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China's unique attitude towards international law: Past and present

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ABSTRACT

China's unique attitude towards international law: Past and present

The rules and regulations of international law are intended to be able to resolve conflicts between two or more states. However, there are some nations of the world that do not completely abide by the mentioned rules, thus making conflict resolution through international law difficult or even seemingly impossible.

One of those countries—one with exceptional global influence—is the People's Republic of China. This paper is intended to firstly discover the historical background and evolution of the East Asian superpower's current attitude towards law, most of all international law, then present some of the most significant aspects of China's way of not abiding by or bending the rules to their benefit, while still maintaining a rather neutral or friendly stance in its relations with other states. Finally, my work takes future implications of this attitude into account, looking at some possible alterations that could be beneficial to China as well as to international lawmaking.

ÖSSZEFOGLALÓ

Kína egyedi hozzáállása a nemzetközi joghoz – múlt és jelen

A nemzetközi jog szabályrendszerének egyik fő célja a két vagy több állam között felmerülő konfliktusok megoldása. A világon azonban vannak olyan nemzetek, amelyek nem tartják be teljes mértékben az említett szabályokat, így megnehezítik, sőt látszólag lehetetlenné teszik a vitás helyzetek a nemzetközi jog által történő megoldását.

Az egyik ilyen ország – kivételes világszintű befolyással – a Kínai Népköztársaság. Munkám elsősorban a kelet-ázsiai nagyhatalomnak a joghoz – elsősorban a nemzetközi joghoz – való hozzáállásának történelmi hátterét és fejlődését hivatott bemutatni, majd ismerteti Kína azon módszereit, amelyek által a nemzetközi jogi szabályokat nem tartja be teljesen vagy éppen saját javára értelmezi át jelentésüket, miközben továbbra is meglehetősen semleges vagy barátságos álláspontot képvisel más államokkal fenntartott kapcsolataiban. Végül írásom figyelembe veszi ennek a hozzáállásnak a jövőbeni következményeit, megvizsgálva néhány olyan lehetséges változást, amelyek Kína és a nemzetközi jogalkotás szempontjából egyaránt előnyösek lehetnek.

VIKTÓRIA LAURA HERCZEGH

CHINA'S UNIQUE ATTITUDE TOWARDS INTERNATIONAL LAW: PAST AND PRESENT

I. INTRODUCTION

Does China follow or even consider the rules of international law? Looking at current international controversies and disputes involving the East Asian superpower, the evident answer probably seems to be „no". Many times, China refuses to comply with international law when it does not suit its interests or claims. It is perhaps an even more common Chinese strategy to re-interpret, so to say bend or shape the already existing regulations of international law to better fit their national purposes.[1]

Does international law hold any importance for China and their interests? Why is it possible for the rules of the international legal system to be bent or shaped to the liking of a powerful state? Should China even comply with rules and regulations of an order entirely created by Western thinkers, according to European philosophy?

This kind of behavior of non-compliance and rule-shaping is in fact characteristic of other great powers as well, yet it is most notable and frequent in the case of China.[2] In my paper I intend to uncover the origins and reasons of the East Asian superpower's approach towards what came to be modern international law as well as present the future implications that mentioned attitude may hold for China and for the current existing international legal system, respectively.

[1] BODDE 1963: 344–348, SALÁT 2015: 10–13.
[2] HAYDEN 2006: 11–15.

II. HISTORICAL OVERVIEW

Long before the emergence of what we call international law today, China has already had some unique and firm concepts of a legal order—in fact, Chinese legal tradition is one of the oldest such traditions in the world. At the beginning, Chinese law was based on two important schools of thought: Confucianism and Legalism. The former, mostly elaborated in Confucius' collection of sayings *Lúnyǔ* 論語 (Analects), focuses on the concepts of unwavering virtue and morality but recognizes that society needs law and rules more than those concepts. The latter, Legalism, states that harsh, uniform, simply worded law is the only effective mechanism to maintain order. Even though Qin dynasty (221-206 BC) Legalists sought to eradicate virtue-based Confucianism by burning books, during the successor Han dynasty (202 BC-220 AD) it was completely revived and also revised, set into a more enduring form, an imperial code of rules and regulations.[3]

