Rethinking International Legal Narrative Concerning Nineteenth Century China: Seeking China's Intellectual Connection to International Law

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Abstract

The standard of civilization is haunting international legal studies. The problem remains whether the non-Western traditions are legitimate sources for international governance. Although legal scholars sometimes approach international law from different perspectives or from a particular experience, at last, they are still writing about one international law that are supposed to apply to all nation-states without differentiation. The future outlook of international law partly depends on if there are real and lasting Asian intellectual connections with international law and whether the Asian inspirations could find their expression in the existing international legal framework. After exploring the existing discourse on China's reception of international law in the nineteenth century, the paper suggests that Qing China's statesmen had a vision for co-existence of international legal system and the China oriented tributary system.

Keywords

China – history – nineteenth century – international law

International lawyers make history by citing precedents and providing legitimacy for state behavior. In an age of universal rule of law, the word of

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international lawyers is especially powerful. What constitute history for international lawyers thus become a legitimate concern for nation-states, and other relevant non-state entities. Law is powerful in contributing to the formation of the historical consciousness that characterizes our civilization, because it is a combination of judgements (not necessarily in the judicial process) and our decisions to stay with the judgements we have made in the past.¹

By professional demand, international lawyers cannot ignore history. The nature of their profession dictates that they find precedents and well-established doctrines as authorities to support their present judgement. However, whether a piece of historical information constitutes authority is decided by the lawyers themselves in accordance with their professional consciousness.² What does not constitute authority is automatically disregarded. Moreover, the profession originated and developed on the basis of Western civilization and its interaction with the rest. As a result, during the process of universalization of international law, much valuable information from the non-West or the peripheries has been lost to the professionals who are making judgements for the world at large.

The injustice of imperial and colonial past of international law was brought to light by those postcolonial scholars. Yet the new parameter they have set for the studies of international law is not sufficient to tackle the Chinese and East Asia's encounter with international law. The following analysis rides on the existing literature on postcolonial international law and argues that the historiography of international law must be pushed one way further in order to be inclusive towards the non-West. For this short paper, I will focus on China's experience.

1 J.G.A. Pocock, *Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi* (1998) 43 McGill LJ.481, 483.

2 Consciousness refers to the total contents of a mind, including images of the external world, images of the self, of emotions, goals and values and theories about the world and self. Legal consciousness is only slightly more defined notion than consciousness. It refers to the particular form of consciousness that characterizes the legal profession as a social group, at a particular moment. The main peculiarity of this consciousness is that it contains a vast number of legal rules, arguments, and theories, a great deal of information about the institutional workings of the legal process and the constellation of ideals and goals current in the profession at a given moment. Kennedy, D. *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850–1940*//*Researches in Law and Sociology*. 1980. *N*, 3, 3–24, 23.

1 Postcolonial International Law and China

Critical legal scholars, especially the Third World Approach to International Law (TWAIL) school scholars have provided a strong link between colonialism and the universalization of international law.

Among all the postcolonial scholars, Anghie is perhaps the most influential in present days. Anghie informed us how the making of international law was used to legalize the domination of the West over the rest of the world. Due to incommensurable differences, the non-West was characterized as the “Other” that must be transformed or silenced in order to keep the purity of law. Anghie called this the “dynamic of difference” that were developed by the positivist jurists to create a gap between the East and the West. This gap is best understood as a civilization gap.³ According to Anghie, positivists were constantly engaged in defining, subordinating and excluding the natives, even if the natives were a nation of people in a sophisticated and highly developed society, such as China. The power to define what is “Other” was indispensable for the self-image of the West expanding into the domain of unknown civilizations at the time.⁴

In order to maintain the consistency of law, the uncivilized states, meaning the states with different cultures from the European ones, must be educated by the Western states to prevent the alien characters of these nations from undermining the international legal system. At the theoretical and jurisprudential level, alien societies were a primary threat to the integrity of the overall structure of law. Consequently, Anghie concludes that international law of the period could be read, not simply as the confident expansion of intellectual imperialism, but as a far more anxiety-driven process of naming the unfamiliar, asserting its alien nature, and attempting to reduce and subordinate it.⁵

Anghie's critique on imperialism is focused on the political purpose of Western intellectuals' interpretations of international law in the nineteenth century. Although it was a critical study of the intellectual history of international law and it was anti-Eurocentrism, it was still a critique within the Western framework revealing the illogical and unjust reasoning of Western international law.

The value of this type of critique is beyond doubt. It is the foundation to unsettle the presumption that there exists one linear universal history of

3 A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) 737.

4 Anghie, *Imperialism, Sovereignty and the Making of International Law*, 38–39.

5 Anghie, *Imperialism, Sovereignty and the Making of International Law*, 63.

international law written by Western international lawyers. Thus his work and the work of his followers prepare more unsettling questions to be asked about the past, present and future of international law. Despite the decisive contribution to the anti-eurocentrism in the studies on the history of international law from Anghie, the non-West's reactions towards this subjugation by law were not reflected in his critique.

Anghie's work is part of the TWAIL movement. In the eyes of the TWAIL scholars, international law is a discourse of domination and subordination. TWAIL is a broad dialectic of opposition to such international law.⁶ The TWAIL movements believes that the process of the dissemination of European international law was the forced assimilation of non-European peoples into the European system. It is particularly pointed out that this international law was built on the premises of European thought, history, culture, and experience that were alien to the non-West.⁷ TWAIL is a confrontation to the Western hegemony in the discipline, theory, and practice of international law.⁸ The underlying assumption of this confrontation is that the non-West passively accepted all the impositions of the West because they were coerced by strong military forces.

