CHINESE PHILOSOPHY AND INTERNATIONAL LAW

Dr. Junwu Pan†

***Abstract*:** China, as a country with a history of as long as more than 5,000 years, has developed its unique way to look at the world. Its traditional philosophy is deeply rooted in its community and exerts a powerful influence upon people's basic thinking and understanding as well as its behaving accordingly. In fact, the close relationship between China's attitude to international law and its philosophy can explain China's certain behaviour patterns at both the domestic and international level.

I. INTRODUCTION

China is a country which has been bathing in its unique philosophy for several thousand years. Even in modern China, the traditional philosophy continues to influence Chinese attitude to the world and the rules governing the world. The unique way to understand the world is characteristic of Chinese envision of international law. As a new growing power, China, based on its philosophy, is making an effort to revise the existing international system for creation of a new international order. Although the Chinese culture is being influenced by the western one, it has not been superseded yet. Accordingly, the Chinese behaviour pattern is still deeply rooted in its culture and philosophy.

II. TRADITIONAL CHINESE PHILOSOPHY

Some three thousand years ago, two philosophical concepts were developed and established in China. One is *Li* (Confucianism) and the other is *Fa* (Legalism). Some scholars compare *Li* and *Fa* to Natural Law and Positive Law respectively.[1] Nonetheless, no proper English equivalent covers all of the features of *Li* and *Fa*. *Li* and *Fa* are the two basic concepts the Chinese have created to understand the diversified social phenomena in their society. Their effects are hidden but very powerful.

Li refers to the use of moral rules to regulate individual behaviour in accordance with natural law. As far as an individual in a society is concerned, *Li* includes all aspects of behaviour and social position ranging from politeness and

† Dr. Junwu Pan, Ph.D. (2008) in Laws, King's College London; Senior Lecturer of international law, Northwest University of Politics and Law, Xi'an, China. The author may be contacted by junwupan@yahoo.com.

[1] *See generally* HI KIM, FUNDAMENTAL, LEGAL, CONCEPTS OF CHINA AND THE WEST: A COMPARATIVE STUDY (Kennikat Press) (1981); D Bodde, *Evidence for 'Laws of Nature' in Chinese Thought*, 20 Harv J Asiatic Stud 709 (1975).

propriety to social status. *Li* establishes unequal relations between people. Based on *Li*, people should know who is the master and who the servant, who is the elder and who the younger, who is the guest and who the host and behave accordingly. *Li* suggests to people their unequal duties and rights when they stay together. *Li* tries to make people internalise the unequal formalised behaviour so that personal desires and cultivation can be properly socialized. Confucius argues that under law, external authorities administer punishments after illegal actions, so people generally behave well without understanding the reasons why they should; whereas under *Li*, patterns of behaviour are supposed to be internalised and to exert their influence before actions are taken, so that people behave properly because they fear shame and want to avoid losing face.[2]

Fa, which is often comparable to "legalism" or "law", is traditionally different from the western concept of law. In ancient China, "law" referred exclusively to criminal law. Any perpetrator should be punished severely as a criminal. So law, to some extent, equaled punishment, and commoners accordingly feared the law and the legal institutions. The only thing people knew was that if they violated the imperial law they would be punished; but they never had a sense that they might use the law to protect their civil interests. This is the way in which "law" in the absence of a sense of civil rights protection was perceived by commoners for more than two thousand years. Anything related to law such as courts was only assumed to deter potential evildoers instead of aiming at the good,[3] which was described in the well-known proverb: "Law is meant for a base person but not for a gentleman."[4] Generally, law in Chinese traditional comprehension is an instrument for dominance and not for the protection of natural rights.

Li is persuasive, preventive and enforced by social sanction, while *Fa* is compulsive, punitive and enforced by legal sanction. Both normative concepts have helped maintain social order and stability. But as far as the traditional relationship between *Li* and *Fa* is concerned, the conclusion drawn from the Chinese past legal practice is that *Li* was believed to be more effective and positive in function than *Fa* and that *Li* ranked above *Fa* in importance. As a result, in ancient China, many criminal and civil cases were decided in accordance with *Li* rather than *Fa*.[5] *Li* was shrined as creating and maintaining

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[2] *Analects of Confucius*, one of the core texts of Confucianism, states in Part II (3): " If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good." The English version of Analects of Confucius is available at http://afpc.asso.fr/wengu/wg/wengu.php?l=Lunyu&no=19 (last visited Nov. 11, 2008).

