Mollis, 01.09.2008

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Seminar Comparitive Constitutional Law

The Relationship between international and national law in China, Hong Kong and Switzerland

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Herbstsemester 2008

Contents

Abbreviations

Art.	Article
BBl	Bundesblatt
BGE	Decision of the Federal Supreme Court of Switzerland
E.	consideration
ECHR	European Conventions of Human Rights
e.g.	for example
f./ff.	following
No.	number
p.	page
PRC	People's Republic of China
SAR	Special Administrative Region
Vol.	volume

Literature

Chow Daniel C.K., The legal system of the People's Republic of China in a Nutshell, St. Paul 2003

Häfelin Ulrich/Haller Walter, Schweizerisches Bundesstaatsrecht, 6. Edition, Zürich/Basel/Genf 2005

Haller Walter/Kölz Alfred, Allgemeines Staatsrecht, 3. Edition, Basel 2004

Herdegen Matthias, Völkerrecht, 6. Edition, München 2007

Heuser Robert, Einführung in die chinesische Rechtskultur, Hamburg 2002

Hsu Stephen C., Understanding China's legal system: Essays in Honor of Jerome A. Cohen, New York/London 2003

Kälin Walter, Völkerrecht: Eine Einführung, 2. Edition, Bern 2006

Mushkat Roda, One country, two international legal personalities: The case of Hong Kong, Hong Kong 1997

Peters Anne, Völkerrecht: Allgemeiner Teil, Zürich/Basel/Genf 2006

Slomanson William R., Fundamental Perspectives on International Law, 5. Edition, Australia/Brazil/Canada/Mexico/Singapore/Spain/United Kingdom/United States 2007

Stein Torsten/Von Buttlar Christian, Völkerrecht, 11. Edition, Köln 2005

Thürer Daniel/Aubert Jean-François/Müller Jörg-Paul (Hrsg.), Verfassungsrecht der Schweiz, Zürich 2001

Thürer Daniel, Völkerrecht, 2. Edition, Zürich/Basel/Genf 2007

Von Senger Harro, Einführung in das chinesische Recht, München 1994

Wallace Rebecca M.M., International Law, 5. Edition, London 2005

Werner Sven-Michael, Recht im Systemwandel: Ein Land, zwei Systeme und das Kontinuitätsproblem in Hong Kong, Frankfurt am Main 2004

Ziegler Andreas R., Einführung ins Völkerrecht, Bern 2006

Introduction

In today's time, countries always get more and more related to and depending on each other. A huge number of bilateral or multilateral relations emerge and are concluded in an international treaty – additionally, international customary law needs to be respected. International law, meaning the result of negotiation between international legal personalities, does not just regulate relations between states anymore. The scope of international law continues to extend, therefore e.g. social concerns are being regulated by international law[1]. "International law is more and more aimed at individuals."[2]

Apart from the international legal system every country established its own national legal order addressing amongst other things individuals as well.

As a result a country has to follow two binding legal systems. A lot of questions emerge out of the existence of two different binding legal orders. I want to name just a few: What role does international law play in a national legal order? When and how is a country bound through the treaties it signed and ratified? Can individuals go to national courts submitting actions based on rights guaranteed in international agreements? Where does unwritten or written international law stand in the national hierarchy of norms? What if the national and international law contradict each other in ruling a certain topic? Which rule has to be followed?

In this work I want to show general principles answering these questions firstly and later discuss the different solutions China, Hong Kong and Switzerland found for this important and challenging topic.

1. The relationship between international and domestic law in general

As a starting point, international law forms a complete and self-contained legal order which does not say anything about its relation to national law. International law just wants to be respected and recognized in national law, but how this has to be done is a matter of national law. Generally speaking there does not exist a universal rule which everybody recognizes. Every sovereign country has to decide how it wants to incorporate international law in its domestic legal system. Most countries rule in their constitution about this question[3].

[1] See Wallace, p. 36.
[2] Wallace, p. 36.
[3] See Kälin, p. 95; Wallace, p. 36 f.; Thürer/Aubert/Müller, p. 187.

As a basic rule, Art. 27 of the Vienna Convention on the Law of Treaties says, that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." National law cannot be used to justify an infringement of international law. So every country is bound in a certain sense to these things it agreed on, e.g. in a treaty, independent of what the specific national law says[4].

