



## Ear to Asia podcast

**Title:** Law and disorder in China-Australia relations

**Description:** While relations between China and Australia have been on a protracted downward spiral, with on-the-ground issues continuing to hamper bilateral ties, how much of the impasse is down to a mutually poor grasp of the opposite number? China legal veteran Dr Andrew Godwin and China political scientist Assoc Prof Delia Lin make the case that an appreciation of how concepts of law and justice differ between Australia and China may help get relations onto a better footing. With presenter Ali Moore. An Asia Institute podcast. Produced and edited by profactual.com. Music by audionautix.com.

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### Voiceover:

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Ali Moore:

Hello, I'm Ali Moore. This is Ear to Asia.

Andrew Godwin:

In the context of current trade issues between Australia and China, if you suggest or if you argue that China is using trade as a weapon for political purposes, I think we need to recognize that China is no different from many other countries in that regard, in terms in the use of trade.

Delia Lin:

In China, that Confucian legacy, that distrust in institution, and a lack of understanding of how institution-building is able to build confidence in law, I think China is still trying to understand that. I think that's something that we need to grapple with as well in order to have a conversation with China.

Ali Moore:

In this episode, law and disorder in China-Australia relations.

Ear to Asia is the podcast from Asia Institute, the Asia Research Specialist at the University of Melbourne. Nation states naturally pursue their own national interests. And as we've seen all too often, this can lead to rubbing other states the wrong way.

And while bilateral tensions can take on the appearance of a zero sum game with one country's gain a mounting to another country's loss, frictions arise in part from misunderstanding the other side's intentions, motivations, and objectives. A potential case in point of relations between China and Australia, with tit for tat accusations and finger-pointing the current modus operandi. There are real on-the-ground issues that continue to hamper ties between the two countries, but how much of the impasse is down to a mutually poor grasp of what's driving the opposite party?

In this episode of Ear to Asia, we focus on how concepts of law and justice in China and Australia differ in both their philosophical underpinnings and modern day practise, and how understanding those differences

can offer insights that may help the two countries better appreciate each other's perspective and help get relations onto a better footing. Joining me to discuss are China legal veteran, Dr. Andrew Godwin, principal fellow at Melbourne Law School, and associate professor in Chinese studies, Dr. Delia Lin of Asia Institute. Welcome back, Delia. And welcome, Andrew.

Delia Lin:

Thank you, Ali.

Andrew Godwin:

Thank you, Ali.

Ali Moore:

Andrew, let's jump straight into the thick of it when it comes to China-Australia relations, which have deteriorated across the board at scenes with a war of words being played out particularly in the trade space. Australia upsets China. China impose punitive tariffs on everything from lobster to timber products, notably though, not iron ore. Andrew, how did we get here?

Andrew Godwin:

That's a good question, Ali. And I think it's one that we need to consider. Obviously, there are global geopolitical tensions in play. And I think to some extent, the problems in the Australia-China relationship are attributable to those global issues and challenges. But I think also these tensions that currently exist between our two countries can be attributed to a lack of understanding and trust between the two countries. And also, I'd suggest an inability to understand the perspective of the other. And that can lead to emotional and irrational responses from each government and an inclination to jump, I think, too quickly to conclusions.

Now, one of the great features, I think, of the relationship between Australia and China is that there's always been good private citizen to citizen and also business-to-business relationships. On the whole, I think we like each other. And I think there's a good social and cultural compatibility between the peoples of each country.

In other words, we like interacting. And I think we like doing business with each other. But, of course, in the current climate of heightened tensions, I think it's really important to recognise that although there are obvious problems at the governmental level, interaction and cooperation between the two countries continue at both the private level and the state level.

And I think at these levels, you could say the relationship is very strong. Now, when I talk about the state level, I'm talking about the institutions of the state and the necessary cooperation that occurs between, for example, law enforcement agencies in areas such as crime and the fight against money laundering and terrorism. The critical question though, I think, is the extent to which these governmental tensions create problems that the other levels. And I think that's something we need to think about as we move forward.

Ali Moore:

And, Andrew, when you talk about understanding the different perspectives, how different at the government level are those perspectives? And when you take a step back, why are they so different?

Andrew Godwin:

I think to a large extent, domestic considerations are relevant in terms of what the people of each country expect its government to do. So I think there are domestic considerations in play, but I also think that one can't really look at the bilateral relationship without focusing on the broader global network of relationships. And that obviously brings into discussion the relationship between Australia and the US, and also the various alliances that we have, the Five Eyes Alliance, for example, and other networks to which China doesn't belong. So it's a very complex set of relationships that often interfere with the bilateral relationship between countries, such as Australia and China.