[3] L Zhiping, *The Past, the Present and the Future of Chinese Law: A Critical Retrospect of A Kind of Culture*, Study of Comparative Law 17, 19-20 (1987).

[4] The Chinese version is that *Fa bei xiao ren, bu fang jun zi*.

[5] For example, a civil case in ancient China can illustrate this practice. In the Qing Dynasty, a widow had a dispute with her deceased husband's cousin, Mr. Sun, over the ownership of a piece of land. After a lawsuit had been brought to the county magistrate, six relatives and friends volunteered to serve as conciliators. The conciliators and disputing parties examined the deeds of the land. They concluded the widow's late husband had mortgaged the disputed land to Mr. Sun. The late husband had never been able to repay the loan. As a result, Mr. Sun took over the land. The conciliators decided that Mr. Sun had the title to the property, but stated that, as uncle of his deceased cousin' s children, Mr. Sun had a moral duty to look after

a harmonious relationship while *Fa* was degraded as disrupting harmony. *Fa* which is not grown out of *Li* can never be a real law. *Fa* just functions as a supplement to *Li*.

III. INTERNATIONAL LAW FROM PERSPECTIVE OF CHINESE PHILOSOPHY

The late Professor Wang Tieya, one of the most distinguished international law scholars and lawyers, advocated an authoritative view of international law, which has been dominating China's theory and practice. In his theory, international law should be treated as a unique legal system which should never be confused with domestic law, although a kind of interactive and supplementary relationship between these two different legal systems exists. International law and domestic law can supplement each other but cannot replace each other.[6] Consequently, China believes that there should be some kind of "international *Li*" existing as the basis for international law.[7]

According to Confucianism, obedience to *Li* will improve the public order and social relationships. In the Chinese view, the priority for international society is to construct a so-called "international *Li*". Actually China has been searching for the "international *Li*" ever since it began to understand international law. What is "international *Li*"? When China realizes that the "international *Li*" is still in the process of formation and that she is living in a world without a father, it naturally regards the world as being in a state of anarchy,[8] and the "international law" that has not grown out of "international *Li*" is no "real law". Consequently, it intends to denounce the international rules that are thought to be unfair and tries to reform international legal systems. According to traditional Chinese ideology, without *Li*, there is no way in which a society can be a harmonious one or one ruled by real law.[9]

Professor Wang Tieya defined international law as "the sum total of principles, rules, regulations and systems which are binding and which mainly

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the widow and her children. In the end, Mr. Sun agreed to transfer the title of the land to the widow. The conciliators reported the result to the county magistrate and requested the suspension of the lawsuit. The Magistrate immediately approved the request. *See* Y SHEN, RESOLUTION OF DISPUTES BETWEEN FOREIGN BANKS AND CHINESE SOVEREIGN BORROWERS: PUBLIC AND PRIVATE INTERNATIONAL LAW ASPECTS 13 (Kluwer Law International) (2001).

[6] On the question of the relationship between international law and municipal law, Wang Tieya and Wei Min, two leading experts in international law, describe like this: "International law and municipal law are two systems of law or one may say that international law is a special system of law which is different from domestic law…. However, because municipal law is enacted by states and international law is enacted through the participation of states, there are close connections between these two systems-mutual infiltration and mutual supplementation. *See* W TIEYA and W MIN (eds), INTERNATIONAL LAW 44 (Law Press, Beijing) (1981).

[7] The Chinese believe that in the domestic society, there exist both *Li* and *Fa* which function simultaneously for a peaceful and orderly society, named as a harmonious society.

[8] Y Zewei, *A Probe into the Relationship between International Order and State Sovereignty*, 6 Falü kexue (Science of Law) 80 (2004).

[9] The Confucian concept of *Li* involves the use of moral rules to regulate behaviour with the universe. *See* Creel, *Legal Institutions and Procedures during the Chou Dynasty*, in J COHEN, R EDWARDS and CHEN (eds), ESSAY ON CHINA'S LEGAL TRADITION 38-9 (Princeton University Press) (1980).

regulate interstate relations."[10] He explained that "while states are subject to the binding force of international law, they are also the makers of international law. Therefore, the basis for the legal effect of international law can only be attributed to states themselves, that is, the will of states."[11] He emphasized that such will is not the arbitrary will of a single state, nor does it refer to the "common will" of states, but rather is an agreement between the will of various states.[12]

His theory about international law represents the Chinese academic authority. According to his theory, international law is expressive of the "reconciled will" of states instead of the "common will". What is the "reconciled will"? What is the difference between the "reconciled will" and the "common will"? No one has given good answers to these basic questions yet. From Professor Wang's emphasis on the interaction between international law and international relations in his teaching and research in international law, it seems that the "reconciled will" refers to the result of interstate struggle during the complicated international relations. In his words, international law is not only a branch of legal science but also an offspring of international relations.[13] Thus, international law keeps changing with the development of international relations. [14] His theory suggests that international relations dominate international law and states' practice. How states settle their disputes, in fact, depends on the international relations, which are political in nature.

