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SYMPOSIUM ON COMPARATIVE FOREIGN RELATIONS LAW

CHINESE FOREIGN RELATIONS LAW

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Curtis Bradley has observed that, apart from in the United States, foreign relations law generally has not been treated as a separate academic field, but that this situation is starting to change.[1] This observation can also find evidence in China. In March 2016, I hosted a conference on "Chinese Foreign Relations Law: A New Agenda" at Xiamen University School of Law, where I am a faculty member.[2] This is the first conference engaging with this field in China. Also in 2016, a Chinese professor of private international law published the first article discussing Chinese foreign relations law in a general way, the main argument of which is that foreign relations law should be a component of the "rule of law" in China.[3]

This short essay tries to concisely answer the following questions: Why was Chinese foreign relations law not taken seriously before and why has it begun to be taken seriously today? What is the current status of Chinese foreign relations law? And what are the trends of Chinese foreign relations law? My basic argument is that Chinese foreign relations law has its own dynamic, structure, goals, and effects, which differ from that in many other countries including the United States, and thus that it should be evaluated in the specific context of the rise of China and China's socialist identity.

Why Chinese Foreign Relations Law Matters Now

That Chinese foreign relations law has long been given little attention can be attributed to two main factors. One is academic bias. In China, international law professors and national law professors traditionally are isolated from each other, narrowing their research and teaching to their "own" disciplines respectively. Few international lawyers know constitutional law well and, vice-versa, few constitutional law professors have much knowledge of international law. The other, more important factor concerns the manner in which China conducts foreign relations. It is widely recognized that the rule of law is far less developed in China than in many other countries. China was regarded as a rule-of-man state for a long period.[4] This situation was especially conspicuous in the field of foreign relations. Political expediency is routinely invoked to justify governmental activities in foreign relations, which is

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[1] Curtis A. Bradley, *What is Foreign Relations Law?*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW (Curtis A. Bradley ed., forthcoming).

[2] For the conference information, see Chinese Foreign Relations Law: A New Agenda, XIAMEN UNIVERSITY SCHOOL OF LAW.

[3] Liu Renshan, *On Chinese Foreign Relations Law as a "Law" of "Governing the State by Law"*, 3 LAW & COM. STUD. 131 (2016).

[4] Mao Tse-Tung (Mao Zedong), the founder of the People's Republic of China, once asserted that to govern China "depend[s] on the rule of man, not the rule of law." Citing from SHAO-Chuan Leng, *The Role of Law in the People's Republic of China as Reflecting Mao Tse-Tung's Influence*, 68 J. CRIM. L. & CRIMINOLOGY 356, 356 (1977).

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also characterized by low transparency to outside observers. For a long period, the Chinese people had hardly debated what role the law could play in foreign relations. For instance, it came as a surprise that China concluded and ratified treaties in a legal vacuum for a period of three years, starting from October 1987 when the Decision on the Ratification Procedure on Concluding Treaties with Foreign States[5] ceased to apply, to December 1990 when the Law of the People's Republic of China on the Procedures for the Conclusion of Treaties entered into force.[6]

It is time to take Chinese foreign relations law seriously, however. The most fundamental reason is the rise of China as a great power. The enthusiasm for scrutinizing the foreign relations law of the United States is not only because this legal body in and of itself is sophisticatedly framed and enforced, but also because it is the legal body of the United States, a great power and the once sole superpower in the world. As China rises, foreign relations in which it is involved expand sharply in scope, content, and effect. How China manages foreign relations will have increasing effects on other states, nonstate actors in China and abroad, and China itself. Of particular interest, there is a trend whereby China is seeking to rely more heavily on legal means to argue for and pursue its national interests. In 2014, the Chinese Communist Party (CCP), the sole ruling party in China, adopted a grand legal reform strategy with the aim to develop the country into a real "socialist rule-of-law state."[7] China, under this strategy, would "actively participate in international rule-making … increase China's power of discourse and influence in international legal affairs" and "protect the legal rights and interests of Chinese nationals and corporations abroad in accordance with the law."[8] Chinese foreign relations law is thus beginning to grow in academic and practical importance.

