

Pluralism or Cosmopolitanism? Reflections on Petersmann's International Economic Law Constitutionalism in the Context of China

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Professor Petersmann has developed a constitutionalization theory for IEL based on Western constitutionalism theory in conjunction with human rights law. However, there is a paradox in his theory considering that he stresses 'legal pluralism' on the one hand, while calling for a cosmopolitan conception of IEL on the other hand. The hypothesis of this paper is that there are no 'universalizable' principles and common constitutional principles that can guarantee the compatibility between the two. Petersmann's three often-used keywords, 'human rights,' "principles of justice," and "judicial protection of individual rights," are clarified in the context of Chinese thought and China's progressive integration into the world economy. This paper finds that Petersmann's theory focuses on bottom-up individual struggles, whereas Chinese thought is characterized by top-down overall consideration. The value divergence between the goodness of human nature in Chinese thought and the evil of human nature in Western thought makes 'legal pluralism' an insurmountable obstacle to a cosmopolitan conception of IEL.

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1. Introduction

When discussing scholarship in the area of international economic law (“IEL”), there is a man whose work cannot be ignored. He is Ernst-Ulrich Petersmann, an Emeritus Professor at the European University Institute. Professor Petersmann is well known for his decades of efforts in developing a monolithic theoretical base for IEL. His writings cover various issues, including the reform of the UN,¹ the future of the world trading system,² and the de-fragmentation of international law regimes.³ However, the instruments he has employed for analyzing those issues are basically unchanged, namely, Western constitutionalism theory in conjunction with human rights law. He has thereby developed an IEL constitutionalization theory,⁴ which, in his own words, has long been neglected by citizens and governments, to correctly understand the game rules of their participation in the global division of labor.⁵

The authors believe that Petersmann’s theory is paradoxical. On the one hand, he posits that the universal recognition of human rights requires “respect for legitimate ‘legal pluralism’” and “respect for the legitimate diversity of ‘constitutional pluralism.’”⁶ On the other hand, he argues for a cosmopolitan conception of IEL by saying: “Non-hierarchical legal relationships between diverse national and international legal sub-systems must be coordinated and clarified on the basis of ‘universalizable’ principles of justice, human rights, deliberative democracy, transnational rule of law and other common constitutional principles like judicial comity.”⁷ Therefore, the question may arise whether there are such ‘universalizable’ principles and common constitutional principles that can guarantee the compatibility between ‘legal pluralism’ and a cosmopolitan conception of IEL. Or, to put it another way, is Petersmann’s IEL constitutionalization theory coherent in terms of the interrelationship between ‘legal pluralism’ and the cosmopolitan conception of IEL? This article aims to inquire into this issue.

The logic and rationality of the development of the above thesis must

be explained in a few more words. Petersmann has frequently presented the words 'multilevel governance,' "multilevel judicial protection," 'multilevel cooperation,' and 'multilevel constitutionalism' to clarify that his theory covers national, regional, and transnational subsystems of IEL. However, his theoretical sources come primarily from Kant, Rawls and other Western philosophers, and his empirical support is mainly drawn from European culture.⁸ Petersmann has given much less consideration to the thought and practice in non-English speaking countries, including China, as a world member that plays an increasingly important role in global economic development. Hence, inquiry is necessary as to whether the Western-style constitutional conception of IEL is representative of a global understanding and whether the constitutionalization experience in Europe exhibits a world-wide tendency. In addition to the multilevel coverage of his theory, a number of keywords are repeatedly used in Petersmann's writings, including 'human rights,' "principles of justice," "judicial protection of individual rights," "interdependent public goods," 'participatory democracy,' 'rule of law,' 'cosmopolitan rights,' and 'overlapping consensus.' The authors consider the first three, which constitute the skeleton of Petersmann's IEL constitutionalization theory, most important. By focusing on the clarification of these three keywords in the context of traditional Chinese thought and China's progressive integration into the world economy, this article will also attempt to make a contribution to improving the discourse on IEL constitutionalism.

2. Human Rights

A. Human Rights as a Foundation of Petersmann's IEL Constitutionalization Theory

Petersmann regards human rights law as the foundation of the development of IEL in the twenty-first century.⁹ Under the premise that modern concept of human rights was a 'Western invention'¹⁰ and that North America and Europe have different priorities in the protection of human rights,¹¹ he pays inadequate attention to the interpretation and realization of human rights in China. For the purpose of better clarification and comparison, a recap of Petersmann's articulation in this regard is needed.

