

Fresh Squeezed! The Opinio Juris Podcast

China and the Rise of a New International Legal Order: An Interview with Cai Congyan*

Host: Zhang Binxin

[We have used AI tools to transcribe and translate the podcast. We've also made minor edits to aid with the flow of the text, while remaining true to the host and guest's interventions. All errors sit with the team at FreshSqueezed!]

Zhang Binxin: Hello everyone, welcome to our podcast. I am Zhang Binxin, the host of this episode. Currently, I am a Ph.D. student in Political Science at Sciences Po, Paris. I returned to academia to pursue my doctorate after over a decade of work experience. Previously, I was a faculty member at a university law school, specialising in international public law, particularly international law and international humanitarian law.

Our guest today is Professor Cai Congyan from Fudan University Law School, a leading professor and doctoral supervisor in international law. In addition to his academic role, he also serves as the Vice President of the Shanghai Law Society Foreign Rule of Law Research Association and the Vice President of the Shanghai Law Society Belt and Road Legal Research Association. He is an arbitrator for the China International Economic and Trade Arbitration Commission and an editorial board member of the Chinese Yearbook of International Law.

Professor Cai's main research areas include international legal theory, foreign relations law, international economic law, and the policy and practice of Chinese international law. He is widely known for his extensive academic work and has been published in influential domestic and international journals and publishing houses, such as the Oxford University Press and the Cambridge University Press, including publications in journals like the American Journal of International Law, the European Journal of International Law, the German Yearbook of International Law, Chinese Social Sciences, and China Legal Science. Welcome to our podcast, Professor Cai.

Cai Congyan: Hello, I am Cai Congyan from Fudan University Law School. I am very pleased to have the opportunity today to discuss with Zhang Binxin and the audience about my personal research and China's international law research.

Zhang Binxin: Professor Cai, you have focused on the topic of China's interaction with the international order for a long time. You noticed the importance of this issue early on and began specialised research. Today, we want to centre our discussion around this theme. You mentioned in your paper published in 'Chinese Social Sciences' about an international order based on international law, contrasting it with the so-called 'rules-based' international order advocated by some Western countries in recent years. This is interesting because, in recent years, Western academic and media circles, including the government, have always discussed China as a challenger to the existing international order. However, your article seems to suggest that China is, in fact, an upholder and defender of the existing international law. In contrast, the so-called 'rules-based' international order appears to be an attempt by some countries to circumvent international law, using vague and ambiguous terms to dilute or misuse certain existing rules. So, I'd like to ask if my understanding correctly interprets your viewpoint? Is my understanding accurate?

Cai Congyan: To begin with, those who view China as a challenger to the existing international order need to answer two questions. First, is the current order reasonable, not just for a specific Western country or China, but for the majority of nations in the international community? When viewed globally, the current order seems unreasonable. I am not sure how many Western scholars seriously confront this issue. If the existing order is deemed unreasonable, the term 'challenge,' as understood in

Chinese, implies a negative connotation. From China's perspective, the existing international order is not unchangeable. Change, particularly in the Chinese context, is essential.

I am not sure if the word 'challenge' in English carries a positive connotation of change. If it's negative, then labelling China as a challenger to the existing international order by Western countries is incorrect, since the order itself is unreasonable. I believe Western scholars, including government and media, need to address this first. If the existing order is seen as reasonable or acceptable by most countries, and China seeks to change it, only then could it be considered a 'challenge' in the Chinese understanding of the term. Hence, it is crucial to clarify these two issues.

Now, regarding the 'rules-based' international order, I have been following this concept since 2018. However, this notion itself doesn't provide much clarity. A 'rules-based' international order might seem unproblematic at first glance, but since the beginning of the China-U.S. trade war in 2018, I've realised that it should be understood from a legal practice perspective. For international law scholars, an international order based on international law is evidently preferable to one based on rules. I am unsure why some Western countries are reluctant to use the term 'international law-based order.' In my opinion, China's endorsement of an international order based on international law is a matter of common sense.