This anti-imperialism and anti-Eurocentrism already dominates the cognition of nineteenth century international law in China. Chinese international lawyers firmly believe that China was mistreated by imperial West and later Japan, with international legal instruments. China's perception of international law was influenced by this humiliating experience. The general and official attitude seem to be that the Chinese should not forget the past, but will actively engage in the formation of future international law which China had not mastered even now.⁹

It seems to me that while some Western international lawyers are busy reflecting on Europe's imperial past and its implications for today,¹⁰ Chinese international lawyers are satisfied with proving that China was victim of history. They would ensure that China would not be the victim of international law

6 Makau Mutua, What is TWAIL (2000) 93 ASIL Proceedings, 31.

7 Mutua, What is TWAIL, 34.

8 Mutua, What is TWAIL, 36.

9 James Li, The Impact of International law on the Transformation of China's Perception of the World: A Lesson from History, Maryland Journal of International Law, Volume 27 | Issue 1; Che Pizhao, Guojifa de huayu jiazhi, Jilin University Journal, Social Sciences Edition, 2016 Issue 6 (车丕照, 国际法的话语价值, 吉林大学社会科学学报, 2016年第6期); Also see Prof. He Zhipeng's related work (另参见何志鹏教授的文章).

10 A. Martineau, "Overcoming Eurocentrism? Global History and the Oxford Handbook of the History of International Law." European Journal of International Law 25.1 (2014), 332.

again. However, China's declared attitudes towards international law since the Opium War had been a history of constant ruptures and disruptions. In every era of Chinese modern history, China had a different idea of international law, from resistance by the imperial dynasty, to adherent, to isolation and condemnation and to acceptance. All these attitudes are determined by undercurrent political needs. No wonder China's practice of international law was interpreted to be adaptive and instrumental.¹¹

The problem for China's inability to conceive a continuous relationship with international law is perhaps reinforced by the recent success of anti-imperial postcolonial discourse. The postcolonial discourse is supportive of China's claim of victimization in history and it has set up such a good example against nineteenth century imperialism that all later research seems to have an obligation to follow this line of critique. Postcolonial scholarship has pushed the boundary of the international legal professional, but contemporary China cannot fit into the role of victim forever. Consequently, the studies on the history of international law in China cannot connect with China's present status. The Chinese perspective thus becomes disrupted and can't fit into any existing categorical view of international law.

This discord may have motivated Onuma to suggest a transcivilizational perspective of international law to deal with China and East Asia in general.¹² It seems that after a great deal of struggle with the standard of civilization, the future of international law, at least, in the Chinese neighborhood is again associated with civilization.

Among all the international legal doctrines and principles in the nineteenth century, the standard of civilization was the most explicit example showcasing the oppressive nature of colonial international law. It was therefore subject to a lot of debates. The standards were developed during Western colonization. They were conceptualized on the basis of civilizational or cultural differences between the West and the non-West.

According to Gong's comprehensive book on this topic, the foundation of the standards of civilization was sovereignty or statehood. The Western states denied sovereignty towards the non-Western states because they were in lack of certain attributes that were essential for a Western sovereign state. Gong pointed out that the standards were vague and subject to interpretations by

11 P.C. Chan, "China's Approaches to International Law since the Opium War," *Leiden Journal of International Law* 27.4 (2014): 859–892.

12 Y. Onuma, *A transcivilizational perspective on international law: questioning prevalent cognitive frameworks in the emerging multi-polar and multi-civilizational world of the twenty-first century*. Martinus Nijhoff, 2010.

the Western states who invoked them. The standards were double standards developed by the West to justify their expansion into the non-West in international law. Gong explored how the Persian, Chinese and Japanese Empires tried to meet up with those standards. The Japanese were successful to force the West to recognize Japan as a civilized nation not long after the Western penetration into Japan. The Ottoman Empire and the Chinese Empire were less successful.¹³

In his study of the Sino-Western encounter, Chen also argues that European colonialism began with the discourse of universal jurisdiction in natural law tradition.¹⁴ Through studies on the Qing policy with regard to territorial rights over Macau and a criminal case concerning foreign subject in China, Chen argues convincingly that Qing China had the attribute of sovereignty as defined by Western lawyers.¹⁵ Then Chen argues that, when the natural law conceptual framework could no longer work in favor of the West, Britain re-conceptualized a positivist international law for the purpose of subjugating the China for profits and power.¹⁶ Chen's historical account is informative and opens up a new possibility of approaching nineteenth century international law and China.

Similarly, Lai argues that Western lawyers' examination of the Opium War demonstrated these lawyers only examine international events in the framework of legalistic science. They disregard substantial political or moral issues.¹⁷ His observation and critique of nineteenth century positivism is a critique on positivist legal theory. He argues that colonialism, in association with the discourse of civilization cannot be explained by legal arguments alone. International lawyers need to look beyond the legal framework created by themselves.¹⁸

13 G.W. Gong, *The Standard of 'Civilization' in international society* (Oxford: Clarendon Press, 1984).

14 Li Chen, *Universalism and Equal Sovereignty as Contested Myths of International Law in the Sino-Western Encounter*, *Journal of the History of International Law/Revue d'histoire du droit international* 13.1 (2011), 78.

15 Chen, *Universalism and Equal Sovereignty as Contested Myths of International Law in the Sino-Western Encounter*, 102.

16 Chen, *Universalism and Equal Sovereignty as Contested Myths of International Law in the Sino-Western Encounter*, 110.

