

.....

The composite state of China under “One Country, Multiple Systems”: Theoretical construction and methodological considerations

Guobin Zhu*

Under the formula of “one country, two systems,” Hong Kong and Macau were handed over to the People’s Republic of China to become two special administrative regions. Today, China has a total of thirty-three subnational units or constituencies: twenty-two provinces, four municipalities directly under the central government, five national autonomous regions and two special administrative regions. With the creation of special administrative region, the Chinese state has experienced a de facto structural change and, in my view, can no longer be characterized as a unitary state nor a federation. It is more accurate to identify and define China as a “composite state.” The concept of composite state, developed in this article, not only will come to terms theoretically with the newly formed relationship between central and regional/local authorities but will also rationalize how the vertical separation of power is institutionalized, how different degrees and forms of autonomy are designed to accommodate each locality’s needs, and what the salient features of each autonomous regime are. With special reference to the autonomy practiced by Hong Kong today, the article proposes this novel legal and political conception in hopes that it will be able to provide a theoretical paradigm and a sound constitutional framework which can serve as an original approach to such issues as Tibet and Xinjiang, and also to the question of national unity and reunification with Taiwan in the future.

* Associate Professor, School of Law, City University of Hong Kong. I want to express my heartfelt gratitude to Professor Mark Tushnet from Harvard Law School and Dr. Eduardo J. Ruiz Vieytes from Law Faculty of University of Deusto (Bilbao, Spain) for their enlightening advice and suggestions, and to my friends Rohan Price, Bryan Bachner, Larry Catá Backer, Bjorn AHL, and Tahiri Lee, for their valuable and constructive comments. My special thanks go to the anonymous reviewers for their valuable opinions and, equally, to the editors of I·CON for their professional editing work. Email: lwzhugb@cityu.edu.hk

1. Introduction

Article 30 of the Constitution of the People's Republic of China (PRC), adopted in 1982, defines the arrangement layout of subnational units and administrative divisions of the country. At the provincial level, "The country is divided into provinces, autonomous regions and municipalities directly under the Central Government."¹ In addition, article 31 also provides for the establishment of special administrative regions (*tebie xingzhengqu*; SAR, or SARs), an institution that did not exist in the 1954, 1975, and 1978 Constitutions. This article, which constitutes the constitutional source for the establishment of the SAR, reads as follows:

The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions.

Guided by this constitutional clause and in accordance with the idea of "one country, two systems," Hong Kong and Macau, colonies of the United Kingdom and Portugal, respectively, were handed over to the PRC to become the Hong Kong Special Administrative Region (HKSAR) in 1997 and the Macau Special Administrative Region (MCSAR) in 1999.

"One country, two systems," "high degree of autonomy," and "Hong Kong people ruling Hong Kong" are the primary political and constitutional principles that have served as the cornerstone for the resumption of the exercise of

sovereignty over Hong Kong by the PRC and for the creation of the HKSAR.² As principles, they have been implemented throughout the whole text of the Basic Law of the Hong Kong Special Administrative Region (Basic Law), adopted by the National People's Congress (NPC) on April 4, 1990. Article 2 states that "The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law." Furthermore, article 5 declares that the socialist system and policies shall not be practiced in the HKSAR, and the previous capitalist system and way of life shall remain unchanged for fifty years. Constitutionally, article 31 of the Constitution, cited above, and article 11 of the

² These principles were first laid down in the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (the "Sino-British Joint Declaration"), signed on December 19, 1984. The Joint Declaration included an annex entitled "Elaboration by the Government of the People's Republic of China of its Basic Policies regarding Hong Kong," which constitutes an integral part of this international treaty. THE SINO-BRITISH JOINT DECLARATION, art. 1, declared that the Government of the PRC "has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997." Art. 3(2) states that:

The HKSAR will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.

And, art. 3(4) further states that:

The Government of the HKSAR will be composed of local inhabitants.

¹ CONST. (P.R.C.) art. 30(1). Nowadays the PRC has twenty-two provinces (*sheng*), four municipalities directly under the central government (*zhixia shi*), and five national autonomous regions (*minzu zizhiqu*).

Basic Law,³ together grant the Basic Law a special legal status—the de facto constitution of the HKSAR.

The relationship between the central authorities and the HKSAR created by the Basic Law is definitely novel with special features in its structure and model. It is novel, because it is different from any of the existing relationships between the central authorities and the local and subnational units such as municipalities directly under the central government, national autonomous regions, and special economic zones (*jingji tequ*). It is special, considering that there is no actual and direct comparability between this model and other foreign and remotely comparable experiences in the world (for example, the highly decentralized state system in Italy and Spain, the federalized state of Belgium, and the typical federalism in the U.S., Canada, Australia, and the like).

Taking the HKSAR for example, this type of central–local relations, now in place for over fourteen years, represents a reconstructing of state organization and a new model of autonomy characterized by another kind of separation of powers between center and periphery; it demonstrates a paradigm shift in the theory of Chinese constitutional law.

³ Art. 11 of The Basic Law (HKSAR) reads as follows:

In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practiced in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law.

No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.

This article, starting with an examination of the meaning of “one country, two systems” and of the autonomous regime represented by the SARs, aims to theorize this constitutional paradigm by proposing a new concept—the composite state of China—the better to define the current constitutional relationship between the central authorities and the SAR, and to conceptualize the autonomy practiced by the SARs. The hope is that it will be able to provide the Chinese authorities with a sound and useful constitutional basis and framework to deal with such delicate issues as Taiwan, Tibet, and Xinjiang.

2. Constitutional reading and interpretation of “one country, two systems”

It may be asked: How shall we define and correctly expound this novel type or model of constitutional relationship? So far, the traditional theory has been utilized by the Chinese authorities and scholars to interpret the Hong Kong Basic Law and related issues and has been applied to solve various disputes arising continuously since the resumption of the exercise of sovereignty over Hong Kong by the PRC.

The dominant theory in mainland China, the only officially adopted one, prescribes that “the PRC is a unitary state,”⁴ and the SAR, under the principle of “one country, two systems,” remains a system that parallels the other autonomous

⁴ ZHONGGUO XIANFA [CHINESE CONSTITUTIONAL LAW] 121 (Xu Chongde ed., 3rd ed. 2006). Xu Chongde is a former member of the Drafting Committee of the Basic Law of the HKSAR and of the Drafting Committee of the Basic Law of Macau SAR.

systems within the Chinese state. Xu Chongde, an authority of constitutional law, reiterated that “the creation of the SARs will not lead to any fundamental changes to the structure of [the] unitary state of our country.”⁵ Xiao Weiyun, another authority, expressed the same idea by declaring that the HKSAR “is a local administrative area enjoying a high degree of autonomy within the unitary structure of state.”⁶ Mo Jihong, an expert of the younger generation, inherits the legacy by stating that the relationship of the SARs with the central authorities “is such kind of relationship as the one between center and locality under the unitary structure of state.”⁷ So far, this theory has never been revisited, revised, or challenged by scholars on the mainland China even after over twelve years of new constitutional developments in the Hong Kong and Macau SARs.

2.1. “One country, two systems” as political concept and the making of the Basic Law

“One country, two systems” is first viewed as a political thought and principle. The concept of “one country, two systems” was not formulated in a day. As a matter of fact, this idea was first presented as a solution to the problems of Taiwan and, later on, of Hong Kong.

⁵ GANG’AO JIBENFA JIAOCHENG [A COURSE OF THE BASIC LAW OF HONG KONG AND MACAU] 53 (Xu Chongde ed., 1994).

⁶ “YIGUO LIANGZHI” YU XIANGGANG TEBIE XINGZHENGQU JIBENFA [“ONE COUNTRY, TWO SYSTEMS” AND THE BASIC LAW OF THE HKSAR] 92 (Xiao Weiyun ed., 1990). Xiao Weiyun was also a member of the Drafting Committee of the Basic Law of the HKSAR and of the Drafting Committee of the Basic Law of the Macau SAR.

⁷ XIANFA XUE [CONSTITUTIONAL LAW] 478 (Mo Jihong ed., 2004).

The late Chinese paramount leader Deng Xiaoping officially formulated it in 1984 during a meeting with members of a Hong Kong industrial and commercial delegation and with other prominent Hong Kong figures on June 22–23. Deng then said:⁸

We are pursuing a policy of “one country, two systems.” More specially, this means that within the People’s Republic of China, the mainland with its one billion people will maintain the socialist system, while Hong Kong and Taiwan continue under the capitalist system.

Deng further clarified that:

We have stated on many occasions that after China resumes the exercise of its sovereignty over Hong Kong in 1997, Hong Kong’s current social and economic system will remain unchanged, its legal system will remain basically unchanged, its way of life and its status as a free port and an international trade and financial centre will remain unchanged and it can continue to maintain or establish economic relations with other countries and regions. . . . Beijing will not assign officials to the government of the Hong Kong Special Administrative Region. This Policy too will remain unchanged. . . . Our policies with regard to Hong Kong will remain unchanged for fifty years, and we mean this.

