act in ways that are not completely rational. This new paradigm argues that policymakers should act as 'choice architects', organizing the context, process and environment in which individuals make decisions. Thaler and Sunstein advocate the use of 'nudges', small features designed in the environment of choice making. Nudge offers a valuable framework for changing the choice architecture of Chinese citizens in order to achieve modifications in their behaviours. However, such tools should be designed taking due account of the specificities of the Chinese society and culture, creating 'green' but also 'Chinese' nudges which are suitable to achieve effective behaviour change.

Prevention of Agricultural Land Pollution: An Empirical Study on Legal Measures in Hunan Province

Wu Xianshu, China University of Political Science and Law

The "Soil Pollution Survey Communique 2014" shows that in agricultural land, the soil pollution is exceeding by 19.4% and the slight, mild, moderate and severe levels were 13.7%, 13.7%, 1.8% and 1.1% respectively, including cadmium, nickel, copper, arsenic, mercury, lead, DDT and PAH.

This research used large-scale investigation, sampling investigation, case survey and tracking investigation, conducted among farmers, administrative departments and enterprises. HUNAN province, as "a Land of Nonferrous Metals" and the "Hometown of Rice" faced pollution both industrial and agricultural, is blamed for its cadmium rice in 2013.

Initially, the author will analyze the distribution and the cause of pollution in agricultural land based on this empirical study.

Secondly, the author will analyze the current legal system. After examining the Land Administration Law of the People's Republic of China, agricultural law, Environmental Protection Law, regulations on the management of farmland, it points out that the defect is lack of special legislation and lack of specific legal measures.

Finally, the author will put forward the following measures which should be divided into prevention and governance. The preventive measures includes: a. improving the administrative management system of the agricultural land pollution; b. improving the dynamic monitoring and evaluation system of soil pollution; c. improving the environmental quality standard system, take cadmium for example; d. improving cleaner production system, especially in pesticides and fertilizers; c, improving the protection consciousness and public participation by making the information open. The governance includes: a. improving the system of legal responsibility including subject, object, and scope; b. promoting experimental area to remedy, such as ZHUZHOU test plots in HUNAN province.

The author contends that, the urgent task is to improve the prevention and governance measures of agricultural land pollution in legislation.

Regulating Carbon Emissions Trading in China – From Local Pilot Schemes to National Market

Zhao Yuhong, Chinese University of Hong Kong

The pressure on China to take action to mitigate climate change is intensifying as we approach 2020. The domestically binding target of 40-45 percent cut in carbon intensity by 2020 as compared to the 2005 level has to be achieved and the potential international legal obligation to control total greenhouse gas (GHG) emissions beyond 2020 seems inevitable and will have to be honoured by the world's largest emitter of carbon dioxide. Apart from the administrative command-and-control measures, subsidies and technology innovation to promote clean energy and clean production, China is keen to try and test market mechanisms including carbon emissions trading and carbon tax.

This paper studies how an emerging carbon market in China should be designed and regulated so as to abate carbon emissions effectively and efficiently. Seven pilot schemes in two provinces (Guangdong and Hubei) and five cities (Beijing, Shanghai, Shenzhen, Tianjin and Chongqing) have been up and running one after another since mid 2013 under slightly different regulatory frameworks designed by the local governments. Despite the short period of operation, they have already provided valuable experience and lessons from different aspects for the regulation of a national carbon market anticipated to be established as early as 2016. On the basis of case study of local pilot schemes, the paper will examine key issues including (1) setting and adjusting the carbon cap, (2) allocation of emissions quota, (3) monitoring, reporting and verification, (4) information disclosure, and (5) sanctions for non-compliance.

Session 6: Socialist Democracy: Theory, Practice and Innovations

Chair: Zhao Yun, University of Hong Kong

Crafting a Theory of Socialist Democracy for China in the 21st Century: Considering Hu Angang's Theory of Collective Presidency in the Context of the Emerging Chinese Constitutional State

Larry Catá Backer, Pennsylvania State University

This paper considers the emergence of a theory for a new type of law maker in China with deep implications for Chinese constitutionalism and democracy theory. In the West democratic constitutionalism is grounded on the premise that democracy occurs outside of the organs of state, through elections and discourse. Chinese constitutional theorists have begun to elaborate a distinct view—that democratic constitutionalism may also be grounded on the premise that democracy occurs within the organs of state and the political apparatus of the nation, through collective and

representational decision making. Hu Angang has most recently expressed a theory of socialist democracy around the notion of a collective presidency. This paper considers Hu Angang's theory and defense of the role of the CCP in China's constitutional system, with particular focus on the evolution of the premises of collective action merged with democratic theory and applied to the operations of a party-state system. Its object is to theorize internal democratic structures of the CCP, and through them, of the government as a whole. Its focus is on the development of collective leadership. Part I first considers the theoretical underpinning of the theory of collective presidency—grounded in China's history, context and its political ideology. The object is to better situate the history and utility of a collective presidency within the political structures and ideological premises of Chinese constitutionalism, and then to consider the connection between that construction and global principles of constitutional democracy. Part II then considers the arguments advanced for the efficiency and representation-reinforcing elements of the collective presidency—collective succession, collective labor division and cooperation, collective learning, collective research, and collective decision-making. Part III briefly considers the work that remains to be done as the CCP continues to "scientifically develop" the theory of democratic socialism and attends to the harder task, not of drawing theory form facts, but of living theory through practice.

Journalistic Exercise of Freedom of Information: A Socio-legal Review of China's Access to Information Regime

Chen Yongxi, University of Hong Kong

This article examines and explains the impacts of access to government information (ATI) regime in China, a party-state that introduced transparency reform in the absence of press freedom. The Regulations on Open Government Information became effective in 2008, implicitly conferring an ATI right on every citizens. Despite the surprising increase in the volume of information requests, the public at large and journalists in particular have had great difficulty in accessing information whose disclosure is likely to enable the citizenry to monitor and check the government. From a legal perspective, the insufficient protection of journalists' ATI right owes to the ambiguity in and conflicts of the laws, but also to the unreasonable judicial law-makings that impose a need to know and bind the right to the immediate interests of information requesters, as shown by an empirical survey of over 300 representative lawsuits. In addition, the legal regime of state secrets, the quasi-legal institution of press censorship, and the political control of journalists, have severely undermined the utility of information access and the incentives of journalists to file requests. To a great extent, the "old" defects in China's existing accountability system has deprived the ATI regime of its potential function of accountability-enhancing.

On the Perfection of Judicial Protection System of Human Rights in Contemporary China

Wang Xigen, Wuhan University

Judicature is the most important way to transfer human rights from ideal to reality. The 3rd Plenary Session of the 18th Central Committee of the CPC is a symbol that the protection of human rights in China has been transforming rapidly from legislation to judicature, which aims to realize the unity of substantive, procedural and comprehensive rights. The so-called substantive human rights consist of three types of basic rights, including the right to life, to liberty and to property. What mainly indicates the protection of the right to life is the measure of decreasing gradually the number of crimes which the death penalty applied to. It is not only good for maintaining social order and protecting rights in China, but also satisfies the international standard. The right to liberty is mainly about personal freedom. To protect this right, the reform of abolishing the regime of reeducation through labor has been carried out. As for the protection of the right to property, we should pay special attention to "further standardizing the judicial procedure of sealing up, distraining, freezing and dealing with the property involved in the case", and restrict power by procedure while safeguard human rights by restriction of power.

