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## Tianxia, or another Grossraum? U.S.–China Competition and Paradigm Change in the International Legal Order

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*Tianxia*, or another *Grossraum*?  
U.S.–China Competition and Paradigm Change in the  
International Legal Order  
Tokujin Matsudaira\*

**Abstract**

In this Essay, I try to provide some clarification on the concept of *Tianxia* from the perspectives of both classical Chinese philosophy and constitutional theory, which Tom Ginsburg nominated as the source of authoritarian international law. My observation is that a paradigm shift is occurring in the international legal order. *Tianxia* designates the ideal relationships between states in the Chinese classics. And in the new paradigm, *Tianxia* is expected to integrate the international society. In that sense, I take *Tianxia* as a regime-neutral ideotype between democratic/Western and authoritarian/non-Western legal order. However, Chinese engagement with international law has shown a tendency towards realism since 1949, and at the root of that realism is Western nationalism. In Carl Schmitt's theory, the latter will finally bring about the plurality of spatial legal order (*Grossraum*), which gives birth to national and regional legal systems. Accordingly, it is still too early to tell whether China is willing take advantage of the transition to *Tianxia*.

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\* Professor, Kanagawa University Faculty of Law. Thanks to Professor Tom Ginsburg for inviting me to join the 2022 *CJIL* Symposium. Special thanks to Professor Fu Pei-Jung of the National Taiwan University Department of Philosophy, who is also a well-known expert on Chinese philosophy, for his guidance in developing this topic; and Professor Yasuo Hasebe of Waseda University Law School, one of distinguished constitutional scholars in Japan, for sharing his thoughts on reading Chinese classics. I am also indebted to the *CJIL* editors for their efforts in bringing this Essay to publication.

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## I. INTRODUCTION

In *Democracies and International Law*, Tom Ginsburg again shows his ability to craft general theories using his insight into the diversity of legal order.<sup>1</sup> My comments will focus on Chapter 6 of this book because it contains the essence of Ginsburg's comparative jurisprudence. In this Essay, I try to provide some clarification on the concept of *Tianxia* (天下) from the perspectives of both classical Chinese philosophy and constitutional theory, which Ginsburg nominated as the source of authoritarian international law.<sup>2</sup>

My observation is that a paradigm shift is occurring in the international legal order. In that sense, I take *Tianxia* as a regime-neutral ideotype between democratic/Western and authoritarian/non-Western international law. In this new paradigm, *Tianxia*, as *res publica*, is the continuous realization of appropriate and legitimate relationships between states. Compliance with legal norms by acting in good faith and mutual dialogue is also an integral part of *Tianxia*. However, a reasonable observer should be cautious not to rush into replacing *realpolitik* with this ideotype. The Chinese engagement with international law has shown a tendency towards realism since 1949, and at the root of that realism is the *fin de siècle* nationalism that haunted Europe and thus was essentially Western. Accordingly, it is still too early to tell whether China will accept the transition to *Tianxia*.

This short Essay is organized as follows: Section II outlines the characteristics of Ginsburg's comparative jurisprudence as I read it in Chapter 6. Section III reveals the concept of *Tianxia* as a non-Western, regime-neutral ideotype mediating between authoritarianism and democracy. Section IV explains the historical background behind China's choice of a hybrid approach that combines an emphasis on formal legality with realism. In conclusion, Section V emphasizes the need for openness and competitiveness in the interpretation of *Tianxia*.

## II. A GUIDANCE OF CONFUCIAN INTERNATIONAL LEGAL ORDER?

I found Chapter 6 fascinating for the following three points. First, Ginsburg is always willing to leave space for legal systems considered heterogeneous or undemocratic.<sup>3</sup> He recognizes the possibility of legal orders based on non-Western or authoritarian values.<sup>4</sup> Such an attitude is rare, considering the fact that mainstream lawyers in Japan, South Korea, and Taiwan tend to blame

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<sup>1</sup> See generally TOM GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW* (2021).

<sup>2</sup> See *id.* at 248–52.

<sup>3</sup> See *id.* at 186, 245.

