Final Program of the Special Workshop
Political Pluralism in Greater China – 大中华的政治多元化

Friday, 12 July 2019, 9.00–13.00 & 14.00–18.45,
Room 3.B57, University of Lucerne [CH],
convened by Philipp Renninger and Ewan Smith at the 29th IVR World Congress (SW 8)

Morning Panels: Philosophical Pluralism – 哲学多元化 **(9.00–13.00)**

9.00–9.30 **Introduction by the Chairs**
講 Philipp Renninger (Doct. cand., Lucerne [CH] and Freiburg [DE])
講 Ewan Smith (Jun. Res. Fellow, Oxford [UK])

9.30–10.30 **Marxist Pluralism** – 马克思主义多元化
講 Harro von Senger (Prof. em., Zurich [CH] and Freiburg [DE])
Keynote Speech: «The Evolution of PRC's Principal Contradictions»

10.30–11.00 Coffee Break

11.00–13.00 **Ancient Schools of Thought Pluralism** – 诸子百家多元化
講 Bryan Van Norden (Prof., Vassar [US], Wuhan [CN], and Yale-NUS [SP])
«Contextualizing Contemporary Confucian Political Philosophy»

講 Clement Yongxi Chen (Res. Ass. Prof., HKU [CN])
«New Bottles for Old ‹Legalism›? A Case Study of the Social Credit System»

Lunch Break **(13.00–14.00)**

Afternoon Panels: Legal Pluralism – 法律多元化 **(14.00–18.45)**

14.00–16.00 **International Legal Pluralism** – 国际法律多元化
講 Eva Pils (Prof., KCL [UK])
«China's Dual State Revival and its Implications for the Global Legal Order»

講 Jie Cheng (Prof., UBC [CA] and Tsinghua [CN])
«Transforming the Constitutional Order in Hong Kong: Dynamic Enforcement of the International Covenants of Human Rights in the HKSAR»

16.00–16.30 Coffee Break

16.30–18.30 **Central-Local Legal Pluralism** – 央地法律多元化
講 Wei Cui (Prof., UBC [CA])
«Is There Too Little Law in China?»

講 Elisa Bertolini (Ass. Prof., Bocconi [IT])
«Internet and Algorithm as Instruments of Technological Federalism and Technologically Shaded Citizenship»

18.30–18.45 **Conclusion by the Chairs**
講 Philipp Renninger and Ewan Smith

Abstracts of presentations

to be held at the Special Workshop 8

Political Pluralism in Greater China – 大中华的政治多元化

A) *Morning Panels: Philosophical Pluralism* – 哲学多元化 **(9.00–13.00)**

I) **Marxist Pluralism** – 马克思主义多元化

1) **Prof. em. Dr. iur. Dr. phil. Harro von Senger**

Keynote Speech: "The Evolution of PRC's Principal Contradictions"

The astonishing development of the People's Republic of China especially with respect to economy in the last 40 years is intrinsically linked with "Zhongguo Makesizhuyi 中国马克思主义" = "Chinese Marxism" respectively "Sinomarxism". In my contribution, I shall speak about

- The importance of Sinomarxism
- The two functions of Sinomaxism
- The sinomarxist concept "principal contradiction"
- The impact of the evolution of PRC's principal contradictions upon the economic development of the PRC

II)   Ancient Schools of Thought Pluralism – 诸子百家多元化

1)   <u>Contextualizing Contemporary Confucian Political Philosophy</u>

Bryan W. Van Norden
Kwan Im Thong Hood Cho Temple Professor, Yale-NUS College (Singapore)
29th World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR)
July 7-13, 2019, Switzerland

When the Qing dynasty ended in 1911, it seemed that Confucianism was dead, both as a political philosophy and as a general system of thought. However, in the last few decades, the political relevance of Confucianism has grown. A major factor has been change in the Chinese government's attitude toward Confucianism. Mao Zedong (as a member of the May Fourth Generation) opposed Confucianism; Deng Xiaoping (as a survivor of the Cultural Revolution) tolerated Confucianism; Xi Jinping (as leader of a huge nation that is no longer unified by faith in communism) openly embraces Confucianism. One of the consequences of the new freedom to openly praise Confucianism is that Confucian political reform is on the table for discussion again. JIANG Qing ignited controversy with works like *A Confucian Constitutional Order* (2013). Jiang's proposals are ultra-traditionalist—some might say reactionary. He calls for China to have a constitutional monarchy (like Japan), to resume traditional state-sponsored rituals honoring ancestors, mountains, and rivers, and for the majority of positions in the legislative and executive branches to be reserved for Confucian scholars and direct descendants of Confucius. A more moderate approach has been defended by Professor Joseph Chan of Hong Kong University in his seminal book *Confucian Perfectionism* (2015), and Daniel Bell of Tsinghua University in his provocative *The China Model* (2016). Both books defend the view that China should have a bicameral legislature, with a lower house whose members are elected by direct, popular vote, and an upper house whose members are appointed based on their qualifications as determined by the Confucian classics. In my talk, I hope to do two things. First, I would like to provide a political typology to situate contemporary Confucian views at the intersections of two political spectrums. Second, I would like to discuss some of

the reasons why we should take the resurgence of theoretical interest in Confucian political theory seriously.