The Current Structure of Chinese Foreign Relations Law

According to China's Constitution, the National People's Congress (NPC), with the Standing Committee as its permanent operational body, is the "highest organ of state power."[9] Theoretically, the NPC could decide on any matters in foreign relations. Apart from stipulating that the NPC has the power to "decide on question of war and peace,"[10] however, the Constitution is silent on other powers of the NPC. Of particular note, it is silent about the NPC's power concerning treaty-making, which presumably is the most important modality of power in foreign relations in peacetime. The Constitution instead authorizes only the Standing Committee of the NPC to "decide on ratification or abrogation of treaties and important agreements."[11] And the Treaty-Concluding Procedure Law (1990) does not refer to a treaty power of the NPC, implying that even though the NPC might, relying on its constitutional status of the "highest organ of state power," decide on the treaty ratification; it has no legal basis to do so under the Treaty-Concluding Procedure Law (1990). Similarly, the Constitution gives the President little substantive power in foreign relations. For instance, while it is not disputed that the Head of a State under customary international law has the power to conclude a treaty,[12] the Chinese President does not have this power and instead is more of a rubber stamp to ratify treaties in accordance with decisions of the Standing Committee of the NPC. As far as the judiciary is concerned, the Constitution does provide that courts "exercise judicial power

[5] This decision was adopted by the Standing Committee of the NPC on October 16, 1954.

[6] The law was adopted by the Standing Committee of the NPC on December 28, 1990.

[7] Central Committee of the CCP, Decision on Some Major Issues Concerning Comprehensively Enhancing the Rule of State by Law (Oct. 23, 2014).

[8] *Id.* at sec. 7.

[9] XIANFA art. 55 (1982, as amended in 2004) (China).

[10] *Id.*, art. 62, § 14.

[11] *Id.*, art. 67, § 14.

[12] Vienna Convention on the Law of Treaties art. 7(2)(a), May 23, 1969, 1155 UNTS 331.

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independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual."[13]

In contrast to the NPC, the dominant player in Chinese foreign relations is the State Council, China's cabinet. It is authorized under the Constitution to "conduct foreign affairs and conclude treaties and agreements with foreign states."[14] Under the Treaty-Concluding Procedure Law (1990), it approves "nonimportant" treaties and agreements.[15]

There are discrepancies between norms and practice, however. The NPC has in fact been involved in treaty ratification in several cases. For instance, the State Council once submitted to the NPC rather than to the Standing Committee of the NPC the Joint Declaration on the Question of Hong Kong between the UK and China (1984), which, among others, provided the establishment of a special administrative region (SAR) in Hong Kong. The NPC adopted a decision on ratification in its own right.[16] Although it is justified for the NPC to do so under the Constitution and the Legislation Law (2000) because, in accordance with both laws, the establishment of SARs exclusively falls within the domain of the NPC,[17] it did not have authority to do so under the Treaty-Concluding Procedure Law (1990), as discussed above.

The President has also exercised the treaty power beyond the Constitution and the Treaty-Concluding Procedure Law (1990). For instance, in 2007, then-President Hu Jintao, on behalf of China, signed the Treaty of Good Neighborliness, Friendship and Cooperation between China and Tajikistan,[18] and the Treaty of Long-Term Good-Neighborliness, Friendship and Cooperation between the Member States of the Shanghai Cooperation Organization. Moreover, the State Council did not submit many international agreements like bilateral taxation agreements and bilateral investment agreements to the Standing Committee of the NPC for a decision on ratification, even though these agreements should have been identified as "important." Rather, it approved them in its own right.[19]

Or course, discrepancies between norms and practice exist in other countries as well as in China. Presumably, what really matters is the unique, inherent dynamic underlying the mechanism of Chinese foreign relations law, which is imposed by China's socialist identity. According to China's Constitution, the executive and judicial organs at central and local levels (for instance, the State Council and the Supreme People's Court at the central level respectively) are created by, and shall be subject to, the People's Congress (for instance, the NPC at the central level).[20] Furthermore, as the sole ruling party in China, the CCP, through its branches at central and local levels, controls the operation of legislative, executive, and judicial branches.[21] This mechanism was authoritatively

[13] Xianfa art. 126 (1982, as amended in 2004) (China).