In the following centuries the Chinese legal system became more dynamic with the appearance of substatutes (li), which supplemented statutes and took priority when two measures conflicted. Another characteristic of these times is the existence of a rich set of customary rules and practices, among others the law of merchants, which is almost identical to the European body of rules used by merchants to regulate their dealings.[4]

Before China first opened up to the world in the 19th century, the legitimacy of their national legal order was unquestionable. Of course there had been earlier interactions between Chinese and Western scholars, but for China, taking exceptional pride in its historical traditions and thoughts, European influence in the field of law was less than significant.

China's first thorough encounter with Western international law was neither natural, nor favorable. During and following the Opium Wars (1839-1860), international law was used as an instrument to bring unequal treaties into effect and to secure territories and legal rights within the borders of the East Asian country. The unequal treaties that China signed with Western powers, such as those allowed Western powers to sell opium in China and indemnified them for any harm done—in fact, the Treaty of Nanjing concluding the First Opium War (1842) provided that British nationals accused

[3] BODDE 1963: 50–51, SALÁT 2016: Chapter I–II.
[4] LIU 2009: 10–14.
[5] FENG 2010: 19–22.

of crimes should be tried under British rather than Chinese law.[5] All this gave the impression to China that international law was a tool used by already powerful nations to maintain their superiority and might. Fueled by this new idea as well as by the humilation they had to live through, China actually began to take into consideration the Western development of international law.

The humiliation also caused efforts by Chinese intellectuals to reform state law in a way that it could address Western concerns while staying true to national traditions and values. At the beginning of the 20th century, lawyer and juristic philosopher John C. H. Wu attempted to introduce the basic concepts of Western liberal legality into China.[6] The initiative did not prove to be successful, mainly due to the unfortunate timing for any kind of serious legal reform: during the second and third decade of the 20th century China suffered through a period of chaos, warfare, poverty and disintegration.

After the Chinese Communist Party rose to power and gained control of mainland China in 1949, a new legal system was introduced. The framework of this new order was Soviet socialist legality, but it retained some judges from the previous Kuomintang era (Republic of China, 1912-1949). This rather unstable legal system was attacked from the very beginning of its existence and this opposition intensified significantly during the Cultural Revolution (1966-76). During this time, Chinese state law seemed to be strictly interconnected with politics.[7]

With Deng Xiaoping's rise to supreme power, a new program for legal development began. In its first few years, the initiative focused on building a more stable, less attackable [3]legal order that would be able to prevent another chaos similar to that of the Cultural Revolution. The efforts of the new, ambitious program included two new constitutions (in 1978 and in 1982), reestablished law courts and schools as well as laws issued in areas like criminal justice and modern economic activity. China's new leaders also realized that in order to make the giant step of moving the country from planned to market-oriented economy, a lot more lawyers and other legally trained professionals would be needed. Thus, from the very beginning of the Deng era, hundreds of thousands of people all over China received thorough and high-level legal training.[8]

[6] FENG 2010: 25.
[7] DELISLE 2010: 493–524.
[8] LO 1992: 649–660.

Much like its economy, China's legal system—institutions as well as state law itself—went through a rapid and significant modernization during the last decades of the 20th century. Therefore, also similarly to economic reforms, legal development was also surrounded with issues of implementation and enforcement. Local protectionism, lack of professional competence and most of all corruption are problems to this day, although the latter is constantly being fought with anti-corruption laws from the beginning of its emergence.

