



中国法治论坛

CHINA FORUM ON THE RULE OF LAW

法治发展与法治模式： 中国与芬兰的比较

Rule of Law in
China and Finland:
Comparative Studies of
their Development
History and Model

主 编 李 林

副主编 谢增毅



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总 序

故宫北侧，景山东麓，一座静谧的院落。蕴藉当年新文化运动的历史辉煌与典雅的土地上，流淌着中国法律理论的潺潺清泉，燃烧着法治思想的不息火焰。多年来，尤其是1978年中国改革开放以来，一代代法律学者在这里辛勤劳作，各领风骚，用他们的心血和智慧，谱写了许多可以载入史册的不朽篇章。

为了记载和激扬法治学问，推动法治，继往开来，中国社会科学院法学研究所设立“中国法治论坛”系列丛书。一方面，重新出版最近20余年来有重要文献价值的论文集，如始于20世纪70年代末的关于人治与法治、法律面前人人平等、起草新宪法以及法律阶级性等问题的专项讨论，90年代初以来关于人权、市场经济法律体系、依法治国、司法改革、WTO与中国法、环境保护、反酷刑、死刑存废等问题的专项讨论；另一方面，陆续编辑出版今后有足够学术含量和价值、比较成熟的国际国内相关研究项目和会议的论文集。

法律乃人类秩序规则。法治乃当世共通理念。“中国法治论

坛”不限于讨论中国的法律问题，也并非由中国社会科学院的学者独自担当。我们期望，这个论坛能够成为海内外学者、专家和广大读者、听众共同拥有的一个阐释法意、砥砺学问的场所，一片芳草茵茵、百花盛开的园地。

夏 勇

2003 年 6 月 6 日

Preface to China Forum on the Rule of Law

To the north of the Forbidden City and east of Jingshan Hill lays a peaceful courtyard. It is the seat of the Institute of Law of Chinese Academy of Social Sciences, the most prestigious national institute in China devoted to legal research and legal education. On this small piece of land, rich in historical splendor and elegance of the New Culture Movement of 1919, flows an inexhaustible spring of Chinese legal theory and rages an inextinguishable flame of the ideal of the rule of law. Since several decades ago, especially since the “reform and opening up” in 1978, generations of Chinese legal scholars have been working diligently on this small piece of land and, with their wisdom and painstaking efforts, composed many immortal masterpieces of law that will go down in history.

China Forum on the Rule of Law is a series of books published by the Institute of Law with a view to carrying on the past and opening a new way for the future in the research of the rule of law and promoting the development of the rule of law in China. In this series, we will, on the one hand, republish papers published in China in the past 20 years which are of great historical significance, such as those relating to the discussions since

late 1970s on the rule of man and the rule of law, the equality of everyone before the law, the drafting of the new Constitution, and the class nature of the law and those relating to debates since early 1990s on human rights, the legal system under the market economy, ruling the country in accordance with the law, judicial reform, WTO and China, environmental protection, eradication of torture, and abolition of the death penalty. On the other hand, we will edit and publish papers from future research projects and academic seminars, both in China and abroad, which are relatively mature and of sufficiently high academic value.

The law is the norms of order for all mankind and the rule of law a universal ideal of all peoples in the contemporary world. China Forum on the Rule of Law is not limited to the discussion of the legal issues in China, nor will it be monopolized by scholars of the Institute of Law. We sincerely hope that it will be able to provide an opportunity for scholars, experts, as well as readers to freely express their ideas and exchange their views on legal issues, a forum for a hundred schools of thoughts to contend, and a garden for a hundred flowers to bloom.

Xia Yong

6 June 2003

Preface

In the Analects of Confucius we find some interesting remarks about law and governance. In Book 2 the master says: 'He who exercises government by means of his virtue may be compared to the north polar star, which keeps its place and all the stars turn towards it.' Pole Star is characterized by its stability, which gives it a special significance among the stars.