Ali Moore:

But what about those, as we said in the introduction, those different notions of law and justice? How did they feed into the sorts of relationship between China and Australia and I guess the sorts of misunderstandings that we can see?

Andrew Godwin:

Well, this is an area in which I've always had a very strong interest – differences between China and Australia. And when I refer to Australia, to some extent, I'm referring to the Western countries, particularly those that adopt a common law approach as we do in Australia. And I think, fundamentally, what we see is the difference between a focus on rules and process, in the case of Australia as compared with a focus on outcomes and principles as we see in the case of China.

So what do I mean when I identify this distinction? Well, I think to some extent we've got bogged down in arguments over whether China is following the rules and pursuing the right processes in trying to achieve the right outcomes whereas China's approaching it from the other angle, focusing on outcomes and looking at how we might work backwards from outcomes to determine how we design the process and the rules that should be adopted to achieve that outcome.

So we're both approaching the issues from different perspectives. And I'm not suggesting that one is necessarily better than the other. Indeed, I think some people would argue that having a rules-based process-oriented approach to the resolution of disputes is much better than starting at where you think we should end up and working backwards.

But I think it is important to be aware of this, particularly in relation to continuing discussion around the viability of the rules-based international order, China's role in that international order, and what we can do to get things back on a level keel. And so I think what we're seeing too, Ali, and this is something that we might pursue in due course, and that is the extent to which countries like China that used to be rule takers are now challenging the rules that they have traditionally been expected to follow and, in some respects, reinterpreting the rules and creating their new ones. And I think we need to be aware of the dynamics that arise in that regard.

Ali Moore:

And we will discuss that. But on this rules-based order, which is something Australia is certainly very fond of talking about, and if we're talking about Australia and China approaching things from different directions in some ways, this rule-based order is in the middle. So whose rules are we talking about? And to what extent does this rules-based order reflect Western values, not necessarily universal values?

Andrew Godwin:

Well, it's interesting to examine this concept of the rules-based order, particularly as it applies to the international relations. I think the best way of describing it would be that this is the order to which all countries should aspire in their relations with other countries, whether it be in the area of trade, security, or geopolitical relations generally.

And I think as you alluded to, it has involved the notion that all members of the rules-based international order should agree and observe a common set of rules. To a large extent, I think today it has been quite effective in that regard, particularly in promoting international trade and maintaining international peace.

But as I mentioned just before, a lot of countries that were traditionally rule takers have now started to challenge the rules. And, of course, they started to become rule makers in their own right. And I think there is a risk that the rules-based international orders we've perceived it today has been identified with one perspective only such as the post-war liberal international order that was led by the US. And I think that perspective is starting to be challenged.

Now, I don't have any issue in terms of promoting international order. My question is whether we focused too much on the rules and argued too much over the rules and paid insufficient attention to outcomes.

Ali Moore:

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Let me bring Delia in here. Delia, how do you think China views the sort of global rules that Australia talks about and many countries talk about in terms of the rules-based order?

Delia Lin:

If I can just bring us back a little bit in 2014, remember that when President Xi Jinping came to Australia and made that speech at Australian Parliament. At the time, Prime Minister Tony Abbott said that he has never seen a Chinese leader who is so committed, explicitly committed to rule-based international order.

So what that means is that if we are fixated with the language of rules, we may end up with some really difficult debate with China because China would see itself as a good international citizen who plays by the rules. I don't think anyone is against the principle that we need to abide by the rules. And if there was a certain set of rules for every nation to observe, then, it would be a better place for everybody.

I don't think that different nations disagree on that principle. But they may have different views on what rules are and who should be considered as observing rules, because both the US and China are accusing each other of not being the international citizen which abides by the rules. So we just need a different set of language that would help with engagement.

As Andrew has just mentioned that if we look at people-to-people relationships, institution-to-institution relationships, Australia and China have a long standing good relationships. But in this new environment, international environment, how we can facilitate those relationships and continue with discussion? I think that's something that we all need to think about.

Ali Moore:

Delia, can we just step back even further, if you like? And if we look at those different views and perspectives, can you give us a broad picture of China's concepts of justice and rules and governance, and a little bit about the philosophies that underpin those concepts from a historical perspective?

Delia Lin:

If we look at those underpinning philosophies of law and justice in China, we really need to go back to the Confucian and the legalist philosophies there. One might say that those theories are developed far back in history and why are they relevant to contemporary China today.

One way of looking at it is I like to remind ourselves, Fukuyama used to say that China might be the all disciplined nation that has established not just a state but a modern state. What it means is that since the Qin dynasty in 221 BC that China has established a centralised bureaucracy and has established these institutions that make laws, but also enforce laws.