<sup>4</sup> See *id.*

traditional culture and institutions for impeding democracy and the rule of law.<sup>5</sup> In fact, building a civil society based on universal values has long been the task of constitutionalism as a common standard in this region.<sup>6</sup> For these countries, the term “political pluralism” has not included non-Western political systems of the states from its earliest conception.<sup>7</sup>

Second, Ginsburg’s recognition of the equality of conflicting values does not imply a denial of the superiority of democratic legal order.<sup>8</sup> The endurance of constitutional democracy is still a premise of his theory.<sup>9</sup> Nevertheless, he and his colleagues now face the fact that democracy is on the decline with the rise of revisionist movements, which made Donald Trump the U.S. president.<sup>10</sup> This reminds me of the old Buddhist wisdom expressed in *Heike Monogatari*, one of the masterpieces of Japanese classics: “[T]he proud ones are but for a moment, like an evening dream in springtime. The mighty are destroyed at the last, they are but as the dust before the wind.”<sup>11</sup> There is no reason to believe that only democracy is immune from the law of impermanence.<sup>12</sup>

Third, Ginsburg depicts the conflict between authoritarian and democratic international law through the struggle for hegemony between the U.S. and China, and tries to treat the “Eastphalia” model on an equal basis.<sup>13</sup> This reminds me that Professor Susumu Yabuki, an expert on the Chinese Communist Party, has used the term “Chimerica” to describe the forced mutual dependence between the U.S. and China.<sup>14</sup> He argues that Francis Fukuyama was wrong to declare the end of world history in the Hegelian sense, in light of the fact that China has built a version of socialism (and authoritarianism) that is almost identical to capitalism

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<sup>5</sup> See Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805 (2011) (holding fast to the idea of “civil society” that overcomes the Asian particularism, while acknowledging the particularities of each Asian country); Takao Suami, *Global Constitutionalism for East Asia: Its Potential to Promote Constitutional Principles*, in GLOBAL CONSTITUTIONALISM FROM EUROPEAN AND EAST ASIAN PERSPECTIVES 533 (Takao Suami et al. eds., 2018) (suggesting that constitutionalism as global standard, which developed in Western democracies, enhances the effectiveness of constitutional rights in tension with traditional values in East Asian countries).

<sup>6</sup> See Yoichi Higuchi, *The 1946 Constitution: Its Meaning in the Worldwide Development of Constitutionalism*, in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 1–8 (Yoichi Higuchi ed., 2001).

<sup>7</sup> See generally KUNG CHUANG HSIAO, *POLITICAL PLURALISM* (Routledge 2000) (1927).

<sup>8</sup> See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* (2009).

<sup>9</sup> See GINSBURG, *supra* note 1, at 39–41.

<sup>10</sup> See GINSBURG, *supra* note 1, at 289–91.

<sup>11</sup> THE TALE OF THE HEIKE 3 (Royall Tyler trans., Penguin Books 2014).

<sup>12</sup> See DAVID RUNCIMAN, *HOW DEMOCRACY ENDS* 174–76, 207 (2018).

<sup>13</sup> See GINSBURG, *supra* note 1, at 245–46.

<sup>14</sup> Susumu Yabuki, *U.S.–China Collusion and the Way Forward for Japan*, EAST ASIA F. (Jun. 30, 2012), <https://perma.cc/WAC9-E4MZ>.

(and representative democracy).<sup>15</sup> Even former U.S. Vice President Dick Cheney, known for his hawkish role in leading the Bush administration's War on Terror, acknowledged that "Chinese power will be a long-term feature of events," calling for "a genuine efforts to deepen the dialogue" between the U.S. and China.<sup>16</sup> But for "Western" observers, it is not easy to recognize this reality without fastening a stigma upon or encouraging their ideological rival. China must be the Dark Lord if not Master Yoda the Wise in the film *Star Wars*.<sup>17</sup>

### III. *TIANXIA* AS IDEOTYPE

#### A. Confucian Order Is Not Necessarily Authoritarian

In Ginsburg's theory, *Tianxia* is placed between democratic international law and its authoritarian counterpart as a regime-neutral ideotype.<sup>18</sup> I agree with his classification. To be clear, some scholars argue that Confucianism gave birth to an East Asian authoritarianism, as exemplified by the sacred emperor, *Shinsei Tenno*, who enabled the prewar militarism and postwar right-wing movements in Japan.<sup>19</sup> Others point out that Chinese classical thought may be responsible for facilitating intellectuals' acceptance of communism due to its hostility to private property and inequality.<sup>20</sup> However, one will find there can be conflicting explanations depending on how they read it. Confucian texts, like a written constitution, are subject to interpretation. Thus, their meaning can only be determined through a process of open debate. For the People's Republic of China (PRC) which has been negative to the competitiveness of deliberative

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<sup>15</sup> See SUSUMU YABUKI, CHUGOKU NO JIDAI NO KOEKATA [HOW TO PASS THROUGH THE AGE OF CHINA] (2020).

<sup>16</sup> DICK CHENEY & LIZ CHENEY, EXCEPTIONAL: WHY THE WORLD NEEDS A POWERFUL AMERICA 249 (2015).

