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*International Law in Chinese Courts during the Rise of China*

by Congyan Cai

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Ran Guo*

The economic and geopolitical rise of China has been recognized and becomes an issue of high concern for many countries in the world. Whether China will resort to power politics with its economic development and geopolitical influences, or become a defender and builder of international rule of law, has been always questioned in line with its rise. How does China treat international law in practice? In his article, *International Law in Chinese Courts during the Rise of China*, in recent volume of American Journal of International Law. Professor Congyan Cai has tried to answer this question from a Chinese's perspective, as well as "theorize Chinese judicial policy toward international law."

Taking the rise of China as the main explanatory variable for its judicial policy towards international law, the author argues that China traditionally tends to "encourage shielding executive authority from systematic challenge," in order to ensure economic growth and the efficiency of the executive branch. In consequence, both the Chinese laws and municipal courts served to some extent to "respect, coordinate with, and assist executive bodies in the pursuit of their economic and social policies." The author's core argument is that "China's thirty-year pursuit of great power status has been a significant causal and explanatory factor in the particularities of approach, methodology, and structure in judicial

* Ran Guo is an Associate Professor at East China Normal University, Shanghai, China, and currently a Visiting Fellow in Lauterpacht Centre for International Law, University of Cambridge, UK. He may be contacted at: rguo@fl.ecnu.edu.cn

application of international law by Chinese courts."

This argument is based on an empirical study of China's Constitution and laws. Due to the "Century of Humiliation" and the influence of Soviet international legal theory and practice, China's Constitution was silent regarding international law, which "contributes to the fragmentation and unpredictability that characterizes its domestic application," and flexibility which "is more important than formal commitment-stability" for China's rise. In correspondence, Chinese laws adopt three approaches to international law. Transformation is the most common approach, because it "allows China to deal with treaty commitments on a case by case basis." Automatic incorporation is applied to those international legal rules that "govern solely the legal relations between private parties." Consistent interpretation might be used in a rather subtler manner in judicial reasoning and case reviews, especially in relation to China's WTO commitments.

There has been a rapid rise in the application of international law by the Chinese courts, whose approach toward international law was sensitive. First, the Chinese courts have shifted from absolute state immunity to relative immunity since 2005, because China must protect the rights and interests of its overseas private parties that encounter infringement by foreign host governments, and safeguard China's rise under the law. Although the Chinese courts are still cautious to take cases involving state immunity such as Japan's violations of *jus cogens* during the World War II, the author argues that the Chinese courts will seriously protect Chinese private interests against foreign states with the rise of China.

Second, it seems that "China has sought to clarify that its courts would not directly apply human rights conventions." International protection of human rights is indispensable for a state to be a leading country. China has thus ratified most of the core international human rights instruments, but Chinese courts do not directly apply these instruments. China tries to maintain the efficiency of its executive branch, which is one of the two 'core elements' for its rise.

Third, the Chinese courts had not exercise criminal jurisdiction over crimes prescribed in the treaties up until 1987. However, courts are now willing to exercise their conventional jurisdiction, because China has encountered increasing "threats to its economic and security interests, such as piracy, transnational organized crime, and international terrorism," with its engagement in economic globalization.

Fourth, the Chinese courts have frequently applied the international legal norms which only govern relations between the private parties. There are remarkable applications by the Chinese courts. Furthermore, the Supreme People's Court of China has established "reporting and reviewing mechanisms" to support its application by the local courts. "It became expedient for China to incorporate international regimes into its domestic legal system, which increased foreign confidence in investment and trade without seriously challenging executive authority."

China's judicial policy to international law has been adjusted to protect its overseas interests for the last decades. A clear definition of the "rise of China" would be more enticing, since it may surely connote the economic and geopolitical rise. This may help to explain the Chinese court's "frequent application of rules governing private relationships" and less or seldom application of other international rules. Will direct or indirect application of international law by the domestic courts make a substantial difference to a strong or weak executive authority? Will a strong executive authority necessarily mean an efficient executive authority? The answers to these questions may help to understand the *de facto* application of international law by the Chinese courts. Most importantly, the courts may also help to streamline the reasoning from China's judicial policy toward international law to efficient economic growth and the executive branch, and eventually to the rise of China.