So if you look at the two major political philosophies, traditional philosophies in China, namely Confucianism and the Legalism, both were established during war-ridden period Spring and Autumn Warring States periods. When different states were at war, we're fighting for supremacy. So at the time different philosophies, including Confucianism and the legalism, were presenting different architecture of maintaining order.

So that was basically at the core of two series and how to maintain order in a very chaotic society. And what Confucianism was promoting was to establish a normative design of universal moral system to design this moral sort of landscape or moral compass for the entire society to go by.

And then, the legalist idea is to emphasise enforcement of law. And the universal application of law was very important to have clearly stated law that would apply to all subjects, including the rulers as well, including the prince of the state. So those two different systems have different design of how to bring order to society.

Ali Moore:

So how do terminologies which have their origins in the west, things like rights, freedom, wellbeing, justice? How do they translate in the Chinese context?

Delia Lin:

Those words have been translated into Chinese, but if we look at the language that's being used, the picture is much more complex. For instance, there wasn't really a unified term for justice in the Chinese language. There are many different terms that would describe some aspects of justice. And I basically would put those terms into two categories. And one category of terms would point to what I call high justice, which describes the political legitimacy and moral supremacy of the ruling party or of the people who are in the high position of the society.

And the other set of terms that are related to what we would call social justice and I call them low justice. They're at the less important sort of category of notions of justice. And those notions would matter to those who are ruled but do not necessarily straight away respond to moral supremacy or the political legitimacy of the ruling party.

So both sets of concepts are at play at the same time in society and also in the legal system, which has created a lot of confusion and also conflation of ideas of what is the right thing to do for citizens, for society, and for the nation. And in terms of rights, there was a term that's been translated into Chinese that's used very often.

But then, the idea of rights in the Chinese in general, what it means by rights, usually it's understood as permission to do something. So if the law says citizens have the right to something or to do something, it's often interpreted to be citizens have the permission to do something. But it doesn't mean that they can do it all the time. It doesn't mean that they won't get into trouble. If they do it, it doesn't mean that the government would facilitate that kind of behaviour.

So that idea of permission as if rights is bestowed by the authority. So that kind of idea of rights still permeates into every corner of society. I don't mean that everyone understands rights in this way. And certainly, there was a very strong rights consciousness among the general public and also ecosystem as well. But then that old idea of rights being understood as permission is still quite strong in the society, which can create some confusion and misunderstanding amongst one another.

Ali Moore:

So, Delia, when you look at these concepts of high justice and low justice, and when you look at China's plan for building the socialist rule of law with Chinese characteristics, how do they feed into each other? And I guess my real question is given that the socialist rule of law includes the basic principle of upholding the unified leadership of the Communist Party, is the law the servant of the party? Is there any independence between the law and the party?

Delia Lin:

In the Xi Jinping era, that question has been answered. That party of the leadership is considered as the key feature of Socialist rule of law under Xi Jinping. And that is written in the party constitution that is north, south, east, west, and the middle, party leads all. Then, that bears the question that it seems that the party is above the law. And indeed, many Chinese legal professionals also raised that question who has more power, the party or the law?

And Xi Jinping himself, in 2014, spoke very extensively on that and called this a pseudo proposition or a false question to say that the party is at least all, but doesn't mean that party members or the party officials can act outside of law. Basically what's in the socialist rule of law agenda of Xi Jinping is to try to create an institution that would make the party become the regulatory body itself to regulate the behaviour of the party members itself. But how successful that is, is a way to see. But that's where it's going at the moment.

Ali Moore:

Andrew, before I ask you about independence of China's legal system, can you tell us a little bit about how the actual system works? It's based on civil law, isn't it? Can you draw us a picture of civil law and how different that is from common law?

Andrew Godwin:

Sure. I think it's always helpful to look at the way in which the various jurisdictions around the world have been broken down into categories. And if you look at the world's great legal traditions or jurisdictions, I think you could say that about 30% of the world's jurisdictions, consistent common law jurisdictions, the common law model as we have in Australia, England, of course, which is the birth place of the common law, the US, Singapore, New Zealand, and of course, Hong Kong, which is still a Commonwealth jurisdiction. 30% of the world's jurisdictions consist of the civil law tradition as it's reflected in the French or Napoleonic manner or tradition.

And that includes jurisdictions such as France and Italy. 30% of the world's jurisdictions are also civil law inspired, but take their inspiration from what we refer to as the Roman-Germanic tradition. And that consists of jurisdictions including Germany and Austria. And the remaining 10% consists of what you might refer to as mixed jurisdictions or hybrid jurisdictions, those that combine influences from the major traditions and also their own traditions, whether that be customary law or indeed religious law, such as Islamic or Sharia law.