17 Junnan, Lai, *Sovereignty and "Civilization" International Law and East Asia in the Nineteenth Century*, *Modern China* 40.3 (2014): 282–314. 2014, 283. See A. Carty, *Preface, on professional conscience, Philosophy of international law*. Edinburgh University Press, 2007.

18 This suggestion still exists in the international legal discipline. See Ingo Venzke, 2014, *What makes for a valid legal argument*, *Leiden Journal of Int'l law*, 27, 811–816.

After extensive review of Gong's book and many nineteenth century and early twentieth century international lawyers' account of the standard of civilization, he questioned that how could such a vague standard become a legal doctrine other than underlying European political interests?¹⁹ From both historical and theoretical viewpoints, Lai has provided a good contribution to the critique of positivism international law. But, what then? What was the Chinese alternative that might destabilize our current existing cognition of the nineteenth century international law to complete the picture of a global intellectual history? The answer is, regrettably, there may not be sufficient information.

Referring to Gong's finding that China failed to attain the status of civilized nation in the nineteenth while Japan did, Lai provided a detailed historical account of Japanese practice of international law and use of legal positivism to become a "civilized" member of the international community. This detailed historical examination of Japan's success in being admitted as a civilized state would show the rigidity and lack of moral strength of the nineteenth century international law. During the Sino-Japanese war in 1895, Japan showed itself as a master of international legal rules. It carefully framed its invasion of Korea and its conflict with China in the legal language that Europe understood.²⁰

When it comes to Qing China's performance in the Sino-Japanese war 1895, he could only find a secondary source indicating that a Chinese merchant intellectual Zheng had composed a pamphlet condemning the war by referring to international law. Even for this pamphlet, the original source was nowhere to be found. Apart from Zheng, two Chinese contemporaries were using the "out dated" naturalist international law taught by W.A.P Martin to put a feeble legal denunciation. It was such a tragedy that the decline of the Chinese empire had resulted in a vacuum in Chinese intellectual world. There was no Chinese to express the experience and views of China to the Europeans using a mutually understandable language.²¹

The value of postcolonial international legal research is beyond doubt. Yet, it has somehow narrowed the imagination of contemporary critical scholars' approach to the history of international law. Despite the postcolonial scholars' fierce critique of nineteenth century international law, the European rules and especially the standard of civilization has become the standard of

19 Lai, Sovereignty and "Civilization" International Law and East Asia in the Nineteenth Century, 287.

20 Lai, Sovereignty and "Civilization": International Law and East Asia in the Nineteenth Century, 299–303.

21 Lai, Sovereignty and "Civilization": International Law and East Asia in the Nineteenth Century, 304.

historiography of the discipline. What kind of history of nineteenth century international law would it be if one does not make reference to the standard of civilization? Despite the consciousness that we need to search for a solution to Eurocentrism in international law, we find that even the postcolonial scholarship does not provide for an alternative narrative. The vocabularies, concepts and periodization are all European.²²

2 The Semi-peripheries' Acceptance of International Law

Fortunately, there is a new trend in the studies of the history of international law that focuses more and more on the elimination of the bias of mainstream history that monopolize the time and space of this area of study.

One problem with the current research is that the existing mainstream history focus on a series of canonical events and authors. Other history, such as Islamic history of international law is overlooked.²³ If one ventures outside the realm of international law which was founded on Western traditions, one takes the risk of not being recognized as an international "legal" scholar.

The non-Western nation-states were also involved in diplomatic practice and their scholars were also reflecting instantly on the academic dilemma associated with nineteenth century international law. The non-Western officials and intellectuals must have struggled against the discriminative standard of civilization and considered their integration to the international legal system. Their intellectual reflections and practical deeds are great resources for adding another narrative to the universalization of international law.

There have been attempts to reconstruct the missing pieces of the history of interaction from the perspectives of Ottoman Empire and Latin America.²⁴

22 M. Koskeniemi, *Histories of international law: Dealing with eurocentrism* (2011): 1–33, 171.

23 Ignacio Del Moral, *The Shifting Origins of International Law* Del Moral, *Leiden Journal of International Law* 28.3 (2015): 419–440.

24 The process of the universalization of international law was used to be described as a one-way expansion of the European international society. (Bull, Hedley, and Adam Watson, eds. *The expansion of international society*. Oxford University Press, USA, 1984.), or the non-west's attempt to enter into the international legal community by undertaking legal and social reforms. (eg. Hsu, Immanuel Chung-yueh. *China's Entrance into the Family of Nations*, 1960). In the new approaches to international law scholarship, it is argued that the real universalization of international law began with the appropriation of international law by non-Western states, Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933*, The symposium published by the Journal of the History of International

Existing literature shows how the Ottomans and Latin Americans dealt with the alien elements of international law and how they made connections to international law and tries to get involved in shaping the future outlook of this body of laws. There is a collection of papers on the history of international law from the perspective of the Ottoman Empire. The purpose was to examine the shifting and contested status of international law in and in relation to the Ottoman Empire during the nineteenth and early twentieth centuries.²⁵ Through the Ottoman jurists and diplomats, the authors explore the Ottoman Empire's struggle with the European model and their own contribution to the doctrines and debates of international law.²⁶ The premise of such research is that there was actual engagement between the Ottomans and the Europeans, both in intellectual debates and in diplomacy. Yet there did not seem to be any Chinese intellectual connection to international law. The dominant Chinese historiography on the subject is that China had been victimized in the nineteenth century and Chinese patriots had always fought the unjust colonial international law.

