

The Sino-Swiss Conference of Constitutional Law

Lidija BASTA FLEINER

The Conference on RULE OF LAW AND ORGANISATION OF THE STATE was held in Beijing, China, 15-18 October, 1998.

Participants and Topics:

The Swiss delegation was composed of 5 members. From the Chinese side 17 academic and governmental institutions were represented.

Swiss side :

Prof. Thomas FLEINER, IFF: *The Emerging Challenges to the System of Powers and Direct Democracy in Switzerland*; Prof. Lidija BASTA FLEINER: *Constitutional Democracy Revisited: The Postmodern and Globalization Challenges*; Prof. Guy KIRSCH, University of Fribourg: *The Economic and Social Security Policies in Switzerland and their Effects on Human Rights* Prof. Giorgio MALINVERNI, University of Geneva: *The Rule of Law and the Protection of Human Rights In Switzerland: Key Issues and New Questions*; Dr. Rudolf WERTENSCHLAG, Federal Office for Legislation (BJ): *Federalism and Decentralisation as the Basic Principles of State Organisation in Switzerland: Major Effects and Recent Trends*.

Chinese side (Only the persons who presented a paper):

Prof. DU GANGJIAN : *The Comparative Perspectives of the Theories and Systems about the Right to Petition*; Prof. LI BUYUN: *The Rule of Law and Human Rights Guarantee in China*, Prof. SUN XIAOXIA: *The Trend und Multiplicity of Legal Control over Administrative Power in China*, Prof. ZHUO ZEYAN: *The Legal Means for Securing Civil Rights*; Dr. FENGJUN: *The Rule of Law and the Administration of Law in China*, Dr. LILEI: *Property Rights and Constitution of P.R. China*, Dr. LI LIN: *The Theory and Practice on Distinguishing of Legislating Authority between the Central Government and the Local Government in China*; Dr. LIZHONG: *The Referendum System in Swiss Constitutional Supervision*; Dr. MO JIHONG: *The Relationship between International Human Rights Conventions and the Constitution*; Dr. RENJIN: *The Reform of Chinese Local Governments and the Legislation Improvement*; Dr. XIE PENGCHENG: *Clarify outside Relationships to Ensure the Independent and Fair Exercise of Power of Trial and Prosecution*; CAI DINGJIAN: *The History and Future of Constitutionalism Movement in China*; JI TAO: *The Effective Enforcement of Administrative Power and Legal Control*, YAN XINJUN: *The Exercise and Check and Balance of Administrative Power*; ZHANG JIANHUA: *The Comparative Perspectives of the Separation of Legislation Authority in France and USA*.

The key-issue in the presentations and the discussion of the Chinese scholars:

The ratio behind a broad topical framework of the Conference was to initiate academic human-rights debate across the major respective principles and institutions governing the relationship between the citizen and the state. To start with, the Conference was indeed a debate on political issues, but with academic arguments and at a very high level of academic discourse. The papers presented demonstrated critical self-reflection of the respective problems in Switzerland and China. However, partly due to the fact that the Chinese reporters have significantly outnumbered the Swiss delegation, but to a greater extent also due to the nature of the problem itself, the leitmotiv of the Conference could be formulated as follows: *The key principles and institutional designs of constitutional democracy and rule of law as reflected in the current debate in China*.

It was more than clear that the underlying premise of a strong case for constitutional democracy and rule of law among Chinese scholars resulted out of the overwhelming discontent with the human rights situation in China. The demand for individual rights and individual liberty was often articulated in a clear-cut manner, leaving little doubt as to how far-reaching the reforms of the political and legal systems have to be in order to pave the way towards the rule of law and moral reconstruction, as put by one of the Chinese participants. On the other side, the accent was equally often put on the necessity to preserve stability and pursue the strategy of reforms which would not end up by replicating the disastrous effects of radical, not well reflected reforms in some of the ex-communist countries in transition (Russia, e.g.)

One could say that three major premises were underlying most of the interventions of the Chinese scholars:

A) There was a full recognition of the emancipatory potentials which law as such contains. Such a position obviously demonstrated a significant departure from the traditional Chinese understanding of law as the instrument of subordination. Related to this, another point of interest may also be that the Chinese scholars rarely referred to the Marxist concept of law, and if so, not in the sense of the unquestionable ideological argument, but rather in order to point to the inherent linkage between market economy, civil society and human rights. Diversity of economic factors - as it was pointed out - will drive to its appropriate accommodation, towards constitutional democracy, with the emerging civil society being stronger and the state power being weaker.