<sup>17</sup> See JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 361, 368–70 (2014) (arguing that both a Chinese regional hegemony in Asia and U.S.-China war are inevitable); STATE COUNCIL INFO. OFF. PEOPLE'S REPUBLIC CHINA, CHINA: DEMOCRACY THAT WORKS 45–46 (2021), [http://english.scio.gov.cn/whitepapers/2021-12/04/content\\_77908921.htm](http://english.scio.gov.cn/whitepapers/2021-12/04/content_77908921.htm) (declaring that "China did not duplicate Western models of democracy, but created its own," and that the Chinese model is "most encouraging to developing countries and greatly enhances their confidence in developing their own democracy"). Compare with KISHORE MAHBUBANI, HAS CHINA WON?: THE CHINESE CHALLENGE TO AMERICAN PRIMACY 1–10 (2021).

<sup>18</sup> See GINSBURG, *supra* note 1, at 252.

<sup>19</sup> See SUSUMU SHIMAZONO, SHINSEI-TENNO NO YUKUE [THE FUTURE OF THE SACRED EMPEROR] (2019); Susumu Shimazono, *State Shinto and Emperor Veneration*, in THE EMPERORS OF MODERN JAPAN 53, 61–66 (Ben-Ami Shillony ed., 2008) (discussing how the Japanese Zhu Xi school of Confucianism reshaped *Kokutai*, the ethno-nationalistic form of government in Japan).

<sup>20</sup> See YÜ YING-SHIH, FROM RURAL CHINA TO THE IVY LEAGUE: REMINISCENCES OF TRANSFORMATIONS IN MODERN CHINESE HISTORY 54–59 (Josephine Chiu-Duke & Michael S. Duke trans., 2021).

interpretation, using the Chinese classics to legitimize the authoritarian international order will be a double-edged sword.

Confucianism posits a fictional godhead called *Tian* (天).<sup>21</sup> This transcendental deity created rulers and teachers to care for the people, but even rulers are doomed to be overthrown if they disobey the mandate of heaven (*Tianming*) given to them.<sup>22</sup> If focusing only on functionality, this is not so different from modern democracy, where the elected leaders and public intellectuals stand between those who govern and those who are governed. Confucius and Mencius also left behind statements that are friendly to modern democracy and individual dignity. Confucius transformed the *Tianming*, which had been monopolized by the monarch, into something that is for everyone.<sup>23</sup> Mencius explicitly stated that “when a ruler looks upon his subjects as though they were straw to strew over mud, the subjects look upon the ruler as a thieving enemy.”<sup>24</sup> Not to mention the fact Mencius was shunned by authorities because he suggested emperors and princes who mistreat their people be dethroned and even executed,<sup>25</sup> thus making him comparable to the *Monarchomachs* in the Western tradition.<sup>26</sup>

## B. *Tianxia* is Regime-Neutral

### 1. *Tianxia* is not immutable

*Tianxia* is a political order that imitates nature which stems from a transcendental *Tian* or *Tao*. Laozi stated:

Man follows the ways of the Earth.  
The Earth follows the ways of Heaven,  
Heaven follows the ways of Tao,  
Tao follows its own ways.<sup>27</sup>

In ancient Greek political philosophy, the harmony between *nomos*, which is human-crafted law and tradition, and *phusis*, which is the state of nature that logically precedes *nomos*, can be maintained as long as the former controls the

<sup>21</sup> See Pei-Jung Fu, *The Concept of 'T'ien' in Ancient China: With Special Emphasis on Confucianism* (1984) (Ph.D. dissertation, Yale University) (on file with author).

<sup>22</sup> See Shang SHU, *Tài shì* 1:1, CHINESE TEXT PROJECT, <https://ctext.org/shang-shu/great-declaration-i> (last visited April 29, 2022).

<sup>23</sup> 2 PEI-JUNG FU, ZHE XUE YU REN SHENG [PHILOSOPHY AND HUMAN LIFE] 69, 85 (2018).

<sup>24</sup> ROBERT ENO, MENCIOUS: A TEACHING TRANSLATION 80 (2016), <https://perma.cc/B8Q6-9E3S>.

<sup>25</sup> See *id.* at 36.

<sup>26</sup> The Monarchomachs were Protestant and Catholic thinkers who opposed monarchy in the 16<sup>th</sup> and 17<sup>th</sup> century. Later, their theories served to legitimize the modern bourgeois-democratic revolution that called for overthrowing royal tyranny. See Shannon Brincat, ‘Death to Tyrants:’ *The Political Philosophy of Tyrannicide - Part I*, 4 J. INT’L POL. THEORY 212, 213-15 (2008).

<sup>27</sup> LAO TZU, TAO TE CHING, ch. 25 (John C. H. Wu trans., 1961), <https://perma.cc/F8BH-JNE3>.

latter.<sup>28</sup> But in the Chinese tradition, nothing under heaven can go against *Tian* or *Tao*. Since both the states and *Tianxia* are transcendent, their rise and fall cannot be stopped by human will. As I Ching says:

[The ancestors of Chinese] were divine in the transformations they wrought, so that the people were content. When one change had run its course, they altered. (Through alternation they achieved continuity.) Through continuity they achieved duration.<sup>29</sup>

This change does not prejudice any political system, including democracy and authoritarianism.