Later on July 31, 1984, Deng Xiaoping repeated the idea in a talk with the British foreign secretary Sir Geoffrey Howe.⁹

We have ample reason to believe that all the important discourses Deng Xiaoping produced from 1982 to 1987 on behalf of the central authorities represented the gradual development of the policy of “one country, two systems.”

⁸ DENG XIAOPING, ON THE QUESTION OF HONG KONG 6–7 (1993).

⁹ *Id.*, at 12.

A translation of this political idea or policy into legal norms was further expected. In this context, the drafting of the Basic Law of HKSAR took place in 1985. This policy, first systematically formulated in the Sino-British Joint Declaration, was implemented in the Basic Law, adopted on April 4, 1990, by the NPC.

The Basic Law has a dual nature. Interestingly, scholars and judges in Hong Kong generally regard the Basic Law as the constitution of the HKSAR while recognizing its nature as domestic law. This duality of the Basic Law has been confirmed by the courts of the HKSAR. Chan, Chief Justice of the High Court, in *HKSAR v. Ma WK David*, first stated that “The Basic Law is not only a brainchild of an international treaty, the Joint Declaration. It is also a national law of the PRC and the constitution of the HKSAR.”¹⁰ This position was affirmed by Chief Justice Andrew Li, in the landmark case *Ng Ka-ling*, when he declared that “The Basic Law is a national law and is the constitution of the region.”¹¹ Johannes Chan, a professor of law and a senior counsel, also recognized “the dual nature of the Basic Law as being a piece of domestic law in the Mainland and a constitution in the HKSAR.”¹²

Chief Justice Chan made an excellent presentation of the Basic Law and concluded that:¹³

The Basic Law is a unique document, reflecting a treaty made between two nations. It deals with the relationship

between the Sovereign and an autonomous region which practices a different system. It stipulates the organizations and functions of the different branches of government. It sets out the rights and obligations of the citizens. Hence, it has at least three dimensions: international, domestic and constitutional.

2.2. “One country, two systems” as legal and constitutional norm

The formula of “one country, two systems” has direct impact upon constitutional order and law, and it allows different political, administrative, legal, and social systems to coexist in a unified sovereignty.

From the perspective of a political system, under “one country, two systems,” socialism as the major system of China is not applied to the capitalist special administrative regions because socialism and capitalism are allowed to coexist side by side. Furthermore, taking Hong Kong’s and Macau’s legal systems, for example, there exists in the country three distinctive jurisdictions, three judicial power centers characterized by their own power of final adjudication, and three legal systems including mainland socialist civil law, Hong Kong’s common law, and Macau’s civil law. The settlement of legal and judicial, if not political and constitutional, disputes among different jurisdictions now basically relies on judicial assistance and cooperation among each institution on an equal footing;¹⁴ a series of mutual agreements on judicial assistance and arbitration have been reached for this purpose between

¹⁰ [1997] 2 HKC 323.

¹¹ [1999] 1 HKC 323.

¹² See Johannes Chan, *Basic Law and Constitutional Review: The First Decade*, 37 HONG KONG L.J. 413 (2007).

¹³ *Supra* note 10, at 324.

¹⁴ THE BASIC LAW (HKSAR) art. 95, and THE BASIC LAW (MACAU SAR) art. 93.

Beijing and the SARs.¹⁵ However, at macroeconomic policy level, it is also safe to assert that the central authorities do have substantial influence on the policy-making process of the SAR governments; however, they are prevented from setting agendas for the SAR government them by law. One illustrative example was the conclusion of Mainland and Hong Kong Closer Economic Partnership Agreement (CEPA) in 2003 between HKSAR and the Central People's government;¹⁶ the latest instance is demonstrated by the HKSAR's active consideration of the Plan for the Reform and Development of the Pearl River Delta, a transregional project

released in January 2009 and driven by the State Council.¹⁷

"One country, two systems" has been widely used as a customary saying or expression to describe the relationship between Beijing and Hong Kong and/or Macau. It is certainly not an amply and accurately defined legal term, nor has it been transformed into legal language by constitution and law. Nowadays, the paradigms of relationship between the central authorities and local administrative units under "one country, two systems" have been evolving and pluralizing. "One country, two systems" has been continuously enriching and developing in its content, structure, and way of existence. On the whole, it should be understood as an important constitutional principle since it has a direct and far-reaching impact on the reshaping of central-local relationships and of the autonomous regimes within China, and on the solution to state reunification and national consolidation.¹⁸

¹⁵ See, for example: *Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts*, signed in Shenzhen on 14 Jan 1999; *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR*, signed in Shenzhen on 21 June 1999; *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR Pursuant to Choice of Court Agreements between Parties Concerned*, signed in Hong Kong on 14 July 2006; *Arrangement between the Government of the HKSAR and the Government of the Macau SAR on the Transfer of Sentenced Persons*, signed in Hong Kong on 20 May 2005; and *Cooperative Arrangement between Correctional Services Department of the HKSAR and Macau Prison of the Macau SAR*, signed in Macau on 29 March 2006. All of the foregoing are posted on the website of the Department of Justice of the HKSAR at: <http://www.legislation.gov.hk/intracountry/eng/index.htm#mainland>.

¹⁶ For details, cf. HKSAR Trade and Industry Department official website: http://www.tid.gov.hk/english/cepa/cepa_overview.html. The model of CEPA has been used to deal with the economic relations and to reduce tariffs and commercial barriers between the two sides of Taiwan Strait. It has become ECFA (*The Economic Cooperation Framework Agreement*), signed on 29 June 2010.

¹⁷ The HKSAR Chief Secretary declared that "The HKSAR Government places great importance on the strategic meaning of the Outline. We will do our best to implement the contents of the Outline." Cf. the official website of the Government: <http://www.info.gov.hk/gia/general/200902/19/P200902190275.htm>. The full text of the *Outline of the Plan for the Reform and Development of the Pearl River Delta* can be found at: http://www.china.org.cn/government/scio-press-conferences/2009-01/08/content_17075239_2.htm.

¹⁸ I argue that the formula of "one country, two systems" should be regarded as a constitutional principle in view of its guiding role and binding force in the course of the unification of the country and because of its value in handling regional disputes. See Guobin Zhu, *Huigui Shijian Huhuan "Xianggang Jibenfa Xue"* ["The Practice of Hand-over Calls for a 'Theory of Hong Kong Basic Law'"], 1 ZIJING YUEKAN [BAUHINIA MONTHLY] 45–47 (2005).

3. Why China is no longer a unitary state nor a federation

3.1. The concept of unitary state and the difficulty in applying it to today's China

There is no precise definition of unitary state, although a common understanding of it is widely accepted in Chinese literature. Xiao Weiyun, a leading constitutional law scholar, from Peking University, gave his definition as follows:¹⁹

In modern state structures, unitary system and federal system are two major forms. In constitutional law theory, unitary system means a structure in which several administrative divisions constitute a single sovereign state, and under which there is one unified legislature, one constitution, one central government, and one unified nationality. Within the country, local governments of respective local administrative divisions submit to the leadership of the central government; in conducting external relations, the central government is the subject of international law.

This is a rather loose explanation of the concept and is open to interpretation. Xu Chongde, from Renmin University of China, also expressed his view in his textbook by stressing the following: “A unitary state is rather simple in its form and the whole country has only one constitution and one central government. In international relations, this state is the single subject and the central government represents the sovereign state.”²⁰

We may approach the meaning of the unitary state from a comparative perspective, too. In the context of a discussion on the future state structure of Sri Lanka, Ram Manikkalingam offered

his understanding of the unitary state. He wrote that:²¹

By unitary state, I mean the set of political arrangements where all powers—executive, legislative and judicial—are concentrated at the centre. A unitary state may involve the separation of powers horizontally, i.e., the separation of executive, legislative and judicial powers within a political unit. However, *it will not permit the separation of powers vertically, between a political unit and subunits*. A unitary state may permit the delegation of such powers to [a] subordinate unit, but it will not permit the alienation of powers. Under a unitary system of governance political powers that are granted to a subordinate unit can always be retracted at the discretion of the central state. Examples of [a] unitary state include France and Sri Lanka. [Emphasis added.]

There may be other definitions and descriptions from different perspectives. Based on the materials available and my own understanding, a unitary state is a system of state where:

- (a) All powers—legislative, executive, and judiciary—are centralized at and held by the center, as defined by the written constitution and by the arrangement of political institutions.
- (b) There should not be substantial vertical separation of powers. However, delegation of powers is possible under the condition that the delegated power always belongs to the center and can be retracted at any time; in other words, local units cannot appropriate the power but can use it.
- (c) Legislative and legal systems at central and local levels are homogenous and the locality has no

¹⁹ XIAO WEIYUN, *supra* note 6, at 124–125.

²⁰ XU CHONGDE, *supra* note 4, at 118.

²¹ RAM MANIKKALINGAM, A UNITARY STATE, A FEDERAL STATE OR TWO SEPARATE STATES? 2 (2003).

power to legislate on its own; nor is there a second parliamentary chamber representing local constituent units.