B) The demand for *far-reaching constitutional and political reforms in a smooth way* was dominant in the bulk of the presentations and interventions of the Chinese scholars. (In fact there was only one presentation on local government which recognizably reflected the orthodox Marxist-Leninist case for *status quo* in China). The demand was formulated both as a general postulate and when referring to different aspects of the Chinese legal and political system (reform of administration, the need of redistribution of law-making powers between the central and local governments, introduction of the judicial constitutional review, e.g.). Indirectly, but most impressively was the argument for far-reaching reforms articulated in the thesis that the last two decades experienced the deepest change in the last 100 years of the Chinese constitutional history.

C) The *level of the critical insight* into the Chinese system and the *articulation of the directions for the necessary reforms* were by some of the most prominent Chinese participants brought to the demand for the judiciary independent from the interventions of the Party committees, as well as the demand to put the Communist Party under law were formulated as the most important and most difficult principles accommodating the rule of law.

The Feed-back of the Chinese Scholars to the Presentation of the Swiss Papers:

The Chinese participants demonstrated a great interest, some of them also a considerably high knowledge of the Swiss constitutional and political system. There was, for example, a very competent critical analysis of the Swiss system of referendum done by one of the younger Chinese scholars (cf. Programme). The paper initiated a very interesting debate on theoretical underpinnings, institutional design and practical aspects of direct democracy in Switzerland. On the other hand, the paper on rule of law and human rights in Switzerland provoked a general discussion on the universality of human rights. As already pointed out, the Chinese scholars did underline the structural linkage between market economy and individual human rights, but at the same time some of them equally insisted that human rights make inseparable part of man's dignity.

The questions and interventions further on addressed primarily the issues of the relationship and accommodation between collective and individual rights, Swiss

communal democracy and directorial system of powers, decentralization and federalism, as well as the main mechanisms of the Swiss social policy. On the whole, one had the feeling that the Chinese scholars appreciated that they could hear a lot of the current problems and challenges, as well as structural drawbacks of the Swiss constitutional and political system in respective areas.

General evaluation and desirable follow up activities:

1. The main objective of the Conference was to launch a critical academic dialogue on different aspects of the relationship between the citizen and the state in two countries, and on the post-modern challenges of globalization as faced against specific legal and political traditions in Switzerland and China. Given the level of the debate and issues that were discussed, the writer of this report is of the opinion that the Sino-Swiss Conference on Rule of Law and Organization of the State was successful beyond average standards. Such an evaluation implies not only the academic performance in debating highly political issues, but also the atmosphere and mutual confidence which was developing among scholars during the three-day intensive work.
2. Given the course and the outcome of the Conference, we are of the opinion that the collaboration with the Institute of Law of the Chinese Academy of Social Sciences should continue and take various complementary forms. On the one hand, for the human-rights dialogue it is of substantive relevance to establish regular contacts with the institution which evidently both gathers around the most prominent academic potential in China and together with them leads the efforts to initiate and formulate basic preconditions and major avenues of a thorough constitutional and political reform in China. On the other hand, the Academy has been engaged in a big project for the over-all reform of the Chinese legislation till 2010. Finally, follow-up contacts should also further develop academic exchange and Swiss support for the young, promising, liberally-oriented scholars in China.

This is why Prof. Thomas FLEINER, on behalf of the Institute of Federalism, invited the Director and the Deputy Director of the Law Institute, Prof. LIU HAINIAN and Prof. XIN CHUN YING, to visit Switzerland and the Institute and discuss on desirable forms of further collaboration. Besides, Dr. XIE PENCHENG, the most impressive and openly critically oriented young scholars who participated in the Conference, was offered a scholarship for the coming year. Namely, within the DEZA Mandate, the Institute of Federalism was provided with a possibility to have young researchers stay and work in the Institute up to one year.

Other activities of the Swiss delegation:

On Wednesday, October 14th, Prof. Thomas FLEINER and Prof. Lidija BASTA gave conferences at the University of Politics and Law in Beijing. The conferences were attended by the teaching staff members and post-graduate students. The topic of Prof. Thomas FLEINER's lecture was "*The Modern State and Law*", while Prof. Lidija BASTA talked on "*The Differences between Rule of Law and Rechtsstaat*". Both presentations were followed by a very active discussion and questions posed mainly by the students.

Last but not least, we owe our thanks to the Swiss Embassy in Beijing for the successful outcome of the Sino-Swiss Conference on Rule of Law and Organization of the State. Our special thanks go to Mr. Dominique Dreyer - who is by the way since March 1999 the new Swiss ambassador in Beijing - for his creative initiative, his important assistance in the organization of the Conference and his warm hospitality in Beijing.