

# OBLIGATION, EAST & WEST

by Thomas Pepper

World trade is often a purveyor of social and political values as well as of goods. The economic development of Japan, South Korea, Taiwan, Singapore—and increasingly China itself—will likely bring attempts at changing today's standards of international commerce and law to bring them into greater conformity with those that prevail in the East. As this process unfolds, different concepts of obligation—as between the Judeo-Christian tradition prevalent in Europe and areas settled by Europeans and the Confucian tradition prevalent in China and other countries of East and Southeast Asia—will become far more noticeable than in the past.

## THE SOCIAL CONTRACT

For the West, moral obligation initially was considered in terms of religious obligations to worship God or to "do unto others as you would have them do unto you." With the rise of secularism, concepts of obligation became associated with moral philosophy or, less rigorously, with secular political movements. In general, obligation in the West may be thought of as covering a range from the merely desirable to the explicitly formal and legal.

The central assumption in the West is that one undertakes an obligation in return for a consideration; and one must expect to forfeit a consideration, or even some multiple of that consideration, in the event of nonperformance of the obligation. The usual instrument through which such obligations are undertaken and enforced is the contract. Implicit in the idea of a formal contract is a second assumption of the Western system—namely, that individual entities act independently and according to their own best judgment of what their own best interests are. A third assumption behind the Western system of obligation is the role of the state as an agency of enforcement. Although this is an explicitly limited role, the state is empowered to enforce the obligations of one party to another when and if, in the judgment of an arbiter, the first party unjustifiably fails to comply with its obligations. In other words, to preserve the general welfare, the state may be called upon by an aggrieved party to enforce an otherwise private contract. Such a system is designed to be objective, that is, open to independent examination: Judicial proceedings are open to the public, judicial rulings are subject

to review. In this way, rules and obligations are tested much as scientific data and conclusions are tested.

In international relations, the assumption that individual units act independently and in their own best interests is manifested in the doctrine of sovereign equality, according to which each nation, or unit in the international system, is assumed, for purposes of law, to be sovereign within its own realm and, in this regard, equal to units comparably sovereign in their realms. There might be large variations of actual power, but, as with individuals in domestic law, nations are assumed for purposes of international law to be units of equal weight.

The concept of reciprocal costs and benefits also applies to international obligations, though enforcement, in the absence of a supranational authority, is the implied threat of military action or war. For this reason, some scholars of international relations consider the very concept of international law self-contradictory. Without an agreed-upon body with a legitimate monopoly on the use of force, as Max Weber put it, there is no law. For now, no such body supersedes the nation-state and, thus, no law supersedes the laws of nation-states. Other scholars make the obvious point that an international law does exist for some purposes, sometimes even affecting "central" issues, if only for reasons of convenience.

In any case, to whatever extent international law exists, it exists in a form that clearly is derived from, and consistent with, the Western concept of obligation: All three elements of this concept—the notion of reciprocal costs and benefits, the assumption of equal sovereignty, and the implication that a higher authority enforces obligations—are present in the body of international law and custom currently followed by all nations, Western and non-Western.

## THE FIVE RELATIONSHIPS

There is a quite different concept of obligation in traditional Chinese culture (recognizing, of course, that there are many "Easts" and many variations of Chinese culture within the geographical area of East Asia). Unlike the Western system of legal obligation, which appears to be based on a calculation of interests, the Chinese concept is, in principle at least, based on an absolute—and therefore a seemingly moral—relationship between persons, defined in terms of higher or lower function or status.

Such vertical differentiation may at times be based on many criteria, or it may be reduced to the single criterion

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*Thomas Pepper is a member of Hudson Institute's Senior Professional Staff and Director of its Corporate Environment Program.*

of age. Other things being equal, an older person always has a higher status in Chinese culture than a younger one. This simple method of status differentiation ensures that, as a matter of last resort, individuals can always relate to one another in an unambiguously hierarchical manner by falling back on the distinction of age. More commonly, however, other criteria are available, such as political power, wealth, education, or seniority within a group. Always, however, some kind of hierarchical differentiation is required for a normal relationship to ensue.