Petersmann's understanding of human rights can be epitomized in two words, i.e., individualism and antagonism. Individualism is embedded in his argument for reinterpreting and redesigning IEL by "treating citizens as subjects and 'democratic principals' of international economic regulation of mutually beneficial economic cooperation among citizens."¹² He thinks that the prevailing conception of IEL as "international law among states" to promote national interests cannot be justified in view of its "failures to prevent unnecessary international poverty, banking crises, financial and environmental crises"¹³ and that the human rights obligations of all UN member states require an IEL paradigm shift by constitutionalizing IEL to better protect citizen interests. Antagonism is reflected in his repeated comments about "rivalry among individuals, groups and people."¹⁴ Following the Westphalian mode of international economic regulation in which governments and rent-seeking interest groups would often abuse public and private power to the detriment of general consumer welfare, he contends that "human rights and other "principles of justice" may justify "struggles for rights" by citizens and parliaments for additional legal, parliamentary and judicial "checks and balances" of intergovernmental regulation."¹⁵

Petersmann acknowledges the significance of economic, social and cultural human rights as well as that of civil and political human rights, which are indivisible in his view. More importantly, in line with the EU tradition but not congruent with human rights specialists in common law states, he attaches greater importance to economic freedoms as fundamental rights.¹⁶ In his earlier work, *CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW*, Petersmann explained the problem of protectionism in domestic foreign trade regulation as a constitutional problem and called for direct application of the GATT rules in domestic courts to constitutionalize arbitrary foreign trade policy, thereby protecting individual rights.¹⁷ In view of the fact that market freedoms as fundamental individual rights have gained judicial protection in the EC and played an important role in market integration, he contends that market freedoms "can reinforce and extend the protection of basic human rights."¹⁸ Based on the position that human rights law and economic integration law offer mutually beneficial synergies, he recommends connecting human rights law with the law and practice of intergovernmental organizations.¹⁹ Relying on Kantian and Rawlsian theories of justice to justify the maximum equal liberties in citizen-

driven competition and international trade, he argues for legitimizing many state-centered, power-oriented regimes of international economic governance in light of the citizen-oriented principles of human rights law.²⁰ The authors hold the opinion that this understanding of economic freedoms, notably trade freedom, is the primary impetus behind his entire theory of IEL constitutionalization.

B. Human Rights in Chinese Thought

The Chinese characters ‘renquan 人权,’ a generally accepted translation of the English term ‘human rights,’ were never used in Chinese literature before the late nineteenth century.²¹ However, this does not mean that traditional Chinese thought cares less about respect for human dignity. In fact, Chinese philosophy has a particular expression for topics similar to the modern meaning of human rights. Early Confucians provided the basis of Chinese thought on human rights, which can be summarized as regarding the people as the foremost. Confucius said, “If the people have plenty, their prince will not be left to want alone. If the people are in want, their prince cannot enjoy plenty alone.”²² Mencius noted, “Within a state, the people are the foremost, the state comes second, and the ruler is the least important.”²³ Xunzi also said, “The monarch is a boat, while the people are water; the water bears the boat, but it can also swallow it up.”²⁴ The Confucian thought of regarding the people as the foremost emphasizes that only if the monarch cares for the wellbeing of the people can the monarchy be maintained. However, the key point of this thought is in the ruler’s obligation to the people rather than the positive rights the people may have.²⁵ Petersmann also properly compares the two boat stories in the works of Xunzi and Plato, saying that the people in the Chinese story are not capable of steering, whereas in the Western story, the people, who are on the same boat with the ruler, own ‘constituent power.’²⁶

Traditional Chinese thought admits the significance of people’s desires for fulfilling lives,²⁷ which is somewhat akin to Petersmann’s emphasis on economic freedoms. Huang Zongxi said, “The people as a whole should benefit,” but he did not say to “protect the interests of every individual.”²⁸ Traditional Chinese propriety requires a man to love others with virtues. Therefore, in traditional Chinese thought, people should think of others rather than compete for limited resources. Chinese society is explained as a human community; when people seek to attain what they desire, they have a duty to ensure that others get what

they want.²⁹ Even when the 1890 reformers talked about *minquan* 民权 (people's authority) drawing on the Western concept of 'rights,' they thought of the authority of the people as a group rather than every individual.³⁰

Contemporary Chinese scholars think that cultural traditions have a significant influence on the conception of human rights. As opposed to the individual-centered culture in the West, traditional Chinese culture stresses the indivisibility of individuals, families and the state, which has fostered a Chinese conception of human rights that prioritizes the rights to subsistence and development and underpins collective rights.³¹ All in all, Chinese thought on human rights emphasizes the wellbeing of the people and their utmost significance to the state, but it does not encourage individuals' competition with others and state power. In this sense, Chinese thought on human rights stands in sharp contrast with the individualism and antagonism reflected in Petersmann's human rights understanding.

C. Evolution of Free Trade Right in China as an Illustration of Human Rights Development

The PRC Constitution amended in 2004 declares for the first time that: "The state respects and protect human rights."³² Before then, however, some 'fundamental rights' have been confirmed in it, including voting right,³³ freedom of speech,³⁴ personal dignity,³⁵ and labor right.³⁶ In the same year, the amended Foreign Trade Law of China also confirms Chinese citizens' foreign trade freedom, though it still has not been recognized as a 'fundamental right' in the Chinese Constitution. Considering that economic freedoms, notably trade freedom, are emphasized in Petersmann's theory, we concentrate on the evolution of Chinese citizens' free trade right in the context of China's progressive liberalization of foreign trade governance, which can be divided into four phases as follows.