Among all similar approaches to the semi-peripheries accounts of the history of international law, Lorca included China in his studies along with the Ottoman Empire and Latin America. Riding on the postcolonial literature, he argues that the nineteenth century was a time when Europe was able to impose its legal views, institutions and instruments on others backed not only by its material power, but also intellectual resource. With this backdrop, Lorca tried to find out how the semi-peripheral elites also appropriated international law. He argues that as a result of this participation, non-Europeans were also influencing the discourse of international law.²⁷ The strategic use of international law by the semi-peripheries' elites during the European expansion suggests that there are "multiple sites of articulation" of international law. That is also how international law really achieve global validity.²⁸ On China, the Chinese

Law on International Legal Histories of the Ottoman Empire, see Umut Özsu, Thomas Skouteris, *International Legal Histories of the Ottoman Empire: An Introduction to the Symposium*, 2016 *JHIL* 1–4. Liliana Obregon, *Between Civilisation and Barbarism: Creole interventions in international law*, *Third World Quarterly*, 2006, Vol. 27, No. 5, 815–832.

25 Umut Özsu and Thomas Skouteris, *International Legal Histories of the Ottoman Empire: An Introduction to the Symposium*, *Journal of the History of International Law/Revue d'histoire du droit international* 18.1 (2016): 1–4.

26 Ozsu and Skouteris, *International Legal Histories of the Ottoman Empire: An Introduction to the Symposium*.

27 Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933*, Cambridge, Cambridge University Press, 2015, 75.

28 Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933*, 21–22.

Treaty Port system governed inter-state relations on the basis of diplomatic representation under horizontal equality and it was the way to regulate legal relations between China and the West.²⁹

However, in contrast to the other semi-peripheries, Lorca claims that “there was considerable international legal activity during the nineteenth century, but no significant efforts by Chinese public servants to appropriate classical international law.”³⁰ Despite sharing many similarities with other semi-periphery states, Imperial China appeared as very inactive with regard to its appropriation of international law. There is a general historical timeline of the efforts of disseminating international legal knowledge among the Chinese elites starting with the translation of the Law of Nations written by Wheaton.³¹ Apart from that, there seems little evidence that Imperial China was actively using international law in its diplomacy in the late nineteenth century.

From a lawyer’s point of view, imperial China itself does not seem worthy of studying. There was no first generation international lawyer in China. Although there were Chinese who received law degrees from Western universities, they did not write from a professional capacity, so they could not represent China’s appropriation of international law.³² Does this mean it is impossible to study imperial China’s appropriation of international law?

This approach to China’s appropriation of international law is problematic. Chinese statesmen and intellectuals had been dealing with foreign affairs within the general framework of international law at least beginning from the end of Opium War in 1842. After the establishment of Zongli Yamen (Imperial Chinese Foreign Ministry), certain Chinese officials had basic knowledge of international law and profound understanding of their own empire and culture. Their lack of professional constraints could even be interpreted to be their advantage in terms of representing the Chinese view towards international law.³³

Nonetheless, Lorca had pioneered in trying to find China’s intellectual connection to international law in the nineteenth century. Imperial China is an important element that cannot be ignored in the emerging field of rewriting global intellectual history. Moreover, the nineteenth century for China is still a source of inspiration. The narrative concerning that period is having a lasting impact on contemporary China.

29 Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933*, 88.

30 Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933*, 117.

31 Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933*, 116.

32 Arnulf Becker Lorca, *Universal international law: Nineteenth-century histories of imposition and appropriation*, *Harv. Int’l LJ* 51 (2010): 475.

33 Pre-modern international legal/quasi-legal system.

3 Finding Continuity in China's History of International Law

On how Latin Americans established connection to international law, Oregon presented a Creole intervention. Creole international law is not a Latin America's approach to international law. It is the Creole's way of making justification to connecting with international law and arguing to alter the part that they find hard to apply using the argument that could be understood by the West.³⁴

When it comes to China's acceptance, the intellectual connection is missing. James Li claims that modern China has accepted international law now despite the past humiliation associated with international law.³⁵ But Chan has showed that China had a troubled relation with international legal system beginning the Opium War until China decided to ignore the ideology struggle and focus on economic development and socialist market economy.³⁶ Are the Chinese intellectuals satisfied with an adaptive and instrumental acceptance after more than 150 years struggle and compromise with international law?

In order to find out the nature of the Sino-Western encounter perceived by the Chinese, one must begin with what prevailed in China before international law instead of the standard of civilization.

To imperial China, an ideal empire, that is close to the condition of ruling all-under-heaven, consists of sub-states that are "independent in their economies, military powers and cultures, but politically and ethically dependent on the Empire's institutional center." The suzerain center has the authority to decide whether a sub-state enjoys legitimacy. The emperor will normally leave the domestic affairs to the local rulers. He will only intervene if one sub-state fights against another in the same family system.³⁷

The Confucian principle *De* and *Li* are the foundations for Confucian universalism. *De* is a political ideology. It requires an emperor to be virtuous including governing in a pacification policy towards ethnic minorities and foreign countries and granting economic benefits to them through the tributary system. *Li* dictates the structure and order of the relations between China and foreign countries. Yang claims that Confucian universality is anti-violent

34 Liliana Obregon, Between Civilisation and Barbarism: Creole interventions in international law, *Third World Quarterly* 27.5 (2006): 815–832.

35 James Li, The Impact of International Law on the Transformation of China's Perception of the World: A Lesson from History, *Md. J. Int'l L.* 27 (2012): 128.

