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TOWARDS CONSTITUTIONAL LAW OF PEOPLES:

CHINA AND ITS PERIPHERAL SOCIETIES

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DECLARATION

Pursuant to The University of Edinburgh Postgraduate Assessment Regulations for Research Degrees, I hereby declare that this thesis has been composed by me alone and the research work is my own. It has not been submitted for any other degree or professional qualification.

Signature:

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Date: 1 September 2011

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ABSTRACT

This thesis addresses issues surrounding Chinese constitutional arrangement to Tibet, Hong Kong, and Taiwan. It contends that in light of the Chinese State's constitutional accommodation of, and integration with, the peripheral societies of Tibet, Hong Kong, and Taiwan, a re-conceptualisation of Chinese constitutional law in on the verge of maturity, which, informed by realistic ideals, would be conducive to establishing a constitutional order of peace and stability that is embodied in a legal structure in which multiple societies, as self-governing people-s, could sustain healthy constitutional relationship and abstain from violent conflicts.

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List of Abbreviations

CPC	The Communist Party of China
DPP	The Democratic Progressive Party
HKSAR	The Hong Kong Special Administrative Region
KMT	The Kuomintang (The Chinese Nationalist Party)
PRC	The People's Republic of China
ROC	The Republic of China
TAR	The Tibet Autonomous Region

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Statutes and Documentations

Additional Articles to the Constitution of the Republic of China	中華民國憲法增修條文
Temporary Provisions Effective During the Period of Communist Rebellion	動員戡亂臨時條款
The 17-Point Agreement	中央人民政府和西藏地方政府关于和平解放西藏办法的协议
The Act for Exchanges between Chinese Nationals in the Mainland and in Taiwan of the PRC 1992	中国公民往来台湾地区管理办法
The Act Governing Relations between the People of the Taiwan Area and the Mainland Area	臺灣地區與大陸地區人民關係條例
The Act Governing Relations with Hong Kong and Macau	香港澳門關係條例
The Anti-Secession Act 2005	反分裂国家法

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The Anti-Smuggling Act	懲治走私條例
The Basic Law of Hong Kong Special Administrative Region	中華人民共和國香港特別行政區基本法
The Common Programme of the Chinese People's Political Consultation Conference	中國人民政治協商會議共同綱領
The Constitution of the People's Republic of China	中華人民共和國憲法
The Constitution of the Republic of China	中華民國憲法
The Ethnic Regional Autonomy Act 1984	中華人民共和國民族區域自治法
The Guidelines for National Unification	國家統一綱領

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The Hakka Basic Law	客家基本法
The Joint Announcement of the Supreme People's Court and the Supreme People's Procuratorate on Expiration of Prosecution against Taiwanese Residents for Crimes before the Establishment of the People's Republic of China	最高人民法院、最高人民检察院关于不再追诉去台人员在中华人民共和国成立前的犯罪行为的公告
The Joint Announcement of the Supreme People's Court and the Supreme People's Procuratorate on Expiration of Prosecution against Taiwanese Residents for Crimes before the Establishment of Local People's Government	最高人民法院、最高人民检察院关于不再追诉去台人员在中华人民共和国成立后当地人民政权建立前的犯罪行为的公告
The Joint Notice of the National Commission for Ethnic Affairs and Ministry for Public Security on Suspension of Change of Ethnic Status 1989.	国家民委、公安部关于暂停更改民族成份工作的通知
The Mainland and Hong Kong Closer Economic Partnership Arrangement	內地與香港關於建立更緊密經貿關係的安排
The Method for the HKSAR of the People's Republic of China to Elect Deputies to the Eleventh National People's Congress	中华人民共和国香港特别行政区 选举第十一届全国人民代表大会代表的办法

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The Method of Lama Appointment	喇嘛任用辦法
The Method of Lama Incarnation	喇嘛轉世辦法
The Method of Lama Registration	喇嘛登記辦法
The Method of Regulating the Process of Finding Tulkus of Tibetan Buddhism	藏传佛教活佛转世管理办法
The Method of Rewarding and Punishing Lama	喇嘛獎懲辦法
The Method to Promote the National Language	國語推行辦法
The National Commission for Ethnic Affairs Regulation for Ethnic Identification 1990	国家民族事务委员会关于中国公民确定民族成份的规定

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The Personnel Appointment Committee of the Judicial Yuan Rule for Personnel Appointment	司法院人事審議委員會審議規則
The PRC Criminal Act	中华人民共和国刑法
The PRC Election Act 2004	中华人民共和国选举法
The PRC Legislation Act 2000	中华人民共和国立法法
The PRC Local Government Act 1979	中华人民共和国地方各级人民代表大会和地方各级人民政府组织法
The PRC National Language and Character Act 2000	国家通用语言文字法
The PRC Protection Act for Investment of Taiwanese Residents 1994	中华人民共和国台湾同胞投资保护法

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The Procedure to Record and Review Administrative Regulation, Local People's Congress Regulation, Autonomous and Special Regulation of Ethnic Autonomous Region, and Regulation of Economic Special Zone.	行政法規、地方性法規、自治條例和單行條例、經濟特區法規備案審查工作程序
The Record of the Third Meeting of the Criminal Court of the Supreme Court	最高法院九十三年第三次刑事庭會議紀錄
The Referendum Act	公民投票法
The Regulation for Lama Monastery	管理喇嘛寺廟條例
The Immigration Act 1989	出入國及移民法
The Nationality Act 1929	國籍法
The Tibetan Legislation Regulation	西藏自治區立法條例

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The Tibetan Marriage Regulation	西藏自治区施行《中华人民共和国婚姻法》的变通条例
The University Act	大學法

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Chapter 1 Introduction

In the last 30 years the People's Republic of China (hereinafter PRC) has promulgated a series of parliamentary acts to accommodate the peripheral societies of Tibet, Hong Kong, and Taiwan. These acts include but are not limited to the Ethnic Regional Autonomy Act 1984,¹ the Basic Law of the Hong Kong Special Administrative Region (hereinafter Hong Kong Basic Law), and the Anti-Secession Act 2005,² which aims at a political reunification between the Chinese mainland and Taiwan. The PRC government's legislative agenda has been devised to constitutionalise the relationship between the PRC central government and these peripheral societies. This has naturally generated both positive and negative responses. Whereas after the 1997 sovereign handover, Hong Kong has been ostensibly stable and is arguably a successful case with respect to constitutional design, the PRC central government's relationship with Taiwanese and Tibetan communities has not been as good as that with Hong Kong. In 1984 and 2008, ethnic unrest in Lhasa exposed the fact that China's Tibet policy remains under challenge. The political tension across the Taiwan Strait intensified in 1996 and 2004, but has been alleviating since the alleged "China/Mainland-friendly" Chinese Nationalist Party, otherwise known as the Kuomintang (hereinafter KMT), returned as the majority party in the territorial legislature and seized the territorial administration with an overwhelming majority of votes in 2008.

In this context, there is an intellectual and practical need to ask: what are Chinese constitutional arrangements relating to Tibet, Hong Kong, and Taiwan? Are they just? Are they satisfactory? If not, are there possibilities of further constitutional reform? I will devote this thesis to provide some answers to these questions. In

¹ This Chinese parliamentary act is also translated as the "The People's Republic of China Regional Ethnic Autonomy Law".

² This Chinese parliamentary act is also translated as the "Anti-Secession Law".

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addressing these issues, this thesis contends that in light of the Chinese State's constitutional accommodation of, and integration with, the peripheral societies of Tibet, Hong Kong, and Taiwan,³ a re-conceptualisation of Chinese constitutional law is on the verge of maturity. Being informed by realistic liberal ideals, this re-conceptualisation would be probably conducive to establishing a constitutional order of peace and stability. Such an order would be embodied in an asymmetric legal structure in which multiple societies, as self-governing peoples, can sustain healthy constitutional relations and abstain from violent conflict.

To my best knowledge, this is the first academic attempt to build a legal conception upon Chinese constitutional arrangements to Tibet, Hong Kong, and Taiwan with a doctoral thesis in any language. The constitutionalisation of the relationships between the Chinese State and peripheral societies should have interested two academic traditions. These traditions have nevertheless so far both remained mostly silent. The discipline of Chinese Studies as an "area study" replaced classical Sinology in the West in the second half of the 20th century. This is because the establishment of the PRC motivated statespersons and scholars in the West to comprehend its new politics and economic growth.⁴ However, the base for Chinese

³ Tibet, Hong Kong, and Taiwan are "peripheral" societies in the sense that they are far from the conventional centre of the Chinese heartland, comprised of the North China Plain and Yangtze River Delta. However, the reverse perspective could also view China proper as the periphery of each said society. Indeed, this is an emerging Taiwanese worldview that circulates China, Japan, South Asian nations around Taiwan, making the Chinese mainland a periphery of Taiwan. For Tibetans, a 15th century Tibetan classic recorded that most Tibetans then regarded India as the centre of the known continent because Buddhism was born there. Nevertheless, some Tibetans still deemed Tibet to be the centre, as they observed that rivers all derive from the Tibetan Plateau. See STAG-TSHANG-RDZONG-PA-DPAL-VBYOR-BZANG-PO, *rgya-bod-kyi-yig-tshang-mkhas-pa-dgav-byed-chen-mo-vdzm-gling-gsal-bavi-me-long-zhes-bya-ba-bzhung-so*, pp. 11-12.

⁴ For a seminal review of the discipline of Chinese Studies in the West see COHEN, PAUL A., *Discovering History in China: American Historical Writing on the Recent Chinese Past* (Columbia University Press. 1984).

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Studies in the West lies with university social science departments, and Chinese constitutional law is not a field that Chinese Studies have cultivated enthusiastically. Moreover, the second academic tradition, comparative constitutional law, has not said much about China either. In the aftermath of Chinese “reform and opening” Chinese constitutional law has made several great leaps. The Constitution of the PRC of 1982 (hereinafter “1982 Constitution”),⁵ the 1999 constitutional amendment that adds a provision to promote the “rule of law”,⁶ and the 2004 constitutional provision promising “the State respects and protects human rights”⁷ all exemplify the dynamics of Chinese constitutional law. Western academics have gradually acknowledged these new characteristics of Chinese constitutional law.⁸ However, the constitutional relationship between the PRC central government and peripheral societies has not caught much attention.⁹

⁵ The 1982 Constitution.

⁶ The 1982 Constitution, art 5, s 1.

⁷ The 1982 Constitution, art 33, s 3.

⁸ MCCORMICK, BARRETT L., *Political Reform in Post-Mao China : Democracy and Bureaucracy in a Leninist State* (University of California Press. 1990). CHEN, HONGYI, *An Introduction to the Legal System of the People's Republic of China* (Butterworths Asia. 1992). LUBMAN, STANLEY B., *Bird in a Cage: Legal Reform in China after Mao* (Stanford University Press. 1999). TURNER-GOTTSCHANG, KAREN, et al., *The Limits of the Rule of Law in China* (University of Washington Press. 2000). ZOU, KEYUAN, *China's Legal Reform : towards the Rule of Law* (Martinus Nijhoff Publishers. 2006). LALIBERTÉ, ANDRÉ & LANTEIGNE, MARC, *The Chinese Party-State in the 21st Century : Adaptation and the Reinvention of Legitimacy* (Routledge. 2008). CLARKE, DONALD C., *China's Legal System: New Developments, New Challenges* (Cambridge University Press. 2008).

⁹ There are nevertheless a number of works dedicated to studying Hong Kong's constitutional law: see C. DAVIS, MICHAEL, *Constitutional Confrontation in Hong Kong* (St. Martin's Press. 1990). WESLEY-SMITH, PETER, *An Introduction to the Hong Kong Legal System* (1998). GHAI, YASH P., *Hong Kong's New Constitutional Order: the Resumption of Chinese Sovereignty and the Basic*

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How the Chinese State's constitutional progress relates to the peripheral societies of Tibet, Hong Kong, and Taiwan has been neglected for three reasons at least. First, it remains an ongoing academic argument that a constitutional structure should recognise and accommodate multiple societies with territorial self-governance. Stephen Tierney indicates: "these societies position themselves in a relational way to the state not as internal 'minorities', but rather as polities which are in fact comparable to the state in the way they offer, or have the potential to offer, an effective site for many if not all of those functional and indentificatory roles which the state plays in the life of the citizens".¹⁰ Although "one index of regional authority in 42 mainly Organization for Economic Co-operation and Development (OECD) states makes clear, between 1970 and 2005 only two states became more centralized while almost three-quarters saw regional powers increase",¹¹ a new conceptualisation based on this phenomenon is no substitute for traditional analytical frameworks unless pluralised constitutional structures neither re-centralise nor disaggregate to a number of new constitutional units of societal singularity. The ongoing uncertainty reminds us the famous sentence of Hegel: "the owl of Minerva spreads its wings only with the falling of the dusk". So it could be risky to overconfidently advocate a fledgling – an idea or a concept or a theory based on currently emerging factors – to fly in the dawn.

Secondly, the inherited geographic partition of academic traditions also impeded China's peripheral societies being depicted on one piece of map. Tibet, as a

Law (Hong Kong University Press 2nd ed. 1999). FU, HUALING, et al., *Interpreting Hong Kong's Basic Law: the struggle for coherence* (Palgrave Macmillan. 2007).

¹⁰ TIERNEY, STEPHEN, *Constitutional Law and National Plualism* (Oxford University Press 2004), pp. 4-5.

¹¹ MARKS, G & HOUGH, L, *Regional Authority in 42 Countries, 1950–2006: a Measure and Five Hypotheses*, *Regional and Federal Studies* 111-307, (2008). Cited from HENDERSON, AILSA, *Why Regions Matter: Sub-state Polities in Comparative Perspective*, *20 Regional & Federal Studies* 439, (2010).

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Himalayan region, has been for long studied as part of South Asia in the West, and this is probably because the region was “discovered” by Great Britain, the only Western state having substantial contact with pre-communist Tibet, from British India.¹² It is still a new endeavour to put Tibet and ethnic “Chinese” societies (the Chinese mainland, Hong Kong, and Taiwan) in one mosaic,¹³ but this academic drift is inevitable since these societies are now legally and politically connected by the presence of the PRC central government.

Thirdly and probably most importantly, traditional preconceptions and prejudices of liberal constitutionalism are the major obstacle to theorise the Chinese constitutionalisation of the relationship between the PRC central government and the peripheral societies. It is the liberal hypothesis that non-liberal regimes, such as the PRC, are not genuinely implementing constitutional law. Many liberals would rebuke the Soviet-style PRC Constitution for being full of political declarations but of no effectiveness and efficiency in the real world. In the Chinese mainland the PRC Constitution indeed shall not be cited in adjudication, and in this sense no constitutional jurisdiction exists. Hence previous generations of scholarship found little necessity in studying the PRC’s constitutional law.

Yet the sovereign handover of Hong Kong in 1997 has compelled the PRC central government to put Chinese constitutional law into practice, at least in a part of China’s territory. Since the second half of the 19th century Hong Kong has adopted and adapted British constitutionalism successfully, and the continuity of Hong

¹² An interesting story of the first British expedition to Tibet see TELTSCHER, KATE, *The High Road to China: George Bogle, the Panchen Lama and the First British Expedition to Tibet* (Bloomsbury. 2006). The British-Tibetan contact in the 19th century see ALLEN, CHARLES & YOUNGHUSBAND, FRANCIS EDWARD, *Duel in the Snows: the True Story of the Younghusband Mission to Lhasa* (John Murray. 2004).

¹³ TUTTLE, GRAY, *Tibetan Buddhists in the Making of Modern China* (Columbia University Press. 2005).

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Kong's legal system is a condition of the handover committed by the PRC government to the United Kingdom. Since 1997 the Hong Kong Basic Law has provided the constitutional mechanisms for the PRC government to deal with Hong Kong affairs, and judicial courts in Hong Kong have also cited the PRC Constitution in judgements several times. In this sense, Chinese constitutional law has already been activated in constitutional jurisdiction. Secondly, comparative constitutional scholarship has already recognised a plurality of substate societies may co-exist in one constitutional structure, and several liberal democracies' experience demonstrate a series of constitutional arrangements can be made for that.¹⁴ Non-liberal regimes may not replicate the liberal model completely, but the similarities and dissimilarities between liberal and non-liberal regimes in accommodating substate societies are certainly of interest for those trying to draw a bigger picture. Thirdly, no matter what hypothesis is taken for granted ideologically, a politically stable and economically prosperous state of affairs is a shared ideal for most individuals and societies. Kantian liberals reckon that a reasonable legal institution can be the basis for the perpetual peace of humanity,¹⁵ while Marxists also attach importance to law as a part of the "superstructure" that facilitates the development of "economic basis". So being liberal or otherwise, constitutional theory could give a hand to build a consensus towards a more peaceful future for both the struggling societies and the host state.

Here a new conceptualisation of Chinese constitutional law, mapping the peripheral societies of Tibet, Hong Kong, and Taiwan as a whole, is expected to achieve two goals. First, it shall describe the concrete constitutional arrangements that the Chinese State has devised for each and every peripheral society, and forensically explain how Chinese constitutional law has evolved to a structure that assembles a plurality of societies practically or nominally. In fact, the asymmetry of

¹⁴ TIERNEY, *Constitutional Law and National Pluralism*.

¹⁵ KANT, IMMANUEL, *Perpetual Peace* (U.S. Library Association. 1932).

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constitutional status among Tibet, Hong Kong, and Taiwan has in some measure defied the traditional constitutional dichotomy of unitary/federal state. In liberal democracies “union state”¹⁶ and other terms are used to attend similar phenomena.¹⁷ The PRC theoretically remains “unitary”, but Hong Kong’s new constitutional status has in almost all respects undermined traditional terms’ currency. Secondly, the new conceptualisation, to be a good one, should help to anticipate, or hopefully predict, future developments of the constitutional relationship between the PRC central government and the peripheral societies in line with it. For this, the conceptualisation shall promote a normative prescription. On the one hand, constitutional law as the “basic law” is expected to declare a list of values and principles endured by the state and the society. In this context a truly viable and vivid constitutional order must be able to coordinate the ideological differences among the peripheral societies and the Chinese mainland. On the other hand, a normative prescription is vital because a prospective perspective is needed. This thesis endorses an attitude of “realistic idealism”, which derives from John Rawls’s idea of “realistic utopia” in his *The Law of Peoples*.¹⁸ It quintessentially means that

¹⁶ The term “union state” see WALKER, NEIL, Final Appellate Jurisdiction in the Scottish Legal System, (Scottish Government. 2010), pp. 13-15.

¹⁷ Many have constitutionally examined these phenomena. A comprehensive account see TIERNEY, Constitutional Law and National Pluralism. For devolution in United Kingdom see Alan J. Ward, *Devolution: Labour’s Strange Constitutional ‘Design’*, in JOWELL, JEFFREY L. & OLIVER, DAWN, *The Changing Constitution* (Oxford University Press 4th ed. 2000), pp. 111-136. OLIVER, DAWN, *Constitutional Reform in the United Kingdom* (Oxford University Press. 2003), chapters 13-15. TURPIN, COLIN & TOMKINS, ADAM, *British Government and the Constitution* (Cambridge University Press 6th ed. 2007), chapter 4. HIMSWORTH, CHRIS & O’NEILL, C. M., *Scotland’s Constitution: Law and Practice* (Tottel Print on demand ed. 2006). For Canadian “asymmetrical federation” see Ferran Requejo, *Political Liberalism in Multinational States*, in GAGNON, ALAIN & TULLY, JAMES, *Multinational Democracies* (Cambridge University Press. 2001), pp. 113-130.

¹⁸ RAWLS, JOHN, *The Law of Peoples: with, The Idea of Public Reason Revisited* (2001), pp. 11-22. BEITZ, CHARLES, *Rawls’s Law of Peoples*, 110 *Ethics*, (2000) 669 at 677.

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theoretical reconstruction must reconcile with political and social conditions, but we should bear in mind that political and social institutions are artificial and changeable to a greater or lesser extent. As Rawls says, we are entitled to envision a social world as best as we can, which is feasible and might actually exist at some future time under happier circumstances.¹⁹

This thesis is organised into two parts. The first part contains three chapters, including this one, which addresses the political and normative foundations of the new conception. The second part then goes to the details of the PRC central government's constitutional arrangements. In the following sections, this chapter will use an Olympic story to provide the reader a first sight of the relationship between the PRC central government and the peripheral societies and then render a critical review to past scholarship of Chinese Legal Studies in English. In a half-century quest to comprehend Chinese law, scholars have divided between liberal and progressive groups roughly reflecting the right/left political tendency. Confronting media stereotypes, ideological prepositions, and political interests, it is necessary and inevitable indeed to clarify where is my start point and how this thesis is different from opinions of non-academic writers and senior scholars in the past. In fact the reason why past assessments of Chinese constitutional law are lacking is that senior scholars have been overlooking the role of peripheral societies in shaping Chinese constitutional law. Section 1.4 will emphasise the importance of studying Chinese peripheral societies, as to manage the relationship between the PRC central government and the peripheral societies of Tibet, Hong Kong, and Taiwan is an indispensable function of Chinese constitutional law. I will try to be objective in terms of expression, and for this a clarification of definition is needed.

¹⁹ RAWLS, *The Law of Peoples: with, The Idea of Public Reason Revisited*, p. 12.

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Issues of definition

The English word “China” targets different identities. In influential English media “China” equates to the Chinese mainland, or territory under the PRC government’s political control. Yet the Mandarin word “*zhongguo*” (literally, the middle kingdom) refers to a vaster land, which consists of both China proper and the peripheral territories of Tibet, Hong Kong, and Taiwan.²⁰ The Tibetan letter “*bod*” (literally, Tibet) is the self-expression of Tibetans, which differs from the PRC’s Tibet Autonomous Region (hereinafter TAR) – “*bod rang skyong ljongs*”. The 10th Panchen Lama once said he is a “*bod mi*” but not a “*bod pa*”, because he, as an ethnic Tibetan figure, was not born in the TAR. Tibetans used “*rgya*” (literally, great) to denote the Han Chinese, which word also refers to the Hindus. In history Han Chinese were called “*rgya nag*” (literally, the great people in black) while Hindus were “*rgya gar*” (literally, the great people in white). In Tibetan eyes Han Chinese residents in Hong Kong and Taiwan are all “*rgya*”. But if we link “China” with “*rgya*”, it matches neither meaning of “*zhongguo*”. After the 1950s takeover, however, a new Tibetan word “*krung ko*” that is the transliteration of “*zhongguo*” becomes popular. In the past both Tibet and China proper are “*rgyal kha*” (literally, kingdom), but now “*rgyal kha*” only refers to the PRC that is the host state for most ethnic Tibetans.²¹

If we follow the English usage of “China” unconditionally, it is unavoidable to misinterpret or mislead somewhere and also to offend someone. Many pro-independence Taiwanese always insist on that they are neither from “China”, nor “Chinese” even in ethnic terms. For a number of exile Tibetans, “China” is the

²⁰ In Taiwan, the Mandarin word may refer to an area that excludes Taiwanese isles.

²¹ WANG, JIAWEI & NIMAJIANZAN, *The Historical Status of China's Tibet* (China Intercontinental Press 2nd ed. 2008), chapter 1. SCHWARTZ, RONALD D., *Circle of Protest: Political Ritual in the Tibetan Uprising* (Hurst. 1994), p. 220. DAWA, NORBU, *China's Tibet Policy* (Curzon. 2001), p. 381.

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monstrous force that is repressing their homeland; it is incredibly difficult to ask them to accept China as their host state, which in legal terms, is usually not indeed.²² But standing in the shoes of Chinese officials, the concatenation of “China and Taiwan” or “China and Tibet” is unacceptable either. Some suggest “the Great Chinese Economic Zone” or “*liang’an sidi*” (literally, four territories on two sides of the Taiwan Strait) is something proper for short, which would comfort the critics since the names have little political implication. However, these economic or geographic labels evidently could not highlight Tibet’s prominence in subsequent comparison.

An expression from linguistic studies probably inspires: in the past people believed the Sino-Tibetan languages should be categorised into one Chinese branch of all Chinese dialects and another of all non-Chinese languages. Yet new research suggests some non-Chinese languages are more close to a plurality of Chinese language-s than to other non-Chinese ones, so there should be a *Sinitic* branch instead of the *Chinese* one. The de-politicised word “Sinitic” here refers to the historical and cultural region that includes not merely China proper but also Tibet, Hong Kong, and Taiwan. Although not perfect, in this thesis it is used whenever possible.

The word “people”, which is to be employed to define the peripheral societies of Tibet, Hong Kong, and Taiwan in following chapters, is another controversy. In the West, pluralised constitutional structures can exist at sub-*national*, supra-*national*, and trans-*national* levels. But the word “nation” is hardly applicable to our territories because Hongkongers’ identity never meets this definition. In the Chinese context, an inspiring Chinese diction is “*tongbao*,” or “*bao*”. Hong Kong’s Chinese residents and Taiwanese are respectively referred as “*xianggang tongbao*” (literally,

²² For most Tibetan refugees, India is their major “host state”. HESS, JULIA MEREDITH, *Immigrant Ambassadors: Citizenship and Belonging in the Tibetan Diaspora* (Stanford University Press, 2009).

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Hong Kong compatriots) and “*taiwan tongbao*” (literally, Taiwan compatriots) by the PRC government in Mandarin. The Taiwanese authorities used “*dalu tongbao*” (literally, mainland compatriots) to address Chinese mainlanders too before the democratisation. In fact the character “*bao*” implies a fraternal bond. In each and every Chinese presidential New Year message, the PRC president always begins with greetings to “people of all nationalities around the country”,²³ “compatriots in the special administrative region of Hong Kong”, and “Taiwan compatriots”. Although the PRC government in ordinary situation does not need to opt for any single ethnic group from “people of all nationalities from around the country”, there is an exception for the Tibetans. Referring to overseas Tibetans, the Chinese characters “*zang bao*” (literally, Tibetan compatriots) appear in governmental statements; the website of the Tibetan branch of the Communist Party of China’s United Front Work Department sets up a column entitled “*guowai zang bao*” (literally, overseas Tibetan compatriots) too. The character “*bao*” shapes the Chinese understanding of a plurality of Sinitic “societies”; and it is better than other terms such as “*guojia*” (literally, state), “*minzu*” (literally, nation/nationality/ethnic group), “*difang*” (territory/locality), and “*diqu* (region)” to address the peripheral societies of Tibet, Hong Kong, and Taiwan.

The last one to be clarified here is “constitutional law”. Since Great Britain is the birthplace of modern constitutionalism, the English usage and understanding of “constitutional law” has decisively influenced other nations’ adoption of the term. But because there is a codified “Constitution” in China and most countries around the world, it is not redundant to say in this context “constitutional law” refers to a series of laws that constitute the relationship between the state and the societies as well as that among various authorities of the territorial societies.

The *pinyin* system is used in this thesis to Romanise Chinese characters and the Wylie system to Tibetan letters except for a few names of people or places because

²³ The word of “nationality” roughly refers to ethnic group here.

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readers may be familiar with them in other forms. Hong Kong statutes will retain their official English titles. The English titles of Taiwanese statutes are adopted from the official translations of the Taiwanese authorities. The Taiwanese authorities use “act” to name their statutes, and it is how the English-speaking nations give a title to a parliamentary legislation. But the PRC government uses “law” in English titles of statutes. In this thesis I try to apply a consistent style in translating all the statutes and legislative documentations, so some names of PRC statutes will be different to the official translation of the PRC government. The table of English/Chinese equivalents has listed all important statutes and documentations to be referred. Non-English names of the legal texts may be easily found in that table.

1.1 CASE STUDIES

On 8 August, at 8.08 pm (GMT+8) in the Beijing National Stadium (colloquially known as the “Bird’s Nest”) the 2008 Summer Olympics was spectacularly opened after a controversial torch relay around the globe. On 14 March 2008 in Lhasa, the provincial capital of China’s Tibet Autonomous Region (TAR), ethnic unrest erupted without any forecast. 18 people died, 58 were severely injured. Most recognised victims were Han Chinese, the majority ethnic group in China but a minority in Tibet. But the number of Tibetans arrested later is unbeknown to the public. The PRC central government accused emigrated Tibetan communities²⁴ had manipulated behind the turbulence thus violated their promise that they would not challenge the PRC central government’s prestige in preparing a peaceful Olympics

²⁴ Since the Chinese communists took over Tibet, tens of thousands ethnic Tibetans crossed Sino-Nepalese/Indian boundaries without legitimate passports or visas. These Tibetans have established settlements in India and few immigration communities in the West. It would be not appropriate to label all of them “exile Tibetans” due to a variety of identities and political attachments. The term “emigrated Tibetans” may hopefully avoid that confusion. See SAUTMAN, B, *Is Tibet China's Colony: The Claim of Demographic Catastrophe*, 15 Columbia Journal of Asian Law 81, (2001); SAUTMAN, B, *Cultural genocide and Tibet*, 38 Tex. Int'l LJ 173, (2003).

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to fulfil the Chinese people's centurial dream of national resurgence. The spiritual and political head of Tibetans in exile, the 14th Dalai Lama insists he had nothing related by way of remote "manipulation", and remained supportive for a successful Olympics to be hosted by the Chinese people.²⁵ The number of civilian deaths stimulated a national anger in China towards "Tibetan separatists"; on the other side, the Lhasa scene also catalysed Tibetan sympathisers to recall that "Tibet" remains a victim of Chinese communists. Western activists to "free Tibet" then were mobilised to stem the Olympics torch on its way to Beijing, while overseas Chinese also came to streets, to escort the torch.²⁶

The torch arrived and left Hong Kong, the 11-year-old special administrative region of the PRC, with scarcely any public humiliation as in the liberal world. However, Taiwan is another case. Taiwan had refused the torch before the relay because the PRC proposed a route from Ho Chi Minh city via Taipei to Hong Kong, but the Taiwanese authorities persisted in the demand that the torch must both arrive from and depart to cities in a third country. In accordance with precedents, Taiwan may not display its governmental symbols in Olympic events because its flag, emblem, and song are inherited from the Republic of China (ROC) that was the "ancient regime" in Chinese communist eyes and would cause an inappropriate impression of there being "two China-s" or "one China, one Taiwan". Indeed this is the very reason that the Taiwanese authorities could not embrace the torch: to accept the Taipei-Hong Kong-Macau route would mean to kowtow before the world to the PRC. Since 2000 Mr Chen Shui-bian, a Democratic Progressive Party (DPP) member standing for Taiwanese de jure independence from the Chinese mainland, had held the Taiwanese presidency. Mr Chen and his comrades including the DPP presidential candidate in 2008, Mr Frank Hsieh Chang-ting disseminated that Tibet's past can be Taiwan's future, and the DPP is the only "indigenous" political

²⁵ NORMAN, ALEXANDER, *I Can't Wait to Be a Chinese Citizen*, The Sunday Times 18 May 2008.

²⁶ *Tibet and the Beijing Olympics*, The Economist 27 Mar 2008.

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party on which the Taiwanese may rely to resist both the Olympic torch and the Chinese communists.

The Chinese National Party or the Kuomintang (KMT), as the founder of the Republic of China, officially disregards the necessity of a declaration of Taiwanese independence. However, the KMT presidential candidate Mr Ma Ying-jeou shouted even louder than Mr Hsieh in impugning the PRC's Tibet policy and threatened to withdraw the Taiwanese team from Beijing Olympics if the PRC government could not improve. By criticising the Chinese communist leadership, Mr Ma proved he is not a communist puppet and will not be. But other KMT patriarchs might have different positions. The honorary KMT chairman Mr Lien Chan, then KMT chairman Mr Wu Po-hsiung, and the ex-chairman of Taiwan province²⁷ Mr James Soong Chu-yu all showed up in VIP seats in the opening ceremony of the Beijing Olympics. It is observed that the former Chief Executive of the Hong Kong Special Administrative Region (HKSAR), Mr Tung Chee-Hwa and his successor also had those seats.

It might be already sensed that the three cases are important in the Chinese context, while the importance of these three territories can also be seen in comparison with two other territories: Macau and Xinjiang. The relationship between the Chinese mainland and the peripheries cannot be explained with an enduring leftist centre-periphery paradigm, which is the centre continues to exploit and marginalise the peripheries in both international and national levels.²⁸ Although the Chinese

²⁷ The "Republic of China" in Taiwan nominally controls two provinces – Taiwan and Fujian. But the Taiwanese authorities have de-functioned the two provincial governments and make the "central government" responsive and responsible directly. Mr James Soong Chu-yu thus is the last provincial head elected by the Taiwanese residents, who is also the last one that had executed major administrative powers in the name of Taiwan province.

²⁸ WALLERSTEIN, IMMANUEL MAURICE, *World-Systems Analysis: an Introduction* (Duke University Press. 2004). The centre-periphery asymmetry within a state, see HECHTER, MICHAEL, *Internal*

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mainland as an economy has been emerging in recent years, Hong Kong and Taiwanese residents are capitalist investors rather than employees. Taiwan ranks around the twenty-fourth largest in the gross domestic product (GDP) in comparison with major world economies between Saudi Arabia and Norway, while Hong Kong exceeds Egypt that is around the fortieth one. However, in that comparison Macau falls below Panama. Xinjiang Uygur Autonomous Region in the PRC, as another autonomous region designed for an ethnic minority, may rank similarly to Libya that is around the sixty-third largest economy. However, counting the PRC's Uygur autonomous prefectures and counties, the "Uygur economy", if at all, also performs badly. Hardly can anyone deny that in regard to its economy Tibet remains grievously backward. But Tibet's enchantment has been rooted in its underdevelopment, and it never needs GDP numbers to raise visibility so long as there is the charismatic Dalai Lama. Moreover, in Xinjiang the Uygurs is only a half of the population, but in the Tibetan areas in the PRC the Tibetans are over 90% in demographic composition, which is another feature the Uygur case cannot compete with.²⁹ The Uygur dissidents in the Chinese mainland in a sense are genuinely "separatists" because they insist in creating an independent country for their own, thus no "constitutional arrangements" of the PRC are needed anymore.³⁰ On the contrary, the 14th Dalai Lama and emigrated Tibetans have made, or at least have been trying to make more compromises within the PRC constitutional framework.

1.2 CHINESE LEGAL STUDIES IN ENGLISH

The following section will provide a review of past literature of Chinese Legal Studies in English, upon which this thesis is built. Although these academic pieces

Colonialism: the Celtic Fringe in British National Development, 1536-1966 (Routledge and Kegan Paul. 1975).

²⁹ GHAI, *Autonomy and Ethnicity : Negotiating Competing Claims in Multi-ethnic States*, pp 79-90.