(d) Deconcentration and decentralization of power is possible subject to the condition that the process goes top-down, and that local autonomy in any form is exercised under the supervision and guidance of the center.

(e) The identity of an ethnic minority is not always considered a major determinant when designing the system of local government and, in the worse case, this is never being considered.

(f) Cultural and religious diversity may not exist or is being overlooked by the center.

(g) There is no or little room in the constitution for the development of any kind of genuine autonomous regime.

Is China a unitary state in compliance with the above criteria? Chinese leading scholars all agree that it is.²² However, after the creation of the Hong Kong and Macau SARs, the answer to this has become blurred or much more difficult. This assertion can be easily confirmed and justified by referring to, for example, the first two chapters of the Basic Law of the HKSAR.

In light of the constitutional arrangement set out in the Basic Law, how shall we describe the relationship between the center and locality (including SARs) under “one country, two systems”? Although the traditional theory and today’s common understanding still insists that, quoting Wang Shuwen’s view, for example, the relationship between Beijing

and Hong Kong is “the one between the central authorities and local units in a unitary state.”²³ It is apparently true that traditional theory represents an orthodox and outdated position the Chinese political authorities accept. We should also note that it is the safest theoretical demonstration that will not render the people in power nervous and will cause no political refutation from the ruling Communist Party of China (CPC) and the government.

The problem we are facing is that the conventional constitutional theory is incapable of explaining the new situations resulting from the establishment of new constitutional order in connection with the creation of SARs. Furthermore, the new type of relationship between center and locality brought about by “one country, two systems” needs to be justified by an appropriate theory. Interestingly, when mainland scholars—for example, Wang Shuwen—argue that the power that the Hong Kong and Macau SARs enjoy today is equivalent to or even far greater than that of a state or province is entitled to in a federal state, what do they really want to express by so stating?²⁴ Their observation is definitely accurate as it is supported by the articles of the two Basic Laws as well as by the continued practice after the handover; however, it is not supported by an appropriate constitutional theory. Hence, it is true that the coming into being of the

²³ XIANGGANG TEBIE XINGZHENGQU JIBENFA DAOLUN [AN INTRODUCTION TO THE BASIC LAW OF THE HKSAR] 105 (Wang Shuwen ed., revised ed., The Press of the Party School of the Central Committee of the CPC 1997). Wang was a member of the Drafting Committee of the Basic Law of the HKSAR and of the Drafting Committee of the Basic Law of the Macau SAR.

²⁴ *Supra* note 23, at 52–53.

²² *Supra* notes 4, 6, & 7.

SARs has broken through the traditional dualist paradigm or the theoretical dichotomy of unitarism vs. federalism.

The next question is, while acknowledging this theoretical flaw or insufficiency and the inapplicability of unitarism to China's case, is there a substitute? Albert Chen, a professor from Hong Kong, also posed the same question: "What is the difference between unitary system and federalism? Is there a third type of state structure in the world?"²⁵

3.2. Why do Chinese authorities and elites reject federalism?

There has been much scholarly debate about the definition of federalism. For the sake of clarity we should distinguish three terms: federalism, federal political systems, and federation.

"Federalism," according to Ronald L. Watts, an influential scholar in the field from Canada, "is basically not a descriptive but a normative term and refers to the advocacy of a multi-tiered government combining elements of shared-rule and regional self-rule. It is based on the presumed value and validity of combining unity and diversity and of accommodating, preserving and promoting distinct identities with a larger political union. The essence of federalism as a normative principle is the perpetuation of both union and non-centralization at the same time." He thought that "'Federal political systems' and 'federations' are descriptive terms applying to particular forms of political organization. The term

'federal political systems' refers to a broad category of political systems in which, by contrast to the single central source of authority in unitary systems, there are two (or more) levels of government thus combining elements of *shared-value* through common institutions and *regional self-rule* for the governments of the constituent units." He included in this broad genus a whole spectrum of more specific nonunitary forms, that is, species, ranging from "quasi-federations" to "confederacies" and beyond. He further explained that "with the genus of federal political systems, federations represent a particular species in which neither the federal nor the constituent units of government are constitutionally subordinate to the other, i.e., *each has sovereign powers derived from the constitution rather than another level of government*, each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers and each is directly elected by its citizens."²⁶

Daniel Elazar, a notable specialist of federalism from South Africa, has identified the following as specific categories of "federal political systems": unions, constitutionally decentralized unions, federations, confederations, federacies, associated statehood, condominiums, league (of nations), and joint functional authorities.²⁷

²⁶ Emphasis added. RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 6–7 (2nd ed. 1999).

²⁷ Cf. DANIEL J. ELAZAR, *FEDERALISM: AN OVERVIEW* 2–7 & 16 (1995); *FEDERAL SYSTEMS OF THE WORLD* xvi (Daniel J. Elazar ed., 2nd ed. 1994). Elazar put the definitions in his book in the form of tables: *FEDERALISM: AN OVERVIEW*, *id.* at 3–5; Ronald L. Watts also adopted these tables in his book with some minor modifications, *supra* note 26, at 8–9. It is interesting to note that Daniel J. Elazar included PRC in the table of "Political Systems with Federal Arrangements" because of its different constituencies (provinces, autonomous regions and municipalities). Cf. ELAZAR (1995), *supra* note 27, at 5.

²⁵ Albert Chen, *Danyi yu Duoyuan—"Yiguo Liangzhi" xia de Xianggang Tebie Xingzhengqu Jibenfa* [*Singularity and Diversity—the Basic Law of the HKSAR under "One Country, Two Systems"*], XIANFA XUE [CONSTITUTIONAL LAW] 491 (Zhang Qianfan ed., 2004).

In view of its wide spectrum of systems, the term "federal political systems" is very much used in the same sense as the Chinese term *fuhe zhi*, which means, in a word-by-word translation, "a system of complex combination," and, as understood by Xu Chongde, "is an associated country made up of two or more member states, and is a combination of states."²⁸

Elazar explained that the political principles that animate federal systems emphasize the primacy of bargaining and negotiated cooperation among several power centers. Thus, federalism stresses the virtues of dispersed power centers as a means of safeguarding individual and local liberties. He noticed that federation or federalism has a Latin origin in *foedus*, meaning covenant, and he further elaborated three key elements pertinent to federal relationships, stating that: "by definition, federal relationships emphasize partnership between individuals, groups and governments, cooperative relationship that make the partnership real, and negotiation among partners as a basis for sharing power."²⁹

In accordance with the above understanding of federation, there are today twenty-four contemporary examples of federation encompassing over 40 percent of the world population.³⁰ It is worth noting that South Africa

and Spain, while predominately federations in form, have not adopted the label "federation" in their constitutions.

Based on a comprehensive comparative study, Watts summarized the commonly accepted structural features of federation, as a specific form of federal political systems, which include: (a) two orders of government each acting directly on their citizens; (b) a formal constitutional distribution of legislative and executive authority and allocation of revenue resources between the two orders of government ensuring some areas of genuine autonomy for each; (c) provision for designated representation of distinct regional views within the federal policy-making institutions, usually provided by the particular form of the federal second chamber; (d) a supreme written constitution not unilaterally amendable and requiring the consent of a significant proportion of the constituent units; (e) an umpire (in the form of courts or provision for referendum) to rule on disputes between governments; and (f) processes and institutions to facilitate intergovernmental collaboration for those areas where governmental responsibilities are shared or inevitably overlap.³¹

In practice, a federation may adopt different operational models, too. In *Concepts of Federalism*, the author displayed probably more than a hundred definitions and examples of federalism.³² While we are unable to give a generally accepted definition of federalism, we may simply understand it by grasping some salient features of it

²⁸ *Supra* note 4, at 118–119.

²⁹ ELAZAR, *supra* note 27, at 1.

³⁰ They are: Argentine Republic, Commonwealth of Australia, Federal Republic of Austria, Belgium, Brazil, Canada, The Federal and Islamic Republic of the Comoros, Ethiopia, Federal Republic of Germany, Republic of India, Malaysia, United Mexican States, Federal States of Micronesia, Federal Republic of Nigeria, Islamic Republic of Pakistan, Russian Federation, St. Kitts and Nevis, South Africa, Spain, Swiss Confederation, United Arab Emirates, United States of America,

Republic of Venezuela, and Federal Republic of Yugoslavia. See WATTS, *supra* note 26, at 10. However, this list may need to be revised today to include the changes that have taken place.

³¹ WATTS, *supra* note 26, at 7.

³² WILLIAM H. STEWART, *CONCEPTS OF FEDERALISM* (1984).

as demonstrated above, based on its basic principles, constitutional frameworks, and operational models and practices.