The right to fair trial, to humanistic treatment, and to return to life compose the namely procedural rights. Everybody has the qualification to be justly and openly judged by a lawfully established, self-governed and impartial court. The principles of exclusion of illegal evidence and presumption of innocence ought to be legislated into regulation and standard of law as well as normalized via specialized judicial interpretation. Meanwhile, the right to humanistic treatment is by no means to tolerate and connive with the suspect; on the contrary, it plays a key role in opposing extorting confessions by torture, corporal punishment and maltreatment, which in turn can prevent the occurrence of cases that people are unjustly charged. In addition, the right to return to society is related to the problem about how to maintain the harmonious relationships among the subjects of community correction, right, obligation, procedure and subjects of correction in legal theories and norms.

Regarding to comprehensive rights, the accessibility, availability and convenience of judicature are commonly acknowledged as the criterion of rule of law In order that everyone is capable of engaging in a lawsuit and equally enjoying the achievements of legal reform, we should endow particular subjects with the right to obtain material and mental assistance from the nation or society, principally including three aspects: right to judicial assistance, to legal aid and access to help by lawyers.

To solve the actual problems about judicial protection of human rights, we must establish the systems of complaint reporting ended by judicature, disputes resolved in judicial mechanism concerning people's livelihood together with public interest, and uniform standards of access to judicial career. We should also promote justices' consciousness and organization system of protecting human rights.

Session 7: China's Court Reform

Chair: Rogier Creemers, University of Oxford and ECLS

Session 8: Labour and Immigration

Chair: Juha Karhu, University of Lapland and ECLS

Collective Bargaining in China: Guangdong Regulation a Harbinger of National Model?

Ronald C Brown, University of Hawaii at Manoa

Negotiating collective contracts in China can be viewed as a source of *"law-making,"* regulating the employment relationship; and, issues are raised regarding *enforcement* of the *process* and the *resultant contract*, thus embracing two of the three Conference themes.

China's collective negotiations have evolved from the iron rice bowl to collective contracts negotiated by processes recently resembling "collective bargaining." Labor disputes frequently occur during the negotiation process and over collective contracts. The ACFTU increasingly embraces collective negotiations as it strives to stay relevant. While *labor rights* are dealt with by legal measures providing mediation and arbitration; processes for resolving disputes involving *labor interests* are still evolving. While use of the Labor Arbitration Committees is widespread for disputes of labor rights, there is a very underdeveloped regulation for resolving labor interest disputes, notwithstanding since 2004 there are national legal provisions in place that could deal with the negotiation process, impasses, or labor interest disputes. Discussed in this paper are the legal developments of collective bargaining and a summary and critique of the September 25, 2014 Guangdong Province Regulation on Collective Contracts for Enterprises. Observations are made whether it can serve as a model for national legislation.

Implementation of Justice in Employment and Service Relations in China: Exploring Legal Responsibilities within Contract Chains in the Building Industry

Pilar-Paz Czoske, University of Cologne

Division of labour and labour outsourcing are a means of increasing efficiency and profit. Coupled with these advantages from an economic approach, questions of justice arise on the employees' side. It is the division of labour and outsourcing of labour force that easily create a lack of rights implementation for employees. Within a production chain it is easier to shift legal responsibilities. It is a significant challenge for a legal system and it is driving formal and informal norm setters to 're-allocate' shifted legal responsibilities within chains of labour.

This paper aims to examine and to determine legal responsibilities and legal liabilities in Chinese labour relations by focusing on formal and informal two-party labour relations, labour dispatch and the 'bao gong tou'-phenomena, which is a common form to realise projects within the building industry and reflects the handling of divided and outsourced labour force in practice.

The paper starts by classifying the different forms of employment within the Chinese legal system and then searches for dogmatic approaches and approaches in practice of legal responsibility and liability principles. In so doing, questions of law making and law implementation arise: As the different types of employment relations and the legal responsibility and liability of the employers and their employees are not conclusively and clearly defined in legal norms set by the legislative bodies, court decisions, executive norms as well as standardized collective and individual labour agreements and subcontracts play an important role for detecting how labour relations are classified within the legal system, who is setting responsibility principles and liability norms and how these can or why these can't be easily implemented in practice within the different types of labour relations. By exploring the latter, this paper also draws attention to approaches that have been developed in order to ensure access to law making and law enforcement on the employee's side.

Law Enforcement through Political Campaigns: Taking the Sanfei Campaigns as an Example in the Area of Immigration Law

Jasper Habicht, University of Cologne

Due to China's rapid economic development, the country turned out to be a preferred destination for people from countries of the so-called 'Global South'. This inflow of surplus low-skilled workers surging into the bigger cities is seen with big concern, especially since many of these migrants do not possess proper documents.

In mid 2012, the Standing Committee of the National People's Congress promulgated a new Exit–Entry law that established a rigorous immigration examination and administration system and entered into force in July 2013. In Mai 2012, the police began to execute several actions against foreigners residing and working illegally in China. This crack-down was the first in a row of so-called sanfei campaigns in different major cities across the country.

Campaigns are often considered critical because of their political nature that is likely to circumvent any legal basis. On the contrary, recent research has shown that in the last decades campaigns increasingly adhere to legal proceedings and more and more often are used as a means of enforcement of legal norms.

This paper aims to shed light on the main goals of the sanfei campaigns and their role in law enforcement. In the field of immigration law, different interests clash: On the one hand, illegal activities pose a threat to public security and thus have to be curtailed by appropriate legal rules. Also, campaigns

against foreigners are capable to satisfy public xenophobic resentments and thus may serve as a means to safeguard party legitimacy. On the other hand, foreign workers help to build up trade connections while stricter immigration rules have a chilling effect on foreign investment.

In this paper, on the basis of a thorough discourse analysis the author tries to identify the intended focus of the sanfei campaigns against the background of apparently conflicting interests.

The Bonfire of the 'Illegalities': Will China's New Immigration Law Combat the 'San Fei' (Illegal Entry, Illegal Residence, Illegal Work)?

Mimi Zou, Chinese University of Hong Kong

This paper is perhaps the first scholarly analysis of the new regulatory regime to combat 'illegal' immigration under China's Entry and Exit Administration Law 2013 ('CEEAL'). Until recent times, China had no special law for regulating the legal statuses accorded to migrants, with only a handful of disjointed national and local regulations and rules that dealt with the entry and exit procedures. As China is rapidly becoming a destination country of international immigration, the CEEAL represents an important step in building a much-needed comprehensive immigration law framework and administrative apparatus. This paper seeks to situate the complexities of this new legislation in the context of an increasingly hostile political and public discourse concerning the 'three illegalities' (san fei) of illegal entry, residence and work in China. I critically analyse the specific provisions in CEEAL that are aimed at combating the 'illegalities', including employer sanctions, fines, detention and deportation. For a state seeking to develop a more 'ordered' system of immigration control, legal interventions for the prevention and punishment of san fei may fail to address the many ways that irregular situations can arise. At the same time, as the experience of many other destination countries has shown, governments often pursue politically-motivated policies that disregard the basic needs and rights of irregular migrants as well as the effects of irregular migration on a range of actors in and beyond the receiving state.