³⁰ The ethnic unrest in Xinjiang on 5 July 2009 killed more than a hundred Han Chinese civilians including a large number of women and children.

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were written in English and their readership generally is Western scholars and students, the correspondence between them and China's legal developments is manifest. The academic interest in the West in a way had been stimulated by what the Chinese State already had or recently manufactured. This thesis follows this pattern too. If there is no new constitutional agenda in accommodating the peripheral societies of Tibet, Hong Kong, and Taiwan coming forth, it is unlikely that any sort of new conceptualisation of the PRC's constitutional arrangements to the territories could be invented by theory.

Under the impression that the PRC government regards law merely as an instrument to consolidate its regime rather than subordinating the regime to law,³¹ Western liberals' perspective on Chinese law has been to a large degree negative and pessimistic. On the other side of the coin, non/anti-liberal scholars are fascinated by China's "otherness" to Western liberal democracy, envisioning that China might find an alternative way. In light of the relationship between the PRC and the peripheral societies of Tibet, Hong Kong, and Taiwan, liberals easily go to the conclusion that without a regime change in the Chinese mainland, the only way to construe the moral right of self-determination of the peripheral societies is that they shall become independent from the one party-state.³² The PRC officials nevertheless

³¹ LI, JIEFEN, *The Rule of Law or Rule by Law?: Legal Reform versus the Power of the Party-State in the People's Republic of China: 1978-2002*, Edinburgh University Doctoral Thesis (2005). In explaining the PRC government's attitude toward law, Li distinguishes "rule of law" and "rule by law", and the latter means the regime uses legal rule to regulate the society, and sometimes the institutions of the state, but never scrutinises its reign.

³² SLOANE, R., *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 *Emory International Law Review* 107, (2002). BROUDER, ALAN, *Self-determination for Tibet: Prospects in International Law*, 5 *Trinity College Law Review* 172, (2002). EDWARDS, GEORGE E, *Applicability of the "One Country, Two Systems" Hong Kong Model to Taiwan*, 32 *New England Law Review* 751, (1998). CHEN, L & REISMAN, W. M., *Who owns Taiwan: A search for international title*, 81 *Yale Law Journal* 599, (1971). HUANG, ERIC TING-LUN, *Taiwan's Status in A Changing World: United Nations Representation and Membership for Taiwan*, 9 *Annual Survey*

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defend their policies by referring to the non/anti-liberal theories despite few in the West wholeheartedly endorsing the PRC government's rhetoric. This thesis won't choose either side. The liberals have very limited options in their hands and thus are not ready to accept the PRC government may accommodate the peripheries constitutionally, while the other side does not convince a plurality of Western academia that there is already a perfect solution of "Chineseness" to the problems either.

1.2.1 Oversimplified images of China and Tibet

In 1812 Sir George Thomas Staunton for the first time translated the Great Qing Code as "the penal code of China" to English,³³ which is a precursor in the West to address post-1500s Chinese laws.³⁴ Once in the 18th century European continent, Chinese laws were highly estimated based on the encounter experience and mutual appreciation between continental Jesuits and Chinese mandarins.³⁵ In Voltaire's

of International and Comparative Law 55, (2003). HSIEH, P, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 26 Michigan Journal of International Law 765, (2007).

³³ CHINA. & STAUNTON, GEORGE THOMAS, Ta Tsing Leu Lee; Being the Fundamental Laws, and a Selection from the Supplementary Statutes, of the Penal Code of China ([s.n.]. 1810).

³⁴ I hesitate in using the word "modern" to describe the "post-1500s" China. This period of time comprises roughly regimes of Chinese Ming Dynasty (1368-1644), Qing Dynasty (1644-1911), Republic of China (1912-1949), and the People's Republic of China (1949-present). In the Chinese mainland historians typically start their "modern" chapters from 1840 when the late Qing government lost the first Opium War and conceded Hong Kong to the United Kingdom. Many in the West, needless to say, may not agree. It is helpful to point out that pre-1500s and post-1500s Chinese laws magnetise very different interest in academia: the former entreats the "wisdom" and "system of beliefs" of the ancient Chinese civilisation yet scarcely affects contemporaries; the latter, on the other hand, more or less remains relevant to Chinese laws in our time. Few cut across the two scholar groups, and I will focus on the latter.

³⁵ ROWBOTHAM, ARNOLD HORREX, *Missionary and Mandarin: the Jesuits at the Court of China* (University of California press. 1942).

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imagination, China is a Confucian utopia of more rationality and reasonableness than Europe. Yet the “High Qing” era³⁶ had gone in the 19th century when newly industrialised Britain met China. At this time English academia found “like India and other Asian nations, China was a long way from being the advanced civilisation the Jesuits had described,” the more appropriate image of Chinese laws was “though the principles of law might have been formed in accordance with Chinese culture, they inevitably led to despotism and corruption and therefore could not simply be accepted as a cultural expression of the Chinese.”³⁷ Since then the “cannibalistic” dystopia image of China and its laws has dominated English press and mass media. It should be admitted that contemporary Chinese nationalist pride cannot conceal despotism, corruption, arbitrariness, and torture are a large proportion of Chinese administrative and legal institution; however, this negative image of Chinese laws also plays a deliberate or accidental role in placing China in an evolutionist hierarchy of cultures and civilisations: at the bottom are “barbarians”; at the top are “industrial and commercial Europeans”; Asian empires rest in-between as semi-civilisations contaminated by imperfect principles and praxis.

³⁶ The “High Qing” era, see WAKEMAN, FREDERIC, *High Ch'ing, 1683-1839, in Modern East Asia: Essays in Interpretation*, (James B. Crowley ed., 1970), pp. 1-28.

³⁷ HILLEMANN, ULRIKE, *Asian Empire and British Knowledge : China and the Networks of British Imperial Expansion* (Palgrave Macmillan. 2009), p. 167. This historical account tells how Britain built up her knowledge of Asian empires, especially China, during imperial expansion in the 19th century.

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Table 1 The Oversimplified Images of China and Tibet

	Utopia	Dystopia
China	The Confucian Civilisation	Despotism, Corruption
Tibet	The Buddhist Civilisation, “Shangri-la”	Lamaist theocracy, Serfdom

Interestingly, in English literature the image of Tibet differs from China’s. The Lamaist and “savage” Tibet spotted by the East India Company explorers later became the “Shangri-la”, which is the “lost horizon” of the industrial world.³⁸ Hollywood also helped to virtualise a Tibetan utopia in a series of films, especially the “Seven Years in Tibet” (1997) in which Brad Pitt acts as a friend of the young Dalai Lama.³⁹ Rebecca Redwood French’s research on Tibetan customary laws also mirrors that image.⁴⁰ The isolated but harmonious society was organised by compassionate Buddhists until invaders, say, Britons and Chinese communists, destroyed that. The Chinese literature on Tibet, however, goes to the other direction. Some Chinese writers were also fascinated by Tibet as well as Sino-Tibetan consanguinity, and use “Tibetan Buddhism” instead of “Lamaism” to imply Tibetan culture is part of East Asian Buddhist tradition that has been adopted and adapted by

³⁸ LOPEZ, DONALD S., *Prisoners of Shangri-La: Tibetan Buddhism and the West* (University of Chicago Press Pbk. ed. 1999). DODIN, THIERRY & RÄTHER, HEINZ, *Imagining Tibet: Perceptions, Projections, and Fantasies* (Wisdom Publications. 1996).

³⁹ SCHELL, ORVILLE, *Virtual Tibet : Searching for Shangri-la from the Himalayas to Hollywood* (Metropolitan Books. 2000).

⁴⁰ FRENCH, REBECCA REDWOOD, *The Golden Yoke: the Legal Cosmology of Buddhist Tibet* (Cornell University Press. 1995).

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Han Chinese for centuries.⁴¹ But another trend in Chinese literature is to stereotype the mystic elements of Tibetan Buddhism: weird rituals, creepy cremation, and serfdom. Just as the Orientalist did to China, the “Tibetan dystopia” also placed Tibetan society in a lower degree in the hierarchy of cultures and civilisations and thus tried to justify Chinese communist “emancipation” of Tibetan serfs.⁴²

However, in common sense it is hardly true that millions of Buddhist serfs all lived an idyllic life in theological Tibet, neither is the story that Chinese communists “emancipated” Tibetans only for the latter’s good. Broadly speaking, each and every human society has both advantages and disadvantages of its own, neither utopia nor dystopia exists in the real world. We do hope to set up a consistent thus “universal” criteria in reflecting and evaluating the justness of political institutions, which may help to explain why normative ideals are needed; on the other hand, scientifically and scholarly contested facts are also crucial in a context where literatures are full of utopian or dystopian fantasies serving the interests of ideological and political causes. (See Table 1)

1.2.2 Liberal and progressive perceptions of Chinese laws

In fact few in the Anglo-American world had taken Chinese Legal Studies as an academic career until the 1960s-70s. Derk Bodde as a sinologist and Clarence Morris as a legal scholar published one of the major works in this field in 1967 after six years of teaching ancient Chinese laws in the Pennsylvania Law School.⁴³ Kung-

⁴¹ The process in which “Lamaism” became “Tibetan Buddhism” in Chinese discourse, see TUTTLE, GRAY, *Tibetan Buddhists in the Making of Modern China* (2007).

⁴² POWERS, JOHN, *History as Propaganda: Tibetan Exiles versus the People's Republic of China* (Oxford University Press. 2004).

⁴³ BODDE, DERK, et al., *Law in Imperial China* (University of Pennsylvania Press 1st Pennsylvania pbk. ed. 1973).

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chuan Hsiao's exhaustive study of the imperial control in rural China⁴⁴ and T'ung-tsu Ch'u's classic⁴⁵ are both written in English by Chinese scholars. They established the dominant understanding of imperial Chinese laws: they are administrative and penal regulations "Confucianised" both in principle and praxis. However, in Confucius's land observers also saw a Soviet transplant having grown up in the 1960s.⁴⁶ Directed by Marx-Leninist ideology, Chinese communists blended law and politics to a new degree that continued the Chinese legal sector's subordination to politics, which definitely failed a universal standard of "rule of law".

The liberal, in a broad sense, perception of Chinese laws had been summarised by Randall Peerenboom:⁴⁷

The biggest obstacles to a law-based system in China are institutional and systemic in nature: a legislative system in disarray; a weak judiciary; poorly trained judges and lawyers; a low level of legal consciousness; a weak administrative law regime; the lack of a robust civil society; the enduring influence of paternalistic traditions and a culture of deference to government authority; rampant corruption; large regional variations; and the fallout from the unfinished transition from a centrally planned

⁴⁴ HSIAO, KUNG CHUAN, *Rural China: Imperial Control in the Nineteenth Century* (University of Washington Press. 1967).

⁴⁵ QU, TONGZU, *Law and Society in Traditional China* (Mouton. 1961).

⁴⁶ The Soviet source of Chinese law has been discussed by many authors in COHEN, JEROME ALAN & BERMAN, HAROLD JOSEPH, *Contemporary Chinese law: Research Problems and Perspectives* (Harvard University Press. 1970).

⁴⁷ PEERENBOOM, R. P., *China's Long March toward Rule of Law* (Cambridge University Press. 2002), p. 72. Peerenboom himself does not belong to the "liberal" circle of Chinese legal studies, but he shares with liberals this perception, which is a ground for considering further improvements.

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economy to a market economy, which has exacerbated central-local tensions and resulted in the fragmentation of authority.⁴⁸

The liberal perception connects Chinese laws with a linear view of world history towards a universal end, modernised as well as westernised. Despite not entirely echoing the hierarchy of cultures and civilisations, the liberal perception still describes Chinese law as a system of malformation, especially in administrative and criminal branches that trail behind the international expectation to improve human rights protection.⁴⁹

The re-appraisal of Chinese law has been shepherded by Philip Huang since the 1990s. In disputing Max Weber's four ideal-types of "substantial irrational, formal irrational, substantial rational, and formal rational law" that contestably categorised Chinese law as one of the "substantial irrational" legal systems implying neither a legal profession nor legal reasoning existed, Philip Huang's work based on newly found legal cases demonstrates that in imperial and modern Chinese institutions, relatively independent "civil justice" in dealing with property, contract, marriage, and torts still survives. The supreme political authority – the Crown or the Party – may represent the substantial and irrational face of Chinese law, however, a giant mandarin bureaucracy forges another formal and rational face of the Janus. Hence

⁴⁸ This is the lasting theme of Chinese Legal Studies in the Anglo-American world, see LUBMAN, Bird in a Cage : Legal Reform in China after Mao. See also COHEN, JEROME ALAN & HSU, C. STEPHEN, Understanding China's Legal System: Essays in Honor of Jerome A. Cohen (New York University. 2003). POTTER, PITMAN B., From Leninist Discipline to Socialist Legalism: Peng Zhen on Law and Political Authority in the PRC (Stanford University Press. 2003). DIAMANT, NEIL JEFFREY, et al., Engaging the Law in China: State, Society, and Possibilities for Justice (Stanford University Press. 2005). ZOU, China's Legal Reform : towards the Rule of Law. CLARKE, China's Legal System: New Developments, New Challenges.

⁴⁹ POTTER, PITMAN B, The Chinese Legal System: Globalization and Local Legal Culture (Routledge. 2001).

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the Chinese legal system is more fitting for the ideal type of “substantial rational law”, which even involves the common law system in Weberian eyes.⁵⁰

Philip Huang encapsulates his academic thoughts as:

Coming from a long and complex historical tradition, China defies any simple constructions of "irrational," "traditional," or "pre-modern," juxtaposed against modern Western civilization. Coming from a semi-colonial past of subjugation, it defies any simple equation with the West, which was the dominator and not the dominated. With a modern revolutionary tradition powered by an alternative socialist vision, it cannot be simply boxed into a capitalist and liberal-democratic Western model. "Transitioning" from a socialist past and not from a simple "pre-industrial" society into the market economy of the present, it cannot be understood simply by theories of market-driven capitalist development. It is, in short, a past and a present of great and continuing paradoxes from the point of view of Western theoretical expectations. Properly studied and conceptualized, Chinese experience/practice can form the basis for unique contributions to human knowledge.⁵¹

Philip Huang concludes if we look into the praxis of Chinese law, many provisions and procedures are for the weaker party in litigation against the elites or the state; hence we can preposition a more progressive perception of Chinese laws. The progressive perception does not hide Chinese institution's imperfectness, yet denies there shall be a linear history of all cultures and civilisations towards the same end. The progressive perception of the end of Chinese legal reform is being modernised

⁵⁰ HUANG, PHILIP C., *Civil Justice in China: Representation and Practice in the Qing* (Stanford University Press. 1996). HUANG, PHILIP C., *Code, Custom, and Legal Practice in China: the Qing and the Republic Compared* (Stanford University Press. 2001). The Weberian ideal-types see WEBER, MAX, et al., *Economy and Society: an Outline of Interpretive Sociology* (Bedminster Press. 1968). See also KUHN, PHILIP A., *Soulstealers: the Chinese Sorcery Scare of 1768* (Harvard University Press. 1990). Philip Kuhn insightfully introduces the antinomy between the absolutist monarchy and his bureaucracy in a story about some “soulstealers” in Qing China.

⁵¹ Philip Huang, *Why an Advanced Institute for Historical and Social Research?*, available at http://en.lishiyushehui.cn/modules/extendpage/index.php?cat_id=1&page_url=Academic-Principles.

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but not westernised. Philip Huang thus predicts a mixture of Chinese and Western ingredients, which liberals disagree and dislike.⁵²

Chinese constitutional law, however, fits any of these perceptions? In the Anglo-American world, many define a “civilised” state by the appearance of a constitution. The PRC state does have a codified Constitution, but it very likely cannot count in the liberal perception due to its socialist nature. Speaking of constitutional and administrative statutes, the liberal perception stands steadily in addressing these materials, no matter one may have an optimistic or pessimistic vision for the future. The progressive perception, on the other hand, has just started dealing with the dynamics of Chinese constitutional law.⁵³ It should be a surprise for Western readers that in a late communist state, the Chinese legal academia is overwhelmingly dominated by the liberal perception of its own laws. Holding on Marx-Leninist orthodoxy, statist scholars, sometimes as communist cadres, are only a small proportion in the Chinese mainland. The larger proportion adores one or another Western legal model and prepares to transplant them, partially or as a whole, to China.⁵⁴ The PRC’s 2007 property law scarcely accepts any ancient or modern Chinese innovations, and completely copies the German code. If the progressive perception loses the battle over what it is good at (i.e. the civil law), hardly can it win in constitutional and administrative areas where the liberal perception has accumulated cogent argumentations for centuries long.

⁵² HUANG, PHILIP C., *Chinese Civil Justice, Past and Present* (Rowman & Littlefield. 2010). Also see BERNHARDT, KATHRYN, *Women and Property in China: 960-1949* (Stanford University Press. 1999). SOMMER, MATTHEW HARVEY, *Sex, Law, and Society in Late Imperial China* (Stanford University Press. 2000). HUTCHINGS, P, *Freedom of Speech in Hong Kong & the Problem of "China"*, *Cardozo Studies in Law and Literature* 267, (1996).

⁵³ JIANG, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China*, 36 *Modern China* 12, (2010).

⁵⁴ A general introduction of contemporary Chinese intellectual thoughts see LEONARD, MARK, *What does China think?* (Fourth Estate. 2008).

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The real vulnerability of the progressive perception is the retrospective and empirical approach, which does not generate predictive and periscope ideas. Philip Huang himself advocates a list of values inherited by modern Chinese laws, e.g. the compassion to the weaker party in litigation, the pursuit of social harmony, and expectation for virtuous and disciplinary judges; but even if these values are true and genuine, few of them are measurable in quantity and universal in quality. One could never accept that the economically or socially “weaker” party should be favoured in each and every case; “social harmony” not only encourages compromise but also helps to justify authoritarian governance. The constitutional law, as the basic agreement and common identity of the entire nation, always demands a strong normative foundation of which the progressive perception seems still short.

1.3 MODERN CONSTITUTIONALISM?

The liberal perception of Chinese constitutional laws takes an upper hand because it has been endorsed by the dominant modern constitutionalist tradition in legal studies and alternative theories so far have failed to excogitate a constructivist account that could transcend liberal ideals. Modern constitutionalism, as James Tully illustrates, forged contemporary institutions and our understanding about them, thus reduces objective plurality and subjective flexibility to a limited degree.⁵⁵ The radical ideas of modern constitutionalism might be encapsulated to a dictum, such as “one nation, one people, one state, and one constitution” that stems from the self-appreciation of Atlantic nation-states, especially the United States and French republic in the aftermath of revolutions. Some human associations had taken an advantage in worldwide competition because of a relative preponderance of social communication or military and capital expansion, and to build a new form of government upon a “nation” – a larger and more homogenous human association –

⁵⁵ TULLY, JAMES, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press. 1995).

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was the best way to sustain this advantage.⁵⁶ After the French revolution, the material evolution of nation-state further converges with the normative development of liberal democracy thus “everyone becomes the ‘third estate’”. The national community turns out to a self-determining political unit, a “demos” or the electorate. The government has to be organised by a democratically elected group of representatives of the “people” whose liberal rights are declared and protected by a written document – *the constitution*.⁵⁷ The singularity of a codified “Constitution” symbolifies both national unity and popular sovereignty in the aftermath of revolutions, so James Tully can summarise modern constitutionalism has seven features:⁵⁸

- a. popular sovereignty;
- b. in contrast to an ancient or historically earlier constitution [that has been a mere recognition of existing laws, institutions, and customs];
- c. in contrast with the irregularity of an ancient constitution;
- d. the recognition of custom within the theory of progress;
- e. identified with a specific set of European institutions;

⁵⁶ Karl Deutsch focuses on the social communication aspect of modern state-building, while Charles Tilly emphasises force and economy. A discussion on theories on state building see KEATING, MICHAEL, *The Independence of Scotland: Self-government and the Shifting Politics of Union* (Oxford University Press. 2009), pp. 11-12. Also see DEUTSCH, KARL W., *Nationalism and Social Communication: an Inquiry into the Foundations of Nationality* (M.I.T. Press 2nd ed. 1966). TILLY, CHARLES, et al., *The Formation of National States in Western Europe* (Princeton University Press. 1975). TILLY, CHARLES, *Coercion, Capital, and European States, AD 990-1990* (Basil Blackwell. 1990).

⁵⁷ The convergence between nation-state and liberal democracy, see KEATING, MICHAEL, *Plurinational Democracy Stateless Nations in a Post-sovereignty Era* (Oxford University Press 2001), pp. 29-32.

⁵⁸ TULLY, JAMES, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press. 1995), pp. 62-70.

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- f. a constitutional state possesses an individual identity as a ‘nation’, an imaginary community to which all nationals belong and in which they enjoy equal dignity as citizens;
- g. a modern constitution comes into being at some founding moment and stands behind – and provides the rules for – democratic politics”.

However, early- and post-modern ideas and institutions are challenging modern constitutionalism. Hapsburg Spain as the first “sun-never-sets” empire had established governance across the oceans long before the American and French revolutions. Based on the emperor’s enterprises Spanish Catholic theologians both converges and diverges with post-revolution Protestant followers on the idea of authority, legality, and unity, but this imperial Spanish world never attracts genuine appreciation in the English world.⁵⁹ The Spanish School of Salamanca tried to coordinate a “New World” with Christendom under a monarchy pairing the papacy, which is unsurprisingly a discursive macro-project yet did not have some successes. This macro-project does not need a “nation” since it transcended cultures and civilisations; nor a “people” since there was no “popular sovereignty” but merely a sort of social consent to divine/historical reign; the singularity of “state” seemed ambiguous, because Castile and Aragon separated “Cortes”; and at last, it was more safe to indicate that there was no “Constitution” with a capital letter “C”.⁶⁰ Michael Keating presumes that the Hapsburg enterprise, as a prominent European multinational state, might have provided different experience in contrast to the modern constitutionalism only if it had survived to our times.⁶¹

⁵⁹ HOWARTH, DAVID, *The Invention of Spain: Cultural Relations between Britain and Spain, 1770-1870* (Manchester University Press. 2007), esp. pp. 3-4.

⁶⁰ HAMILTON, BERNICE, *Political Thought in Sixteenth-Century Spain: a Study of the Political Ideas* (Clarendon Press. 1963).

⁶¹ KEATING, MICHAEL, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford University Press. 2001).

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For postmodernists, moreover, the “common law system” contains an alternative Atlantic tradition in accommodating sub-state societies and indigenous cultures. James Tully concludes: “A modern constitution is an act whereby a people frees itself (or themselves) from custom and imposes a new form of association on itself by an act of will, reason, and agreement. An ancient constitution, in contrast, is the recognition of how the people are already constituted by their assemblage of fundamental laws, institutions, and customs.”⁶² The common law system and the (British) Commonwealth enjoy a long tradition of so-called “ancient constitution” that had been more flexible and open to diverse interpretations. The relationship between the United Kingdom and her constituent nations, Canada and Quebec, New Zealand and Maori all embrace such arguments. Some modern constitutionalists, e.g. John Locke and John Stuart Mill, supported assimilative interpretations and thus stood on the opposite side to sub-state societies and indigenous cultures; but there are scholars and jurists standing on the other side who constitutionally recognise the multiplicity of nations, peoples, forms of state, as well as “constitutionalism-s”.⁶³

The early- and post-modern ideas and institutions do inspire in some respects. In the Chinese context, scholars are interested in following a Confucian way, if at all, to harmonise the relationship between the Chinese State and the peripheral societies neighbouring on China proper. Daniel A. Bell draws a picture like that:

So here’s the situation as Confucians see it. The dragon is sick and can’t survive in its current state. Liberal democrats want to slay it and build a foreign-looking political animal out of the wreckage—an animal that looks like either Scandinavia (left-liberals) or the United States (right-liberals). And we shouldn’t worry too much about differences in population, culture, history, education, and levels of economic development. In contrast, Confucians want to feed the sick animal traditional medicine, gently admonish it when it strays from morality, and stroke it when it

⁶² TULLY, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, p. 60.

⁶³ A detailed study of constitutional plurinationality of the United Kingdom and Canada see TIERNEY, *Constitutional Law and National Pluralism*.

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behaves properly, with the aim of restoring the dragon to what it used to be—an auspicious and awe-inspiring creature that rarely pulls out its claws and won't bother too much with the lives of the smaller animals.

It could be a happy ending of the story in which the dragon and the snow lion get along with the other successfully in accordance with Confucian principles. Given there is a Confucian tradition in Hong Kong and Taiwan, there is no wonder that Daniel A. Bell, as other Chinese and Western Confucians, are “still betting on the Confucians” for the success of Chinese political reform.⁶⁴

But problems remain. First, it could be a wrong argument that imperial China in praxis truly implemented Confucian principles in binding multiple societies together. A number of works reveal imperial China's realistic motivation to conquer peripheral territories and set up direct and indirect rule there was to retain a strategic space for security,⁶⁵ while the ideological endorsement for this derived mainly from the ruling class's Manchu tradition rather than Confucian classics.⁶⁶ More importantly, the prerequisite that the PRC and the peripheral societies may co-exist peacefully and successfully in accordance with Confucian principles is all the societies recognise Confucianism as the source of values. In other words, Confucianism is what John Rawls calls a “comprehensive doctrine” that is incompatible with other doctrines of reasonableness. Hong Kong and Taiwanese societies have moved into political pluralism and converted to liberal values. Tibet

⁶⁴ Daniel A. Bell, “A Visit to a Confucian Academy”, available at

<http://www.dissentmagazine.org/online.php?id=146>. Retrieved on 19 May 2011.

⁶⁵ PERDUE, PETER C., *China Marches West : the Qing Conquest of Central Eurasia* (Belknap Press of Harvard University Press. 2005).

⁶⁶ HEVIA, JAMES LOUIS, *Cherishing Men from Afar : Qing Guest Ritual and the Macartney Embassy of 1793* (Duke University Press. 1995). SAKAKIDA RAWSKI, EVELYN, *The Last Emperors: a Social History of Qing Imperial Institutions* (University of California Press. 1998). C. ELLIOTT, MARK, *The Manchu Way: The Eight Banners and Ethnic Identity in Late Imperial China* (Stanford University Press. 2001).

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never adopts Confucianism. The Chinese mainland has demolished Confucian values in the Cultural Revolution. Therefore it is extensively dubious that Confucianism is a “comprehensive doctrine” in either society and will be one in the near future.

To establish a normative foundation for constitutional accommodation to national pluralism in Western liberal democracies as well as refute the exclusive correctness of traditional liberal constitutionalism, a school of liberal nationalism has emerged in recent years. Liberal nationalists endorse rule of law and the basic individual civil and political rights, such as freedom of press, freedom of conscience, habeas corpus, and universal adult suffrage. Liberty prioritises when conflicting with values deriving from other doctrines. But liberal nationalists, as Yael Tamir says, take a point of view that “grant prominence to several dimensions that liberal theory has tended to overlook: social attachments, cultural affiliations, the communal aspect of individual identity, and particular moral commitments that grow out of membership in associative communities.” Tamir contends: “Once the importance of these dimensions is recognised, they could shed light on the liberal argument itself.”⁶⁷ In essence, liberal nationalists are defending a great number of choices that individuals as members of cultural communities should possess, which a “neutral” state is not supposed to offer. Different from traditional liberals, liberal nationalists support governmental assistance to keep the choices alive and accessible.⁶⁸ But liberal nationalists persevere with the claim that their reshuffle of governance remains liberal in nature, as they are committed to liberal rights without hesitation.

⁶⁷ TAMIR, YAEL, *Liberal Nationalism* (Princeton University Press. 1995), p. 10.

⁶⁸ KYMLICKA, WILL, *Multicultural Citizenship : a Liberal Theory of Minority Rights* (Clarendon Press. 1995). Others see MILLER, DAVID, *On nationality* (Clarendon Press. 1995). MACCORMICK, NEIL, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press. 1999).

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The liberal nationalist theory does have its advantage in reinforcing the normative framework of the constitutional structure of Western liberal democracies in facing the reality of national pluralism.⁶⁹ In the aftermath of regime change in Central and Eastern Europe where national pluralism has been an enduring phenomenon, Will Kymlicka contends it is possible to export their theory to ex-communist countries converted to liberal values too.⁷⁰ They might be right, and this thesis will not argue with that. But in the Chinese context, the problem is that in the Chinese mainland the authoritarian regime has ruled in a relatively confident manner with a stunning record of economic growth and military expansion. Additionally, the degree of democratisation also varies in the territories. Taiwanese residents now are holding universal suffrage regularly, Hong Kong has been extremely liberal in economic and political terms but no universal suffrage normally exists there. The Dalai Lama's administration that is in charge of some emigrated Tibetan communities is trying to democratise. Although the 14th Dalai Lama has repeatedly declared his wish to retire from politics, but he is still the absolutist authority for that administration. In the complex circumstances the solution to import liberal nationalism is hardly realistic, and liberal nationalists would have never believed it possible.⁷¹

This thesis, finally, attempts to build a normative framework for our cases in a dialogue with John Rawls's late work *The Law of Peoples*. John Rawls's early works make him a figure of "traditional liberal constitutionalists" in people's eyes, as John Rawls's theoretical designs of "original position" and "veil of ignorance"

⁶⁹ TIERNEY, Constitutional Law and National Plualism.

⁷⁰ KYMLICKA, WILL & OPALSKI, MAGDALENA, Can Liberal Pluralism be Exported?: Western Political Theory and Ethnic Relations in Eastern Europe (Oxford University Press. 2001).

⁷¹ In analysing the Soviet Union's constitutional arrangements of federation to grant territorial autonomy to several national minorities, Will Kymlicka reckons it remained pseudo-federalism, because in procedures it lacks "any tradition of partnership, negotiated cooperation and open bargaining concerning the accommodation of ethnic diversity." KYMLICKA, Multicultural Citizenship : a Liberal Theory of Minority Rights, pp. 62-64.

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are holding back communitarian values, hampering sub-state societies to justify their demand for state-like institutions to foster these values. But in *The Law of Peoples* this thesis finds an interlocutor who is fully prepared to face a situation where liberal democracies and non-liberal regimes have to co-exist in peace. Traditional liberals do not agree with this compromise and accuse John Rawls of having betrayed his own theory, which should have led to individualist cosmopolitanism as they once thought.⁷² However, the merit of *The Law of Peoples* is the very idea of “realistic utopianism” –theoretical construction shall reconcile with the historical and political situation and go beyond reality. It is somehow utopian that philosophers are dreaming about the perpetual peace, while it is realistic that we do not ignore the world order consists of hundreds of states not individuals. In the Chinese context, the order now consists of multiple societies of conflicting ideologies and, it seems to me, this is the starting point to construct a constitutional theory. This thesis, of course, does not agree with John Rawls in everything. *The Law of Peoples* is especially an account of symmetrical units in the international community while the Chinese cases are extremely asymmetrical and bound by constitutional provisions.

1.4 WHY DO PERIPHERIES MATTER?

The last question is “why do peripheries matter”? There has been little attention paid to peripheral societies in both liberal and progressive perceptions on Chinese law, yet the periphery-inclusive approach may accumulate more consensuses between the liberal and the progressive for the future. The liberal perception of Chinese law sees the late communist Chinese State as an authoritarian regime concerned more with the survival of the regime than anything else. Future Chinese laws will not make any significant progress unless the “fragile superpower” of the

⁷² BUCHANAN, ALLEN E, *Rawls's Law of Peoples: Rules for a Vanished Westphalian World*, 110 *Ethics* 697 at 701, (2000). CABRERA, L, *Toleration and Tyranny in Rawls's "Law of Peoples"*, 34 *Polity* 163, (2001).

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PRC makes a change in political reform alongside its embrace of the market economy.⁷³ The progressive and relatively positive perception of Chinese laws envisages some forms of “rule of law” without a democratic foundation.⁷⁴ Peerenboom contests that under the condition of granting a Lon Fuller type “rule of law”, a gradual democratisation would sustain Chinese economic boom in a stable environment.⁷⁵

Aside the nature of the Chinese State, in peripheral societies, however, both rule of law and democracy run faster than in the centre. Under British rule, Hong Kong has established a mature system of rule of law; Taiwan’s rule of law and democracy developed in recent decades, and so far the multiparty election system is the most westernised among ethnic Chinese societies; the Tibet Autonomous Region as a part of the PRC shares common features with the centre, yet emigrated Tibetan communities have experimented in bridging Tibetan traditions with liberal values. If we deal with these peripheral societies and the centre together, the liberal elements as well as progressive confidence will increase. In admitting that the liberal perception endorsed by modern constitutionalism retains an upper hand in assessing Chinese law, especially constitutional law that demands credible normative underpinning, the progressive perception of Chinese law reminds us that the liberal framework is able to tolerate existing provisions and procedures of positive effect and efficiency.

Hong Kong plays a crucial role in re-constructing a new constitutional discourse. Before the 1997 handover, mainstream opinion towards PRC-territory relationship had been dominated by a unification/separation dichotomy in both Chinese and English literatures. However, the PRC’s relatively successful management of Hong

⁷³ SHIRK, SUSAN L., *China: Fragile Superpower* (Oxford University Press. 2007).

⁷⁴ HUANG, *Chinese Civil Justice, Past and Present*.

⁷⁵ PEERENBOOM, *China's Long March toward Rule of Law. PEERENBOOM, R. P., China Modernizes: Threat to the West or Model for the Rest?* (Oxford University Press. 2007).

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Kong demonstrates that Chinese communists would not overthrow territorial rule of law and threaten liberal rights of individuals under certain conditions; this history, though not long enough, does liberalise minds. A new generation of scholarship, mostly based on Hong Kong, has started to talk about a Hong Kong model that is possibly and probably applicable to Taiwan or Tibet; this is the first interesting shift in the academia.⁷⁶

The second shift happens when Hong Kong constitutionalism affects the centre. It is undeniable that the PRC central government and communist cadres are severely lacking of legal professions. But the Hong Kong Basic Law forces them to learn a “constitutional” way to resolve conflicts between the centre and the territory and silence arbitrary interference from irrelevant departments to the legal realm. This may be a process of discipline and training for the regime, which it voluntarily accepts with less pressure and more pleasure. When Hong Kong’s fruit turns mature, one could even expect a third shift in the centre. Hualing Fu and others say:

The international community has watched the relationship between Hong Kong and China with interest, as it is a measure of China’s ability to interact with Western-style constitutional values. The “one country, two systems” formula, which is the foundation of Hong Kong’s autonomy, was intended to serve as a model for Taiwan’s reintegration into the Mainland. The formula also has broader implications: China’s responses to constitutional debates in Hong Kong are increasingly viewed as indicative of China’s plans for the constitutional structures and process in the Mainland. Legal and constitutional reform on the Mainland may even have been accelerated by the need to deal constructively with the issue arising from the contrasting legal systems.⁷⁷

⁷⁶ ALLEN, STEPHEN, *Recreating 'One China': Internal Self-Determination, Autonomy and the Future of Taiwan*, 4 Asia-Pacific Journal on Human Rights and the Law 21, (2003). DAVIS, MICHAEL C, *Establishing a Workable Autonomy in Tibet*, 30 Human Rights Quarterly 227, (2008).