According to the Chinese government's statements, international *Li* should serve the common goals of peace, development and cooperation. At the General Debate of the 59th Session of the United Nations General Assembly, the former Chinese Minister of Foreign Affairs Li Zhaoxing stated, "In today's world, peace and development remain the dominant theme of the times. Peace, development and cooperation are the prerequisites for our times… People all over the world are raising their voice in favor of peace, development and cooperation and against war, poverty and confrontation… Peace is the precondition for human development and prosperity." [15] "Without a peaceful and stable international environment, development is out of the question for any country."[16] "It is the fervent aspiration of all peoples to live and develop in a secure and stable environment."[17]

He, on behalf of China, declared that the Chinese Government will always take development as its top agenda item. China stands for peace, development and cooperation, and strives to win peace and development

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[10] *See* Tieya and Min, *supra* Note 6, at 1.
[11] Z Li, *Teaching, Research, and the Dissemination of International Law in China: The Contribution of Wang Tieya*, 31 Can Y B Int'l L 206 (1993).
[12] *Id.*
[13] *Id*, at 193.
[14] *Id.*
[15] Li Zhaoxing, *Peace, Development and Cooperation*, at http://www.un.org/webcast/ga/59/statements/chieng040927.pdf (22 July 2009).
[16] *Id.*
[17] *Id.*

through cooperation.[18]

It is obvious that China is endeavouring to establish "international *Li*" based on the concepts of peace, development and cooperation. Economic development is the core of the system of concepts.

IV. METHODS OF RESOLVING DISPUTES FROM PERSPECTIVE OF CHINESE PHILOSOPHY

Although China established a judicial system very early in history, the prevalence of *Li* encouraged the disputants to resolve their differences by dialogue rather than by adjudication. The Confucian conception of minimum order is characterized by disappearance of litigation.[19] According to Confucianism, the minimum social order shouldn't be achieved by submitting disputes to an appropriate decision-maker, such as a judge. It calls for disappearance of litigation, and instead promotes knowledge of virtue throughout the world. In the Confucian ideal world, a self-perfected person knows the difference between right and wrong. If his claim is spurious or questionable, he will feel too ashamed to raise it.[20] As Confucius put it, "If the people be led by laws, and uniformity is sought to be given to them by punishment, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity is sought to be given to them by the rules of *Li*, they will have the sense of shame, and moreover will become good."[21] Although Confucius felt confident that he could try lawsuits as well as anyone else, he still gave preference to the idea that "what is necessary is to cause the people not to litigate."[22] The traditional Chinese preference for consultation, mediation and conciliation over formal methods of dispute resolution has its origins in the Confucian philosophy, which views social conflicts as shameful aberrations from *Li*, that is, from the natural order of social life.

In Chinese, court (*fayuan*) originally means a place to conduct a severe punishment instead of place to seek justice. Historically, the Chinese had very painful experience with the rule of law and the courts. In ancient China**,** law referred exclusively to criminal law. The word "court" was closely associated with punishing criminals in a harsh way. In addition, the painful experience was strengthened by the principle of collective responsibility, under which the criminal's family was also subject to punishment by exile, enslavement, or castration.[23]

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[18] *Id.*

[19] The Confucian conception of minimum order has three core ideas: (1) absence of unauthorized coercion or violence; (2) disappearance of litigation; and (3) authorized use of force.

[20] FT-s Chen, *The Confucian View of World Order*, 1 Ind Int'l & Comp L Rev 57 (1991).

[21] *Confucian Analects*, Bk. II, Ch. III.

[22] Chapter IV of GREAT LEARNING (Da Xue), one of the Four Books which were selected as a foundational introduction to Confucianism, Commentary. *See* FT-s Chen, *The Confucian View of World Order*, 1 Ind Int'l & Comp L Rev 58 (1991).