Session 9: Criminal Law and Justice

Chair: Gregory Gordon, Chinese University of Hong Kong

The Political Battlefield Surrounding the Cases of Liu Xiaobo and Xu Zhiyong

Hermann Aubié, University of Turku

On 25 December 2009, Liu Xiaobo, the 2010 Nobel Peace Laureate, was sentenced to eleven years' imprisonment and two years' deprivation of political rights by the Beijing No. 1 Intermediate People's Court. He was charged of "inciting subversion of state power."

Five years later, on 26 January 2014, Xu Zhiyong, a human rights activist and university law professor, was sentenced to four years in prison for "gathering crowds to disrupt public order" by the same court in China. Both inciting subversion of state power and gathering crowds to disrupt public order are crimes stipulated by the Criminal Law of the People's Republic of China. Both cases relate to freedom of expression and freedom of speech.

This article examines different arguments and interpretations of laws in China with regard to these two cases. It summarizes and analyzes the different arguments from the court judgments, lawyers defense statements, the defendants' self-statement, and analysis from the Chinese academic world. It concludes that although ~~that~~ both Liu Xiaobo and Xu Zhiyong were officially criminalized, different arguments surrounding the two cases have shown how controversial the judgments are. Moreover, they have reflected that the interpretations and the implementation of laws in China has become a battlefield for

political aims. On the one hand, the use of legal rhetoric to silence different voices has shown that in China politics can still often prevail over law; on the other hand, Chinese intellectuals and lawyers have also endeavored to use the legal language to express their opinions and thoughts.

Mental Disability in an Age of Social Harmony: China's Mental Health Law in Practice

Joy Chia, Chinese University of Hong Kong

China's first National Mental Health Law came into effect on May 1, 2013, after more than 25 years of drafting. While lauded by official media for standardizing treatment and limiting "unnecessary" commitments, China's Mental Health Law has in practice granted discretion to public security organs, hospitals and guardians to involuntarily commit those deemed "dangerous" to society, leaving the system open to abuse. Understanding this apparent conflict requires contextualizing the law within its political and social context, where the twin government goals of economic growth and social harmony are paramount. The mental health and disability rights arena therefore is a rich site for inquiry into law-making and enforcement in China as legal actors (i.e. judicial actors, legal and medical experts, plaintiffs, guardians and practitioners) are all grappling with understanding and enforcing the new Mental Health Law, often with very different results.

The Article will first locate the Mental Health Law within China's domestic legal regime and compare the law to international standards on disability rights (including reference to European legal standards). It will then demonstrate how conflicting frameworks for addressing mental disability have created legal confusion on critical issues, including: (1) the laws governing legal capacity and guardianship; (2) the apportioning of civil and criminal liability in matters involving people with mental disabilities; and (3) access to justice for individuals within the mental health system. The Article will also analyse two legal cases brought after the promulgation of the Mental Health Law, and consider how legal ambiguities and confusion have stymied judicial action and hindered individuals' access to courts. Finally, this Article concludes that a focus on psychosis and social stability has undermined the core tenets of the Mental Health Law and offers policy recommendations to ensure that legal actors are able to interpret and comply with the law.

Enforcement of Amended Criminal Procedure Law in China: Trends and Patterns

Li Li, Sun Yat-sen University

The enforcement of the Criminal Procedure Law (CPL) in China is politically embedded in the power relations between various procedural participants. The structural configurations of these powers are shaped by formal laws as well as dynamic negotiations conducted in daily practice. The newly revised CPL has amended the criminal proceedings in many areas but not addressed the fundamental power relations in the "iron triangle", i.e., the police, prosecutors and courts. The "iron triangle" is supposed to operate in the old fashioned way of functional division, mutual checks, and cooperation, thus resulting in a strong procedural authority and comparatively weak social engagement. In this paper, it is argued that a strong authority together with weak social involvement lead to the appearance of several trends in the enforcement of the CPL. First, although the current CPL intends to reduce the use of arrests, arrest rates have been slightly reduced. One reason for the small change in the arrest rates is the poor application of the surveillance of residence, a socially enforced compulsory measure and an alternative for arrests. Another trend is the occasional exclusion of illegal evidence, which is partly because defense lawyers have difficulties in adducing relevant clues that show the illegality of the evidence to initiate the exclusion process. The third pattern is the rare prosecutorial decisions of conditional non-prosecutions, which are largely due to the lack of social facilities to keep suspects under surveillance. Furthermore, although the CPL encourages witnesses to testify in open courts, it is still rare for witnesses to do so. Finally, this article discusses the pros and cons of the power relations in criminal proceedings, and some legislative recommendations are offered.

Session 10: Judges as Legislators?

Chair: Samuli Seppänen, Chinese University of Hong Kong

Responsive Justice in China during Transitional Times: Revisiting the Juggling Path between Adjudicatory and Mediatory Justice

Gu Weixia , University of Hong Kong

China has been discussed in international literatures as a transitional state in social and economic sense. Literatures are however scant in analyzing how China's justice system responds to the country's social and economic transitions. This Article studies the international "transitional justice" framework, which examines justice system in economic, societal, and political transitions in post-Communism Central and East European (CEE) jurisdictions. Although China is not a transition state in political sense, the transitional justice studies, particularly the analyses on how successor regimes in CEE countries deal with the aftermath of economic restructuring and societal reparations through justice system, is of relevance to Chinese ongoing judicial reform and its future development. By comparing judicial situations in China to the CEE countries during transitional times, this Article attempts to analyze China's distinctive justice response to her massive economic and societal transformation, so as to conceptualize "responsive justice" in China during transitional times.

Judge-made Law in Chinese Civil Law: From an Empirical Perspective

Min Lee, Central South University of Forestry and Technology

In most studies of judge-made law, the definition of judge-made law is seldom discussed, which is not because of the definiteness of this concept, but due to diversity of understanding. In Chinese judicial practice, judge-made laws are frequently applied but never affirmed. The primary goal of this research is to differentiate proper judge-made law and alienated judge-made law and to clarify judge-made laws in judicial practice according to different lawmakers and different modes of law-making. The research suggests the danger of judge-made law is not from proper judge-made law, but from alienated judge-made law. Alienated judge-made law is made by the Supreme Court by way of Judicial Interpretation other than proper judge-made law made by the judges by way of law-making case by case. Similar to the statute, the alienated judge-made law is of general binding effect in judicial practice. In conclusion, the results show that it is necessary to specify judge-made law. Only on two occasions can the judge make laws. One is that it is necessary for filling the gaps of statute. The other is to avoid the extreme injustice of applying the unreasonable stipulations of statue law. In addition to these results, in making laws, the judges shall be subject to the basic principles of civil law and the systematic consistency and shall refer to doctrine and guiding cases. Besides, the judge shall be in duty bound to illustration and argumentation of the law made by him/her.