So I think if you were to locate China in the world's great traditions, you'd say that China is a hybrid jurisdiction, one that's drawn inspiration from the socialist model because China is a socialist system. And it's also drawn inspiration from the civil law model as practised primarily in Germany. But increasingly, Chinese law has been influenced by aspects of the common law system, particularly in areas such as commercial transactions. And that's partly because of the integration of Hong Kong with mainland China.

Now, I mentioned before that Hong Kong has its own common law jurisdiction and that's by virtue of its background as a British colony, even though it's now part of the People's Republic of China, and also the commitment in the basic law of Hong Kong to preserve Hong Kong's legal system for a period of 50 years following the handover, or as some people would prefer to say the hand back of sovereignty over Hong Kong to mainland China.

Ali Moore:

Andrew, can I get you to just tell us a bit about the difference between the civil and the common law systems?

Andrew Godwin:

There are two key differences between common law jurisdictions and civil law jurisdictions. Now, the differences are much more subtle and complex than I'm suggesting here, and it's difficult to generalise. But I'll attempt to summarise these two key differences. First, common law jurisdictions recognise case law or judge-made law as a source of law, as a formal source of law. And that's in addition to statutory law, namely law enacted by parliament. We often refer to it as legislation in addition to statutes.

In civil law jurisdictions, on the other hand, although case law is influential, it's not formally binding in the way in which it is in common law jurisdictions. In other words, it isn't a formal source of law in its own right. And because case law isn't a source of law in civil law jurisdictions, the approach has been to codify the law through the enactment of comprehensive codes. And that was certainly the legacy of the approach in France under Napoleon, which involved the enactment of comprehensive codes that were designed to cover all areas of governance.

Now, the second key difference I would suggest, and this is partly due to the dominance of case law in common law jurisdictions, the second key difference is that in undertaking legal reasoning and applying the law to specific cases, the common law jurisdictions have tended to adopt what you might refer to as an inductive approach to legal reasoning, where you start with a specific problem or dispute and work your way up to the legal principle or legal doctrine.

And what that means is that you can't really understand legal doctrine except by reference to the context in which it develops. By comparison, civil law jurisdictions are traditionally proceeded from high-level principles and adopted more of a deductive approach in applying the law and engaging in legal reasoning.

In other words, you start with the general principle as formulated in the abstract. And then, you look at how that principle should be applied in the context of specific cases or disputes. Now, it's interesting, Ali, over time, we've seen a degree of convergence between the civil law jurisdictions and the common law

jurisdictions. So for example, in civil law jurisdictions case law has become more influential. And in common law jurisdictions, we've seen the increasing importance of statutes, particularly statutes that cover the field and operate along similar lines to codes.

Now, China's legal system, as I said, is inspired partly by the civil law model as practised in Germany. But it also contains a number of other interesting influences as I mentioned. And that includes its own legal traditions, which go back before 1949, go back hundreds of years to the tradition that Delia described when China was unified under the Emperor Qin Shi Huangdi. And it also has some interesting influences from the Soviet model. And so we see a very interesting hybrid jurisdiction in China today. And I'd have to say that it is, in many respects, a very pragmatic model, one that does focus on the outcomes and doesn't worry too much about the particular tradition from which the various concepts have been drawn.

Ali Moore:

So given that, Andrew, under the civil law system as it's practised in China, how much room is there for interpretation if it tends to be about high-level principles and then a deductive approach? Is interpretation key?

Andrew Godwin:

Well, it is. And we see the age-old question about detail and interpretation. So the more detail the law is, one might assume the easier it is to interpret the law and to apply the law. But equally, if you have detailed rules and they produce bad outcomes, or if you like as we say, hard cases create hard law, then, there might be a preference in some jurisdictions to look first to principles, to draught laws in very loose terms that enables those laws to be interpreted and applied in a flexible manner. And that's traditionally what we've seen in mainland China.

And although I think it could be said that the point at which China's modern legal system really came of age was when China acceded to the World Trade Organisation in 2001. And from that point on, the legal system developed quite rapidly and became more comprehensive and detailed. And in becoming more detailed, the legal system became more assertive and more autonomous in terms of its reach and significance.

And this is significant, Ali, because another age-old question that many countries have had to deal with is how to, if you like, allocate governance between policy, primarily government policy, and law. And prior to the modern era in China, up until I'd say 2000 or so, Chinese law was characterised by high level aspirational provisions that allow plenty of scope for the exercise of discretion in its interpretation and application. And further to that, it was expected to take into account and defer when necessary to government or party policy, which co-existed, if you like, alongside the law as an official source of law.

But now, of course, as the legal system has become more autonomous, more assertive, we start to see this tension increasing namely what should be governed primarily by policy? What should be governed primarily by law? And that is an ongoing challenge that China is facing.