[23] J Waley-Cohen, *Collective Responsibility in Qing Criminal Law*, *in* KG TURNER, JV FEINERMAN and RK GUY (eds), THE LIMITS OF THE RULE OF LAW IN CHINA 112-31 (University of

It was common to regard adjudication as a kind of shame and a loss of face. There are many vivid Chinese proverbs related to the general aversion to adjudication, such as "in death avoid hell, in life avoid the law courts," "to enter a court of law is to enter a tiger's mouth," and "it is better to die of starvation than to be a thief; it is better to be vexed to death than to bring a lawsuit," etc. .[24] Even if modern Chinese have some trust in courts and judges, they still give preference to more informal methods of dispute resolution. This partially explains why China remains reluctant to using the International Court of Justice to settle its international disputes.

So, China has been adhered to face-to-face talks for settlement of its territorial and boundary disputes. In 1955, at the Afro-Asian conference which was held at Bandung, Indonesia, the Chinese premier Zhou Enlai issued a pattern of how Beijing resolved its border disputes: 1) Before negotiating a settlement, the disputing parties should maintain the *status quo* and recognize the undefined boundary lines as lines yet to be defined; 2) If one round of negotiations cannot produce any results, further negotiations should be held, and these further negotiations should be comprehensive, i.e. cover an entire border; 3) The disputing parties are supposed to negotiate a new border treaty at last.[25] Obviously, adherence to negotiations is the most prominent feature of this pattern.

Nowadays, adherence to negotiations continues to be a typical feature of China's framework for settlement of its territorial and boundary disputes. The *Code of Conduct in the South China Sea* signed by China and the ASEAN in 2002 states, "the Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, … through friendly consultations and negotiations by sovereign states directly concerned, … ."[26] The *Agreement on Political Guiding Principles for Resolving the Boundary Issue* signed by China and India in 2005 also emphasizes that "the two sides will resolve the boundary question through *peaceful and friendly consultation*."[27] To resolve the dispute concerning the continental shelf/EEZ delimitation in the East China Sea, China has been endeavoring to negotiate a provisional arrangement with Japan pending final settlement.

China's adherence to negotiations and consultations has its roots in its philosophy, where establishing a relationship between the parties is always a top priority in *Li*. However, "relation", which is often replaced by the word "connection", connotes a negative attitude to adjudication. Connection, in Chinese called *guanxi*, particularly emphasizes the informal character to deal

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Washington Press, Seattle/London) (2000).

[24] *See generally* P CHEN, LAW AND JUSTICE: THE LEGAL SYSTEM IN CHINA 2400 B.C.- 1960 A.D., (Dunellen Pub. Co,, New York/London) (1973); *See also* R Nafziger and R Jiafang, *Chinese Methods of Resolving International Trade, Investment, and Maritime Disputes*, 23 Willamette L Rev 624 (1987).

[25] N. Maxwell. *Settlements and Disputes: China's Approach to Territorial Issues* (9 September 2006) Economic and Political Weekly 3874-81.

[26] See Art. 4 at http://www.aseansec.org/13163.htm (03 Mar. 2008).

[27] See R. Walker and K. Renfrew 'China and India Sign Deal to Settle 40-Year Territorial Dispute' (12 Apr. 2005), at http://www.radionetherlands.nl/currentaffairs/region/southasia/CHI050412 (8 Apr. 2008).

with all the issues including disputes between the individuals or groups. Once a relationship has been acknowledged, a special connection is understood as having been established. Consequently some special rules would be applied to the parties who have connections. Today China endeavours to build up some special connections with neighbouring countries in order to employ these special connections to help resolve the territorial and boundary disputes without third party involvement.

V. CONCLUSION

China is working to integrate itself into the international community, economically, politically and legally. During the process, it is inevitable for China to be faced with both problems and opportunities which are actually related to its philosophy. Its traditional conceptions of *Li* and *Fa* represent the Chinese basic philosophy and methodology applied to understanding human society and the rules and principles governing human society. *Li* is superior to *law* and *law* should grow out of *Li*. *Li* and *Fa* should function simultaneously for a peaceful and orderly society, which is often called a harmonious society. *Li* and *Fa* are still the influential factors in its value system. On the Chinese mind, international law and international *Li* are generally inseparable and before the establishment of international *Li*, international law can not be called real law. In that case, priority should be given to the work of establishing or revising *Li* at the international level. That is why China especially emphasizes the importance of the General Assembly of the United Nations in developing international law.