Judicial Lawmaking in China

Vai Io Lo, Bond University

According to the Chinese Constitution, the National People's Congress (and its Standing Committee) and the State Council are to enact basic laws and administrative regulations, respectively. The Legislation Law also delineates the legislative powers of various state organizations and explains the hierarchy of legal norms. Although the Constitution and the Legislation Law vest the interpretive power in the NPC Standing Committee, the National People's Congress has authorized the Supreme People Court to interpret laws and decrees relating to their specific application at trial. Occasionally, the Supreme People's Court issues judicial interpretations to provide lower courts with guidance in their application of statutory norms. In issuing judicial interpretations, the Supreme People's Court may create new legal

norms beyond the mere application of law in adjudicating disputes. To facilitate the uniform application of law, the Supreme People's Court has recently adopted the system of "guiding cases," to which lower courts should "refer" in adjudging similar cases, even though the guiding cases may fall short of being judicial precedents. This paper examines judicial interpretations and the "guiding cases" system in selected areas of law and assesses the role of judicial lawmaking in China's efforts to reform its legal system.

The Chinese Guiding Case System – Solution to Legal Problems or Reaction to Non-Legal Demands?

Marco Otten, University of Cologne

Since the promulgation of the provisions of the Supreme People's Court concerning work on guiding cases in 2010, the new mechanism has attracted considerable attention from scholars both within and outside of China. Being designated to give guidance to lower courts and covering a variety of law fields, guiding cases seem to have far reaching implications for a considerable amount of civil, public and criminal law constellations. But is the guidance of lower courts the only intention of guiding cases? This study aims to assess whether or not an impact on the application of law to specific cases is the only effect of the Guiding Cases or if the mechanism has to be seen from a different angle as well.
The paper examines the 26 guiding cases that the Supreme People's Court has issued by now, focusing on the question whether the guiding cases primarily address doctrinal questions of law or whether they rather address political demands of the party state or general popular expectations towards the judiciary, more specifically: Do guiding cases address real legal problems, i.e. cases where legal provisions are unclear or where contradicting scholarly views or contradicting court practice exist? If cases address such problems, is the solving of the doctrinal issue satisfactory? Is the intention of the mechanism to respond to popular demand or political requirements defined by the party state? Are there even cases addressing constellations, that are not problematic at all in terms of the involved legal problems?
After giving an overview on the guiding case mechanism, the paper aims to answer the above mentioned question by examining the current Chinese literature: Do legal experts regard the guiding cases as a contribution to solving legal problems? The next step is to put the cases into context with political requirements and popular demands. Lastly, it shall be decided, where the emphasis of the mechanism can be found: Solving legal problems or reacting to non-legal demands?

Session 11: Law in Social Transformation of Chinese Society

Chair: Billy K. L. So, Hong Kong University of Science and Technology

Law in the *Chunqiu Zuozhuan*

Ulrich Manthe, University of Passau

Mr Zuo's Commentary of the Spring and Autumn Annals is the richest and most important historical document of the Zhou dynasty. Zuo Qiuming seems to have written the Zuozhuan about 400 BCE. Within the Chunqiu and the Zuozhuan, there are some, but not many traces of legal matters.

The feudal system established by King Wu of Zhou still existed, but declined until the end of the Spring and Autumn period; the feudal lords ceased to observe the ceremonial rules of behaviour against the king. The unwritten "constitution" of King Wu's state was no more effective. The enforcement of *Li* by Confucius may be seen as his reaction to his disappointment at this development.

During the Chunqiu period, the concept of *Fa* as a code of conduct for the subordinate class was developed. The first written code was enacted during the 6th century BCE; this enactment was heavily criticized by contemporaries.

In family law, we can observe that the system of (originally matrilineal) *clan* names was restricted to members of the ruling houses whereas the civil servants gradually got *family* names.
Marriages were only recorded when they took place between members of the ruling clans. There was no fixed system of exchange of princesses between the states.

In the Zuozhuan, there are traces of a developing contract law and of criminal procedure.

The author will speak on some legal phenomena and try to explain them in their historical context.

Dirt of Whitewashing: Re-conceptualizing Debtors' Obligations in Chinese Business by Transplanting Bankruptcy Law to Early British Hong Kong (1860s-1880s)

Michael Ng, University of Hong Kong

This paper, drawing on a wide range of archived materials, and using one of the earliest sets of English business law imported to Hong Kong—the Bankruptcy Ordinance of 1864—as a case study, argues that the transplantation of the English bankruptcy regime into early colonial Hong Kong was contrary to the business interests of both the European and Chinese communities and wrongfully displaced the traditional Chinese business norms and practices that had contributed to the health of the colonial economy prior to the regime's introduction. This paper constitutes one of the first empirical studies to place English business law and its widely acknowledged contribution to the economy of early colonial Hong Kong under scrutiny. From the perspective of the relationship between English law and former British colonies' quest for business modernity, the findings presented herein contradict the readily accepted notion that English business law provided a solid legal infrastructure upon which colonial Hong Kong's prosperity and economic growth were built and call for more nuanced studies of the positive role of Chinese legal traditions in Hong Kong's quest for business modernity in its early colonial period.

Session 12: China and the International Legal Order

Chair: Björn Ahl, University of Cologne

Unravelling the 'Right of Asylum': A Case Study of China

Shuo Liu, University College Dublin

Although "asylum" was conceptualised as an individual human right in Article 14 of the Universal Declaration of Human Rights, modern states have always imposed strict border controls, rendering the realisation of this right difficult for asylum seekers to assert in practice. By unravelling the drafting processes of key international instruments pertaining to asylum, it becomes clear that contrary to the rhetoric infusing the "right of asylum", States were consumed during the drafting processes with domestic and ideological political preoccupations resulting, untypically, in unanimous agreement on the formulation of the so-called right. Against this backdrop, the paper analyses China's participation in drafting processes concerning asylum. Although China is routinely viewed as a refugee-producing state, this historical analysis demonstrates that China has also played a significant role as a receiving State for refugees and was an active player in the debates that led to the erection of the modern system of international refugee law based on individualized refugee status determinations. Despite that active role, China has resisted commitments to establish a clear legal framework or refugee determination system to ensure the proper processing of refugee claims. The paper concludes with some insights into the gaps

that currently exist in refugee protection regime in China and the reasons why a more structured system, typical in most developed countries, has failed to emerge.

Effective Use of International Law in the Chinese Domestic Order: Formal Implementation or Informal Inspiration?

Wim Muller, University of Manchester and Chatham House

For a long time, the question of the domestic status of treaties and customary international law in China remained a doctrinal, theoretical matter. With the constitution silent, the initial theory of 'adoption', which maintained that treaties were incorporated into domestic law without a legislative act and all provisions directly applicable, was never applied in practice and abandoned in the 1990s. Driven by the debate on domestic applicability of the WTO Agreement and its annexes, two new theories were developed: 'transformation', which assumes that treatiy provisions need an act of transformation to apply in the domestic order, and a 'hybrid form', which synthesises both approaches and distinguishes between directly applicable or self-executing treaty provisions which become binding immediately, and other provisions which do not. The continuing debate led to seemingly paradoxical statements by Chinese representatives before UN human rights treaty bodies, refecting the different approaches.

While this doctrinary debate was taking place among international and constitutional lawyers, others did not wait until treaties were ratifed or cases reached the courts. Criminal procedure lawyers have long been referring to international human rights law to support their proposals for legal reform. Proponents of the rule of law used the process of WTO accession to promote better safeguards. All of this leaves the question: how do norms of a foreign provenance enter into a society and become internalised in its practice? The present paper explores this question with regard to China in a way which takes into account both developments in doctrine as well as the more empirical dimension about the way in which international norms are actually used by domestic actors. In particular, it attempts to answer the question whether international norms have been more relevant by their actual use rather than their application through any formal channel.

