

# The East Asian Legal Culture according to Confucius

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## 1 Introduction

The legal culture in East Asia has its unique distinctive features.<sup>1</sup> The emphasis on the amicable dispute resolution and avoidance of confrontation has its origin in conformity with the Confucian<sup>2</sup>

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<sup>1</sup>The paper refers to the East Asian “legal consciousness”, “attitudes” and “values” as manifestation of legal culture.

<sup>2</sup>Confucius or literally translated, Master Kong (*K'ung-fu-tzu or Kongfuzi*), lived and worked during what is known as the Chinese Spring and Autumn Period (770-481 BCE), and is by tradition said to have been born on the 28th September in 551 BCE in the state of Lu located on the Shandong peninsula in north-eastern China and died in 479 BCE. Confucius was an infamous Chinese thinker and educator who are comparable to Socrates in the West. He developed a social and political philosophy that is often considered to be the foundation of subsequent Chinese thought. He was the founder of the Ru School of Chinese thought and the philosophical school of thought that has come to bear his name, Confucianism. This is evident from his tradition and the fragments that were recorded in the text called *Analects (Lunyu)*. His educational background is unclear except that tradition claims him to have studied with Lao Dan, the Daoist Master, as well as with Chang Hong and Xiang in music and lute respectively. What is clear is that education or study was extremely important to Confucius in which one must be dependent and independent. He is recorded in the *Analects* as saying, ‘he who learns but does not think is lost. He who thinks but does not learn is in great danger’. The *Analects*, recorded during the Warring States era are said to reveal the dialogues between Confucius and his pupils in which he transmits and perhaps expands, on the ideas, or the way (Dao) of the ancient Zhou. He was known to say that he was a transmitter and not a maker and he had a passion for the wisdom of the Zhou sages upon which his teaching was based or transmitted from. It is worth noting that it was in the fall of Zhou Empire that the various small states

values that influenced political philosophy in pre-communist China. For East Asian countries, the cultural differences regarding dispute settlement raise a serious issue. The legal tradition in those countries is entirely different from the Western ideal of the rule of law. In Chinese legal culture, a dispute is considered an evil in that it disturbs the harmony that governs all of social life. The Chinese believe that it is important to amicably remove the root cause of the potential dispute if it could yield to inevitable long term dispute.

A significant aspect of the Confucian attitude toward dispute resolution is Confucianism's emphasis on the principle of harmony. For example, even if a party was believed to be in the right, it was better for him or her to be merciful to the wrong party and suffer a little. Forbearance was expected and such behaviour was appreciated and highly praised by Confucius. In Confucianism, a decent man was expected to be gentle, selfless and forbearing.<sup>3</sup> Only an indecent man valued profits. A person preoccupied with his own personal gains and losses was discriminated against by the whole society.

Historical records show that the earliest law in China appeared more than 4000 years ago during the Xia Dynasty, the first dynasty in Chinese history.<sup>4</sup> This long lasting legal history has been labelled the "Chinese legal tradition" and the Chinese legal tradition is distinct from the common and civil law traditions in the West.<sup>5</sup> With these 4000 years of legal tradition, however, China has been criticized as a country with laws but no rule of law.<sup>6</sup> Even scholars who oppose this view may still agree that China was a country with an anti-law tradition.<sup>7</sup> Law has never been central to the Chinese experience. Throughout its history, the concept of law and the notion of the rule of law have never taken centre stage in society until

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began to vie for power and such a unified loss was a probable influence on Confucius.

<sup>3</sup>His teachings, as did his own learning, emphasized morality, government, speech, language and arts (he focused on what was referred to as the Six Arts such as "archery", "calligraphy", "chariot", "computation", "music" and "ritual"). Of the various subjects, it was "morality" that was considered of utmost importance above all else. Through a proper understanding and practice of morality all else could be derived, harmonized and rectified. This is revealed in a famous lesson in which a student asks if there is one word that could guide a person through life, the master's reply is *shu* (reciprocity). This followed by the exemplifying phrase, 'never impose on others what you would not choose for yourself'.

<sup>4</sup>MacCormack 1996, hlm. 2-6.

<sup>5</sup>Bodde 1967. See also Jun 1997, hlm. 135, 40.

<sup>6</sup>Chenguang 1997, hlm. 1-5.

<sup>7</sup>Chenguang 1997.

early this century.<sup>8</sup> As early as the West Zhou Period, there were local magistrates known as *Tio Ren* whose main function was to help settle disputes through amicable means. Since then, mediation<sup>9</sup> has been widely practiced throughout the ancient Chinese feudal society. Profound philosophical and social factor explain the existence and development of mediation in ancient China. The fundamentals of Confucius philosophy that provide the basis for East Asian legal culture are described below.

