

# The Generation and Development of International Law Ideology in China

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## Abstract

The earliest International Law was based on the foundation of treaties among European countries. China began to communicate with the United Kingdom and other countries at the late Qing Dynasty. From then on, a large number of translated books concerning western International Law were published in China. This article points out, the concept of “Wanguogong fa” or “Gongfa” (International Law) had a great impact on the intellectuals and from the point of view of them, peace, fairness and justice should be excellently achieved only if they could master and apply International Law. However, Japan’s aggression made China’s dream broken, which directly prompted some intellectuals to reflect on the nature and function of International Law. Since then, China had no choice but to study the core knowledge of International Law from Japan, gradually realizing that the essence of International Law should observe the law of jungle, therefore a reconsideration of the International Law came into being. With the process of globalization, the contemporary International Law ideology in China has been enriched and the content of contemporary International Law has been extended. This paper attempts to return to the long-term perspective to search for the path of International Law ideology and provide a useful reference for the current construction of the rule of law.

## Keywords

International Law Ideology, China, Generation, Development

## 1. Introduction: The Research Status of the Generation and Development of International Law Ideology in China

He Qinhua held the idea that the birth and growth of China’s modern International Law is a process that is derived from western international law and gradually localized. The earliest introduction of international law in China was the

western missionaries. Until late 1930s, the discipline of international law has been mature, which is embodied in the fact that the basic fields and topics involved in the teaching and research of modern international law have basically been determined (He, 2004). Li Shengyu believed that neither traditional Chinese culture nor China's world order can produce the concepts of modern international law from our own tradition. Modern international law was imported from the West in the middle of the 19th century. The first comprehensive and systematic introduction of Western international law to China was the American missionary William A. P Martin, whose Chinese name was Ding Bangliang (Li, 2001). Gao Liping thought that the first person to translate modern international law is Ding Haoliang (Gao, 2005). Chen Yue believed that late Qing Dynasty of China was a troublesome period in Chinese history. During this period, the guns and cannons of western powers collapsed the Chinese nation. In order to solve the national crisis, in the late Qing Dynasty, everybody tried some means to integrate with the West, and the modern international law played a role as a communication bridge (Chen, 2004). Yang Zewei signaled that the seventeenth century was the heyday of the Qing Dynasty and maintained the traditional hierarchical ideas in foreign relations that are incompatible with the emerging equal international relations in Europe.

In addition, in the mid-19th century, the Opium War broke out, and the Qing government defeat. Due to the above two reasons, China began to attach importance to understanding of International Law (Yang, 1996). Ding Guangpan believed that Beijing Tongwen Guan's translation and teaching of modern international law had a tremendous impact on the spread of international law in China (Ding, 2005). Guan Wei believed that after the two Opium Wars, with the translation and introduction of international law and the need for foreign negotiations, the notion of international law in modern sense started to emerge (Guan, 2004). Zhang Weiming pointed out that during the Sino-French War, China and France took very different attitudes toward International Law. China had actively used the theory of international law, whereas France had repeatedly violated the principles of international law. This phenomenon embodied the conflicts and contradictions between idealism and realism in the relations between China and foreign countries (Zhang, 2009). According to Zeng Tao, the landmark event in the development of Western international law in China was that western missionaries translated early works of international law in the West. In addition, during the Sino-Russian treaty negotiations, international law was applied (Zeng, 2008). According to Xiu Zhijun, with the violent invasion by the Western powers in the 19th century, modern International Law began to be formally introduced into China and gradually spread. However, the impact was mainly malign. In a sense, International Law is the legal tools of the aggression and enslavement of imperialist (Xiu, 2006). One scholar signaled that a country's attitude toward International Law can be mainly determined by its state of sovereignty (Singh, 2015). As we know, India has acknowledged the British colonial

position since 1947, and yet China has taken issue with the colonial treaties which are epitome of injustice and inequality since 1920 (Singh, 2015). China and its publicist have accepted other treaties, such as the Vienna Convention on the Law of Treaties (VCLT) and the UN Convention on the Law of the Sea (UNCLOS)<sup>1</sup>.

#### 1) The Background of China's Introduction of the Concept of "International Law"

Although there is no doubt that China signed an international treaty with Russia during the *Kangxi* emperor Period of Qing dynasty, careful consideration reveals that it was in the second half of the 19th century that International Law was introduced into China.