Should the CESL Influence the Chinese Consumer Protection Law Reform?

Kate Surala, Maastricht University

China is not only Europe's second largest trading partner but also a dominant player in the global economy and engaged in transactions with many countries that in turn have strong connections with European nations. Most civil codes in Europe have been enacted by national legislatures, however, the continuing efforts of the European Union to reduce the resulting diversity of private law between Member States is becoming more pressing due to a set of newly adopted legal instruments. After several initiatives by the European institutions, such as the Common Frame of Reference, the European contract law can be regarded as a developing international phenomenon. Therefore, one can conclude that the Europeanization of private law is blurring the line between national and Community law. In addition, the adoption of an optional instrument on a Common European Sales Law ('CESL') may be highly influential for subsequent development, not only in the EU, but also for China. This paper will explain the potential impact that CESL may have on Chinese legislation and on bilateral relations between EU and China. Most scholarly initiatives focus solely on the evaluation of harmonization of contract law in the EU whilst very little research has been done to assess the impact of those EU harmonization efforts on countries outside of the EU, such as China. This paper shall therefore focus mainly on the area of harmonization of private law with a specific emphasis on CESL and its significance for China.

Session 13: The Changing Role of the Judiciary

Chair: Zhao Yuhong, Chinese University of Hong Kong

Law-making and Enforcement of Law: the SPC's Two Faces of Janus

Ivan Cardillo, Zhongnan University of Economics and Law

The Supreme People's Court is the highest judicial organ in China, bind by the principle of "judicature for the people". Among its functions we find the promulgation of judicial explanations. They constitute the soul of the case judgment system, based on statutory law and not on case law like in the common law, and they are used by the SPC to give directions for the accurate understanding and appropriate application of the provisions of laws. The final result is the creation of specific rules, classified as "secondary law", that play an important role on shaping the judicial process and the normative asset of the society. While fulfilling their duties, the judges must strictly observe the Constitution and laws, safeguard the State interests and public interests, safeguard the lawful rights, accept the legal supervision and the supervision by the masses. In the same time the SPC is not empowered to interpret the Constitution, and to release judgments on its basis. Also, is not clear of the meaning and the implications of the "safeguard of public interests" and the "supervision by the masses". Accordingly the SPC's position in the Chinese legal system is unclear, due to its double power of law-making and making judgments that can serve as a boundary for the political power or as its hidden hand. The independence of the Court is a major issue. The outcomes demonstrate that the SPC has an important role on shaping the Chinese legal system, by combining the abstract law with the social needs, solving conflicts of laws, establishing more detailed rules, dealing with sensitive social issues, and promoting a general understanding of the legal concepts based on the practical experience. The Chinese experience of the judicial system is different from any western models and its deepening can provide a better understanding of the rule of law with Chinese characteristics.

Courts as Regulators: Understanding the Non-Judicial Role of the Chinese Judiciary

Pan Xuanming, Chinese University of Hong Kong

Regulation has been ubiquitous in different legal systems. During the past few decades, a growing literature has acknowledged the rise of regulators in response to the problem of deterrence failure that may be resulted from inefficient law enforcement by courts. The allocation of law enforcement and lawmaking powers to different state agents has been a subject of enduring interests. As noted in existing studies, allocating original lawmaking powers to the legislature alone is insufficient for achieving an optimal level of deterrence, especially when a given law cannot resolve all future cases. Therefore, the power to interpret and develop existing law and to decide how to deal with new cases, namely the residual lawmaking power, needs to be allocated to courts or regulators. The two major legal systems, however, allocate residual law making powers quite differently. In civil law systems, judges are purported to interpret, not make, law; common law judges, comparatively, hold extensive residual lawmaking powers, and are often vested with the power to develop new principles of law. This article challenges the conventional wisdom by giving a case study of Chinese local courts. The article argues that, even within the civil law tradition and other limited choices of legal institutions, Chinese judges have strived to mitigate the problem of deterrence failure by expanding their residual lawmaking powers. The article also contributes to the comparative literature for understanding judicial responsiveness to socio-economic changes by advancing the knowledge of the Chinese-style judicial innovation and, in particular, exploring the unconventional regulatory role that can be played by the Chinese local courts.

Judicial Independence or Government Responsibility? The Law Makers and Users of Environmental Courts in China

Wang Juan , McGill University and Liang Wenting, Beihang University

Since 1996, over 100 environmental courts at the basic and intermediate levels have been established in around 14 provinces in China. Why were these special courts established? Existing researches have primarily focused on two factors: local severe and complex environmental problems necessitate the establishment of special courts; the career consideration of local state agents motivates them to use environmental courts to showcase "green" strategies. However, not all places that suffer from environmental problems establish environmental courts, and some environmental courts were promoted by higher courts (such as Yunnan) instead of local governments. In fact, a closer look at different environmental courts across China reveals different lawmakers (local intermediate courts, higher courts, or local governments) and different local laws and regulations on the establishment and use of environmental courts.

In this essay, we argue that different facilitators of and designs on the establishment and use of environmental courts across localities suggest dynamic relationship between local judicial systems and government administrations. Through interviews and document collection, we compare and contrast the roles of local judicial systems and government administrations in environmental courts in two provinces. More specifically, we examine the identities of lawmakers, the substance of local laws and regulations on environmental courts (e.g. lawsuit selection criteria and plaintiff qualification for public interest litigation), court records of lawsuits, and government policies on environmental issues and activities in addressing them.

This essay makes both theoretical and empirical contributions. Theoretically, understanding the conditions under which these environmental courts were established and used contributes to the scholarly debate on judicial independence. Empirically, understanding local practices of governments' involvement in environmental courts helps make substantive suggestions on the judicial interpretation of "government responsibility" for the 2014 revision of the Environmental Protection Law (art. 26).

Judicial Empowerment within/out of the Political-Legal System in China?

Yu Xiaohong, Tsinghua University

Is there judicial empowerment in China? Some scholars argue for judicialization on the basis of either the expansion of court jurisdiction, or the increasing role of Chinese courts in policy-making. Others disagree and stress those adverse trends in the last decade, such as the rise of diehard lawyers (sike 死磕律师), the turning against law which is manifested in the grand medication project, etc.

The paper notes that such divergence is partially caused by mistaking courts as the judiciary in China. Unlike their counterparts in the western system of separation of powers, Chinese courts are merely one of the four institutions that compose the political-legal system (zhengfa 政法), which itself is only one of the nine policy systems in this party-state.

From this perspective, the judicial power (court per se.) in China expands from without the political-legal system yet dwindles from within. The authority of courts vis-à-vis other state organs expands significantly during the past few decades, especially at the local level. Within the political-legal system, however, the rise of the courts is thwarted by that of the procuratorate, which was arguably the biggest winner of the last round of the judicial reform.