I. Two different theories

The relationship between national and international law has been the subject of a theoretical conflict over a long time[5]. The supporter of the Dualist theory faced their counterparts as supporters of the Monist theory. At these two different theories shall be looked at in the following.

A. Monism

Although international and national law differ in some aspects, Monists see international and national law belonging to one and the same legal order. Because of that, international law becomes binding for a Monist country without transformation. In contrary, it is incorporated automatically. From the very moment when the parties of a treaty are bound to the content of an international agreement, the treaty becomes a part of national law and has legal effects there[6].

If a country follows the monistic tradition, it cannot reject international law in principle because international law is part of the national legal system itself. It can only have reservations about certain components of a treaty which the country does not want to be part of its national law[7].

B. Dualism

According to the theory of dualism, international and national law belong to two different legal systems which are independent and stand completely separate next to each other. They differ in the subjects and things they have to rule for and also the sources of law are not the same. On one hand,

[4] See Herdegen, p. 149.
[5] See Stein/Buttlar, p. 62.
[6] See Kälin, p. 95.
[7] See Slomanson, p. 38.

international law regulates the relations between states. On the other hand, national law regulates matters inside a national state. Because of this separation international law needs to get incorporated into national law to become a part of it. As long as the incorporation has not taken place, an international treaty does not have any effect in a dualistic country[8]. Generally speaking, international law does not have any validity as long as its principles are not accepted and incorporated in national law[9]. Through the incorporation, which passes according to national law, international law gets a place on a certain level in the hierarchy of norms in the national law. Therefore, conflicts between international and national law can be circumvented in dualistic countries in a certain sense.

II. Validity of international law

Like a national legal order, international law does have different levels of law. The reason for that are the varying sources international, and also national, law comes from[10]. Some levels differ in their relationship to national law.

A. Ius cogens

According to Art. 53 subsection 2 of the Vienna Convention on the Law of Treaties, ius cogens is on the highest level of international law. It is primary to all other international law. Ius cogens includes fundamental principles of international law which are binding for all nations that follow the monistic tradition[11].

B. Customary international law

Concerning the validity of customary international law in national law, the monistic tradition is more common than the dualistic tradition. As customary international law is not written down, or only partly mentioned in certain treaties, and changes easily over time, there does not exist a treaty which could be incorporated.

[8] See Wallace, p. 37.
[9] See, Slomanson, p. 39.
[10] See Häfelin/Haller, p. 569.
[11] See Peters, p. 78 f.

Although, nowadays, some authors think differently and deny customary international law its national validity which it has according to monism[12].

C. Treaty-based international law

A look at international treaties shows that in monistic States international treaties are binding after their ratification in national law. However, in dualistic countries, an incorporation of treaties is needed. The theory a country chooses depends on its tradition and its attitude towards international law. Every country decides for itself where to place a certain international treaty in its national hierarchy of norms.

III. The application of international treaties in national law

When a treaty is incorporated automatically (monism) or through a special legislative act (dualism) into national law, the question arises, if individuals can derive rights out of these provisions for themselves. Can they go to court and base an action directly on a norm of a treaty? This is the question of the applicability of an international treaty in national law. Not every provision of a treaty is directly capable to guarantee individuals rights or to put them under a certain obligation. Sometimes a provision needs to be specified by the national legislative force to become binding for the national legal order and therefore also for individuals. Because of that the provisions of an international treaty can be grouped in self-executing and non-self-executing provisions[13]. Elusive for this grouping is always the content of the specific provision[14], at which needs to be looked at carefully. It is possible that a treaty includes both self-executing and non-self-executing parts which need to be treated differently[15].

A. Self-executing provisions of an international treaty

If a provision has self-executing character, it is possible for individuals to go to court submitting an action based directly on rights guaranteed in an international agreement.

[12] See Ziegler, p. 113 f.
[13] See Kälin, p. 109.
[14] See Herdegen, p. 150.
[15] See Thürer/Aubert/Müller, p. 189.

But when and how can a provision be qualified as self-executing? Every state answers this question in a different way because the answer depends on the weight a State puts on its own sovereignty.

If a provision is accepted as self-executing, the international provision is directly applicable in front of the national court. Out of it can be said that a state has to accept its whole content and cannot change it according to its own opinion anymore.