For example, a federation normally refers to such a consolidated constitutional order in which:

- (a) there are usually two sets of governments: a federal government representing unity of the country and state/provincial/cantonal governments symbolizing diversity;
- (b) the idea of “dual sovereignty” is practiced, under which a citizen is the citizen of both the federation and the state where she or he resides;
- (c) there is a vertical separation/distribution of powers (legislative, administrative, and financial/fiscal power, even judicial power) among federal and state or provincial government;
- (d) the distribution of powers and the federal–local relationship are provided for in a written federal constitution made on mutually accepted grounds;
- (e) constitutional and legal disputes over the competency and use of power normally have to be referred to federal courts for decision in the light of the constitution and constitutionalism; and
- (f) the federal constitution makes provision for deciding which jurisdictions and laws shall apply if there is an inconsistency between them.

The Chinese government is determined not to consider the concept of federalism as an optional definition of the current state system, or as a possible model for the design of the future state structure. The ruling CPC and the government simply reject such ideas as separation of powers, political pluralism, or a biparty

system, and federalism and their implementation in China.³³ We are sure that the so-called “primacy of bargaining and negotiated cooperation” and the three key elements of federal relationships, as identified by Elazar, are certainly not acceptable to the Chinese authorities and the implementation of which would represent a serious challenge to the foundation of the current party-state structure.

The study of federalism conducted by the mainland scholars basically focuses on introducing foreign theory and practices. They mainly take the American experience for a model and overlook, more or less, the continuously changing landscape of federalism in the world. Although some have begun the study from a comparative perspective, no one ever dares publicly to advocate its application to China.³⁴ With no exception, the mainstream scholars have built their

³³ The Chinese government has expounded its political ideas, principles of governance, and standpoints on the democracy in a white paper published in 2005. Cf. BUILDING OF POLITICAL DEMOCRACY IN CHINA (original text is in English), issued by INFORMATION OFFICE OF THE STATE COUNCIL, October 2005, available at http://news.xinhuanet.com/english/2005-10/19/content_3645750.htm. The Propaganda Department of the CPC published in 2009 a pamphlet called “Six Why,” which includes six “questions and answers,” to reach a common understanding. Cf. LIUGE “WEISHENME” – DUI JIGE ZHONGDA WENTI DE HUIDA [SIX “WHY” – AN ANSWER TO A FEW MAJOR QUESTIONS] (The Bureau of Theory of the Propaganda Department of the CPC ed., Xuexi Chubanshe 2009).

³⁴ The study of federalism was once flourishing in late ‘80s and early ‘90s in mainland China. Suggestions were made to resort to federalism to solve Chinese minority and unification problem. Cf. Tahirih V. Lee, *The Future of Federalism in China*, in THE LIMITS OF THE RULE OF LAW IN CHINA 271–272 and footnotes nos. 4 & 8 at 296–297 (Karen G. Turner, James V. Feinerman & R. Kent Guy eds., 2000). Scholars and some

theory on a common but misleading understanding, which is, that federalism may lead to the division or breaking up of China or to separatism or “splitism,” a term the Chinese authorities prefer to use. In this sense, accepting federalism as a solution to the Chinese state equals the acknowledgement of separatism. The others just avoid the subject of federalism, firmly believing that federalism would lead to localization and local protectionism and, thus, further expand the existing and ever-increasing disparity between the developed and developing regions within the country. No matter how naïve and simplistic this conceptualization is, scholars generally prefer not to step into this mine field.

Apart from this realistic political consideration, one of the reasons for which academic and political elites refuse to consider federalism is linked to the failure of a federal movement in modern China. In the early twentieth century, federalism was a very fashionable term, and the application of federalism appeared in a number of provinces (Zhejiang, Hunan, and Guangdong, for example). During that period of time, liberal scholars actively advocated it and applauded the

trend.³⁵ Warlords, however, took advantage of it and dragged the country into civil war.³⁶ This historical scar has never been truly healed, and its impact on academia and politicians who care, first of all for political correctness, is obvious.

Indeed, the idea of a federal China was twice widely considered among Chinese scholars and elites. The first wave of federalism in China dates back to the 1920s and 1930s with the “Provincial Constitution-making Movement” (*sheng xian yundong*) and “Autonomy of Associated Provinces” (*liansheng zizhi*).³⁷ In section 4 of his paper “The Failure of the Movement of Provincial Constitution-making—Federation is not Suitable for China,” Li Xiuqing concluded that: “One of the important reasons for the failure of ‘Provincial Constitution-making Movement’ in Modern China is that its rise was not a response to the demand of the people but was linked to the respective purposes of warlords and politicians; the deeper reason is that autonomy of associated provinces or federation went against Chinese tradition and the actual situations of China then.”³⁸ Many scholars and politicians still have this deeply held belief that a strong, powerful, and consolidated center is the precondition for a prosperous and united China; and that a divided country means chaos and disorder.³⁹

notable Chinese political dissenters not residing in China, such as Yan Jiaqi and Wu Jiaxiang, have audaciously put forward the idea of federal China. Cf. YAN JIAQI, LIANBANG ZHONGGUO KOUXIANG [THE CONCEPTION OF A FEDERAL CHINA] (1992). Recently there are publications discussing a de facto federalism in a reformed China; see, e.g., ZHENG YONGNIAN, *De Facto Federalism in China: Reform and Dynamics of Central-Local Relations* (2006); Zheng Yongnian, *Explaining the Sources of de facto Federalism in Reform China: Intergovernmental Decentralization, Globalization, and Central-local Relations*, 7 JAPANESE J. POL. SCI. 101–126 (2006).

³⁵ Cf. Tahirih V. Lee, *supra* note 34, at 272–286.

³⁶ Cf. Li Xiuqing, *Jingdai Zhongguo Lianbangzhi de Lilun yu Shijian [Theory and Practice of Federalism in Modern China]*, 4 HUANQIU FALÜ PINGLUN [GLOBAL LAW REVIEW] 466–480 (2001).

³⁷ *Id.*

³⁸ *Id.*

³⁹ Much has been written in this sense. See, e.g., Tian Jiongjin, *Lianbangzhi yu Zhongguo [Federation and China]*, 62 SHIDAI GONGLUN [JUST OPINIONS OF THE TIME] (1933). Cited from Li Xiuqing, *supra* note 36. Li also agreed to it in her paper.

In the 1980s and 1990s, scholars restarted the debate about federalism in association with ongoing economic reform, Hong Kong, Macau's scheduled return, and the question of Taiwan. As observed by Tahirih Lee, a learned observer, "Chinese political scientists, economists, and politicians on both sides of the Taiwan Strait and those in exile use the notion of 'federalism' to describe the current decentralization of the PRC, the current integration of the PRC, Hong Kong, and Macau, and Taiwan in 'Greater China', and the likely shape of Greater China tomorrow." However, as she rightly pointed out, "the viability of a federalist conception of China, in a formal sense, depends in part on the likelihood that China's government will officially choose a federal structure."⁴⁰

The reality will be disappointing to her (and many others). Based on my study and continued observation, a federal model of governance would not be an option for Chinese policy makers in the foreseeable future, unless there is a drastic change of political regime.

3.3. Inapplicability of unitarism and federalism to the Chinese case

Scholars in mainland China adopt a rather simple way to distinguish federation from unitary state, with which I agree. The demarcation line lies in whether the possession of state/local power is accomplished by way of authorization/grant/delegation, corresponding to the "delegation of power" theory or by mutual agreement of sharing or division, representing "division/separation of power" theory. Xiao Weiyun further came up with a theory to dif-

ferentiate unitary state and federation by proposing to examine five related aspects: (a) whether a local government, whatever name it may bear, has original or intrinsic power; (b) whether it has its own power of establishment and organization; (c) whether it has the right to take part in national politics; (d) whether its power is granted or authorized by the central government; (e) whether the division of power between central and local governments is protected by the Constitution.⁴¹

Obviously, these criteria are critical and may generally indicate whether a polity is of a unitary or federal nature. Xiao Weiyun once asserted that the HKSAR is "a local administrative area under China's unitary state structure."⁴² This article tends to believe that Xiao rushed to this conclusion without seriously taking into account the salient features of the new regime of autonomy represented by the HKSAR, and that his and many others' theories are not convincing enough to the Hong Kong (and Macau) people living under "one country, two systems" and presently enjoying "high degree of autonomy." To conclude, the dichotomy of unitarism/federalism cannot and should not be applicable to the Hong Kong and Macau cases, simply because it cannot explain the relationship between them and Beijing nor justify the existence of the SARs in constitutional law.

⁴⁰ Lee, *supra* note 34, at 272.

⁴¹ XIAO, *supra* note 6, at 90.

⁴² *Id.* at 90.