III. THE FIGHT AGAINST CORRUPTION

A key element of power centralization against the local party-state is China's anti-corruption campaign: Over the last five years, 1.3 million cadres of the Chinese Communist Party have been disciplined for violating the laws, rules, regulations and ethics of the CCP. Most of them were local officials. Most recently, China's parliament, the National People's Congress in March 2018 made several changes to the anti-corruption campaign that reflect the ambivalences well in China's approach to legal reforms: The NPC established a new anti-corruption authority, the National Supervision Commission which holds even more power than the Central Commission for Discipline Inspection (CCDI) that has been in charge of the anti-corruption campaign recently. This new commission may not only investigate cases of corruption against Party cadres as the CCDI but against any public official, including employees of state-owned enterp[4]rises. This reflects that while the CCDI was purely an institution of the Party outside of the state's law enforcement apparatus, the National Supervision Commission is a dual institution reporting both to the state and the party authorities.[9]

Although this closer interlinkage may appear to be a positive step in the first place, the control of the CCP over the new commission remains essentially undisputed: The National Supervision Commission is headed by Yang Xiaodu. However, at the same time, Yang is the deputy secretary of the CCDI. In this latter function Yang is accountable to Zhao

[9] ZHOU 2017: 122–125.
[10] ANG 2021.
[11] ANG 2021, VANDERKLIPPE 2017.

Leji who is the head of the CCDI. In other words, this personal overlap allows the leader of the CCDI to instruct the head of the National Supervision Commission.[10]

In accordance with this finding that improvements are limited, defendants of anti-corruption charges will continue to be denied access to legal defense. Appealing the decisions of the commission is impossible; detainees can be held for six months without any legal charges. At the same time, however, one should keep in mind that corruption is in fact a severe challenge for the whole country not being restricted to the CCP.[11] Therefore, the broadening of the campaign as such is a logical step. While Western observers tend to view it as a means in the hands of President Xi Jinping to consolidate his power, this perception overlooks that most cadres being charged for corruption have actually been corrupt and their removal is not connected to power struggles within the CCP at all. Furthermore, the widespread system of extra-legal prisons (*shanggui*) will be abolished giving rise to hopes for less arbitrary and more transparent litigations. Therefore, while the policy initiatives respond to real challenges (e.g. corruption) and include some improvements (e.g. abolishment of extra-legal prisons) they do not genuinely strengthen China's rule of law. This became obvious in 2015 when the Chinese authorities cracked down on 248 human rights lawyers that had previously defended oppositionists. In essence, legal reform is not about judicial independence as such but aims at functionally strengthening the central authorities vis-à-vis the local party-state.

IV. CHINA AND INTERNATIONAL LAW: SOVEREIGNTY, NON-INTERFERENCE

As mentioned before, China's humiliating interactions with the outside—Western—world played a significant role in shaping the modern Chinese approach to international law.

One particularly important concept in that approach is sovereignty. It is a basic position set up to maintain the country's independence regarding its internal affairs as well as a means to safeguard national pride, its essential nature hardly surprising after long decades of foreign powers taking advantage of China.[12]

Two key elements to the Chinese concept of sovereignty are territorial integrity and non-interference. Concerning the former, China has long regarded many borders in Asia to be illegally made and invalid due to the fact that they were created by Western powers—The McMahon line separating India and China is a classic example of this. This

line currently serves as the border between Tibet and the Indian state of Arunachal Pradesh, but has been a subject of tension between India and China since the border was established within the 1924 Simla Convention between British and Tibetan authorities.[13] India maintains the stance that the McMahon line is the official border between China and India, yet China contends that the line is invalid, claiming that Tibet was not a sovereign state and therefore unable to sign the Simla Convention.[145]

Two more recent examples of China's focus on territorial integrity are the handovers of Hong Kong in 1997 and Macao in 1999. Both were cessions from the Qing government to Western Powers—Macao to Portugal and Hong Kong to the United Kingdom. China had long considered these unlawful, stating that "Hong Kong has been Chinese territory since ancient times and the whole of Hong Kong must revert to being domain of the motherland.[15]