1949-1978: State monopoly

In the beginning of the PRC, the Chinese Communist Party ("CCP") adopted an economic policy featuring all-around central planning and control as a counter measure to an economic blockade and embargo imposed by the West. Consequently, a foreign trade policy emphasizing control by the central government came into being. Private foreign trade organizations were gradually

eliminated, so that all foreign trade transactions were ultimately handled by state corporations under the direct control and supervision of the government pursuant to a master plan. During this period, individuals and private corporations were completely deprived of foreign trade rights.³⁷

1978-1992: Tentative reform

After the Cultural Revolution (1966-76), China entered into a new era accentuating reform and development. As the economy was dragged carefully away from the former stringent planning system, foreign trade policy became less rigid as well. To promote foreign trade growth, a series of tentative reform measures were carried out, including the devolvement of foreign trade operational right to local branches and the diversification of trade business organs. However, foreign trade was then a privilege of state-owned corporations, which were essentially an arm of the government. Individuals and private corporations were not yet allowed to engage in this industry.³⁸

1992-2001: Preliminary liberalization

During this period, a socialist market economy was confirmed by the CCP as the development goal of China,³⁹ and the political leaders strongly supported China's accession into the GATT-WTO system. To satisfy the accession requirement, preliminary efforts were made to bring its legal system into consistency with the GATT-WTO rules. As a result, the first Foreign Trade Law went into force as of July 1, 1994. This law purported to maintain a fair and liberalized foreign trade order and to safeguard the business autonomy of foreign trade dealers.⁴⁰ However, this law also set forth the basic requirements for a foreign trade dealer. In particular, it required permission from the competent authorities.⁴¹ Therefore, foreign trade right was subjected to government license, which, in fact, excluded individuals and most private corporations from this industry.

2001- Present: Complete conferral of foreign trade right

After fifteen years of prolonged negotiations, China became the 143rd member of the WTO on December 11, 2001. Additionally, the Foreign Trade Law was amended in April 2004. This amendment clearly stated the protection of the legitimate rights and interests of foreign trade dealers⁴² and recognized individuals

as subjects of foreign trade dealers.⁴³ Furthermore, in line with the requirement of China's Protocol of Accession, the amendment changed the previous licensing requirement to the current registration requirement for obtaining foreign trade rights.⁴⁴ In this sense, free trade right has been completely conferred to Chinese citizens from that time.

From the above overview of the evolution of foreign trade rights in China, the CCP policymakers significantly pushed forward this historical process according to the international and domestic environment. Although those reform policies, notably the conferral of foreign trade freedom, have sometimes been reflected in laws, the legislator approving those laws is essentially an extended branch of the CCP bureaucracy.⁴⁵ It means that the laws are hardly an outcome of participatory democracy. To put it another way, this is not a process of "struggles for rights" as advocated by Petersmann.⁴⁶ Even without such "struggles for rights," however, the Chinese people are largely better off, along with China's progressive integration into the world. The Chinese people were not unhappy, even with the government's overall decision-making in a less democratic mode during the past four decades. In contrast, by purporting to "represent ... the fundamental interests of the overwhelming majority of the Chinese people,"⁴⁷ the CCP obtained external legitimacy for its ruling. As the Three-Step Development Strategy has illustrated,⁴⁸ the people's lives are always the primary concern, which is bound up with state development. In short, the evolution of foreign trade freedom in China is a modern embodiment of traditional Chinese thought on human rights, which is characterized by regarding the people as the foremost, while abating individualism and antagonism.

3. Principles of Justice

A. Petersmann's Theory of Justice for IEL

Petersmann's elaboration on justice for IEL is a mixture of Kantian and Rawlsian theories on justice and human rights law, as illustrated in the three principles of justice he suggested.⁴⁹ Inspired by Kant's extension of the constitutional conception of law to international law,⁵⁰ Petersmann asserts that "maximum equal freedoms as a first principle of justice ... has become a matter of positive

national and international law”⁵¹ In particular, he implies that worldwide ‘market freedoms’ may be defined as cosmopolitan expansions of Rawls’ first principle of justice.⁵² In contrast to Rawls’ refusal to extend his ‘difference principle’ from liberal nations to the international level, Petersmann opines that deepening globalization and modern human rights law may provide convincing reasons for a cosmopolitan “second principle of justice.”⁵³ Borrowing Kant’s phrase the ‘moral imperative,’ Petersmann recommends “multilevel constitutional protection of a just cosmopolitan order” as the third principle of justice, given that citizens agree on the constitutional principles of justice.⁵⁴ In toto, economic freedoms, equality, and human rights are the three major components of Petersmann’s theory of justice for IEL.