## 2. Pacifism and authoritarianism

On the other hand, the philosophy of *Tianxia* rejects the Rousseauian-Schmittian state of nature that transforms the political character of belligerent individuals into a state of war between states. Surely the transcendental godhead or the *tao* that gives birth to *Tianxia* does not follow Article 9 of the Japanese constitution, but it is war-averse anyway.<sup>30</sup> Laozi emphasized the importance of winning *Tianxia* without striving.<sup>31</sup> Mencius argued that only one who has no pleasure in killing can unite *Tianxia*.<sup>32</sup> Under the Confucian international order, the maintenance of peace should be achieved through the rule of rites, which is highly hierarchical.<sup>33</sup> Small states should respect big states, and big states should respond to defiant small states not with anger, meaning military suppression, but with reserve, meaning diplomatic pressure.<sup>34</sup> The Taoist, based on a realist perspective, went further to suggest that the hegemon lower itself before small states in order to win them over.<sup>35</sup> In this respect, it cannot be denied that *Tianxia* does have the effect of benefiting the authoritarian international law since it presumes an order of inequality.

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<sup>28</sup> See *Nomos and Physis*, ENCYCLOPEDIA.COM, <https://perma.cc/9XX3-CWMA>; JACQUES RANCIÈRE, DISAGREEMENT: POLITICS AND PHILOSOPHY 68–70 (Julie Rose trans., 1999) (1995).

<sup>29</sup> I CHING, Xi Ci 2:2. See RICHARD WILHELM, THE I CHING OR BOOK OF CHANGES 331–32 (Cary F. Baynes trans., 3d ed. 1967) (1950).

<sup>30</sup> FU, *supra* note 23, at 141, 169 (arguing that both Confucian humanism and Taoism take war as foolish and self-destructive).

<sup>31</sup> Lao Tzu, TAO TE CHING, ch. 57 (Gia-fu Feng & Jane English trans., 1989). Cf. *supra* note 24, at ch. 57 (translated as “[W]in the world by letting alone”).

<sup>32</sup> See ENO, *supra* note 24, at 23–24.

<sup>33</sup> See generally Yang Zewei, *Western International Law and China's Confucianism in the 19<sup>th</sup> Century: Collision and Integration*, 13 J. HIST. INT'L L. 285 (2011).

<sup>34</sup> I CHING, Hexagram 33 (Tun). See WILHELM, *supra* note 29, at 550.

<sup>35</sup> See Tzu, *supra* note 31, at ch. 61.



### 3. Functional equivalent of democratic international order

Most importantly, *Tianxia* is a public sphere or *res publica* that subjugates hegemonic states. *The Book of Rites* prescribes that a public and common spirit should rule *Tianxia*.<sup>36</sup> Laozi noted that *Tianxia* disfavors rulers who define themselves in the first person singular.<sup>37</sup> In short, *Tianxia* can be understood as the organization of common good at the international level, which refers to the realization of proper relations between states.<sup>38</sup> By rephrasing Rousseau's famous formulation about social inequality, a small state in the Westphalian model, like a human being in the state of society, is "born free and everywhere he is in chains."<sup>39</sup> In the *Tianxia* model, however, both the hegemon and other states enjoy relative space for freedom and dignity so long as they are considerate of each other's position.<sup>40</sup> Furthermore, in addition to the bilateral dialogue between states mentioned in this chapter, complying with moral and legal norms is also essential to maintain appropriate and legitimate relations between states. Under *Tianxia* of the 21st century, these norms will naturally include democratic approval of *Tianxia*-friendly rites and laws in the sense that hegemonic states need support from mid-sized states.

## IV. THE CHINESE REALISM

### A. Antithesis against the American Globalism

The old Chinese Empire, especially that of the Ming Dynasty (1368–1644) from the 15th century onward and the Qing Dynasty (1644–1911), was introverted and uninterested in a global international order beyond its neighborhood.<sup>41</sup> It can be said that the two dynastic empires, which both saw themselves as self-contained systems, were closer to the classic Taoist vision of *Tianxia* expressed in Zhuangzi: "When the springs dry up and the fish are left stranded on the ground, they spew one another with moisture and wet one another down with spit—but it would be much better if they could forget one another in the rivers and lakes."<sup>42</sup> In Taoist view, the endurance of *Tianxia* depends on states which are self-sufficient and indifferent to each other.

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<sup>36</sup> See THE BOOK OF RITES (LI JI), ch. 9, ¶ 1 (James Legge, trans., 1885), <https://perma.cc/ES4B-TFHJ>.