36 Phil Chan, China's Approaches to International Law since the Opium War.

37 Tingyang Zhao, Rethinking Empire from a Chinese Concept 'All-under-Heaven' (Tian-xia, 天下), *Social Identities* 12.1 (2006): 29–41, 34.

and anti-war. Historical facts supported this claim. Before the mid-nineteenth century, East Asia suffered much less war under the Chinese dominance.³⁸

The Confucian universalism of all-under-heaven (which could also mean all under the virtuous rule of the Chinese emperor) legitimized the practice of the tributary system. In return, the maintenance of the tributary system and geopolitical reality reinstated the legitimacy of Confucian universalism. Under the ideal circumstances, the emperor is so virtuous and generous, every guest country should be willing to enter his realm and follow the *Li*. The logic has been valid for thousands of years until the mid-nineteenth century when the Western powers start to seize China's former tributary states and erode in China's internal political system.

According to Yang, the Unequal Treaty Regime (also known as the Treaty Port System, discussed in Lorca's book) crashed the tributary system and the European originated international law collided with Confucian universality.³⁹ In an attempt to find out integration of Confucianism and international law, Yang explores the Qing official attitudes towards international law. He concludes that there were two divergent views, one school held that international law depends on power politics and the other found international law to be powerful in maintaining world peace.⁴⁰ Yet Yang did not show how the latter school established intellectual connection with international law. Yang did not provide how the integration happened between Confucianism and international law in the intellectual sphere. The adoption of modern institutions or even legal rules did not necessarily mean that China had reconciled with the alien nature of nineteenth century international legal system.

Whether there was real integration during late imperial China between Confucianism and international law became especially suspicious when the latest two contributions to this field of enquiry demonstrated that the authoritative translation of Wheaton's book on international law by the American Missionary W.A.P Martin misrepresented European international law at the time. Martin, in his Chinese translation, had eliminated the part in Wheaton's book where the latter discussed his connection with and deviation against

38 Zewei Yang, Western International Law and China's Confucianism in the ninetieth century, *Collision and Integration, Journal of the History of International Law/Revue d'histoire du droit international* 13.2 (2011): 285–306, 287–289.

39 Yang, Western International Law and China's Confucianism in the ninetieth century, *Collision and Integration*, 302.

40 Yang, Western International Law and China's Confucianism in the ninetieth century, *Collision and Integration*, 302–305.

17th century European natural law tradition.⁴¹ In many Martin's other translation on public international law, he also disguised the domination of positivism in the nineteenth century and presented Wanguo Gongfa (public law among nations) as an example of Christian universality. Gongfa (public law) is almost like divine law.⁴²

After the publication of his first translation of Wheaton, Martin became the director of Tongwen Guan (imperial foreign language institute). His work had such a huge influence on Chinese intellectuals who engage with international law that even after the collapse of the Qing dynasty, Chinese intellectuals who had studied abroad still seem to perceive international law following his teaching. He once compared the ancient Chinese Warring States period. In the early twentieth century, foreign educated Chinese wrote lengthy thesis about the similarities between the rules and beliefs during ancient Chinese Warring States period and European international law.⁴³ However, Yi questioned that the Chinese intellectuals' motivation was still under the influence of the standard of civilization. Their most desired outcome for their research was to be recognized by Western states that China also had international law.⁴⁴ Faced with the unprecedented challenges, Chinese intellectuals seemed to accept the fact that the West was superior. These intellectuals were eager to apply the Western way of regulating inter-state relations to China. From the perspective of intellectual history, China gradually adopted international law in managing its international relations, because the intellectuals genuinely felt the need to imitate the superior western way.⁴⁵ The line of enquiry for the purpose of establishing intellectual connection between Chinese civilization and international law seems to have a dead end.

However, if we look beyond the narrow confinement of the legal profession. The tributary system appeared to be more diversified than from a lawyer's viewpoint. From the perspective of international relations, Imperial China and the more Sinic states enjoyed cooperation and harmony. Yet the relation between Imperial China and its northern nomadic neighbors were highly

41 Zhiguang Yin, Heavenly Principles? The Translation of International Law in 19th-century China and the Constitution of Universality, *European Journal of International Law* 27.4 (2016): 1005–1023, 1014.

42 Yin, Heavenly Principles?, 1015–1016.

43 Ping Yi, A Swan Song, or a Phoenix Rising, *Journal of the History of International Law/Revue d'histoire du droit international* 18.2–3 (2016): 147–180, 152–153, 159–162.

44 Yi, A Swan Song, or a Phoenix Rising, 166–167.

45 R. Svarverud, Re-constructing East Asia: international law as inter-cultural process in late Qing China, *Inter-Asia Cultural Studies* 12.2 (2011): 306–318, 306–308.

power-political. The best one could ask for was co-existence. After examining the constitutional structure of the tributary system, the paper by Zhang and Buzan suggests that a common culture or shared understanding of the structure of the tributary system was not necessary. It was actually a mutually expedient arrangement to secure peace and facilitate strategic interactions.⁴⁶ Moreover, the tributary system should not only be defined in its cultural and civilizational terms, but also structural terms. It not only had the cooperative inner circle, but also power-political outer circle. The system was more hegemonic than suzerain.⁴⁷ Thus if one takes a strict legal view of suzerain and vassal relations, the tributary system would appear incomprehensible.