4. A new regime of autonomy and a review of division of powers under the Basic Law

To further defend the above conclusion, we have to examine the power relationship between Beijing and Hong Kong (and Macau) and the autonomous regime in place. When discussing it, almost all scholars on mainland China emphasize the “derivative nature”⁴³ of the autonomous powers enjoyed by the SARs under the notion of the “high degree of autonomy,” one of three principles underlying the Basic Laws, while also emphasizing the “nature of direct subordination”⁴⁴ of SARs to the central government. While one may regard this relationship between the central authorities and SARs⁴⁵ as a “power-granting based”—not as a “power-division based”—relationship, others take the Basic Law for a “special law of power authorization.”⁴⁶

4.1. Vertical division of powers between the center and the HKSAR

The Basic Law has specified the scope of power to be enjoyed by the central authorities and, it involves six major aspects:

(a) Responsibilities of the Central People’s Government (CPG) for foreign affairs and the defense;⁴⁷

(b) Power to appoint the principal officials of the government of the SAR by the CPG, including the chief executive and the principal officials of the executive authorities.⁴⁸ However, the Basic Law does not especially provide for the power of removal of these officials.⁴⁹

(c) Application of national laws to the HKSAR by the Standing Committee of the NPC (NPCSC) by way of amending the list of national laws in Annex III of the Basic Law.⁵⁰ It is worth noting that the Basic Law has set restrictions over the exercise of power of the NPCSC, requiring it to comply with both substantial and procedural requirements when amending the list.⁵¹

(d) Legislative review of constitutionality of local legislation by the NPCSC, which has the power to return the laws passed by the legislature of the HKSAR subject to conformity with

⁴⁸ THE BASIC LAW (HKSAR) art. 15.

⁴⁹ Different views on the nature of appointment of the chief executive by the CPG show the divergence of positions from Beijing and Hong Kong. Scholars including Xu Chongde insist that the appointment is not only a procedural requirement but also a substantive process, which means the CPG has the power to deny the candidature of a selected or elected chief executive. This is, in my view, obviously debatable based on the text of the Basic Law.

⁵⁰ THE BASIC LAW (HKSAR) art. 18.

⁵¹ Procedurally, the NPCSC has to consult the Committee for the Basic Law of the HKSAR and the Government of the Region before amendment. National laws to be listed in Annex III shall be confined to those relating to defense and foreign affairs as well as other matters outside the limits of the autonomy of the region as specified by the Basic Law. Cf. THE BASIC LAW (HKSAR) art. 18.

⁴³ *Id.* at 91; XU, *supra* note 5, at 48; WANG, *supra* note 23, at 109.

⁴⁴ XU, *supra* note 5, at 53.

⁴⁵ *Id.*, at 71; WANG SHUWEN, *supra* note 23, at 105.

⁴⁶ XIAO, *supra* note 6, at 91.

⁴⁷ THE BASIC LAW (HKSAR) arts. 13, 14.

the Basic Law.⁵² This sets a procedure of review of constitutionality of the substance of regional law by the central legislature.

(e) Interpretation of the Basic Law by the NPCSC.⁵³ This arrangement is very controversial since it does not conform to the tradition of common law.⁵⁴ However the exercise of power has to be subject to certain restrictions in terms of subject matter and of procedure as provided for by the Basic Law. In the meantime, the courts of the HKSAR have the power to interpret all clauses “in adjudicating cases” as authorized by the NPC.

(f) Amendment of the Basic Law by the NPC.⁵⁵ Still, the amendment is subject to certain substantive and procedural conditions;⁵⁶ in other words, the power is restricted.

The above institutional setting reflects the Basic Law’s consistency with the principle of “one country.” Indeed, it constitutes the basis of the central–Hong Kong relationship.

Meanwhile, guided by the principle of “high degree of autonomy” under “two systems,” the Basic Law stipulates that the HKSAR government shall enjoy a wide range of powers that can be qualified as “autonomous powers,” all of which fall within four major categories: executive, legislative, and an independent judicial power, and power to conduct external affairs. These powers are manifested as follows:

⁵² THE BASIC LAW (HKSAR) art. 17. The article sets the following conditions: All laws enacted by the legislature of the HKSAR must be reported to the NPCSC for the purpose of record; however, the reporting for record shall not affect the entry into force of such laws. “If the NPCSC, after consulting the Committee for the Basic Law of the HKSAR under it, considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, the NPCSC may return the law in question but shall not amend it.” Any law returned by the NPCSC shall immediately be invalidated. This invalidation will not have retroactive effect, unless otherwise provided for in the laws of the region.

⁵³ THE BASIC LAW (HKSAR) art. 158. So far, the NPCSC has made three interpretations to the Basic Law in 1999, 2004, and 2005, respectively.

⁵⁴ *Ng Ka-ling*, the most controversial landmark case decided by the Court of Final Appeal in 1999, [1999] HKC- 291–346, and the subsequent interpretation of the Basic Law by the NPCSC in relation to *Ng*, have revealed the deep institutional difference between the legal and judicial systems of the mainland China and Hong Kong.

⁵⁵ THE BASIC LAW (HKSAR) art. 159. Furthermore, chapters IV–VI of the Basic Law together provide for the scope of power to be exercised by the government of the HKSAR “on its own.” The scope ranges from election and local politics, economy (which includes public finance, monetary affairs, trade, industry and commerce, land leases, shipping, civil aviation), to education, science, culture, sports, religion, labor, and social services.

⁵⁶ For example, “the power to propose bills for amendments to this Law shall be vested in the NPCSC, the State Council and the HKSAR. Amendment bills from the HKSAR shall be submitted to the NPC by the delegation of the Region to the NPC after obtaining the consent of two-thirds of the deputies of the Region to the NPC, two-thirds of all the members of the Legislative Council of the Region, and the Chief Executive of the Region.” And “no amendment to this Law shall contravene the established basic policies of the PRC regarding Hong Kong.” *Cf.* THE BASIC LAW (HKSAR) art. 159. “The established basic policies of the PRC regarding Hong Kong” are reflected in the Sino-British Joint Declaration which is binding on the PRC.

(a) Executive power. The Basic Law makes a blanket statement as follows: "The HKSAR shall be vested with executive power. It shall, on its own, conduct the administrative affairs of the Region in accordance with the relevant provisions of this Law."⁵⁷

(b) Power to conduct external affairs.⁵⁸ Interestingly, the Basic Law separates "external affairs" from "foreign affairs" and authorizes the HKSAR government to deal with "external affairs" relating to it.⁵⁹ In view of the wide range of substantial powers to handle external affairs, one scholar describes HKSAR as enjoying the status of an international legal

person,⁶⁰ while another opines that Hong Kong is assuming the role of "an active non-sovereign international actor."⁶¹

(c) Legislative power. The Basic Law stipulates that the HKSAR shall be vested with legislative power.⁶²

(d) Independent judicial power, including that of final adjudication. The Basic Law's provisions are rather complete and defensive,⁶³ which purportedly apply common law principles and preserve judicial independence after the handover.⁶⁴ Compared with the judicial system in the British Hong Kong era, the judicial power of the HKSAR has been enhanced and expanded, and it is mainly manifested by the institution of the Court of Final Appeal within the region.

Among all the autonomous powers, certain are nontransferable, such as the

which the PRC is not a party but which are implemented in Hong Kong, may continue to be implemented in the HKSAR. The CPG shall, as necessary, authorize or assist the government of the region to make appropriate arrangements for the application to the region of other relevant international agreements, *cf.* art 153. In addition, the HKSAR government can decide, on its own, on such matters as issuing SAR passport, immigration control, *cf.* art 154, visa waivers, *cf.* art 155, and establishment of economic and trade missions abroad, *cf.* art 156.

⁵⁷ THE BASIC LAW (HKSAR) art. 16.

⁵⁸ There are two articles dealing with Hong Kong's ability of conducting external affairs, which assessed the role of Hong Kong in China's international strategy since its return to China. *Cf.* Ting Wai, *Hong Kong in between China and the Great Powers: The External Relations and International Status of Hong Kong after the Chinese Resumption of Sovereignty*; Ren Yue, *Hong Kong in the Eyes of the International Community*. Both are included in THE HONG KONG SPECIAL ADMINISTRATIVE REGION IN ITS FIRST DECADE 261–304, 305–326 (Joseph Y. S. Cheng ed., 2007).

⁵⁹ "External Affairs" are conducted in two forms: either the HKSAR government may, as members of delegations of the Chinese Government, participate in negotiations at the diplomatic level directly affecting the region conducted by the Central People's Government, *cf.* THE BASIC LAW (HKSAR) art. 150; or the HKSAR may on its own, using the name "Hong Kong, China," maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural, and sports fields, *cf.* art 151. The HKSAR may, using the name "Hong Kong, China," participate in international organizations and conferences not limited to states, *cf.* art 152, para. 2. International agreements to

⁶⁰ RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG (1997).

⁶¹ Ren, *supra* note 58.

⁶² THE BASIC LAW (HKSAR) art. 17, para. 1.

⁶³ THE BASIC LAW (HKSAR) art. 18.

⁶⁴ The Basic Law guarantees the continuation of common law principles in the HKSAR. *Cf.*, particularly, THE BASIC LAW (HKSAR) arts. 8, 19, 82 & 84. This position has been confirmed in the above-cited leading cases *Ma WK David* [1997] and *Ng Ka-ling* [1999].

independent judicial power and the power of final adjudication (except in constitutional cases involving state or national affairs), the power to issue Hong Kong currency, and independent financial and taxation systems. Others, which normally belong to the sovereign, are not retractable without amending the Constitution and the Basic Law. Since “no amendment to this Law shall contravene the established basic policies of the PRC regarding Hong Kong,”⁶⁵ it is safe to say that a high degree of autonomy and the future of Hong Kong as an SAR are constitutionally guaranteed.

