

The relationship between international treaties and domestic legal system – the Chinese case

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There are various theories on the relationship between international and municipal (i.e. state or national) law, each of which establishes a different structure. Monism, for example, believes that there is only one system of law to which both international and national legal systems belong. On the other hand, dualism claims that these two systems are separate and exist next to each other. In case of a conflict between international and municipal legal norms, according to the dualist theory, either international or municipal law prevails, depending on the chosen form of dualism.

In recent decades, the dualist theory with the primacy of international law above municipal law has become the mainstream approach accepted and promoted by the international community, namely by the UN and its Vienna Convention on the Law of Treaties adopted in 1969. In article 27 it says that “*a party (a state) may not invoke the provisions of its internal law as justification for its failure to perform a treaty*”. This principle, together with *pacta sunt servanda*, is widely recognized by majority of states and has constituted a part of customary international law, according to many. States have often reflected these principles in their highest municipal laws – constitutions – stating that in case of a conflict between international and municipal law, the international law shall prevail. States and individuals shall trust national court systems to comply with international commitments and abide the rule of international law.

Not all states, however, occupy this position with a strict attitude. For example, Switzerland does not have the relationship rigorously defined, the United States do not put international treaties over state law unless incorporated into the domestic legal system. The US Supreme Court repetitively even refused to consider rulings of ICJ as binding. The People’s Republic of China has failed to clarify this relationship in its constitution too, or more precisely, intentionally has not done so. The unresolved issue brings uncertainty to possible conflicts in many spheres. The objective of this article is to analyse and evaluate the situation in Chinese legal system, from both theoretical and practical points of view.

The Chinese approach to the role of international law and treaties in a state has been changing in the course of the last century. From a semi-colonized country which despised the instruments of international law as means to humiliate and exploit the country, through an aspiring member of the international community, to a rising power which uses all available instruments to seek influence, including those which international law offers.

To fully understand the Chinese position in international legal order, we ought to keep in mind the territory’s history. All the way up to 19th century, China had been utterly dominant in the Southeast Asia region. For centuries, it placed itself above the surrounding states and saw itself as a centre of everything (even today, China’s name in mandarin is 中国 – the Middle Kingdom). China had not known nor accepted the western concept of international law based on equality before it was forced to in 19th century. After that, China understood the importance and necessity of becoming a respected member of

international community and made steps to become a part of it. Nevertheless, it never truly accepted the idea of handing its powers to a strange entity.

As mentioned above, the Chinese constitution does not deal with the question of relationship or a prospective conflict between international and municipal law at all. It gives freedom to courts and government to decide in individual cases which legal norm prevails. It needs to be said that there are some municipal laws where this conflict is dealt with in certain situations – for example, the Law of Civil Procedure, the Income Tax Law or the Law of Succession all provide that China's treaty obligations override any inconsistent municipal laws or regulations. However, these are mere municipal laws which may be repealed or derogated at any time. Exactly this happened in 2015 when such provision was removed from the Administrative Procedural Law without any explanation, or from the Environmental Protection Law in 2014. These sudden and unexplained changes lead to uncertainty in relationships between states and individuals.

What is the attitude of the Chinese government regarding this issue and what development can be expected? How do Chinese courts cope with the unresolved relationship when such case is brought before them? And most importantly, how may this setup influence foreign entities in China?