Ali Moore:

Can we go back to the point that Delia was making and put it in that context, but party leadership is a key factor of socialist rule of law. So the direct question to you, Andrew, is in the way the system works in China, is it open to influence? Is it independent? It may have changed since 2000, but would you call it an independent system?

Andrew Godwin:

Well, once again, Ali, I think we need to consider the impact that the terminology has on our analysis in this regard. So independence, you won't like the answer I'll give because it's a very much a lawyer's answer. But the best answer I can come up with is that it depends. It depends on the situation. It depends on the extent to which sensitive issues are involved, whether they be social issues or economic issues. And this goes back to the issue that Delia mentioned about China's desire to build rule of law as distinct from rule by law and to develop its legal system, albeit one with Chinese characteristics.

So when we talk about independence, it's important to identify exactly what we mean by the terminology. So for example, as a matter of law, China's judiciary is independent. But when they talk about independence in the context of the courts, they're talking more about institutional independence than they are about the independence of the judges.

And so in that, we can see some differences arising between the approach in countries like Australia where it is very much individual independence. And by achieving individual independence, one would assume that institutional independence would follow whereas in China, the focus is more on institutions as distinct from the individuals who work within the institutions. And that's partly because I think China doesn't have the same degree of confidence in law and the legal system to resolve disputes and to govern society as we've had in common law jurisdictions.

And, of course, we've had hundreds of years of development, hundreds of years in which to strengthen our institutions. And that's a good thing. But China's had relatively little time in which to do that. And they're still grappling with these tensions between policy and law, and also what it should do in order to achieve a country that's subject to rule of law as distinct from rule by law.

Ali Moore:

Delia, your thoughts on that, and I guess in particular the distinction between institutions and individuals.

Delia Lin:

I mean if we go back to the traditional ideas of law, if we look at the two fundamental philosophical foundations or other meanings of the practise of law in today's China Confucianism and the Legalism, the Confucian way of thinking, the legalist way of thinking, I mean the Confucian way of thinking about governance is very suspicious of the use of law in courts or use of law to maintain order because Confucianism would have believed that once you have clearly stated codes, then people are usually tempted to interpret the law in a way that would suit their own personal interests.

And then, the legalist tradition would be very suspicious of application of moral codes and believing that we should leave morality to individuals which takes a very much Daoist idea of morality in that individual case and the state should have nothing to do with building a moral state or to build a universal design of a moral system.

And yet, what the states need to do is to set out clear rules for the courts to observe. So throughout times 2000 years of sort of ruling and even today that those two competing ideas go hand-in-hand somehow in practise. So that's why we see a lot of contradictions, conflicts in the practise, and also inconsistency as well. And certainly, many law professors in China have worked very hard to try to adopt ideas of judicial independence and to have more institutional autonomy especially for court's judicial system to act based on their own codes of ethics and based on their own professional standards rather than being guided by the political agenda of the time.

Andrew Godwin:

Ali, if I may, one issue or area in which I've always had a very strong interest in looking at differences between the Western approach to law and the Chinese approach to law is that in Western jurisdictions and, obviously, it's somewhat inaccurate to generalise by referring generally to Western jurisdictions. But I do think that our Judeo-Christian heritage has provided a basis on which we always recognise that there is ultimate truth. And there is, if you like, an independent source of truth that exists in reason.

So we're very comfortable in terms of reasoning at an abstract level and designing our legal systems accordingly. But in China, and I think this is an aspect of Confucianism, the way in which society is governed very much depends on what makes sense from a human perspective. And indeed an important statement that's been attributed to Confucius is that truth all the way does not depart from human nature or the human experience. If what is regarded as truth departs from human nature, it's not treated as truth.

So we find quite an anthropocentric approach to the use of law or rules to govern society. And what this means is that you can't separate rules from the human experience. And you need to measure the effectiveness of rules against the behaviour of humans and what's realistic from a human perspective. And

so I see this as being partly behind the preference, traditional preference, in China for adopting flexible principles over prescriptive rules.

Ali Moore:

You're listening to Ear to Asia from Asia Institute at the University of Melbourne. Just a reminder to listeners about Asia Institute's online publication on Asia and its societies, politics, and cultures, it's called the Melbourne Asia Review. It's free to read, and it's open access at [melbourneasiareview.edu.au](http://melbourneasiareview.edu.au). You'll find articles by some of our regular Ear to Asia guests and by many others. Plus, you can catch recent episodes of Ear to Asia at the Melbourne Asia Review website which again you can find at [melbourneasiareview.edu.au](http://melbourneasiareview.edu.au).

I'm Ali Moore. And I'm joined by associate professor, Delia Lin and Dr. Andrew Godwin. We're talking about China's legal system and the ideology that underpins it.

Delia, can we talk a bit about China under Xi Jinping and how the use of language by China itself and how the rhetoric under Xi has shifted?