To sum up, the core of this relationship between the central authorities and the SAR is a power relationship; in this sense, the Basic Law is precisely a law of separation of power and a law regulating the norms and conduct of power. Three situations illustrate this power relationship:

- (a) The powers that belong to the central authorities, are not transferable and cannot be shared. The SAR shall be subject to the leadership and decision of the central authorities;
- (b) The SAR shall have the power to handle and manage on its own such matters as external affairs, while the central authorities (mainly the State Council) may exercise supervision over the SAR through established mechanisms, according to chapter VII, “External Affairs,” of the Basic Law. There might be some gray areas, where the central authorities could interfere with the regional affairs. There is also the possibility of disputing the exercise of such power; however, no such incident has been reported and made public so far.

- (c) The SAR shall have full power to handle and manage on its own all other matters, and the central authorities shall not interfere. In theory, the SAR government is even not bound to make any report to the central government.

4.2. Comparison of the HKSAR with subnational units in other jurisdictions

The substance and scope of autonomy enjoyed by the HKSAR can hardly be compared with that enjoyed by other subnational constituent units of the PRC or in other unitary states. It is also difficult to compare it with that enjoyed by the constituent units of any federation.

As stated above, the dualist theory—unitarism versus federalism—is not applicable to the autonomous regime of the SAR under “one country, two systems” in China. Wang Shuwen once made a comprehensive comparison between the high-degree-of-autonomous powers the SAR government enjoys and the autonomous powers of local governments in Western capitalist unitary states. Wang wrote: (a) “the legislative power that the HKSAR holds is not only broader in scope, but also represents a higher degree than that of local governments in capitalist countries under unitary system”;⁶⁶ (b) “the judicial power that the HKSAR enjoys, especially the power of final adjudication, is something that local governments in capitalist countries under unitary system cannot possess”;⁶⁷ (c) “the HKSAR government enjoys many

⁶⁵ THE BASIC LAW (HKSAR) art 159, para. 4.

⁶⁶ WANG, *supra* note 23, at 47.

⁶⁷ *Id.* at 47.

autonomous powers in respect of administrative management, including maintaining financial independence, implementing independent taxation system, making currency and monetary policies on its own, issuing Hong Kong currency, carrying out free trade policies, defining its own functions and responsibilities regarding shipments, maintaining Hong Kong's status as international and regional aviation center, making policies in the fields of education, teaching, culture, and the like. All of these powers are something that local administrative organs in unitary state cannot obtain."⁶⁸ This summary may be superficial and inaccurate but is still inspiring and worth being shared here as reference.

Second, Wang Shuwen compared the SAR's high degree of autonomous powers with the powers of local constituent units in a federation. He asserted that: (a) "the scope of autonomous legislative power that the HKSAR has is broader than that of the states in a federation";⁶⁹ (b) "obviously, whether in range or in degree, [the] judicial autonomy [of] the courts of the HKSAR is broader than that of the state courts of a federation";⁷⁰ (c) "the HKSAR enjoys a broad range of administrative management powers, some of which the state governments of a federation cannot possess";⁷¹ (d) as regards the conduct of external affairs, "the autonomous power the HKSAR enjoys not only cannot be possessed by the local authorities of a unitary country, but also are broader than that of the state governments of a federation."⁷²

⁶⁸ *Id.* at 47.

⁶⁹ *Id.* at 49.

⁷⁰ *Id.* at 49–50.

⁷¹ *Id.* at 50.

⁷² *Id.* at 50.

Therefore, Wang Shuwen concluded as follows: "From the above comparison and analysis, we can see that the scope of administrative power, legislative power, independent judicial power, and power of final adjudication the HKSAR enjoys is broader than that of the regular local authorities and of the local autonomous organs of national autonomous areas in our country; even compared with the autonomous power of local government of a capitalist unitary country, it is broader, too. If further compared with the powers and competences of state government of a federation, except for such particular matters as state constitution making, the HKSAR enjoys a broader scope and a higher degree of autonomy in all other aspects. This is crystal clear."⁷³ As one of the established authorities in China's constitutional law and the Basic Law and in particular, as a member of the Drafting Committee of the two Basic Laws, Wang's observations and standpoint should be regarded as based on his understanding of law-making principles and his holistic comprehension of the provisions of the Basic Law. Needless to say, his views are closely in line with, if not identical to, the official position.

A theoretical paradox thus emerges and we now face a dilemma. On the one hand, notable scholars including Wang Shuwen, Xiao Weiyun, and Xu Chongde insist that since the Basic Law is a "power-authorization law," China is and should be regarded as a unitary state, and the state structure should remain unchanged even after the establishment of the SARs. On the other hand, equally based on the above, the power that the SARs enjoy is not only not at all comparable with

⁷³ *Id.* at 51–52.

that of local self-rule governments of national autonomous areas but also it is broader in scope than that of local governments in a unitary state and/or that of local constituent units in a federation. In theory, the autonomy, once granted to the SARs by the Constitution and the Basic Laws, cannot be interfered with by the central government or, at least, such interference, if really required, must comply with substantial and procedural requirements according to the Basic Laws. Looking back at the ups and downs over the past thirteen years since Hong Kong's return to the PRC, we have witnessed that the central government basically has followed the rules set out in the Constitution and the Basic Law insofar as its relationship with Hong Kong is concerned, although different opinions and criticism have been voiced regarding this. This is largely thanks to the fact that the Basic Law has clarified the relationship and clearly distributed the power between the central authorities and the HKSAR. Meanwhile, the successful handover and transition of Hong Kong has proven that the Basic Law is a matter-of-factly efficient “power-division law” and has played well its role as the constitution of the region.

5. Composite state: Seeking unity in diversity

5.1. Definition of “composite state”

The Basic Law is an organic law that, first of all, organizes the SAR politically, secures the rights and liberties of the people within the territory/jurisdiction, distributes powers among different stakeholders, and regulates relationships

among them. It also constitutionalizes all the norms and rules governing the operation of the system. From the above analysis, this power relationship and its operational model of autonomy cannot be categorized either as a unitary system or as a federation but should be understood as a new type, which can be referred to, and promoted, as a “composite state system.” As far as the SAR is concerned, the composite system bridges the “two systems” and incorporates characteristics of both unitary system and federalism both in principle and in practice. It is a hybrid of unitarism and federalism. Politically and socially speaking, it can accommodate the existing “one country, two systems” and the emerging “one country, multiple systems.”

According to The Oxford English Dictionary (OED) Online, “composite,” a term widely used in science and engineering, means, in its adjectival form: a creature or material “made up of various parts or elements.” It is also used in the form of noun, meaning “a material made from two or more physically different constituents each of which largely retains its original structure and identity.” It is in this sense that this article adopts the term to define the concept of “composite state” and to characterize today's Chinese state.

By definition, a “composite state” is a state that comprises an aggregate or group of constituent units, each category of which is established under it in accordance with the different constitutional arrangements. Like all other forms of state, a composite state is “a political system of a body of people who are politically organized”; and it is “the system of rules by which jurisdiction and authority are exercised over such a body of

people."⁷⁴ A composite state is "an institution," "that is to say, it is a system of relations which men establish among themselves as a means of securing certain objects, of which the most fundamental is a system of order within which their activities can be carried on."⁷⁵

In light of this understanding, the composite system under "one country, two/multiple systems" has become a reality or, at least, should be regarded as a political system with Chinese characteristics.

5.2. The salient features of the composite state of China

Specifically, under the structure of the composite state, the guiding principle of "one country" will not change since it purports to uphold the principle of the indivisibility of sovereignty, a doctrine that Chinese authorities still maintain. The change could or should happen in order to accommodate the diversity of the constituent units, which concerns their retaining their original structure and identity, their relationship with the center, the different degrees of autonomy they can enjoy, their various ways of exercising autonomous powers, the legal norms and constitutional frameworks to be established in their regard, and maintaining their original way of life, and so forth. The flexibility in institutional arrangements is dependent on the bargaining and deliberation between the center and the locality concerned.

Under the high principle of sovereignty, the internal structure of a composite state, generally asymmetrical, is

adjustable and magnanimous in the sense that it is able to accommodate different physical, cultural, legal, social, and economic situations, differences of systems, and different forms of organizations of constituent units. This feature is particularly important considering the time sequence of constituent units as they join the state, the divergences of ideology and culture, the various claims of powers and rights, the claims of national, cultural, and religious identity, related historical backgrounds, and even international politics.

Diversity of constituent units in a larger society suggests that this must be an asymmetrical structure. To theorize it, under an asymmetrical structure, each component unit or each category of component units has a unique feature or group of features that separate them one from another in important ways. The only point the components are to agree upon is that the central government is the sovereign and, in this capacity, it shall have constitutional authority over the components.