⁷⁷ FU, et al., *Interpreting Hong Kong's Basic Law: the Struggle for Coherence*, p. 2. Similar points see HANDERS, SUSAN, *The Hong Kong Special Administrative Region Implications for World*

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Finally, to constitutionalise the relationship between the centre and the peripheral societies will reduce the tension of the past and enhance possibilities of the future. Robert Scalopira indicates some of them: (i) the continuation of status quo – to maintain the Party-State but embrace decentralisation; (ii) a China divided into parts; (iii) the emergence of a new nation (in Western style); or (iv) “authoritarian pluralism”, which tolerates a reforming authoritarian regime but encourages liberal pluralism in lowers levels.⁷⁸ The conservative paradigm of modern constitutionalism appreciates the polarised options, while this thesis contends infinite permutations exist in a continuum.

Needless to say, in a methodological sense a low number of comparative cases have both merits and demerits. Donatella della Porta contrasts variable-based research with a case-based one. The former uses anonymous cases as variables to test the concepts that are predetermined and operationalised, while the latter constructs concepts during the research and attempts to increase the number of variables in order to make the description thicker. This echoes the difference between Durkheim’s and Weber’s research approaches. The former prioritises statistical correlation analysis in social sciences, while the latter relies on narratives to deepen our understanding of historical and social diversity.⁷⁹ This thesis is close to the latter approach. So it is very reluctant at this moment to conceptualise a Yin to the Yang of modern constitutionalism, and at best there is a “family resemblance” among non-liberal or quasi-liberal regimes in Wittgenstein’s sense. Further case studies are needed to determine whether a new paradigm in constitutional scholarship has arrived.

Order, in The Chinese Party-State in the 21st Century: Adaptation and the Reinvention of Legitimacy, (André Laliberté & Marc Lanteigne eds., 2008), pp. 106-107.

⁷⁸ SCALOPIRA, ROBERT, *China in the late Leninist era, in Engaging the law in China: State, Society, and Possibilities for Justice, (Neil Jeffrey Diamant, et al. eds., 2005), p. 16.*

⁷⁹ DELLA PORTA, DONATELLA & KEATING, MICHAEL, *Approaches and Methodologies in the Social Sciences : a Pluralist Perspective (Cambridge University Press. 2008), pp. 203-208.*

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1.5 THESIS STRUCTURE

Five chapters will follow this one. Chapter 2 will explore how the territorial authorities forge neither a vertical hierarchy nor a horizontal symmetry in the Chinese context. The peripheral authorities have grasped different titles to elevate their positions in relationships with the PRC central government. However, in relationships with the people(s) the territorial units function like states to different degrees. These territorial units may also seek to secure some unique status in international eyes. This proposes a multiple understanding of Chinese constitutional units – people-s.

Chapter 3 delivers the normative reflection and revaluation to constitutional institutions. Constitutional law in some sense is written ideals, which means constitutional law cannot be morally irrelevant or ideologically neutral. Hence a more realistic question to be asked is what moral philosophy or ideology the constitutional law should endorse. Here the periphery-inclusive approach brings an in-between normative framework that is neither totalitarian nor liberal in traditional terms. In the aftermath of “reform and opening” the PRC state has no longer been a totalitarian regime, especially when it has tolerated Hong Kong constitutionally and tried to replicate this model to Taiwan. But the liberal perception has also indicated the PRC state is far from any liberal democratic varieties; at best it is a late communist regime waiting for the next move. I therefore advocate John Rawls’s “law of peoples” as the best idea in the context. The most crucial reason underpinning this choice is Rawls’s idea tolerates different ideological attachments under the same “liberal” umbrella, and as it seems to me, it is what China needs at this moment.

Chapter 4 examines China’s constitutional accommodation of, and integration with, these peripheries respectively: “one country, two systems” to Hong Kong and Taiwan; “ethnic regional autonomy” to Tibet. In the 1950s when the PRC still held faith in political unification under the communist rule, the central government had already had to negotiate reserved privileges with the Dalai Lama’s representatives to

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win Tibetan minds and hearts. In the aftermath of Mao's death, Deng Xiaoping decided to make pragmatic substitutes to regain Hong Kong and Taiwan. Deng promised to allow Taiwanese authorities to remain autonomous in exchange for a formal unification under the title of China. A slimmed version was put into practice in Hong Kong, which turns out to be the special administrative region. Modern constitutionalism shadows the arrangement with a unitary pre-occupation in the PRC. However, in constitutional praxis the "one nation, one people, one state, and one constitution" system has never been achieved in the Chinese context.

Chapter 5 will focus on constitutional praxis on the territorial scale. In chapter 4, the centre has made a number of vertical arrangements to accommodate the territories, while this chapter explores the horizontal arrangements in each territory. The PRC state does not have a "check-and-balance" system, but territorial units more or less accept a sort of separation of powers. This chapter thus addresses the administrative, legislative, and judicial branches respectively. The Taiwanese authorities enjoy a de facto independence from the PRC government, so in all branches their autonomy stands on top of the three. The Taiwanese authorities are restrained merely in the power of changing their "constitution", i.e. the de jure independence is prohibited by the PRC and will cause military interference in accordance with the Anti-Secession Act 2005. The territorial constitutional convention of Hong Kong is the administrative branch of government being most powerful. However, in praxis Hong Kong judicial courts are more active to stand against the centre, sometimes the Chief Executive as well, to defend autonomy. Whereas Hong Kong is planning a further reform of its election system, the Hong Kong legislature may become a second agonistic branch to the centre in the future. Obviously, Tibet is the weakest autonomy among the three, but the Tibetan legislature will still probably make a difference.

Chapter 6 then addresses constitutional future(s). Once we get out of the circle drawn by modern constitutionalism, there are so many possibilities in front of us. The core issue in Tibetan discourse is to reserve the culture and to make as much as possible improvement in human rights protection as standing inside the red line.

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Stemming from normative discourse in chapter 3, one may suggest a sort of “cultural autonomy” about which Austrian Marxists once talked. It is scarcely workable to establish a “Great Tibet” incorporating all ethnic Tibetans in a single administrative entity as emigrated Tibetans claim, but there can be some coordinating institutions to encourage ethnic Tibetans to raise literacy and protect customs. A majority of Taiwanese prefer the status quo, but what is the current state of affairs? Nevertheless, cross-Strait authorities must keep on moving towards the peaceful agreement that ends the civil war. Can politicians finally resolve the problems based on normative ideals? In the past the answer is “no”, but now that would be a “maybe”. The 10th Panchen Lama once prayed for constitutional law to enlighten all individuals as the Sun does; for peace and for the good, his words might be listened to.

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Chapter 2 Sinitic People-s

2.1 INTRODUCTION

This chapter addresses the historical and political situation with which the constitutional conceptualisation and theoretical construction must reconcile. Chapter 1 has sketched in the relationship between the central government of the People's Republic of China (hereinafter PRC) and the peripheral societies of Tibet, Hong Kong, and Taiwan with a story of the torch relay before the 2008 Beijing Olympics, in which the resuscitative Chinese State, compliant Hong Kong, antagonistic Taiwanese authorities, hundreds of emigrated Tibetans and their sympathisers all played their parts impressively. This chapter will continue to thicken the narrative in the province of jurisprudence. The situation, in a nutshell, is that the peripheral societies to a greater or lesser extent have evolved to become self-governing political units, distinctive as administrative regions.

In addressing this, this thesis shares John Rawls's three features of a *people* to define these political units. John Rawls conceives that a *liberal* people should have "a reasonably just constitutional democratic government; ... citizens united by what Mill called 'common sympathies'; and, finally a moral nature. The first is institutional, the second is cultural, and the third requires a firm attachment to a political (moral) conception of right and justice".⁸⁰ Chapter 3 will return to this, but at this stage it is helpful to point out that the three features of institution, culture, and morality are also applicable to non-liberal people-s. A Rawlsian *people* is no longer a "society" as its self-governing institutions possess the coercive power of enforcement, and they are not ordinary administrative divisions either. Charles R. Beitz reminds us that John Rawls's understanding of the second feature of a people derives from Mill's notion of "nationality", which makes individuals "cooperate

⁸⁰ RAWLS, *The Law of Peoples: with, The idea of public reason revisited*, pp. 23-24.

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with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves, or a portion of themselves, exclusively”.⁸¹ And the third feature of a people, the “moral nature”, constrains the people as a political unit to act with reasonableness in accordance with what its public culture prescribes.⁸² An ordinary administrative division often lacks these features.

Chapter 1 has clarified in advance that in this thesis the Chinese equivalent of “people” is *tong-bao* – a term that refers to, *inter alia*, Chinese nationals in Hong Kong, Taiwanese residents, and ethnic Tibetans of Sinitic originality⁸³ – not *ren-min*, which appears in the Chinese texts of Article 1 of the International Covenant on Civil and Political Rights of equal authenticity to the English texts. But the usage of “people” still leads to the question: as qualified people-s, do the peripheral societies have the right to self-determination according to international law? The peripheral societies, as political units, should be granted the *moral* right of self-determination to freely determine their political status and freely pursue economic, social, and cultural development, and this is a stance rarely challenged by any theorists. But many liberals’ deduction from the moral stance is that in positive international law the societies are also entitled to establish their own sovereign state with a liberal

⁸¹ MILL, JOHN STUART, *Considerations on Representative Government* (Parker and Bourn. 1861), chapter 16. Cited from BEITZ, *Rawls's Law of Peoples*, p. 679.

⁸² BEITZ, *Rawls's Law of Peoples*, p. 679.

⁸³ The “Sinitic originality” means a Tibetan individual’s parent or at least, in this situation, grandparent shall be from Tibetan areas now under the PRC government’s control. There are thousands of ethnic Tibetan families living in Nepal and Bhutan, and their legal and political status is fundamentally different from Tibetans emigrating from modern Tibet.

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democratic form of government, which, as they see it, is the only authentic form to implement the *legal* right of self-determination.⁸⁴

It is not coincidental that the usage of “people” would open the sluices for international legal scholarship. The logic underneath is that international law has been an arena where institutionally, culturally, and morally diverse states can play and compete based on a series of rules, and international lawyers are understandably keen to apply those rules to regulate the political units whose institutions, cultures, and political attachments are showing a great deal of variety too. In comparison with ordinary administrative divisions, the peripheral societies have indeed moved into a stage of high-level political pluralism that enables and urges corresponding legal rules. The situation of high-level political pluralism has increased the cost of enforcement and decreased the chance to foster consensus among ideologies. This thesis thus appreciates international lawyers’ efforts, as it will also observe the huge similarities between the legal order of Sinitic people-s and the international legal order.

Yet international legal scholarship informed by liberal dogmas lacks a sensitive and meticulous understanding of the contextualised people-s, which, in the final analysis, are not states. Donald G. Palmer’s words about Taiwan’s status under international law are illustrative. He says: “Because I have concluded that there can be only two

⁸⁴ For the applicability of the right to self-determination in positive international law to Taiwan see, CHEN & REISMAN, *Who Owns Taiwan: A Search for International Title* at 656-657. The opposite side see SHEN, J, *Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan*, 15 *American University International Law Review* 1101, (1999). For the applicability of that right to Tibet see, VAN PRAAG, M, *Tibet and the Right to Self-Determination*, 26 *Wayne L. Rev.* 279, (1979). JOSEPHS, H. K., et al., *Independence for Tibet: An International Law Analysis*, 8 *China Law Reporter* 21, (1994). CLARK, R. M., *China's Unlawful Control Over Tibet: The Tibetan People's Entitlement To Self-Determination*, 12 *Ind. Int'l & Comp. L. Rev.* 293, (2001). BROUDER, *Self-Determination for Tibet: Prospects in International Law*. SLOANE, *The Changing Face of Recognition in International Law: A Case Study of Tibet*.

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alternatives to the question of Taiwan's legal status, whether one characterizes the relationship between the two sides of the Taiwan Strait as being 'one country, two systems,' 'one country, two governments,' 'one country, two territorial entities,' 'multi-system nation,' 'dual-system nation', or 'divided states,' to name just a few, the conclusion must still be the same: either Taiwan is an independent State under international law or it is not."⁸⁵ Donald Palmer might be right that there shall be an either-or answer from an international legal point of view, but the problem is this either-or answer will seriously oversimplify the situation. It is easy to give a scholarly either-or answer based on doctrinal studies. But to reach such an answer means little for persons and people-s pursuing peace and prosperity in this region. If the international community cannot militarily force the PRC government to respect a scholarly answer like that, why should we abandon so many probably feasible solutions as Palmer suggests?

As a matter of scope, this chapter will explore only three phenomena that set the peoples apart from ordinary administrative divisions. The first section addresses the heterarchy of authorities in the Chinese context. The PRC central government and the peripheral societies are neither of equal authority, nor do they form a hierarchy of authorities with the PRC central government standing on top of it. Ordinary administrative divisions should subordinate themselves to a central government, but the peripheral societies may vary in intuitions, cultures, and political attachments. The second section goes to the relationship between the authorities and citizens/nationals. The PRC, as a theoretically unitary state, still does not offer homogenous citizenship to all Chinese nationals. In fact Chinese nationals registering residentship in different jurisdictions are entitled to various rights and legal treatments; in many occasions, Chinese nationals are neither one hundred percent citizen nor alien in a Sinitic territory. This nevertheless has much

⁸⁵ PALMER JR, D, *Taiwan: De Jure or Not De Jure-That Is the Question-An Analysis of Taiwan's Legal Status within the International Community*, 7 John F. Kennedy University Law Review 65 at 80, (1996).

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outstripped what ordinary administrative divisions are supposed to do. In the third section, we address the peripheral societies' relationship to the international community. The structure of this chapter may be understood as a trio covering the relationship between the territorial authorities and the PRC central government, that between it and individuals, and that between it and foreign states. Hypothetically, a unitary state's relationship, legal or political, with its citizens/nationals shall be simple and direct. As modernist constitutionalism presumes, the constituent power shall vest in a singular "people" as the demos of a liberal democracy and the constituted power ought to be primarily provided by a singular Constitution. However, as following sections will illustrate, the Sinitic cases obviously are different to this presumption.

2.2 HETERARCHY OF AUTHORITIES

2.2.1 China and Taiwan

In Sinitic territory, there are two main opposition political stances on each side of the Taiwan Strait – the PRC and the "Republic of China" (Taiwan). Because the Communist Party of China (hereinafter CPC) does not seek democratic legitimacy for the regime, the narrative of historical triumphs against "national enemies" is possibly the only legitimisation of its reign. The Preamble of the 1982 PRC Constitution provides:⁸⁶

"The people of all nationalities in China have jointly created a splendid culture and have a glorious revolutionary tradition. Feudal China was gradually reduced after 1840 to a semi-colonial and semi-feudal country. The Chinese people waged wave upon wave of heroic struggles for national independence and liberation and for democracy and freedom. Great and earth-shaking historical changes have taken place in China in the 20th century. The Revolution of 1911, led by Dr Sun Yat-sen, abolished the feudal monarchy and gave birth to the Republic of China. But the Chinese people had yet to fulfil their historical task of overthrowing imperialism and feudalism. After

⁸⁶ The 1982 PRC Constitution, Preamble.

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waging hard, protracted and tortuous struggles, armed and otherwise, the Chinese people of all nationalities led by the Communist Party of China with Chairman Mao Zedong as its leader ultimately, in 1949, overthrew the rule of imperialism, feudalism and bureaucrat capitalism, won the great victory of the new-democratic revolution and founded the People's Republic of China. Thereupon the Chinese people took state power into their own hands and became masters of the country.”

Yet the CPC never fully accomplishes the triumph over the Chinese Nationalist Party or the Kuomintang (hereinafter KMT). In 1949 the CPC had overthrown the KMT regime in the Chinese mainland, but at that time it had no capacity to destroy the KMT remainders in Taiwan of which the KMT had taken over control after the Second World War.

On the north side of the Taiwan Strait, the PRC central government declared unilateral ceasefire across the Strait in 1979,⁸⁷ but never admits the Chinese civil war has ended.⁸⁸ According to its rhetoric, the 1982 PRC Constitution regards Taiwan as a breakaway province to be politically reunified with the Chinese mainland: “Taiwan is part of the sacred territory of the People’s Republic of China. It is the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.”⁸⁹ Since the 1980s the PRC government has enacted a series of “judicial interpretations” to decriminalise Taiwanese residents who were involved in anti-communist activities during the civil war thus facing possible prosecution in the Chinese mainland. Against this background, millions of Taiwanese travel across the Strait each and

⁸⁷ Zhonghua renmin gongheguo quanguo renda changweihui gao taiwan tongbao shu (Standing Committee of the National People's Congress of the People's Republic of China ed., 1979).

⁸⁸ Article 3(1) of the PRC Anti-Secession Act 2005 reads: “The Taiwan question is one that is left over from China's civil war of the late 1940s.”

⁸⁹ The 1982 Constitution, Preamble.

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every year and contribute greatly to Chinese economic recovery after the Cultural Revolution.⁹⁰

On the south side of the Strait, Article 4 of the Constitution of Republic of China (hereinafter ROC), which was promulgated in the Chinese mainland in 1946, says: “The territory of the Republic of China within its existing national boundaries shall not be altered except by a resolution of the National Assembly.”⁹¹ What are “existing national boundaries”? The direct interpretation should be the international boundary of China in 1946 when the Constitution was made, whose territory includes both Taiwan and the Chinese mainland. Yet the reality is the Taiwanese authorities only control Taiwan (or Formosa) and some tiny islands, which makes the claim rather bizarre. But the Taiwanese authorities cannot recklessly alter the provision either, as it is arguably the most important symbol of Chinese unity.

So the Taiwanese authorities attempt to lay this question aside. In facing challenges from pro-independence Taiwanese politicians, the “ROC” Judicial Yuan, which is the constitutional court in Taiwan, made a judicial interpretation on 26 November 1993 indicating the meaning of “existing national boundaries” is a political question and ought to be answered by a political organ.⁹² As a result, politicians can interpret the constitutional provision with great liberality. The President Mr Chen from the

⁹⁰ The PRC central government actually enacted a law to protect Taiwanese residents’ investment in the Chinese mainland, see the PRC Protection Act for Investment of Taiwanese Residents 1994. The PRC parliamentary act is also translated as “Law of the People’s Republic of China on Protection of Investment by Compatriots From Taiwan”.

⁹¹ The Constitution of the Republic of China of 1946 (hereafter “1946 Constitution”), art 4.

⁹² The ROC Judicial Yuan Interpretation No. 328, which holds: “Instead of enumerating the components, Article 4 of the Constitution provides that the national territory of the Republic of China is determined “according to its existing national boundaries.” Based on political and historical reasons, a special procedure is also required for any change of territory. The delimitation of national territory according to its history is a significant political question and thus it is beyond the reach of judicial review.”

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Democratic Progressive Party (hereinafter DPP) regards Taiwan and China as two sovereign countries; but the incumbent President from the KMT reversed the position. The KMT President's understanding arguably has the judiciary's support. The "ROC" Supreme Court's binding precedence of the No. 8129 case in 1982 is precise and clear: crime in the Chinese mainland shall still be regarded as having been made in the "national territory" of the "ROC".⁹³

The "ROC" National Assembly in 1991 finally repealed the Temporary Provisions Effective During the Period of Communist Rebellion (hereinafter TPEDPCR) that was a martial law to suppress anti-KMT movements in Taiwan. In 1992 Taiwan set down a constitutional act to regulate the relationship between residents in Taiwan and those in the Chinese mainland, in which Chinese nationals with different household registration (in Taiwan or the Chinese mainland) are entitled to separate treatments in the territory.⁹⁴ Not until 2005 did the PRC make its own constitutional act to do a similar job. The PRC Anti-Secession Act 2005 recognises that the Chinese mainland and Taiwan have not been re-united politically and hence it admits there is a difference between Taiwanese and Chinese mainlanders. So far both sides of the Strait have occupied a position in the other's constitutional rhetoric despite the languages not being compatible.

As a result of cross-Strait conflicts and long-term political pluralism in the aftermath of Taiwanese democratisation, the political attachments of Taiwanese residents have been diversifying. It is not important whether politicians portray Taiwanese residents as ethnically distinct people from Chinese mainlanders – the Taiwanese population consists of at least four constituent groups: Hoklo (70%), Hakka (15%), post-war migrants from the mainland (13%) and around 2% Taiwanese aboriginals. The ethnic similarities between Taiwanese Han groups (Hoklo, Hakka, and mainland migrants) and Han Chinese in the mainland are manifest. The crucial point

⁹³ The ROC Supreme Court Case No. 8129 in 1982.

⁹⁴ See section 2.

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is individuals from the same ethnic people may have very different political attachments and they probably and possibly can inhabit in separate states or establish those for their own. As in Taiwan, arguably the most reliable opinion poll on Taiwanese attitudes towards political reunification with the Chinese mainland, which is made by the ROC Mainland Affairs Council, illustrates that the PRC central government should not be too optimistic about the prospect: although more than 80% of Taiwanese adults in the poll agree with a status quo, 24% pollees prefer independence to re-unification, and another 30% would join them in some circumstances – uncertainties about the Chinese economic miracle and the survival of CPC regime would both determine how they think about the future. (Figure 1)

Moreover, the distinctiveness of Taiwanese institutions and maintenance of liberal democracy in Taiwan also lie in the shade of the possibility of United States (US) military interference whenever the PRC central government would have resumed the Chinese civil war to pursue political reunification. The pro-independence Taiwanese activists always assume Taiwan behave like as an ordinary state in each and every respect, except for some minor political shortages that will be overcome soon, but the reality has been rather complicated. The United States Congress took Taiwan as a preserved territory of its own. The US Taiwan Relations Act compels the US administration to formulate a sufficient policy on the issue of Taiwan:

- (1) to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people on Taiwan, as well as the people on the China mainland and all other peoples of the Western Pacific area;
- (2) to declare that peace and stability in the area are in the political, security, and economic interests of the United States, and are matters of international concern;
- (3) to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means;
- (4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States;

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(5) to provide Taiwan with arms of a defensive character; an

(6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan.⁹⁵

The US government has been cutting both ways to sustain a balance.⁹⁶ Yet Article 8 of the PRC Anti-Secession Act 2005 has cleared the way for the PRC central government to pursue political reunification by military means.⁹⁷ There is a danger of real war, which hardly exists in a relationship between a host state government and ordinary administrative divisions – even states in disagreement would not go there.

2.2.2 Hong Kong

Taiwan and the PRC may be on an arguably equal footing in political terms, but Hong Kong as a special administrative region of the PRC stands doubtlessly lower in a hierarchy than the PRC central government, especially the omnipotent Chinese parliament. The Basic Law of the Hong Kong Special Administrative Region (hereinafter HKSAR) was promulgated by the PRC National People's Congress

⁹⁵ The Taiwan Relations Act of 1979, United States Public Law 96-8.

⁹⁶ For the US role in PRC-Taiwan relations, see KONKOLY-THEGE, K. S. W., *The Taiwan Question: Why the United States Must Not Enact the Taiwan Security Enhancement Act*, 5 Holy Cross JL & Pub. Pol'y 107, (2000). HAMILTON, J. X., *Overview of the Legal and Security Questions concerning Taiwanese Independence*, An, 1 Int'l L. Rev. 91, (2003). LEE, S., *American Policy Toward Taiwan: The Issue of the De Facto and De Jure Status of Taiwan and Sovereignty*, 2 Buff. J. Int'l L. 323, (1995).

⁹⁷ The PRC Anti-Secession Act 2005, art 8. Article 8 reads: "In the event that the "Taiwan independence" secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity."

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(hereinafter NPC), and the special administrative region is organised in accordance with a “unitary state” preposition of the PRC central government.⁹⁸ The NPC can make whatever law for Hong Kong, despite it will be politically unwise to breach the Hong Kong Basic Law.

Yet in terms of political attachments, the PRC central government lacks of the capability and competence to homogenise Hong Kong residents’ allegiance. As an international metropolis and financial centre, there are numerous Hong Kong residents holding non-Chinese passport and from non-Chinese families. They are not requested to defer to the PRC central government but only to the HKSAR if necessary. In fact the only obligation that the HKSAR asks its residents for is they shall obey the law,⁹⁹ and the territorial administration is not yearning for any sort of emotional attachment or patriotism from its residents. Hong Kong’s political pluralism actually encourages Hong Kong residents to confront the CPC’s reign within the scope of Hong Kong’s constitutionalism. Article 23 of the Hong Kong Basic Law prescribes the HKSAR shall enact territorial law to prohibit treason, secession, sedition, subversion against the PRC central government.¹⁰⁰ But when the HKSAR administration tried to make an ordinance to fulfill the article’s requirement, Hong Kong residents seriously opposed its proposal that was later

⁹⁸ The Hong Kong Basic Law, art 12. Article 12 reads: “The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.”

⁹⁹ The Hong Kong Basic Law, art 42. Article 42 of the Hong Kong Basic Law reads: “Hong Kong residents and other persons in Hong Kong shall have the obligation to abide by the laws in force in the Hong Kong Special Administrative Region.”

¹⁰⁰ The Hong Kong Basic Law, art 23. Article 23 reads: “The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.”

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shelved after a number of demonstrations. Hong Kong residents are wary that a new ordinance would force them to succumb to criminal prosecution for disobedience to the government (of the HKSAR or the PRC). The HKSAR proposal attempted to demand allegiance from all residents in the territory based on case law – Lord Jowitt, L.C. said allegiance “is owed to their Sovereign Lord the King by ... those who, being aliens, reside within the King's realm”.¹⁰¹ But this is not the reality in the circumstances.

Hong Kong is also allowed to use territorial symbols to express its difference from the Chinese mainland. Appendix 3 of the Basic Law prescribes the PRC national anthem, national flag, national anniversary, and national emblem shall be respected in Hong Kong.¹⁰² At the same time, the HKSAR is entitled to use a territorial flag and a territorial emblem. The HKSAR flag is a “red flag with a bauhinia highlighted by five star-tipped stamens.” The HKSAR emblem is “a bauhinia in the centre highlighted by five star-tipped stamens and encircled by the words ‘Hong Kong Special Administrative Region of the People's Republic of China’ in Chinese and ‘HONG KONG’ in English.” The Regional Flag and Regional Emblem Ordinance provides: “In the Hong Kong Special Administrative Region, whenever the national flag is flown together with the regional flag, or the national emblem is displayed together with the regional emblem, the national flag or the national emblem is to occupy a more prominent position. When both the national flag and the regional flag are raised in procession, the national flag is to precede the regional flag. When the national flag is flown alongside the regional flag, the national flag is to be on the right and the regional flag on the left.”¹⁰³ In Chinese culture this is an explicit way

¹⁰¹ The case is *Joyce v DPP* [1946] 1 All ER 186 at 189. See *Proposals to Implement Article 23 of the Basic Law: Consultation Document* (The Security Bureau of the Hong Kong Special Administrative Region of the People's Republic of China ed., 2002), p. 12.

¹⁰² The Hong Kong Basic Law, Appendix 3.

¹⁰³ The Hong Kong Regional Flag and Regional Emblem Ordinance, Instrument A602 available at the Bilingual Laws Information System operated by the HKSAR Department of Justice

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to show which is exalted, which scene is different from the fact that the Union Jack, the Saint Andrew's Cross, and the European Union flag may fly side by side. Even so, the HKSAR still surpasses ordinary Chinese administrative divisions, since they have nothing at all.¹⁰⁴

2.2.3 Tibetan communities

Tibet nevertheless is an ambiguous case. In the sense of ethnicity, the Tibetans may qualify as a “people” without redundant contestation; but a Rawlsian people features distinctive institution, *public* culture, and political attachment. So far Tibetans being entitled to PRC nationality/passport have inhabited two separate communitarian environments: one is in Tibet, and the other is under administration of the 14th Dalai Lama's chamberlains “in exile”. Tibetan communities within and outside the PRC have highly different intuitional and ideological surroundings, so this section uses a plural form of title in addressing the Tibetans.

There is even no agreement on what *Tibet* is. The traditional *ethnic Tibet* covers Tibetan areas in the PRC, Ladakh, Sikkim, Bhutan, and South Tibet, which is the Arunachal Pradesh state under Indian actual control but claimed by the PRC. The ethnic Tibet now is governed by three sovereign states: China, India, and Bhutan; it is the largest geographic concept of Tibet. In the PRC, Tibetan areas consist of the Tibet Autonomous Region (TAR), and several autonomous Tibetan prefectures and counties in other provinces. Yet the Dalai Lama's “Central Tibetan Administration” in exile insists of a “*Great Tibet*”:

Tibet here means ... *Cholka-Sum* (U-Tsang, Kham and Amdo). It includes the present-day Chinese administrative areas of the so-called Tibet Autonomous Region,

<http://www.legislation.gov.hk/eng/home.htm>. Retrieved on 19 May 2011.

¹⁰⁴ The symbols are protected in Hong Kong from desecration even in sake of “freedom of speech and freedom of expression”. See HKSAR v. Ng Kung Siu and Another [1999] 3 HKLRD 907; (1999) 2 HKCFAR 442.

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Qinghai Province, two Tibetan Autonomous Prefectures and one Tibetan Autonomous County in Sichuan Province, one Tibetan Autonomous Prefecture and one Tibetan Autonomous County in Gansu Province and one Tibetan Autonomous Prefecture in Yunnan Province.¹⁰⁵

The crucial difference between the abovementioned “Tibetan areas” in the PRC and “Great Tibet” is: the provincial capital of Qinghai, Xining City is included in “Great Tibet” but excluded from “Tibetan areas” in the PRC. As a crossroad in the ancient Silk Road encompassed by ethnic Tibetans to the South West, Muslims to the North West, and Han Chinese to the East, Xining City was and is a multiethnic habitation with a Han Chinese majority, which played an important role in Tibetan history. However, in the latest official memorandum submitted by representatives of the 14th Dalai Lama to the PRC central government “Tibet” has been restricted to “all autonomous Tibetan areas in the PRC”, which matches the PRC’s notion now.¹⁰⁶

In speaking of Tibetan institutions, we have to skim through some historical pages.¹⁰⁷ In the 18th century, the Manchu Crown in China and the Gelug sect of Tibetan Buddhism developed a politico-religious bond. Tibetans regard this as a “patron-priest” relationship, but Chinese literature emphasises the secular side of the

¹⁰⁵ The map of Tibet in this version available at the website of the “Central Tibetan Administration” <http://www.tibet.net/en/index.php?id=13&rmenuid=8>. Retrieved on 19 May 2011.

¹⁰⁶ Memorandum on Genuine Autonomy for the Tibetan People (Central Tibetan Administration ed., 2009).

¹⁰⁷ The history has been interpreted from different perspectives. One side see, SMITH, WARREN W., *Tibetan Nation: a History of Tibetan Nationalism and Sino-Tibetan Relations* (Westview Press. 1996). SHAKYA, TSERING, *The Dragon in the Land of Snows: a History of Modern Tibet since 1947* (Columbia University press. 1999). DAWA, *China's Tibet policy*. The other side see, GONG, WEIYANG & LING, NAIMIN, *Tibet, 1950-1967* (Union Research Institute. 1968). GOLDSTEIN, MELVYN C., *The Snow Lion and the Dragon: China, Tibet, and the Dalai Lama* (University of California Press. 1997). GOLDSTEIN, MELVYN C. & RIMPOCHE, GELEK, *A History of Modern Tibet, 1913-1951: the Demise of the Lamaist State* (University of California Press. 1989).

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coin. The Crown re-shaped the entire governance of Tibet and empowered the Dalai Lama with a theocracy that combined both the religious and the secular. The Tibetan local government (Kashag) was set up, which was in composition of four ministers (Kalön) under the Dalai Lama and supervised by two commissioners (*amban*) appointed to represent the Crown in Tibet.¹⁰⁸ In counties neighbouring Shigatse, the Panchen Lama was also empowered with a series of secular powers; the Kashag did not levy tax in the Panchen Lama's domain, neither in Amdo and Kham where local feudatories were in subjection of provincial direct rule of the Crown.

The last Manchu emperor abdicated in 1911, which led to the establishment of the Republic of China. The Republic of China declared a "five-face republic" policy towards ethnic groups once under the Manchu Crown, i.e. Han Chinese, Manchu, Mongol, Tibetan, and Hui Muslim.¹⁰⁹ The 13th Dalai Lama did not accept that. When the British army invaded Tibet, the 13th Dalai Lama fled to Outer Mongolia and visited Beijing following a call from the Manchu Crown. The imperial court cherished him well but changed the manner of encounter between the Emperor and the Dalai Lama: when previous Emperors embraced the Dalai Lama, the Emperor should step down from the throne and welcome the religious figure warmly, then sit the Dalai Lama next to himself slightly lower. But the Crown at this time asked the Dalai Lama to kowtow, maybe because his exile was not agreed and the Crown had already prepared to start its modern state-making process regardless of ancient rituals. The Dalai Lama was not satisfied. When the Crown decided to re-shape Tibet's governance and establish direct rule, the Dalai Lama fled to British India. Then the empire collapsed and the 13th Dalai Lama returned. He forced Chinese

¹⁰⁸ The appointment of the commissioners in late Qing era see, HO, D. D, *The Men Who Would Not Be Amban and the One Who Would: Four Frontline Officials and Qing Tibet Policy, 1905--1911*, 34 *Modern China* 210, (2008). Initially the Manchu Crown only appointed Manchu and Mongol *amban*, but in late Qing era there were Han Chinese appointments being made.

¹⁰⁹ TUTTLE, *Tibetan Buddhists in the Making of Modern China*.

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commissioners and troops to leave and for the first time took control of Tibet's affairs in his own hands. The era of the 13th Dalai Lama was the only chance Tibet had to modernise without external interference, but the overwhelming majority of conservative lords and lamas opposed it. The 13th Dalai Lama died in 1933.