<sup>37</sup> See TZU, *supra* note 31, at ch. 42.

<sup>38</sup> See Nele Noesselt, *Chinese Visions of World Order: Tianxia, Culture, and World Politics*, 234 CHINA Q. 571 (2018).

<sup>39</sup> JOHN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 3 (G.D.H. Cole trans., 2008) (1762).

<sup>40</sup> See WILHELM, *supra* note 29, at 551–52.

<sup>41</sup> See RAY HUANG, CHINA: A MACRO HISTORY 169, 204 (1997).

<sup>42</sup> ZHUANGZI, THE COMPLETE WORKS OF ZHUANGZI 44 (Burton Watson trans., 2013) (1893).

However, Communist China could not have been indifferent to the international order from its founding. The PRC participated in the Bandung Conference of 1956, in which the Chinese leaders confirmed China's basic policies of honoring the principles of sovereignty and non-interference in internal affairs.<sup>43</sup> From 1950 to 1953, China fought the U.S. in the Korean War. In the 1960s, China fought battles with India and the Soviet Union in territorial disputes, which eventually led China toward a rapprochement with the U.S.<sup>44</sup> In 1971, with the support of African nations, China was reinstated as a permanent member of the U.N. Security Council, and in the following year it reached historic settlements with the U.S. and Japan by restoring diplomatic relations and mutual cooperation.<sup>45</sup> China, by necessity, became one of the fish on land.

On the other hand, the world is not unitary by nature, but multipolar. For China and other non-allied states, sovereignty and non-interference remain essential preconditions for peaceful coexistence. Mao Zedong wrote a poem about this situation, using the metaphor of the Kunlun Mountains:

Kunlun, you don't need all that height or snow.  
If I could lean on heaven, grab my sword,  
and cut you in three parts,  
I would send one to Europe,  
one to America,  
and keep one part herein China  
that the world have peace  
and the globe share the same heat and ice.<sup>46</sup>

In his 1962 book *Theory of the Partisan*, Carl Schmitt cited this poem as highlighting the pluralistic character of the international order, and as an antithesis to the American "One World."<sup>47</sup> He saw China as a spatial legal order (*Grossraum*) that was defending itself from the U.S. globalism.<sup>48</sup> However, this does not mean that the German theorist had foreseen a Chinese renaissance of *Tianxia*. In his previous book *On the Three Types of Juristic Thought*, Schmitt had distinguished the spatial normative order that bears legal institutions and cultures from two other

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<sup>43</sup> See generally Roland Burke, *The Compelling Dialogue of Freedom: Human Rights at the Bandung Conference*, 28 HUM. RTS. Q. 947 (2006).

<sup>44</sup> See YABUKI, *supra* note 15, at 55–56 (pointing out that it is the territorial dispute with the Soviet Union which pushed China to embrace its old enemy, the U.S., and that Mao's radical shift to realism disillusioned Japan's nationalistic left-wing who had endorsed the Chinese struggle against imperialism).

<sup>45</sup> See MICHAEL SCHALLER, *ALTERED STATES: THE UNITED STATES AND JAPAN SINCE THE OCCUPATION* 243–47 (1997).

<sup>46</sup> MAO ZEDONG, *POEMS OF MAO ZEDONG* 67 (Willis Barnstone trans., 2008) (1935).

<sup>47</sup> See CARL SCHMITT, *THEORY OF THE PARTISAN* 59 (G.L. Ulmen trans., 2007) (1962).

<sup>48</sup> See *id.* at 58.

ideotypes—judicial rulings and political decisions within a state.<sup>49</sup> Moreover, the *Grossraum* in Schmitt’s theory is essentially Western because it stems from the Anglo-American reconstruction of the Westphalian international law, which Schmitt described as “European Public Law” (*Jus Publicum Europaeum*).<sup>50</sup> Thus the Chinese *Grossraum* is very different from *Tianxia*.

Sixty years later, as Ginsburg describes, China has become a hegemon along with the U.S.<sup>51</sup> At least on the surface, the Chinese government has accepted existing international law as a common standard. Xi Jinping is selling his proposals for a renewed international order based on consensus and mutual cooperation, with projects such as the “Community of Common Destiny” and the Belt and Road Initiative.<sup>52</sup> In the ongoing Russia–Ukraine war, Chinese officials have relied on the U.N. Charter and justify their preference on neutrality and peace talks by reiterating that “the sovereignty and territorial integrity of all countries should be respected”.<sup>53</sup> However, it remains to be seen whether this is another version of *Grossraum* or instead a grand project to revive *Tianxia* that matches the pluralistic realities of the modern world.<sup>54</sup>

## B. The Japanese Impact

In this chapter, Ginsburg introduces China’s practice of authoritarian international law based on soft law and formalistic positivism.<sup>55</sup> However, these practices have so far given no indication that China is moving to change the paradigm of the international legal order. Rather, China’s adoption of nation-building and international law is essentially Western in its adherence to the infallibility of the nation state. China also owes much of its development to the reception of international law by Japan during the Meiji period (1868–1912).<sup>56</sup> As

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<sup>49</sup> See CARL SCHMITT, ON THE THREE TYPES OF JURISTIC THOUGHT (Joseph W. Bendersky trans., 2004) (1934).