Delia Lin:

We spoke about this two notions of justice or conceptions of justice in China which I call high justice and low justice. So there were a set of concepts and notions that point to political legitimacy and moral supremacy of the ruling party and then the set of notions around justice that points to what we usually understand as social justice and fairness and all that.

So in order for the party to claim that moral supremacy, at the same time political legitimacy to rule over everything, the party needs to claim that it represents the will of the people. And so that's in the rhetoric of language with the language of law in China under Xi Jinping. That has been gradually built up, to build up the party as the author of the collective. That's one shift.

The second shift is this law morality amalgamation. As Andrew just mentioned that there isn't this kind of intrinsic link between law and the ultimate truth in China. Traditionally, it's not there. So for the party to establish the moral value of the law, they need a set of moral codes that go with the law. That, of course, has a tradition of Confucian Legalist state of China or imperial China for 2000 years. It has that legacy.

But also at the same time under Xi Jinping, what he has done differently is to really using a set of moral rules in terms of socialist core values to make it as part of judicial and legal system. And that has never been done before because moral cultivation or moral campaigns have always been part of Chinese governance since the Mao era, but this is the first time that socialist core values must be an integral part not just considered, but needs to be practised as an integral part of the legal and judicial system.

Ali Moore:

And Delia, if we look at China under Xi in terms of its global relationships though, the party also seems to have, I suppose, for one of a better word, co-opted the terminologies of the West to explain China's position. The language that is used at terms that we're familiar with but are the meanings the same?

Delia Lin:

What's changed under Xi Jinping, I think, that's something that's very interesting is that systematically both party officials and some intellectuals are trying to explicitly reinterpret some of the fundamental values of the legal system of the West and then try to promote the fundamental values of the Chinese legal system.

For example, individualism. Qin Gang who's now Chinese ambassador to the US wrote a very influential article meaning that it's been disseminated widely among the general public and also among the party officials of superiority of the Chinese political system. And part of this article is an explanation of what individualism in the West is. And that interpretation of individualism is a moral interpretation of it. And also, it's a Marxist class struggle perspective of individualism to say that it's based on bourgeois idea and to interpret it as an egocentric kind of ideology or philosophy. And it is morally inferior to the collectivist philosophy of the Chinese system.

So people who read those articles and who are not aware of the fundamental philosophies behind the Western legal system would generally believe that the Chinese system is morally superior because it generally cares for the general well-being of the people of the society whereas the Western system is motivated by individual interests from the bourgeois class.

Ali Moore:

Andrew, do you see this seeking to redefine terminologies and terminologies that the West is very familiar with? Do you see it as part of China moving from rule taker to rule maker?

Andrew Godwin:

To some extent, I do. Yes. And that's where I think we need to avoid making assumptions about what we're talking about even if we're using the same language or the same words. There'll always be differences in understanding in terms of the concepts that underpin the language we use and ultimately the outcomes that we're trying to achieve.

And I think we see this, for example, in the phrase "rule of law" which we'd all uphold as being an objective or an outcome to which all countries should aspire as distinct from rule by law which is often used to refer to the use of law in an instrumental sense to govern society but without the elevation of law to a position that sits above the government and exercises authority over the constitutionality of laws that are passed by parliament.

This notion of rule by law also incorporates the notion that the government or the state is not itself subject to the law in the same way as the citizens are subject to the law. And as Delia mentioned, to some extent, that's because of the alignment that officially exists between party policy, if you like, or party ideology and what's considered to be the will of the people.

Now, China's been making a lot of effort to move towards rule of law as distinct from rule by law. And I think this rule by law concept does have certain similarities with the legalist approach as reflected in the writings of the Chinese legalist, Han Feizi, as Delia mentioned.

But over the past two decades even though China has increasingly emphasised the importance of rule of law, there's still a constant tension between the priorities and expectations of governments in China and the official commitment to develop China into the country that observes the rule of law. And so I think this struggle continues in the age of Xi Jinping where it's not just a struggle over control although, of course, it's easy to see it as a struggle over control as between, if you like, the government and the legal system.

But it's also reflective, I think, of the fundamental lack of confidence in the ability of the law and the legal system to operate effectively and to achieve acceptable outcomes.

Ali Moore:

So, Andrew, if we accept that, if we accept this fundamental lack of confidence and we go back to our original core topic of how all this works in terms of geopolitical relations, do we assume that China is not interested in rewriting the rules because they can't see how a set of objective rules can be applied across the board? It's more about working with China on outcomes because focusing on the rules doesn't make sense.

Andrew Godwin:

I think that's where we've got to. And it's not so much that the rules don't make sense. But, sometimes, the way in which they are interpreted and applied may lead to outcomes that don't make sense.