### 1.1. Initial Contacts between China and West

China was undoubtedly a sovereign monarchy before the Nanking Treaty of 1842. Qing dynasty (1644-1911), its main ruling period was the 18th century and the 19th century. In history, it attracted many people's attention that Macartney visited China in the end of eighteenth Century<sup>2</sup>, which was a big event because it was the first formal contact. The following interactions make no sense when we are not considering this opening of international relationship. In fifty-seven years of Qianlong George Lord Macartney (1737-1806) led diplomatic corps to visit China delegated by King of Britain and in 1794 after two years he returned to Britain. On the one hand, he wrote *An Embassy to China Being the Journal Kept by Lord Macartney during his Embassy to the Emperor Chien-Lung*<sup>3</sup>, on the other hand, the vice George Thomas Staunton (1737-1801) also wrote the book *An Authentic Account of an Embassy from the King of Great Britain to the Emperor of China*<sup>4</sup>, which was quickly translated into French, German and Italian and there were a great number of readers. In addition, such phenomenon would suggest that many other countries had known the basic information about China, and this maybe the earlier documental description of China. The two preceding representatives set a model for the following members. As we know, many other members of diplomatic corps traveled to China, they wrote similar works that became important references for western people to know China from a more comprehensive and accurate angle in the early 19th century. In one

<sup>1</sup>Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969) (VCLT). UN Convention on the Law of the Sea, 1833 UNTS 3 (1982) (UNCLOS).

<sup>2</sup>Representative works: Alain Peyrefitte, *The Immobile Empire*, SDX Joint Publishing Company (1993); James L. Hevia, *Cherishing Men From Afar*, Social Science Academic Press (2002); Ge Jian-xiong, "There is not only Chinese in the World-Comparing *Yingshi Magaerni Laipin An* (An Affair of an Embassy from the King of Great Britain Macartney Celebrating the Birthday of Emperor of China) and *An Authentic Account of an Embassy from the King of Great Britain to the Emperor of China*", *Dushu*, no11 (1994).

<sup>3</sup>See *An Embassy to China Being the Journal Kept by Lord Macartney during his Embassy to the Emperor Chien-Lung*, translated by Liu Bannong, revised by Gao Yehou, Zhonghua Book Company (1916).

<sup>4</sup>The University of Tokyo General Library Stack: English edition (1797), (1798), (1799); French edition (1798).

sense, it may be a blessing to let more foreign people to have a better understanding of China. Fortunately, the coming of Western warned Chinese who used to believe China was the biggest and the most burgeoning country in the world. From the 19th century, with the circulation of these books concerning China, western people's impression on China was becoming worse and worse. In their image, China was no longer an idyllic scenery like it in the 18th century and no longer a Shangri-la ruled by kind philosophers, on the contrary it became a stagnant, backward and uncivilized country<sup>5</sup>, which was the opposite to the original flourishing, prosperous scene.

## 1.2. Treaty between China and UK

In 19th century western countries felt so confident that it was evident that they were superior to China, especially the obvious advantages in their legal arrangements and political system. Besides the above overwhelming features, in western people's minds, their military and industrial strength, religious and cultural traditions and other aspects gave them a dominant position in the arrangement of a new world. All these may be rational for their arrogance and contempt about China's people and things. Some countries took more vigorous actions in order to have more connections with China, the United Kingdom was a case in this point. It was the first one who signed a treaty of more modern significance with China. During the process of concluding the treaty, the United Kingdom demonstrated a far greater say in the whole talks.

If we want to have a more clear and explicit view, it is very necessary to point out the specific differences between the treaty of China and Britain, while the treaty that was signed between China and Russia in early *Qing dynasty-Kangxi, Yongzheng and Qianlong* period. There is a need to clarify that it was indicated at the beginning of the treaty of China and Russia that the treaty was signed by the envoys of the two countries at the authorization of their monarchs. However, the treaty of China and Britain was required to give clear indication before negotiation ministers that the treaty was peacefully permanent between *Qing dynasty's Empire and Britain's King*. The Queen of Britain mainly informed and disciplined China by the use of powerful military force, the so-called International Law and the Bible (Liu, 2009). It was so arduous and demanding for Qing dynasty to move forward in the circulation of being defeated, signing a treaty, breaking a treaty, being defeated and signing a new treaty.