<sup>50</sup> See CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF *JUS PUBLICUM EUROPAEUM* 140, 351–56 (G. L. Ulmen trans., 2006) (1950).

<sup>51</sup> GINSBURG, *supra* note 1, at 240, 245.

<sup>52</sup> See Erping Li, *The Contribution of the Belt and Road Initiative to the World’s Right to Development*, 15 J. HUM. RTS. 454 (2016); Guangjin Lu, *Contemporary China’s Human Rights Development to the World*, 16 J. HUM. RTS. 110, 112 (2017).

<sup>53</sup> Wang Yi Expounds China’s Five-Point Position on the Current Ukraine Issue, MINISTRY FOREIGN AFFS. PEOPLE’S REPUBLIC CHINA (Feb. 26, 2022), <https://perma.cc/YJ2V-VA39>.

<sup>54</sup> See Ryan Martínez Mitchell, *Towards an “Asian Faction” in International Law? On Third Worldism and Contingent Eurocentrism Since the Second Hague Conference of 1907*, HARV. INT’L L.J. ONLINE, <https://perma.cc/75NC-5YTR>.

<sup>55</sup> See GINSBURG, *supra* note 1, at 267, 280.

<sup>56</sup> See Hiroshi Watanabe & Linus Recht, *Alexis de Tocqueville and Three Revolutions: France (1789–), Japan (1867–), China (1911–)*, 17 INT’L J. ASIAN STUD. 163, 175–76 (2020) (arguing that the ruling class

famous writer Ryōtarō Shiba pointed out, Japan contributed greatly to the dismantling of the tribute system in East Asia, transforming the ambiguous *Tianxia* into the specified *dominium* and *imperium* that constitute modern state sovereignty.<sup>57</sup> With what Japanese historian Shinichi Yamamuro calls “the Japanese impact,” China decided to start Westphalian nation-building.<sup>58</sup>

But Chinese wisdom cautions that “past experience, if not forgotten, is a guide for the future.”<sup>59</sup> The Meiji government used international law to meld the Ryukyu Kingdom—now Okinawa—and the Ainu tribes in Hokkaido into its territory, and to colonize the Korean Peninsula and Taiwan.<sup>60</sup> Later, between 1931 and 1945, Japan even tried to develop a kind of authoritarian international law—known as the “Greater East Asia Co-Prosperity Sphere (GEACPS)” —to justify its invasion of China and its role in the Asia-Pacific War.<sup>61</sup> The “Chinese” characteristics of authoritarian international law can also be found in prewar Japan. The first characteristic is the emphasis on historical title in territorial disputes. The second is holding fast to the political oneness of the nation state—what Schmitt called *politische Einbeit*<sup>62</sup>—and legal assimilationism. The third is using coercive political and economic soft power in relation to the outlying areas of the homeland.<sup>63</sup> In Japan’s case, however, except in times of the self-deceptive,

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in Edo Japan was the samurai, who understood more about the importance of the legal reasoning in the modern nation building than the Chinese mandarin); SHINICHI YAMAMURO, *AJIA NO SHISO SHIMYAKU* [HISTORY OF THOUGHT IN THE ASIAN CONTEXT] 134-37 (2017) (outlining the reception of Western law by the Chinese elite through legal education in Japan).

<sup>57</sup> See generally RYŌTARŌ SHIBA, *TAIWAN KIKŌ* [A JOURNEY TO TAIWAN] (1994).

<sup>58</sup> See generally SHINICHI YAMAMURO, *NICHIRO-SENSO NO SEIKI* [THE CENTURY OF RUSSO-JAPANESE WAR] (2005).

<sup>59</sup> The Chinese saying derives from the classic *Zhan Guo Ce* (Strategies of the Warring States). See CHAN-KUO TS’E 284 (J. I. Crump, Jr. trans., 1970) (translated as “Because we do not forget what has happened in the past, we have instructions for the present.”). It is often quoted by Chinese and South Korean officials as a remonstrance against Japan’s revisionism on history of invasive war and colonialism. See Arif Dirlik, “Past Experience, If Not Forgotten, Is a Guide for the Future”; or, *What Is in a Text? The Politics of History in Chinese-Japanese Relations*, 18 *JAPAN IN THE WORLD* 29–30 (1991).