## 2 Of *Li* and *Fa* – Never the Twain Shall Meet

Confucianism is the greatest traditional source of normativity in East Asia. It is not generally seen as religion, while other East Asian religions such as Buddhism, Taoism or Shintoism, have concerns which are largely other than legal.<sup>10</sup> At the same time, Confucian legal tradition differs from Western legal traditions, at least since the thirteenth century in its reluctance to root normativity in formal structures and sanctions.<sup>11</sup> In other words, the essence of Confucianism seeks to persuade and not oblige. It is a tradition of great and friendly persuasion based on centrality of communal to create harmonious societal relations. It intends to develop social harmony and moral philosophy which sought to induce and persuade rather than command and punish. Confucius is the philosopher of the *Li*,<sup>12</sup> which emphasis on denial of the lasting and effective normativity of formal law and formal sanctions. There is therefore little place for detailed Confucian regulation of an entire society. One has to understand its general teaching. The moment one understands, there is no need to concern with the detail of formal law. As a result, there were many legal maxims that lend support to this non-adversarial or persuasion approach. Confucius himself wrote that

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<sup>8</sup>*Chiu 1995*, hlm. 21-24.

<sup>9</sup>Mediation is an informal, private and non-binding process where disputes are resolved by an independent and impartial mediator assisting parties to reach an agreement. The process of mediation is a faster, more flexible and less expensive alternative to litigation. The parties involved in a dispute must consent to mediation and the mediator to be used must be agreed by the parties or nominated by an independent body.

<sup>10</sup>*Glenn 2010*, hlm. 320.

<sup>11</sup>*Glenn 2010*.

<sup>12</sup>Through *Li* one can cultivate and master the idea of *ren* (compassion or loving of others) which is a core element of his thinking.

‘what we need is for there be no lawsuit;’ ‘win a lawsuit and lose a friend,’ ‘better to be vexed to death than bring a lawsuit,’ ‘litigation ultimately ends in disaster’.<sup>13</sup> The Confucians preferred conciliation. In other words, if legal complaint was possible it was to be deterred by all possible means.

The notion of law in the form of *Li*, based on informal tradition of normativity reflects persuasiveness that could effectively control all those areas of life which were not given over to the formal world of *Fa* – edicted sanction. The domain of *Li* is thus greater than the domain of law, at least as it is understood in the west. *Li* has been variously defined in its totality as “moral law”,<sup>14</sup> as “customary, uncodified law, internalized by individuals”,<sup>15</sup> as the “moral and social rules of conduct”,<sup>16</sup> as “property”,<sup>17</sup> and as the “courtesy, customs and traditions we come to share...following the human way”,<sup>18</sup> Confucianism thus posit somewhere between religious norm and positive law, necessarily defending itself in both directions.

There is, however, a long tradition of formal law and formal sanctions which is known as *Fa*, though it has played a subordinate role to the *Li* or persuasion of the Confucian. Myth has it that *Fa* was invented by a barbarian people, the Miao, who blossomed around 2300 BC, even before Hammurabi.<sup>19</sup> At some point the word *Fa*, originally model, pattern or standard, was taken over to mean an imposed standard, closely associated with criminal conduct and conduct repugnant to established order.<sup>20</sup> Law was perceived not as a means of regulation of private, economic activity, nor as a means of upholding religious values but rather as an instrument of politics and public order.<sup>21</sup> It is known as rule by law and much flow from this premise. *Fa* is thus concerned with criminal conduct and administrative regulation. It is primarily directed not to the people but to administrative officials. It was closely associated with militarism (enrich the state, reinforce the army) and in practice exhibited a measure of doctrinal intolerance including burning of

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<sup>13</sup>Confucius 2007, hlm. 13, 83.

<sup>14</sup>Tan 1994, hlm. 660, 663.

<sup>15</sup>Ching 1998, hlm. 67, 74.

<sup>16</sup>Bodde 1967, hlm. 5, 19. Also see Hahn 2009, hlm. 135, 141.

<sup>17</sup>Chen 2004, hlm. 10.

<sup>18</sup>de Bary 1991, hlm. 33.

<sup>19</sup>Bodde 1967, hlm. 5, 13.

<sup>20</sup>Bodde 1967, hlm. 11.