[14] *Id.*, art. 69, § 9.

[15] The Treaty-Concluding Procedure Law arts. 7,8 (1990) (China).

[16] The Decision of the 3rd Meeting of the 6th National People's Congress on Ratifying the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Apr. 10, 1985).

[17] Xianfa art. 31 (1982, as amended in 2004) (China); Lifa Fa [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, as amended in 2015), art. 8 § 3.

[18] The treaty can be found at Treaty of Good Neighborliness, Friendship and Cooperation between China and Tajikistan, The Central People's Government of the People's Republic of China.

[19] Liu Yongwei, *Important Agreements and Non-Important Agreements: Also Commenting on the Importance of Sino-Foreign Taxation Agreements*, 4 Pol. & L.F. 171 (2008).

[20] Xianfa arts. 3, 92, 96, 111, 128, 133 (1982, as amended in 2004) (China).

[21] Zhu Suli, *Political Parties in China's Judiciary*, 17 Duke J. Comp. & Int'l L. 533, 535, 538 (2006–2007); Zhu Suli, *The Party and the Courts*, *in* Judicial Independence in China 52 (Randall Peerenboom ed., 2010).

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elaborated by Deng Xiaoping, the recognized "Chief Designer" of China's Reform and Opening-up Policy, thirty years ago and Deng's explanation still largely applies to today's China. Deng stated:

> The democracy in capitalist societies is … no more than a system of multiparty elections, separation of judicial, executive and legislative powers and a bicameral legislature. Ours is the system of the people's congresses and people's democracy under the leadership of the Communist Party; we cannot adopt the practice of the West. The greatest advantage of the socialist system is that when the central leadership makes a decision, it is promptly implemented without interference from any other quarters. … From this point of view, our system is very efficient …, and we should keep it—we should retain the advantages of the socialist system.[22]

The socialist identity creates the structure of public governance in China, which is sharply different from that in states like the United States. Roughly speaking, the former is characterized by the "cooperation and coordination" between different governmental bodies and the latter is characterized by "checks and balances." As a result, although being the highest organ of state power, the de facto role played by the NPC in China's public governance is far less than that literally enshrined in the Constitution. By the same token, the judicial branch is not immune from routine external interferences,[23] which are often conducted in the name of cooperation and coordination. Rather, the executive branch occupies the central stage of national governance, often exercising its power without meaningful check. Thus, the dynamic underlying Chinese foreign relations law is sharply different from that in the United States where foreign relations law is said to serve as "an internal constraint on the unilateral exercise of foreign relations powers through the distribution of authority within the national government."[24]

Recent Developments

There are two recent developments in Chinese foreign relation law that merit attention, but it is too early to draw definite conclusions from them. The first concerns a recent important legislative initiative concerning foreign relations. In March 2017, the Legal Affairs Office (LAO) of the State Council published the Regulation (Draft) for the Implementation of the Treaty-Concluding Procedure Law (1990) for public comments. The LAO explained that this initiative is aimed at making the Treaty-Concluding Procedure Law (1990) "more tailored, practical, and operational.""[25]

The Draft includes many encouraging elements. For instance, more treaties are explicitly required to be submitted by the State Council to the Standing Committee of the NPC for a decision of ratification.[26] The State Council, on submitting treaties to the Standing Committee of the NPC, is required to explain the background on negotiation of treaties; the main content of treaties; the necessity to ratify or join the treaties and the potential impact on China; the priorities and difficulties in the course of negotiations; the potential need for enactment or amendment of laws; and explanations of declarations or reservations to be made.[27] Furthermore, if it is found in the course of negotiations that important adjustments or changes need to be made to the negotiation proposal already approved by the State Council, the Ministry of Foreign Affairs or the relevant department under the State

[22] 3 Selected Works of Deng Xiaoping 187–88 (1993).