It seems that Petersmann has not provided fully convincing reasoning on how to institutionalize the “cosmopolitan public reason” in multilevel economic governance by endorsing the three principles of justice. In other words, there might be an internal tension in his arguments for ‘economic freedoms’ and for “a just cosmopolitan order.” In line with the Kantian acknowledgement of man’s selfish tendencies purportedly contributing to a law-governed social order,⁵⁵ Petersmann stresses the importance of citizens’ transnational market competition free of abuses of public and private power. However, in a transnational market where wide-ranging disagreements among billions of people should be respected when they compete for their own interests, how can the ‘overlapping consensus’ on a constitutionally justified ‘cosmopolitan order’ be attained? Brexit shows that there are certain people who are antagonistic to the idea of a single European market. With the new Trump administration, which has successfully echoed the voices of low-income people (rather than some protectionist groups) to suspend trade liberalization, the US is likely to take a more conservative view on economic globalization. Although Petersmann mentioned the ‘Arab spring’ to demonstrate poor people’s “struggle for justice” for the purpose of establishing a justified national and international legal system, its consequence was multiple wars, political instability, and economic decline in the Arab region, with little freedom seen. All these landscapes would imply that it is difficult to arrive at an ‘overlapping consensus’ on the constitutionalization of IEL from Petersmann’s advocating of economic freedoms.

B. Social Justice in Chinese Thought

Petersmann is congruent with Rawls insofar as they favor “reasonable rules and institutions” over natural resources.⁵⁶ According to traditional Chinese thought, however, all institutional arrangements are subject to the feelings and assessment of mankind, and social justice and its realization are no exception. That is, regardless of whether social justice is to be realized by putting the Rawlsian, utilitarian, or any other theory of justice into practice, a good development of the moral sense of mankind is the most important thing. According to this idea, no matter how reasonable and justified a social institutional arrangement is, a man without a righteous heart can always maximize his own interests by craftily seizing advantages. In contrast, even in an authoritarian society, a controller of the public power with good moral sense can do justice to the society by carrying out social governance that can promote social development while benefitting the least advantaged. Consequently, traditional Chinese thought is more concerned with the issue of men’s hearts than institutional problems; it believes that justice emanates from an innate disposition rather than external rules. Only when the people have self-conscience in social justice can the rules and institutions play a concrete role in maintaining social justice more effectively. A Confucian classic states:

The ancients, who wished to illustrate illustrious virtue throughout the kingdom, first ordered well their own States. Wishing to order well their States, they first regulated their families. Wishing to regulate their families, they first cultivate their persons. Wishing to cultivate their persons, they first rectified their hearts. Wishing to rectify their hearts, they first sought to be sincere in their thoughts ... From the Son of Heaven down to the mass of the people, all must consider the cultivation of the person the root of everything besides.⁵⁷

Confucian philosophers believed in oneness between the natural world and the human world. Xunzi said, “The nature has its own intrinsic rules, which is not subject to meritocracy or tyranny of a monarch.”⁵⁸ Therefore, people were taught to regard themselves as an integral part of nature and to accord themselves with nature by acting in conformity with the rule of nature. Confucian thought regards harmony as fundamental in interpersonal relationships.⁵⁹ In terms of the interactions between people and the state, a collective sense of promoting stability and solidarity is emphasized. Nevertheless, harmony does not mean the denial of

diversity and difference. As reflected in the saying that “harmony gives birth to all things while being the same leads to no development,”⁶⁰ harmony is based on pluralistic coexistence, whereas justice is not tantamount to egalitarianism. As a reflection of this harmonious worldview and the emphasis on self-cultivation, Chinese thought has constantly emphasized keeping *yi* 义 in mind when looking for benefits.⁶¹ Confucius said, “Riches and honors acquired by unrighteousness, are to me as a floating cloud.”⁶² Hence, if there is a clash between *yi* 义 and benefits 利, it is suggested to practice *yi* 义 and to ignore benefits 利.

C. Social Justice Practiced in China

The whole process of China's opening-up and progressive integration into the world economic system is also a way to realize social justice. In late 1970s, China began to open its doors to the outside world by putting forward preferential policies to draw in foreign investment.⁶³ Its subsequent arduous efforts in entering into the WTO system revealed a strong will to “develop equal and mutually beneficial economic cooperation with various countries.”⁶⁴ The results following these efforts are splendid: China has risen onto the world stage; hundreds of millions of Chinese people come out of impoverishment; and China has made a positive contribution to world development.⁶⁵ This process strongly proves the correctness of China's belief in the oneness and harmonious nature of the world.

