

amerikanischen Verwaltungsrechts eine ausgezeichnete Arbeit geliefert, die ihn zugleich als Verwaltungs- und Verfassungsrechtler sowie als Rechtsvergleicher ausweist. Daher könnte diese ausgezeichnete, von Peter Lerche geförderte Dissertation Ausgangspunkt eines weiteren Weges in die Wissenschaft werden.

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### **Tibet und das Selbstbestimmungsrecht der Völker**

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This is a painstaking study on a large and contentious issue.<sup>1</sup> Tibet is now part of the territory of the People's Republic of China (PRC), a position not disputed by any other state, and one which the Dalai Lama's government-in-exile has long seemed ready to accept eventually as the basis of an arrangement that might in future afford a degree of genuine autonomy to Tibetans in China. Nevertheless, coexistence between the Peking authorities and Tibetans inside the PRC has frequently proved difficult both after the "peaceful liberation" of Tibet by the Chinese People's Liberation Army in 1951 and ever since the abortive 1959 rebellion and the Dalai Lama's flight to India. The political confrontation between the Dalai Lama and the Chinese government has added significance to legal positions which either side may adopt to its own advantage, in pursuit of a future *modus vivendi* and in search of international political support for one's own objectives.

Dr Schmitz's investigation divides into four large chapters. An introductory *tour d'horizon* on Tibet's modern history is followed by two chapters on the manifestations of the right of self-determination in the sources of international law, in particular with regard to the PRC's position in relation to the relevant modern customary law. In the core fourth chapter, the author mainly explores whether certain aspects of the right of self-determination – as a right of the population of a previously independent state to *restitutio ad integrum*, and as a right of self-defence of oppressed minorities within a state – may apply to Tibetans.

Much in the argument on Tibet's past and present status in, or *vis-à-vis*, China hinges on factual aspects of a long relationship spanning the gamut from the kingdom of *Tubo*<sup>2</sup>, which grew into a Central Asian state whose mail-clad mounted armies often bested the

<sup>1</sup> Cf. also my previous reviews in this journal of works on Tibet, eg, VRÜ 1996, p. 267; and VRÜ 1997, p. 248.

<sup>2</sup> For the reading "Tubo"/"Tufan", cf. the encyclopaedic Chinese dictionaries *Cihai*, Shanghai: Shanghai cishu chubanshe, single-volume edition, 1989, p. 818; and *Hanyu Da cidian*, Shanghai: Hanyu da cidian chubanshe, three-volume edition, 1997, volume 1, p. 1480.

Chinese forces of the mighty *Tang* dynasty<sup>3</sup>, to the state of domination by the government in Peking after the founding of the PRC. Historical sources in the relevant languages (Beckwith – see note 3 – delved into classical texts in Arabic, Chinese, Tibetan and Turkic) are generally inaccessible to non-specialists, and most contemporary Western international lawyers do not read Chinese either. Schmitz's discussion of the historical dimension of Sino-Tibetan relations is also brief and wholly based on secondary sources in Western languages. His difficult search for a "natural historical point of reference" (p. 121) for the application of international legal norms to subject matter enmeshed both in the juxtaposition of different traditions of temporal and spiritual authority as well as in Cold-War antagonism highlights the impediments to accommodating the conflict between the Dalai Lama and the powers that be in Peking to the closely reasoned discourse of the law.

The halting steps towards the international stage by the Lhasa administration during the years between the collapse of the *Qing* dynasty in 1911 and the advent of communist rule in mainland China in 1949 form the main period of contention in the legal debate on modern Tibetan statehood. The PRC has always maintained as its official position, with little regard to the vicissitudes of historical change, that Tibet has been a vassal state of imperial China throughout the ages, and – implicitly – that awkward legal subtleties predicated on a modern international law mostly shaped without Chinese participation have no place in the matter of PRC territorial integrity.<sup>4</sup> The author covers these events, evaluating well-known secondary sources, and he shares the conclusion of those who maintain that Tibet succeeded, in this interval of some thirty-seven years, to grow into a subject of international law whose demise only commenced with the Seventeen-Point Agreement of 23 March 1951 between Tibet and *Mao Zedong's* government, subsequent occupation and gradual incorporation into the PRC.

