

# China, Law and Global Governance

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## 2 China, Law and Global Governance: Power through Rules or Rule Through Power?

*Matthieu Burnay\* and Wim Muller\*\**

### Abstract

The first three contributions to this volume present a thematic discussion on the relationship between law and power in China's emergence as a great power in international relations. China's current prominence on the world stage is the culmination of a story long foretold. The question how China is going to wield its increasing economic and military power, and whether it is going to do this in accordance with the rules set by the current international order, is discussed against the background of China's foreign policy and the rise and decline of liberal norms in the international legal order.

### Keywords

China – global governance – liberal international order – sovereignty

### Introductory Remarks

In this volume of the Hague Yearbook of International Law, we present a thematic discussion representing a mix of perspectives on the relationship between law and power in China's emergence as a great power in international relations. China's current prominence on the world stage is the culmination of a story long foretold. The question how China is

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going to wield its increasing economic and military power, and whether it is going to do this in accordance with the rules set of the current international order, has been occupying scholars and policy-makers at least since the beginning of China's economic miracle.<sup>1</sup> Under the Hu Jintao leadership, the PRC even adopted China's 'peaceful rise' as an official foreign policy slogan, albeit for a short while, in an attempt to assuage the fears engendered by its own rise.<sup>2</sup> China's conduct in the meantime remained largely based on Deng Xiaoping's exhortation to 'keep a low profile'. It aimed to reassure the world that China did want to fit in with a rules-based international order even if it embraced some rules more than others.<sup>3</sup> Although there was some discussion about the viability of a 'China model' of governance as an alternative to the western liberal model around 2010, the Chinese government was careful to downplay such ambitions. It has only been in recent years, as Xi Jinping consolidated his power and centrality, that China begun to express an ambition to shape the international order.

The balance between law and power has been central to China's post-1978 reforms. From the early stages of China's opening-up and growing participation to the dynamics of globalisation, the Chinese Communist Party (CCP) has tried to strike a balance between maintaining its power monopoly, while giving individuals and companies the freedom to pursue wealth to help develop China's own economy and lift hundreds of millions of people out of poverty. China's domestic legal system was largely shaped to facilitate this. A central question in China's process of legal reform has centered around the proper meaning of the notion of rule of law, or rule by law (*fazhi*).<sup>4</sup> Are all political actors, no matter how powerful, ultimately subservient to the law? Or can some political actors use

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1 See, e.g. Martin Jacques, *When China Rules the World* (2nd edn, Penguin 2012); Mark Leonard, *What Does China Think?* (Fourth Estate 2009); Eva Paus, Penelope B. Prime and Jon Western (eds.), *Global Giant: Is China Changing the Rules of the Game?* (Palgrave Macmillan 2009); Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (OUP 2007).

2 Bonnie S. Glaser and Evan S. Medeiros, 'The Changing Ecology of Foreign Policy-Making in China: The Ascension and Demise of the Theory of "Peaceful Rise" (2007) 190 *China Quarterly* 291, 293.

3 See, e.g. Pitman B. Potter, *Assessing Treaty Performance in China: Trade and Human Rights* (UBC Press 2014).

4 See Randall Peerenboom, *China's Long March Toward Rule of Law* (CUP 2002); Stanley B. Lubman, *Bird in a Cage: Legal reform in China after Mao* (Stanford University Press 1999); Carl F. Minzner, 'China's Turn Against Law' (2011) 59 *American Journal of Comparative Law* 935

the law to exercise their power instead? This question has been central to the debate about the direction of China's domestic governance. China's growing participation in the post-World War II liberal international order and institutions and its slow embrace of the global governance in which it is embedded from the 1970s has reinforced the prominence of this question at the international level as well.

China's emergence as a major power and its impact on the rules and institutions of global governance present an opportunity to revisit a discussion which has long divided scholars and practitioners in international relations and international law. International relations scholars have different relationships to norms, both legal and informal, depending on their perspective. Realist scholars tend to see rules as subservient to power structures – in their view, China merely looks to displace the United States as the global hegemon and will therefore take a revisionist approach to existing international norms, which it is bound to see as an expression of American interests.<sup>5</sup> Liberal-institutionalists will see the norms of international relations as a vehicle to convert China into a more liberal state; this has long been the rationale behind engagement with the PRC.<sup>6</sup> Constructivists and critical scholars tend to have a more nuanced view of the way in which norms impact the structure of power.<sup>7</sup> They will recognise that international norms have the power to influence the behaviour even of powerful states, although they may be more sceptical about the extent to which it will impact the motivations of their decision makers. Equally, they recognise the importance of the discursive processes associated with international norms to validating and legitimising the behaviour of states.

It is undoubtedly with this in mind that the convenors of the 2018 Annual Convention of the International Studies Association (ISA) in San

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5 See: John Mearsheimer, *The Tragedy of Great Power Politics* (WW Norton & Company 2001) and specifically on China: John Mearsheimer, 'The Gathering Storm: China's Challenge to US Power in Asia' (2010) 3 *Chinese Journal of International Politics* 381.

6 Robert Owen Keohane, 'International Institutions: Can Interdependence Work?' (1998) 100 *Foreign Policy* 82; and Robert Owen Keohane and Joseph Samuel Nye, *Power and Interdependence Revisited* (1987) 41 *International Organization* 725. Specifically on China, see: Marcia Don Harpaz, 'Sense and Sensibilities of China and WTO Dispute Settlement' (2010) 44 *Journal of World Trade* 1155.