Concerning non-interference, China's strong emphasis on also stems from the experiences of Chinese-European relations in the 19th and early 20th centuries. Foreign intervention in China has led to numerous situations that have been adverse to China's sovereignty. Because of that, China has been very firm in its stance opposing foreign intervention by any country in the domestic affairs of another. For example, when NATO intervened in Kosovo in 1999, China instantly argued that NATO violated the principle of non-interference in the internal affairs of a sovereign country.[16]

In the case of the South China Sea dispute, the concepts of territorial integrity and non-interference can be detected in China's attitude. Concerning the former, while China is clearly also motivated by the rich natural resources and strategic advantages offered by maintaining a strong claim of the maritime features in question, the South China Sea is also part of an Asian world that was once fully under Chinese control. As of no[6]n-interference, China has refused to participate in the South China Sea Arbitration (2013-2016, brought by the Philippines to an arbitral tribunal of the Permanent Court of Arbitration) mainly because according to them, the conflict should have been resolved

[12] AARSHI 2018, DELISLE 2010.
[13] ZOU 2010: 33–36.
[14] ZOU 2010.
[15] HOOK 2002: 113–116.
[16] AARSHI 2018.
[17] ZOU 2010, MA 2016: Chapter II–III.
[18] *UN Treaty Bodies and China*.

bilaterally between China and the Philippines, without the interference of any other state or non-state actor.[17]

V. China and international law: Treaties, agreements, organizations

Legally binding international agreements have become a significant means in China's expansion of its international economic reach as well as political influence. Such agreements set the terms for investments, loans, and dispute resolution procedures in China's Belt and Road projects and beyond, thus facilitating China's acquisition of possible economic-based political leverage over partner states in Asia and in the Western world.

International institutions create and shape international legal obligations and rules, and China has been increasing its influence in them. The East Asian superpower successfully became a charter member of the UN Human Rights Council in 2006.[18] With this, it has been able to mute strong criticism of its own alleged violation of international human rights law and violations by other states with authoritarian regimes.

Especially following the global financial crisis of 2007-08 and China's cooperative role in addressing it, the East Asian country pushed hard for greater power for itself (as well as for other large, emerging economies) in the World Bank and the International Monetary Fund.[19] At the same time, China has taken a leading role in founding new institutions such as the New Development Bank (founded in 2014, location of headquarters in Shanghai) and the Asian Infrastructure Investment Bank (founded in 2016, location of headquarters in Beijing),[20] which provide international legal means for imposing political conditions on economic assistance. Also, China has pursued the Regional Comprehensive Economic Partnership and other China-centered regional trade agreements. China has pledged that the New Development Bank and the Asian Infrastructure Investment Bank would follow international norms and best practices.[21] However, these new institutions and trade pacts are potential rivals to their longer-standing, global and multilateral counterparts, and they are less likely to be significant venues or mechanisms for promoting democratic or democracy-supporting

[19] Dollar 2020.
[20] Wang 2019: 6–8.
[21] Wang 2019: 11–14.
[22] Reich 2017, Introduction.

change in targeted countries than it has been happening with status quo bodies and agreements.

Still, although China may have joined international organizations, or signed bi- or multilateral treaties, the state still has the final say when it comes to the implementation of treaty obligations. If this was otherwise, it would mean ceding authority to dictate to the East Asian superpower what it can or cannot do, which would directly violate the essential Chinese theory of sovereignty.

It has to be mentioned here that most of the leading international organizations in the second half of the 20th century started to expand into areas such as human rights, environmental protection and territorial waters. Not only do international bodies seek to make decisions by which China would be bound, they are now looking into areas that China strictly considers domestic and in case of a conflict situation, would exclusively prefer bilateral negotiation as a means of dispute settlement.