Instrumentality of the judiciary is the logic behind this seemingly ironic observation. The judicial empowerment vis-à-vis other state organs derives from both the strategic and activists actions of the

courts, and the willing retreat from other agencies. It is especially the case when a central-local tension is involved. The dejudicialization within the political-legal system, on the other hand, takes root in a very essential organization rule of the party-state: to centralize on major issues and to decentralize on minor ones (daquan dulan xiaoquan fensan 大权独揽 小权分散). In the last decade, the procuratorate was intentionally empowered to offset the expansion of court power since late 1970s. The party-state is strengthened through keeping the political-legal system fragmented whereas at the same time using courts to rein in disarray local officials.

Session 14: Access to Justice

Chair: Lin Feng, City University of Hong Kong

Public Trial in Chinese Courts and the New Public Access Judgment Database

Björn Ahl and Daniel Sprick, University of Cologne

The Supreme People's Court issued Regulations on the Publication of Court Decisions on the Internet and an Opinion on Establishing Three Platforms of Judicial Transparency in November 2013. The judicial interpretations include a general obligation of courts to publish all decisions in a public access online database as well as, inter alia, the requirement to videotape every court hearing. It is stipulated that the video recordings are to be stored centrally and that access to the recordings is to be granted upon request by the parties of the lawsuit.

The move of the Supreme People's Court to introduce "total transparency" of the courtroom and to include all decisions of all levels of court in a public database will be analyzed in the context of ongoing judicial and political reforms. We discuss the feasibility of the provided means and mechanisms that are put in place in order to implement the new transparency measures. These measures are juxtaposed to current practice of conducting public trials and well publicized experiences of model courts administering transparency of the courtroom. We argue that expanding the principle of public trial beyond the limits of the courtroom in China will induce effects that can both protect and infringe upon the rights of the parties. The introduction of such a comprehensive approach to judicial transparency might be particularly ambiguous in a legal system where the notion of judicial independence is rather frail at best. Although public scrutiny can be filtered and/or censored by the administration, the sweeping use of real-time social media in China will almost certainly bias judicial decision-making.

Considering the institutional effects of the new measures we hold that they enable higher ranking courts to measure, assess and control the work of courts and individual judges in unprecedented ways. The transparency measures also facilitate other instruments of the Supreme People's Court that serve to steer and control judicial law-making such as the guiding cases mechanism, thus serving the aim of bureaucratic centralization of the judicial system.

Practices of Civil Mediation in Mainland China: From Tradition to Modernity

He Zhi-hui, Hubei University

Civil mediation system is an increasingly interesting topic for both Chinese and foreign researchers. As to the revival of mediation in mainland China, some foreign scholars have drawn a preliminary distinction between China's traditional mediation and modern mediation, but the deep-rooted opinion that China's mediation exists as one of the reflections of Confucianism in the area of dispute resolution has in some cases led to the misinterpretation in relevant research. Whether the influence of Confucian ethics on mediation has been overemphasized?

Furthermore, there were and there are so many transmutations of civil mediation that even some Chinese judges, mediators and scholars blend them without differential treatment. In the latest amendment to the Chinese Civil Procedure Law, which went into effect on 1 January 2013, some provisions of a new type so-called “mediation beforehand” were prescribed so as to increase the possibilities of vagueness in practice. Due to the differences in the definition of civil mediation and the diversification in China's practice, we cannot simply classify them under existing typologies of mediation at American and European level, although some of their characteristics correspond to known models. Therefore，"civil mediation"，the object of study in this article, does not merely refer to the range of methods by which third persons seek to resolve a dispute without imposing a binding decision, i.e., it inevitably contains the types which, in a strict sense, do not belong to ADR.

This article, therefore, is not merely to explore civil mediation in mainland China from a historical perspective, but also studies, by means of rules and data, each kind of traditional mediation and modern mediation separately, particularly the causes, actual effects and existing problems.

Evolution of the Guiding Case System towards Judicial Centralization in China

Peter Wang, City University of Hong Kong

Guiding case is a new concept currently raised in China. It is exclusively decided and promulgated by the Supreme People’s Court and is binding on lower courts for deciding later similar cases. Based on the Provisions of the Supreme People’s Court on the Work of Guiding Cases, China has formed a case law system with its own characteristics. It provides both opportunities and challenges as to the future of China’s legal development. This article attempts to explore social and political conditions that lead to its birth, to what extent and under what conditions such mechanism operates in practice. Furthermore, it reveals that the Guiding Case System in based on the model of centralization of judicial power and the role of the Supreme People’s Court has been changed accordingly with the development of the Guiding Case System.

Session 15: Whither Chinese Legal Reform?

Chair: Albert Chen Hung-yee, University of Hong Kong

Changes in Chinese Administrative Structures and the Rule of Law

Juha Karhu, University of Lapland

Key to understand one central dimension and element in the changes of Chinese legal system, and indeed the framework for a possible new Chinese legal culture, is to analyse the changes of the last wave of administrative structure reforms. Even if some models from Western post-New Public Management trends can be detected these changes contain and express some special Chinese characteristics. One of these characteristics is to analyse the dynamics and concrete institutional reforms of similar structural changes on national, provinsional, county and city level. The specific perspective adopted in the paper is Rule of Law, and especially the specific role of administrative litigation as an access to justice.

Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! What Does the 4th Plenum Decision Mean for Legal Reforms in China?

Randall Peerenboom, La Trobe University and University of Oxford Centre for Socio-Legal Studies

On October 23, 2014, the 4th Plenum of the 18th Central Committee of the Chinese Communist Party (CCP) promulgated the CCP Central Committee Decision concerning Some Major Questions in Comprehensively Promoting Governing the Country According to Law (the Decision). This was the first time a central committee plenary session addressed the topic of rule of law.

Part I provides an overview of legal reforms during the last thirty years, and addresses the question of why hold a plenum on rule of law now? Part II analyses the main features of the Decision. The Decision sought to accomplish three main tasks. First, to reconfirm for domestic and international audiences that China is pursuing its own path of development aimed at establishing socialist rule of law with Chinese characteristics; second, to provide a central-level comprehensive plan for reforms that cuts across jurisdictions and rises above departmental interests; and third, to move beyond the hardware of legal reforms to the software by promoting the norms and practices of a rule of law culture for officials and citizens alike. Part III assesses the general principles of the reform agenda. Part IV examines major institutional reforms to the legislature, administrative agencies and the judiciary. Part V concludes with an overall assessment of the reform agenda and a discussion of the implications of China's efforts to establish a socialist rule of law for the promotion of rule of law globally.

Gift-Giving in China and the Rule of Law and Virtue

Mary Szto, Hamline University

Gift-giving, ubiquitous in Chinese familial, business, and official practices, has been under fire by both laws outside and within China. For example, the American Foreign Corrupt Practices Act forbids gift-giving to foreign officials. China's recent anti-corruption campaign has targeted the use of banquets, mooncakes, and luxury goods in the bribing of officials.

What are the origins of ubiquitous gift-giving in China? Is gift-giving a form of law? This article examines the ancient roots of Chinese gift-giving. Gift-giving originated in gifts to ancestors and other spiritual beings to foster blessings for the living. They encouraged filial piety and deference to a sacred order. Gifts to the living engender a similar social order based on respect, affection and mutual support. Parallel to ancestral clan rituals in traditional China, the imperium and merchant guilds also had elaborate rituals of gifts and offerings. These also fostered affection-building and familial-like assistance. They were part of a rule of virtue.