In 1949 the Chinese communist revolution replaced the Republic with the PRC, and the CPC decided to reintegrate Tibet in its direct control. After the People's Liberation Army (hereinafter PLA) had occupied Eastern Tibet, the 14th Dalai Lama, who just took over from a regent lama, sent an envoy to Beijing to make a deal. The "17-point Agreement" is a milestone for Tibetans, which remarks the CPC's taking over of Tibet,¹¹⁰ another milestone should be the Tibetans' 1959 revolt, after which the CPC demolished the Kashag and emancipated all Tibetan serfs. The PRC established the Tibet Autonomous Region (hereinafter TAR) as an administrative division but promised autonomous powers to Tibetans. The 10th Panchen Lama was appointed in high posts along with many *tulkus*¹¹¹ and lords who decided not to flee with the 14th Dalai Lama. When the 13th Dalai Lama tried to launch his state-making project, he forced the 9th Panchen to flee to China proper to take over the Panchen domain. Since then the Dalai and the Panchen Lamas have not had good relations.

The 14th Dalai Lama restored his Kashag in Dharamsala, India. In the early days, the Kashag still wanted to fight back. Emigrated Tibetans set up an army in Nepal with US supplies, which later was demilitarised by the Nepalese government for security

¹¹⁰ For the legality and legitimacy of the "17-Point Agreement" see INTERNATIONAL COMMISSION OF JURISTS., The Question of Tibet and the Rule of Law (The International Commission of Jurists. 1959). INTERNATIONAL COMMISSION OF JURISTS. Tibet and the Chinese People's Republic (International Commission of Jurists. 1960).

¹¹¹ The Karmapa is the first important post to be succeeded by the *tulku* system, whose idea is when the late Karmapa temporarily "goes out of this world," he returns as a baby child, or reincarnation, followers must find this *tulku* and restore him to the post, so this *tulku* may live long in this world and enlighten others. Other sects of Tibetan Buddhism have adopted the system.

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reasons.¹¹² Emigrated Tibetans reformed the Kashag, and the Dalai Lama became the head of it. Although there is no scientific method to investigate Tibetans' political attachments, it is acknowledged that not all emigrated Tibetans are loyal to the Kashag. The Sakya, the Kagyu, and other sects of Tibetan Buddhism all make stunning development in the West. After the 1959 revolt that was led mostly by Eastern Tibetans, the revolt organisation survives. The revolt organisation does not kneel to the Kashag, and made an agreement with the "Republic of China" in Taiwan that it shall accept the ROC's claim over Tibet in exchange of a high level autonomy after the ROC would have re-unified China.¹¹³

To summarise, the Tibetan Autonomous Region sitting in Lhasa is barely distinct from other administrative divisions in the PRC, although it is an "ethnic autonomous region" with a series of autonomous powers in theory. It was established by the PRC central government and can be demolished unitarily by the PRC central government. Under the government's tight control, the political attachments of Tibetans in the PRC are unknown to the public. So it is the Dalai Lama and his Dharamsala office that distinguishes Tibetans from other ethnic groups in the PRC. The Dalai Lama, who in legal terms is an international refugee, keeps disseminating that he and his followers still hope to resume the citizenship of the PRC one day, but they will not surrender to the PRC central government without appropriate conditions. Although it is contestable whether Tibetan refugees may represent millions of Tibetans in the PRC, their presence, in some sense, indeed underpins the argument that the Tibetans shall be recognised as a Rawlsian people of institutional and ideological distinctiveness.

¹¹² CONBOY, K.J. & MORRISON, J., *The CIA's Secret War in Tibet* (University Press of Kansas. 2002).

¹¹³ WANG & NIMAJIANZAN, *The Historical Status of China's Tibet*.

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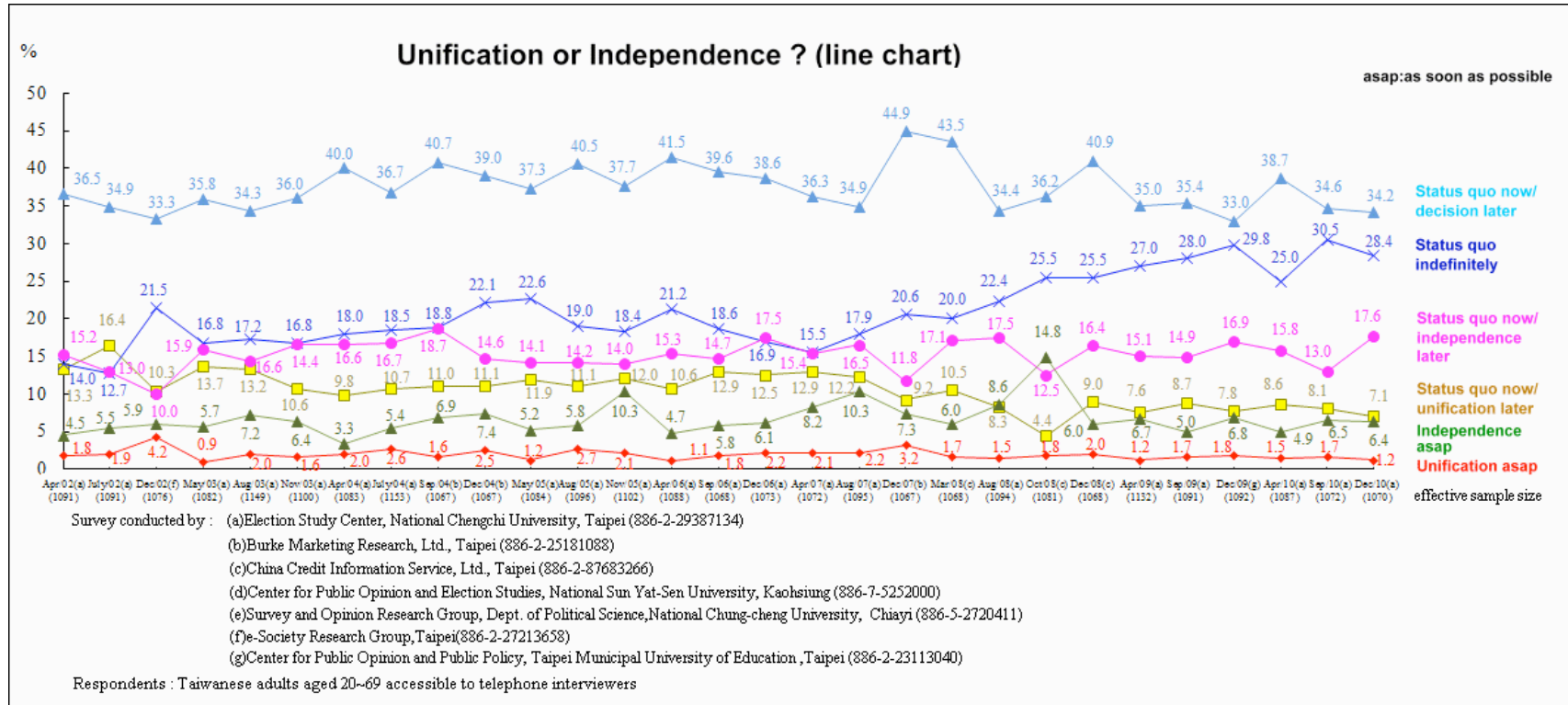


Figure 1 Public Opinion on Cross-Strait Relations in Taiwan

Source: (ROC) Mainland Affairs Council

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2.3 CITIZENSHIP AND NATIONALITY

Section 1 has explained that the peripheral societies have become people-s in Rawlsian terms and formed a heterarchy of authorities. This section goes on to investigate the political situation based on a differentiation between citizenship and nationality. The basic idea is individuals in peripheral societies and the Chinese mainland/China proper are entitled to a variety of political rights, residentship, and protection of territorial administration in accordance with their legal statutes. They are mostly recognised as Chinese nationals, but this does affect in certain circumstances the fact that they are even inferior to legal aliens in Sinitic territory. This section contends that the three cases of Sinitic peripheral societies may disturb the classic notion that citizenship and alienhood are mutually exclusive and exclusionary terms of membership, identity, and legal treatment. As a result, some are neither “others” nor hundred-percent “we”.

Even immigrants in the European Union “typically came to enjoy a full set of negative freedoms, including free access to the labour market, and they also gradually acquired a reasonable level of positive social security rights, limited political participation rights, and protection against sudden expulsion from the country”.¹¹⁴ Chinese nationals, however, in Sinitic territory can be barred from free movement, holding public office, or protection against expatriation because they have no membership of a peripheral society. Rainer Bauböck indicates “Free movement within state territories and the right to readmission to this territory has become a hallmark of modern citizenship. Yet, in the international arena citizenship serves as a control device that strictly limits state obligations towards foreigners and

¹¹⁴ WALKER, N, et al., *Denizenship and the Deterritorialization in the EU*, available at <http://papers.ssrn.com>.

permits government to keep them out or remove them, from their jurisdiction”.¹¹⁵ In this sense, the relationship between peripheral societies and their members has much outstripped that between ordinary administrative divisions and citizens, yet resembles that between states and residents to some extent.

It is probably useful to remind that the term “nationality” refers to two different categories of individuals. The first is a group of individuals (possibly and potentially) entitled to citizenship of a state; the second is an ethnic group, in the Chinese context, officially recognised and identified by the state. Both will be used in this section.

2.3.1 China and Taiwan

At first we will attend the Taiwan case. Section 1 has briefly mentioned the cross-Strait mutual de-criminalisation process in which residents on both sides of the Taiwan Strait have been relieved the threat of prosecution if they were inevitably involved in political activities against the regime on the other side of the Strait. This section will reveal in more detail how the regimes regard residents under control of the other side.

The PRC Nationality Act 1980 prescribes:

Article 4 Any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality.

Article 5 Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality...

Article 6 Any person born in China whose parents are stateless or of uncertain nationality and have settled in China shall have Chinese nationality.¹¹⁶

¹¹⁵ BAUBÖCK, RAINER, *Citizenship and Migration – Concepts and Controversies*, in *Migration and Citizenship: Legal Status, Rights and Political Participation*, (Rainer Bauböck ed., 2006), p. 16.

¹¹⁶ The PRC Nationality Act 1980.

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The PRC Nationality Act 1980 combines *jus sanguinis* and *jus soli*, but the former weighs more. If an infant's parent or parents are Chinese nationals, she can be a Chinese national; or, if an infant would be born in China, she can be a Chinese national too. Besides birth, there are other ways of acquisition of the PRC nationality, e.g. adoption, legitimation, naturalisation, etc; but birth is the primary way of "becoming Chinese".

The PRC Nationality Act 1980 does not recognise dual nationality:

Article 3 The People's Republic of China does not recognize dual nationality for any Chinese national.

Article 5 ... But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.

Article 9 Any Chinese national who has settled abroad and who has been naturalized as a foreign national or has acquired foreign nationality of his own free will shall automatically lose Chinese nationality.

Two consequences of the PRC's non-recognition to dual nationality are: on the one hand, the PRC has abandoned overseas Chinese holding other nationalities (as Article 5 and 9 indicate); on the other hand, the PRC government insists that Chinese nationals with dual nationality are not entitled to foreign consular protection in the Chinese mainland. If any Chinese nationals hope to apply for foreign consular protection in the Chinese mainland, they should renounce their Chinese nationality in the first place through certain official procedures; otherwise their application will not succeed.¹¹⁷

The latest Chinese nationality law before the PRC Nationality Act 1980 was that promulgated on 5 February 1929 by the Republic of China. The ROC Nationality

¹¹⁷ Article 14 of the PRC Nationality Act 1980 reads: "Persons who wish to acquire, renounce or restore Chinese nationality, with the exception of cases provided for in Article 9, shall go through the formalities of application."

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Act 1929 did not refuse dual nationality. Secondly, the ROC Nationality Act 1929 primarily counted an infant's nationality by her father's Chinese nationality; the mother's Chinese nationality would not count unless the father is unknown or stateless. In other words, the 1929 law is overwhelmingly *jus sanguinis* based on patrilineal descent and it did not consider whether an infant is born in China or not. Thirdly, the ROC Nationality Act 1929 was stricter than the PRC Nationality Act 1980 in naturalisation. It requested any people applying for naturalisation to "have basic linguistic ability of the national language." In that decade this read as who wished to naturalise to the Republic of China must be able to speak Mandarin.

The ROC Nationality Act 1929 is comparatively significant because: on the one hand, it is a former version of the contemporary one applying in Taiwan; on the other hand, although "the 1929 law was never formally in force on the territory of the PRC, ... a number of its provisions were still tacitly applied by the PRC authorities on assorted occasions [until the 1980s]."¹¹⁸

As things stands, the PRC Nationality Act 1980 raised a question: in 1949-1980, who were Chinese nationals? Article 17 of the PRC Nationality Act 1980 does say: "The nationality status of persons who have acquired or lost Chinese nationality before the promulgation of this Law shall remain valid." However, because there are many abovementioned differences between the 1929 and the 1980 act and the 1980 act provides "retrospectively" automatic forfeiture of Chinese nationality, the situation turned complicated. Many individuals' Chinese nationality does not "remain valid" after 1980, but others who were not entitled to have Chinese nationality now may have. Since the "ROC nationality" is still valid in Taiwan, we may briefly conclude that the number of Chinese nationals recognised by the PRC and by the ROC in Taiwan should not be the same in theory.

¹¹⁸ GINSBURGS, G, *The 1980 Nationality Law of the People's Republic of China*, The American Journal of Comparative Law 459, (1982).

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Furthermore, although the ROC Nationality Act 1929 was adopted by Taiwan, Taiwan has also amended it many times. Taiwan's contemporary Nationality Act accepts the combination of *jus sanguinis* and *jus soli*, and both parents' Chinese nationality counts in deciding that of an infant. The linguistic ability condition for naturalisation maintains. Besides, Taiwan restricts naturalised nationals' opportunity to hold public office. Unless they have fulfilled a 10-year residency, naturalised nationals could not be elected as "President, leaders of five *Yuan*-s, local officers, legislative representatives, etc."¹¹⁹ Although dual nationality is acceptable to Taiwan, foreign nationality holders are not entitled to hold public office. Comparatively, The PRC Nationality Act 1980 accepts people who are relatives of Chinese nationals or who have settled in China to naturalise with no condition of linguistic ability or restriction to public office.

The clash between the PRC nationality law and Taiwanese nationality law – *in theory* – results: on the one hand, the PRC authorities shall recognise an overwhelmingly majority of Taiwan residents as "Chinese nationals", if not all; on the other hand, the Taiwanese authorities do not exclude an overwhelmingly majority of Chinese mainlanders from being "nationals" either. However, *in practice* both sides lack efficient mechanisms to identify the nationality of individuals who contemporarily inhabit under control of the other side. If an individual would travel across the strait, she should bear some travel documents. This side although in the past did not "know" this individual, her nationality will be recognised when she crosses the border. If the individual does not show, she is always "unknown" to the other side.

To identify the status of "Chinese nationals", it seems the PRC central government's attitude is all individuals bearing Taiwan's official travel documents are so recognised. The Ministry of Foreign Affairs of the PRC indexes:

¹¹⁹ The ROC Nationality Act 1929, art. 10.

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All who have Chinese nationality in accordance with the Nationality Law of the People's Republic of China are entitled to have our consular protection. In other words, as long as you are Chinese citizens – regardless of settling abroad or temporarily travelling abroad; regardless of the mainland residents, or Hong Kong, Macao and Taiwan compatriots – you are our target of providing consular protection.¹²⁰

Here the PRC foreign ministry directly matches “Taiwan compatriots” with “Chinese citizens”. However, its application in legal practice is vague. Naturalised nationals in Taiwan of course do not naturalise to the PRC “through the formalities of application” with the PRC’s approval. It is also a question whether certain Taiwanese residents who have dual nationality have *automatically* lost their nationality in accordance with the PRC Nationality Act.

On the other side, Taiwan’s attitude is also controversial. Taiwanese law defines: “national: means nationals living with the household registration in Taiwan, and nationals living abroad.”¹²¹ The Legislative Grounds of that article reads: “‘nationals’ includes nationals living in Taiwan, the mainland, abroad, and Hong Kong and Macau.”¹²² There are two interpretations: (1) Chinese nationals living in the mainland are recognised by the Taiwan authorities as its “nationals”, as well as those in Hong Kong, Macau and abroad; (2) there are some “nationals” of Taiwan who have settled in the mainland. They have lost their Taiwan household, but they are still recognised as Taiwan’s “nationals”. Because: (a) they have not yet renounced their “ROC” nationality in accordance with Taiwan’s law; (b) even if they have acquired/restored their PRC nationality, this could be in some sense

¹²⁰ Zhongguo lingshi baohu yu xiezhu zhinan (Ministry of Foreign Affairs of the People's Republic of China ed., 2010).

¹²¹ The ROC Immigration Act 1998, art. 3(3).

¹²² See the official website of National Immigration Agency of the ROC (Taiwan) available in Chinese at http://www.immigration.gov.tw/aspcode/Show_Law.asp?DocumentID=4544. Retrieved on 10 October 2009.

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tolerated as Taiwan accepts duality nationality. Interestingly, their “ROC nationality” does not count in the PRC. So they are not holding duality nationality, which would have offended the PRC law.

If we agree finally there are mainland residents who are Chinese nationals in accordance with the PRC law but not in accordance with Taiwanese law, the second interpretation prevails. The standard Taiwanese categorisation of peoples is: (1-a) nationals with household registration in Taiwan; (1-b) nationals without household registration, e.g. nationals living abroad or those yet have Taiwan household by acquisition/restoration of their nationality; (2) aliens; (3) mainland people; (4) residents of Hong Kong and Macau. Category (1-b) and (3) thus are not overlapping. It is understandable that this standard categorisation is applied by a series of immigration and national security laws, for which Chinese mainlanders are to be kept out.

However, on the other hand, Taiwan has not yet disposed of the possibility that mainland residents could also be “Chinese nationals”. This attitude is applied by a series of cross-Strait relationship laws, for which Chinese mainlanders are to keep in. The ROC Act Governing Relations between the People of the Taiwan Area and the Mainland Area (hereinafter “the ROC Cross-Strait Relations Act”) provides:¹²³

Article 1

This Act is specially enacted for the purposes of ensuring the security and public welfare in the Taiwan Area, regulating dealings between the peoples of the Taiwan Area and the Mainland Area, and handling legal matters arising therefrom before national unification...

Article 2

The following terms as used in this Act are defined below.

1. "Taiwan Area" refers to Taiwan, Penghu, Kinmen, Matsu, and any other area under the effective control of the Government.

¹²³ The ROC Cross-Strait Relations Act.

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2. "Mainland Area" refers to the territory of the Republic of China outside the Taiwan Area.
3. "People of the Taiwan Area" refers to the people who have household registrations in the Taiwan Area.
4. "People of the Mainland Area" refers to the people who have household registrations in the Mainland Area.

The new categorisation turns to: (a) people of the Taiwan Area, and (b) people of the Mainland Area. Abovementioned category (1-b) and (3) overlap in category (b). That is to say, the "Republic of China" in Taiwan has not yet abandoned "Chinese nationals" left in the mainland, regardless of whether they were born in Taiwan but settling in the mainland or they were born in the mainland but hoping to immigrate to Taiwan.

Taiwan does beg the nationality question, but "before national unification" to beg the question would be feasible. It is politically efficient that the ROC Cross-Strait Relations Act uses "household registration" to differentiate "people of the Taiwan Area" from "people of the Mainland Area". Actually, in the Act for Exchanges between Chinese Nationals in the Mainland and in Taiwan of the PRC 1992 (hereinafter "the PRC Cross-Strait Exchanges Act") "household registration" is also involved.¹²⁴ The PRC central government provides that if mainland residents would like to travel to Taiwan, the household registration in the mainland is necessary for the authorities to grant travel permission.¹²⁵ Taiwanese residents who would like to travel to the mainland could acquire the permission from the PRC by their household registration in Taiwan, but other travel documents were also acceptable. Even though the PRC imagines all "Taiwan compatriots" are "Chinese nationals", at

¹²⁴ Article 2 of the PRC Cross-Strait Exchanges Act reads: "The law is enacted to regulate exchanges between the mainland and Taiwan of Chinese citizens, including Chinese citizens residing in the mainland (hereinafter referred to as "mainland residents") and Chinese citizens residing in Taiwan (hereinafter referred to as "Taiwan residents")".

¹²⁵ The PRC Cross-Strait Exchange Act.

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the end it has to politically and legally differentiate “Taiwanese residents” from “mainland residents”. That is inevitable.

2.3.2 Hong Kong

After the 1997 handover of Hong Kong, the PRC Nationality Act 1980 applies in the special administrative region. However, for Hong Kong, the “permanent resident” is a more meaningful term than “Chinese national”, because in Hong Kong civic and political rights are granted in accordance with the former status instead of the latter. Article 24 of the Hong Kong Basic Law states:¹²⁶

The permanent residents of the Hong Kong Special Administrative Region shall be:

- (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
- (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;
- (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2).

This article also states which non-Chinese Hong Kong residents are eligible to become “permanent residents” of the HKSAR, but the crucial case is about ethnic Chinese. The first question is that there are a great number of Chinese residents in Hong Kong holding “British Dependent Territories Citizens passport” or “British Nationals (Overseas) passport”, but the PRC Nationality Act refuses “dual nationality”. When the PRC Nationality Act 1980 applies in Hong Kong, shall these people lose their Chinese nationality automatically or not? These people are estimated to be around 3.4 million that is around a half of Hong Kong’s total population. If they were not “Chinese nationals” after the handover, the HKSAR’s political participation would be much undermined. The PRC then realised that their

¹²⁶ The Hong Kong Basic Law, art 24.

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Chinese nationality should be maintained. On 15 May 1996 the PRC Standing Committee of the National People's Congress issued an "explanation" saying:

1. Where a Hong Kong resident is of Chinese descent and was born in the Chinese territories (including Hong Kong), or where a person satisfies the criteria laid down in the Nationality Law of the People's Republic of China for having Chinese nationality, he is a Chinese national.

2. All Hong Kong Chinese compatriots are Chinese nationals, whether or not they are holders of the "British Dependent Territories Citizens passport" or "British Nationals (Overseas) passport". With effect from 1 July 1997, Chinese nationals mentioned above may, for the purpose of travelling to other countries and territories, continue to use the valid travel documents issued by the Government of the United Kingdom. However, they shall not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People's Republic of China on account of their holding the abovementioned British travel documents.¹²⁷

Since the new Hong Kong passport issued by the HKSAR has become more and more convenient for Hong Kong residents, "British Nationals (Overseas) passport" holders have decreased to less than 0.8 million. The question would disappear in decades.

The second and more crucial question is about the interpretation of the third section of Article 24. The issue is: if the parent who has resided in Hong Kong for the period of seven years but has not yet been a Hong Kong permanent resident, is her/his child a Hong Kong permanent resident according to the category (3)? The Director of the Immigration of the HKSAR gave negative answers, but judges of the Court of Final Appeal of the HKSAR (HKSFA) adjudicated that the immigration office was

¹²⁷ The Interpretation by the Standing Committee of the National People's Congress of Article 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 26 June 1999, available at the Bilingual Laws Information System operated by the HKSAR Department of Justice.

<http://www.legislation.gov.hk/eng/home.htm>. Retrieved on 19 May 2011.

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wrong. The judgement brought the first constitutional crisis after 1997, which I will discuss in chapter 4. Here the point is: since the Chief Executive of the HKSAR was scared – he suspected that there would be over one and a half million Chinese mainlanders able to enter into Hong Kong according to the judgement – he requested the Standing Committee of the NPC, via the State Council of the PRC, to interpret the Basic Law. Later, the Standing Committee states: “... the provisions of art 24(2)(3) means that, to qualify as a permanent resident within it, both parents or either parent of the person concerned must be a permanent resident within arts 24(2)(1) or 24(2)(2) at the time of birth of the person concerned.”¹²⁸

The category of “Hong Kong permanent residents” is special for Taiwanese authorities too. In the past Chinese residents in Hong Kong were regarded as Chinese nationals by the “Republic of China” in Taiwan, but since the 1997 handover Taiwan has to review its Hong Kong policy in accordance with the current situation. Taiwan thus promulgated a series of laws to attend Hong Kong and Macau affairs. Interesting points are (a) Hong Kong residents who in the past had contributed to Taiwan should be admitted as Taiwan residents after the handover; (b) Hong Kong students could continue to study in Taiwan, though ordinary mainland Chinese nationals could not; (c) to enter in Taiwan Hong Kong residents could use their own HKSAR passports, though ordinary PRC passports could not be used in Taiwan, etc.¹²⁹

2.3.3 Tibetans

Who are Tibetans? The “Tibetan” status in the PRC is legally identified. The PRC authorities register an infant born to “Tibetan” parents as a “Tibetan”, and this status guarantees the infant a number of civic and political rights, which ordinary Han Chinese lack in certain time and place. For instance, an ethnic minority is entitled to

¹²⁸ The Director of Immigration v. Chong Fung Yuen [2001] 2 HKLRD 533; [2001] 4 HKCFAR 211.

¹²⁹ The ROC Act Governing Relations with Hong Kong and Macau 2006.

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priority in college admission, privileges in taking public office, and irregularity of the birth planning.¹³⁰ This encourages many Han Chinese to change their nationality/ethnicity status. In the 1980s many did so, but since the 1990s alleged “restoration” of minority status has been prohibited.¹³¹ The authorities now request individuals who wish to change nationality status should have their parents’ status changed first. Besides, no one is allowed to register as a non-recognised “nationality”. Only 56 officially recognised nationalities are accepted, including Han Chinese, Tibetan, and Hui Muslim, Uygur, Mongol, Zhuang, etc; Hui Muslim and the other three mentioned minority nationalities have also established autonomous regions. Han Chinese minors’ nationality status may change by adoption or their parent’s remarriage, but adults’ status shall remain. Minority individuals usually could not change their status to another minority nationality.¹³² Hence, if a Zhuang female is married with a Tibetan male, the female’s children born in her previous marriage with a Han male are able to change their Han status to Tibetan, but the female herself could not change. The female should be offered an admission by a PRC college easier than a Han student, but in the Tibetan Autonomous Region she is not eligible to be elected to be the President.

The major PRC criteria to identify or register nationality status are *objective* (descent, language, parents’ legal nationality status registered by law), but there are still some *subjective* criteria applying.¹³³ The eminent Chinese anthropologist Fei Xiaotong’s “Yi-Tibetan aisle” theory highlights the complexity. Alongside the

¹³⁰ In rural areas ethnic Tibetans have been untouched by the policy of birth planning, see FISCHER, A. M., “Population Invasion” versus Urban Exclusion in the Tibetan Areas of Western China, 34 Population and Development Review 631, (2008).

¹³¹ The Joint Notice of the National Commission for Ethnic Affairs and Ministry for Public Security on Suspension of Change of Ethnic Status 1989.

¹³² The National Commission for Ethnic Affairs Regulation for Ethnic Identification 1990.

¹³³ BROWN, MELISSA J., *Local Government Agency: Manipulating Tujia Identity*, 26 Modern China.

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border between the Tibetan Autonomous Region and China proper, where different nationalities live together, people speak a great number of languages, including various dialects of Tibetan, Chinese, Yi, Qiang (another Chinese minority), etc. This area also belongs to “Great Tibet”, where during the past centuries Tibetan-speaking people’s ancestors were coming from the west, Hans the east, Yi the south, and Qiang the north. In accordance with objective “scientific” criteria of the PRC’s “nationality identification”, in this area people ought to be identified and registered by languages and descent, but in fact several Yi-speaking and Qiang-speaking groups have been recognised as “Tibetans” based on their manners and identity.¹³⁴ Secondly, although parents register child’s nationality after birth, one could change it after the age of 18 years old. Then one may select either a matrilineal or patrilineal nationality so the decision is subjective. Another case is naturalised people. Naturalised people in China could register with an identical or similar nationality within the scope of 56 recognised nationalities.¹³⁵

The Tibetan status is also identified or registered by Dharamsala and Taiwan. The Charter of Tibetans in Dharamsala reads:

Article 8.

- (1) All Tibetans born within the territory of Tibet and those born in other countries shall be eligible to be citizens of Tibet. Any person whose biological mother or biological father is of Tibetan descent has the right to become a citizen of Tibet; or
- (2) any Tibetan refugee who has had to adopt citizenship of another country under compelling circumstances may retain Tibetan citizenship provided he or she fulfils the provisions prescribed in Article 13 of this Charter; or
- (3) any person, although formally a citizen of another country, who has been legally married to a Tibetan national for more than three years, who desires to become a

¹³⁴ This is similar to the “dense central belt from northern Italy through the Rhineland to the Low Countries” that Michael Keating described. See KEATING, MICHAEL, *The New Regionalism in Western Europe* (E. Elgar. 1998), p. 10.

¹³⁵ The National Commission for Ethnic Affairs Regulation for Ethnic Identification 1990.

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citizen of Tibet, may do so in accordance with the law passed by the Tibetan Assembly.¹³⁶

This provision obviously adopts *jus sanguinis* rather than *jus soli*. If in the English texts “born within the territory of Tibet” is misleading, in Tibetan and Chinese texts “all Tibetans” are all emphasised. That is to say, non-Tibetan descendants, though born in Tibet, are not eligible to become “Tibetans”.¹³⁷ There is a door reserved for marriage, but the measure for “naturalisation” is not clear.

When the “Republic of China” fled to Taiwan, it brought a governmental organ of Mongolian and Tibetan Affairs Committee together. This committee was established for the ROC to exercise sovereignty over Tibet and several Mongolias. In Taiwan this committee is also in charge of identifying and registering “Tibetan status”. The majority of recognised nationalities in the PRC are not recognised by Taiwan, so the “Tibetan status” is special there. However, the “Tibetan status” counts little in Taiwan. This status is helpful for some emigrated Tibetans to abstain the right of abode; but since the Committee itself is waiting for “appendectomy” by the Taiwanese authorities, it seems the “Tibetan status” will not exist for long.¹³⁸

¹³⁶ The Tibetan Charter available at <http://www.tibet.com/govt/charter.html>. Retrieved on 1 September 2009.

¹³⁷ The Tibetan charter in Chinese version available at <http://www.xizang-zhiye.org/b5/ex/liuwangfagui/index.html>. Retrieved on 19 May 2011.

¹³⁸ For emigrated Tibetans’ nationality and citizenship see HESS, Immigrant Ambassadors: Citizenship and Belonging in the Tibetan Diaspora. FRECHETTE, ANN, Tibetans in Nepal : the Dynamics of International Assistance among a Community in Exile (Berghahn Books, 2002).

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2.4 AUTHORITIES IN INTERNATIONAL EYES

2.4.1 Taiwan

On the legal status of Taiwan, three arguments contest each other severely in international legal scholarship. First, the People's Republic of China argues that as the only legitimate representative of the sovereign Chinese State, the government of the People's Republic of China owns the entire territory now under the control of the Taiwanese authorities in name of the "Republic of China". This argument is based on the documental chain starting from the Cairo Declaration. In the White paper of "The One-China Principle and the Taiwan Issue", the PRC government states:

Taiwan is an inalienable part of China. All the facts and laws about Taiwan prove that Taiwan is an inalienable part of Chinese territory. In April 1895, through a war of aggression against China, Japan forced the Qing government to sign the unequal Treaty of Shimonoseki, and forcibly occupied Taiwan. In July 1937, Japan launched an all-out war of aggression against China. In December 1941, the Chinese government issued the Proclamation of China's Declaration of War Against Japan, announcing to the world that all treaties, agreements and contracts concerning Sino-Japanese relations, including the Treaty of Shimonoseki, had been abrogated, and that China would recover Taiwan. In December 1943, the Cairo Declaration was issued by the Chinese, U.S. and British governments, stipulating that Japan should return to China all the territories it had stolen from the Chinese, including Northeast China, Taiwan and the Penghu Archipelago. The Potsdam Proclamation signed by China, the United States and Britain in 1945 (later adhered to by the Soviet Union) stipulated that "The terms of the Cairo Declaration shall be carried out." In August of that year, Japan declared surrender and promised in its instrument of surrender that it would faithfully fulfil the obligations laid down in the Potsdam Proclamation. On October 25, 1945, the Chinese government recovered Taiwan and the Penghu Archipelago, resuming the exercise of sovereignty over Taiwan.¹³⁹

¹³⁹ White Paper: the One-China Principle and the Taiwan Issue (Taiwan Affairs Office & Information Office of the State Council eds., 2000).

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The PRC government reckons that since it has replaced the “Republic of China” to become the legitimate representative of the sovereign Chinese State in the international community, especially in the United Nations, the PRC’s sovereignty now shall cover Taiwan and Penghu despite the fact that the Taiwanese authorities actually do not consider the territory subordinate to the PRC government.

Secondly, the “Republic of China” in Taiwan also founds its argument partially on the Cairo Declaration and the Potsdam Proclamation, but here one piece missed in the PRC argument is the “Treaty of Peace between the Republic of China and Japan”. On 28 April 1952, the Japanese government and then “Republic of China” in Taiwan signed a “peace treaty” to formally end the war. The Chinese State did not enter the “Treaty of Peace with Japan” signed in San Francisco on 8 September 1952 because of the variance over who is the legitimate representative of China since 1949. The ROC government as the recognised one in Japanese eyes thus made another treaty with Japan that repeats the notion that Japan has renounced all rights, titles, and claims to Formosa and the Pescadores (i.e. Taiwan and Penghu); the treaty also recognises all treaties between China and Japan signed before 1941 have been annulled because of the war, which means the Treaty of Shimonoseki is included and thus abolished by the two parties too; in the treaty, the Japanese government also reckons that ROC nationals shall include those of Taiwanese connections who have resumed Chinese nationality. The “Republic of China” in Taiwan relies on this treaty as one of the footstones of its legitimate rule on the island. But the tricky points are: (i) the entire territory controlled by the Taiwanese authorities composites not only those islands renounced by Japan after the war but also some close to the mainland never occupied by Japan, which belong to the Chinese State without dispute, yet an independent Taiwanese state would not be entitled to own based on any treaties; (ii) whereas the Japanese government shifted the recognition of the Chinese government from the “ROC” in Taipei to the PRC in

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Beijing, the validity of the 1952 Sino-Japanese treaty become ambiguous since 1979.¹⁴⁰

Thirdly, the argument that “the legal status of Taiwan has not been decided” is held by a group of political activists for Taiwanese independence. The last argument contests that Japan did renounce its rights, titles, and claims, but there is no point suggesting the Chinese State shall resume to exercise the sovereignty over Taiwan; Chiang Kai-shek did send an army to recover Taiwan, yet he represented the allies not the Chinese State at that moment; Taiwan shall be a trusteeship of the allies, or the United Nations as the successor of the allies, or the United States as the leader of the allies, and eventually the legal status of Taiwan will be determined by a Taiwanese referendum. Nevertheless, the last argument is every theoretic. The PRC government is hardly challenged in the United Nations for most countries have accepted the so-called “one China principle/policy” in setting up diplomatic relations with the PRC; while even the United States does not see the Taiwanese authorities as a civilian administration under US military supervision!