<sup>5</sup>National Library of China: *Western Books on China Published up to 1850*. This set of books is a collection of books about China published in western countries before 1850 that are stored in the library of School of Oriental and African Studies. Now these books are collated by Britain scholar John Lust and are being promoted all over the world by Inter Documentation Company in the form of fiche of the same name, which is the most important data for the research about the early cultural exchange between China and the west and the development of Sinology in the west. It must be said, English data is only a part of the whole data. In fact, there are languages of main European countries in the data including Latin in Middle Ages. See Chen Kongyan, "New Data of the Research of the Exchange between China and the West: Promoting and Intruding *Western Books on China Published up to 1850*", *World History*, no. 5 (2004).

## 2. The Path of China's Introduction of Concept of International Law

In fact, especially in terms of the European behaviors in Asia, it is so distinct and obvious that there was no war and treaty before 19th century. In other words, starting a war is the shortcut to sign a treaty. Besides Europe, the ruling of International Law, without exception, had to be achieved through force in other parts of the world (Hevia, 2013). In this widespread background, one scholar pointed out that a country's attitude toward International Law can be mainly determined by its state of sovereignty (Singh, 2015). For instance, China's semi-colonial circumstance is the important reason in the choice of yielding to the overwhelming power of the United Kingdom. There is no doubt that certain treaties still have profound impacts on contemporary China's existing legal system. This year is the twentieth anniversary of the resumption of Chinese sovereignty over Hong Kong, Asia's world city, after 156 years as a British Crown colony (Sturgeon, 2017).

### 2.1. The Translation Works of "International Law" at the Late Qing Dynasty

The translation of some part of International law conducted by Lin Zexu in Guangzhou on the eve of the Opium War was only a prelude for the extensive input of International law into China (Tian, 2001). It is better to analyze this issue by knowing the fact that more complete translation works of International law were the European and American International law works that translated by W. A. P. Martin, John Fryer and others relying on School of Combined Learning and Jiangnan manufacturing Bureau. About the research of the input of International law the most representative works are *Elements of International Law* published in 1864 and *Commentaries upon international law* which often quoted at the end of Qing Dynasty<sup>6</sup>.

The concept of "Wanguogongfa" or "Gongfa" (International law) generated a Chinese discourse system of International law that was accepted and praised by intellectual circles. The *Church News* that established by famous American missionary Young John Allen and soon changed its name to *Globe Magazine*<sup>7</sup> in-

<sup>6</sup>*Commentaries upon international law*, sixteen volumes with the addition of two volumes in total, was reprinted by Jiangnan manufacturing Bureau in the last month of summer in Guangxu Twenty-four years in Qing Dynasty (1898). The original text was written by Sir Robert Phillimore and it was interpreted by John Fryer, recorded into words by Yu Shijue (from Taicang), revised by Wang Zhensheng (from Luhe), and revised again by Qian Guoxiang (from Wuxian). Now the book is stored in The University of Tokyo Institute for Advanced Studies on Asia Library.

<sup>7</sup>*Globe Magazine*, whose original name was *Church News*, was founded on September 5, 1868 and in that time it was a weekly newspaper. From no. 301 volume published on September 5, 1874 when its name became into *Globe Magazine* to no. 750 published on July 28, 1883 when it stopped publication, it published 450 volumes. From February, 1889 when it resumed publication and became a monthly newspaper to December, 1907 when it ended, it published 227 volumes. From 1874 to 1907, it published 677 volumes in total and it published up to 28 years (in fact during the time from 1874 to 1907 it stopped for 6 years). Although it was a church newspaper, *Globe Magazine* published a lot of articles about the current political situation of China and situation of western countries. In fact, it was a comprehensive newspaper dealing with current events. *Globe Magazine* (60 volumes in total), Shanghai Bookstore Publishing House (2004).

roduced a lot of things about “Wanguogongfa” (International law). For example, it introduced The Association about the Reform and Codification of the Law of Nations (Zhang, 2003) in no. 354 (1875), published *Civilization, China and Christian Yi Chapter twenty-ninth: The main purpose of International law* (1883) and *Summary of International law (translation): Prologue* (1902) and *Comment: Explain International law* (1904) etc. These articles introduced *Elements of International Law* and knowledge of “Gongfa” (International law) by newspapers, which were widely accepted by intellectual circles as western knowledge (Zhang, 2013). Although intellectuals praised “Gongfa” (International law) until early 20th century, they questioned the practice that they comprehended International law as justice because Japan rose sharply in Asia. For example, “Where is the International law?” someone said in newspaper. According to International law any country should not invade other countries. But when Japan destroyed Ryukyu nations treated it with indifference and when Japan set the Japanese Resident-General of Korea on the excuse of independence of Korea they also didn’t react to it.