Some might think, as expressed by Petersmann,⁶⁶ that it is the WTO system that plays a major role in helping China alleviate poverty. However, insofar as the social justice it has brought about is concerned, this process complies with an indigenous Chinese tradition rather than a Western-fashioned liberal way. In the early stage of modern China's economic reform, China faced a large population, a weak economic foundation, and unbalanced development. China has since strived to find its own way to develop by “feeling the stones before crossing the river”⁶⁷ instead of completely adopting some kind of “reasonable rules and institutions.” This way is an exact exemplification of the traditional Chinese holism concept in terms of its consistent stress on collective flourishing, namely, not merely the prosperity of the state but also the richness of the people.⁶⁸

Following China's accession into the WTO, the 2004 Chinese Constitution clarified that the state protects the lawful rights and interests of the individual⁶⁹ and that the lawful private property of citizens may not be encroached upon.⁷⁰

In this regard, the Chinese socialist market economy has not been developed by predominantly relying on citizens' struggles for economic freedom.⁷¹ Instead, it has always been directed by a master plan, as illustrated by the periodically updated Five-year Guidelines for Development.⁷² Undoubtedly, this is not a way to realize social justice as perceived by Rawls or Petersmann, especially given that China allowed some people to get rich 'first.'⁷³ However, due to China's well-designed development plan, 1.1 billion people have gone out of poverty,⁷⁴ which would be seen as a great achievement for global justice.⁷⁵ In addition, as China attaches more importance to 'rule of virtue'⁷⁶ and pays more attention to the problem of wealth inequality, traditional Chinese thought on *yi* will play a more important role in achieving social justice.

At the global level, the "Belt and Road" Initiative is a China-promoted public good for regional cooperation and development. It has been inspired by the ancient China's Silk Road spirit: "peace and cooperation, openness and inclusiveness, mutual learning and mutual benefit."⁷⁷ As discerned from its commitment to cooperation, harmony, inclusiveness, and mutual benefit,⁷⁸ the "Belt and Road" Initiative is another exemplification of the traditional Chinese view of a harmoniously co-progressing world. With regard to the implementation of this strategy, cooperation priority is given to facilities' connectivity, i.e., to "jointly push forward the construction of international trunk passageways, and form an infrastructure network connecting all sub-regions in Asia, and between Asia, Europe and Africa step by step."⁷⁹ China will share with other countries its experience in infrastructure construction and related investment as an engine for economic development. In this sense, the "Belt and Road" Initiative is much like an extension of Chinese 'virtues' based on China's 'self-cultivation.' This is an exact illustration of Confucius' saying, "The man of perfect virtue, wishing to be established himself, seeks also to establish others; wishing to be enlarged himself, he seeks also to enlarge others."⁸⁰

4. Judicial Protection of Individual Rights

A. Multilevel Judicial Protection of Individual Rights in IEL as Designed by Petersmann

Judicial protection of individual rights is another facet of Petersmann's IEL constitutionalization theory. Within a nation state, the legislature, the executive, and the judiciary are all important branches for safeguarding constitutionality in light of the original meaning of the word 'constitution.' Within the global community, however, there is not yet a world government. How will citizens' constitutional rights be protected at the global level? To resolve this issue, Petersmann pays attention to the courts of justice; he considers "the most independent guardians of the constitutional rights of citizens."⁸¹

Drawing on the experience of European courts in interpreting IEL for individual interests, Petersmann calls for extending this methodology to other parts of the world.⁸² Although it is difficult to understand Petersmann's articulation of this point, the authors would address rough clues in his writings as follows. First, the universal recognition of human rights provides constitutional justification for the connection and coordination between national and international legal systems and judicial procedures for peaceful dispute settlement on the basis of judicial clarification of "principles of justice."⁸³ Second, constitutional nationalism must be complemented by multilevel constitutionalism by empowering individuals adversely affected by international economic regulation with "access to justice" in national and international judicial procedures.⁸⁴ Third, judicial interpretation of IEL in compliance with human rights law has the potential to enhance legal coherence in worldwide governance institutions and to decrease legal fragmentation among national and transnational legal regimes.⁸⁵

B. A Comparison from the Perspective of Chinese Judicial Thought and Practice

Historically, China has no tradition of a separation of powers between the executive and the judiciary, mainly because there was little inherent calling for such separation due to the country's stress on social harmony. Additionally, a precondition for Petersmann's vision of multilevel judicial protection of individual

rights in IEL is the independence of courts of justice and arbitral tribunals at the national and international levels. Without a strong force calling for judicial independence in the current anarchic world, it is difficult to assure adjudication of cases in strict compliance with the so-called “principles of justice,” including respect for human rights.