It is not always easy to decide whether a provision is self-executing or not. Firstly, it needs to be looked at the international treaty itself. It could be that the wording of the treaty specifies exactly how a provision should be transformed into national law, whether its norms are self-executing or not. Secondly it is possible that the parties of the treaty agreed on the direct applicability of the treaty or some provisions[16].

To know whether a treaty itself or its parties say anything about the applicability of its provisions, the provision in question needs to be interpreted. In Switzerland e.g. the Federal Supreme Court has established a practice including specific conditions which need to be fulfilled to acknowledge a provision's self-executing character[17].

B. Non-self-executing provisions of an international treaty

A non-self-executing provision addresses the national legislative body and does not contain any rights or obligations directly dedicated to individuals. For its application in national law it is necessary that a provision gets specified through the national legislation. The way a provision is transformed into national law is not given, every state is free to do this in its own way[18].

The basic rule is that every provision which does not fulfil the conditions for being self-executing is non-self-executing. Neverthless the Federal Supreme Court of Switzerland e.g. said what he thinks is a non-self-executing provision[19].

[16] See Kälin, p. 109 f.
[17] See BGE 118 Ia 112 E. 2b; 124 III 90 E. 3a.
[18] See Kälin, p. 120.
[19] See BGE 105 II 58 E. 3.

2. Situation in three different legal systems

I. People's Republic of China (PRC)

Introductorily it needs to be said that for the PRC, the indefeasibility of its sovereignty represents the basis for any international relation. The reason for that is the Western humiliation the PRC had to endure on the international level after the first opium war (1840-42)[20]. In this time, numerous unequal treaties were concluded between the PRC and foreign powers – for the PRC's disadvantage[21]. Based on this experience, the PRC developed "The five principles on peaceful co-existence"[22], which are still very important for China in international relations until today.

A. Relationship between domestic and international law in the PRC

There is no basis in the constitution of the PRC saying anything about the relation between international and domestic law in China. According to Chinese scholars, an international treaty becomes automatically part of the national law as soon as it is ratified by the National People's Congress, the Chinese legislative body. As there is no transformation or incorporation of international law in national law needed, the PRC is a monistic country[23].

B. Conflicts

As in every monistic country, conflicts between international and national law are able to arise quite easily as international law is automatically part of the national law. It is important to examine a treaty quite closely before its ratification to decrease the possibility of a conflict between national an international law. In practice it is not always feasible to avoid such and overlapping of rules. Therefore a rule of conflict needs to be formed to solve such a distinction.

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[20] See von Senger, p. 45 f.

[21] See Hanqin Xue: China's Open Policy and International Law, Chinese Journal of International Law (2005), Vol. 4, No. 1, 134.

[22] The five principles are: 1. mutual respect for each other's territorial integrity and sovereignty, 2. mutual nonaggression, 3. mutual non-interference in each other's internal affairs, 4. equality and mutual benefit, 5. peaceful coexistence.

C. Solutions

Firstly, to avoid a conflict, the PRC reserves the right to make reservations regarding certain provisions of a treaty which contradict its national law. The PRC is not bound to such reservations. But sometimes, a treaty itself prohibits the assertion of such reservations. Like the Chinese practice shows, the PRC only adds allowed reservations to a treaty and does not join an international agreement if it clearly contradicts the Chinese tradition[24].

However, if a conflict between international and national law still arises, it is the international provision which prevails over the national rule. So it is international law, either contained in customary international law or in a treaty, which is primary to domestic law[25].

II. Hong Kong

Hong Kong was a British colony over 150 years. Since the First of July 1997 Hong Kong belongs to China again. In the 'Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the PRC on the Question of Hong Kong' the two parties settled Hong Kong's transaction. As the British influence in Hong Kong was intensive over the colonial time, Hong Kong developed in quite a different way compared to China. In the Joint Declaration the two parties agreed that Hong Kong would go back to the PRC as a Special Administrative Region of China. Apart from Hong Kong also Macau is a SAR of the PRC.