## 2.2. Japan’s Influence on China’s International Law Thoughts

Since China and Japan established formal diplomatic relations by “Sino-Japanese Friendship and Trade Treaty”, Japan was continually taking colonial policy that it invaded Ryukyu, Korea and Taiwan. This is related to the understanding about the positive nature of International law. When China still took International law as justice, Japan already knew the jungle law in empiricism at the end of 19th century and knew how to use International law. Because of the impact of Japan, China turned to learn western knowledge such as International law from Japan at the end of Qing Dynasty. Because many overseas students went to Japan to learn, Japan’s International law textbooks were put into China and the concept of “Wanguogongfa” or “Gongfa” was replaced by the teaching materials about International law in peacetime and International law in wartime written by Japan’s Ph.D in law. And these students played a huge influence in the field of politics and law in Republic of China and even in the People’s Republic of China.

The influence of the writings by Japan’s Ph.D in law was quite profound (Shi, 2013) and it went down to Republic of China. The *Meanings of Political Science and Law* published by Society of Political Science and Law record the Japan doctor of laws Shingo Nakamura’s (中村進午) *International law in peacetime* (《平时国际公法》) and *International law in wartime* that were published as second edition *Meanings of Political Science and Law Twentieth* in 1913 and *Meanings of Political Science and Law Twenty-first* in 1915. The two sets of books were correctional translated copies of the teaching materials dictated by Shingo Nakamura and that he wrote for Chuo University (中央大学). These books had already been published by Hubei Law and Political Science Publishing House (湖北法政编辑社) in Tokyo. The names, “International law in peacetime” and “International law in wartime”, were still used in the teaching materials of law major in Chaoyang College in 1927. It can be known from the list of

past teachers of Chaoyang College that the principal Jiang Yong once held the post of the teacher of International law and Kojiro Tatsumi (巽来次郎) who was a lecturer of Waseda University also taught International law in Chaoyang College (Jiang, 1932). Another teacher of International law Chin Pao Kang (Kang, 1929) graduated from law major of Hosei University (日本法政大学), who was past counselor of Legislative Affairs Bureau (Jiang, 1932). In 1905 (Russo-Japanese War) when Jiang Yong was studying in Japan he once wrote a book named *Compilation of international treaties in wartime*<sup>8</sup>, which was translated from the twenty three Japanese treaties, rules and regulations. At the early Republic of China the international law books praised highly included *Thesis about International law of China*, (The Commercial Press in 1914) written by Japan's doctor of law Yoshiyuki Imai (今井嘉幸). This book emphasized consular jurisdiction and foreign settlement which were played an important influence in China. In addition, the *International law* (《国际法》) written by the representative of Japan's Pure Jurisprudence Kisaburo Yokota (横田喜三郎) continued to be praised, which can prove the positive nature of International law at that time and help to get a clear understanding of the abuse of International law that it can legalize the jungle law.

### 2.3. Characteristics of International Law in the Late Qing Dynasty

At the late Qing Dynasty, Chinese hoped to get impartial treatment by learning and applying the books of International law translated by western missionaries and Japanese. The strategy of diplomatic treaties that Japan took, which made Chinese know the real International law depended on national power. The failure in wars and foreign affairs let China learn concept of International law from UK, Japan and other countries. From the end of 19th century to the beginning of 20th century, these experiences made China reflected the abuse of International law at that time.

As we know, India has acknowledged the British colonial position since 1947, and yet China has taken issue with the colonial treaties which are epitome of injustice and inequality since 1920 (Singh, 2015). To some extent, the colonial