<sup>21</sup>Bodde 1967.

the books of Confucianism.<sup>22</sup>

### 3 The Confucians' Worldview on Dispute Resolution

The Confucian tradition is often noted as an important factor in understanding many East Asian societies, such as South Korea, China and Taiwan. A review in the literature suggests that there are four cultural traits that underpinned the Confucian worldview on dispute resolution that are the anti-lawsuit attitude, law as punishment, collectivism and family-centered ethics.<sup>23</sup> This worldview on dispute resolution can be attributed to the Confucian legal culture that stressed on social harmony and opposition on lawsuits. As discussed above, the notion of *Li* and *Fa* have deeply influenced the Confucian thinking on dispute resolution in relation to attitude toward “disputes” and approach to “settling” disputes. The East Asian’s unique culture and social values account for the relationship between law and other social factors. These values, to a significant degree, determine how East Asian laws operate either domestically or internationally. In addition, the Confucian worldview on dispute resolution has provided a fertile ground for the development of mediation among the East Asian nations.

First, the anti-lawsuit attitude explains that in maintaining interpersonal harmony, the Confucianist expressed disfavour towards resolving disputes through a lawsuit. Accordingly, the Confucian perceived litigation as a last resort in resolving a dispute. This negative attitude towards lawsuit has taken shaped for centuries resulting in the preference for mediation as a mean for dispute resolution. This is due to the advantages of mediation that allow disputants to seek solution to their conflict in harmonious way while maintaining the relationship. Second, law has always been seen as punitive in character. Moreover, law is nothing more than the imposition of fines and penalties for official transgression.<sup>24</sup>

The ancient Confucianist believed than an ideal society would never require extensive legislation or litigation, because the law was for barbarians not for a civilized society.<sup>25</sup> All types of litigation, including marriage and property distribution issues, were

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<sup>22</sup>Bodde 1967, hlm. 27.

<sup>23</sup>Yi-Peng 2000, hlm. 13. Also see Lin 2011, hlm. 192.

<sup>24</sup>McNeill & Sedlar 1960.

<sup>25</sup>Bodde 1967, hlm. 5, 21-22.

subject to criminal proceedings that include torture and corporal punishment.<sup>26</sup> As a result, being a party to lawsuit was viewed as involvement in a crime from both the judges' eyes and in societies' eyes. Therefore, settling a dispute out of court is always a better option to avoid humiliation in court litigation. Third, collectivism emphasized on selfless righteous deeds in favour of others than personal interest.<sup>27</sup> As a result, asserting one's personal rights was generally discouraged by society. This traditional expectation on selfless personal interest of individual becomes a hindrance for the adoption of modern civil litigation.<sup>28</sup> This is in contrast with the western legal culture that asserts the rights of individual in a conflict. Collectivism, which stressed group and communal goals have been the norms for traditional East Asian society. Fourth, family plays an essential role and was regarded as the most basic unit in East Asian society.<sup>29</sup> The mutual obligation between the individual and his family serve as powerful social control agent. The individual's responsibility to his family and the family's responsibilities to the individual are interdependent.<sup>30</sup> The notion that a parent's status was higher than that of a child was embedded in state law throughout Chinese legal history. The filial piety and brotherhood are the fundamental elements of benevolence, the highest moral standard of a gentleman. Over the centuries, these traditional guidelines have shaped people's expectation and behaviour which profoundly influenced the Chinese way of dealing with family disputes.

## 4 Conclusion

Confucian as a learned tradition is said to occupy learning a place almost equal to that of *Li* and its underlying humanism. Confucianism is therefore to be learned, as are the essential of various human relations and all else which will contribute to the objectives of social harmony. His teachings were evolutionary, radical and enlightening. His legacy has had long lasting and far-reaching impact

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<sup>26</sup>*Lin 2011*, hlm. 23, 196.

<sup>27</sup>See *Analects of Confucius*, ch IV, verse 23 (containing Confucius's statement that 'a gentlemen understands righteousness while a petty man understands profits'); ch. XVII, verse 23 ('a gentlemen who has courage but not righteousness will cause disorder; a petty man who has courage but not righteousness will cause thievery').

<sup>28</sup>*Lin 2011*, hlm. 23, 196.

<sup>29</sup>*Yi-Peng 2000*, hlm. 23, 24.

<sup>30</sup>*Yi-Peng 2000*.

in both the eastern and western world. Nevertheless, Confucianism has long grappled with the problem of simplifying and reviving its teaching, struggling against the tendency toward vulgar, popular culture, politics, bureaucracy and corruption arising out of the notion of *Fa*. Ideally, there is neither Confucian state nor Confucian structure to corrupt. Yet Asia is not immune from corruption than any other place.

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