Lhasa's defeat in the quest for independence during China's temporary weakness was due in a large measure to domestic Tibetan inability to modernise the country's political system.<sup>5</sup> Ironically, such modernisation, aimed at raising taxes to finance the machinery of efficient administration, education and defence, would have had to be attained at the expenses of the monastic and hierocratic parts of the body politic, which constituted the centrepiece of Tibet's cultural uniqueness and which also provided the meta-political quality of Sino-Tibetan ties, in contrast to the numerous other traditional "foreign" relations between

<sup>3</sup> See the masterly study by *Christopher I Beckwith*, *The Tibetan Empire in Central Asia: A History of the Struggle for Great Power among Tibetans, Turks, Arabs and Chinese during the Early Middle Ages*, Princeton: Princeton University Press, 1987.

<sup>4</sup> Current popular Chinese dictionaries, such as the widely used *Xiandai Hanyu cidian*, Peking: Shangwu yinshuguan, 1996, p. 1278, refer to "Tufan" as a "national minority in the ancient times of our country", while at least mentioning that the *Tufan* had established a political power of their own during the *Tang* period.

<sup>5</sup> See *Mervyn C Goldsteins* exhaustive *A History of Modern Tibet, 1913-1951, The Demise of the Lamaist State*, Berkeley/Los Angeles/London: University of California Press, 1989, pp. 815 ff.

China's imperial rulers and various neighbouring non-*Han* peoples.<sup>6</sup> Moreover, Tibetan failure to equip the country with the means of survival alongside its large neighbour coincided with an extended period during which China – the imperial *Qing*, the *Kuomintang* nationalists as well as the Peking communists – had suffered aggressive attempts by Western imperialism to control the country and to carve out possessions and extra-territorial prerogatives. Thus, in dealing with Tibet after the "liberation" of the mainland from *Chiang Kai-shek's* régime, the revolutionary impetus of the victorious Chinese communists was compounded by the nationalist ardour of a people to whom that model Western political framework then *en vogue* – the sovereign nation state – had been denied, in the interest of treaty ports, zones of influence and trading privileges, by the same Western powers whose negative example had taught Chinese of every political stripe that only the most rigid insistence on the imported Western legal concept of territorial sovereignty would forestall new attempts to revive China's "semi-colonial" dependence. It was not a propitious climate for conciliatory arrangements between a hierocratic polity on the outer marches of the former Celestial Empire and the newly converted Chinese disciples of dialectical materialism.

In the author's view, rights of Tibetans in China to defend an existing Tibetan state have since been extinguished because Tibet itself became incorporated into the Chinese state as the 1951 occupation was progressively consolidated in subsequent years (p. 158). With the Tibetan state firmly absorbed into the sphere of PRC sovereignty in the years after the abortive 1959 uprising, and the basis for legal claims resting on the continued existence of such a subject of international law having thus disappeared, the author examines, as a ground for re-establishing the posited Tibetan state, a customary right to *restitutio ad integrum* as an outgrowth of the right of self-determination. Tibetans would, however, only be able to avail themselves of this rather recent legal coinage if it could be shown that this rule of customary international law had come into being before the definitive extinction of the Tibetan state under PRC sovereignty. Customary international law is then described (pp. 52 ff., 176) as having indeed evolved – as attested in particular by the 1970 Declaration of Principles of International Law<sup>7</sup> – to include the right of self-determination in the shape of a right of populations of extinguished states to restitution of their former independence (p. 178).

According to Dr Schmitz's view, the factual conditions for legally relevant absorption of Tibet into the PRC were not present before 1965, and the relevant facet of self-determination as a full-blown rule of customary international law is considered to have been established in 1970 "at the latest" (*ibid.*). He also argues (p. 174) that definitive assimilation of

<sup>6</sup> For relations between China and her neighbours that were in substance often far more equal than the "Sons of Heaven" on the imperial throne would have cared to admit, see, eg., *Morris Rossabi* (ed.), *China Among Equals, The Middle Kingdom and Its Neighbours, 10th-14th Centuries*, Berkeley/Los Angeles/London: University of California Press, 1983.

<sup>7</sup> Declaration 2625, adopted without a vote by the UN General Assembly on 24 October 1970.

the former Tibetan state into the PRC was only achieved with international legal effect through the admission, in 1971, of the PRC as replacement of the Taiwan-based Republic of China without territorial reservation on the part of third states. Even so, he only dates the final extinction of the Tibetan state during the "first half of the 1970s" (p. 175). In conclusion the author, mindful of the requirements of inter-temporal international law (p. 169), asserts that elevation of the aspect in question of the principle of self-determination to the level of a rule of customary international law on the one hand and an interval before the irretrievable absorption into the PRC of a former Tibetan state on the other hand did "at least overlap" (p. 177). His case would have been more persuasive if he had been able to adduce substantial state or international judicial practice in conformity with the state of the law so described, in order to dispel doubts arising from the brevity and uncertain delimitation of this period of overlap between the birth of this aspect of self-determination as part of customary international law and the end of Tibet's assumed continued existence as a state.