It could not be taken for granted that the tributary system was a natural, unwritten network of regulating international relations. It had its own norms to maintain peace and order in East Asia. When the Europeans first expanded into Asia, they were subsumed by the Chinese Empire to be the Empire's new tributary states. The powerful European states resisted the limits of the tributary system and their inferior positions to the Chinese Empire in this system as soon as they were strong enough in the region. They argued that inter-state relations must be regulated by international law, and the tributary system had no legal significance. By playing down the binding force of the tributary system, they justified their treaty-making activities with the other tributary states of the Chinese Empire. Chinese international relations scholar Li disagreed with these arguments. He argues that, if inter-state relations must be regulated by law, the tributary system was East Asian International law. He suggests that the tributary system had major historical, political and cultural significance for East Asia. Contemporary scholars must give recognition to its rightful place in history.⁴⁸

Contrary to the European claims in the nineteenth century, the system had many compulsory rules with regard to a suzerain and tributary relations. However, neither did imperial officials, nor intellectuals wish to conceptualize the system in the terms of the Euro-centric international law. In fact, they did not find it necessary to conceptualize the system in legal terms. It was a matter of fact that there once existed a separate regional system in East Asia.⁴⁹

46 Y. Zhang and B. Buzan, *The Tributary System in International Society*, *Chinese Journal of International Politics* 5.1 (2012): 3–36, 20.

47 Zhang and Buzan, *The Tributary System in International Society*, 35.

48 Li Yangfan, *Yong dong de tian xia: Zhongguo shi jie guan bian qian shi lun (1500–1911)*, Beijing Shi: Zhi shi chan quan chu ban she, 2012, 394. 李扬帆, *涌动的天下: 中国世界观变迁史论 (1500–1911)* (北京市: 知识产权出版社, 2012) 394.

49 Li Yangfan, *Yong dong de tian xia*, 395.

In studying the collapse of the system, Li noticed that different tributary states ended their tributary relations with China under different circumstances and they had very different reasons for doing so. Although the collapse of the system was mainly due to the Western challenge, the dynamics within the system were also important contributing factors. He suggests that Japan played an even more crucial role than any Western states in disintegrating the China-centered world order. In addition, the Qing Empire itself was not paying too much attention to the loss of remote tributary states. For example, Sulu stopped sending tributes as early as 1763. The Qing government did not care. Siam ceased to sending tribute to Beijing because of the harassment suffered by the envoys due to the Taiping Rebellion in China and the Imperial government made no efforts to reestablish contact with Siam.⁵⁰

The geopolitical consequence of the disintegration of the tributary system was devastating to Imperial China. The strategic purpose of the tributary system for the empire was that the tributary states would guard the peripheries of China. To put it in modern terms, the national security of imperial China depended on the existence of the tributary system. This strategy was built upon the self-perceived cultural and moral superiority of imperial China. The Emperor had not the strength to conquer all the surrounding states, so he chose to become friendly with the neighboring states. Because of the friendly relations, these states could provide the natural shelter for the Empire. After reviewing some major ancient Chinese texts on security strategies, Li comes to the conclusion that the dominant geopolitical idea in pre-modern China has always been using the surrounding tributary states to guard the periphery of the Empire.⁵¹

For defense purpose, Sulu and Siam did not matter that much to the Empire. That is why the empire was not concerned with them fading away from the influence of the tributary system. Although the tributary system started to disintegrate as early as the eighteenth century, it was not until France invaded Vietnam that the security purpose of the system came under serious and direct threat. During the time of Sino-French controversy, imperial Chinese officials began to treat the Western states' activities in Asia as threatening China's national security.⁵²

To study the Sino-French controversy is a great opportunity to explore a possible explanation for the missing Chinese intellectual connection with international law. How the Chinese statesmen (who were also Confucian intellectuals

⁵⁰ Li Yangfan, *Yong dong de tian xia*, 396.

⁵¹ Li Yangfan, *Yong dong de tian xia*, 399–400.

⁵² Li Yangfan, *Yong dong de tian xia*, 401.

by education) perceived China's transformation from the center of the tributary system to a participant of international legal system might be the key to a Chinese intellectual connection to international law.⁵³

The Sino-French controversy was one of the major conflicts involving China and a Western state in the late nineteenth century. The controversy started in the 1870s when Imperial China had been in frequent contact with Western states for around thirty years. There were some imperial officials who were familiar with international law and foreign affairs by that time. Their knowledge and applications of international law are essential for this inquiry. Moreover, the Sino-French controversy concerned China's inter-state relations with Vietnam. Vietnam had been a tributary state to the Chinese empire allegedly since time immemorial. Therefore, it is the most suitable case to demonstrate how Imperial China coped with the Western states' legal arguments against the tributary system.

The Sino-French controversy could date back to 1874 when the treaty of Peace and Alliance between France and Vietnam recognized the entire independence of Annam⁵⁴ and it became the main proof for the French legal claim of protectorate over Vietnam in the later years.⁵⁵

In 1876 and 1880, King Tuduc of Annam sent two tributary missions to Beijing. On top of the usual practice, he also requested Chinese emperor to send military assistant to fight France.⁵⁶ The French colonial officials were greatly alerted by the two tributary missions which contradicted their legal claim of protectorate over Vietnam. According to international law, China could rely on the invitation of King Tuduc to intervene in the affair. The French ministers to China also translated the Chinese officials' documents which argued the importance of Vietnam to the Chinese empire. In light of the circumstances, the French colonialists had been lobbying Paris to finance more military operations to strengthen their claims.⁵⁷

53 For a detailed historical study on conservative Chinese statesmen's views and influences on the Sino-French controversy, see Eastman, *Throne and Mandarins* (1967).

54 The Kingdom of Annam was another name for Vietnam.

55 Sanjing Chen, *Jin dai Zhong Fa guan xi shi lun* (Taipei Shi: San min shu ju, Minguo 83 (1994)) 陳三井. 近代中法關係史論 (台北市: 三民書局, 民國 83 (1994)), 21–22.

56 Long Zhang, *Yuenan yu Zhong Fa zhan zheng* (Vietnam and the Sino-French War) (Taipei: Taiwan shang wu yin shu guan gu fen you xian gong si, 1996) 龍章, 越南與中法戰爭 (臺北: 臺灣商務印書館股份有限公司, 1996), 52–55.