Rule of law and good governance certainly are of equal importance for all people, for all states and nations, irrespective of their particular histories and traditions. Just like the Pole Star, they cannot be really reached, but rather always remain ideals and aspirations. In the folk narratives the Pole Star often also guides people seeking the way either forward or home.

The Finnish national poem, Kalevala, has been collected on the basis of very old oral tradition. A particular magical artifact, Sampo, which is a source of wealth and happiness figures prominently in Kalevala. It is not quite clear what Sampo actually was. It may have been some kind of a mill. Sampo has been connected with the world order so that it may have got its name from the name of the pillar that was thought to keep the firmament standing. On top of the pillar was the pole-star, like a needle stitch in the firmament. In the mindset of the northern people, the pole-star and the firmament seem to have played an important role. It is highly inspiring to think that the cosmological views also may have had an impact of thinking about

law and governance.

It has been a very wise and foresighted decision of the Academy of Finland and the Chinese Academy of Social Sciences to start cooperation in the field of legal science and to focus especially on issues of rule of law, comparative law, and governance. I was lucky to be able to participate already in the first Sino-Finnish seminar held in Beijing in 2009. Delegates from three Finnish universities had been invited to participate. The outcome of that meeting has been published.

This volume presents the outcomes of the two bilateral colloquia that followed. The 2010 colloquium was held in Helsinki, focusing on a comparison of the models of rule of law between Finland and China. In 2011, we again convened in Beijing, discussing this time matters of rule of law and social governance.

I am very happy that also this time the fruits of the bilateral meeting can be published and that in this way our contributions may reach the broader academic audiences of our respective countries, and even internationally. In spite of our different legal, historical, and political traditions, we have a lot to learn from each other. Personally I believe that imagination is an important aspect of legal thinking. Our imagination is always limited. We need to test our ideas against a variety of models, and experience is a very important aspect of law. Law is also a public good and must be cherished and cultivated as such. Law also must always be practiced in the service of the people.

In the Nordic legal tradition the Instructions that the Christian theologian and lawyer Olaus Petri, a pupil of the famous Martin Luther, formulated almost 500 years ago have served the function of formulating a certain ethos of law. Also they tell about rule of law and good governance in terms of ethics and virtues. He instructs, e. a.:

All the laws have been enacted for the sake of justice and equity and not for fines. For a fine is to punish those who break the law; but the law prefers not to be broken and would willingly go without fines.

Today, law is increasingly looked at in terms of its instrumental values, as means to ends. No doubt that is part of the truth as we increasingly need to regulate the

lives in our societies for various purposes. As scholars we always need to remember that underneath the fast-moving surface of law there are deeper levels which actually strongly contribute to the success also of the instrumental functions of law. Rule of law, democracy, human rights, fundamental rights, good governance, legal and ethical traditions, they all become relevant when we wish to reach a deeper-level understanding of law.

We are very grateful to our Chinese partners for an intensive cooperation with us over the last years. We have seen a rapidly growing interest in this activity on the Finnish side, the last sign of it being that seven Finnish universities and one research institute have in January 2013 jointly established a National Center of Chinese Law and Chinese Legal Culture, coordinated by the University of Helsinki. We wish to provide, for example, for all law students basic knowledge about Chinese law.

The ties between various Finnish and Chinese academic institutions have also been strengthened by way of establishing bilateral cooperation agreement. On the Chinese side, the director of Institute of Law of the Chinese Academy of Social Sciences, professor Li Lin, has been a determined promoter of the Sino-Finnish cooperation. A good start is half way to success. We certainly have had a good start. I would, on behalf of the Finnish legal academia, wish to thank our Chinese partners for the cooperation so far.