And so I think it goes back to what we were discussing before about the need to locate the rules within the context of why they are drafted in the way in which they are, and ultimately what outcomes they might be supporting. But it does go fundamentally to this lack of confidence, I think, in the use of law alone to resolve issues.

I think it was also Mencius, the Confucian philosopher, who said something like, "It's insufficient to have law alone." Now, of course, our answer, the Australian answer to this lack of confidence in the legal system

would be to say, "Well, let's just let the legal system and legal institutions get on with their job free of interference and influence."

But as I alluded to before, it's easy for us to say that because we've had a very robust and resilient legal system with traditions that have developed over hundreds of years. I think we're also happy to subscribe to this notion that everyone is subject to the law and that rules should be applied in an absolute and non-discriminatory manner. In other words, we believe that if we adopt the right process and apply the right rules, that an acceptable outcome will result. To put it differently, we're happy to accept the umpire's decision so long as we are confident that the rules were applied correctly and the correct process was followed.

But that belief isn't shared in all jurisdictions around the world. And I think China is struggling with this lack of confidence in the legal system. When I talk about the concerns about whether law and procedure will lead to the right outcomes, I'm not talking about or just about the right outcomes from the government's perspective. I'm talking also about outcomes that are acceptable from the perspective of society and Chinese citizens, many of whom in some respects would prefer issues to be resolved by government, once again, because government is seen to be a more efficient, more effective umpire for resolving disputes over the courts. Now, one would hope that this will change over time. But it is a fundamental difference, I think, that we need to come to terms with.

Ali Moore:

But, Andrew, I guess in a very practical sense, if we are to focus more on outcomes and more on principles than this sort of tit-for-tat who broke the law argument, how does that assist because principles can be very different as well? And what drives those principles can be very different.

Andrew Godwin:

Indeed. And once again, I'm not suggesting that we should do away with the rules altogether. I think we need to link the rules to outcomes. And that helps to legitimise the rules. I think also, there'd be benefit in devoting greater attention to fairness in outcomes as a defining and unifying concept within the rules-based order. In other words, I think we need to move beyond just having a rules-based order towards an outcomes-based order, international order, where we don't just reject the position or perspective of other countries on the basis that they're not following the rules.

I think we need to understand better the motivations and concerns behind the position of other countries. And in that way, we need to move beyond, if you like, positional negotiations more towards interest-based negotiations that identify these motivations and concerns, and help us to shift the debate so that we can meet somewhere in the middle, as distinct from simply focusing on the rules whether they've been followed and what consequences should accrue if they haven't been followed.

Ali Moore:

But, Andrew, they'd still need to be a final arbiter, wouldn't there? And I guess that brings me to the question of mutual respect for a final outcome. I will give you a quick example. I mean we looked the very beginning of this interview about China's use of tariffs against Australia completely outside the World Trade Organisation which is one of the institutions in the rules-based order they work so hard to join.

Ali Moore:

If I give you another example, international law of the sea and China's rejection of the permanent court of arbitration finding in favour of the Philippines, a unilateral ignoring of the umpire. So even if you have a principles and outcomes-based system, how does that work if there's no acceptance of a final word? Where does it end, I guess would be my question.

Andrew Godwin:

Well, it's a good question and one that we need to consider. In the context of trade and the current trade issues between Australia and China, if you suggest or if you argue that China is using trade as a weapon for

political purposes, I think we need to recognise that China is no different from any other countries in that regard in terms of the use of trade for political purposes.

Indeed, sanctions is an example of the use of trade for political purposes even though they might be in order to encourage countries to achieve better outcomes whether it be in relation to their own internal governance or recognition of human rights, whatever it might be. But it's very difficult to isolate trade from international relations and to look at trade separately from all of the considerations that go towards pursuing trade relations with other countries.

And so fundamentally, if you look at the WTO and its genesis, it was very much in putting in place a system that would maintain peace and stability and prevent countries from going to war. And so if you look at it from that perspective, it's been operating pretty successfully. But the point I'm trying to make here is that the system provides a basis on which if countries do the wrong thing in terms of the tariff policies or in terms of the measures that they adopt, there is a mechanism for other members, those who consider that they have been damaged or injured to take action.

Australia's taken action under the WTO in respect of barley and wine. And so it's initiated disputes within the WTO framework. And if Australia were successful in getting a ruling in its favour, then, it would have the right to retaliate if China chose not to observe the ruling. But, of course, would Australia ever retaliate against China? I think our preference would be to negotiate and agree an outcome that is acceptable to both sides, or puts us in a better position than we are now.

In the area of international relations and in the area of international law as embodied within conventions, there's no mechanism by which countries can be compelled to observe the rules or to observe the rules in the way in which other countries think those rules should be observed.