Taking China's case to illustrate the above definition: among all constituent subnational units (that is, province, national autonomous region, municipality directly under the central government, and SAR), the different categories of units enjoy different degrees of autonomous power and their relationship with the central government varies in accordance with the existing Constitution and national laws concerned. This landscape can be briefly summarized as follows:

- (a) The relationship between the center and the twenty-six provinces and municipalities directly under it is a classic mode adopted in many

⁷⁴ BLACK'S LAW DICTIONARY 1443 (Bryan A. Garner ed., 8th ed., Thomson West 2004).

⁷⁵ *Id.* at 1443.

unitary states; it is a kind of order–execution relation (however, the phenomenon of fiscal and financial federalism has been present since the reform of the taxation system in the 1990s, according to some observers).⁷⁶

(b) The relationship between the center and the five national autonomous regions is further regulated by another piece of constitutional law—Law on National Regional Autonomy (adopted in 1984 and revised in 2001), in addition to the constitutional provisions.⁷⁷ Under this category, the scope of autonomy could be further adjustable, and flexible national policy could be adopted on the basis of actual needs of each region.⁷⁸

(c) The relationship between the center and the two SARs is not comparable with the above two types. The SARs enjoy a “high degree of autonomy,” as discussed above, and this is fixed by the Constitution, article 31, in particular, and the Basic

Laws that form parts of constitutional law.

(d) There may be a fourth category of central–local relationship if we take Taiwan’s future integration with the PRC seriously. It is expected that the autonomy the future government of Taiwan could enjoy would even be greater in degree than that under the SAR system; the central government of the PRC has made this clear.

5.3. Taiwan under the composite state

Insofar as the policy concerning Taiwan is concerned, it has been formulated progressively. After the articulation of a “9-Points Resolution” by Ye Jianying, then-chairman of the NPCSC, on behalf of the central government on September 30, 1981,⁷⁹ the former secretary-general of the CPC Jiang Zemin and the current secretary-general Hu Jintao put forward “Jiang’s 8-Points”⁸⁰ and “Hu’s 6-Items”⁸¹ in 1995 and 2008, respectively. Comparing the contents of the Taiwan policy with the provisions of the Basic Laws, we observe: (a) the basic powers to be granted to Taiwan would be similar to those in the Basic Laws; (b) however, what is striking is that the future Taiwan government would be allowed to maintain an armed force and would enjoy even larger international space than the SARs.

⁷⁶ See, e.g., Zheng Yongnian’s discussion on “de facto federalism,” *supra* note 34; Wu Jiexiang, *Yong Lianbangzhi Zhiliao Guojia Neishang [Using Federalism to Heal Internal Injury of China]*, available online at: <http://www.tecn.cn/data/detail.php?id=3163>; Wu Jiexiang, *Tongguo Lianbang Zhuji Zouchu “Lianbang Caizheng Zhi” Kunjin [Stepping out of the Dilemma of Fiscal Federalism through Federalism]*, available at <http://www.tecn.cn/data/detail.php?id=10544>.

⁷⁷ Cf., particularly, CONST (PRC) art. 4(3), which states as follows:

Regional autonomy is practiced in areas where people of minority nationalities live in compact communities; in these areas organs of self-government are established for the exercise of the right of autonomy.

And also cf. chap. III, sec. VI.

⁷⁸ Cf., particularly, CONST (PRC) art. 116.

⁷⁹ ZHONGGUO TAIWAN WENTI [CHINA’S QUESTION OF TAIWAN] 229–230 (Office of Taiwan Work of the Central Committee of the CPC and Office of Taiwan Affairs of the State Council eds., Jiuzhou Tushu Chubanshe 1998).

⁸⁰ *Id.*, at 231–235.

⁸¹ The document is widely available online, for example at Xinhua Agency’s site: http://news.xinhuanet.com/newscenter/2008-12/31/content_10586495.htm.

The Chinese government and the party have been continuously promoting "peaceful reunification, and 'one country, two systems'" to be applied to Taiwan.⁸² The core of the Taiwan policy lies in the four key elements: (a) one China; (b) the coexistence of two systems; (c) high degree of autonomy; and (d) peaceful negotiation. This policy, considered inapplicable by the Taiwan authorities and some authors,⁸³ has been repeatedly relayed to the Taiwanese people and authorities by Deng Xiaoping, Jiang Zemin, and Hu Jintao, representing "three generations of Chinese leadership," respectively. Examining the policy from a historical perspective, we can see that a great deal of flexibility is embedded in it. Most of the scholars in legal science and political science on the mainland advocate the direct application of "one country, two systems" to Taiwan.⁸⁴ However, both the government and the majority of the leading scholars from Taiwan reject this

idea.⁸⁵ The current nationalist government, under the ruling party Kuomintang, insists on a negotiation between "two political entities" within "one country" and declares the inapplicability of "one country, two systems" promoted by the mainland. The immediately preceding Taiwan government, under the Democratic Progressive Party, even rejected the foregoing, quite realistic proposal by Kuomintang and called for "One China, One Taiwan" and independence in the constitution.⁸⁶ The dominant idea in the mind of majority of the Taiwanese people is seemingly to maintain the status quo.⁸⁷ Since there is no serious negotiation on the future currently ongoing between both parties, except for enhanced exchange in economy and trade, the political situation is actually deadlocked.

Observed from a pragmatic and realistic perspective, the independence of

⁸² Cf. Chinese government's two white papers: (1) THE TAIWAN QUESTION AND THE UNIFICATION OF CHINA, issued by TAIWAN AFFAIRS OFFICE & INFORMATION OFFICE OF THE STATE COUNCIL, August 1993; (2) THE PRINCIPLE OF ONE COUNTRY AND THE QUESTION OF TAIWAN, issued by INFORMATION OFFICE OF THE STATE COUNCIL, February 2000. Both papers are accessible online at: <http://www.china.com.cn/ch-book/index.htm>.

⁸³ See, e.g., Sean Cooney, *Why Taiwan is not Hong Kong: A Review of the PRC's 'One Country Two Systems' Model for Reunification with Taiwan*, 6 PAC. RIM L. & POL'Y 497 (1997).

⁸⁴ An example is: Zhang Qianfan, *Lun Guojia Tongyi Yu Difanf Zizhi—Cong Gang'ao Jibenfa Kan Liang'an Heping Tongyi de Xianfa Jizhi [The Reunification of the Country and Local Autonomy: Constitutional Mechanism for Peaceful Reunification of Two Sides of the Strait viewed from the Basic Laws of Hong Kong and Macau]* 4 HUADONG ZHENGFA DAXUE XUEBAO [JOURNAL OF EAST CHINA UNIVERSITY OF POLITICS AND LAW] (2007).

⁸⁵ In his paper entitled *Can the One Country Two Systems Work for Taiwan?*, Shee Poon Kim argued that the "one country, two systems" model would lead to an impasse as the solution to the cross-strait relations, and Taiwan would not accept it anyway. He thus proposed that "perhaps the model of OCTSFG [i.e., One Country, Three Systems, Four Governments] would be better for Taiwan than Deng [Xiaoping]'s proposal of 'One Country, Two Systems' which can work only for Hong Kong and Macau." Cf. YIGUO LIANGZHI LUNWENJI [COLLECTION OF ARTICLES ON "ONE COUNTRY, GOOD SYSTEMS"] 232, 241 (Zhu Hongyuan ed., Taipei, 1999; conference proceedings).

⁸⁶ These materials are available in WU XINXING, ZHENGHE LILUN YU LIANG'AN GUANXI YANJIU [THE THEORY OF INTEGRATION AND THE STUDY OF RELATIONS BETWEEN TWO SIDES OF TAIWAN STRAIT] (1995).

⁸⁷ However, scholars and politicians have proposed a number of solutions for national reunification under basic models such as federation, confederation, and unitary state. In applying federal model, there may be different choices, too. Cf. Shao Zonghai, *An Assessment of the Interaction between the Models of Reunification of China and the Process of Reunification*, in Zhu, *supra* note 85, at 367–370.

Taiwan and by Taiwan is not an option. Considering that the mainland authorities still see war (“non-peaceful means”) as an alternative, under the Law on Anti-Secession of the Country especially adopted by the NPC to settle the question of Taiwan in case of a substantial act of independence by Taiwan,⁸⁸ and taking into account the mutual interests and well-being of the people from both sides of Taiwan Strait, this article proposes to adopt and apply the concept of the composite state as a novel constitutional framework to solve this matter.

Accepting the composite-state concept, Taiwan would retain the current governmental system and maintain existing social, political, and democratic systems, and the way of life. In this connection, a consensus should be first sought and reached, and a constitutional accommodation made available on both sides, if required. A new Basic Law of Taiwan should be drafted on the basis of broad deliberation, participation, and mutual agreement, in the course of which the people’s will should be sought by referendum and implemented by means of legislation.