57 Long Zhang, *Yuenan yu Zhong Fa zhan zheng*, 56–66.

Chinese Ambassador to France Marquis Zeng (Zeng Jize) was the key person in the negotiation representing China. His views provide valuable insights into the Chinese viewpoint.

The earliest recorded protest made by Marquis Zeng occurred at around the time when the Vietnamese officials in the tributary mission complained to the Chinese emperor about the French encroachment in Vietnam. Marquis Zeng explained to French Foreign Minister Freycinet that China had a legitimate right over Vietnam. Vietnam had been a vassal state of China for many years. However, he had heard rumors saying that there was an on-going conflict between France and Vietnam. He would like to know the French official response to these rumors. Freycinet assured him there was no complication for conflicts. The Chinese recorded another interview between Marquis Zeng and French Foreign Minister Saint-Hilaire to the same effect in Nov. 1880.⁵⁸

After consulting with the French Ministers to China, on December 27, 1880, Saint Hilaire wrote a reply to Marquis Zeng saying that according to Article II of the 1874 treaty, France recognized that Vietnam was independent of any other states. In addition, France promised to provide assistance to Vietnam should it need help. The Chinese government was informed of the existence of the treaty in 1874. Now the French government intended to comply with the treaty stipulations and execute its duties. Such was the reason why the French government had sent reinforcements to Tonkin.⁵⁹

Marquis Zeng was in St Petersburg at the time. He had an interview with French Minister General Chanzy who brought the message on Vietnam from Paris. After reading Saint Hilaire's reply, Marquis Zeng immediately objected to the argument relying on the treaty signed between France and Vietnam. Because of the existence of the tributary system, France could not just sign a treaty with Vietnam announcing that Vietnam was an independent state. Without the consent of China, no such announcement is legitimate. Three hundred years ago, Vietnam was part of China. It later became a vassal state of China. Despite the treaty between France and Vietnam, the rights of China over Vietnam remained. It was nice of France to offer protection to Vietnam, but China must also protect Vietnam. One could not ignore the previous protector because there was a new protector.⁶⁰

58 Zhong Fa Yuenan jiao she dang/ Zhong yang yan jiu yuan jin dai shi yan jiu suo bian, (Taipei: Gai suo, Minguo 51 [1962]) Vol. 1, 147–148. 中法越南交涉檔 / 中央研究院近代史研究所編 (臺北: 該所, 民國 51 [1962]), 第一卷, 147–148.

59 Affair du Tonkin, Vol. 1, 164–165 cited in Long Zhang, Yuenan yu Zhong Fa zhan zheng, 66.

60 Zhong Fa Yuenan jiao she dang, Vol. 1, 150.

General Chanzy reminded Marquis Zeng that the French Foreign Ministry had informed China of the 1874 treaty immediately after the exchange of signatures. If China was dissatisfied with the arrangement, perhaps China should make an inquiry to Vietnam for the lack of information.⁶¹

Marquis Zeng replied that the King of Vietnam did not make a report to China meant that there was no need to report. The Chinese government did not need to ask. If Vietnam had reported to China of the implications of the treaty argued by the French government, China would not have agreed to this kind of independence of Vietnam. The Marquis also explained why the Chinese government did not argue with the French upon receiving the notification of the treaty. First of all, China always had good relations with France. The situation was not urgent and China did not wish to risk the good relationship for the sake of a vassal state. Second, Vietnam did not report the existence of the treaty to China. In Vietnam, Vietnam was the host and France was the guest. China could only intervene in the affairs between the host and the guest if the host spoke up. Vietnam did not protest to China at the time, so China did not intervene. At last, France signed the treaty to protect Vietnam, not to destroy it. There was not much that China should be worried about. The Chinese government could be flexible with the new relationship.⁶²

Marquis Zeng then went on repeating his previous argument that Vietnam shared a long border with China, even if Vietnam was not a vassal state of China, it was an important neighboring state to China. The safety and tranquility of the China depended on Vietnam. For that reason alone, China should be concerned with Vietnam's problem. If France intended to protect Vietnam, China had no objection. But if France was to occupy Vietnam, China could not agree.⁶³

Marquis Zeng's argument suggests that, to the Confucian statesmen, the tributary system had timeless validity and it could not be altered by international legal instruments. From the viewpoint of the Chinese officials, China was the center of the world or at least the world that was under the influence of the tributary system. The surrounding countries were allowed to have independent policies in their interactions. But these interactions would not alter the relations between the tributary states and China. The ideal Chinese world order could allow the rules of international law to have effect within its loose structure, yet international law could not challenge the tributary system. Even if the ideal cannot be reached, the vicinity of China and Vietnam gives China

61 Zhong Fa Yuenan jiao she dang, Vol. 1, 150.

62 Zhong Fa Yuenan jiao she dang, Vol. 1, 150–152.

63 Zhong Fa Yuenan jiao she dang, Vol. 1, 150–152.

legitimate concern over its neighbor. International law could not change the nature of the neighboring relations.