VI. CHINA AND INTERNATIONAL LAW: WTO

Upon its accession to the World Trade Organization (WTO) in 2001, China accepted some legally binding trade rules.[22] Surprisingly to many experts, since China's economic development is benefiting from legal certainty, China has decided to largely comply with its WTO obligations. In the context of China's WTO accession, reformers succeeded to push through economic reforms against the will of more conservative factions of the Chinese Communist Party using the argument it was a legal requirement for China under WTO law. In the early 2000s, this strategy proved to be highly effective.[23]

An outstanding example of China's overall good compliance with WTO is its handling of WTO Dispute Settlement Body (DSB) rulings against the East Asian superpower. China has a far better compliance record with DSB rulings against it than any other major trading power. Historically, developed countries consisting of the United States, the European Union, Canada, Japan and Australia have only a compliance rate of 50%. Developing countries score considerably better complying with 80%. Out of the 33 concluded cases, the PRC has a compliance record of 85.7% of all completed original cases. The reason for this outstandingly high compliance rate is China's concern for its international reputation: DSB rulings are comparatively clear in naming violations of

WTO law and rather precise by outlining what countries have to do to bring their policies in compliance with WTO law.[24] Therefore, if China wants to avoid being clearly called a violator of WTO law, it has hardly any choice but compliance. At the same time, however, when assessing China's compliance with WTO law it has to be noted that China has done everything to uphold state permeation of its economy and did not convert into a full market economy. However, to achieve this goal, China has aimed to avoid openly violating WTO law but has carefully studied its legal obligations for loopholes. For example, China has interpreted the term "prudential regulations" very broadly when applying it to key sectors such as finance and banking.

Upon its WTO accession, the PRC had committed itself to lift all regulations for foreign financial firms after a phase-in period of five years except for "prudential regulations". This obligation seemed to indicate that China's financial market would turn into one of the most liberal ones on the globe outperformed solely by exceptionally free territories such as the Cayman Islands. This was an outstanding commitment because the financial sector is crucial for the allocation of resources in any country but in a state-permeated one with a high market share of state-owned bankslike in the PRC in particular. Furthermore, in absence of a functioning capital market, apart from their savings Chinese firms mostly finance their investments through bank loans.[25]

When implementing its commitments under WTO law, however, China carefully studied the term "prudential regulations" and noticed that there was no internationally accepted, official definition of the phrase. Consequently, they adopted a very broad definition of it that allowed the PRC to effectively keep full control over its financial sector not endangering the dominance of state-owned banks. Therefore, China is complying with its WTO obligations but violates the spirit of it. In a turn to "creative compliance", China has effectively made use of the legal loopholes present in WTO law. To summarize, China has a comparatively good compliance record reflecting its economic benefits from international trade law. Depolitization and reputational considerations also play a role. Nevertheless, as it is the case with other fields of international law, China prefers vague legal norms that provide room for interpretation or partial compliance.

[23] HALVERSON 2004: 319–324.
[24] WU 2011: 237–240, NÖLKE 2014: Chapter III.
[25] WU 2011: 244–256.

VII. CHINA AND INTERNATIONAL LAW: HUMAN RIGHTS

China has accepted the notion of universal human rights since the early 1990s and, since the early 1980s, the East Asian superpower has joined and participated in many key international human rights treaties, such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) or the Conventi[9]on against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[26] The International Covenant on Civil and Political Rights (ICCPR), which includes the right to participation in self-governance as well as numerous civil and political liberties, has been signed in 1998 but is still waiting to be ratified by China.[27] In recent years, domestic Chinese voices along with the international community have been more actively calling for China's ICCPR ratification. For example, an increasing number of Chinese citizens have been organizing open letters and urging the leaders to ratify the ICCPR.