<sup>60</sup> See, e.g., Huanxin Luo, *Territorial Status and Self-Determination of the Ryukyu Islands*, 2019 *CHINA OCEANS L. REV.* 28 (2019); Tristan R. Grunow et al., *Hokkaidō 150: Settler Colonialism and Indigeneity in Modern Japan and Beyond*, 51 *CRIT. ASIAN STUD.* 597 (2019); Eiji Oguma, *THE BOUNDARIES OF ‘THE JAPANESE’: VOLUME 2: KOREA, TAIWAN AND THE AINU 1868–1945* (Leonie R. Stickland trans., 2017).

<sup>61</sup> Urs Matthias Zachmann, *The Reception and Use of International Law in Modern Japan, 1853–1945*, 37 *ZJAPANR/J. JAPAN L.* 109, 127–32 (2014).

<sup>62</sup> CARL SCHMITT, *CONSTITUTIONAL THEORY* 211 (Jeffrey Seitzer trans., 2008) (1928) (arguing that a homogenous nation state “cannot recognize a status internal to its own that is inalterably prior to or superior to it, the state, and that, therefore, has a public law character with rights equal to the state”); CARL SCHMITT, *DER BEGRIFF DES POLITISCHEN* 54–58 (7th ed. 2002) (1927).

<sup>63</sup> See OGUMA, *supra* note 60, at 41, 89.

hypocritical GEACPS and ultra-nationalism, this country has been generally relying on Western international law to pursue its national interests.<sup>64</sup>

### C. Limits of Chinese Realism

However, unless there is a paradigm shift in the international order, the Chinese approach of soft law without the backing of soft power is unlikely to go well. Without a shared schema of meaning—Hans Kelsen’s conception of *Deutungsschema*—for the changing international legal order,<sup>65</sup> China’s claim of anti-imperialism will sound like the excuse of a newcomer imperialist who arrived late to the same table and complained that there is nothing left for him. China’s “*Wolf Warrior* diplomacy” and provocative tweets by Chinese netizens who support it are provoking more antipathy toward China, especially among the younger generation in East Asian countries.<sup>66</sup> Any kind of Sinophobia linked to racism should not be tolerated, but Laozi’s witty words should be also remembered in term of hegemonic power game:

[A] mighty army tends to fall by its own weight,  
Just as dry wood is ready for the axe.  
The mighty and great will be laid low;  
The humble and weak will be exalted.<sup>67</sup>

Moreover, the Chinese hybrid approach will fail to achieve true integration not only with Taiwan, which increasingly relies on the Westphalian rules of the game to resist China, but also with Hong Kong. Hong Kong is a cosmopolitan city where both Chinese law and common law are in force, and foreign residents are guaranteed certain political rights.<sup>68</sup> China has promised to maintain the autonomy of Hong Kong in the HK Basic Law.<sup>69</sup> Needless to say, establishing a “special administrative region” in a centralized state is equal to the creation of dominion, or self-governing territory under Western colonial law. But since China

<sup>64</sup> See generally Han Sang-hee, *Yukichi Fukuzawa (1835–1901): Revisiting Fukuzawa from a Comparative Perspective*, 56 JAPANESE Y.B. INT’L L. 37 (2013). See also Shigeru Oda, *The Normalization of Relations between Japan and the Republic of Korea*, 61 AM. J. INT’L L. 35, 40-41 (1967) (taking an intellectual and legal-positivist approach that enabled Japan to settle the issue of rebuilding an equal state-to-state relationship with Republic of Korea, while excluding the issue of Japan’s colonial responsibility from the negotiation table).

<sup>65</sup> See generally HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., 1967) (1960).

<sup>66</sup> Oiwan Lam, *Chinese Netizens Rebrand Xi Jinping’s International Relations Strategy as ‘Wolf Warrior’ Style Diplomacy*, GLOB. VOICES (July 22, 2020), <https://perma.cc/N6QT-32SB>.

<sup>67</sup> TZU, *supra* note 27, at ch. 76.

<sup>68</sup> See generally Eric C. Ip, *The Politics of Constitutional Common Law in Hong Kong under Chinese Sovereignty*, 25 WASH. INT’L L.J. 565 (2016).