Obligations in Chinese culture, then, grow out of personal relationships between people of differing status in a hierarchy. Such relationships—and the obligations that go with them—are subjective rather than objective because they cannot be measured or weighed by outsiders. By the same token, they are psychological and open-ended rather than legal and specific. Moreover, people with lower status have little or no appeal against the claims of those with higher status. Finally, since relationships are personal, the operations of government emphasize personal ties.

There is a kind of social contract here, but it is quite different from Western models derived from Thomas Hobbes, John Locke, and Jean-Jacques Rousseau. Traditional Chinese social structure goes back particularly to the so-called five relationships of Confucius: between ruler and subject, father and son, husband and wife, elder brother and younger brother, and friend and friend. In theory, if such relationships held among the populace, a general sense of harmony would prevail.

According to some scholars, Confucianism originally developed as a kind of rationalization for the authoritarianism of those who argued that right stemmed from what the ruler wanted. Confucianism rooted power in the moral authority of the ruler, insofar as he set an example by maintaining the proper relationship with his subjects. In practice, governments usually have been based on an emperor who acted as the highest high-status figure in the society—or, as in contemporary Japan, a symbolic representative of the highest status. There were frequent breakdowns in authority, periods of “warlordism” during which there would develop a series of ministates, each with its own high-status figures but lacking a vertical hierarchy to enable one state to relate to another. Clearly, the Western concept of a general set of human rights existing independently of the hierarchical relationship between two parties has no echo in traditional Chinese culture.

There is also a significant difference between East and West in determining the role of the state. Because relationships in the East are personal, obligations are necessarily also personal and therefore not amenable to judgment by a third party. The latter often may be important—indeed essential—as mediators, but rarely as arbiters. Hence, in distinct contrast to the West, where a third party, often an arm of the state, is preferred as the arbiter of disputes, the East finds it morally unworthy to ask a third party, particularly the state, to judge obligations between private parties.

At least this is the way the system traditionally worked. Nowadays in the East—though more so in Japan and South Korea than in China and Taiwan—there is an overlay of Western law that appears to give the state a role comparable to the one played in the West. Still, disputes are typically resolved in a “traditional,” rather than a modern, or legal,

manner. This hardly means that the Confucian state has little or no role. It most definitely has a role—a much stronger role relative to the West—in formulating rules; for instance, officials of the state play a major role in setting an example in the Confucian manner. But this manifestation of a strong state pertains to relationships between individuals and society as a whole, not to private relationships between individuals. Indeed, relationships between individuals in a Confucian culture are so personal and status-based that the concept of a contract, as commonly understood in the West, is basically alien.

With such differences between Eastern and Western concepts of obligation, it is no surprise that the West’s idea of international relations had no counterpart in China. Rather, Chinese traditionally viewed the world in Confucian terms. They themselves were at the center; other countries—in practice, those within physical reach by whatever means then available—held a lesser status. The well-known concept of the “Middle Kingdom”—the Chinese characters for China signify middle country, or center—illustrates the point clearly. In fact, until around 1500, the beginning of the period of European expansion, China was arguably the most advanced of the various civilizations then in existence. Accordingly, other states were to pay tribute to China as a matter of course. The European concept of a balance of power, in which various nations of roughly equal weight would interact with each other in a horizontal relationship, had no place in the Chinese system.

One might even speculate that the emergence of European power offered a much more profound challenge to China’s view of international relations as a vertical hierarchy than an expanding China would have offered to a Europe already steeped in challenges from sovereign units in horizontal competition with each other.

More recently we witnessed one country with a Confucian culture and a sizable amount of power attempt to impose its concept of international relations on others. The wartime government of Japan developed the concept of “*Hakkō Ichū*,” or “Eight Corners of the World Under One Roof,” meaning various lands under the allegedly harmonious sweep of Japanese rule. The notion of an East Asian Co-Prosperity Sphere, another wartime idea, was a narrower version of this concept, applying specifically to other Asian countries that Japan saw as benefiting from its help in liberating them from European colonial rule.

Similarly, the inwardness of China from 1949 to 1969, including the tumultuous period of the Cultural Revolution, could be interpreted as an implied continuation of traditional Chinese hauteur toward the rest of the world. Even now, more than a decade after the opening to the United States and half a decade of self-consciously “essential” attempts at adopting Western and Japanese technology, it is far from certain that this traditional hauteur is a thing of the past—far from certain, in other words, that China is able or willing to coexist with other countries on the basis of laws or customs other than those in which tribute is expected or, in its absence, scorned.