What interests me is why Western international law scholars, despite this concept being proposed by Western countries, rarely treat it as a special issue for in-depth study. From my observations, especially post the China-U.S. trade war, Western actions, including sanctions against China and China's counter-sanctions, have been notable.

Zhang Binxin: Your explanation about China's stance on the current international order and the concept of a 'rules-based' order is quite insightful. It seems that there is a significant difference in how these concepts are perceived and implemented by different countries. This leads to my next question: You've been observing the evolution of these concepts since 2018, especially in the context of the China-U.S. trade war. Could you elaborate on how these developments have influenced your understanding of the 'rules-based' international order? Also, how do you see the role of international law in this context?

Cai Congyan: One core point in my article is that the 'rules-based' international order actually comprises three main aspects. First, it includes the domestic laws of Western countries. Secondly, it involves some regional international laws. Lastly, it includes the politicisation of international law, which essentially constitutes a set of political rules.

I can understand why Western countries, and China as well, perceive the current international legal order as insufficiently responsive to the current state of international relations and globalisation. From a perspective of changing the international legal order, it's reasonable for Western countries to propose a 'rules-based' international order. There's no issue in seeking to reshape the international legal order, but I think the means they employ are crucial.

Historically, the emergence of new international law often occurred through methods not conforming to existing international law. While this has happened in various historical contexts, such an approach might not be acceptable to China and many developing countries. As the Chinese government has stated, it hopes to promote new international law rules through numerous international law-making platforms. However, this doesn't necessarily mean that the emergence of new international law is guaranteed, especially under the backdrop of major power competition.

Zhang Binxin: Your point about the three components of the 'rules-based' international order – domestic laws of Western countries, regional international laws, and the politicisation of international

law – is quite intriguing. It appears that these components reflect a political underpinning rather than a purely legal one.

Cai Congyan: In my article, I did not fully criticise the concept of a 'rules-based' international order. I agree that the existing international legal order fails to address the challenges posed by the current pattern of international relations, including environmental challenges. As a sovereign state, China may resist or be passive towards certain international law-making agendas proposed by Western countries. This is understandable as China prioritises its national interests.

From a purely international law research perspective, I cannot agree with the methodological approach currently being pushed by the West for reforming the international order. For example, in the context of the China-U.S. trade war, the U.S. used Section 301 to coerce China, which is not something I support. If China is to adapt to the progress in international relations and globalisation, it should promote some aspects of international law.

Zhang Binxin: Regarding your observations on China's approach to international law and its proposal for an international order based on international law, it seems you are suggesting a more nuanced and balanced view. You acknowledge China's efforts to uphold international law while also recognising that, as a sovereign state, China may not always adhere to it in every situation. Could you further elaborate on this balance between being a proponent of international law and the practical considerations of national sovereignty?

Cai Congyan: The reason I say that China is generally an upholder and defender of existing international law is relatively straightforward. Overall, China, despite its economic size, remains a developing country with a per capita income that is still quite low. This unique position means that China's understanding of many international issues, such as development, aligns with that of most developing countries. This is why China's efforts to reform the international order resonate with many developing countries. China is unique in that it can be considered a major power, yet it shares many common interests with developing countries.

China is different from the Soviet Union of the past; it is deeply integrated into almost all multilateral mechanisms and shares common interests with many developing countries in these forums. This alignment allows China to garner support from developing countries, contributing to what I consider a significant achievement. This success has led to a trend where Western countries can no longer dominate the setting of international rules in multilateral mechanisms as they used to.

Zhang Binxin: You've mentioned the influence of China's unique position as a major yet developing economy on its approach to international law and global order. This dual identity seems to place China in a distinct position compared to other major powers. How does this unique status influence China's policies and actions in the international arena, especially in terms of international law and global governance?

Cai Congyan: A concerning trend is the increasing competition between major powers, which might lead to a reduced effectiveness of multilateral mechanisms. Consequently, China might shift towards more unilateral or bilateral approaches, similar to Western practices. So, in the future, China's approach to changing the international order might also change. I believe two fundamental assumptions underlie this: first, a state's behaviour is primarily determined by its national interests, and second, China's assessment of its national interests aligns with that of most developing countries. We should discuss whether state behaviour is solely determined by national interests or if other factors are involved.