The advent of modernization and China's recent meteoric economic growth has not lessened the practices of gift-giving, but may have accelerated them. It is estimated by 2015 half of all luxury goods in the world will be purchased by Chinese consumers. Many go to officials and others to ease business and other practices. This article will explore whether a rule of virtue of gift-giving, can be consistent with anti-corruption measures and a rule of law in today's China.

Session 16: Law and the Market

Chair: Bryan Druzin, Chinese University of Hong Kong

China's Fiscal and Taxation Legal Reform – Issues and Proposals

Hu Tianlong Lawrence, China Renmin University

The Decision on Major Issues Concerning Comprehensively Deepening Reforms ("The Decision") adopted at the close of the Third Plenary Session of the 18th CPC Central Committee held in November 2013 delineated a detailed strategy for reforming the China's fiscal and tax system reform as "an important guarantee of State governance". Moreover, detailed measures on fiscal and tax reform were released thereafter in December 2013. This article provides a summary of (a) observations and assessment of major obstacles or problems in China fiscal and tax system today, and (b) tentative policy suggestions and orientations for the near future.

China has achieved rigorous progress in past three decades on fiscal and tax reform, especially after China's major tax system overhaul in 1994, and China today faces an unprecedented task and opportunity in economic and social development, by and through factoring in social welfare, social stability, urbanization, and citizens' well-beings. This article argues that China can attain goals on fiscal and tax system reform designed in The Decision from the top-level design perspective, but it may require commitment from China's leaders on detailed architecting. In particular, the article reviews and discusses the followings.

China for now should improve the state budget management and transparency by fully exploring the fiscal to strengthen underlying urbanization. Moreover, the tax administration and collection efforts and enforcement should be enhanced to a level of practical control, which is a lynchpin of a modern tax system. As a result, the obstinate while severe problem of transfer payment system should be prompted to balance centralization and de-centralization efforts, especially for the usage of tax incentives to exert an innovative round of foreign investment.

The paper also summarizes and concludes a few policy orientations and proposals against China's current fiscal and tax reform from a four-layer program, including the commitment for the internationalization of RMB; promoting a comprehensive carbon tax system against worsened environment protection; advocating a philanthropic culture for social security and removing wealth disparity; and voicing out China's position for structuring international tax orders such as the BEPS and new transfer pricing guidelines.

Determinants for Effectiveness of Chinese Law – A Case Study of Product Quality Legal Regime

Mary Ip, University of New South Wales

One function of law is to protect people's interests and rights. The effectiveness of this function would depend on the nexus of a chain of determinants that is law-making, implementation and enforcement. A break of the chain of these determinants would render the law useless. However, each determinant is also influenced by economic, social and political factors. Thus, the chain of determinants is tied closely to the influential factors of each determinant and form a complex matrix which ultimately control the effectiveness of a piece of legislation. The Chinese Product Liability Law (PLL) has provided a good example for this study.

Consumer protection is one of the objectives of the PLL as it has explicitly stipulated in Article 1. However, by navigating through the PLL's legislative path and its later development, it has been

revealed that the legislative goal of protecting consumers has been overshadowed by a number of issues. What are those issues is the focus examination of this paper.

The structure of this paper is as follows. To set the scene, this paper commences with a brief discussion of the legislative background before promulgation of the PLL. Then, this paper scrutinises the adequacy of the PLL in its role of consumer protection. After that, this paper identifies factors which have obstructed the PLL's fulfilment of its responsibility towards consumers and catalysts which have led to its overdue amendment. The final remark of this paper is social, economic, political and legal are the influences that have strongly impacted on the PLL not only on its legislative path but also on its obligation in safeguarding consumers' rights and interests in China.

A Study of China's Regulation on Insider Trading of Unlocked Restricted Stocks

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We examine a regulation in China that requires insiders who plan to sell a large amount of un-locked restricted stocks to do so through the block trading system, focusing on its effect of deterring insiders' informed trading and protecting the average investors. While the regulation is well intended and innovative, we find that it is suboptimal because it does not impose restrictions on the counter- parties of the insiders' block trades. As a result, the counterparties lack incentive to safeguard the interests of the average investors and the insiders are able to evade the regulation to a large extent.

Evidence shows that, consistent with our hypotheses, the retail market returns after insider sales are much worse for the block trades than for the retail trades, insider block sales signal poorer future earnings of their firms, and the counterparties of the insider block sales gain from their trades with the insiders and other outside investors.

Protecting Minority Shareholder Rights: Comparative Analysis of Laws in China, Germany, Ukraine

Yelyzaveta Sushko,Ukraine

Nowadays joint stock companies became major form of centralization of capital. A relation between their management organs and shareholders is an issue that influences the efficiency of activity of any joint stock company. The major shareholder can exercise their power to maintain the authority inside a joint stock company; however, minority shareholders may stay outside decision-making process due to limited rights that their share can provide. However, provision of rights of minority shareholders can bring to a situation when minority shareholder can take the given rights for granted as well. Therefore, the protection of rights of minority shareholders should be well balanced. Mechanism of protection of minority shareholders needs to be efficient. It is important to avoid situation of misuse of their rights and to provide stable work of a joint stock company. The purpose of this study is to investigate derivative suit as a mechanism of the protection of minority shareholders in China, Ukraine, and Germany.

This study starts with brief analysis on doctrine background of derivative suit. This is important to know for understanding of derivative suits' roots and their influence on Roman law countries. Then there is a comparative analysis on legal scholars' thoughts in China, Germany, Ukraine on the matter. This is done in this work to show the approaches that scholars of these countries have. Afterwards this work deals with the comparative analysis of introduction of corresponding legal provisions and their content in China and Germany. Then there is an analysis of legal situation on derivative law suit in Ukraine. This study intends to answer the following research questions:

(1) How does the mechanism of protection of minority shareholders' rights look like in China and Germany?
(2) What is useful from the experience of China and Germany in this aspect?
…
Figure 1. Comparative analysis of the basics for filing derivative lawsuit in Germany and China.
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Figure 2. Comparative analysis of peculiarities of admission procedure to file a derivative action in Germany and China.
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Figure 3. Mechanism of a derivative action in China, Germany, Ukraine.

Private-ordering on the Internet: The Sina Weibo's Credit Score System

Tao Zhongyi, University of Hong Kong

Sina Weibo (microblogging) is one of the most popular social media websites in China with more than 300 million users. In April 2012, it proposed a credit score system. Under this system, every user has an original score of 80; posting false information or messages that violate other's rights will result in a deduction of credit scores, from 1 to 10. Users would be prohibited to forward messages, unable to add fans and their accounts would even be blocked with the decrease of the credit score. Sina Weibo learned the jury system in common law via establishing committees of ordinary persons and experts separately to evaluate the disputes.

This credit score system represents valuable creativity in private ordering on the cyberspace. The system designed has a certain degree of democratic character; the dispute resolution is speedy. Meanwhile, it also brings a series of problems. Some users question the fairness of the system, especially the neutrality of committee members; some commentators concern that Weibo, under the pressure of government, used the credit score system as a tool to stamp out dissent, which heavily affect the freedom of speech. Two-year practice shows improvement as well as challenges. This paper takes Sina Weibo's credit score system as a case to illustrate private ordering on the Internet in China. It examines specific rules, outcomes and challenges during the enforcement of the system in the past two years, and makes a comparison with similar credit score system of other websites, such as taobao. It argues that transparent process and neutrality of the executors is essential to the effect of private ordering.