Although there are exceptions and hybrid views, liberal political theories are typically associated with democratic poiltical systems, and perfectionist political theories are associated with meritocratic political systems. However, contemporary Confucian political philosophy provide interesting examples of perfectionistic political philosophies that advocate "mixed" meritocratic-democratic governments. In addition, most people in the contemporary People's Republic of China no longer have faith in communism as a politico-economic system, but many are skeptical of the viability of Western style laissez faire economics and democracy. Confucian theories of "mixed" government may provide increasingly attractive in this intellectual vacuum.

2)   New Bottles for "Legalism"? A Case Study of the Social Credit System

Yongxi Chen[*]

Since 2014, a set of legal reform initiatives have been developed in China with the purpose of "comprehensively promoting ruling the country according to the law (RCAL)". Certain initiatives seem to have been inspired by utilitarian considerationsrather than modern principles of rule of law. This paper compares and contraststhe renewed ideology of RCAL with the creeds of legalism that prevailed in ancient China, mainly through analysing a major reform initiative, i.e. the Social Credit System (SCS).

The SCS is intended to operate nationwide by 2020. Purporting to tackle dishonest conducts across the society, the SCS assesses the "trustworthiness" (□ □) of individuals in keeping their promises and complying with various norms, mainly through data-driven profiling and a "joint punishment" mechanism. Under pilot schemes, individuals are given social credit ratings based on datafied records about their "discrediting behaviours" (□ □ □ □). Individuals with prescribed ratings are subject to multiple punishments imposed by different party and/or state authorities that affect their interests in various fields, e.g. financial loan, entry to the market, and access to public services, etc.

These pilot schemessuggest that a system of rules distinct from the tenets of the rule of law is unfolding. First, viewed from a realist perspective, current SCS rules ignore the division between legislative norms, administrative norms and party norms, extending binding effect to all norms as endorsed by the ruling party. Second, from a doctrinal legal point of view, the regulatory approach under these SCS rules is based on the "credibility" that differs from the "liability" on which China's modernized legal system is based. The SCS that is taking shape approximates to the system of rules championed by the legalists which adopted a realpolitik concept of law and focused primarily on the punitive function of law. However, the SCS maintains ambiguous ideological concepts, which deviate from the legalist pursuit of certainty. These findings may contribute to our understanding of the common features and ideological foundationsof *extra-legal but consistently enforceable rules* in China which are insufficiently addressed through the lens of rule of law.

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B) *Afternoon Panels: Legal Pluralism* – 法律多元化 **(14.00–18.45)**

I) **International Legal Pluralism – 国际法律多元化**

1) **China's dual state revival and its implications for the global legal order**

Eva Pils

Abstract: In this paper, I address the evolution of China's constitutional order in Xi Jinping's 'New Era,' in which the role and visibility of the Chinese Communist Party has been enhanced, while the role of law in limiting public power has been reduced. I draw on Fraenkel's 1940 concept of the Dual State, a duality of coexisting normative and prerogative modes of governance, established to normalise 'emergency' exemptions from legality.

First, discussing the implications of selected domestic developments, including the revisions of the Constitution, the crackdown on civil society, and the crackdown on ethno-religious minorities in Xinjiang, I argue that the theory of the dual state challenges the claim that authoritarian governance reliant on law is per se valuable and that pursuit of the ideal of rule of law (*fazhi*) is possible in authoritarian systems.

Second, I discuss the extent to which Dual State theory may help us understand the global implications of the systemic changes currently taking place in China. In the wake of Xi Jinping's 'Belt and Road Initiative,' pro-Party legal scholarship has begun to emphasise the Party's 'dual mission' for the rejuvenation of the Chinese nation, as well as the 'shared future of humankind'.I argue that the planned export of authoritarian governance norms and practices presents a challenge at various levels, including that of international governance norms, mechanisms and institutions set up on the basis of liberal legal-political principles, such as the treaty mechanisms of the United Nations, and that of transnational civil society. The New Order Party-State's explicit or implicit rejection of rationalist conceptions of law and justice, and its attempts to undermine the international human rights law order raise the question if China's 'going out' strategies and practices may contribute to the emergence of a global dual order.