<sup>8</sup>*Compilation of international treaties in wartime*: 1) The Treaty of the Red Cross (First Geneva Convention); 2) Paris Declaration on Naval War; 3) Regulations Respecting the Laws and Customs of War on Land; 4) Convention about Applying the Principle of Geneva Convention Signed in 1868 in War at Sea; 5) Declaration on the Prohibition of Throwing Missiles and Explosives from Balloons or other New Similar Methods; 6) Declaration on the Prohibition of the Use of Missiles Used to Spread Suffocating or Toxic Gas; 7) Declaration on the Prohibition of the Use of Missiles likely Swelling and Deforming in Body; 8) Hague Convention Final Act; 9) Act about Examining the Capture; 10) Rule of Capture at Sea; 11) Rule about the Treatment of Prisoners(Army); 12) Rule about the Treatment of Prisoners (Navy); 13) Rule about the punishment of Rule of the Treatment of Prisoners; 14) Details of the Treatment of Prisoners; 15) Rule about that Prisoners Walk freely and Stay in Common People's Home; 16) Rule about the Forced Labor of Prisoners; 17) Rule about the Mail of Prisoners; 18) Rule about the Mail and Exchange of Prisoners; 19) Rule about Battlefield Recovery and Burying People Died in War; 20) Rule about Spoils; 21) Rule about Arranging the Spoils; 22) Rule about the Management of Spoils of Navy; 23) Rule about the Management of Capture. See Jiang Yong, *Compilation of international treaties in wartime*, Society of Min Publishing House (1905).

treaties are filled with distinct motives to get more gains and benefits for Britain. In that time, the colonial treaties were construed as the old-fashioned International Law.

### **3. The Development of Contemporary International Law Ideology in China**

With the development of China, especially stepping into a new stage, China has accepted other treaties, such as the Vienna Convention on the Law of Treaties (VCLT) and the UN Convention on the Law of the Sea (UNCLOS)<sup>9</sup>. This is a case in point that reconsideration on the nature of International Law has had a positive role in the conspicuous change in China's attitude to International Law.

#### **3.1. Communication and Cooperation Are the Foundation of Contemporary International Law**

Environmental protection is a common problem for mankind and it is required all countries work together to take action. Consequently, it is imperative to protect the vulnerable environment through the right to information about, and involvement in, environmental decision making (the right to information and involvement). Fortunately, there has been the adoption of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). Parties to the Aarhus Convention are largely consistent with the countries within the Belt (Zhang, 2017).

Furthermore, a more globalized commercial law is emerging. China's 'Go Global' strategy is the incentive for Chinese companies to seek to improve China's resource security through acquisitions in foreign markets. Encouraged by the influence of this policy, Chinese companies have increased the frequency of great investment abroad in recent years (Tomasic & Xiong, 2016). It is inevitable that this increased interaction has been the source of a number of commercial disputes. Out of the actual need to make the disputes more easily addressed, a more and more overt consensus concerned with the settlement of commercial disputes has formed, which is the original demonstration of globalized commercial law.

#### **3.2. The Influence of Economic Globalization on Contemporary International Law**

As the above case has illuminated, contemporary International Law is more and more inclined to the economic field, which is evident in the process of economic globalization. The above case has shown the reasons or the practical necessity for the formation of consensus. The following one will embody a specific situation in the operation process. It is Investor-State arbitration (ISA) that has gotten

<sup>9</sup>Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969) (VCLT). UN Convention on the Law of the Sea, 1833 UNTS 3 (1982) (UNCLOS).



more and more attention among its trade and investment partners. Although it is a fact that the number of ISA cases is still small, the discussions about it are prevalent among the policy makers and scholars (Zhang, 2017). In this situation, China has been the organizer which is accountable for the drafting of the ISA clauses. The age of passive acceptance of the partial and unjust treaties has gone. However, we must see that the practice of China's ISA clauses is not flawless in supporting investors in ISA or in defending their national interests (Zhang, 2017). For example, in the context of the One Belt, One Road Initiative (OBORI), there is parity among the parties involved in the practice of China's ISA clauses in the revising process. It is obvious that some issues can be better disposed of if there is alternations in the specific regulations concerning different generations of ISA clauses, the scope of arbitral disputes, applicable law, the choice of arbitration institutions, procedural arrangements, the enforcement of arbitral awards, the impact of transition clauses, and so on (Zhang, 2017). It is a demanding undertaking for China to make the ISA clauses better, at the same time, it is no doubt that this is an opportunity that should be cherished by China. China and its trade partners will get more benefits from a more adaptable Model ISA clause.

#### 4. Conclusion

It has been fully demonstrated that contemporary International Law is concerned with the equitable communication and cooperation, which is wholly different from the nature of the colonial International Law. In one word, the concept of International Law is changing and inconsistent among different ages. Only by our continuous study and practice, the views about International Law can be enriched.

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