<sup>69</sup> See XIANGGANG JIBEN FA art. 2 (H.K.) (authorizing Hong Kong “to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law”).

has been rejecting any attempts to justify the status quo through colonial jurisprudence, the inclusiveness of *Tianxia* as a legal order may serve as a better solution to the current deadlock.<sup>70</sup>

The Chinese philosophy that guides *Tianxia* is attractive because of its transcendental character. Both Confucianism and Taoism contain a cool-headed reasoning that throws off even the great civilization to which they contributed. An epigram in I Ching warns that what was built up out of the Earth eventually falls back into it.<sup>71</sup> The Taoist thinkers estimated China, compared with the space between the four seas, to be “like one tiny grain in a great storehouse.”<sup>72</sup> However, as mentioned above, the nation-building movement that propelled China to regional hegemony is essentially Westphalian, and it may continue to dominate the emerging public opinion in Chinese society.<sup>73</sup> The possibility of *Tianxia*, therefore, will logically depend on how much the Chinese elite are aware of the ongoing paradigm shift and China’s interest in it.

## V. CONCLUSION

Finally, I conclude with an anecdote about Martin Heidegger and his unfinished project of translating Laozi.<sup>74</sup> In 1946, while living in seclusion, the disgraced German philosopher met Shih-Yi Hsiao, who taught Chinese at the University of Freiburg. They quickly bonded over Laozi, and then began to collaborate on a German translation of the Tao Te Ching. However, the two had a series of clashes over how to translate Laozi and parted ways after translating a small part of the book. Heidegger shouted at Hsiao, “you don’t understand Laozi,” to which the Chinese scholar replied, “you don’t understand Chinese.”<sup>75</sup> When they split, Heidegger asked Hsiao to handwrite two sentences in Chapter 15 of Tao Te Ching, which he had on display in his home:<sup>76</sup>

And yet who else could quietly and gradually evolve from the muddy to the clear?

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<sup>70</sup> See generally Yi-Hua Jiang, *Confucian Political Theory in Contemporary China*, 21 ANN. REV. POL. SCI. 155 (2018).

<sup>71</sup> I CHING, Hexagram 11(Tai). See JACK M. BALKIN, THE LAWS OF CHANGE: I CHING AND THE PHILOSOPHY OF LIFE 199 (2009).

<sup>72</sup> ZHUANGZI, *supra* note 42, at 127.

<sup>73</sup> See, e.g., Siru Chen, *How Chinese Fans Enforce Chinese Nationalism on the World*, DIPLOMAT (May 8, 2021), <https://perma.cc/QFK7-MVG3>.

<sup>74</sup> See REINHARD MAY, HEIDEGGER’S HIDDEN SOURCES: EAST ASIAN INFLUENCES ON HIS WORK 1–7 (Graham Parkes trans., 1996) (1989).

<sup>75</sup> Paul Shih-Yi Hsiao, *Wir trafen uns am Holzmarktplatz*, in ERINNERUNG AN MARTIN HEIDEGGER 127 (Gunther Nseke ed. 1977).

<sup>76</sup> See *id.*

Who else could slowly but steadily move from the inert to the living?<sup>77</sup>

The two sentences indicate that the kind of transcendence that Heidegger was looking for may be something impersonal and undogmatic.<sup>78</sup> Both Westphalia and Eastphalia reflect a type of mindset for people and nations to construe the transcendental. As I Ching stated, “[t]hey all come to the same issue, though by different paths.”<sup>79</sup> Thus the hegemon can only maintain its status by following the ways of transcendence that govern all under heaven. *Tianxia*, as *res publica*, is the continuously renewed expression of appropriate and legitimate relationships between states. Compliance with legal norms through acting in good faith and mutual dialogue is also an integral part of it. Ginsburg points out that the true basis of international relations in the *Tianxia* model is striving for harmony.<sup>80</sup> In my opinion, this will inevitably require that more interested parties and wise persons in the world participate in the formative process of the new paradigm.

Both Hegel and Francis Fukuyama made the fatal error of excluding the non-Western civilization from world history.<sup>81</sup> The new paradigm of international law should be determined not to repeat their mistake. If Jack Balkin can publish a commentary on I Ching and Tom Ginsburg can explain Confucian and Buddhist constitutions, there is no reason to exclude scholars and lawyers affiliated with Western values from taking part in the interpretation of *Tianxia*.

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<sup>77</sup> For reference, the original text reads: “孰能浊以静之徐清? 孰能安以动之徐生?” The German translation by Heidegger reads: “Wer kann still sein und aus der Stille durch sie auf den Weg bringen (bewegen) etwas so, dass es zum Erscheinen kommt? Wer vermag es, stillend etwas ins Sein zu bringen? Des Himmels Tao.”

<sup>78</sup> See MAY, *supra* note 74, at 54–56.

<sup>79</sup> I CHING, Xi Ci 2:5. See WILHELM, *supra* note 29, at 338.

<sup>80</sup> See GINSBURG, *supra* note 1, at 249.

<sup>81</sup> See HAMID DABASHI, POST-ORIENTALISM 140–44 (2009); MASASHI HANEDA, ATARASHII SEKAI-SHI HE [TOWARD A NEW WORLD HISTORY] 102, 110 (2011).