So much has been said about the theories. The praxis is that in international eyes, the Taiwanese authorities have to be granted a *sui generis* status to facilitate the international participation of twenty million Taiwanese residents. There has been a divergence in governments or governmental branches in attending the legal status of Taiwanese authorities. The first group of around twenty states recognises the statehood of the “Republic of China” and thus does not have diplomatic relations with the PRC. Secondly, in many countries the Taiwanese authorities maintain a representative for the sake of addressing cultural and economic affairs of Taiwanese interests, while many also send a representative to Taiwan in exchange. Although defence and foreign affairs are reserved powers for the president in the United States, the US Congress has taken a rare position on Taiwan’s legal status, which

¹⁴⁰ CHIU, HUNGDAH, *The International Legal Status of the Republic of China* (University of Maryland.1992).

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was embodied in the Taiwan Relations Act on the eve of derecognising the ROC. In the absence of diplomatic relations or recognition, the core of the US Taiwan Relations Act is the application of US laws with respect to Taiwan shall be not affected. As a result the US domestic law creates an independent jurisdiction for the Taiwanese authorities in US eyes. The US courts thus note: Taiwanese regulations shall be considered “foreign laws”; governmental acts shall fall under the “Act of State Doctrine”; the US Foreign Sovereign Immunity Act shall also apply to Taiwanese public enterprises, governmental agencies, and officials.¹⁴¹ The United Kingdom as the first Western state that shifted recognition from the ROC to the PRC does not issue an act as the US did; but Pasha L. Hsieh argues: “Instead, by basing judicial interpretations of the Taiwan’s status on the common law, British courts have granted Taiwan State status, thus achieving the same result as the US courts achieved through interpreting the [Taiwan Relations Act]”.¹⁴² In challenging the exclusive province of the executive branch of the government, the common law courts offer a pragmatic way to deal with separate jurisdictions and their regulations, persons, and property, among them Taiwan has been typical. This seems the only feasible option at this moment, otherwise two parties claiming the Chinese title and the international community would be trapped in endless confusions around the issue.

The Taiwanese authorities have been trying to secure an international space in international organisations. The worst performance of the Taiwanese authorities is their endeavour to “re/join” the United Nations. The People’s Republic of China has replaced the “Republic of China” in the United Nations for more than three decades, since then Taiwan’s participation in the UN is always a major concern for people on the island. The “ROC” employs the rhetoric that the ROC itself quitted the UN

¹⁴¹ HSIEH, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan* at 779.

¹⁴² *Id.* at 782.

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before the UN would expel “representatives of Chiang Kai-shek”. To “rejoin” the most important international organisation around the world, since 1993 the “ROC” in Taiwan has yearly raised the issue through states maintaining diplomatic relation with the “ROC”. Yet the proposal of “ROC rejoining the UN” is hardly accepted in confrontation to the PRC pressure. The Democratic Progressive Party (DPP) on the other side prefers to “join” the United Nations with the name of Taiwan rather than the “Republic of China”. Although not challenging the PRC’s seat in the UN, the DPP proposal as a potential means to realise “de jure Taiwanese independence” never reconciles the PRC side either. In 2008 two referenda took place along with the Taiwanese presidential election, but the KMT’s “ROC” proposal and the DPP’s “Taiwan” one both failed because of low turnout.

The newly elected KMT president has shifted to focus on peripheral UN organisations rather than the UN Assembly or the Security Council. The most significant one is the World Health Organisation. However, being in favour of the new KMT authorities’ reconciliation policy, the PRC has lowered the bar for Taiwanese international participation. The Taiwanese authorities were granted an observer status in the World Health Assembly in 2009, which exemplifies the “meaningful international participation” endorsed by both the new KMT government in Taiwan and the provision of Article 7(2)-5 of the PRC Anti-Secession Act 2005. In international organisations that do not request sovereign qualification, the Taiwanese authorities have performed considerably better. The Taiwanese authorities have joined the Asia-Pacific Economic Cooperation in name of Chinese Taipei represented by a ministerial level official. The head of the Taiwanese authorities never takes part in the leadership summit because of international realpolitik. But since 2008, the Taiwanese authorities may send a former “ROC Deputy President” to the summit who himself reopened the KMT-CCP communication in 2005, and thus in some sense a trustworthy figure in CPC eyes. The most successful performance of Taiwanese international participation is in the World Trade Organisation. In the WTO, the Taiwanese authorities are called the “The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu” and truly

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achieve a parallel status with the Chinese mainland as another “separate customs territory”.¹⁴³

2.4.2 Hong Kong and Tibet

As a full-member or member, the HKSAR joins in a number of international organisations, e.g. the Asian Development Bank (ADB), the Asia-Pacific Economic Cooperation (APEC), and the World Trade Organization (WTO). In ADB, APEC, and WTO, the PRC is also a “member”.¹⁴⁴ This is rare. The Soviet Union once allowed communist Ukraine and Belarus to join the United Nations as “sovereign” states, but the Soviet Union had a dual sovereignty doctrine. A traditional unitary state is unlikely to copy that model theoretically, but the reality speaks for itself. Although being excluded from “sovereign” organisations on the international stage, territorial units in changing “unitary” states may find a place in *non-sovereign* organisations or *regional* co-operations since the downgraded controversy and upgraded relevance and necessity, in the sense that these territories are more usually influential entities in concerned regions.

Hong Kong’s international status is rather clear, but the case of Tibet is also worth considering. Considering Tibet’s status under positive international law, the first

¹⁴³ CHEN, A, *Taiwan's International Personality: Crossing the River by Feeling the Stones*, Loyola of Los Angeles International and Comparative Law 223, (1997). WILLIAMS, PAUL R, *Creating International Space for Taiwan: The Law and Politics of Recognition*, 32 New England Law Review 801, (1998). MO, J, *Settlement of Trade Disputes between Mainland China and the Separate Customs Territory of Taiwan*, 2 Chinese Journal of International Law 145, (2003). CHARNOVITZ, S, *Taiwan's WTO Membership and its International Implications*, 1 Asian Journal of WTO & International Health Law and Policy 401, (2006). WINKLER, S., *Can Trade Make a Sovereign? Taiwan-China-EU Relations in the WTO*, 6 Asia Europe Journal 467, (2008). For Taiwan’s participation in the UN see HUANG, *Taiwan's Status in A Changing World: United Nations Representation and Membership for Taiwan*.

¹⁴⁴ GHAI, *Hong Kong's New Constitutional Order: the Resumption of Chinese Sovereignty and the Basic Law*, chapter 11.

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answer was it has been a suzerainty of imperial China or the Manchu Crown. The Oriental praxis had been that the Manchu Crown supported Tibet's theocracy in political, military, and financial matters and the Dalai and Panchen Lamas would reciprocate the Crown in religious matters. Even if the term "suzerainty" could apply to the Tibet case, it is still an anomaly in 20th century international law.¹⁴⁵ Then the second answer, after the human rights covenants' promulgation, was "Tibet is a Chinese colony", which attempted to grant the territory the right to de-colonise in accordance with the covenants. However, this argument misapprehends the complex relation between Tibet's modernisation and China's century-long revolution, as well as their participation to the process of globalisation.¹⁴⁶ Barry Sautman concludes: "None of the main contours of classic colonialism are found in the Tibet case".¹⁴⁷ Now some, mostly emigrated Tibetans, are starting to use the discourse of "minority rights" and "internal secession" to find a third answer. For that, they have to describe the PRC state as a totalitarian regime executing a "cultural genocide" project to annihilate the Tibetan people.¹⁴⁸

Article 31(1) of The PRC Ethnic Regional Autonomy Act 1984 provides that "in accordance with state provisions, autonomous agencies in ethnic autonomous areas may pursue foreign economic and trade activities and may, with the approval of the State Council, open foreign trade ports."¹⁴⁹ But the article is rather vague in practice. On the other side, the 14th Dalai Lama develops strong international contacts around the world, which have been severely criticised by the PRC central

¹⁴⁵ ALEXANDROWICZ-ALEXANDER, C. H., *The Legal Position of Tibet*, 48 American Journal of International Law 265, (1954).

¹⁴⁶ WANG, HUI, *The Politics of Imagining Asia* (Harvard University Press. 2011).

¹⁴⁷ SAUTMAN, *Is Tibet China's Colony: The Claim of Demographic Catastrophe* at 89.

¹⁴⁸ SAUTMAN, *Cultural genocide and Tibet* at 196-197. Sautman himself refutes the emigrated Tibetans' claim that China has been executing a "cultural genocide" project in Tibet.

¹⁴⁹ The PRC Ethnic Regional Autonomy Act 1984, art 31(1).

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government. Yet no state recognises Dharamsala in international legal terms, and the 14th Dalai Lama's activities are widely deemed as his personal campaign.

2.5 CONCLUDING REMARKS

As we have seen, the peripheral societies of Tibet, Hong Kong, and Taiwan to a larger or lesser degree have evolved into political units that are questioning the unitary preposition of the PRC central government. In a heterarchy of authorities, the peripheral societies are fostering different political attachments from the PRC central government's: political pluralism and liberal values are respected in Taiwan and Hong Kong; whereas the Tibet Autonomous Region is ideologically coherent with the PRC central government, the Dalai Lama and his followers in Dharamsala have distinctive ideals. Moreover, in institutional terms, the peripheral societies root in the variety of legal status of Chinese nationals whose citizenships are not identical in Sinitic territories. The territorial authorities are sustaining a unique bond with citizens of relatively exclusive membership in a territorial jurisdiction; hence there is no wonder why political attachments may vary in accordance with territorial boundaries rather than international boundaries between Sinitic territory and foreign land. At the last, the peripheral societies are also special in international eyes, which means the international community distinguishes the societies from ordinary administrative divisions of the PRC. Accordingly, the peripheral societies may climb a ladder towards the international stage faster or slower.

In this sense, the Rawlsian term of people, which was invented to label members of the international community, may also be appropriately applied to define the peripheral societies in context. Originally, the term is conceived to imagine international participants who may behave in accordance with a series of principles of reasonableness thus sustain a peaceful international order. Since peace is also one of the most important ends of an order of Sinitic people-s in this context, this thesis hopes a new conceptualisation based on the situation may also do justice to it. For this, chapter 3 will discuss whether John Rawls's theory may help to engineer a normative project for Sinitic people-s, and if at all, what it shall be.

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Chapter 3 Constitutional Law of Peoples

3.1 INTRODUCTION

This chapter attempts to build a normative framework to assess the political situation and constitutional arrangements. Chapter 1 has introduced the idea that in assessing Sinitic peoples and Chinese law, liberals' perception is negative and pessimistic: the PRC government in the Chinese mainland continues violating human rights thus it has been very fragile as a one party-state struggling to survive. On the other side, the PRC government and its officials are too optimistic about the chosen road, which in some measure has led to stunning economic growth, troubled but still stable reign, and immunity from international interference. In comparison with them, the third-way or progressive perception is relatively objective because it mostly derives from empirical research rather than theoretic hypothesis or propaganda. But chapter 1 has explained a retrospective perspective based on experience usually lacks desirable ideals or justification for the desirability of the ideals, which, however, is indispensable to coordinate interests and foster consensus in an order of complexity and conflicts.¹⁵⁰

Hence it is crucial to lodge a number of ideals that may transcend the debate between the right and the left, and possibly be appreciated by either side. For this, this chapter is built to outline a series of normative principles that can be pursued and materialised in future constitutional reform. Nevertheless, political scientists and moral philosophers on both the right and the left sides have contributed greatly in designing a project that can bring justice to hostile societies. But this chapter has chosen to use John Rawls's theory in unfolding its arguments. This is not only because of Rawls's prominence but also because his theory may reconcile with the Sinitic political situation better than any theoretical rivalries. John Rawls's theory of

¹⁵⁰ See chapter 1.

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“law of peoples” (LoP) aims to provide “a particular political conception of right and justice that applies to principles and norms of international law and practice”.¹⁵¹ In the international community, there are liberal and non-liberal peoples. They may or may not obey international law, and endanger the international order with war. Chapter 2 has discussed that the Sinitic order of peoples resembles the international order in many respects. Being liberal or not, the Sinitic peoples are self-governing political units that may probably fall into violent conflicts too.

However, chapter 2 also explained that Sinitic peoples are not states in the final analysis. They are not on an equal footing in a heterarchy of authorities. The individual bearing Chinese nationality is entitled to various rights, protection, and treatments in different Sinitic jurisdictions. In international eyes, the Sinitic peoples are not widely recognised but to a larger or lesser extent have taken a *sui generis* place on the international stage. For two reasons, John Rawls’s theory of LoP cannot be pasted seamlessly to the order of Sinitic peoples. First, John Rawls’s peoples in the international community, although varying in ideologies, are equal and symmetrical in legal terms. On the contrary, Sinitic peoples are not. Rawls’s critics in fact have repeatedly raised the question that Rawls’s LoP is maladaptive to plurinational states and multilevel polities.¹⁵² This chapter has to agree with them in this regard. Secondly, John Rawls’s LoP is not custom-made for anyone. Rawls in the LoP tries to persuade “statesmen” in liberal democracies to act in accordance with a political conception of right and justice in deciding whether to engage a war with non-liberal regimes. In the Chinese context, however, it is unlikely Hong Kong or Taiwan is willingly to confront the PRC force by any means other than the peaceful means. If at all, this chapter is rather to persuade the non-liberal regime not to use military means in the future, at the same time it would appreciate if non-

¹⁵¹ RAWLS, *The Law of Peoples: with, The idea of public reason revisited*, p. 3.

¹⁵² KUPER, A, *Rawlsian Global Justice: beyond the Law of Peoples to a Cosmopolitan Law of Persons*, Political theory 640 at 656, (2000). BEITZ, *Rawls's Law of Peoples*, p. 680.

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violent social and political causes in the peripheral societies of Tibet, Hong Kong, and Taiwan could stay on that track.

There are four issues and four principles to be addressed. Section one will introduce John Rawls's categorisation of peoples in the international community, which distributes "liberal", "decent", "outlaw", "burden" labels to peoples and in this way determines their treatments from liberal democracies. This leads to the second issue of toleration. In Rawls's opinion, decent peoples should be tolerated despite the fact that they do not yet satisfy a high standard of human rights protection. The third issue is just war. Outlaw regimes deserve international interference, but liberal and decent peoples should keep an eye on the righteousness of their conducts in military actions. The issue of assistance is prepared for burden societies. Liberal and decent peoples have the political obligation to aid burden societies and lift them out of the situation in which they have no choice but to wage wars.

In the second section of this chapter I will draw four principles from the LoP, which then in the normative dimension can frame a conception applying to Sinitic peoples. The principle of recognition contends a plurality of "peoples" can and should be recognised in a constitutional order so long as they are significant as their equivalents in the LoP. In this order, peoples may be both liberal and non-liberal and the political attachment of a people shall not solely determine the necessity of external interference. The principle of representation for liberal peoples in most cases means democratic representative government, and for non-liberal peoples representation is also needed in order to make populous voices heard. Instead of war, even just ones, the principle of reconciliation encourages non-violence. A legal nationality in common means individuals from different peoples are not enemies eventually, and there are other ways to resolve the disagreements among peoples. The principle of reciprocity, finally, is reserved for burdened societies. A just order is always in need of social and economic equilibrium.

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3.2 LAW OF PEOPLES

John Rawls is one of the most prominent political philosophers who led an unexpected resurgence of political philosophy in our times. The theory of LoP is Rawls's political philosophical reflection to the international order and international law, which is the final part of his deep and broad thinking on politics informing right and justice. His thinking has two phases: the first is conceived in *A Theory of Justice*, and the second results *Political Liberalism* and *The Law of Peoples*. *A Theory of Justice* is an egalitarian account in liberal theories, which has earned John Rawls a worldwide reputation. However, John Rawls then realised there was a need to distinguish moral doctrines and political philosophies. In an era of "reasonable pluralism" when individuals no longer adhere to any sort of comprehensive moral doctrine in attending to political issues, Rawls's early endeavour to build liberal politics upon the acceptance by individuals of his moral principles has been called to question. John Rawls wrote *Political Liberalism* to strengthen his theory, in which he contends there is no need of a shared moral doctrine to sustain liberal politics that can now be retrieved based on liberal procedure and rule of law. John Rawls also extended his theory from a domestic order to the international community where a fortiori reasonable pluralism has made any sort of "universal moral doctrine" being out of the question. The theory of LoP sees peoples in the international order as comparable to individuals in a domestic one, who may merely agree to a minimised international rule of law. In this order, peoples may exchange their commitments to international stability and human rights protection for moral autonomy and immunity from interference. Since the LoP is an international version of Rawls's early theory, this section has to sketch in *A Theory of Justice* and *Political Liberalism* first.

3.2.1 John Rawls

3.2.1.1 A Theory of Justice

John Rawls dedicated his early life to a moral theory, which is "the best approximation to our considered convictions of justice and constituted the most

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appropriate basis for the institutions of a democratic society” organised by and for individuals of liberty and equality – “as an alternative systematic account of justice that is superior to utilitarianism” that has dominated the English-speaking academia for centuries.¹⁵³ John Rawls understands the principle of utility as “society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it.”¹⁵⁴ To be fair to utilitarianism, it should be recognized that utilitarian theorists also support liberal democracy because only a democratic process can justify the calculation of social happiness; otherwise no one is entitled to claim her decision will lead to the greatest profit of the society as a whole. But utilitarianism conceives a danger that in accordance with the principle of utility individual liberties and minority interest are subordinate to those of a majority, and totalitarian regimes can justify their violation to human rights for the sake of “maximised social interest”.

John Rawls is aware that “a problem of rational decision has a definite answer only if we know the beliefs and interests of the parties, their relations with respect to one another, the alternative between which they are to choose, the procedure whereby they make up their minds, and so on.”¹⁵⁵ But this omniscient genius is unlikely to exist. We cannot count upon ordinary people either. If individuals know some of their natural and social advantages and disadvantages, they may be opportunists. John Rawls’s innovation is he reverses the know-all approach and suggests if individuals do not know their advantages and disadvantages at all, a decision “equally good for all persons” results. If individuals decide behind a “veil of ignorance” in “the original position”, in which moment they, as genuinely equal and liberal human beings, cannot know whether they are the bottommost groups in a society, the best choice for them is to create a truly just institution for all fellow

¹⁵³ RAWLS, JOHN, *Political Liberalism* (Columbia University Press. 1996), p. xv.

¹⁵⁴ RAWLS, JOHN, *A Theory of Justice*, (Oxford University Press. 1972). p. 22.

¹⁵⁵ *Id.* at 18.

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persons in order to exclude themselves from a potentially worse off situation. John Rawls thus rebuilt the social contract hypothesis and replaced the historical fiction with a brain experiment, which has given his moral theory a theoretical grounding.

John Rawls outlines a couple of principles of justice, or “justice as fairness”. Rex Martin and David Reidy paraphrase the principles:

(i) The principle of equal basic rights and liberties; and (ii) a principle of economic justice, which stresses (a) equality of opportunity and (b) mutual benefit and egalitarianism. This latter principle – of mutual benefit constrained by egalitarianism – Rawls calls the difference principle, it indicates when differences (inequalities) are acceptable. The difference principle, assuming continuing conscientious efforts at achieving equality of opportunity as backdrop, is designed to reach an optimum goal point at which no further mutually improving moves are possible; at this point the difference in income and wealth between the topmost and bottommost groups would be minimized, and those least well off would here have their greatest benefit (without making any group worse off in the process).¹⁵⁶

However, “the original position” never comes true in the real world. When people walk out of the “veil of ignorance”, can “justice as fairness” really prevent opportunist behaviour? John Rawls accepts there is an “uncertainty” flaw in “justice as fairness”: even though a liberal democracy is established in accordance with his principles of justice, none can predict the society will forever stay on the right track. In *A Theory of Justice* John Rawls relies on all citizens in a “well-ordered society” endorsing “justice as fairness” as a comprehensive moral doctrine to sustain liberal politics. But soon John Rawls began to acknowledge that in our times “the fact of reasonable pluralism” is “characterised not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but a pluralism of incompatible yet reasonable comprehensive doctrines. No one of these doctrines is affirmed by citizens generally. Nor should one expect that in the foreseeable future one of them,

¹⁵⁶ MARTIN, REX & REIDY, DAVID A., *Rawls's Law of peoples: a Realistic Utopia?* (Blackwell. 2006), p. 4.

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or some other reasonable doctrines, will ever be affirmed by all, or nearly all, citizens.”¹⁵⁷ Hence “the account of the stability of a well-ordered society in part III [of *A Theory of Justice*] is therefore also unrealistic and must be recast.”¹⁵⁸

3.2.1.2 Political Liberalism

John Rawls’s *Political Liberalism* was published in the early 1990s when the ideological Cold War had ended and liberal democracy had stepped into a new age in which “the fact of reasonable pluralism” was strengthened more than ever before. Against this background, John Rawls reveals the necessity of distinguishing moral and political philosophy, which means “a contrast between comprehensive philosophical and moral doctrines and conceptions limited to the domain of the political.”¹⁵⁹ This contrast is fundamental in *Political Liberalism*, which is dedicated merely to offer a “political” concept of justice rather than a comprehensive doctrine as *A Theory of Justice*. According to John Rawls, the political concept is “shared by everyone while the reasonable [moral/comprehensive] doctrines are not, we must distinguish between a public basis of justification generally acceptable to citizens on fundamental political questions and the many non-public bases of justification belonging to the many comprehensive doctrines and acceptable only to those who affirm them.”¹⁶⁰ By the conventional Kantian separation between the public and the private, or the political and the non-political, John Rawls’s retreat from a well-ordered society in commitment to “justice as fairness” helps “justice as fairness” become the basis of all liberal democracies in modern times.¹⁶¹

¹⁵⁷ RAWLS, *Political Liberalism*, p. xvi.

¹⁵⁸ Id. at xvii.

¹⁵⁹ Id. at xv.

¹⁶⁰ Id. at xix.

¹⁶¹ Rawls says: “How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and

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What about the opportunist? John Rawls now prefers to leave the opportunist alone in moral enquiry. For that, there is need of another idea of “the overlapping consensus” to ensure the unity and stability of a liberal politics not being corrupted by opportunist behaviour. Because no comprehensive doctrine can now play a strong currency, there is a danger that a polity would be unsteady and extremely divided. John Rawls attempts to unite citizens in a liberal democracy with an overlapping consensus: “In such a consensus, the reasonable doctrines endorse the political conception, each from its own point of view. Social unity is based on a consensus on the political conception; and stability is possible when the doctrines making up the consensus are affirmed by society’s politically active citizens and the requirements of justice are not too much in conflict with citizens’ essential interests as formed and encouraged by that social arrangement.”¹⁶² In addition to this, Rawls also distinguishes an overlapping consensus from a *modus vivendi* that is a temporary equilibrium of competing interests. When the equilibrium does not continue, all parties are preparing to extend their interests by violating the *modus vivendi* and sacrificing others. But an overlapping consensus is beyond interests bargaining, based on which consensus liberal democracies will be better able to maintain political stability and societal unity.¹⁶³

3.2.2 Law of Peoples

Rex Martin and David A. Reidy in their reading of *The Law of Peoples* even date the origin of the LoP in 1969 when John Rawls taught a group of Harvard students

moral doctrines? Put another way: How is it possible that deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime? What is the structure and content of a political conception that can gain the support of such an overlapping consensus? These are among the questions that political liberalism tries to answer.” Id. at xviii.

¹⁶² RAWLS, *Political liberalism*, p. 134.

¹⁶³ Id. at 144-50.

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about “problems of war,” and they also found a section in *A Theory of Justice* that addresses principles of “law of nations.”¹⁶⁴ Given just war theory and “law of nations” are main themes of the LoP, to find out a connection between the conception and Rawls’s early works is helpful for us to consider Rawls’s theoretical contributions together.¹⁶⁵ *The Law of Peoples* was first published as an essay in *On Human Rights: The Oxford Amnesty Lectures* in 1993,¹⁶⁶ and then as a monograph in 1999 together with the “Idea of Public Reason Revised”. The basic theoretical framework of *The Law of Peoples* is not much different from *Political Liberalism*, and it is almost an international version of the latter. In *The Law of Peoples*, John Rawls reckons it is necessary to use a second “veil of ignorance” to reach the “original position” of international relationship. In this position, because each and every participant does not know its advantages and disadvantages just like those in the domestic original position, it will rationally and reasonably choose to be adhere to an international rule of law, or the LoP, which is in accordance with “justice as fairness”. John Rawls contends the LoP is needed because contemporary positivist international law might be misled by some utilitarian principle that does not care enough about human rights; on the other hand, in the international arena, “the fact of reasonable pluralism” would be much more complex than that in a domestic order,¹⁶⁷ and hence it is also not realistic to re-organise international relations merely based on any comprehensive doctrine. We thus need a political conception based on an international overlapping consensus. The consensus underpins ideological dominance of liberal theories in international politics, and at the same

¹⁶⁴ MARTIN & REIDY, Rawls's Law of peoples : a Realistic Utopia?

¹⁶⁵ The LoP is considered by a list of theorists to be inconsistent with Rawls’s early works. See MARTIN, REX & A. REIDY, DAVID, Rawls's law of peoples: a Realistic Utopia? (2006), p. 7.

¹⁶⁶ SHUTE, STEPHEN & L. HURLEY, SUSAN, *On Human Rights*, (BasicBooks. 1993).

¹⁶⁷ BEITZ, *Rawls's Law of Peoples*, p. 671. MACEDO, S, *The Law of Peoples: What Self-Governing Peoples Owe to One Another: Universalism, Diversity, and the Law of Peoples*, 72 *Fordham L. Rev.* 1721, (2004).

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time does not oppose that each and every international participant may retain its own belief and interests in domestic affairs corresponding whichever comprehensive moral doctrine.

In *The Law of Peoples* John Rawls outlines eight principles by which positive international law must be informed:¹⁶⁸

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defence.
6. Peoples are to honour human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime.

The first, second, third, fourth, and sixth principles are pre-conditions of toleration among peoples. The fifth and seventh principles are about just war. The eighth principle is about mutual assistance among peoples. However, the first question about the LoP will be what is a “people” in the Rawlsian context? This section will discuss in the following pages the issues of “people”, “toleration”, “just war”, and “assistance” in the LoP, and explain how they are relevant to the Sinitic peoples.

3.2.2.1 Peoples

What is a “people”? This should be the starting question for the LoP. The concept of “people” defines and describes a compact of social phenomena, i.e. a cooperative

¹⁶⁸ RAWLS, *The Law of Peoples: with, The Idea of Public Reason Revisited*, p. 37.

body of individuals sharing something significant that is recognised not merely by themselves but also observers and outsiders. What is that? How significant is it? John Rawls reckons three features are arguably significant: institution, culture, and morality. Andrew Kuper's understanding is: (a) in institutional respect "each people has an [interest of] protecting their territory; preserving their political institutions, culture, independence, and self-respect as a corporate body; and guaranteeing the safety, security, and well-being of their citizens;" (b) in cultural aspect the corporate body of individuals are united by a "common language and shared historical memories"; (c) in moral aspect "each people has "a moral nature" in that each is firmly attached to a moral conception of right and justice that is at least not unreasonable".¹⁶⁹ This can be the first step to understand "peoples".

As Andrew Kuper endorses, a Rawlsian "people" signifies itself with territorial and political institutions, and the most significant institution embodying a "people" is a government. John Rawls repeatedly says that peoples need to be "acting through their governments"; otherwise they can hardly be identified.¹⁷⁰

Although John Rawls hopes governments should be established upon the basis of "constitutional democracy" that prevents them only serving for the interests of bureaucratic agencies or cooperative sectors, the institutional feature of a "people" still brings the LoP a label of "thin statism". John Rawls's theoretical reconstruction is a "thinner" statism because he emphasises that a people is a subject of reasonableness, yet a state is one of rationality:

"If rationality excludes the reasonable (that is, if a state is moved by the aims it has and ignores the criterion of reciprocity in dealing with other societies); if a state's concern with power is predominant; and if its interests include such things as

¹⁶⁹ KUPER, *Rawlsian global justice: beyond The Law of Peoples to a cosmopolitan law of persons* at 642. RAWLS, JOHN, *The Law of Peoples: with, The Idea of Public Reason Revisited*, pp. 23-5. See also BEITZ, *Rawls's Law of Peoples*, pp. 678-9.

¹⁷⁰ RAWLS, *The Law of Peoples: with, The Idea of Public Reason Revisited*, p. 23.

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converting other societies to the state's religion, enlarging its empire and winning territory, gaining dynastic or imperial or national prestige and glory, and increasing its relative economic strength – then the difference between states and peoples is enormous.”¹⁷¹

A thick statism embraces the traditional sovereignty that allows a state to do whatever it wants in accordance with a Westphalia-style positive international law. In comparison with that, the LoP is “thinner” since it constrains the power of state with due respect to the interests of other peoples. A la Andrew Kuper, the LoP pierces or removes the “shell” of a state if the state would have disastrously violated human rights, and in that tragic moment we will appeal to the reasonableness of a “people” to hold its unreasonable government in contempt. But on the other hand the LoP remains a theory of “statism”. Most of the times a “people” is safely and stably preserved within the state shell, even though the host state is not a hundred-percent constitutional democracy.

The cultural feature of a “people” associates with John Stuart Mill's conception of “nationality”: a cooperative body of individuals constitutes a “nationality” if they have a “common sympathy” that makes “them cooperate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves, or a portion of themselves, exclusively”.¹⁷² Such a “common sympathy” in most societies relies on “a common language, history, and political culture, with a shared historical consciousness”,¹⁷³ which implies individuals in the cooperative body may have ethnic similarities. However, (a) shared historical memories contain not merely good but also bad implications for those being conquered and discriminated, some individuals did not

¹⁷¹ Id. at 28.

¹⁷² RAWLS, *The Law of Peoples: with, The Idea of Public Reason Revisited*, p. 23. BEITZ, *Rawls's Law of Peoples*, p. 679.

¹⁷³ RAWLS, *The Law of Peoples: with, The Idea of Public Reason Revisited*, p. 24.

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join in the cooperative body willingly so will not stay inside if they can; (b) although most immigrants join in an existing cooperative body willingly, they may not share any historical memories at all. Ernest Renan once said to make up a solitarily cooperative body of individuals we need: “Two things, which are really only one ... One of these things lies in the past, the other in the present. The one is the possession in common of a rich heritage of memories; and the other is actual agreement, the desire to live together, and the will to continue to make the most of the joint inheritance”.¹⁷⁴ The cultural feature of a “people” may be a combination of both, “which are really only one”. By “an everyday plebiscite” individuals in those cooperative bodies decide how the two mix together, and whither they are going.

The third crucial feature requires a Rawlsian “people” to make independent moral decisions. They need to decide whether things are right or wrong in relation with other peoples. In modern constitutional democracy, the morality of a people is usually reflected by decisions made by representatives taking institutional offices or positions, who are political party members. We thus can acknowledge the moral nature, more or less, of a “people” by its political agent for convenience. However, “if the representatives of a company or corporation act ultra vires or without authority, then they do not act or speak for the company and the company cannot be held responsible for what they do”, so Philip Pettit says: “Rawls holds in parallel fashion that if the government acts ultra vires, then the people are no longer present, no longer represented, in what is said or done. A usurper has taken its place.”¹⁷⁵ So representatives of a “people” are not that people per se.

Chapter 2 has introduced the peripheral societies of Tibet, Hong Kong, and Taiwan to a larger or lesser extent have become Sinitic people-s in Rawlsian terms. Taiwan

¹⁷⁴ RENAN, ERNEST, *What is a Nation, in Nationality and Nationalism*, (Athena S. Leoussi & Steven Elliott eds., 2004), p. 37.

¹⁷⁵ PETTIT, PHILIP, *Rawls's Peoples, in Rawls's law of peoples: a realistic utopia*, (Rex Martin & David A. Reidy eds., 2006), p. 43.

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and Hong Kong are both entitled to genuinely autonomous government. Tibet deserves one too. The Dalai Lama and his followers did establish a civil administration in Dharamsala functioning in cultural, educational, and communitarian affairs. Taiwan and Hong Kong both have mature electorates, but varying in degree of participation and extent of power. The Tibet Autonomous Region has a people's congress that represents millions of Tibetans, although it is not a liberal democratic organ. In Dharamsala, emigrated Tibetans now elect their administrative officers and rule-making representatives regularly, but the Dalai Lama's status, which is the head of the administration, has never been challenged. This chapter will soon set out these points in detail.

However, there are some characteristics that Sinitic peoples do not exactly fall into Rawls's imagination. First, although these political units imitate the state in many respects, they are not fully recognised under international law and hence are not equal and qualified participants in the international community. Secondly, although peripheral societies' respective memories may lend themselves to build a "common sympathy" in each and every society, the societies are still living in the same community of fate. If one goes to conflict with another, the rest will be obsessed at least. The brighter side is that individuals in all the societies have been pooling a positive feeling towards others under the same umbrella. In recent years several catastrophic landslides in the border between Tibetan areas and China proper killed tens of thousands. The societies were all mobilised to rescue and aid the "compatriots" and indeed contributed far more than foreign sources. Thirdly, it is not redundant to repeat that the political agencies of a people do not equate to the people. Although the peripheral societies all have multiple political forces in competing to represent the society, we should not think that the political agencies have monopolised politics, let alone morality.

3.2.2.2 Toleration

The most crucial idea of the LoP is "toleration", which means liberal peoples should tolerate non-liberal but reasonable peoples in the international order as liberals tolerate comprehensive moral doctrines in a domestic order. John Rawls named

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these non-liberal but reasonable peoples as “decent peoples”, which could be a starting point for our discussion. A decent people, says Rawls, is also a “well-ordered people” as are liberal ones. But decent peoples do not possess liberal democratic constitutionalism that regards each and every citizen as liberal and equal individuals. They have a system of consultation that divides members into several groups with representatives sitting in the government, which could also form reasonable decisions in spite of being based on a comprehensive doctrine. A la Charles R. Beitz:

A decent people satisfies two conditions. First, the society does not have aggressive aims in foreign policy and respects the independence of other societies. Second, the society has a ‘common good conception of justice,’ in which each person’s interests are taken into account (though not necessarily on an equal basis) in public decisions and basic human rights (including subsistence rights) are secured for all; all persons are treated as subjects of legal rights and duties; and judges and other officials accept and apply the common good conception of justice in carrying out their public responsibilities.¹⁷⁶

In other words, in a decent people members “must subscribe as a matter of common awareness to certain ideas about how their affairs should be ordered. They must treat the ideas as common reasons that constitute the only currency in which it is ultimately legitimate to justify the way things are done in the collective organizing of their affairs.”¹⁷⁷ Andrew Kuper tells why decent peoples are entitled to toleration by liberal ones:

Rawls reminds us that decent peoples are not unreasonable and so do not engage in aggressive wars or pursue expansionist ends or fail to respect the civic order and integrity of other peoples; thus, the delegates of decent peoples would accept the symmetrical (equal) situation of the original position as fair. He also reminds us of

¹⁷⁶ BEITZ, *Rawls's Law of Peoples*, p. 674

¹⁷⁷ PETTIT, *Rawls's Peoples, in Rawls's law of peoples: a realistic utopia*, (Rex Martin & David A. Reidy eds., 2006), p. 44.