A. One country, two systems

Hong Kong is an integral part of the PRC. Inside the Chinese border, two different social and legal systems have emerged. The PRC as the mainland stays socialistic while, on the other hand, Hong Kong follows its capitalistic principles until today, adopted during its British colonial time[26]. As the systems are completely different, each one needs an own government. The PRC as central government of the Chinese state

[23] See Heuser, p. 194 including other references.
[24] See von Senger, p. 44 f.
[25] See Chow, p. 167.
[26] See Werner, p. 17.

represents and has authority over all Chinese citizens. In contrast, Hong Kong as a local government, representing and having authority over all Hong Kong citizens. As there exist two separate governments on different levels, the power of the two institutions need to be clearly divided and regulated[27]. So what is the relation between the two established governments? Which influence does the PRC have on Hong Kong?

The basis for this relation builds the Basic law of Hong Kong. Generally it can be said that the Basic law functions as Hong Kong's constitution. It is a law enacted by the national, Chinese legislation in pursuance of Art. 31 of the PRC constitution. As it has been said, the Basic law maintains in the SAR a completely different system in various fields, like the political or economic structure, compared to China. Further on it defines the relationship with the central government and guarantees Hong Kong a high degree of autonomy[28]. The discussion about how far the PRC assures Hong Kong's autonomy is not part of this work.

All in all, Hong Kong is a SAR of China. "[It] enjoys executive, legislative and independent judicial power […]"[29], but it still needs to be said that its territory is part of the Chinese mainland which has the power to intervene in Hong Kong's system in certain cases.

B. International legal personality of Hong Kong as a SAR of China

Primary and original subjects of international law are only sovereign States[30]. Concerning Hong Kong it can be undoubtedly said that Hong Kong is not an independent State, although it is quite close to being one. This conclusion is based on the classical "Three-elements-theory" of Georg Jellinek[31]. According to Jellinek a certain area is only able to constitute itself a State when it has a folk, a national territory and its own authority. Hong Kong does not completely fulfil the required conditions - it is not a state.

Apart from sovereign states also international organisations or member states get the power to act in the international field as secondary

[27] See Chen in Understanding China's legal system, p. 356.
[28] See Chen in Understanding China's legal system, p. 358.
[29] http://www.doj.gov.hk/eng/legal/index.htm, 26.08.08.
[30] See Thürer, p. 19.
[31] See Haller/Kölz, p. 6 ff.

international legal personalities. So Hong Kong could still have international legal personality, if it is an independent member state of the PRC. This needs to be checked on the basis of several different indications in the following.

Firstly and most importantly needs to be looked at the domestic authorisation of China allowing Hong Kong's international legal personality. Art. 151 of the Basic law of Hong Kong permits Hong Kong to act independently in certain fields on the international level using the name "Hong Kong, China". The PRC grants Hong Kong the power to act internationally.

But the domestic authorisation as such does not give Hong Kong international legal personality. Third states need to be willing to negotiate and run international relations with Hong Kong. Otherwise, Hong Kong cannot act on the international level on its own, it always needs a partner. For that reason states or international organisations, in general international legal personalities, need to recognize Hong Kong as an international legal personality.

Therefore, the second criterion asks for the formal recognition of Hong Kong by other states. If a state recognizes a member state or a country, it shows expressly or by implication that it accepts the existence of the recognised entity legally. Regarding Hong Kong it is important to say that it is part of a number of international organisations. Alongside it concluded many international or multinational agreements. By doing so, Hong Kong's signatories accepted Hong Kong's capacity to act on an international level not expressly, but certainly by implication.

Every international legal personality has to respect binding international law. If an entity implements such standards, its ability to act on an international level is demonstrated. Hong Kong follows binding international law, e.g. it respects human rights, which gives its territory a certain international legitimacy.

Further on, Hong Kong is an important actor in the international economy and trade. It is a crucial part of the private international legal relations and many states respect it as an equal partner.

In summary it is obvious that Hong Kong does have international legal personality. It can be characterized as a quasi-state. As it is not a sovereign state it has to derive its international legal personality from China and third states[32]. Therefore Hong Kong possesses particulate international legal personality – it is recognized only by certain international legal personalities, not by everyone[33]. It can participate in international organisations or treaties which are not limited to states[34].

C. Relationship between domestic and international law in Hong Kong

Firstly it is important to say that the Basic law of Hong Kong does not say anything about the relation between national and international law. To answer this question it needs to be looked at Hong Kong's practice.