“Rule of virtues” is an important teaching of Confucianism. By advocating “government exercises by means of virtue,”⁸⁶ Confucius attached greater importance to moral sense than man-made rules in adjusting the relationship between people, with a view to “causing the people to have no litigations.”⁸⁷ This approach fits with the Confucian thought of regarding the people as the foremost, in terms of its respect for the people as a whole and its reliance on human nature. The prioritized pursuance of harmony in Confucian thought entails a prevalent anti-litigation mind-set among Chinese people. In the Protocol on China’s WTO accession, China guarantees all specific administrative cases to be reviewed by an impartial and independent judicial body.⁸⁸ In conformity with this undertaking, the Supreme People’s Court makes clear that the adjudication of administrative cases relating to antidumping and countervailing investigations shall be handled by at least an intermediate court.⁸⁹ Subsequent to the promulgation of these judicial interpretations, however, no relevant cases have yet been brought to these courts, which indicates a persistent anti-litigation mind-set regarding China’s foreign trade regulation today.⁹⁰ In contrast, mediation, as an alternative dispute-settlement mechanism focusing on conciliation based on the disputants’ own will, plays an important role in Chinese judicial practice. Compared to litigation, mediation has its advantages in saving cost and time. Due to the voluntary acceptance by the disputants, furthermore, the mediation result can be easily implemented without any negative effect on later cooperation between the disputants.⁹¹

Until now, a target of ‘comprehensively advancing rule of law’ has been confirmed in China. Because of a “socialist rule of law with Chinese characteristics,”⁹² there must be some aspects of traditional ideas in the Chinese judiciary that fundamentally differentiate China’s practices from those of Western countries. On one hand, the mission of “comprehensively advancing the rule of law” falls under the leadership of the CCP,⁹³ which implies that rule of law is still an instrument to fulfill the overall goal of economic and social development in China. On the other hand, diverse forms of dispute settlement mechanisms,

including consultation and mediation, have always been promoted in the Chinese judicial system, with a view to boosting social justice and maintaining social harmony.⁹⁴ Interpretation of the law in specific cases is generally subject to the uniform interpretation by the Supreme People's Court,⁹⁵ which is unlike the human rights-oriented method advocated by Petersmann. In addition to the pursuit of justice in individual cases, the Chinese judiciary has a broader concern of social harmony and national development, exemplifying traditional Chinese holism thought.

5. Value Divergence: Evaluation of Petersmann's Theory from a Chinese Perspective

The above sections demonstrate that there is both similarity and disparity between Petersmann's theory and Chinese thought insofar as the conceptions of human rights, justice and judicial review are concerned. The similarity can be found in their common emphasis on respect for all human beings. Petersmann prioritizes human dignity in his words, whereas Chinese thought regards the people as the foremost concern. The disparity is perceptible in their distinctive methodologies for attaining the respect for all human beings: the former features bottom-up individual struggles, whereas the latter is characterized by top-down overall consideration. The implications of 'human rights', 'justice' and 'judicial review' as related concepts are intimately shaped by the philosophical ideas, culture and even natural conditions in a specific society. Traditional Chinese dialectics considers that all things are composed of two poles, namely, *Yin* 陰 (darkness) and *Yang* 陽 (light), which stresses heavily the complementarity between the two poles.⁹⁶ Western dialectics, as expounded by Hegel, also refers to the principle of polarity, but means the coexistence of opposites.⁹⁷ The divergent values exemplified in the different dialectics engender the friction between Petersmann's theory and Chinese thought.

Since "all the sciences are related, more or less, to human nature,"⁹⁸ the friction between Petersmann's theory and Chinese thought can be explained from the perspective of their different views of human nature. Petersmann's elaboration on his theory may proceed from the "animal spirits' and rational egoism of

individuals,”⁹⁹ which somehow resonates with the evil human nature presumed by many Western philosophers. They would thus call for limiting the power of the government as “a necessary evil” by constitutional arrangement to more effectively protect the equal human rights of citizens. Hume stated: “Every man ought to be supposed a knave and to have no other end, in all his actions, than private interest.”¹⁰⁰ Madison, the founding father of the US Constitution, also stated, “If men were angels, no government would be necessary.”¹⁰¹ In contrast, mainstream traditional Chinese thought is based on the goodness of human nature. Mencius observed that all men are created good, just as water flows downstream forever.¹⁰² *San Zi Jing*, a traditional Chinese classic summarizing Confucianism, starts by saying that “man’s nature at birth is good.”

Both Chinese and Western views of human nature have their pros and cons. By focusing on moral self-cultivation and self-restraint instead of rigid legal rules, power controllers can improve themselves as role models for the entire society so that abuses of power may be forestalled. Confucius asserted, “When a prince’s personal conduct is correct, his government is effective without the issuing of orders. If his personal conduct is not correct, he may issue orders, but they will not be followed.”¹⁰³ However, due to the mutability and unreliability of human nature, evilness cannot be absolutely prevented merely by moral self-cultivation and self-restraint. In contrast, Western constitutional theory, based on the evilness of human nature, underlines a mechanism of rights protection by power limitation. It is significant in terms of its emphasis on a principle of “checks and balances” for the prevention of the abuse of power. If the laws for limiting private and government powers are extremely rigid, however, some beneficial attempts and endeavors will be smothered.¹⁰⁴ Further, if presuming that a power controller is unreliable due to the human evilness, it is likely to cause moral degradation of the power controller without moral restriction himself. A historical lesson should not be neglected: the Weimar Constitution was once considered the most representational constitution among democratic nations, but from this constitutional system emerged the Nazi government, which brought enormous disasters to the world. In short, the opposing presumptions of human nature between Petersmann’s theory and Chinese thought lead to an irresolvable theoretical discord.