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the common good conception of justice, which takes account of persons' important interests, ensuring that decent peoples would accept principles honouring human rights. Finally, a decent people's fundamental interests – in security, independence, the benefits of trade, and so on – would lead it to accept and adopt the law of peace (non-intervention, war only in self-defence, restrictions on conduct in war) and duties of contract (observing treaties and undertakings, mutual assistance in times of need).¹⁷⁸

This idea surprisingly makes even the leading liberal philosopher a heretic among liberals, and there are many criticisms to John Rawls's toleration to decent peoples. First, many reckon an anti-cosmopolitan theory of international order betrays the individualist orthodoxy of liberalism and they assert "principles for individuals as individuals are necessary."¹⁷⁹ Why does John Rawls not endorse "principles for individuals as individuals" in the LoP? Why is he not a cosmopolitan as many predicted?¹⁸⁰ The answer is in "the fact of reasonable pluralism", which is more complex in international order. If in a domestic order not everyone is convinced by atomic individualism, how can we expect all peoples to do so in the international order with a "problem of greater diversity"?¹⁸¹ Besides, universalism once and again

¹⁷⁸ KUPER, *Rawlsian Global Justice: beyond the Law of Peoples to a Cosmopolitan Law of Persons* at 643.

¹⁷⁹ BUCHANAN, A, *Rawls's Law of Peoples: Rules for a Vanished Westphalian World*, 110 *Ethics*, (2000). p. 698.

¹⁸⁰ See BEITZ, CHARLES, *Political Theory and International Relations* (Princeton University Press. 1999). POGGE, T.W.M., *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity. 2008).

¹⁸¹ The "problem" of greater diversity" is coined by Stephen Macedo, see MACEDO, *The Law of Peoples: What Self-Governing Peoples Owe to One Another: Universalism, Diversity, and the Law of Peoples*.

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coincides with imperialism in human history, and supplies justification for legally controversial wars that contrasts with our morality.¹⁸²

However, the second criticism to John Rawls stands well. Allen Buchanan argues: “Rawls gives short shrift to dissenting individuals and minorities. There is, in fact, an additional reason why a moral theory of international law that only reflects the perspective of ‘peoples’ must be inadequate.”¹⁸³ Dissenters and minorities are indeed flaws in the LoP. In liberal democracies there are dissenters and minorities who cannot collaborate with the system too, but liberal democratic constitutionalism still well “represents” their voices notionally, although they are not loud enough to be heard. But non-liberal decent peoples do not allow dissenters and ideological minorities to be heard. “Justice as fairness” endorses toleration in the moral arena, but dissenters and minorities are suffering in the political arena.¹⁸⁴

The third criticism is what John Tasioulas called “human rights minimalism.”¹⁸⁵ John Rawls says decent peoples should protect at least “the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).”¹⁸⁶ John Tasioulas argues: “The first way of bringing out the

¹⁸² The argument on cultural imperialism see AUDARD, CATHERINE, *Cultural Imperialism and 'Democratic Peace'*, in Rawls's law of peoples: a realistic utopia, (Rex Martin & David A. Reidy eds., 2006). Also see MACEDO, *The Law of Peoples: What Self-Governing Peoples Owe to One Another: Universalism, Diversity, and the Law of Peoples*.

¹⁸³ BUCHANAN, *Rawls's Law of Peoples: Rules for a Vanished Westphalian World*, p. 698.

¹⁸⁴ TAN, K. C., *Liberal Toleration in Rawls's Law of Peoples*, 108 *Ethics* 276, (1998).

¹⁸⁵ TASILOULAS, J, *From Utopia to Kazanistan: John Rawls and the Law of Peoples*, *Oxford Journal of Legal Studies*, (2002).

¹⁸⁶ RAWLS, *The Law of Peoples: with, The Idea of Public Reason Revisited*, p. 79.

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unacceptable minimalism of Rawls's human rights doctrine is by comparison with the far more generous schedule of rights extractable from the leading human rights covenants. Among the rights included in them, but excluded from Rawls' list, are to be numbered: the freedom of opinion, expression and the press, the freedom of assembly and association, and the rights to political participation, education, and health care and social services."¹⁸⁷ This argument leads to another that is non-democratic countries have no *raison d'état* to enhance the standard of human rights protection.¹⁸⁸ I assume John Rawls's response would be it will be better off that decent peoples may protect human rights the same as liberal peoples, but what the LoP concerns is the international rather than the domestic order. The perpetual peace among peoples in the international order is the top moral priority, and the well-being of persons is relatively secondary. On the other hand, John Rawls did not say liberal peoples have to be quiet while facing human rights violations. Liberal peoples still can use persuasion and pressure to urge non-liberal peoples to change, but there are many reasons for not going to economic sanction or military invasion.¹⁸⁹ In a continuum of peoples from the most decent one to the worst tyranny, is there a concrete coordinate separating the to-be-invaded from the not-to-be-invaded?¹⁹⁰ A potential military failure would be a tremendous disaster, and even a victory is neither morally perfect. So "human rights minimalism" sometimes in fact is "maximised discretion".

Upon this analysis, this chapter argues it is the time for the PRC central government to wholeheartedly tolerate Sinitic peoples, and vice versa. The cross-Strait tension between the PRC government and Taiwan so far has been reduced to a minimised level since the Nationalist Party of China or the Kuomintang (KMT) took the

¹⁸⁷ TASIOLAS, *From Utopia to Kazanistan: John Rawls and the Law of Peoples*, p. 382.

¹⁸⁸ KUPER, *Rawlsian Global Justice: beyond the Law of Peoples to a Cosmopolitan Law of Persons*.

¹⁸⁹ TAN, K. C., *Liberal Toleration in Rawls's Law of Peoples*, 108 *Ethics* 276, (1998).

¹⁹⁰ CABRERA, *Toleration and Tyranny in Rawls's "Law of Peoples"*.

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territorial presidency in 2008. Although both sides did not end the Chinese civil war with a written agreement of peace, they have stayed in truce for almost half a century. The PRC central government will not resume the war unless Taiwan declares de jure independence. Although no one is sure about what a de jure independence of Taiwan actually means, the PRC central government did tolerate Taiwan's diplomatic contacts, presidential elections, and failed referenda aiming at UN membership. For Tibet, emigrated Tibetans have for long discontinued their military attack in Himalayas. The Dalai Lama has been adhering to a non-violent campaign and was awarded a Nobel Prize for that. So long as Sinitic peoples have all went on a train running on peaceful tracks, they are entitled to be tolerated.

Sinitic peoples should in some measure tolerate the PRC government representing the Chinese mainland too. Liberals within and outside these societies cannot easily accept that. We can go through the criticisms again. Yes, this argument certainly does not ask atomic individuals to decide so it is not "for individuals as individuals". But the complex relationship between the authorities in a heterarchy and individuals in their jurisdictions has apparently caused "reasonable pluralism" in the Sinitic order of peoples. In this situation, it is not realistic and necessary to construct a theory "for individuals as individuals". However, I stand with the second criticism to the LoP, which does lack an account for internal dissenters and minorities. The existence of dissent and minorities defies the assumption that members of a people are adhering to a comprehensive moral doctrine. The LoP could only advise the dissenters and minorities to seek a position in decent peoples' consultation system, and the second "veil of ignorance" blocks off external interference for supporting them. The paradox is in the Chinese context Sinitic peoples are not only political units but also political dissenters and minorities. They are not only dissenters and minorities for the PRC central government, but also for each other in certain circumstances. Thirdly, I have explained that to maintain peace is the justification of a sort of "human rights minimalism" in the LoP. This is also right in the Chinese context. In addition to this, the peripheral societies are unlikely capable to interfere the Chinese mainland in humanitarian crisis anyway.

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3.2.2.3 Just war

The third sort of peoples is “outlaw regimes” that deserves to be interfered with by well-ordered peoples. Outlaw regimes are aggressive, and “any society that follows and honours a reasonably just Law of Peoples [have] the right to war in self-defence.” Though not explicitly, it seems John Rawls supports that in response to serious human rights violation, collective defence is also acceptable for the LoP.¹⁹¹ There is no doubt that liberal and decent peoples have the right to defend themselves, since they are well-ordered in accordance with liberal democracy or comprehensive moral doctrines that protect basic human rights. “Well-ordered peoples, both liberal and decent, do not initiate war against one another; they go to war only when they sincerely and reasonably believe that their safety and security are seriously endangered by the expansionist policies of outlaw state.”¹⁹² Even a “benevolent absolutism” has a right to defend itself, because it honours human rights and it is nonaggressive, even though a benevolent absolutism does not allow members meaningfully to participate in the policy making process.¹⁹³ But for outlaw regimes, “well-ordered peoples may pressure the outlaw ones to change their ways ... [the pressure] may need to be backed up by the firm denial of economic and other assistance, or the refusal to admit outlaw regimes as members in good standing in mutually beneficial cooperative practices.”¹⁹⁴

¹⁹¹ See a comparison between Rawls and Michael Walzer in MARTIN & REIDY, *Rawls's Law of peoples : a realistic utopia?*, p. 12.

¹⁹² RAWLS, *The Law of Peoples: with, The Idea of Public Reason Revisited*, pp. 90-91.

¹⁹³ *Id.* at 92.

¹⁹⁴ *Id.* at 93.

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But there are restrictions for liberal and decent peoples to interfere outlaw regimes. In “conduct of war” part, John Rawls sets up a list of limits for military interference:

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- (i) The aim of a just war waged by a just well-ordered people is a just and lasting peace among peoples, and especially with the people’s present enemy.
- (ii) Well-ordered peoples do not wage war against each other, but only against non-well-ordered states whose expansionist aims threaten the security and free institutions of well-ordered regimes and bring about the war.
- (iii) In the conduct of war, well-ordered peoples must carefully distinguish three groups: the outlaw state’s leaders and officials, its soldiers, and its civilian population. The reason why a well-ordered people must distinguish between an outlaw state’s leaders and officials and its civilian population is as follows: since the outlaw state is not well-ordered, the civilian members of the society cannot be those who organized and brought on the war.

John Rawls admits he does not depart significantly from Michael Walzer’s just war theory. In *Just and Unjust War*, however, Michael Walzer reminds us that we have to be cautious in an intervention to make distinctions between secessionists who attack governmental targets and terrorists who attack civilians in secessionist movements; legitimate and illegitimate authorities in a civil war; and a self-determining majority and suffering minorities in a humanitarian intervention.¹⁹⁶ Even these distinctions are sincerely and truly made, in each and every case the conduct of “war” is still a controversial topic. Are these persons different in context: cabinet officials and ordinary police officers, then what about managers in public companies? What is the difference between soldiers in battlefield and those are not? Civilians from the majority who hurt minorities directly are condemned, but what

¹⁹⁵ Id. at 94.

¹⁹⁶ WALZER, MICHAEL, *Just and Unjust Wars : a Moral Argument with Historical Illustrations* (Basic Books 4th ed. 2006), section 6.

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about those who did so indirectly? At the end it is our moral sense that would lead us to decisions in each and every case.

The issue of “just war” is concerned because Sinitic peoples have not terminated the danger of violent conflicts. Chapter 2 introduced that in the Chinese context, there is a civil war to be ended across the Taiwan Strait. In 1996 when the Taiwanese residents for the first time elected the “President” exclusively and directly in the Taiwanese isles, the PRC central government was threatened by the fact, which might result in a declaration of Taiwanese independence. The PRC used missile tests to intimidate the Taiwanese electorate, and this was the first serious crisis ever since the cross-Strait truce. In 2000 a pro-independence politician was elected to be the “President” of the “ROC” in Taiwan, and during his two terms of presidency (2000-2004, 2004-2008) the cross-Strait tension had never been lessened. For Tibet, there were severe ethnic unrests in Lhasa in 1989 and 2008. On 14 March 2008 Tibetan protestors hurt hundreds of civilians. Dozens of people lost their lives on that day. Liberals may of course blame the PRC government for having caused the tensions and tragedies, but it does not mean we can escape from the moral dilemma. There is also “war”, but where is justice? The best way to resolve the dilemma, however, is not to use violent means to pursue any political goals at all.

3.2.2.4 Assistance

The fourth sort of peoples is “burdened peoples” that deserves to be economically assisted by well-ordered peoples. “Burdened societies, while they are not expansive or aggressive, lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered. The long term goal of (relatively) well-ordered societies should be to bring burdened societies, like outlaw states, into the Society of well-ordered Peoples.”¹⁹⁷

¹⁹⁷ RAWLS, *The Law of Peoples: with, The Idea of Public Reason Revisited*, p. 106.

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There are some guidelines Rawls believes backing up his limited assistance amongst peoples:

(i) “The first guideline to consider is that a well-ordered society need not be a wealthy society.” ... (ii) “A second guideline for thinking about how to carry out the duty of assistance is to realize that the political culture of a burdened society is all-important; and that, at the same time, there is no recipe, certainly no easy recipe, for well-ordered peoples to help a burdened society to change its political and social culture.”¹⁹⁸ (iii) “The third guideline for carrying out the duty of assistance is that its aim is to help burdened societies to be able to manage their own affairs reasonably and rationally and eventually to become members of the Society of well-ordered Peoples. ... After it is achieved, further assistance is not required, even though the now well-ordered society may still be relatively poor. Thus the well-ordered societies giving assistance must not act paternalistically, but in measured ways that do not conflict with the final aim of assistance: freedom and equality for the formerly burdened societies.”¹⁹⁹

The LoP is not an egalitarian account, though John Rawls is one of the leading liberal egalitarian theorists while talking about a domestic order. A truly cosmopolitan egalitarian argument would be in a global order the entire human race stands behind a “veil of ignorance”, then establish a cosmopolitan institution, not necessarily a centralised global government, which can distribute wealth among

¹⁹⁸ John Rawls here obviously involves a Weberian argument that certain culture encourages economic development but others do not. In Max Weber’s theory Protestant Christianity is the only economically positive culture, but in recent years some scholars have notified that neo-Confucianism in East Asian countries and territories is also doing well, at least in degrees. See WEBER, MAX, *The Protestant Ethic and the Spirit of Capitalism* (Routledge. 2001). For Confucian capitalism see LEE, KUAN YEW, *From Third world to First : the Singapore Story: 1965-2000* (HarperCollins Publishers. 2000).

¹⁹⁹ See John Rawls, *The Law of Peoples: with, The Idea of Public Reason Revisited*, §§ 5 and 6.

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each and every human being.²⁰⁰ A non-cosmopolitan egalitarian argument, however, would be: since peoples are basic units of the international order, there is a need of global distribution among peoples. The richest and wealthiest peoples should aid poor peoples to lift up social and economic condition until the poor ones reach an average level. However, this is not what John Rawls said. His idea is it should be morally ok for liberal and decent peoples to leave less rich and wealthy counterparts alone unless their burden will threaten international stability.

Why John Rawls is not an egalitarian any more? Leif Wenar explains:

Citizens within justice as fairness are assumed to want more income and wealth, not as positional goods but simply as resources with which to pursue their visions of the good life. Peoples within the law of peoples, on the other hand, are not assumed to want more wealth, because peoples have no vision of the good life. Rawls says that peoples have interests only in maintaining their territorial integrity, securing the safety of their citizens, maintaining their free and just social institution, and securing their self-respect as peoples. He suggests that the idea that peoples must hunger for more territory is left over from the disastrous days of imperial Europe, and the idea the peoples must perpetually pursue greater wealth is merely the ideology of capitalist businessmen.²⁰¹

Leif Wenar suggests members of wealthier peoples could say this to poorer peoples:

Your society meets the minimal standards of legitimacy and stability. It is just by your own lights, or if it is not just it is your task to make it so. We have more wealth than you do, it is true. But that is an indifferent matter from the standpoint of international legitimacy. If you want more wealth, it is up to you and your compatriots to decide to save more, or to borrow more, or to change your population policy, or whatever. We still guarantee your decency and stability but we need take no

²⁰⁰ BEITZ, *Rawls's Law of Peoples*. POGGE, THOMAS, *Do Rawls's Two Theories of Justice Fit Together?*, in *Rawls's law of peoples: a realistic utopia?*, (Rex Martin & David A. Reidy eds., 2006).

²⁰¹ WENAR, LEIF, *Why Rawls is Not a Cosmopolitan Egalitarian*, in *Rawls's law of peoples: a realistic utopia*, (Rex Martin & David A. Reidy eds., 2006), p. 105.

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notice of your prosperity. Prosperity is a matter to which legitimate international institution need not attend.²⁰²

Nevertheless, this is not what Sinitic peoples should say to each other. We should recall that John Rawls's theory on a domestic order is an egalitarian account that requests individuals to aid their worst off fellow citizens until the latter group will catch up. The individuals as members of Sinitic peoples are not aliens to each other as there is a legal umbrella above them. Having reviewed John Rawls's theories, it can be assumed that the in-between situation may go two directions. First, the situation would go to what the LoP supposed. On the one hand, the Sinitic peoples may request the PRC central government to enhance the degree of toleration so long as they are peaceable participants in the order, and vice versa. On the other hand, the peoples and the Chinese mainland will all lose their entitlement to demand high-level economic assistance in the future, and they will be competitors rather than associates in the situation. Secondly, the situation would also go to what Rawls's early theories supposed, say, a more homogenous welfare state. In this situation, the host state would be responsive and responsible to all citizens/nationals in Sinitic territory regardless of their sub-state societal membership. But on the other hand, the peripheral societies will lose their bargain power in pursuit of more autonomous competence.

3.3 CONSTITUTIONAL LAW OF PEOPLES

Section 3.2 has outlined four issues raised by the LoP: peoples, toleration, just war, and assistance. From these issues derive four corresponding principles of the "constitutional law of peoples" (CLP): recognition, representation, reconciliation, and reciprocity. This section will set out these principles in the Chinese context. In the LoP, the issue of "peoples" suggests we should recognise the international order is formed by separate bodies of individuals, in other words, the basic unit of a just

²⁰² Id. at 106.

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international order is “people” instead of “person”. The issue of toleration requests the people to make reasonable decisions by a way of representative government or a system of consultation. The issue of just war suggests in what conditions liberal and decent peoples may use military means to interfere or overthrow outlaw regimes, and in wartime where the boundary is between the just and the unjust conduct. The issue of assistance, finally, suggests what is the responsibility of capable liberal and decent peoples to aid “burdened” societies suffering a tragic social and economic disorder, but this responsibility does not exceed a requirement to reinstall peace. Similar to the LoP, in the CLP the principle of recognition suggests the host state should recognise “internal” peoples, if necessary, by a constitutional apparatus. The principle of representation suggests peoples have to be well represented to qualify as being of decency or reasonableness. The principle of reconciliation suggests perpetual peace is of top priority in reconfiguring the constitutional structure, and war is the worst option no matter it is just or not. The issue of reciprocity, finally, suggests a much stronger social and economic cooperation among separated but associated peoples, because under the same constitutional umbrella individuals have a bond with each other much more stronger than those in the LoP. The CLP urges peace. It may probably encourage decent peoples to move forward to liberal democracy, but even without it violent conflict is still avoidable.

3.3.1 Recognition

For John Rawls, recognition to peoples is needed because there is a high level of “pluralism of reasonableness” in the international order, in which circumstance we have to rely on the second “veil of ignorance” to build overlapping consensus. This is generally an objective reason: the international pluralism of reasonableness is an objective phenomenon, and our recognition to peoples as basic units of the international order is merely a response to the sociological facts of the real world. However, there is another subjective reason given by the leading theorist Charles Taylor, who is roughly supposed as a right wing liberal nationalist. Charles Taylor asserts:

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The demand for recognition ... is given urgency by the supposed links between recognition and identity, where this latter term designates something like a person's understanding of who they are, of their fundamental defining characteristics as a human being ... our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.²⁰³

In a domestic order John Rawls may worry that this “communitarian” argument will exaggerate some “associationist” good that undermines individual liberty. But first, recognition to peoples does not by any means turn to nonrecognition to individuals. Second, even for John Rawls himself the LoP is a compromise to the need of some collective unit of “people” in dealing with the real world. If liberal and decent peoples are well represented by their political agents, any denial to their institutional, cultural, or moral uniqueness will lead to “real damage and real distortion” to individuals within those bodies, as Charles Taylor reminds us, and eventually betrays the noble faith of liberalism to individual dignity.

Chapter 2 has touched this issue. The two sides of the Taiwan Strait were in a situation of “mutual denial” at the beginning. Initially, the PRC central government and Taiwanese authorities mutually regarded the other as “rebels” in political propaganda, and the alleged “legitimate Chinese central government” on both sides of the Strait would never talk to “war criminals”. However, in 1986 an aircraft hijack led to the first cross-Strait negotiation since the Chinese civil war. The Civil Aviation Administration representing the Chinese mainland and the China Airlines representing the counterpart agreed on an ad hoc method to send the hijacked aircraft of the China Airlines and the Taiwanese staffs back. On 10 September 1990,

²⁰³ TAYLOR, CHARLES & LAFOREST, GUY, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (McGill-Queen's University Press. 1993), p. 25.

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the first treaty-like agreement was sign between the Red Crosses on the two sides, which resolved how to repatriate criminals and suspects across the Strait. In early 1990s, the Association for Relations Across the Taiwan Strait (hereinafter ARATS) in the Chinese mainland, and the Straits Exchange Foundation (hereinafter SEF) in Taiwan, as “civil associations”, were set up to represent the two sides in regular semi-official negotiations.

In cross-Strait negotiations nevertheless the most important issue is the definition of “one China”.²⁰⁴ In 1992, the ARATS raised that in following negotiations the two sides should adhere to the “one China principle”, but in technical discussions the precise political definition of “one China” might not be referred so long as both sides have asserted that there is only “one China”. The AEATS later suggested five ways to express the idea, while the SEF gave eight others. The 8th expression of the SEF is: “in the process of the two sides of the Taiwan Strait to endeavour to reunify the country, both should adhere to the one China principle, but may acknowledge the definition of ‘one China’ has been differed”; the SEF also suggested the two to express the idea orally. The AEATS then in a letter to the SEF expressed: “both sides of the Taiwan Strait should adhere to the one China principle and endeavour to reunify the country; but in technical discussions, the political definition of the ‘one China’ shall not be referred”, and attached the 8th expression of the SEF to the letter. So this is the “92 consensus” across the Strait. The “92 consensus” is neither a “mutual denial” nor a “mutual recognition”; at best it is to “agree to disagree”, which symbolises there is a long way to go before the two sides of the Strait can find a way to recognise the other in political and constitutional terms.

For Tibet, there have been nine rounds of “dialogue” between the PRC central government and emigrated Tibetans. The emigrated Tibetans call this dialogue

²⁰⁴ For the “one China principle/policy”, the PRC perspective see White Paper: the One-China Principle and the Taiwan Issue. A more objective account see, ALLEN, *Recreating 'One China': Internal Self-Determination, Autonomy and the Future of Taiwan*.

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“Sino-Tibetan dialogue” that implies it is based on the equal footing between the two parties. The PRC central government, on the other hand, regards this dialogue as a “meeting with the Dalai Lama’s personal representatives” and insists there shall be no personnel from the “Central Tibetan Administration in Exile” that is an illegal institution in CPC eyes. This means the PRC central government only recognises the personal prestige of the 14th Dalai Lama rather than the Kashag or any institution established by emigrated Tibetans in Dharamsala. In 1979, the first delegation from Dharamsala arrived in Lhasa. In the 1980s a number of Tibetan delegations returned to Tibet or other part of the PRC. However, the dialogue ceased in the 1990s after the Dalai Lama was awarded the Nobel Prize and the “Tibetan Parliament” in Dharamsala passed a resolution “stating that no new move for negotiations should be initiated unless there was a positive change in the Chinese leadership’s attitude”. It is not until 2002 that a new round of dialogue revived. In November 2008, the emigrated Tibetans submitted a Memorandum on Genuine Autonomy for the Tibetan People to the PRC officials. The memo was refuted critically by the PRC in the aftermath. The 9th round of dialogue was held in 2010, in which the emigrated Tibetans supplemented their memo with a new note. The deadlock between the two parties is not yet broken.

3.3.2 Representation

In an ideal situation, peoples are well represented by a liberal democracy with a representative government, for which deliberation and consultation are helpful to make wise decisions. The LoP also accepts decent people may divide individuals into separate groups with representatives in the decision-making process, in other words, instead of liberal democracy other forms of representation can also be reasonable. For internal affairs due representation enables the political agent of a people to remain with the people’s interests rather than the bureaucratic interests of its own, thus endowing it with legitimacy that demands individual loyalty and obedience. For external affairs due representation removes the excuse for military interference. This is what the LoP told us.

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The CLP cannot link representation directly with liberal democracy, because there are two difficulties. First, the PRC regime is not a liberal democracy and is not preparing to change this in the near future. The best hope is that the PRC will fulfil a standard of “decency” based on its representation and consultation system. Secondly, some may ask, “what if China does democratise”? Many do believe democratisation will increase transparency and accountability to Chinese foreign policy and reduce military influence. China’s democratisation is a main concern for Tibetan communities, Hong Kong “democrats”, and Taiwan, and they probably would more willingly engage with a democratised China. But democracy proponents also indicate that a rapid democratisation will not change Chinese nationals’ attitude towards the peripheral societies.²⁰⁵ Randall P. Peerenboom reminds us that low-level social and economic development come along with low-level democracy, and finally low-level stability in other Asian countries.²⁰⁶

The PRC central government nevertheless has set up a system of consultation in the Chinese mainland. For instance, there are more than 30 ethnic Tibetans among less than 3000 congresspersons in Chinese parliament, representing less than 4.6 million Tibetans among more than 1.3 billion Chinese nationals. Article 15(3) of the Election Act also authorises the National People’s Congress (hereinafter NPC) to decide how and how many representatives from Hong Kong shall be chosen.²⁰⁷ For the 36 Hong Kong representatives in the 11th NPC, the electorate comprises Chinese nationals who have been members of the Hong Kong electorate of the 10th NPC, those who are members of the 10th Chinese People’s Political Consultation Conference (hereinafter CPPCC), and Chinese nationals who are members of the

²⁰⁵ WANG, JIANWEI, *Democratization and China's Nation Building*, in *What if China Doesn't Democratize?: Implications for War and Peace*, (E. Friedman & B.L. McCormick eds., 2000), pp. 63-69.

²⁰⁶ PEERENBOOM, *China Modernizes : Threat to the West or Model for the Rest?*, p. 280.

²⁰⁷ The PRC Election Act 2004, art 15(1).

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electorate of the 3rd Chief Executive of the Hong Kong Special Administrative Region (hereinafter HKSAR).²⁰⁸ The Election Act does not prescribe how and how many Taiwanese congresspersons shall be chosen to the NPC, but it is a convention that a number of “Taiwanese representatives” shall sit in the NPC. In the 11th NPC, there are 13 Taiwanese congresspersons who are mainland residents coming from Taiwan or descendants of Taiwanese migrants since the 1940s.

The CPPCC is a “legally established” institution in the PRC. As an advisory body, the composition of the CPPCC is not distributed according to population proportion. There are around 43 ethnic Tibetans CPPCC members among around 2200 in total. It would be an advantage for the Tibetans that they may be a significant part of both the “ethnic minority” and the “religious” sectors of the CPPCC. Ngapoi Ngawang Jigme (1910-2009) and Pagbalha Geleg Namgyai were pointed deputy presidents of the CPPCC, which position had been held by the late 10th Panchen Lama. Ngapoi Ngawang Jigme was a Tibetan lord; Pagbalha Geleg Namgyai is one of the highest *tulku* slightly lower than the Dalai and Panchen Lamas. The Hong Kong sector is even greater than ethnic Tibetans. There are more than 120 Hong Kong members invited to participate in the CPPCC. The ex-Chief Executive of the HKSAR is also a deputy president of the CPPCC. The Taiwanese Democratic Autonomous Alliance – an allied political party of the CPC – send around 20 members to the CPPCC; while the Chinese National Sodality of Taiwanese Compatriots contribute around 15 CPPCC members for the Taiwanese sector. The Taiwanese president Mr Ma once considered lifting the CPPCC ban for indigenous Taiwanese after Ms Wu Xiaoli, an anchor of the Phoenix Television had participated in the Guangdong provincial branch of the CPPCC. But the Taiwanese authorities later repeated no Taiwanese

²⁰⁸ The Method for the Hong Kong Special Administrative Region of the People’s Republic of China to Elect Deputies to the Eleventh National People’s Congress, art 5.

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citizenship holder is allowed to sit in the CPPCC, and it also turned out that Ms Wu's CPPCC membership was granted based on her Hong Kong residency.²⁰⁹

3.3.3 Reconciliation

John Rawls believes in an international rule of law based on the overlapping consensus to end war, the CLP may be not as optimistic as the LoP in this regard.

David Boucher summarises: "Kant argued that in order for a treaty of perpetual peace to be legally binding it must attain the formal consent of civilised nations. In other words, it cannot be affected in the absence of a legally constituted framework. This is the point that Rawls takes firmly on board."²¹⁰ John Rawls indeed endorses an international rule of law. Departing from Immanuel Kant who builds his perpetual peace mostly on the objective process of commercial globalisation, John Rawls relies more on a psychological process of "moral learning" to backup his rule of law: "when the Law of Peoples is honoured by peoples over a certain period of time, with the evident intention to comply, and these intentions are mutually recognised, these peoples tend to develop mutual trust and confidence in one another. Moreover, peoples see those norms as advantageous for themselves and for those they care for, and therefore as time goes on they tend to accept that law as an ideal of conduct."²¹¹

For John Rawls this moral learning process ensures the LoP is not the same as a *modus vivendi*, as the latter is merely "a stable balance of forces only for the time

²⁰⁹ The News Press Record of the Mainland Affairs Commission of the ROC in Taiwan on 18 September 2008 in Chinese available at

<http://www.mac.gov.tw/ct.asp?xItem=44883&ctNode=5651&mp=105>. Retrieved on 19 May 2011.

²¹⁰ BOUCHER, DAVID, *Uniting What Right Permits with What Interest Prescribes: Rawls's Law of Peoples in Context, in Rawls's law of peoples: a realistic utopia?*, (Rex Martin & David A. Reidy eds., 2006), p. 26.

²¹¹ RAWLS, *The Law of Peoples: with, The Idea of Public Reason Revisited*, p. 44.

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being.” John Rawls believes we have seen much evidence in history that the moral learning process can succeed. Having been aware of its reasonable interests, democratic countries have not gone to war with each other for a long time. However, John Rawls’s point can be questioned. The strongest objection is that political agents of democratic peoples do not necessarily put reasonable interests of the international community before the rational interests of their own people, the best we have is an international *modus vivendi*.²¹²

The CLP, however, would like to cite a very beautiful piece of Michael Walzer to express its understanding of reconciliation, who says:

The dream of a war to end war, the myth of Armageddon (the last battle), the vision of the lion lying down with the lamb – all these point toward an age definitively peaceful, a distant age that lies across some unknown time-break, without armed struggle and systematic killing. It will not come, so we have been told, until the forces of evil have been decisively defeated and mankind freed forever from the lust for conquest and domination. ... The only alternative is non-violence defence, ‘war without weapons,’ as it has been called by its advocates, who seek to adjust our dreams to our realities. They claim that we can uphold the values of communal life and liberty without fighting and killing, and this claim raises important questions (secular and practical questions) about the theory of war and the argument for justice.²¹³

The CLP does not envision an end of war or perpetual peace among peoples, but it insists that conflict and confrontation shall remain non-violent in nature. Michael Walzer is once again right that “non-violence has been practiced (in the face of an invasion) only after violence, or the threat of violence, has failed.”²¹⁴ For the civilians who decide to launch a non-violence cause it is very crucial that they have

²¹² KUPER, *Rawlsian Global Justice: beyond The Law of Peoples to a Cosmopolitan Law of Persons* at 660. Also see TAN, *Liberal Toleration in Rawls's Law of Peoples*, p. 288.

²¹³ WALZER, *Just and Unjust Wars : a Moral Argument with Historical Illustrations*, p. 329.

²¹⁴ *Id.* at 330.

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a leadership that is able to persuade most of them to accept non-violence strategy. Additionally a non-violence cause is feasible only if the state prepares to tolerate a number of protests, demonstrations, strikes, etc. Michael Walzer reminds us that in confrontation to a Nazi-style regime, non-violence means nothing at all. He offers the images of a civilian statement like this: “You cannot shoot at me, because I am not shooting at you; nor am I going to shoot at you. I am your enemy and will remain so as long as you occupy my country. But I am a non-combatant enemy, and you must coerce and control me, if you can, without violence.”²¹⁵ Only if this statement is also acceptable for the state, non-violence can be meaningful. Non-violence turns soldiers into police on the one hand, and turns terrorists into civilians on the other hand. There is no hope that reconciliation happens between the non-violence cause and the state, but when terrorists stop killing innocent civilians of other peoples, an inter-people reconciliation is possible.

On 25 December 1948, the Xinhua News Agency, a CPC-run media, publicised a list of “war criminals”, on the top of which was Mr Chiang Kai-shek, while Madame Chiang was No. 23. On the Taiwanese side, prosecutions and executions to “communist rebels” did not stop until the annulment of the martial law. However, since 1 May 1991 the martial law has been abolished in Taiwan. The Taiwanese authorities promulgated an act entitled the Act Governing Relations between the People of the Taiwan Area and the Mainland Area (hereinafter “ROC Cross-Strait Relations Act”) on 31 July 1992. Article 77 in that act has largely excluded Chinese mainland residents from potential prosecution from the Taiwanese authorities and thus resolves the biggest problem in everyday communication across the Strait.²¹⁶

²¹⁵ Id. at 334.