5.4. Guiding constitutional principles under composite state

China is quite complex, and the complexity is even greater when considering the complicated international politics, transnational religious fundamentalist movements, and terrorism in the world. Among the five regions where minority nationalities live, in particular, in Xinjiang Uygur Autonomous Region (XUAR)

and Tibetan Autonomous Region (TAR), activities that have been characterized as “splitism” or “separatism” by the central authorities have been taking place for years. Activities of this sort have been automatically suppressed, and the organizations involved have been dismantled by the authorities. Separatism is obviously not a feasible option from the perspective of real politics, nor is it in the interests of the majority of people of the regions concerned.

However, the problem persists, mainly in XUAR and TAR, and the manifestation of the problem varies from cultural identity, religious practice, to economic backwardness. Then conflicts follow. Among all the claims put forward by minority nationalities, national (*minzu*), cultural, and religious identity is central.

Needless to say, China is facing the serious question of the solidarity of all its people. The concept of the composite state, as proposed in this essay, should be viewed and upheld as a fundamental and accommodative idea on which further appropriate institutional arrangements could be based. This concept is a formulation deeply rooted in the Constitution and in the reality of China; it is not a groundless creation or castle in the air. To make it feasible and viable, however, the following principles of particular relevance must be highlighted and observed in the course of constitution making and lawmaking and in the negotiations, particularly in relation to the question of Taiwan.

5.4.1. *Unified or sole sovereignty*

By upholding sovereignty, the central authorities, necessarily composed of representatives of all the people, parties, and subnational units concerned, should show

⁸⁸ *Law on Anti-Secession of the Country* was adopted by the NPC on 14 March 2005.

no reluctance in granting autonomous powers of various degrees to each category of constituent units, and the units should not haggle with the central authorities in order to share or own sovereignty. The Chinese theory on sovereignty is derived from a lineage of French writers such as Jean Bodin and Jean-Jacques Rousseau and has seen no substantial change. For the Chinese political and academic elites, sovereignty is "united," "indivisible," "inalienable," and "imprescriptible."⁸⁹ The current Constitution still holds this as a supreme constitutional principle. However, the Basic Laws have shown a certain degree of flexibility in terms of the actual enjoyment of sovereignty by granting to the SARs an autonomous power to handle "external affairs." In this respect, ownership and enjoyment of sovereignty is to be treated differently in constitutional law.

5.4.2. *Self-government, self-rule, or autonomy*

Whatever term is adopted, among all those available in the literature, the constituent units should enjoy autonomy of different degrees and forms all according to their actual needs and original status and should be able to govern on their own. "Self-government implies," as Louis B. Sohn, a leading international law authority from Harvard, once stated, "that for important political or economic reasons a particular area will remain within the territorial jurisdiction of another political entity but will possess political freedom to regulate certain of its own

affairs without any interference by that entity."⁹⁰

The essence of the composite system is to promote self-government and autonomy and people's participation in the management of local affairs (which is similar to the principle of "Hong Kong/Macau people ruling Hong Kong/Macau"). While proposing this, however, a regime of independence or complete self-determination by the people, "which implies the right of separation from another political entity,"⁹¹ will be excluded. It is, for a certainty, that any goal of independence and self-determination, in the above sense, will be automatically rejected by the central authorities whose position is categorically intransigent, a position has been expressed in the Law on Anti-secession of the Country, cited above.⁹²

5.4.3. *Secularism*

Under secularism or secularity and the separation of state and church, or *laïcité*,⁹³ political institutions should exist separately from religion and/or religious

⁸⁹ These four qualifications were first adopted in the first French constitution (September 3, 1791), Title III, Art. 1.

⁹⁰ Louis B. Sohn, *Models of Autonomy within the United National Framework*, in *MODELS OF AUTONOMY* 5 (Yoram Dinstejn ed., 1981).

⁹¹ *Id.*

⁹² *Supra* note 88.

⁹³ Sometimes, *laïcité* is translated in English as laicity or laicism. It is a French concept of a secular society, which connotes the absence of religious involvement in governmental affairs as well as absence of governmental involvement in religious affairs. *Laïcité* is a core concept and fundamental principle of the French Constitution, whose art. 1 formally and solemnly declares that France is a secular republic (*La France est une République indivisible, laïque, démocratique et sociale*). Countries such as Belgium, United States, Canada, India, and Turkey have incorporated similar, even identical, terms or concepts in their constitutions; practices, however, may vary.

beliefs. Secularism generally implies state secularism, a secular society, and secular ethics. In short, it requires the setting of a code of conduct to accommodate both freedom of religious belief and separation of state and church.

In this respect, the current Constitution has laid a solid foundation by prescribing a free exercise clause” in article 36.⁹⁴ In view of the diversity of religions and religious practices in China, the free exercise clause can guarantee the right to freedom of religious belief to citizens, including those in XUAR and TAR. The great degree of freedom of belief will certainly help establish *minzu*, that is, national, cultural, and religious identity. Religious fundamentalism or extremist activities, though existing in China, do not constitute “normal religious activities,” as stated in the Constitution, and go against the status quo of order and law in China (and elsewhere too). In this context, even the widest possible autonomy will be subject to the high principle of unified sovereignty.

China has no state religion and the Constitution has no such provision. The unwritten nonestablishment principle confirms the applicability of secularism or separation of state and church. In The

Central Committee of the CPC’s Basic Ideas and Policies regarding Religious Questions in the Socialist Period, a fundamental party policy document, it is stated that “the State power of our socialist country shall absolutely not be used to promote one religion, nor can it be used to prohibit another religion, as long as they are all normal religious beliefs and activities. In the meantime, religion is absolutely not allowed to interfere with State’s administrative, judiciary affairs, disrupt school education and social public education. . . .”⁹⁵ The relation between religion and state is always a current and sensitive issue. The promotion of the idea of the composite state will have recourse to the principle of secularism, which has been proven an efficient and viable solution in most mature democracies.

The articulation and institutional design relating to the composite state requires us to think about its deeper philosophical foundation. In line with this thought, the following pairs of relations are worth further exposition and clarification: (a) unity versus diversity; (b) national interests versus the interests of a particular minority, nationality, or ethnic people; (c) nationalism versus self-identification; (d) national law versus local customs and habits and the like. Actually, this would be an enterprise

⁹⁴ CONST. (PRC) art. 36 states that:

Citizens of the People’s Republic of China enjoy freedom of religious belief.

No State organ, public organization, or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion.

The State protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens, or interfere with the educational system of the State.

⁹⁵ *The Central Committee of the CPC’s Basic Ideas and Policies regarding Religious Questions in the Socialist Period*, adopted on March 31, 1982, by the Central Committee of the CPC and often cited as “Document No. 16,” is regarded as the fundamental document of the party on religion. It is included in XIN SHIQI XONGJIAO GONGZUO WENXIAN XUANBIAN [SELECTED DOCUMENTS ON RELIGIOUS WORK IN THE NEW PERIOD] 54–73 (Zhonggong Zhongyang Wenxian Yanjiushi Zonghe Yanjiuzu ed., Beijing Zhongjiao Wenhua Chubanshe 1995).

anticipating cooperation from all the disciplines concerned.

6. Conclusion: Building a composite state

The formulation of the concept of the composite state is based on a process of continued observation and reflection. The current administrative division of the PRC and the experiences of the different regimes of autonomy, particularly those represented by the SARs, have prompted me to contemplate and to find and define an appropriate paradigm or theoretical framework to describe the current state structure. The conceptualization and theorization of the composite state serve two immediate purposes: to crystallize our understanding of the current state structure and, more importantly, to design and put forward a theory that can be adopted so as to consolidate the country, unite all peoples, and solve the question of Taiwan. The composite state of China is taking shape and a theory relating to it is expected and necessary. Therefore, this essay is mainly an initial theoretical exploration and, more precisely, a reaction against the inapplicability of the theories available today.

The concept of the composite state is basically built on a pragmatist philosophy. It aims to resolve the puzzling situation with regard to the characterization of

the Chinese state. As we have seen, the orthodox position held by the mainstream scholars on the mainland is considerably outdated and even incapable of clarifying accurately the status of the SAR within the PRC.

Comparative constitutional law reveals that there are various models and regimes of autonomy, such as the Greenland model, the Puerto Rico–U.S. model, the Spanish model, and French Nouvelle-Caledonia or French Polynesia model, all of which prove useful to the formulation of the concept of composite state, itself a novel model. In this connection, the newly published book *The World's Modern Autonomy Systems* examines various examples and deserves our attention.⁹⁶

Based on the above study of the autonomy represented by the HKSAR and on the brief reference to other available models from unitary states and federations (except for constitutional monarchies), this article concludes that the PRC is neither a unitary state nor a federation but a hybrid of both. In this context, the concept of the composite state is a fact-based, theoretically sound proposal; it not only can define the actual structure of the state, correctly and accurately, but also can serve to consolidate the Chinese state and achieve the ultimate aim of the country, namely, unity while maintaining diversity.

⁹⁶ THOMAS BENEDIKTER, *THE WORLD'S MODERN AUTONOMY SYSTEMS* (2009) displays over twenty models and arrangements in the name of territorial autonomy and includes a chapter discussing "Autonomy in the PRC" as special form of autonomy, at 212–222.