Short bio: Eva Pils is Professor of Law at The Dickson Poon School of Law at King's College London, where she teaches public law, human rights, and law and society in China. She studied law, philosophy and sinology in Heidelberg, London and Beijing and holds a PhD in law from University College London. scholarship focuses on human rights. Her current research addresses the challenges to human rights and the rule of law from authoritarian conceptions and practices of governance and the boundaries of legal and political resistance. She has previously worked on human rights defence in a variety of contexts, including criminal justice, land and housing rights, and wider issues of access to justice, with a focus on China. She has written on these topics in both academic publications and the popular press. Eva is author of *China's human rights lawyers: advocacy and resistance* (Routledge, 2014) and of *Human rights in China: a social practice in the shadows of authoritarianism*(Polity, 2018). Before joining King's in 2014, Eva was an associate professor at The Chinese University of Hong Kong Faculty of Law.

2) **Transforming the Constitutional Order in Hong Kong: Dynamic Enforcement of the International Covenants of Human Rights in the HKSAR**

Jie Cheng
Professor, Tsinghua University Law School
Associate Professor (term), Peter A. Allard School of Law, UBC

Abstract

Although many believe that the HKSAR has inherited the dualist approach to enforcing international law, including the two international human rights covenants, this paper argues that after 1997, the HKSAR took a more dynamic and pluralistic approach of its own. This approach creatively incorporates international human rights into Hong Kong's new constitutional order and transforms the Bill of Rights into a higher law through Article 39 of the Basic Law. I develop this argument along three dimensions: the historical dimension, the positive dimension and the normative dimension. I first provide a historical review of the previous dualist approach and the enforcement of the Bill of Rights (BOR) under the colonial government before July 1, 1997. I then offer a positive study of how the Court of Final Appeals promotes human rights through creative applications of Article 39 in constitutional adjudicationsduring 1997-2017. I finally compare the pre- and post-1997 approaches and provide an analytical structure to explain the changes and constraints of the new model. The paper concludes with the legal and political implications of human rights adjudication for the new constitutional order in both the HKSAR and China.

II)   Central-Local Legal Pluralism – 央地法律多元化

1)   Is There Too Little Law in China?
WEI CUI, PROFESSOR, UBC

A longstanding piece of popular wisdom has it that China has plenty of laws on paper, it is the implementation of laws that is lacking. Yet it is hard to find comparative, empirical, or theoretical grounds for this conventional wisdom. Between 2000 and 2014, China's provincial legislatures passed on average fewer than 17 statutes per year per province—the same order of magnitude as the legislative activities in the barely populated Canadian territories of Nunavut and Yukon. National-level legislative activities are even more anemic from a comparative perspective. Several features of the Chinese political and legal system also predict that it is very unlikely that the Chinese government could generate an adequate supply of law. First, legislative power is highly centralized, ensuring that those who monopolize lawmaking lack both information and incentives to make law. Second, China's parliamentary-style polity implies that the same politicians are in control of legislation and executive-branch orders, while the latter, especially informal policy documents, are much less costly to produce than formal statutes. Third, China's civil law judiciary, when faced with scant statutory guidance, is highly likely to defer to executive expertise, thus ensuring that informal policy documents are rarely set aside—which in turn diminishes the benefit for formal lawmaking. In other words, the fact that law is made at all in China should not be taken for granted. This paper proposes a theoretical framework for analyzing Chinese politicians' incentives to make law, and show what positive and normative insights emerge if one adopts the view that, indeed, there is too little law in China.

2) <u>Internet and Algorithm as Instruments of Technological Federalism and Technologically Shaded Citizenship</u>

by <u>Elisa Bertolini</u>[*]

The paper claims that the Chinese government implementation, at both national and local level, of a different Internet governance and, more broadly, of a different use of new technologies is realising a sort of technological federalism entailing a different shading of citizenship. A different use of new technologies on geographical basis realises a connection between geographical location and extent of enjoyment of citizens' rights and freedoms. It is to say, technological federalism creates a technologically shaded citizenship. The claim is supported by making reference to the Internet governance in the Xinjiang and the Social Credit System.

The Internet governance in the Xinjiang is far harsher than in the rest of mainland China. Xinjiang has been in the last decades a sort of technological workshop, where new tools of censorship and control on netizens' surfing have been experimented, leading to the establishing of a regional intranet within a national intranet. The stricter control on the net in Xinjiang affects a series of rights and freedoms - such as freedom of expression, right to education, private entrepreneurship - which are far less enjoyed by Uygur than by Han Chinese living in other Chinese regions.

The social credit system, even though still being in a preliminary testing stage, has already been implemented in some areas, such as Shanghai. Even though it is not clear yet how the system will be implemented on a national scale - the most plausible option is an interconnection of local database -, at present what has been implemented is a system that ranks citizens on the basis of different parameters (depending on local regulations) through algorithmic analysis. The ranking affects the enjoyment of a series of rights and freedoms - such as freedom of movement and access to welfare benefits -, which may be either expanded or compressed, depending on whether you are an A-level citizen or an E-level citizen.

Therefore, the different geographical implementation of new technologies can be interpreted as a sort of technological federalism, realising at the same time different shading of citizenship. There is no uniformity when coming to the enjoyment of certain citizens' rights and freedoms, which is moulded on the basis of algorithmic analysis (i.e. a technological tool).

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