Now, you mentioned the South China Sea dispute, that's a very complex dispute over maritime areas and resources. China's claim, as many people would be aware, is based on historic rights, this assertion that China historically had claim to these resources in the South China Sea. And that's a position that was rejected by the tribunal in 2016 that was set up under the United Nations Convention on the Law of the Sea to which China is a member.

And what the tribunal determined, it didn't make any determination in respect of sovereignty over the islands or territorial waters. But it did conclude that this claim based on historic rights was of no effect because it wasn't recognised under the convention. And one of the arguments that was used to reject the historic claim or this claim to historic rights was that China hadn't maintained or asserted exclusive control over these resources. And therefore, its claim of historic rights was no longer relevant.

Now, what's interesting to note in this regard is that even if you say that this claim of historic rights isn't recognised by the convention, that doesn't deal with China's fundamental argument that nonetheless it did have historical rights. And therefore, it thinks it has a legitimate argument for dealing with the resources in the South China Sea accordingly. Once again, we have a situation where countries are accusing China and not playing by the rules.

But if we continue to argue only in relation to the rules, then I don't think we'll get very far. And I think it would be much better to argue over outcomes. And these outcomes include environmental outcomes, resource management outcomes, outcomes to do with passage-free navigation. And I think we need to, if you like, liberate ourselves from just arguing over the rules because for so long as we do that, I think we won't be able to move the discussion forward. And we'll just get bogged down in detail and arguments over whether the rules should be interpreted in this way or that.

Ali Moore:

We really are very nearly out of time. But Delia, if Australia and the West do take a more principles and outcome-driven approach, obviously, China would have to do the same, would it not? And do you think that is a possibility, a real possibility, under Xi? It would be a welcome change.

Delia Lin:

The merit of changing the language and changing the conversation is to be able to have a conversation, is to be able to start from the same direction because as Andrew has mentioned, the Chinese way of thinking

about following the rules, is pretty much from outcome perspective and move backwards. If we can make explicit the outcome of following the rules and then adverse outcome of not following the rules and to look at different aspects of the outcome which very often is interpreted in a simplistic way or purely political way on the Chinese side, if we are able to look at different facets of outcome and then make explicit motivations of those rules, I mean those discussion would be much more productive. I think at least can move the discussion a bit forward and make a lot of implicit motivations explicit.

And also, I just would like to really highlight this distinction between also institution building and also individuals that we spoke about, as Andrew spoke about before. That's pretty much also in the psyche of, I suppose, you can use that term in a very broad sense of thinking about law in China as well. Again, that's Confucian legacy that distrust in institution and also a lack of understanding of how institution building is able to build that confidence in law, I think China is still on the way of trying to understand that because from Confucian legacy, really, law is observed and made by the individuals.

So the Chinese way of thinking about governance is pretty much on moulding the individuals. And China doesn't see anything wrong with doing that. And from Western perspective, we see this as a possible interference of privacy and all that. And whereas China sees moulding the individuals as the way to good governance. I think that's something that we need to grapple with as well in order to have a conversation with China.

Ali Moore:

Anything that means we can actually have the conversation has to be of assistance because where we are right now doesn't appear to be working at all. Andrew, can I ask you just before I let you go? Are there places that you could point listeners to, to perhaps hear more of your research and more of your thoughts?

Andrew Godwin:

I think, certainly, if listeners go to my profile on the Melbourne Law School website, they'll find a long list of publications. But also, I think they might be able to find their way through to some opinion pieces I've written that are located on the website of Asialink. And apart from that, I would suggest just googling my name and China. And that should bring up a few interesting bits of information as well.

Ali Moore:

Which is Andrew Godwin, G-O-D-W-I-N.

Delia, what about you? Where would you point people to?

Delia Lin:

Perhaps, the best way of finding my publications on Law and Morality under Xi Jinping and also Construction of Political Superiority under Xi Jinping. You could go to Find an Expert website on the university website. I think that would be their best place to go. And also, also if you google Delia Lin in China, you can find a list of publications there as well.

Ali Moore:

And that's Lin, L-I-N. Andrew and Delia, thank you so much for talking to Ear to Asia.

Andrew Godwin:

You're welcome.

Delia Lin:

Thank you, Ali.

Ali Moore:

Our guests have been China law specialist, Dr. Andrew Godwin from Melbourne Law School, and China political scientist, associate professor, Delia Lin from Asia Institute. Ear to Asia is brought to you by Asia Institute of the University of Melbourne Australia. You can find more information about this and all our other episodes at the Asia Institute website. Be sure to keep up with every episode of Ear to Asia by following us on the Apple Podcast app, Stitcher, Spotify, or SoundCloud.

Ali Moore:

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