Hong Kong has sealed many international treaties. But a treaty does not constitute part of Hong Kong's domestic law as long as it is not incorporated in national law through Hong Kong's legislation. Also customary international law can be affiliated in domestic law. In conclusion, Hong Kong applies the dualistic theory.

But additionally a court could use international law as an aid for the interpretation before its incorporation. Because of that, international law may affect the development of Hong Kong's common law indirectly before incorporation[35].

D. Conflicts and solutions

A conflict between international and domestic law in Hong Kong as a dualistic country should theoretically not occur because all international law needs to get incorporated. "[Still] the national legislation is to be construed as to avoid inconsistency with international law."[36] If a provision implementing a treaty is still capable of having more than one

[32] See for the whole chapter: Werner, p. 238 ff.; Yongping Ge: Völkerrechtssubjektivität und Vertragsabschlusskompetenz von Hong Kong, Archiv des Völkerrechts, 2003, 222 ff.
[33] See Yongping Ge: Völkerrechtssubjektivität und Vertragsabschlusskompetenz von Hong Kong, Archiv des Völkerrechts, 2003, 226.
[34] See Art. 152 subsection 2 of the Basic law of Hong Kong.
[35] See http://www.doj.gov.hk/eng/legal/index.htm, 26.08.08.
[36] Mushkat, p. 173.

meaning, the meaning which complies with the national provision shall be chosen.[37]

i. Common law in Hong Kong

As a British colony Hong Kong adopted the common law system from England. Did this change on the first of July 1997 when Hong Kong became a part of China again?

Art. 8 and 81 subsection 2 of the Basic law say that the established political system and laws enacted in Hong Kong under colonial time shall maintain unless it contradicts to the Basic law itself. Thus, the distinction between customary international law and treaty-based international law is followed until today. Concerning the statute law, it is more or less clear that English law does not have any validity in Hong Kong anymore as Hong Kong does not belong to England any longer. On the contrary, Hong Kong has to comply with Chinese statute law which is listed in Annex III of the Basic law[38].

ii. Influence of the PRC law on Hong Kong law

Another question is how far the influence of PRC law on Hong Kong law goes. To answer this question a distinction between the general laws of the PRC and its constitution is necessary.

General PRC statute law needs to get implemented according to Art. 18 of the Basic law to become binding for Hong Kong. Apart from that, Chinese statute law is only binding for Hong Kong if it is listed in Annex III of the Basic law. Concerning the hierarchy of norms in Hong Kong law, the Basic law is primary to all other statute law, whether originally enacted in Hong Kong (Art. 11 subsection 2 of the Basic law) or incorporated from the PRC.

This is different in relation to the PRC constitution. The Basic law does not have any impact on the Chinese legal order. According to the Basic law, Hong Kong as an SAR is part of the PRC. For that reason, only the PRC constitution is authoritative for China. Hong Kong has its constitutional basis in the PRC constitution. Therefore, the Basic

[37] See Mushkat, p. 173.

law depends on the PRC constitution, it is subordinate. Relevant is now the impact the PRC constitution has inside Hong Kong as it actually is superior to the Basic law. According to the 'one country, two systems' – policy, China's legal system and socialistic order cannot be imposed upon Hong Kong. For that reason, the Basic law needs to be primary to the PRC constitution regarding specific Hong Kong rules. The PRC constitution can only be adopted in Hong Kong if circumstances affecting the central power need to be ruled on. This could for example be the case concerning codes of practice for Hong Kong-topics in organs of the central government. The PRC constitution cannot be applied if it contradicts with Hong Kong's capitalistic system or other fundamental principles[39].

In summary, China does have the possibility to intervene in Hong Kong, as Hong Kong is a part of China and therefore depending on the PRC. But still, the SAR enjoys a high decree of autonomy which China respects. Therefore China does not have any influence on Hong Kong relating to international law in Hong Kong – specific topics. All in all Hong Kong is able to act quite independently on the international level.

Regarding international organizations Hong Kong can participate either in these organizations to which the PRC does not belong to or to those, the PRC is also part of (Art. 152 subsection 3 and 4 of the Basic law).