²¹⁶ The ROC Cross-Strait Relations Act, art 77. The provision reads: “Any of the people of the Mainland Area who commit treasons outside the Taiwan Area and are permitted to enter into the Taiwan Area shall not be prosecuted or punished if it discloses such fact to the authorities upon application for entrance; the same shall apply to those who enter into the Taiwan Area to

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Similar resolutions can be found in the Chinese mainland too. On 14 March 1988 the Supreme People's Court and the Supreme People's Procuratorate together issued an interpretation that states: "those who fled to Taiwan shall not be prosecuted for their crimes before the establishment of the PRC".²¹⁷ On 7 September 1989, the two supreme judicial institutions of the PRC again issued an interpretation further excludes those from prosecutions, whose crimes were committed after the establishment of the PRC but before the local "people's authorities" were founded.²¹⁸ The second interpretation is more important because it not only relieves the "war criminals", but also covers those in Taiwan where no "people's authorities" – communist authorities – has been set up. The only flaw is the expression of "those who fled to Taiwan" seems not referring indigenous Taiwanese. But in praxis, there is no difference between the two groups of Taiwanese residents. The first stone of reconciliation across the Strait thus is established.

The Tibetan Kashag never involved in the Chinese civil war. Yet the entire chapter of "Crimes of Endangering National Security" of the PRC Criminal Act concerns emigrated Tibetans.²¹⁹ Article 102 punishes "whoever colludes with foreign states in plotting to harm the motherland's sovereignty, territorial integrity and security"; Article 103 combats "whoever organizes, plots, or acts to split the country or undermine national unification", to "instigate" to do so is also punishable; Article 104 is about "Whoever organizes, plots, or carries out armed rebellion, or armed

participate in conferences or activities approved by the competent authorities and are exempt specifically on a case by case basis from the referred disclosure."

²¹⁷ The Joint Announcement of the Supreme People's Court and the Supreme People's Procuratorate on Expiration of Prosecution against Taiwanese Residents for Crimes before the Establishment of the People's Republic of China.

²¹⁸ The Joint Announcement of the Supreme People's Court and the Supreme People's Procuratorate on Expiration of Prosecution against Taiwanese Residents for Crimes before the Establishment of Local People's Government.

²¹⁹ The PRC Criminal Act.

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riots”; Article 105 defends the socialist system; and Article 109 warns state organ personnel, during the time of performing his public functions, not to leave his post without authorization and defects from the country. Most of these provisions lead to life sentence or execution, and the term of imprisonment is harsh. There is a grey area in judging emigrated Tibetans’ continuous behaviour. The Dalai Lama has orally given up “Tibetan independence”, but even “genuine autonomy” is regarded as a “distorted independence” that obviously touches the red line. The Dalai Lama himself was a PRC official when he fled to India; for him, Article 109 seems having prepared to bite.

Having not been working for Dharamsala, some emigrated Tibetans are also involved in crimes according to the PRC Criminal Act. Article 322 reads: “Whoever violates the laws and regulations controlling secret crossing of the national boundary (border), and when the circumstances are serious, shall be sentenced to not more than one year of fixed-term imprisonment and criminal detention or control.”²²⁰ Since many Tibetan crossed the border without passport and permission, they are not free of danger in returning to China. Yet Article 87 provides a potential solution.²²¹ For those who crossed the border without a legitimate passport, the periodic limitation of prosecution may be a relief. But for those involved in “national security” matters, it remains vague.

²²⁰ The PRC Criminal Act, art 322.

²²¹ The PRC Criminal Act, art 87. Article 87 reads: “Crimes are not to be prosecuted where the following periods have elapsed: (1) in cases where the maximum legally-prescribed punishment is fixed-term imprisonment of less than five years, where five years have elapsed; (2) in cases where the maximum legally-prescribed punishment is fixed-term imprisonment of not less than five years and less than ten years, where ten years have elapsed. (3) in cases where the maximum fixed-term imprisonment is not less than ten years, where fifteen years have elapsed. (4) in cases where the maximum legally-prescribed punishment is life-imprisonment or death, where twenty Years have elapsed. If it is considered that a crime must be prosecuted after twenty years, the matter must be submitted to the Supreme People’s Procuratorate for approval.”

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However, Article 90 proscribes:²²²

In situations where the autonomous areas inhabited by ethnic groups cannot completely apply the stipulations of this law, the people's congresses of the autonomous regions or of the provinces may formulate alternative or supplementary provisions based upon the political, economic, and cultural characteristics of the local ethnic groups and the basic principles of the stipulations of this law, and these provisions shall go into effect after they have been submitted to and approved by the National People's Congress Standing Committee.

This could be a chance for the PRC to find a way to make reconciliation with emigrated Tibetans.

3.3.4 Reciprocity

The CLP pays more attention to reciprocity than the LoP. In John Rawls's early theories, individuals in one constitutional order owe each other a responsibility of assistance. We may recall Rawls's two principles of "justice of fairness": "(i) The principle of equal basic rights and liberties; and (ii) a principle of economic justice, which stresses (a) equality of opportunity and (b) mutual benefit and egalitarianism." As the CLP shares traits with both the LoP and a constitutional order, the latter prescribes individuals within the same constitutional order cannot be indifferent to others' poverty. This pushes the CLP to get close to egalitarianism. Yet it will be reluctant for individuals in one people to put other peoples' well-being before their own, so what reciprocity asks is similar with the LoP and does not exceed the standard promoted by "justice as fairness." There are two ways to fulfil this requirement.

The first one is to add responsibilities to capable peoples in order to redistribute resources and wealth among peoples in the CLP until all peoples are generally equal in social and economic development. The second one is to ignore the boundary

²²² The PRC Criminal Act, art 90.

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between peoples when dealing with redistribution and retreat to an ordinary constitutional order. This way adds responsibilities to capable individuals instead of peoples to aid any worse off individuals in the constitutional order regardless of which people they belong to. It is hard to say which way is the best at all times, and it may depend on the concrete relationship between contextualised peoples and individuals. But a wrong way is to ignore individuals in a worse condition in one people to benefit others in a better condition in another people for sake of redistribution among peoples. This way is bizarre but it happens.

Reciprocity is an important force to unite separated but associated peoples together in the CLP. In social terms reciprocity may suggest a sort of bilingualism or free migration, but after all reciprocity mostly unfolds in the economic arena. If reciprocity functions in the first way, it could be economic cooperation, free-trade area, common currency, etc. If reciprocity functions in the second way, it is much more like a welfare state that carries on redistribution among individuals. Experience of industrial liberal democracies makes an example of how welfare or reciprocity affects the unity of peoples in one constitutional order. Nicola McEwen exhibits how the welfare state enhances unity by expanding an inter-people network and symbolises that separated but associate peoples still share a common heritage, as well as serves more for worst off individuals than those in better conditions.²²³ In this sense the second way would be closer to the ideal of “justice as fairness” in the CLP.

The PRC Tibet Autonomous Region remains the least developed among territorial economies. The PRC government has decided to help the Tibetans to catch up the national average of economic development, which goal is also endorsed by The Ethnic Regional Autonomy Act 1984. The entire Chapter VI of the act concerns “responsibilities of state organs at higher levels”. The PRC central government has a

²²³ MCEWEN, NICOLA, Nationalism and the State: Welfare and Identity in Scotland and Quebec (P.I.E.-Peter Lang. 2006), p. 183.

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personnel-exchange scheme between the TAR and inland provinces. In the sixth round of personnel-exchange, around 1000 inland “skilled people” arrived in Tibet for a three-year full term or a half term work in the TAR. By the end of the term, these people will return to China proper and another round replaces them. The Qinghai-Tibet railway is another instance that the PRC government is trying to use infrastructure projects to accelerate economic growth in Tibet. According to the PRC, the Qinghai-Tibet railway has almost doubled the number of tourists in Tibet, which is likely to bring good news for the TAR economy.²²⁴ The PRC also poured 0.24 billion CNY to finance the maintenance of the Potala Palace that was the Dalai Lama’s “Holy See” in Tibet. Whereas the harsh environment of Tibet costs too much to exploit natural resources, the local revenue of Tibet cannot sustain a modern public sector. To enhance literacy rate of Tibetans, the PRC Ministry of Education established a number of “Tibetan classes and schools” to train ethnic Tibetan students in China proper with better living conditions and scientific equipments.

The PRC governmental aid to Tibet is unilateral, but economic cooperation between the Chinese mainland and the other two cases seems more reciprocal. Hong Kong and Taiwan are members of the WTO in parallel with the Chinese mainland. The WTO allows members to set up bilateral economic cooperation within its framework, so the Chinese mainland and the Hong Kong SAR on 29 June 2003 signed an agreement of “Closer Economic Partnership Arrangement” (hereinafter CEPA). The CEPA aims at reducing tariff, removing discrimination, and facilitating trade and investment.²²⁵ The HKSAR has already applied “zero tariff” to goods imported from the Chinese mainland, while the Chinese mainland promised to adopt

²²⁴ But others argue that the railway also threatens Tibetan environment and cultural sustainability. SHAKYA, TSERING, *Tibetan Questions*, 51 New Left Review 5 at 9-10, (2008).

²²⁵ The CEPA, art 1.

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“zero tariffs” to hundreds of Hong Kong goods too.²²⁶ The two parties agreed not to use anti-dumping or anti-subsidies provisions against the other.²²⁷ The cooperations of finance and tourism are crucial for Hong Kong’s sustainable development. The PRC central government promised to encourage mainland banks to set up their international centres in Hong Kong and invite Hong Kong financial institutions to get involved in mainland financial reforms, which means the Chinese mainland has opened its financial market to Hong Kong banks.²²⁸ Because of the restriction on international banks in mainland financial market, the CEPA gives Hong Kong a big chance to strengthen a status as the Asia-Pacific financial metropolis. The cooperation of tourism on the other hand opens the Hong Kong market to mainland residents, but this still benefits Hong Kong. Tourist consumption will stimulate Hong Kong’s economy that employs a majority of the population in service.²²⁹ The two parties also promised they will cooperate in investment, customs, food safety, e-business, small business, and Chinese medicines.²³⁰

On 5 March 1994 the NPC Standing Committee promulgated an “Act for Protection of Taiwanese Compatriot’s Investment” that pioneers the legal protection of cross-Strait economic communication. In 2008, the so-call “three openings” were agreed in the revived cross-Strait negotiations: airway, marine, and postal direct communications across the Taiwan Strait recommenced after a 60-year interruption. Since then cooperations in concern of food safety, finance, customs were also projected. But the most important agreement is the “Economic Cooperation Framework Agreement” (hereinafter ECFA), which urges the two parties to reduce tariffs and set up economic cooperation. But there is no restriction of anti-dumping

²²⁶ The CEPA, art 5.

²²⁷ The CEPA, arts 7-8.

²²⁸ The CEPA, art 13.

²²⁹ The CEPA, art 14.

²³⁰ The CEPA, art 17.

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or anti-subsidies measures in the ECFA, implying Taiwan is still free to use these WTO mechanisms against the Chinese mainland. The ECPA does also include a list of potential cooperations: intellectual property, finance, trade, customs, e-business, industrial strategy, small business, and exchange of representatives between economic and commercial associations.²³¹ Speaking of “zero tariff”, the "early harvest" list of tariff concessions covers 539 Taiwanese products and 267 Chinese mainland goods. The advantage to Taiwan would amount to US\$ 13.8 billion, while the Chinese mainland could receive around US\$ 2.86 billion. In fact the surplus of Taiwan in trading with the Chinese mainland in 2009 was more than US\$ 65 billion. The ECFA is likely to increase the cross-Strait imbalance, reflecting that the Chinese mainland seems happier to “buy Taiwan” than to “liberate Taiwan” now.

3.4 CONCLUDING REMARKS

The CLP is a variation of John Rawls’s LoP. To assert a normative framework for peaceful coexistence among peoples, the CLP is identical to the LoP in many aspects. However, the LoP is designed for peoples as participants in the international community. The CLP has to differ from the LoP, because in the Chinese context, peoples, if at all, are actors in a quasi-constitutional association. But this quasi-constitutional association is also highly different from a unitary constitutional system or a domestic order, so the CLP does not have to go far away. John Rawls starts with the perspective of a capable liberal people, for which decent peoples are to be tolerated, outlaw regimes are to be militarily interfered with, and burdened societies are to be assisted. But in the Chinese context there is a more centralised non-liberal, but in some sense reasonable, host state government. Even so, the CLP disagrees with some liberals who insist there is no possible peaceful coexistence and sound cooperation unless an overall liberal constitutional umbrella will be set up. Putting its top priority in maintaining peace among Sinitic liberal or non-liberal peoples, the CLP reckons potential improvement towards liberal

²³¹ The ECFA, art 6.

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democracy of non-liberal peoples is a good but secondary matter, though it also reckons a general liberal framework would encourage non-liberal peoples to make some differences.

Chapter 1 introduced the point that towards a new conception of Chinese constitutional law, which is “constitutional law of peoples”, this thesis has two goals just as the re-conceptualisation has two dimensions. This chapter draws the normative dimension of the conception. The principles of recognition, representation, reconciliation, and reciprocity are not what surprisingly contrasts common sense or moral feelings. I believe a Confucianist or a (Tibetan) Buddhist would not disagree much with these ideas in any debate on how to live peacefully with a nearby community of our relatives and friends. But it is still better for this thesis proceeding from John Rawls’s theory, because his theoretical construction and especially his way of thinking have transcended the parochialism of particular “comprehensive moral doctrine”. In essence, what the CLP is trying to do is to combine Rawls’s early theory and the “law of peoples” together. In a domestic order, Rawls emphasises representation and reciprocity, and in the international order he subscribes to recognition and reconciliation; so in a quasi-domestic as well as quasi-international order, what would he or a liberal say? This thesis suggests we should bear all these ideas in mind, and retain the balance in employing them in the elaborate context. But this is not enigmatic. It is hard to make friends with a mobster or a madman; the greatest “welfare state” is the patriarchal regime of two parents established for their children. The first case is about reconciliation and representation, which leads to reasonableness. The second case is about reciprocity and recognition.

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Chapter 4 Constitutional Accommodation

4.1 INTRODUCTION

This chapter addresses issues of Chinese constitutional accommodation of, and integration with, the Sinitic peoples in positive law. The words “accommodation” and “integration” are deployed in two ways. First, there is an internal/external difference between accommodation and integration: accommodation refers to measures the host state uses to hold a plurality of substate societies together, while integration renders the agenda of a state to hold break-away societies back. Secondly, accommodation and integration also imply a debate between a “difference recognising” constitutional design of the host state towards substate societies and a “difference diffusing” strategy to assimilate the substate societies or subcultures.²³² In the first sense, Chinese constitutional arrangements to Tibet and Hong Kong are mostly “accommodation”, while for Taiwan “integration” seems to be involved. In the second sense, however, there has been a mixture of accommodation and integration in Chinese constitutional designs with respect to Tibet, Hong Kong, and Taiwan.

The chapter argues that the constitutional amendments of the People’s Republic of China (hereinafter PRC), the “ethnic regional autonomy”, and “one country, two systems” may sometimes encounter the peripheral societies’ constitutional aspirations and hence reflect the principles of *recognition*, *representation*, *reconciliation*, and *reciprocity* by and large. Yet there remains a unitary preposition of the PRC central government in attending to the peripheral societies’ constitutional status, as well as a default one party-state infrastructure in the Chinese mainland. Both have constricted the space of further constitutional accommodation

²³² MEYERS, J, *Rethinking'Constitutional Design'and the Integration/Accommodation Dichotomy*, 73 Modern Law Review 656 at 656-659, (2010).

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in the centre. Emigrated Tibetans, Hong Kong democrats, and the Taiwanese independence movement are therefore not perfectly satisfied. There has been a huge gap between what the PRC central government offers and what the peripheral societies demand.

If Chapter 3 is built to partly answer the question of “whether Chinese constitutional accommodation of the peripheral societies of Tibet, Hong Kong and Taiwan is just”, this chapter will set out to respond the question of “whether the arrangements are satisfactory”. Chapter 3 has explained the government of a territory does not necessarily reflect the reasonableness of a society, but there is still needed a measure to investigate how the peripheral societies consider the contemporary Chinese constitutional law. So I will include more political agencies in my analysis, such as the administration of the Dalai Lama and political parties in Hong Kong and Taiwan. They do not necessarily represent the respective societies either. Yet at last we will get a detailed scenario of the interaction between the PRC central government and the peripheral societies in exploring the achieved and unachieved constitutional aspirations of all related political forces in Sinitic territory.

The structure of this chapter is as follows. The first section is a historical account of the process of constitutional amendments in the Chinese mainland and peripheral societies. In the beginning of the second part of the thesis, which will examine Chinese constitutional arrangements relating to Tibet, Hong Kong, and Taiwan, it is helpful to use this section to outline the basic institutional structures of the Chinese State and peripheral societies that might not be acquainted by readers. So in this section, I will epitomize the history about how the binding Constitutions in Sinitic territory were made and what they have created to deliver governance. Although the Constitutions have laid the foundation of contemporary Chinese constitutional accommodation of the peripheral societies, there are still many constitutional constraints from the centre. Section 4.3 will explain that in addition to the prohibition of “secessionist” behaviour, the PRC central government has been very solicitous in imposing a unitary conception of the Chinese State upon Tibet, and to a lesser degree on Hong Kong and Taiwan. In light of this, section 4.4 then shows that

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emigrated Tibetans’ “genuine autonomy”, Hongkongers’ “universal suffrage”, and Taiwanese’ “de jure independence” are ruled out by the PRC central government at this moment. Hence there is work to be done in further constitutional reform, which will be discussed in chapter 6.

4.2 THE PROCESS OF CONSTITUTIONAL AMENDMENTS

4.2.1 The 1946 Constitution

In the aftermath of the Second World War, China’s future was to be determined by the Nationalist Party of China or the Kuomintang (hereinafter KMT) and the Communist Party of China (hereinafter CPC). Our navigation will begin from here. The KMT founding father, Mr Sun Yat-sen promised a three-phase process of Chinese constitutionalisation: to, the military rule after the revolution that would overthrow the Manchu Crown; secondly, the supervisory rule in which the Chinese people should be apprenticed to the KMT; thirdly, the constitutional rule which would be started by a codified “Constitution”. The KMT regime in the name of the “Republic of China” (hereinafter ROC) remained in the second phase when Japanese troops invaded China in the 1930s; the process of Chinese constitutionalisation was thus interrupted. In the 1940s, Chinese nationalists and Chinese communists were united under the ROC central government to defend the nation. Chinese communists were accommodated in national armies and in the ROC central government as well, which tolerated or actually, turned a blind eye to the “special regions” under communist control. But after the war the accommodation to communists had discomfited the KMT. Mr Chiang Kai-shek decided to invite Mr Mao Zedong to talks. In preceding negotiations between the ROC central government and Chinese communists, the two parties agreed to principles of constitutionalisation, democratisation, and military nationalisation; but disagreed on the details of implementation. Nevertheless, the two parties agreed to convene a “political consultation conference” that would allow not only the two parties but also other political parties to participate and discuss issues through.

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The KMT, the CPC, and some “third parties” held the “political consultation conference” in 1946, which produced a constitutional draft and proposed a “national assembly” to promulgate it. In the 1930s a “national assembly” had already been elected but was never convened because of the war. So the KMT insisted that the old national assembly was still functioning, but other parties wished for a re-election. At the end, the KMT accepted to double the number of representatives of the national assembly to around 2000 combining a half of the 1930s members and another half to be elected or appointed, which would accommodate territorial representatives from newly recovered Manchurian provinces and Taiwan, as well as partisan representatives – most were Chinese communists – who were banned to stand in the 1930s. Mr Carson Chang (Zhang Junmai), a founding member of a third party was appointed to draft the constitution. The draft later was recommended by the political consultation conference to the constituent assembly with minor changes. On 15 November 1946, the constituent national assembly was convened. Taiwanese and Tibetan representatives all took part in; however, the CPC rejected the quota and refused to send representatives. For that, the PRC government does not recognise the legality and legitimacy of the 1946 national assembly and “the 1946 Constitution”, but in Taiwan the 1946 Constitution remains the basic law in the legal system.

The 1946 Constitution adopts a “five-Yuan system” of government that Mr Sun Yat-sen initiates based on the “check and balance” and Chinese historical institutions. The first chapter of “General Provisions” of the 1946 Constitution promulgates that “the sovereignty of the Republic of China shall reside in the whole body of citizens”,²³³ “persons possessing the nationality of the Republic of China shall be citizens of the Republic of China”,²³⁴ and “there shall be equality among the

²³³ The 1946 Constitution, art 2.

²³⁴ The 1946 Constitution, art 3.

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various racial groups in the Republic of China”.²³⁵ Article 25 of the 1946 Constitution reads: “the National Assembly shall, in accordance with the provisions of this Constitution, exercise political powers on behalf of the whole body of citizens.”²³⁶ According to the 1946 Constitution, the National Assembly is entitled to elect and recall the President of the Republic of China and his/her deputy,²³⁷ and another crucial power of the National Assembly is that of amending the Constitution.²³⁸

Under the National Assembly, the five-Yuan system comprises the Executive Yuan, the Legislative Yuan, the Judicial Yuan, the Examination Yuan, and the Control Yuan.²³⁹ The initiative of the 1946 Constitution was to create a cabinet system with a President of relative powerlessness. Article 55 provided that the President of the Executive Yuan shall be nominated and appointed by the ROC President, but the consent of the Legislative Yuan is a prerequisite to the appointment,²⁴⁰ which exemplified Mr Carson Chang’s endeavour to reduce and resist Mr Chang Kai-shek’s paramourcy. Article 37 reads “the President shall, in accordance with law, promulgate laws and issue mandates with the counter-signature of the President of the Executive Yuan or with the counter-signatures of both the President of Executive Yuan and the Ministers or Chairmen of Commissions concerned.”²⁴¹ In other words, the Executive Yuan as the “highest administration” of the state may restrict the arbitrariness of the ROC President in intervening in the law-making process. The 1946 Constitution empowers the Legislative Yuan to be the supreme

²³⁵ The 1946 Constitution, art 5.

²³⁶ The 1946 Constitution, art 25.

²³⁷ The 1946 Constitution, art 27(1), (2).

²³⁸ The 1946 Constitution, art 27(3); art 174.

²³⁹ LUO, CHANG-FA, *The Legal Culture and System of Taiwan* (Kluwer Law International. 2006).

²⁴⁰ The 1946 Constitution, art 55(1).

²⁴¹ The 1946 Constitution, art 37.

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legislature, while requests the Judicial Yuan to interpret the Constitution and unify the interpretation of laws and orders as the constitutional court.²⁴² The last two Yuan-s are of less importance in that system.²⁴³

In 1947 the first “constituted national assembly” (different from the “constituent national assembly”) and the first Legislative Yuan were duly elected in national polls pursuant to the 1946 Constitution, and around 3000 members of the National Assembly and more than 750 members of the Legislative Yuan returned. But the first constituted national assembly had to promulgate a constitutional amendment even in the first convention merely several months after the 1946 Constitution was made. In the Chinese civil war the KMT could not and indeed did not hope to implement the 1946 Constitution that is full of human rights provisions. The Temporary Provisions Effective During the Period of Communist Rebellion (hereinafter TPEDPCR) was declared, which authorised the ROC President an absolute power of executing “emergency measures” without any restriction from either Yuan.

4.2.2 Constitutions: 1954, 1975, 1978, and 1982

Having overthrown the KMT regime in the Chinese mainland in 1949, the CPC decided to convene its own “political consultation conference”. The Chinese People’s Political Consultation Conference (hereinafter CPPCC) convened on 21 September 1949 in which the CPC, eight allied political parties, and a group of invited social elites promulgated a Common Programme of the Chinese People’s

²⁴² The 1946 Constitution, Chapter VI; art 78.

²⁴³ The 1946 Constitution, art 83 and art 90. Article 83 reads: “The Examination Yuan shall be the highest examination organ of the State and shall have charge of matters relating to examination, employment, registration, service rating, scales of salary, promotion and transfer, security of tenure, commendation, pecuniary aid in case of death, retirement and old age pension”. Article 90 reads: “The Control Yuan shall be the highest control organ of the State and shall exercise the powers of consent, impeachment, censure, and auditing”.

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Political Consultation Conference (hereinafter “1949 Common Programme”) that became the provisional constitutional law of the newly established PRC. The 1949 Common Programme declares “to repeal all laws, orders, and institutions of the KMT reactionary government that have oppressed the people”.²⁴⁴ Article 2 urged “the Central Government of the People’s Republic of China shall carry on the people’s liberation war to the end until the entire territory of China has been liberalised eventually and the great enterprise of China’s unification is accomplished”.²⁴⁵ The 1949 Common Programme also authorised the CPPCC to organise the PRC central government before a “national people’s congress” is elected by a general election.²⁴⁶ The CPPCC stipulated the “National People’s Congress” (NPC) to be the parliamentary body in the future and rendered itself an advisory body to the government after the NPC had taken charge.²⁴⁷

In 1954 the first NPC convened in Beijing, which promulgated the first PRC Constitution on 20 September 1954. The 1954 Constitution maintains the NPC shall be the sovereign organ of the Chinese State to exercise any power according to its own decision.²⁴⁸ When the NPC is not in session, a Standing Committee of the NPC shall make ordinary laws and orders.²⁴⁹ According to the Constitution, the PRC Chairman shall be the head of state, while the Premier is the head of the central administration – the State Council;²⁵⁰ the Chairman shall be elected by the NPC,²⁵¹

²⁴⁴ The 1949 Common Programme, art 17.

²⁴⁵ The 1949 Common Programme, art 2.

²⁴⁶ The 1949 Common Programme, art 13(2).

²⁴⁷ The 1949 Common Programme, art 13(4).

²⁴⁸ The 1954 Constitution, arts 2, 21, 22, and 27(14).

²⁴⁹ The 1954 Constitution, art 31.

²⁵⁰ The 1954 Constitution, art 50.

²⁵¹ The 1954 Constitution, art 27(4).

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and the Premier shall be nominated by the Chairman and decided by the NPC.²⁵² In the 1954 Constitution, the Chairman's power was greater than the contemporary Chinese President. Article 43 of the 1954 Constitution reads "the Chairman shall convene a supreme council of national affairs of necessity and presides by himself",²⁵³ which council could advise the NPC, the State Council, or others institutions to make decisions.²⁵⁴ The article actually enabled Chairman Mao to rule in a constitutional way, but it is a misfortune that he chose in the Cultural Revolution (1966-1976) to wipe out the Constitution.

In the last episode of the Cultural Revolution, the Maoists decided to tailor another constitution to replace the shelved 1954 one. The texts of the 1975 Constitution are rough, which was replaced again in 1978. The 1978 Constitution almost returns to the 1954 version, but the crucial difference is the 1978 Constitution, the 1975 one as well, authorises the Party Chief of the Central Committee of the CPC to command Chinese military forces.²⁵⁵ The confusion between statal and partisan institutions seems odd even to Chinese communists.²⁵⁶ When in 1982 the PRC government remade the Constitution, partisan institutions of the CPC disappeared in the Constitution. The 1982 Constitution creates a Central Military Commission to command Chinese military forces.²⁵⁷ In terms of the relationship between the Chinese state and the CPC, Article 5 prescribes: "The state upholds the uniformity and dignity of the socialist legal system. No law or administrative or local rules and regulations shall contravene the constitution. All state organs, the armed forces, all

²⁵² The 1954 Constitution, art 27(5).

²⁵³ The 1954 Constitution, art 43(1).

²⁵⁴ The 1954 Constitution, art 43.

²⁵⁵ The 1978 Constitution, art 19(1).

²⁵⁶ See, POTTER, From Leninist Discipline to Socialist Legalism : Peng Zhen on Law and Political Authority in the PRC.

²⁵⁷ The 1982 Constitution, art 93.

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political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organization or individual may enjoy the privilege of being above the Constitution and the law”. In this sense, as one political party the CPC literally shall also be obligated by the Constitution.²⁵⁸ The NPC recovers its sovereign status. Under the supreme legislature – the NPC and its Standing Committee – there are provincial people’s congresses as legislatures of respective administrative divisions.²⁵⁹ The State Council is the supreme administration, under which administrations of provinces and counties are authorised to issue orders.²⁶⁰ The Supreme People’s Court shall be the highest judicial court that supervises lower courts,²⁶¹ “the people’s courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals”.²⁶² The 1982 Constitution removes the freedom of migration (in the 1954 Constitution)²⁶³ and the freedom to strike (in the 1975 and 1978 Constitutions),²⁶⁴ but a charter of human rights is protected at least on paper.²⁶⁵

In the 1982 Constitution, Taiwan appears. The preamble of the 1982 Constitution says: “Taiwan is part of the sacred territory of the People’s Republic of China. It is the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to

²⁵⁸ The 1982 Constitution, art 5.

²⁵⁹ The 1982 Constitution, art 100.

²⁶⁰ The 1982 Constitution, art 107.

²⁶¹ The 1982 Constitution, art 127.

²⁶² The 1982 Constitution, art 126.

²⁶³ The 1954 Constitution, art 90(2).

²⁶⁴ The 1975 Constitution, art 28(1). The 1978 Constitution, art 45.

²⁶⁵ The 1982 Constitution, chapter II. An introductory account of the PRC system see CHEN, An introduction to the legal system of the People’s Republic of China.

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accomplish the great task of reunifying the motherland.”²⁶⁶ The CPC finally has to re-address the remainder of the Chinese civil war. The great enterprise of “liberalising the entire territory of China” pursued by the first Chinese People’s Political Consultation Conference was never accomplished.

The 1982 Constitution is Janus-faced with respect to peripheral societies. It has an authoritarian face. The Chinese parliament’s omnipotence, the monistic leadership of the CPC, and the unyieldingness to any “secessionist” danger are all maintained in the Constitution, and hence if someone supposes the Constitution is open to any constitutional aspirations of the peripheral societies, they definitely are wrong. But the 1982 Constitution also has a moderate face. In terms of recognition and reconciliation, the 1982 Constitution does not urge the PRC central government to wage an immediate war to liberate or unify Taiwan as the 1949 Common Programme; on the contrary, it merely calls upon “our compatriots in Taiwan” not to forget their “lofty duty” to the motherland. Although the 1982 Constitution does not refer to Hong Kong literally, in Article 31 it opens the door for the PRC central government to establish a “special administrative region” which could be granted autonomous powers extremely greater than ordinary administrative divisions in the Chinese mainland. For Tibetans and other ethnic minorities, the 1982 Constitution designs an “ethnic regional autonomy” that at least recognises the legitimacy of ethnic minorities to pursue some sort of special status in China. In terms of representation and reciprocity, the CPPCC and the NPC qualify as consultative institutions; even the removal of freedom of migration is helpful to justify the separation of jurisdictions of peripheral societies, which blocks off Chinese mainlanders entering Hong Kong or Taiwan.

²⁶⁶ The 1982 Constitution, Preamble.

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4.2.3 Constitutional Amendments in Peripheries

The constitutional amendments of the PRC are nevertheless only one side of the coin; on the other side, institutional change in peripheral societies determines what the peripheral societies can or cannot do in response to the PRC central government's constitutional accommodation, so it is also necessary to keep an account of their "constitutional amendments" in this chapter. But a problem is the PRC central government does not recognise the constitutionality or legality of the rules made by Taipei or Dharamsala. Secondly, even For Taipei and Dharamsala there is still a difference. Taipei's rules are binding in the territory for everyone living there; Dharamsala rules, to a large extent, rely on emigrated Tibetans' voluntary obedience and apply to them exclusively. Needless to say, the difference contrasts the two territories' legal competence and political capacity as chapter 2 has introduced. In this context, "constitutional amendments in peripheries" refer to institutional changes expressed in constitutional discourse in respective territories. I will put their compatibility to the PRC Constitution aside at this stage. The paradox is although the PRC central government cannot recognise the constitutionality of the rules of Taipei and Dharamsala; it has to take the contemporary institutions of the peripheral societies in consideration while designing the constitutional arrangements.

In Taiwan Article 6 of the TPEDPCR authorises the first "constituted national assembly" to function continuously because after fleeing to Taiwan the "ROC" regime had been incapable to hold another poll in the "territory controlled by communist rebels".²⁶⁷ The same crisis confronted the first Legislative Yuan too. The Judicial Yuan thus issued a constitutional interpretation that also extended the term of the first Legislative Yuan till the second Legislative Yuan would be elected.²⁶⁸ However, members of the National Assembly and Legislative Yuan were

²⁶⁷ The TPEDPCR, art 6.

²⁶⁸ The Judicial Yuan Interpretation No. 31, 29 January 1954.

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overwhelmingly elected in the Chinese mainland and had little connection with indigenous Taiwanese constituencies. The KMT regime had to add new representatives from Taiwanese communities to both institutions. Whereas the senior members gradually passed away, the Taiwanese representatives might eventually become a majority.²⁶⁹ In 1991 a series of milestones in Taiwanese constitutionalisation were set up. On 30 April 1991 then “ROC” President Mr. Lee Teng-hui renounced the martial law²⁷⁰ and urged the National Assembly to revise the 1946 Constitution. The National Assembly decided to elect the second National Assembly and Legislative Yuan and thus could resign itself and the first Legislative Yuan. Since then, the representatives of the National Assembly and Legislative Yuan are all elected from “ROC” nationals from the “free area”. The “ROC” does not regard Chinese communists as “rebels” any more, but instead issues a law to regulate the relationship between people of the “free area” and the Chinese mainland.²⁷¹ As the constituent organ that was entitled to amend the Constitution, the National Assembly in 2005 dissolved itself and dissimulates the constituted powers to the people of the “free area” of the “ROC” and the Legislative Yuan.²⁷² The “free area” shall elect the ROC President now.²⁷³ Departing from the cabinet system of the 1946 Constitution, the head of the Executive Yuan now shall be appointed directly by the ROC president without prerequisite consent of the

²⁶⁹ LUO, *The Legal Culture and System of Taiwan*, chapter 1.

²⁷⁰ The TPEDPCR, art 10.

²⁷¹ The Additional Articles, art 11.

²⁷² The Additional Articles, art 1(1). It reads: “The electors of the free area of the Republic of China shall cast ballots at a referendum within three months of the expiration of a six-month period following the public announcement of a proposal passed by the Legislative Yuan on the amendment of the Constitution or alteration of the national territory. The provisions of Article 4 and Article 174 of the Constitution shall not apply”.

²⁷³ The Additional Articles, art 2(1).