6. Conclusion

Three centuries ago, Montesquieu stated, “Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.”¹⁰⁵ Today’s globalization has brought humankind closer together than in the era of Montesquieu. However, people still tend to devote their loyalty to and value commonality with families, intimates, and groups of the same identity rather than abstractive and void cosmopolites. Although such keywords as ‘human rights’, ‘social justice’, and ‘judicial review’ used by Petersmann in his theory are known to people all around the world, they may be interpreted in different ways due to different values implanted in different lands. Petersmann draws theoretical foundation one-sidedly from Western liberal thought and acquires empirical support mainly from European practice. Hence, he might, as heralded in Montesquieu’s expression, have difficulty in developing a widely acceptable cosmopolitan constitutionalization theory for IEL. Even though Petersmann also makes allowances for ‘constitutional pluralism,’ the legal conception is so pluralistic that it gives rise to failure in attaining ‘universalizable’ principles of human rights, justice, and judicial review. As illustrated by the friction between Petersmann’s theory and Chinese thought due to the divergent values, ‘legal pluralism’ becomes an insurmountable obstacle to a cosmopolitan conception of IEL.

Petersmann has foreseen the potential objection to the philosophical and constitutional premises of his theory from other perspectives,¹⁰⁶ just as presented in this article. The authors respect Petersmann for his persistent development of theory from the foundation of human dignity. However, he has taken little consideration of Chinese philosophy and thought, which is likely to provide new valuable insights on supplying transnational public goods. On the same global plane, we not only compete for limited resources, but also rely on each other to ensure a better flight. As the same token, for the theorization of IEL, both Western and Chinese thought should be incorporated.

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2. See, e.g., E.-U. Petersmann, *Multilevel Governance Problems of the World Trading System beyond the WTO Conference at Bali 2013*, 17 J. INT'L ECON. L. 233-70 (2014).
3. See, e.g., E.-U. Petersmann, *How to Reconcile Health Law and Economic Law with Human Rights - Administration of Justice in Tobacco Control Disputes*, 10 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 27-78 (2015).
4. For details on Petersmann's academic profile, see M. Cremona et al., *Preface*, in REFLECTIONS ON THE CONSTITUTIONALIZATION OF INTERNATIONAL ECONOMIC LAW: LIBER AMICORUM FOR ERNST-ULRICH PETERSMANN (M. Cremona et al. eds., 2014).
5. E.-U. PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS 4 (2012).
6. *Id.* at 16.
7. *Id.*
8. According to Petersmann's own words, IEL's constitutional elements "are more developed in European law than in other international legal systems." See *id.* at 3.
9. E.-U. Petersmann, *Human Rights and International Economic Law*, 4 TRADE L. & DEV. 284 (2012).
10. Petersmann, *supra* note 5, at 240.
11. *Id.* at 23.
12. *Id.* at 74.
13. *Id.* at 4.
14. *Id.* at 35.
15. *Id.* at 144.
16. *Id.* at 173-4.
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27. ANGLE, *supra* note 25, at 93-8.
28. *Id.* at 126.
29. *Id.* at 96-97.
30. *Id.* at 126.
31. Xianming Xu, *An Analysis on The Human Rights Universality and Human Rights Culture* [对人权的普遍性与人权文化之解析], 6 L. REV. [法学评论] 20 (1999).
32. THE PRC CONST. 2004 [中华人民共和国宪法], art. 33.
33. *Id.* art. 34.
34. *Id.* art. 35.
35. *Id.* art. 38.
36. *Id.* art. 42.
37. The Common Programme (interim Constitution) of the PRC proclaimed on October 1, 1949 make clear that the state implements foreign trade control and adopts protectionist trade policy. See also FENGQIN MA, CHINA'S FOREIGN TRADE POLICIES AND MANAGEMENT [中国对外贸易政策与管理] 11-2 (1995).
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39. See The Decision of the CCP Central Committee on Relevant Issues concerning Improving the Socialist Market Economy System [中共中央关于完善社会主义市场经济体制若干问题的决定] (Oct. 2003), available at http://www.gov.cn/test/2008-08/13/content_1071062.htm (last visited on Feb. 9, 2018).
40. THE PRC FOREIGN TRADE LAW 1994 [中华人民共和国对外贸易法], art. 4.
41. *Id.* art. 9.
42. THE PRC FOREIGN TRADE LAW 2004 [中华人民共和国对外贸易法], art. 1.
43. *Id.* art. 8.