III. Switzerland

A. Relationship between domestic and international law in Switzerland

The Federal Supreme Court of Switzerland decided in early times[40] (and this opinion the Federal Supreme Court still follows until today[41]) to adopt the monistic tradition as there was no basis in the Swiss constitution which would suggest another solution. This means that international treaties have

[38] See Werner, p. 315.
[39] See Werner, p. 200 f.
[40] See BGE 7 782.
[41] See BGE 127 II 177 E. 2c; BGE 122 II 234 E. 4a.

legal effects within the country after the moment of ratification and they do not need a special incorporation in Swiss law. Today we find Art. 5 subsection 4 of the Swiss Constitution saying that Switzerland respects international law. But still there is no explicit norm which says that Switzerland follows the monistic tradition.

B. Conflicts

As soon as international law becomes part of the Swiss legal system a conflict between national and international law could shape up. This happens particularly when both legal systems rule about the same topics meaning that there exist legal question where the international and the Swiss ruling overlap. When both, international and Swiss law, have the competence to rule, both rules are theoretically binding for Switzerland. If the two regulate the same questions in the same way no conflict will occur. But if they contradict in there rulings, Switzerland has to decide which rule it wants to follow because it cannot "walk on two different lines". To solve such problems it is important to know where international law in the Swiss hierarchy of norms stands. If it is clear which law is in a higher position, it is also clear which rule prevails over the other one and therefore has to be followed.

C. Solutions

i. International law "breaks" national law

The principle of the primacy of international law is very important in the Swiss legal system[42]. Based on this, four general rules about the conflict of law have been developed:

- International law breaks the law of all Cantons (Art. 49 subsection 1 of the Swiss constitution).
- International law is primary to the regulations of the Swiss Federation.
- International law breaks the law of the Swiss constitution. According to Art. 190 of the Swiss constitution, all courts have

[42] See BGE 122 II 234 E. 4e; 131 V 66 E. 3.2; 133 V 367 E. 11.1.1.

to respect international law even if it contradicts with national law.

- International law is also primary to Swiss statute law, but exceptions are possible[43] and general principles like the lex posterior need to be respected.

Theoretically it is not allowed to have federal or cantonal rules which contradict with international law. Practically this often cannot be avoided. At least Art. 193 subsection 4 and Art. 194 subsection 2 of the Swiss Constitution say, that, if the whole or just parts of the constitution need to be revised, the revision must not conflict with binding international law[44].

ii. Interpretation of Swiss law according to international law

As Switzerland cannot withdraw its international responsibility (Art. 27 of the Vienna Convention[45]), international law needs to be followed. To follow this command the Federal Supreme Court[46] decided to interpret Swiss law according to international law. This means, that if a certain Swiss provisions needs to be interpreted by using different methods, the provision should get the meaning which is the most similar to what international law says. Through this approach the Federal Supreme Court of Switzerland wants to avoid conflicts between international and Swiss law as good as possible[47].

Sometimes a conflict between international and Swiss law cannot be avoided because it is deeply routed between the two different legal systems[48]. In this case the interpretation of Swiss law according to international law is limited, the conflict cannot be corrected through this method. To solve this distinction in a certain case, the international rule prevails over the Swiss rule[49]. According to BGE 125 III 209 E. 6e, the Swiss rule which violates international law must not be used in a particular case. Although the Swiss rule is not applied

[43] See below, Schubert-Practice, p. 15.
[44] See Kälin, p. 99 f.
[45] See above, The relationship between international and domestic law in general, p. 2.
[46] See BGE 94 I 669 E. 4.
[47] See Kälin, p. 101 f.: Ziegler, p. 122 ff.
[48] See Häfelin/Haller, p. 50.

in such a case it is not automatically dissolved. The Federal Supreme Court does not have the power to nullify Swiss law which violates international law.

iii. Schubert-Practice

In BGE 99 Ib 39 the Federal Supreme Court made a huge exception of the principle "international law breaks national law". In this case it stated, that a younger federal Swiss statute law can override an older international treaty. But this is only possible if the Swiss legislative body was aware of this contradiction when it enacted the federal statute law. As a second condition the federal Swiss law must not breach binding international law or the provisions of the ECHR[50].