Session 17: Law and Enforcement

Chair: Huang Hui, Chinese University of Hong Kong

Evolving Concepts and Standards in PRC Trademark Law 2001-2013: A Study on the Interaction of Statute and Case Law

Raffaello Girotto, University of Trento

This article is an abridged version of the graduation paper I wrote between December, 2013 and March, 2014. It investigates the interaction of the legislative and judicial formants in the evolution of PRC trademark law from the statutory amendment of 2001 to that of 2013. The following topics will be analyzed: concept of "trademark use"; use of likelihood of confusion as a standard for judging trademark conflicts; protection against squatting; issues entailed by the use of trademarks in original equipment manufacturing; trademark coexistence.

The People's Courts seem to be the driving force in the evolution of Chinese trademark law. Many relevant innovations made to this branch of law in the last decade or so spring from day-by-day

enforcement work, to be later endorsed in legal texts issued by courts and, finally, fixed in the statute. As a result, although the legal system of the PRC denies judicial precedents any binding value, case law in fact leads the evolution of law; statute, which in principle is the only binding source of law, often seems to actually ratify ex post solutions already practiced.
This trailblazing activity of courts seems to be mainly triggered by policy impulses. The law is enforced keeping in mind policy aims that do not supersede the purely legal solution of each case, but rather "bend" the application of law and therefore channel its evolution. Most interesting is the fact that this creative role remains hidden at the declamatory level: judges, though proud of contributing to legal progress, do not stress their own creativity, but rather the fact that they abide by the (correctly interpreted) statute and by the relevant policy guidelines.

Post-contractual Evaluation of Obligations in China: Emphasis on Changing Circumstances

Matti Tjäder, University of Lapland

This paper discusses certain features of Chinese legal system related to post-contractual evaluation of the parties' obligations should an unforeseen circumstance on the market arise. The scope of contractual parties has been limited to concern commercial enterprises contracting within the P.R. China.

Special emphasis is put on inspecting the changing circumstances doctrine in the contemporary Chinese civil law. In this paper it is inspected to what extent there is, first of all, a doctrine of changing circumstances established (especially in terms of the Supreme People's Court's Guiding Cases of 2009 and the recognition of such named doctrine) in China, and what are the general features and the scope of applicability. One of the main questions is whether the general understanding of the doctrine is similar in China and Europe, and especially what is its relation to principle of good faith (and fair dealing) and force majeure doctrine. !

The academic discussion in China has been inspected, the overall approach being contrasting the similar discussions in Europe, especially in the Nordic countries. The main focus is put on in which situations the changing circumstances doctrine becomes applicable, and further-on, what are the specific criteria. Especially the requirement for unpredictable circumstance criterion in relation to typical business risk is being inspected. Special emphasis has been put to analyse what challenges does this criterion bring to the legal assessment in a very dynamic and rapidly changing market environment of China. In this respect a significant contribution from the commercial customs has to be taken into account. Also, this paper discusses whether the changing circumstances doctrine can be seen de facto bringing more or less flexibility for the post-contractual evaluation of obligations.

An Understanding of Traditional Chinese Medicine from a Concern of Legal and Semantic Aspects

Wang Saisai, University of Brussels

The formats of the TCM mentioned in many research articles and books were various; TCM has different expressions in different legislations; the different characteristics of Chinese medicine and western medicine have not been recognised clearly and sufficiently. All these complicated situations led to the misusing or misunderstanding of TCM and other relevant wordings; counteractively, the misusing or misunderstanding of the terminologies brings confusing to the medical legislation practice. Wordings are needed to be precise in the statutes. So this paper aims to clarify the terminologies relevant to TCM from a concern of legal research aspect. The paper reviewed the reason and importance of unifying the wordings relevant to TCM in the introduction; it discussed relevant important wordings used in western medicine world in the first part at the same time compared certain

different characteristic between TCM and western medicine in part I; it analysed the categories of TCM and wordings used in Chinese legislation in part II; and then showed the definition relevant to TCM in international legislations in part III; finally, it summarised some terminologies relevant to TCM from a concern of legal perspective in part IV and suggested dividing the TCM legislation into two branches, one mainly regulates the crude Chinese drugs and Decoction piece via setting out the rules for Chinese practitioners, while the other one focuses on the pharmaceutical supervision of Zhong Cheng Yao in the market.

Reasons for Noncompliance with Cultural Heritage Laws in China

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Recognizing the value of cultural heritage, the Chinese central and local governments have set up a series of law and regulations on heritage preservation, but in reality they often fail to ensure people's compliance with the law. Many heritage sites have been damaged and destroyed by human activities. This paper is aiming to investigate the non-compliance of laws and regulations in the field of cultural heritage preservation in China. There are several reasons contributing to this social and cultural phenomenon.

The first one is the cost of offence is too low. The preservation law is not be enforced effectively by relevant authorities, but the benefits from the offence can be high, therefore many people include some local governments take a risk to violate the law. The second reason is related to the over emphasis on external intervention from the governments and experts, which has led to a disengagement of citizens with cultural heritage preservation. The third is the benefit of cultural heritage is monopolized and rarely used to improve local people's livelihoods, resulting in an increase of the tension between the development of local communities and cultural heritage preservation. This paper argues that heritage preservation highly depends on the compliance and participation of local people and communities; and the largest incentive to the compliance is to share the benefit gained from cultural heritage with the local. At the same time people's understanding on their shared responsibility for cultural heritage and public participation should be promote. All these need establishing a better monitoring and co-operation system. Council of Europe framework Convention on the value of Cultural Heritage for Society has set up a good example for China to learn how to deal with the challenge in the area of cultural heritage preservation in a transformative age.

Administrative Components in Private Law - The Special Role of the Chinese State in Private Law Enforcement

Rebecka Zinser, Humboldt University Berlin

Chinese copyright law, unfair competition law, consumer protection law are all areas of private law. But in China they share one characteristic feature: they can be enforced not only with private law means, but also by means of administrative law. Because of this administrative component, the state plays an active role in law enforcement, as opposed to mere passive reliance on the right holders to defend their interests in court. Therefore, the state has the power to act upon policies and raise public attention and awareness with "crack down on" and "strike hard against" campaigns. This style of law enforcement receives harsh criticism and is often said to be an inheritance of the Mao-era.

The reasons for opting for the administrative enforcement of private law are rooted in history and the current state model likewise. The original understanding of law, as in 法, is an objective and public one. According to this understanding, the state is responsible for safeguarding the legal system as a whole. It was later paired with the socialist model of government and law making, which views the state as the prevailing actor in enforcement in any field of law. Even today, in the era of opening and reform, a substantive withdrawal of the state is rarely discussed.

Recognizing this self-understanding of the Chinese state's role in law enforcement is crucial to understanding the meaning of XI Jinping`s and LI Keqiang´s call for strengthening the Socialist Rule of Law.

This paper describes, firstly, the system of administrative enforcement in Chinese private law. Secondly, it compares this system with other legislative models of private law enforcement that, though private, try to protect a wider circle of interests than those of the parties involved, such as punitive damages and class action. Thirdly, it assesses the impact of the administrative enforcement model on the judicial system of the PRC.