Apart from those rights of Tibetans that may derive from the existence at some material time of an independent Tibetan state, the author also looks at a right of self-defence of minorities who are fundamentally aggrieved in respect of certain human rights under a government dominated by the majority in that state (pp. 204 ff.), taking the secession of East Pakistan/Bangladesh from West Pakistan as the salient modern precedent. Having rejected a number of oppressive Chinese government measures directed (also) against Tibetans as not meeting the requirements of fundamental aggrievement that would in turn give rise to a right of self-defence, Dr Schmitz concludes (pp. 307 ff.) that government restrictions on the content and conduct of religious activity, although again by no means exclusively imposed on Tibetans, so incisively impinge upon a central characteristic of religiously defined Tibetan culture as to constitute a destructive intervention liable to obliterate the foundations of the Tibetan community (pp. 311 f.). By virtue of the right to self-determination, Tibetans are therefore said to be entitled to secede from China, while the territorial reach within China of such secession should be determined by referenda in the areas of Central Tibet and other regions where Tibetan inhabitants have traditionally been in the majority. Defining the degree at which government interference in matters of faith should be assumed legally to call forth such a right to secede is not, of course, a very precise operation.<sup>8</sup> It also needs to be borne in mind that other religions likewise lay claim to governing all aspects of human relations and to reaching far beyond the ambit of private worship, into public mores, and even the administration of justice. A religiously based right of secession with respect to Tibet would have to be examined in a much wider context before it could be assumed to be an instance of a norm reasonably capable of generalisation.

<sup>8</sup> The few broad-brush notions on religion in Tibetan society that the author offers in support of his conclusion (p. 311) would need to be substantiated much more systematically in order to validate a claim to the far-reaching right of secession.

It is perhaps not without significance that, domestic debate on Tibet in directions as those suggested by Dr Schmitz notwithstanding, no major state has so far espoused such positions for action of its own in the field of international law. Other considerations have outweighed any willingness to proceed in support of possible Tibetan claims along the lines indicated by the author and this, in turn, may over time reflect on the international legal import of these positions.<sup>9</sup>

China, tossed into modernity of a Western mould, as well as Tibet, which was sucked along the Middle Kingdom's slipstream, suddenly found themselves deprived of the cultural landmarks of their ancient, if changeful, relationship and were forced to find their places on the map of international law which had largely been drawn by others. Building new foundations of coexistence between China and Tibet will probably prove as hard for a Tibetan leader (the incarnation of a living Buddha), who might become a mere regional partner in a secular state, as it will for the leaders of China, accustomed for so long – whether seated on a Dragon Throne or marching in the van of "revolutionary progress" – to the rhetoric of superiority and exclusivity. Lawyerly pleading is no likely avenue towards quickly unravelling the Sino-Tibetan tangle, but future political dealmakers will find their way paved a little more smoothly by previous legal groundwork, and Dr Schmitz's methodical monograph may be taken as a contribution to these preparatory efforts.

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"Den in der Bundesrepublik verstreut vorhandenen Sachverstand zu Politik, Wirtschaft und Gesellschaft des heutigen Indiens im Rahmen eines Indienjahrbuches zusammenzuführen und damit ... ein Forum für Wissenschaftler wie Praktiker zu Gegenwartsfragen Indiens zu schaffen" ist die Zielsetzung des Herausgebers Werner Draguhn, Direktor des Hamburger Instituts für Asienkunde.

Die Autoren haben uns den Zugang zu dem aktuellen politischen, wirtschaftlichen und sozialen Geschehen durch das wohlgeordnete Jahrbuch bequem gemacht. Mit umfangreicher Bibliographie, Chroniken innen- und außenpolitischer Ereignisse sowie Statistiken ist ein Handbuch daraus geworden. *Theo Sommer*, Mitherausgeber der "Zeit", gibt einleitend die großen Entwicklungslinien des seit 50 Jahren freien indischen Staates im Inneren und in

<sup>9</sup> See the remarks, at p. 325 of the work reviewed here, on possible acquiescence through reluctance to actively promote the realisation of self-determination.