I believe China has two distinguishing factors. One is the socialist ideology. Historically, this ideology, especially during the Soviet era, led to expansionist tendencies. In contrast, China's current socialist ideology may lead it to make concessions regarding its national interests, for the sake of the

international community or developing countries. This trait is something Western countries typically lack.

The second factor is China's civilisational tradition. I feel that Western scholars, particularly those in international law, don't fully understand China's traditional political philosophy. Chinese traditional political thought, which is not just about the 'Tianxia' (All-Under-Heaven) system but much more complex, has been around for thousands of years. This long-standing civilisation and its political reality must have some valid reasons for its endurance. Western academia could benefit from a more equal and open approach to learning about Chinese civilisation, including its less favourable aspects. However, they first need to make an effort to understand it.

In my view, a crucial aspect is how Western scholars, particularly those in international law, approach a civilisation they are unfamiliar with. Just as China approached Western civilisation with a learning attitude in the 19th century, Western scholars should adopt a similar attitude towards Chinese civilisation. There are valuable lessons to be learned from each other, but first, there needs to be a genuine effort to understand. The language barrier is a practical obstacle, as Western scholars may not have extensive access to Chinese literature. However, language is also a manifestation of power dynamics.

Zhang Binxin: Why is there an expectation for everyone to communicate in a certain language? You may have noticed that our podcast aims to experiment with different languages to foster discussions on international law.

Cai Congyan: Language barriers pose a significant challenge, as Western scholars may rely on limited sources translated into English or works by foreign scholars who understand Chinese. In recent years, there has been a call in Western academia to move beyond binary oppositions and pay more attention to non-Western traditions. Having acquired your education in China, you are aware that Chinese traditional political philosophy does not operate on a binary opposition concept. In contrast, the Western concept of binary opposition, or dualistic worldview, tends to see things in opposition, which they need to address. Chinese traditional political thought does not view the Western world as inherently oppositional.

According to the Tianxia system, there is an understanding of 'us' within and 'others' outside, but this distinction is dynamic and interactive. In traditional Chinese political thought, gaining 'Tianxia' does not necessarily mean it is limited to the Han Chinese central government. Minority groups could also achieve this status under certain conditions, showing a lack of binary opposition. I believe this is the first issue Western scholars need to address: if they do not move beyond this binary and oppositional thinking, they will not be able to adopt an equal or learning-oriented attitude towards other nations' perspectives, including China's.

Discussing overcoming binary opposition implies that such opposition inherently exists. But in Chinese political philosophy, this binary opposition is not necessarily a given. This difference in foundational assumptions is significant. Not just an assumption, it is evident in China's political practice and part of Chinese civilisation, influencing its current international law practice. However, as I mentioned earlier, it could also be countered by other factors.

Zhang Binxin: Your analysis of how China's civilisational tradition and socialist ideology influence its approach to international law and relations is very insightful. It seems these factors offer a unique perspective that differs from Western approaches. In your view, how should Western scholars approach and understand these aspects of Chinese political thought and practice? How can they overcome the language and cultural barriers to gain a deeper understanding of China's role in international law?

Cai Congyan: Your question leads to why I proposed the concept of 'Chinese exceptionalism.' Looking at the rise of major powers throughout history, including Japan's rise in the late 20th century, China's rise has been unique in the context of the international legal framework. China's rise is perhaps the first instance of a major power emerging within a robust international legal framework, unlike previous powers for whom war was a legitimate means to achieve national goals. This is a new phenomenon, and observing how China navigates this will be interesting.

As for the recent state of affairs and the key to breaking the current stalemate, I believe it is essential for international law scholars to engage in more equal and open exchanges. This means not always insisting on one's correctness. In my writings, I never presume to be absolutely correct, and I think this is a crucial attitude for scholars. Historically, the academic field has been dominated by the West, and any deviation from their perspective was seen as a challenge. This dynamic needs to change, and scholars must acknowledge the longevity and significance of civilisations like China's.