Current Chinese views on international human rights do not include the right to democracy, in some ways being distinctly undemocratic. Traditional Chinese accounts state that core international human rights include a right to sovereignty and a right to economic development—both of which can provide arguments for delaying or sacrificing pursuit of liberal political rights generally associated with the concept of democracy. This purported human right to sovereignty implies the right of each and every state (or the people of a state) to choose a form of political system, possibly even an undemocratic one that suits its own conditions. Therefore, a right to democratic governance essential to most Western states is not officially accepted by China.[28]

Although China has for long voiced their support for international legal rights of decolonization and, sometimes for national liberation movements as well, it has rejected arguments that Tibetans, Uyghurs, and other minority groups in China, or the people of Taiwan, enjoy the international legal right to self-determination, which could include the right to separate states.[29]

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[26] *UN Treaty Bodies and China*.
[27] *Ratification Status for China: UN Treaty Bodies.*

Chinese views include the statement that it is permissible to prioritize economic, social, and cultural rights over civil and political ones. They also intend to excuse China's asserted shortcomings on civil and political rig[10]hts as the consequences of still relatively low levels of economic developments or the legacies of past political problems (in China's case, mainly the Cultural Revolution and associated depredations of human rights). Chinese discourse, including statements from the most important leaders, has adopted some variants of cultural relativism in the concept of human rights. Although never fully signing onto the "Asian Values" arguments of the 1990s, Chinese statements did and do indeed support the view that the meaning of universal human rights may vary by national circumstances, which includes history as well as some elements of culture.

VIII. CONCLUSION

Based on all of the above, what does international law mean to the East Asian superpower today?

International law is a set of rules, norms and standards fully originated from the West. Nevertheless, since the unintentional opening up to the world at end of the 19th century China has intended to adapt it to their fundamentally different norms, distinct history and traditions. This has resulted in an approach to international law that is substantially different than the generally accepted Western understanding. The Chinese approach is, as mentioned above, strongly connected to as well as heavily influenced by Chinese history and national way of thinking, especially China's experiences with the West.

Although China in great part disagrees with the rules of existing international law and the nature of legal norms as such, the rule of law holds great importance to their national politics and reforms: the independence of the judiciary from local party-state cadres' interference has been strengthened. At the same time, China's approach to law remains functional, with careful attention focused on the benefits of law for policy-making. This approach based on functionality comes with a preference for legal norms

[28] *China's Perspective and Practice of Democracy.* 2021.
[29] *Human Rights in China.* 2021.

that are vague and can allow several different interpretations, something that is easily detectable within the East Asian superpower's approach towards international law.

Under such circumstances, can it even be expected of China to comply with norms, rules and regulations not only foreign to their history, traditons and thinking, but something at the creation of which they had absolutely no say? For China, compliance with international law is not an essential value. On the other hand, non-compliance and re-interpretation is a strategy that has certainly worked in several past situations and has not yet had a negative impact on the nation's aspirations or interests. In the future, China will most likely continue this method—however, being member/signatory of the most important international treaties, agreements and organizations and economically co-dependant on many great Western states, it is certainly not in their agenda to openly violate international law.

Even so, Chinese non-compliance and exploitation of legal loopholes has been having a negative impact on international lawmaking time-wise and financially as well. What exactly could be done by the Western world in order to somehow hold China back from their unusual approach towards international law?

First of all, similarly to China, Western states are not always fully compliant with the rules of international law, especially when it comes to interests in the fields of finance and economy. Even though their ways are different and sometimes not as easily detectable, if there is no transparence from their part, the East Asian superpower will certainly not feel obliged to respect the rules and regulations. With this in mind, it could also be beneficial to adopt more strict and precise international rules, ones that are practically impossible to re-interpret. Such norms would minimize the chance of the emergence of legal disputes as well as that of non-compliance from any side.

As stated before, good international image and reputation is extremely important for China. The country's intention is portray itself as compliant with international regulations and being a respectable, reliable partner in international relations in order to contrast the „century of humiliation" that started with the Opium Wars and lasted until the Chinese Communist Party's takeover of power in 1949. One of China's primary concerns is not being accepted into the circle of highly developed global leading powers. This is something they are right to be concerned about, as their systemic shortcomings and weaknesses, in the political and legal field alike, are constantly under harsh criticism. In order to reach some accordance and get China to actually consider complying with

rules and regulations of international law, the Western world should maybe not just complain about existing weaknesses of the Chinese legal system but also highlight positive developments strengthening the incentive to improve the Chinese reputation by the means of legal reform.

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