Kimmo Nuotio
Dean
Faculty of Law
University of Helsinki

序 言

在孔子的《论语》中我们发现了一些有关法律和治理方面的令人颇感兴趣的言论。例如在该书第二篇中，这位大师说道：“为政以德，譬如北辰，居其所而众星共之。”北辰即北极星，因其稳定而在众星中被赋予了特殊的地位。

法治和良政对于所有人、所有国家和所有民族来说，无论具体的历史和传统如何，无疑都具有同等的重要性。就像北极星永远无法触及一样，法治和良政也永远不可能真正实现，而只是人们的一种理想和渴望。在民间传说中，北极星往往还为人们指引前进或回家的方向。

在基于古老口头传说的芬兰民族史诗《卡莱瓦拉》中，一种名叫“三宝”（*sampo*）、被认为是财富和幸福之源泉的魔法神器占据了显著的地位。我们不知道“三宝”究竟为何物，但是它可能是某种神磨。“三宝”被与世界秩序联系在了一起，因此其名称可能来自一根被认为支撑着苍穹的擎天柱。在这根柱子的顶端就是像缝合苍穹的一个针脚一样的北极星。北极星和苍穹在北欧人的思维模式中扮演着重要的角色。宇宙观也可能影响人们有关法律和治理的思想，这是一个非常发人深省的现象。

芬兰科学院和中国社会科学院所做出的在法律领域开展合作并将合作重点放在法治、比较法和治理等问题上的决定是非常明智和富有远见的。我有幸参加了2009年在北京召开的第一次中芬研讨会。这次研讨会会有3个芬兰大学的代表团应邀参加，其成果已经出版。

本书收录了在此之后召开的两次中芬研讨会的成果：2010年研讨会在赫尔辛基召开，其主题是中芬法治模式的比较；2011年研讨会在北京召开，其主题是法治与社会治理。

我很高兴我们这次研讨会的论文集也将出版，从而使我们两国甚至全

世界的读者都能够分享我们的学术成果。尽管中国和芬兰有着不同的法律、历史和政治传统，但是我们仍然可以从对方学到很多东西。我个人认为，想象力是法律思想的一个重要方面。但是我们的想象力总是受到限制。我们的思想需要接受各种模式的检验，并且经验也是法律的一个重要方面。法律是一种公共利益，并且因此而应该受到珍爱和培养。法律还必须服务于人民。

在北欧法律传统中，著名的基督教神学家兼律师马丁·路德的学生奥劳斯·彼得里（Olaus Petri）在将近 500 年前所作出的教导对于我们法律精神的形成起到了重要的作用。他也是从道德伦理的角度论述法律和良政的：

所有的法律都是出于公正和平等的目的，而非出于罚款的目的而制定的。罚款是为了惩罚那些违反法律的人，而法律不希望自己被违反，因此它也不希望看到任何人被罚款。

如今人们越来越从工具价值观的角度将法律看作实现某种目的工具，这无疑是正确的，因为我们为了达到各种目的而越来越需要对社会生活进行规制。作为学者，我们应该时刻牢记，在瞬息万变的法律表象之下的一些更为深层的东西对于法律的工具性功能的成功实现也是至关重要的。当我们在更深层次上理解法律的时候，法治、民主、人权、基本权利、良政以及法律和道德传统就都具有了相关性。

我们非常感谢我们的中国伙伴们在过去几年中与我们的密切合作。我们看到，芬兰国内对于这一合作的兴趣正在迅速增长，在这方面的一个最新迹象就是：芬兰的 7 个大学和一个研究所在赫尔辛基大学的协调下于 2013 年 1 月共同成立了一个国家级的“中国法律和中国法律文化中心”。该中心的目的之一就是为所有法律专业的学生提供有关中国法律的基本知识。

芬兰和中国的各学术机构还通过达成双边合作协议来加强其相互关系。在中国方面，中国社会科学院法学研究所所长李林教授就是中芬合作的一位坚定的推动者。良好的开端就是成功的一半。毫无疑问，我们的合作已经有了一个良好的开端。对此我要代表芬兰法学界向我们的中国合作伙伴们表示衷心的感谢。

基默·诺迪欧（Kimmo Nuotio）

赫尔辛基大学法学院院长

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