3. Comparison of the three different legal systems

A. Comparing Hong Kong and the PRC

Looking at Hong Kong and China shows two completely different systems regulating the relation between national and international law. Hong Kong chose the dualistic tradition, contrary to the monistic China. The realisation of the 'one country, two system' doctrine cannot be more obvious. Hong Kong has to incorporate all international law, on the other hand China implements international law automatically. The PRC only has the possibility of not ratifying a treaty or making reservations about certain components of an agreement. In my opinion, Hong Kong does have a certain autonomy which the PRC respects.

B. Comparing Hong Kong and Switzerland

Although Hong Kong, as well as Switzerland, is a capitalistic country, their ruling about the relation between international and national law differ in many aspects. Not even the basis is the same, as Hong Kong follows the dualistic theory and Switzerland the monistic one. Apart from that the legal systems are not similar at all, as Hong Kong law is based on common law, while Switzerland follows the civil law tradition.

[49] BBl 1997 I, p.134 f.

The interpretation of national law according to international law, which is important for Switzerland, has kind of a counterpart in Hong Kong. What has been said before is, that if a provision of a treaty can have different meanings, the one which is the most similar to an international rule about the same topic has to be chosen. This is not directly an interpretation of national law according to international law, but the proceeding in Hong Kong is aimed at the same goal as the interpretation of national law according to international law in Switzerland: to avoid a conflict between international and national law.

C. Comparing Switzerland and the PRC

Surprisingly, international law does have quite a huge influence in China. Although China had to endure humiliation in international law through the numerous unequal treaties, it is international law which prevails over domestic Chinese law in case of a conflict. Switzerland rules this topic the same way, having one exception (Schubert-practice). Seeing China, like Switzerland, as a monistic country, is very interesting, as China saw international law for a long time as by the Western world composed law. The standard of international law in China is quite high in its hierarchy, as international law breaks domestic law. In my opinion, China, as a socialistic country, has found quite a liberal solution for the relation between international and national law which I did not imagine. On the contrary, I expected China would choose the dualistic theory. Therefore I do not find many differences in the Swiss or the Chinese ruling, the similarities overbalance.

But still it needs to be mentioned that China, like Switzerland, always has the possibility to make reservations about certain components of a treaty, or does not have to ratify a treaty if it does not harmonise with its domestic law.

D. Conclusion

All three legal systems chose a special way of regulating the relation between international and domestic law. I cannot find a special scheme or

[50] See Kälin, p. 105.

reasons one country chooses this or another rule, except for their individual history. The similarities or differences can neither be grouped in Eastern – Western systems or capitalistic – socialistic countries. According to my opinion, it is open to every state whatever system it wants to adopt. I think it is important to see that all countries see international law as binding for them, more or less intensively.

One similarity between all three systems exists. Whether Hong Kong's nor China's nor Switzerland's constitution states expressly whether it adopts the dualistic or the monistic theory. In some cases hints can be found in the constitution, but generally it needs to be looked at its practice.

Basically it can be said that the relation between national and international law is formed very differently in every country. Although one chooses the monistic or the dualistic theory, it is shaped very individually and adjusted to the national legal order and its preferences. Dualism and Monism are not two stiff theories, and they do not say anything about a conflict rule in a country. This has to be chosen individually as an interstate matter. Apart from that I think the attitude of a country concerning international law can change over time. The relation between international and national law is quite a dynamic matter. Therefore the importance of the dualistic and monistic theories get less and less, as they get more and more mixed up. Basically a dualistic country is able to insert elements of the monistic theory or the other way around. In the individual rulings of the states the two theories overlap, because they get adapted to the individual national circumstances[51].

In summary, the definition of a country as being monistic or dualistic does not say much about its individual practice.

Concluding it is essential for every state or SAR to regulate the relationship between international and domestic law. I believe that a large amount of a state's international policy depends on this relationship. As a party of an international treaty it is important to know if the counterpart complies with a certain agreement or what impact the agreed terms have in the individual national state law.

[51] Similar, Thürer/Aubert/Müller, p. 188.

Hiermit erkläre ich, dass ich die vorliegende Arbeit selbständig und nur unter Zuhilfenahme der in den Verzeichnissen oder in den Anmerkungen genannten Quellen angefertigt habe. Ich versichere zudem, diese Arbeit nicht bereits anderweitig als Leistungsnachweis verwendet zu haben. Eine Überprüfung der Arbeit auf Plagiate unter Einsatz entsprechender Software darf vorgenommen werden.

Mollis, 11.09.2008

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