

## LAWS3516 International Law and China

### Topic 1 - China's Historical Engagement with International Law

#### Ancient China

Was there international law in ancient China?

- Oppenheim: "more or less frequent and constant contact of different nations with one another could not exist without giving rise to certain fairly consistent rules and usages"

#### **Arguments against it:**

- No independent, sovereign states
- Not systematic
- No connection to modern international law

#### China's Traditional World Order

- Sino-centric
- Cultural/ethical relationship (benevolence and obedience)
- Superiority and subordination based on cultural ascendancy, not sovereignty
- No room for international law

#### The Tribute System

##### **Framework of relations**

- Appointment and conferment of titles
- Presentment to the Emperor
- Kowtow
- Tribute of local products and grant of imperial gifts
- Privileges of trade

#### Modern China

##### **Early contact with western international law**

- Negotiations with Dutch colonialists (1662-90) ("law of all nations")
- Treaty of Nerchinsk (1689) (advice from Jesuit missionaries)
- Translation of Vattel's *Le Droit des Gens* for Commissioner Lin Zexu (林则徐) (1839)
- W.A.P. Martin's Translation of Wheaton's *Elements of International Law* (1864):
  - "it is commonly used in various nations and is not a monopoly of any single State. Moreover, it is like the laws and regulations of various countries, hence it is called ... Laws and Regulations of All Nations"
- Incident of Prussia-Denmark War (1864)
  - "Foreign countries have the view that oceans and seas over 10 li [one marine league] from the coast, where it is beyond the reach of guns and cannons, are common area of all countries."
  - "We ... find that although this book on foreign laws and regulations is not basically in complete agreement with the Chinese systems, it nevertheless contains sporadic passages which are useful."
  - "For instance, in connection with Prussia's detention of Danish ships in Tianjin harbour this year, your ministers covertly used some statements from that law book in arguing

with him [the Prussian minister]. Thereby, the Prussian minister acknowledged his mistake and bowed his head without further contention."

→ **Dispute with Portugal (1909)**

- "European and American countries have a bias against East Asian people ... Having these powers involved, Hague arbitration will definitely defend Portugal's interest ... It is better for us to negotiate with Portugal directly so that we may yet have a fifty-fifty chance to succeed."

→ **Unequal Treaties (1842-1943)**

- "The treaties were imposed by force or concluded under the threat of force with the purpose of exacting rights and privileges for the foreigners and their countries in flagrant violation of the sovereignty and independence of China ..."

→ **Treaty of Nanking (1842) - System of extraterritoriality**

- Jurisdiction based on the nationality of the defendant / accused
- Special courts (British Supreme Court for China / United States Court for China)
- Shanghai Mixed Court

→ **The Maoist era (1949-78)**

- Struggle for international recognition and personality
- Five Principles of Peaceful Co-existence and belligerent foreign policies (Korean War, Indo-China War and armed conflicts with Taiwan, India, USSR and Vietnam)
- Radical politics and human calamities

→ **The Post-Mao Era (1979)**

- Economic reform and the China Development Model
- Opening-up policy and re-integration into the international economic order
- Authoritarian rule and human rights abuses
- The "Chinese Dream of the great rejuvenation of the Chinese nation"
- Constructing a "community of common destiny for mankind" (人类命运共同体)

**Art. 19(1) Foreign Relations Law (2023)**

"PRC upholds the international system with the UN at its core, the international order underpinned by international law, and the fundamental norms governing international relations based on the purposes and principles of the UN Charter."

## Topic 4 - Taiwan

### Status in international law

#### Three basic theories

##### A. Taiwan Status undermined

- Terra nullius after the Treaty of San Francisco?
- ROC as a belligerent occupier

#### UK Government (1955)

"The arrangements made with Chiang-Kai-Shek put him there on a basis of military occupation pending further arrangements, and did not of themselves constitute the territory Chinese. Under the Peace Treaty of April, 1952, Japan formally renounced all right, title and claim to Formosa and the Pescadores; but again this did not operate as a transfer to Chinese sovereignty, whether to the People's Republic of China or to the Chinese Nationalist authorities. Formosa and the Pescadores are therefore, in the view of Her Majesty's Government, territory the de jure sovereignty over which is uncertain or undetermined."

##### B. Taiwan as part of the state of China

1. **Official PRC / former ROC position (3 declarations + 1945 handover + abrogation of Shimonoseki Treaty)**
  - Legal effect of Cairo / Potsdam?
  - Peace treaty essential? (Occupation = Acquisition of Sovereignty?)
2. **Sovereignty based on San Francisco Treaty**
3. **Recognition / acquiescence of other States (implying relinquishment by the Allied Powers of dispositive authority over Taiwan)**
4. **International judicial recognition ("Taiwan Authority of China" per SCS Arbitration)**

##### C. Taiwan as an independent State UK House of Commons Foreign Affairs Committee Report (2023)

- "Taiwan is already an independent country, under the name Republic of China (ROC). Taiwan possesses all the qualifications for statehood, including a permanent population, a defined territory, government, and the capacity to enter into relations with other states—it is only lacking greater international recognition. Taiwan's government has not made an official proclamation of independence—because China regards that as a casus belli—but President Tsai Ing-wen states that this is because Taiwan is "an independent country already" so has no need to declare itself an independent state..."

### One China Policy

- There is only one China in the world.
- Taiwan is an inalienable part of China.
- The People's Republic of China is the sole legal government representing the entire Chinese people

#### **Previous ROC Position (1992)**

Both sides of the Taiwan Strait agree that there is only one China. However, the two sides of the Strait have different opinions as to the meaning of “one China.” To Peking, “one China” means the “People’s Republic of China (PRC),” with Taiwan to become a “Special Administration Region” after unification. Taipei, on the other hand, considers “one China” to mean the Republic of China (ROC), founded in 1911 and with de jure sovereignty over all of China. The ROC, however, currently has jurisdiction only over Taiwan, Penghu, Kinmen, and Matsu. Taiwan is part of China, and the Chinese mainland is part of China as well.