#### **PLURALISM IN INTERNATIONAL LAW**

As noted earlier, whatever international law may be said to exist derives from and is consistent with Western concepts of obligation. Moreover, its existence in this form has gone essentially unchallenged because, until recently,

Western nations as a group had far more military and political power than did non-Western nations. But as the power of non-Western nations increases and international relations become more pluralistic, various non-Western nations are likely to want to assert the validity and relevance of their own concepts of law or equity.

In an interesting recent case, just such an assertion appears to have been made. An essentially Confucian concept of obligation may be discerned in Japanese efforts in 1977 to obtain lower sugar prices from Australian exporters despite an existing long-term contract to buy sugar at an already determined price. With more than ten ships anchored in Tokyo Bay awaiting unloading and matters at a standstill, the Australian exporters invoked the arbitration rules of the Sugar Association of London. At this point the Japanese importers quickly sought a settlement without formal arbitration.

In their informal appeals for a downward adjustment of previously agreed-upon purchase prices, the Japanese importers did not formally invoke a doctrine of *force majeure*, which in any case would have had to be justified rather than simply invoked. Nor did they invoke the relatively obscure Japanese legal doctrine of "change of circumstance," which has only been acknowledged in Japanese Supreme Court decisions as *dicta* and whose occasional use in lower court decisions has been confined almost exclusively to real estate transactions. Rather, the Japanese importers appear to have sought a reduction in price merely because the contracted price was now considerably higher than the newly prevailing market price. Presumably the importers thought such a demand on their part might be acceded to because of some commercial advantage they held over the Australian exporters owing to Japan's economy, population, and superior buying power.

Australians with business interests in long-term resource or commodity contracts with Japan are well aware of this possibility, as is evidence in a paper presented to the Australia-Japan Business Co-operation Committee in 1978. The Australian side, as a result of previous experience, appealed for "greater acceptance [in the future] of the fact that legally enforceable long-term contracts can only be changed by mutual agreement or pursuant to their terms."

Unfortunately, this entreaty by one group of Australian business executives constitutes little more than a restatement of general principles of contract law based entirely on Western concepts of obligation. The problem in the sugar dispute, however, lay more in the Japanese side's

desire to apply an altogether different concept of obligation—one in which the Australian exporters would think of themselves within a vertical hierarchy and subordinate to the Japanese importers. The Japanese importers almost certainly thought of themselves as having either more power or a higher status, or both: Had they thought of themselves as being of a lower status, they doubtless would have sought a lower price from the Australian exporters by explicit appeals rather than by the unilateral step of not taking delivery as called for in the contracts.

Given the ability of the various Confucian cultures to prevent Western influences from totally dominating their societies, and their achievements in economic development over the past thirty years, the pattern of events in the Australian-Japanese sugar dispute may well become a more likely one in the future. Yet there is a countertrend. Japanese business executives themselves have been concerned over China's peremptory cancellations of a number of major industrial development contracts in 1980 and 1981. Various Chinese officials subsequently sought to assure their Japanese counterparts that compensation for these cancellations would be forthcoming—a development that is instructive both because the promise was elicited subsequently rather than concurrently and because it was elicited at all. Still, Japanese seem perplexed about finding a way to deal with China to their own satisfaction. To date Japanese seem to believe that, on the basis of national wealth, they deserve a higher status than Chinese appear to give them; while Chinese, for their part, appear to consider themselves much superior in cultural terms. In this situation, Japanese may well find the objective procedures of Western law extremely useful. Whether these procedures will seem as useful in Japanese dealings with Westerners is another question.

The experience Australia, a predominantly Western nation, has had with Asia is important for other Western nations, for it is, in effect, a nation on the frontier. Although much smaller in population and GNP, Australia has far greater dealings with Japan and China relative to other Western countries. At the same time, it has no foreseeable prospect of becoming large enough, in terms of an Eastern concept of obligation, to enjoy anything other than a subordinate relationship to Japan or China. Hence, Australia's success in using existing international law, based as it is on Western concepts of obligation, may provide an early indication of the continued utility of such law in an increasingly pluralistic world.

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