[23] China's Long March Toward Rule of Law 307 (Randall Peerenboom, 2002).

[24] Daniel Abebe, *Great Power Politics and the Structure of Foreign Relations Law*, 10 Chi. J. Int'l L. 125, 125(2009–2010).

[25] Note by the Legal Affairs Office Concerning Seeking Public Comments on the Implementation of the Law of the People's Republic of China on the Procedures for the Conclusion of Treaties.

[26] Regulation (Draft) for the Implementation of the Treaty-Concluding Procedure Law (1990) art. 17.

[27] *Id.*, arts. 24 & 25.

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Council in conjunction with it shall report it to the State Council for a new authorization.[28] This would-be law could both enhance the treaty power of the Standing Committee of the NPC and make treaty negotiators more accountable. However, whether it suggests a trend toward an overall reconstruction of the distribution of power in Chinese foreign relations law and, more generally, a substantial improvement of rule of law in Chinese foreign relations, remains to be seen.

The second development concerns two Judicial Interpretations recently issued by the Supreme People's Court (SPC).[29] The two Judicial Interpretations provide in detail how Chinese courts exercise jurisdiction over disputes and matters occurring within the waters under Chinese jurisdiction. It has been argued that they are helpful to protect Chinese maritime rights and interests in waters such as South China Sea,[30] where China recently has been in confrontation with several states like the Philippines. Notably, He Rong, then Vice-President of the SPC, recently argued that, as China increases its international status and, in particular, China advocates the "One Belt One Road" Initiative, Chinese courts should increase their participation in the international economic rule-making through more active application of international law.[31] My own view, as I discussed when commenting on a case reported in 2014 in which a Chinese court allowed a suit filed by dozens of Chinese forced laborers and their descendants against two Japanese companies accused of being involved in Japan's forced labor programs during World War II, is that Chinese courts have begun to be involved in foreign relations in a deliberate manner.[32] In short, it seems that Chinese courts have begun to be mobilized to cooperate and coordinate with other governmental bodies to expand and protect China's national interests, pursuing China's rise. It is unclear, however, whether and to what extent Chinese courts will provide meaningful checks and balances against the executive branch in foreign relations.

Conclusion

Foreign relations law matters to both national governance and international governance. Its academic and practical importance increases as the international community becomes more interdependent and internal affairs and external affairs become increasingly intertwined. Thus, compared with either national law or international law in a narrow sense, foreign relations law provides a more comprehensive perspective to evaluate how a state organizes its constituent parts, mobilizes its resources, and chooses an approach it deems appropriate to pursue its public policy. Until now, foreign relations law in the United States has attracted nearly all the attention, but it clearly does not and could not provide a prototype for all other countries. China adds uncertainties and complexities to foreign relations law. A comparative study on Chinese foreign relations law not only adds to the current academic literature, but, more importantly, helps increase understanding of how China, a rising great power and a socialist state, conducts foreign relations, which in turn is conducive to manageable relations between China and the outside world.

[28] *Id.,* art. 11.

[29] Rules on the Relevant Issues Concerning the Adjudication of Cases Occurring in the Waters Under Chinese Jurisdiction (First) (Dec. 28, 2015, entry into force Aug. 2, 2016) (China); Rules on the Relevant Issues Concerning the Adjudication of Cases Occurring in the Waters under Chinese Jurisdiction (Second) (May 9, 2016, entry into force Aug. 2, 2016) (China).

[30] Li Tiansheng, *Fully Recognize the Significance of Enhancing Maritime Judicial Sovereignty*, ChinaCourt (Aug. 3, 2016, 7:34 AM).

[31] He Rong, *On China's Judiciary Participation in the Formation of International Economic Rules*, 1 Int'l L. Stud. 3 (2016).

[32] Congyan Cai, *International Law in Chinese Courts During the Rise of China*, 110 AJIL 269, 280–82 (2016).

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