#### **1992 Consensus between SEF and ARATS (“One China, Different Interpretations”—一個中國各自表述)**

- SEF in Taipei: “On November 3, a responsible person of the Communist Chinese ARATS said that it is willing to ‘respect and accept’ SEF’s proposal that each side ‘verbally states’ its respective principles on ‘one China.’”
- ARATS (Beijing): “At this working-level consultation in Hong Kong, SEF representatives suggested that each side use respective verbal announcements to state the one China principle. On November 3, SEF sent a letter, formally notifying that ‘each side will make respective statements through verbal announcements.’ ARATS fully respects and accepts SEF’s suggestion.”

#### **President Tsai Ing-wen’s Inaugural Address (2016)**

In 1992, the two institutions representing each side across the Strait (SEF & ARATS), through communication and negotiations, arrived at various joint acknowledgements and understandings. It was done in a spirit of mutual understanding and a political attitude of seeking common ground while setting aside differences. I respect this historical fact.

#### **President Lai Ching-te’s Inaugural Address (2024)**

I think it is apparent to us all: We have a nation insofar as we have sovereignty. Right in the first chapter of our Constitution, it says that “The sovereignty of the Republic of China shall reside in the whole body of citizens,” and that “Persons possessing the nationality of the Republic of China shall be

citizens of the Republic of China.” These two articles tell us clearly: The Republic of China and the People’s Republic of China are not subordinate to each other.

#### **Shanghai Communique (1972)**

The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position. It reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves.

#### **Joint Communique (1979)**

“The United States of America recognizes the Government of the People's Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan.”

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## Topic 8 - Human rights

### Engagement with human rights

#### **Art. 33(3) Constitutional Amendment 2004**

The State respects and preserves human rights.

### Human rights with 'chinese characteristics'

#### **WP 1991**

It has been a long-cherished ideal of mankind to enjoy human rights in the full sense of the term. Since this great term -- human rights -- was coined centuries ago, people of all nations have achieved great results in their unrelenting struggle for human rights. However, on a global scale, modern society has fallen far short of the lofty goal of securing the full range of human rights for people the world over.

However, the evolution of the situation in regard to human rights is circumscribed by the historical, social, economic and cultural conditions of various nations, and involves a process of historical development. Owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights.

Despite its international aspect, the issue of human rights falls by and large within the sovereignty of each country. Therefore, a country's human rights situation should not be judged in total disregard of its history and national conditions, nor can it be evaluated according to a preconceived model or the conditions of another country or region.

### Historical perspective

#### **WP 1991**

Under long years of oppression by the 'three big mountains' -- imperialism, feudalism and bureaucratic capitalism - people in old China did not have any human rights to speak of. ... The situation in respect to human rights in China took a basic turn for the better after the founding of the People's Republic of China.

Without national independence, there would be no guarantee for the people's lives. When imperialist aggression became the major threat to their lives, the Chinese people had to win national independence before they could gain the right to subsistence.

As a developing country, China has suffered from setbacks while safeguarding and developing human rights. Although much has been achieved in this regard, there is still much room for improvement. It remains a long-term historical task for the Chinese people and government to continue to promote

human rights and strive for the noble goal of full implementation of human rights as required by China's socialism.

### **Progressive attainment of rights**

#### **Art. 2(2) ICESCR**

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

### **Margin of appreciation**

#### **Handyside v UK (1976)**

##### **Facts/Held**

It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective law of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject.

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them...

Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context. Consequently, Article 10 para. 2 ... leaves to the contracting States a margin of appreciation.

### **Humans rights and economic development**

#### **WP 1991**

[I]t is the fundamental wish and demand of the Chinese people and a long-term, urgent task of the Chinese government to maintain national stability, concentrate their effort on developing the productive forces along the line which has proven to be successful, persist in reform and opening to the outside world, strive to rejuvenate the national economy and boost the national strength, and, on the basis of having solved the problem of food and clothing, secure a well-off livelihood for the people throughout the country so that their right to subsistence will no longer be threatened."

## **WP 2016**

The rights to subsistence and development are the primary, basic human rights. Poverty is the biggest obstacle to human rights. Without the production and supply of material goods, it is difficult or even impossible to realize any other human right. Development is a means of eliminating poverty. It provides necessary conditions for realizing other human rights, and releases human potential.

## **WP 2016 - development achievement**

- China feeds more than 20 percent of the world's population with less than 10 percent of the world's arable land.
- Through more than 30 years of reform and opening-up, China has lifted 700 million people out of poverty, accounting for more than 70 percent of the global reduction in poverty.
- China has established the world's largest social security system, and average life expectancy had grown from 35 years in 1949 to 76.34 years in 2015, ranking high among the developing countries.
- The level of education has soared: in 1949, more than 80 percent of the national population was illiterate, and the enrollment rate of school-age children was only 20 percent. In 2015, net enrollment rates were as follows: primary school-age children - 99.88 percent; nine-year compulsory education -- 93 percent; high school - 87 percent. The enrollment rate for higher education has reached a level approaching that of medium-developed countries.

## **International Law on Human Rights**

### **UN Declaration on the Right to Development (1986) - right to development**

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

## **International legality of human rights**

- Interdependence / indivisibility of rights (re-prioritising)
- Human rights limited by sovereignty and non-intervention
- Politicisation of human rights
- Human rights and Chinese values
  - Common values ("proto ideas), common / different solutions
  - Different values