44. *Id.* art. 9.
45. *E.g.*, among the 175 members of the 10th SCNPC, who were also the legislators of the 2004 Amendment of the Foreign Trade Law, 118 were from the CCP. *See* Tao Zhang, *An Analysis of the Constituent Structure of the 10th SCNPC: Main Characteristics and Development Tendency* [第十届全国人大常委会组成人员结构分析: 主要特点与发展面向], 7 CONTEMP. CHINESE POLITICS REV. [当代中国政治研究报告] 80 (2009).
46. Petersmann, *supra* note 5, at 144.
47. The PRC CONST. 2004, pmb1.
48. The Three-Step Development Strategy shall be maintained as China's overall economic development model from 1980s to the middle of the 21st century: (1) to double the 1980 GNP and ensure that the people have enough food and clothing; (2) to quadruple the 1980 GNP by the end of the 20th century and ensure the Chinese people a well-off life; and (3) to increase per-capita GNP to the level of the medium-developed countries by the mid-21st century and to ensure the Chinese people a wealthy life. *See* Ziyang Zhao, Walk on the Road to Socialism with Chinese Characteristics: Report Delivered at the 13th National Congress of the CCP [沿着有中国特色的社会主义道路前进: 在中国共产党第十三次全国代表大会上的报告] (1987), available at <http://cpc.people.com.cn/GB/64162/64168/64566/65447/4526368.html> (last visited on Feb. 10, 2018).
49. Petersmann, *supra* note 5, at 355-71.
50. *Id.* at 164.
51. E.-U. Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 LOY. L. A. L. REV. 416-7 (2003).
52. Petersmann, *supra* note 9, at 307.
53. Petersmann, *supra* note 5, at 361.
54. However, the inevitable nature of certain normative disagreements is the major concern in Rawls' later work. *See* J. Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 798-805 (1997).
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56. Petersmann, *supra* note 5, at 156.
57. The Great Learning in THE BOOK OF RITES. *See also* LEGGE, *supra* note 22, at 357-59.
58. XUNZI, *supra* note 24, at 166.
59. CONFUCIUS, THE ANALECTS, Book I Hsio R, ch.. XII (saying that application of the rites is for harmony). *See also* LEGGE, *supra* note 22, at 143.
60. QIUMING ZUO, DISCOURSES OF THE STATES [国语] (Yongxiang Zhang trans. & annot.) 322 (2015).
61. *Yi* is a Confucian virtue roughly equivalent to righteousness or justice in English.
62. CONFUCIUS, THE ANALECTS, Book VII Shu R, ch. XV. *See also* LEGGE, *supra* note 22, at 200.
63. The preferential policies have been reflected in several Chinese laws, including Law of the

- PRC on Chinese-Foreign Equity Joint Ventures [中华人民共和国中外合资经营企业法], Law of the PRC on Chinese-Foreign Contractual Joint [中华人民共和国中外合作经营企业法], and Law of the PRC on Wholly Foreign-owned Enterprises [中华人民共和国外资企业法]. The former two were adopted in July 1979, and the third was adopted in April 1986.
64. See Gazette of the 3rd Plenary Session of the 11th Central Committee of the CCP (2009) [中国共产党第十一届中央委员会第三次全体会议公报], available at http://www.gov.cn/test/2009-10/13/content_1437683.htm (last visited on Feb. 10, 2018).
65. China is estimated to contribute to global economic growth in future years. See OECD, *Looking to 2060: A Global Vision of Long-Term Growth*, OECD Economics Department Policy Notes, No 15, (Nov. 2012), available at <https://www.oecd.org/eo/outlook/2060policynote.pdf> (last visited on Feb. 10, 2018).
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68. Xi Jinping, Speech on the First Session of the 12th National People's Congress [在第十二届全国人民代表大会第一次会议上的讲话] (Mar. 17, 2013), available at http://news.xinhuanet.com/2013lh/2013-03/17/c_115055434.htm (last visited on Feb. 10, 2018).
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71. The distinctiveness of the Chinese market economy can be indirectly perceived by the continuing denial of a market economy status by the EU and the US even after a 15-year's period expired after China's accession to the WTO. See Request for Consultations by China, *United States - Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS515/1 (adopted Dec. 12, 2016); Request for Consultations by China, *European Union - Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/1 (adopted Dec. 12, 2016).
72. Five-year Guidelines (Plans) were formulated by the CCP through the plenary sessions of the Central Committee and passed by national congresses. The ongoing 13th Five-year Guideline runs from 2016 to 2020 and includes such goals as fostering green industry, bridging the existing welfare gaps, and deepening participation in global economic governance. See The 13th Five-year Guidelines for Economic and Social Development of the PRC [中华人民共和国国民经济和社会发展第十三个五年规划纲要], available at http://news.xinhuanet.com/politics/2016lh/2016-03/17/c_1118366322.htm (last visited on Feb. 10, 2018).
73. See 3 SELECTED ESSAYS OF DENG XIAOPING [邓小平文选] 155 (2001) (stating that subject to the principle of common prosperity, a part of the people and regions are allowed to get rich first to prompt other people and other regions to get rich).

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82. Petersmann, *supra* note 5, at 456.
83. *Id.* at 438-9.
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