Fearing the Chinese intervention, the French colonial government negotiated with other Western powers to give French Consuls jurisdiction over all foreigners in Vietnam.⁶⁴ In May 17, 1881, Admiral Cloué requested the Foreign Minister to ensure that France have the right of protectorate over Vietnam from legal perspective.⁶⁵ In response to this request, the Ferry government brought a bill to the Chamber to support an expedition to clear the Red River of bandits, as well as exploring the upper regions of the river.⁶⁶

At the time, the Red River route was controlled and blocked by the Black Flag troops. This group of bandits were tolerated by the Vietnamese King to keep order in Tonkin. They fought with the expedition led by Garnier in Hanoi in 1874 and won. The King of Annam was very pleased with the leader of Black Flag Liu Yongfu that he gave Liu an official title. From then on, the Black Flag troops took over the administration of the Red River region.⁶⁷

In July, 1882, French Foreign Minister Freycinet instructed French Ambassador to China Bourée to inform the Zongli Yamen that France was not fighting a war with Annam. France was simply demanding the execution of the 1874 treaty. The only enemy of France in Tonkin was the bandits whom no civilized nation would defend.⁶⁸

Marquis Zeng sent a report back to the Zongli Yamen stating his opinion towards the whole controversy. Judging from his advice to the Yamen, he had an accurate understanding of the situation and the conflict between the Chinese tributary system and the international legal system. He wished to preserve the tributary system as much as possible. He emphasized that Vietnam should not sign any more treaties with France if China was to stand for Vietnam's cause. Vietnam should also arrange for an official to reside in Beijing to coordinate with the Chinese government and exchange information more frequently. Moreover, the Red River should be open for commerce, but it must be stated that the opening was the result of Chinese command. At last, the Vietnamese

64 Long Zhang, *Yuenan yu Zhong Fa zhan zheng*, 71.

65 Documents Diplomatiques Français. Ière série 1, Tome IV, No. 3, Cloué to Saint Hilaire, 1881.5.17, 9–12 cited in Long Zhang, 71.

66 T.F. Power, *Jules Ferry and the Renaissance of French Imperialism* (New York: Octagon Books, 1944), 158.

67 L.M. Chere, *The Diplomacy of the Sino-French War (1883–1885): Global Complications of an Undeclared War* (Notre Dame: Cross Cultural Publications, 1988) 20; H.B. Morse, *The International Relations of the Chinese Empire*, Vol II, 343.

68 *Affair du Tonkin*, Vol. 1, 273, cited in Long Zhang, *Yuenan yu Zhong Fa zhan zheng*, 94.

authority should restrain their people from destroying French properties so as not to give any excuse to the French.⁶⁹

His opinion demonstrated that he understood and accepted the validity of many rules of international law. The Chinese legitimate concern cannot prevent the application of treaty relations among states.

In China, Viceroy Li Hongzhang, submitted his memorial to the Throne regarding the current controversy. Similar to Marquis Zeng, he advised that the 1874 treaty between France and Vietnam was a *fait accompli*. There was no way that China could ignore the existence and the consequence of the treaty. Moreover, it was the Vietnamese themselves who invited the French to Vietnam (referring to the fact that the last Vietnamese dynasty was established with the help of a French priest and French mercenaries). Vietnam had been weak for a long time. As a result, they asked for French help on almost every matter. There was hardly anything China could do to reverse the fact that France wanted to make Vietnam a French protectorate in international law. The best China could do was to make sure that France do not annex Vietnam.⁷⁰

Li and French Ambassador to China Bourée reached a preliminary agreement in 1882. The essences of the agreement were as follows. First, the imperial Chinese army would withdraw from Tonkin into Chinese territory. In exchange, Bourée promised that France would not conquer Vietnam or annex its territory. Second, the Red River would be open for trade and a customs service would be set up at Lao-Kay in Vietnam. Third, a buffer zone was to be created and a boundary line drawn in Tonkin. China would protect the north part of the buffer zone, and France, the south part. On the basis of the above understanding, China and France would draft a treaty.⁷¹

This agreement would greatly transform the traditional tributary system. Imperial China generally did not intervene in the domestic or foreign policies of the tributary states. However, facing the new European dynamics, Imperial China was no longer able to subsume the new foreign relations into the China-centered world order. The Chinese world order was based on the overwhelming power of the Chinese Empire. Now that the condition was gone, the only solution to avoid open conflicts was for China to be part of the European order.

The Sino-French controversy did not stop here. Li Hongzhang and Zeng Jize's understanding of the nature of the relations between Vietnam and the Chinese empire was clear. Despite the ideal Confucian hierarchical system, new power configurations were against the ideal order of relations from imperial Chinese

69 曾惠敏公文集，卷四，16–17, cited in Long Zhang, *Yuenan yu Zhong Fa zhan zheng*, 77.

70 *Zhong Fa Yuenan jiao she dang*, Vol. 1, 181–183.

71 *Zhong Fa Yuenan jiao she dang*, Vol. 1, 531–535.

perspective. The new powers demanded a new order consolidated with legal instruments. The Chinese recognized the legitimacy of the French claim based on treaty. The Chinese officials believed that the new order of inter-state relations did not have to contradict the Chinese “passive imperialism”⁷² in East Asia. For the Chinese, the prominent position of China and the virtuous rule of the Chinese emperor were not in clash with the international law in practice.

More remain hidden in the diplomatic correspondence in the nineteenth century that could further reveal how Chinese officials wanted to cope with international law within the tributary system and how may have tried to preserve the neighboring ties within the imposing European legal system.

China’s intellectual connection to international law must be explored in its own historical context. As a unified and declining Empire, the recognition and accommodation of positive international law within its traditional hierarchical tributary system could provide more insights into how China, again unified and rich, might contribute to the future of international law.

72 Chi-hsiung Chang, *A Comparison of Eastern and Western Principles of International Order: Suzerainty vs Colonization*, 79 *Institute of Modern History, Academia Sinica*, 张启雄, 东西国际秩序原理的差异—宗藩体系对殖民体系, 中央研究院近代史研究所集刊第79期, 中华民国一百零二年三月.