Besides scholars, my research also includes ordinary individuals, domestic courts, and cities. I find cities particularly interesting. Since the 1990s, the study of non-state actors in international law has become a trend in the West, and I have learned from this. However, given China's size and complexity, understanding it only at the national level is insufficient. This is why I explore the role of non-state actors, including cities, in international law. For instance, I have studied how a unitary state like China, through its central government, empowers specific cities to perform certain international law functions or how these cities help the state fulfil international legal obligations. This approach differs from the Western model due to the distinct relationship between local and national governments in China compared to the West.

Lastly, I am concerned that in the context of great power competition, scholars from both China and the West seem to be getting drawn into this rivalry. This atmosphere is not conducive to unbiased academic research and presents a challenge for scholars in maintaining their independence. The growing tension and competition between major powers have implications for academic freedom and the quality of scholarly discourse.

Zhang Binxin: Your concerns about the impact of great power competition on academic research and discourse are indeed valid. In this context, what role do you think scholars can play in fostering a more balanced and comprehensive understanding of international law, free from geopolitical biases?

Cai Congyan: This situation is indeed a challenging one. In the context of rising great power competition, both Chinese and Western scholars are increasingly being drawn into this dynamic. This development is not conducive to academic freedom or unbiased research for scholars from either side. It poses a challenge as to whether scholars can remain detached from the prevailing geopolitical narratives and maintain their independent academic perspectives.

For instance, the trade war initiated by the United States against China in 2018 is a significant event in human history and a clear violation of WTO rules. Yet, it's surprising to see how few Western scholars have written about this issue, considering that it represents a critical crisis for the multilateral trading system. This situation reveals a certain bias or lack of independent critical thought among some Western scholars, who might perceive themselves as independent thinkers but often align with a broader Western narrative. This mindset is more of an internalised bias rather than an external imposition, as might be the case with Chinese scholars.

The challenge for Western scholars is to overcome the binary and oppositional way of thinking. If they continue to perceive the world in such a manner, they will not be able to approach other civilisations, including China's, with an equal or learning-oriented attitude. However, it's also important to note that many Chinese scholars, even when discussing sensitive issues, choose not to express their views in the form of published articles or public statements. This tendency could be due to various reasons,

including a natural inclination to avoid controversy or a sense of responsibility towards national interests.

I think a simplistic critique that Chinese scholars only support the government's views is not entirely accurate. There are many instances where Chinese scholars have critically evaluated and even opposed government policies, advocating for internal reforms to better meet China's international obligations, such as those under the WTO.

To sum it up, the current geopolitical context, characterised by great power competition, seems to be drawing scholars from both China and the West into its orbit, affecting their ability to conduct unbiased research and maintain academic freedom. This development is unfortunate and presents a significant challenge for scholars, as it is not easy to remain completely detached from nationalistic narratives in such an environment.

Zhang Binxin: Lastly, considering the challenges and dynamics you've described, what do you think is the future of international law scholarship?

Cai Congyan: The situation brings us back to our earlier discussion about transcending binary oppositions, particularly in the context of Chinese and Western political thought. The current global narrative often frames issues in terms of Western versus non-Western, liberal versus non-liberal dichotomies. As scholars, we should strive to move beyond these frameworks, which can constrain our understanding and analysis.

For Chinese scholars, the impact of such geopolitical tensions is undoubtedly negative, but I believe it is also detrimental for Western scholars. It is crucial for us to maintain open channels of communication and exchange. Historically, when China was less developed, Western scholars might not have paid as much attention to Chinese practices in international law. However, as China has opened up and developed, there has been significant interest and learning from the West. Ideally, this should lead to richer, more diverse international legal scholarship.

However, if current geopolitical tensions hinder these exchanges, it would be a regrettable development. For genuine progress in international legal scholarship, open dialogue and mutual learning are essential. This is especially true for non-state actors, including scholars, who can play a significant role in shaping international law.