7 Jeffrey Checkel, 'The Constructive Turn in International Relations Theory' (1998) 50 *World Politics* 324 and specifically on China: Alastair Iain Johnston, *Social States: China in International Institutions, 1980-2000* (Princeton University Press 2014).

Francisco picked the theme of “Power of Rules and Rule of Power”.<sup>8</sup> For the present authors, this presented an opportunity to bring together political scientists and lawyers working on China in a panel to address this theme from an interdisciplinary perspective. Before the ISA Convention, early drafts were discussed at a workshop organised in London by Queen Mary University of London and Chatham House, the Royal Institute of International Affairs in February 2018 as well as a symposium at University of California, Hastings College of the Law. The discussions and comments at these events ultimately resulted in the contributions in this thematic discussion.

The contributions in this thematic discussion offer an early glimpse into what we can expect from the ‘community of shared future for mankind’ offered to the world by China under Xi Jinping. It explores this through different approaches grounded in international law as well as international relations theory and provides historical context as well as information about the most recent developments. It was our intention to steer clear of both the Scylla of undue alarm about the ‘China threat’ as well as the Charibdis of unreserved enthusiasm about all aspects of the ‘Chinese dream’.

China, an advanced state representing one-fifth of the world population, one of the world’s great civilisations, the second largest economy in the world and occupant of a veto-wielding permanent seat in the United Nations Security Council, is indispensable in addressing the challenges facing the world in the early twenty-first century. It is our sincere hope that these contributions will help the world outside China to engage with the civilisation within.

### The Contributions

The contributors to this thematic discussion each present different perspectives on the relationship between law and power in China’s international affairs. Matthieu Burnay situates his analysis in the context of what has been described as a liberal international order ‘in transition’ not to say in a ‘deep state of crisis’. He argues that the contestation of the post-World War II liberal international order and the global governance system in which it is embedded is to be found as much within as outside the established order. The rise of populism, nationalism, and protection-

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8 See <[www.isanet.org/conferences/san-francisco-2018](http://www.isanet.org/conferences/san-francisco-2018)>, accessed January 2019.

ism in the West and beyond do indeed challenge the procedural and normative foundations of the established (in-) balance between power and politics in international affairs. In that context, Matthieu Burnay seeks to understand whether China is ready to fill in the existing gaps left by a liberal international order in crisis and how it would be likely to fill in these gaps. He argues that China understands that there is currently 'an important momentum' to defend the emergence of a 'low-cost version of the international order'. This low-cost international order may not be fully deprived of its liberal dimension but clearly challenges attempts to secure the role of democracy, human rights, and the rule of law as foundational values of the international order.

Wim Muller also identifies the risk of dilution of liberal elements in the international order, even if China's approach to international law remains firmly within accepted doctrinary practices. He examines China's approach to international law from the vantage point of its ambition to increase its 'discourse power'. As a state which long remained an outsider in the international order, China is keenly aware of the importance of international law as a discursive practice and the legitimising power which comes with being seen as a leader in shaping the norms which emerge from this practice. Muller argues that for all of the Xi government's ambitions, the PRC has still not come up with a positive 'China model' to counter the various liberal models. He illustrates this by revisiting China's wielding of its discursive power in human rights and following the *South China Sea* arbitration. He notes the renewed importance of CCP ideology in China's development of a possible alternative model, about which there are still many unknowns.

Finally, this thematic discussion provides a case study on cyber-governance. Li Bin's contribution shows how the Party-State tries to shape cyber-governance with the promotion of 'internet sovereignty'. He demonstrates how China's socialisation in cyberspace encompasses 'a process of internalizing the already existing norms' and most importantly 'a process of creating norms through social interaction'. In that context, the statist orientation of China's strategy for cybersecurity stands in sharp contrast with the existing normative framework that governs the cyberspace through a multi-stakeholder and multi-level system of global governance. Li Bin's contribution is therefore also a further illustration of China's exercise of discursive power.

## Concluding Remarks

At a time where the very premise of a liberal international order is increasingly contested both internally and externally, this thematic discussion supports the view that the study of comparative approaches to international law<sup>9</sup> and international relations<sup>10</sup> constitutes a pre-requisite to grasp the complexity of contemporary international affairs. This thematic discussion highlights in that sense the different ways in which China supports but also challenges the established order and the global governance system in which it is embedded.

The analysis of China's perspective on the international rule of law and the international rule of power sheds light on China's flexible and pragmatic foreign policy. While China keeps supporting those parts of the international system that have driven its re-emergence as a great power, it is also increasingly vocal against those institutions and norms that do not fit its own domestic governance model and national interests. China can support, reform, complement or even circumvent existing global governance institutions. In all instances, there is nevertheless a rising rejection of universalism and a renewed activism to promote the emergence of a new model of international relations that stands in sharp contrast with the liberal values present in the international order.

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9 Anthea Roberts, *Is International Law International?* (OUP 2017).

10 Amitav Acharya and Barry Buzan (eds.), *Non Western International Relations Theory: Perspectives On and Beyond Asia* (Routledge 2010).