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Legislative Yuan.²⁷⁴ The five-Yuan system of the 1946 Constitution has also been altered.²⁷⁵

In spite of the controversy on the legal status of emigrated Tibetan communities, they have promulgated a “Charter of the Tibetans in Exile” (hereinafter “Tibetan Charter”) on 14 June 1991.²⁷⁶ In the 1950s the 14th Dalai Lama brought his Kashag – the Tibetan cabinet – to India, which became the predecessor of contemporary “Central Tibetan Administration in Exile” sitting in Dharamsala, India. According to the agreement between the Kashag and the PRC central government, the Kashag in 1951 had already been incorporated as the “Tibetan local government”. When the Dalai Lama fled, the PRC State Council exterminated the Kashag and established the Tibet Autonomous Region (hereinafter TAR) as a substitute. The Dalai Lama’s Kashag nevertheless was trying to define itself as the “Tibetan Government in Exile” which is never recognised by any governments. The secondary choice for the Kashag is to function as the administration of emigrated Tibetans who are still loyal to the Dalai Lama, and the Indian government accepted this choice.²⁷⁷ The Tibetan Charter endorses this point in Article 2: “this Charter shall be binding and enforceable to all Tibetans under the jurisdiction of the Tibetan Administration in Exile”.²⁷⁸ The Kashag now is aware that as a “non-governmental” institution in international eyes, “all laws, ordinances, regulations, administrative and executive

²⁷⁴ The Additional Articles, art 3(1).

²⁷⁵ The Additional Articles, art 7(1). It reads: “The Control Yuan shall be the highest control body of the State and shall exercise the powers of impeachment, censure and audit; and the pertinent provisions of Article 90 and Article 94 of the Constitution concerning the exercise of the power of consent shall not apply”.

²⁷⁶ KHEYAP, T, *Homeless but Not Hopeless: How the Tibetan Constitution Governs a People in Exile*, 36 Hastings Const. LQ 353, (2008).

²⁷⁷ HESS, *Immigrant Ambassadors: Citizenship and Belonging in the Tibetan Diaspora*.

²⁷⁸ The Tibetan Charter, art 2.

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orders of the Tibetan Administration in Exile shall endeavour to conform to the generally accepted principles of international law as specified by the United Nations, and in particular comply with the local laws of the host countries”.²⁷⁹ With no contradiction with “local laws of the host countries”, “The executive power of the Tibetan Administration shall be vested in His Holiness the Dalai Lama, and shall be exercised by Him, either directly or through officers subordinate to Him, in accordance with the provisions of this Charter.”²⁸⁰ The Dalai Lama shall nominate no less than two candidates for the position of the Chief Kalön of the Kashag, from whom the “Tibetan Parliament in Exile” shall elect one. The Kalön and the Kashag are in charge of welfare, culture, education, and health of emigrated Tibetans under permission of “host countries”. The Tibetan Parliament in Exile composites 10 members from “three Tibetan provinces” – U-Tsang, Amdo, and Kham; each and every major religious sectors of Tibet shall elect 2 representatives; there are another one from North America and two from Europe; the Dalai Lama shall appoint 1-3 Tibetan MPs by himself.²⁸¹ The Tibetan Supreme Court in-Exile shall interpret the charter and deal with complains from within emigrated Tibetan communities in India, but genuine judicial powers shall belong to the “host countries”.²⁸²

Taipei and Dharamsala both made some progress in terms of the principles of *recognition*, *representation*, *reconciliation*, and *reciprocity*. In Taipei, the Taiwanese authorities have recognised the CPC’s rule in the Chinese mainland to a limited degree. In Dharamsala, the Kashag has been cautious to explain its status to outsiders. Although having connived at a name of “government in exile”, the Kashag is fully aware that it can only be recognised as a civil administration in charge of Tibetan refugees in Dharamsala and other settlements in India. In terms of

²⁷⁹ The Tibetan Charter, art 6.

²⁸⁰ The Tibetan Charter, art 19.

²⁸¹ The Tibetan Charter, art 37(1).

²⁸² The Tibetan Charter, art 66.

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representation, the Taiwanese authorities have democratised in the 1990s. The Taiwanese democratisation prevents the “ROC” to wage a war just because of the paramount leader’s personal decision, which is good news for maintaining peace across the Strait. The Kashag is also trying to democratise its institutions but giving the unique situation and historical tradition, there is a long way to go for emigrated Tibetans to establish a liberal democracy. However, although the Dalai Lama is an absolute authority in Dharamsala, he is a widely recognised peace-lover. So the Dalai Lama’s presence is not a serious danger to the process of reconciliation between hostile societies. What seems concerning is: if the Kashag would have been truly democratised without the Dalai Lama, could it still endorse a non-violent campaign? If the LoP is right, they will. But there is uncertainty surrounding the Dalai Lama’s political role and the Kashag’s future.

4.3 CENTRAL RESTRICTIONS ON ACCOMMODATION

4.3.1 Restrictions on the “ethnic regional autonomy”

In 1984 the PRC promulgated an Ethnic Autonomous Region Act 1984²⁸³ to deal with the “national question” in China. “Ethnic regional autonomy” is regarded as “the basic policy adopted by the Communist Party of China for the solution of the national question in China through its application of Marxism-Leninism”, and is “a basic political system of the State”.²⁸⁴ To adopt a form of autonomy to address the so-called “national question” is not rare, but some basic features of the Chinese ethnic regional autonomy should be articulated.

First, Article 2 of The PRC Ethnic Regional Autonomy Act 1984 makes it clear that “all national autonomous areas are integral parts of the People's Republic of

²⁸³ The “regional national autonomy” is an old translation, while the new one is “ethnic regional autonomy”. The two are referring the same Chinese term that itself never changes.

²⁸⁴ The PRC Ethnic Regional Autonomy Act 1984, Preface.

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China”.²⁸⁵ It denies any sort of “right of secession” of Chinese national autonomous areas.

Secondly, the ethnic autonomous region is primarily an administrative division of the unitary Chinese State despite it also eyes on one or several minority “nationalities” in the civil service. Article 3(1) of The PRC Ethnic Regional Autonomy Act 1984 reads: “organs of self-government shall be established in national autonomous areas as local organs of the State power at a particular level”.²⁸⁶ In this sense, the Tibet Autonomous Region functions as an ordinary province; the *Aba Zangzu Qiangzu Zizhi Zhou* (Aba Autonomous Prefecture for Tibetans and the Qiang people) in Sichuan province as a prefecture; and the *Muli Zangzu Zizhi Xian* (Muli Tibetan Autonomous County) as an ordinary county respectively. Article 3(2) of the act also prescribes: “the organs of self-government of national autonomous areas shall apply the principle of democratic centralism”.²⁸⁷ The “democratic centralism” on the one hand looks for a democratic endorsement of governmental legitimacy; on the other hand emphasises the unchallengeable superiority of the higher authority over lower ones.²⁸⁸ The combination of Article

²⁸⁵ The PRC Ethnic Regional Autonomy Act 1984, art 2(3).

²⁸⁶ The PRC Ethnic Regional Autonomy Act 1984, art 3(1).

²⁸⁷ The PRC Ethnic Regional Autonomy Act 1984, art 3(2). The Article 3(2) of The PRC Ethnic Regional Autonomy Act 1984 actually repeats Article 3 of the 1982 Constitution that reads: “The state organs of the People's Republic of China apply the principle of democratic centralism. ... The division of functions and powers between the central and local state organs is guided by the principle of giving full play to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities”.

²⁸⁸ The “democratic centralism” also appears in the CPC party constitution: “The Party's basic principles of democratic centralism are as follows: (1) Individual Party members are subordinate to the Party organization, the minority is subordinate to the majority, the lower Party organizations are subordinate to the higher Party organizations, and all the constituent organizations and members of the Party are subordinate to the National Congress and the Central Committee of the

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3(1) and 3(2) thus describes a horizontal symmetry and a vertical hierarchy of governmental institutions in the PRC system. This sheds light on the reading of Article 5 and Article 7 of The PRC Ethnic Regional Autonomy Act 1984. Article 5 concerns: “the organs of self-government of national autonomous areas must uphold the unity of the country and guarantee that the Constitution and other laws are observed and implemented in these areas”,²⁸⁹ while the Article 7 says: “the organs of self-government of national autonomous areas shall place the interests of the State as a whole above anything else and make positive efforts to fulfil the tasks assigned by State organs at higher levels”.²⁹⁰ The judicial courts of higher levels in PRC legal hierarchy shall supervise courts of national autonomous areas; the procurators, who represent the State in criminal cases, shall be not only supervised by but also responsible for those of higher levels.²⁹¹

The third feature of the ethnic regional autonomy is although it resists Han Chauvinism; ethnic groups are neither allowed to overshadow other *ethnos*. Article 12 is a key to understand this:²⁹²

(1) Autonomous areas may be established where one or more minority nationalities live in concentrated communities, in the light of local conditions such as the relationship among the various nationalities and the level of economic development, and with due consideration for historical background. (2) Within a national autonomous area, appropriate autonomous areas or nationality townships may be established where other minority nationalities live in concentrated communities. (3) Some residential areas and towns of the Han nationality or other nationalities may be included in a national autonomous area in consideration of actual local conditions.

Party.” This is a two-hand provision too.” See also, ANGLE, S. C., *Decent Democratic Centralism*, 33 Political theory 518, (2005).

²⁸⁹ The PRC Ethnic Regional Autonomy Act 1984, art 5.

²⁹⁰ The PRC Ethnic Regional Autonomy Act 1984, art 7.

²⁹¹ The PRC Ethnic Regional Autonomy Act 1984, Chapter IV.

²⁹² The PRC Ethnic Regional Autonomy Act 1984, art 12.

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Article 12(1) explains why there is a list of Tibetan autonomous areas outside the Tibet Autonomous Region (hereinafter TAR). Article 12(2) embodies in the Muli Tibetan Autonomous County that locates in an autonomous prefecture designed mainly for the Yi people, another ethnic group in the Sino-Tibetan family. Article 12(3) exemplifies in the Haixi Autonomous Prefecture that accommodates both Tibetans and Mongolians, so does the Aba Autonomous Prefecture for both Tibetans and the Qiang people. In fact the entire Chapter V of The PRC Ethnic Regional Autonomy Act 1984 urges the entitled ethnic group in respective autonomous area not to discriminate smaller groups under the administration. If an autonomous area combines two entitled ethnic groups, The PRC Ethnic Regional Autonomy Act 1984 calls for mutual respect and solidarity.²⁹³ With no idea of a “neutral state” or “universal citizenship”, a sense of equality is conceivable only when the communists repeatedly privilege the weaker: the working-class in social hierarchy, the minority in ethnic affairs, and eventually the smaller minorities facing bigger ones.

It is observed that the PRC central government does recognise there is a “national question” to be addressed and hence acknowledges that the Tibetans and other ethnic minorities in China need a particular constitutional arrangement. But the PRC central government does not recognise there is a separate Tibetan society. Aside the Dalai Lama, the TAR government of the PRC is neither recognised as a legitimate representative of Tibetans. The second feature of “ethnic regional autonomy” has made this point clear. In the Chinese mainland, ethnic Tibetans inhabit in a variety of Tibetan areas that are two times larger than the TAR. The TAR does not own the privilege to represent all Tibetans as a society. Moreover, in light of the “democratic centralism” even in the TAR there is no representative government specialised for a *demos* at all. The TAR cannot be accountable for Tibetans living in the territory because of the PRC central government may intervene without legal obstacles. At

²⁹³ The PRC Ethnic Regional Autonomy Act 1984, Chapter V.

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best the TAR can provide a mechanism of consultation to the PRC government with respect to Tibetan affairs in the circumstances. But in terms of reconciliation and reciprocity, the “ethnic regional autonomy” is generally right to encourage all ethnic groups to live peacefully alongside of each other. The third feature of the “ethnic regional autonomy” demonstrates how the PRC central government has to attend the interests of smaller ethnic groups and Han Chinese and prevent a single ethnic group from monopolising an autonomous territory.

4.3.2 Restrictions on the “one country, two systems”

The invention of “one country, two systems” (hereinafter OCTS) is attributed to Mr Deng Xiaoping’s idea of “peaceful unification” between the Chinese mainland and Taiwan. In comparison with the unilateral approach of political unification under a Chinese one party-State, the OCTS grants many more powers to the peripheries in proposed constitutional accommodation. Mr Deng’s promise that binds succeeding paramount CPC Party Chiefs reads:²⁹⁴

After reunification with the motherland, the Taiwan special administrative region will assume a unique character and may practise a social system different from that of the mainland. It will enjoy independent judicial power, and there will be no need to go to Beijing for final adjudication. What is more, it may maintain its own army, provided it does not threaten the mainland. The mainland will not station anyone in Taiwan. Neither troops nor administrative personnel will go there. The party, governmental and military systems of Taiwan will be administered by the Taiwan authorities themselves. A number of posts in the Central Government will be made available to Taiwan.

In this paragraph Mr Deng has agreed that the Taiwanese authorities may exercise independent judicial power and maintain, say, partisan, governmental, and military

²⁹⁴ DENG, XIAOPING, *An Idea for the Peaceful Reunification of the Chinese Mainland and Taiwan*, in Selected Works of Deng Xiaoping, (Foreign Languages Press. 1995).

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autonomy. Besides, Taiwanese officials will be appointed in the “central government” in representation of Taiwan after the peaceful unification.

However, Mr Deng in the same speech also clarifies that there are several restrictions, which at the same time binds contemporary PRC officials too. Deng says:²⁹⁵

We do not approve of “complete autonomy” for Taiwan. There must be limits to autonomy, and where there are limits, nothing can be complete. “Complete autonomy,” means two Chinas, not one. Different systems may be practised, but it must be the People's Republic of China alone that represents China internationally. We recognize that the local government of Taiwan may have its own separate set of policies for domestic affairs. And although, as a special administrative region, Taiwan will have a local government, it will differ from local governments of other provinces, municipalities and autonomous regions. Provided the national interests are not impaired, it will enjoy certain powers of its own that the others do not possess.

There are three conditions of the OCTS to be applied in Taiwan. First, there shall be no “complete autonomy”. The “central government” reserves a list of powers that restricts the Taiwanese authorities, although these powers have not been written down. Secondly, the PRC government shall be the internationally recognised Chinese government. The Taiwanese authorities will represent an administrative division of the PRC, although this “special administrative region” shall enjoy more judicial, administrative and military powers than ordinary Chinese provinces and even ethnic autonomous regions. Thirdly, the “national interests” shall not be impaired. There is no a priori explanation of what these interests are. The “military” part in the speech nevertheless indicates that Taiwanese military forces shall not threaten the Chinese mainland.

Since the OCTS has not yet come true in Taiwan, the Hong Kong case illustrates what the real restrictions are. Because Hong Kong never achieves any sort of

²⁹⁵ Id.

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“complete autonomy” or “international recognition” to statehood, these two conditions of the OCTS did not catch much attention there.

In the Hong Kong Basic Law, Article 12 prescribes: “The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government”.²⁹⁶ The Hong Kong Special Administrative Region (hereinafter HKSAR) is fully aware of the meaning of this provision. The HKSAR government states: “The PRC is a unitary state, and the HKSAR is a local administrative region under such a system. ... In other words, all powers exercised by the SAR are derived by way of authorisation by the Central Authorities, and there are no ‘residual powers’ on the part of the SAR”.²⁹⁷

Concerning Hong Kong’s international status, Article 13(1) of the Hong Kong Basic Law provides: “The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.”²⁹⁸ The PRC central government indeed stations an office in Hong Kong to deal with “foreign affairs”,²⁹⁹ which seems different from that “the mainland will not station anyone in Taiwan”. This reminds us that a remote ministry does not manage the periphery’s foreign affairs well thus a local branch of the PRC foreign ministry is needed for day-to-day functions, but it can hardly be copied to the Taiwan case since Mr Deng had given his word to the contrary.

²⁹⁶ The Hong Kong Basic Law, art 12.

²⁹⁷ Green Paper on Constitutional Development (The Hong Kong Special Administrative Region of the People's Republic of China ed., 2007), para. 2.07.

²⁹⁸ The Hong Kong Basic Law, art 13(1).

²⁹⁹ The Hong Kong Basic Law, art 13(2).

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The mostly contested restriction nevertheless is the third one – “national interests”. Mr Deng in another speech asserts.³⁰⁰

There is another point that I should make clear. Don't ever think that everything would be all right if Hong Kong's affairs were administered solely by Hong Kong people while the Central Government had nothing to do with the matter. ... The Central Government certainly will not intervene in the day-to-day affairs of the special administrative region, nor is that necessary. But isn't it possible that something could happen in the region that might jeopardize the fundamental interests of the country? Couldn't such a situation arise? If that happened, should Beijing intervene or not? Isn't it possible that something could happen there that would jeopardize the fundamental interests of Hong Kong itself? Can anyone imagine that there are in Hong Kong no forces that might engage in obstruction or sabotage? I see no grounds for taking comfort in that notion. If the Central Government were to abandon all its power, there might be turmoil that would damage Hong Kong's interests. Therefore, it is to Hong Kong's advantage, not its disadvantage, for the Central Government to retain some power there.

Is Mr Deng talking about some sort of “emergency”? In the Hong Kong Basic Law Article 14 embodies Mr Deng's speech.³⁰¹

The Central People's Government shall be responsible for the defence of the Hong Kong Special Administrative Region.

The Government of the Hong Kong Special Administrative Region shall be responsible for the maintenance of public order in the Region.

Military forces stationed by the Central People's Government in the Hong Kong Special Administrative Region for defence shall not interfere in the local affairs of the Region. The Government of the Hong Kong Special Administrative Region may, when necessary, ask the Central People's Government for assistance from the garrison in the maintenance of public order and in disaster relief.

³⁰⁰ DENG, XIAOPING, *Speech at a Meeting with the Members of the Committee for Drafting the Basic Law of the Hong Kong Special Administrative Region*, in *Selected Works of Deng Xiaoping*, (Foreign Languages Press. 1995).

³⁰¹ The Hong Kong Basic Law, art 14.

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Article 14(3) indicates two circumstances of necessity of central intervention: “in maintenance of public order” and “in disaster relief”. This seems a normal provision. But in Mr Deng’s context, the “national interests” also renders the CPC.³⁰²

I should like to ask you to think this over and take it into consideration when drafting the basic law. You should also consider a few other things. For example, after 1997 we shall still allow people in Hong Kong to attack the Chinese Communist Party and China verbally, but what if they should turn their words into action, trying to convert Hong Kong into a base of opposition to the mainland under the pretext of “democracy”? Then we would have no choice but to intervene. First the administrative bodies in Hong Kong should intervene; mainland troops stationed there would not necessarily be used. They would be used only if there were disturbances, serious disturbances. Anyway, intervention of some sort would be necessary.

Mr Deng opposed the idea that the HKSAR may allow people to attack the CPC in deeds, especially to “convert Hong Kong into a base” to oppose the mainland or to overthrow the CPC regime. Hence it would be more accurate to say the “national interests” in Mr Deng’s eyes are the stability and sustainability of the regime – the CPC’s direct rule in the mainland and indirect rule in Hong Kong shall adhere to a sort of OCTS arrangement. Article 23 of the Hong Kong Basic Law does prescribe: “The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.”³⁰³

³⁰² DENG, *Speech at a Meeting with the Members of the Committee for Drafting the Basic Law of the Hong Kong Special Administrative Region*.

³⁰³ The Hong Kong Basic Law, art 23.

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However, in spite of the success in securing the first two conditions, the third condition of the OCTS for the HKSAR has never been satisfied. Since the 1840s, Hong Kong has been a primary residing site for political dissenters escaping from the Chinese mainland. Their complaints are based on not only the freedom of speech but also the freedoms of association, consciousness, and migration, etc. There was a formidable resistance to potential restrictions to the freedoms when the HKSAR tried to promulgate a territorial ordinance incorporating Article 23 to the indigenous legal system. After a demonstration numbering more than 50000, the draft was blocked in the HKSAR Legislature.

The invention of the OCTS manifests the CPC and the PRC central government intend to simulate the process of reconciliation across the Taiwan Strait. The PRC central government's demand that the Taiwanese authorities should stop their military threat to the Chinese mainland has been partly met, as the truce across the Strait has lasted for around sixty years. Although the endeavour to enact a territorial law to combat treason, secession, and subversion against the government has failed, the PRC central government shows no intention to take any serious repression in Hong Kong at all. So long as Hongkongers do not turn their "words" to "deeds", the PRC central government definitely will remain in that status. In terms of representation, the PRC central government does not request the Taiwanese authorities to demolish the representative government in the territory. The Hong Kong case also demonstrates that the PRC central government can respect Hongkongers' freedom of expression and allow the HKSAR government to act in accordance with Hong Kong residents' will. The principles of recognition and reciprocity are also relevant. It seems that the PRC central government has to compromise some "national interests" to trade a lower level of recognition to the independence and autonomy of Hong Kong and Taiwan. This strategy so far has been working in Hong Kong, but the Taiwanese authorities or at least pro-independence Taiwanese politicians would rather give up the high posts and economic aid from the PRC government if the PRC would recognise Taiwan's equal status in constitutional or international law.

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4.4 UNACHIEVED CONSTITUTIONAL ASPIRIATIONS

Against the background set out in sections above, we can now discuss some of the constitutional aspirations of emigrated Tibetans, Hong Kong democrats, and the Taiwanese independence movement that are not compatible with contemporary PRC constitutional law. These constitutional aspirations thus remain “unachieved”. In fact the unachieved constitutional aspirations of the peripheral societies of Tibet, Hong Kong, and Taiwan are mostly surrounding the principles of recognition and representation. The emigrated Tibetans are demanding a Great Tibet where ethnic Tibetans may organise a government that could speak on Tibetans’ behalf at least in cultural affairs. The “universal suffrage” requested by Hong Kong society is the very foundation of a representative government. For Taiwan, Taiwanese politicians actually are stimulating the notion that Taiwanese residents shall be and shall only be represented by the Taiwanese authorities despite the fact that there is difference within the Taiwanese society as to what is the most appropriate name of the polity. In this context, the peripheral societies claim they are entitled to recognition from the PRC. Their claims may be translated to a historical nation, or a liberal democracy, or a sovereign people. At this moment the PRC central government is obviously unprepared to accept these claims. It is indeed very difficult to apply these ideas into legal praxis too. However, the good news is the peripheral societies have been willing to reconcile with the PRC central government. All of them agree with a non-violent approach in pursuing their constitutional aspirations. It is not surprising, as reasonableness often leads people-s to this path. The peripheral societies are not eager to have reciprocal cooperation with the PRC central government. But if the PRC central government will share economic interests with them, the peripheral societies may just accept.

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4.4.1 Emigrated Tibetans: the Great Tibet

The 14th Dalai Lama in a Five-point Peace Plan addressed to a United States Congressional Human Right's Caucus on 21 September 1987, delivered his aspirations as:³⁰⁴

(1), Transformation of the whole of Tibet into a zone of peace; (2), Abandonment of China's population transfer policy which threatens the very existence of the Tibetans as a people; (3), Respect for the Tibetan people's fundamental human rights and democratic freedoms; (4), Restoration and protection of Tibet's natural environment and the abandonment of China's use of Tibet for the production of nuclear weapons and dumping of nuclear waste; (5), Commencement of earnest negotiations on the future status of Tibet and of relations between the Tibetan and Chinese peoples.

On 15 June 1988 the Dalai Lama addressed another speech to members of the European Parliament in Strasbourg, in which the five-point plan was further developed and the dimension of "interdependence" was more emphasised than that of "independence". Particularly, in the 1988 Strasbourg Proposal the word "constitution" was for the first time mentioned. In the proposal the Dalai Lama insisted that the Tibetans should establish a new government for all Tibetans in "Great Tibet". The Dalai Lama made it clear that "the whole of Tibet known as Cholka-Sum (U-Tsang, Kham, and Amdo) should become a self-governing democratic political entity ... in association with the People's Republic of China." Thus, an "independent" sovereign Tibet has been dropped. Secondly, the Dalai Lama admitted, "the Government of the People's Republic of China could remain responsible for Tibet's foreign policy." On the other hand, "the Government of Tibet should, however, develop and maintain relations, through its own foreign affairs bureau, in the field of commerce, education, culture, religion, tourism, science, sports and other non-political activities. Tibet should join international

³⁰⁴ The Dalai Lama, Five-Point Peace Plan, available at his official website

<http://www.dalailama.com/messages/tibet/five-point-peace-plan>, retrieved on 2 May 2010.

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organisations concerned with such activities.” “Constitution” in this proposal means a code to be drafted in the future: “the Government of Tibet should be founded on a constitution or basic law. The basic law should provide for a democratic system of government ... this means that the Government of Tibet will have the rights to decide on all affairs relating to Tibet and the Tibetans.” This Tibetan “constitution” is not necessarily a sub-code or by-product of that of the PRC; the proposal declares: “Tibetan people themselves must be the ultimate deciding authority.”³⁰⁵

However, in 2009 when emigrated Tibetans submitted to the PRC central government a Memorandum on Genuine Autonomy for Tibetan People, “constitution” has become the PRC 1982 Constitution. The memorandum restates emigrated Tibetans’ aspirations that could be categorised into three sorts. The first is still “the integrity of the Tibetan nationality,” in other words, “the application of a single administration for the Tibetan nationality in the PRC”. The aspiration of combining all “three Tibetan provinces” – the Tibetan Autonomous Region, Qinghai province, and part of Sichuan – into a single administrative region has already been mentioned in the five-point plan and the 1988 Strasbourg proposal, but in this new memorandum it seems Tibetans have accepted that the concrete administrative boundary between Tibetan and non-Tibetan areas could be that of contemporary PRC administrative lines between different administrative regions.³⁰⁶

The second sort of Tibetan aspirations can be coined as “cultural autonomy”. Emigrated Tibetans demand that “the principal language of the Tibetan autonomous areas needs to be Tibetan”; second “[the] distinct [Tibetan] cultural heritage needs protection through appropriate constitutional provisions”; third, given the freedom of religious belief, “monasteries [should] be organised and run according to

³⁰⁵ The Dalai Lama, Strasbourg Proposal, available at his official website,

<http://www.dalailama.com/messages/tibet/strasbourg-proposal-1988>, retrieved on 2 May 2010.

³⁰⁶ Memorandum on Genuine Autonomy for the Tibetan People.

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Buddhist monastic tradition, to engage in teachings and studies, and to enrol any number of monks and nuns or age group in accordance with these rules. The normal practice to hold public teachings and the empowerment of large gatherings is covered by this freedom and the state should not interfere in religious practices and traditions, such as the relationship between a teacher and his disciple, management of monastic institutions, and the recognition of reincarnations”.³⁰⁷

Although the two sorts of aspirations above may fall into the shade of PRC laws, the last sort has transgressed the scope of the PRC 1982 Constitution. In the memo emigrated Tibetans demand a “regulation on population migration.” They said: “it is not our intention to expel the non-Tibetans who have permanently settled in Tibet and have lived there and grown up there for a considerable time. Our concern is the induced massive movement of primarily Han but also some other nationalities into many areas of Tibet, upsetting existing communities, marginalising the Tibetan population there and threatening the fragile natural environment.” But the PRC constitution does not authorise any autonomous regions to regulate their own administrative boundary.

Emigrated Tibetans ask the PRC to change some laws too.³⁰⁸

Implementation of genuine autonomy, for example, requires clear divisions of powers and responsibilities between the Central Government and the government of the autonomous region with respect to subject matter competency. Currently there is no such clarity and the scope of legislative powers of autonomous regions is both uncertain and severely restricted. Thus, whereas the Constitution intends to recognise the special need for autonomous regions to legislate on many matters that affect them, the requirements of Article 116 for prior approval at the highest level of the Central Government - by the Standing Committee of National People’s Congress (NPC) - inhibit the implementation of this principle of autonomy. In reality, it is only

³⁰⁷ HE, B & SAUTMAN, B, *The Politics of the Dalai Lama's New Initiative for Autonomy*, 78 Pacific Affairs 601, (2005).

³⁰⁸ Memorandum on Genuine Autonomy for the Tibetan People.

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autonomous regional congresses that expressly require such approval, while the congresses of ordinary (not autonomous) provinces of the PRC do not need prior permission and merely report the passage of regulations to the Standing Committee of the NPC 'for the record' (Article 100).

4.4.2 Hong Kong: Universal Suffrage

In Hong Kong, the major constitutional contestation centres on the “universal suffrage”. So far both the Chief Executive and the Legislative Council of the HKSAR have been elected in accordance with two annexes of the Hong Kong Basic Law and decisions of the Standing Committee of the National People’s Congress (NPC) of the PRC. The Chief Executive is elected by a 800-member election committee that shall be composed of four groups: 200 from industrial, commercial, and financial sectors; 200 from the professions; 200 from labour, social services, religious, and other sectors; and the last 200 are members of the Legislative Council, representatives of district-based organizations, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference.³⁰⁹ The British Hong Kong Government first introduced this sophisticated election system of “functional constituency” to Hong Kong in 1987 by a governmental Green called “The 1987 Review of Developments in Representative Government”.³¹⁰

The “functional constituency” system may recruit local elites to participate in politics and thus stabilise the governance, but on the other hand it results a substantial inequality of voting rights among Hong Kong residents. In a number of sectors associations instead of individuals are the basic unit of vote, which means one business elite’s voting right counts several times more than an ordinary Hong Kong resident. The “functional constituency” system also applies to the Hong Kong

³⁰⁹ The Hong Kong Basic Law, Annex I.

³¹⁰ Green Paper: the 1987 Review of Developments in Representative Government (British Hong Kong Government ed., 1987).

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Legislative Council. The 60-member legislature of Hong Kong consists of around one half of members from functional constituencies, while the other half returned by geographical constituencies through direct elections. (See Table 2) The Annex II of the Hong Kong Basic Law has prescribed the methods of formation of the second and third terms of the Hong Kong Legislative Council, and indicates that if the HKSAR would amend the method after 2007, the amendment shall be passed with a two-thirds majority in the Legislative Council and reported to the Standing Committee of the National People's Congress for record.³¹¹ In 2004 when the Standing Committee of the NPC reviewed a report from then Chief Executive seeking decision in respect of a potential amendment of the method of formation of the Hong Kong Legislative Council, the NPC Standing Committee chose not to alter the composition of the Hong Kong legislature in 2008.³¹² One consequence of the current election system is the opposition parties – most returned from geographical constituencies – never achieves a majority in the Legislative Council. Hence it is not a surprise that the self-labelled “Hong Kong democrats” have forwarded a serious aspiration to universal suffrage to replace the “functional constituency” system as soon as possible.

³¹¹ The Hong Kong Basic Law, Annex II.

³¹² Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008, see Instrument 208 available at the Bilingual Laws Information System operated by the HKSAR Department of Justice at <http://www.legislation.gov.hk/eng/home.htm>. Retrieved on 19 May 2011.

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Table 2 Composition of Legislative Council of the HKSAR

The Legislative Council	Functional Constituencies	Geographical Constituencies	Others
Term 1 (1998-2000)	30	20	10
Term 2 (2000-2004)	30	24	6
Term 3 (2004-2008)	30	30	0
Term 4 (2008-2012)	30	30	0
Term 5 (2012-2016)	35 nominally/30 substantially	35 nominally/40 substantially	0

Three major opposition parties in the HKSAR all emphasise that the “universal suffrage” shall be the next step in constitutional development in Hong Kong. The Civic Party says: “As a cosmopolitan and advanced society, Hong Kong deserves a democratic politics that includes all citizens and truly speaks to their interests. This is not just our aspiration but also our right. We believe Hong Kong is ready for the election of the Chief Executive and the Legislative Council by universal suffrage and it should be implemented without further delay.”³¹³ The League of Social Democrats accuses the “little circle” of Hong Kong business elites of having monopolised Hong Kong politics based on the “functional constituency” system, and the PRC central government also sets obstacles to block universal suffrage and abet the political despotism of the “little circle”.³¹⁴ The Democratic Party, as the

³¹³ The Party Platform of the Civic Party.

³¹⁴ The Party Policy of the League of Social Democrats.

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largest opposition party in Hong Kong urges the “double universal suffrages” in the elections of the Chief Executive and the Legislative Council too. The aspiration of universal suffrage among Hong Kong opposition parties has already transcended the right-left gap: the Democratic Party that endures political and economic liberties, the Civic Party that sits in centre-left, and the leftist League of Social Democrats share the same aspiration of further and fast democratisation, which, eventually presses on the HKSAR government and the central government of the PRC to respond seriously.

On 11 July 2007, the HKSAR government published a governmental Green Paper to call for open consultation, especially as to when a universal suffrage shall be applied to Hong Kong elections after 2007. The options are 2012, 2017, or after 2017 for the election of Chief Executive, and 2012, 2016, or after 2016 for the Legislative Council. The Green Paper also gives a list of options to change the “functional constituency” system. The Chief Executive submitted another report to the Standing Committee of the NPC to seek a decision. Upon receiving the report from the Chief Executive, the Standing Committee of the NPC decided that the method of the 2012 election of the Hong Kong Legislative Council shall not be altered at that moment, but the Standing Committee accepted that in 2017 the Chief Executive of the HKSAR can be elected through universal suffrage, while after the Chief Executive could be elected by this way, the Legislative Council can also be formed by the same method.³¹⁵ In addition to this, the Standing Committee of the NPC also allowed a change of election method of the Chief Executive and the formation of the

³¹⁵ Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012, see Instrument 211 available at the Bilingual Laws Information System operated by the HKSAR Department of Justice at <http://www.legislation.gov.hk/eng/home.htm>. Retrieved on 19 may 2011.

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Legislative Council under the condition that the number of members of functional constituencies and that of the geographical constituencies must be the same.

On 24 June 2010, the Legislative Council of the HKSAR passed the methods of 2012 elections of the Chief Executive and the Legislative Council. The original draft of the HKSAR Government contained: (i) add 10 members to the Legislative Council; (ii) five shall be elected by a universal suffrage, while the other five shall be elected amongst district councillors who themselves are elected directly by Hong Kong residents; (iii) add 400 members to the election committee of the Chief Executive, that means 100 for each and every group; (iv) 75 members of the newly added 100 in the four groups of the election committee shall be elected amongst district councillors. (See, Table 3) This draft could be passed with a two-thirds majority because the opposition parties refuted that this was another “functional constituency” design in nature, especially since the newly added 400 members of the election committee are overwhelmingly from functional constituencies. At the last moment, the Democratic Party and the HKSAR Government achieved a consensus after a meeting the representatives from the PRC central government. The core idea of the draft of the Democratic Party is that Hong Kong residents who did not have a vote in any “functional constituencies” now shall elect the newly added 5 members of the Legislative Council for district councillors. In sake of “functional constituency”, these 5 members are in fact based on 3 million voters rather than 400 district councillors now. Additionally, according to this idea all Hong Kong resident will have two votes: one for geographic constituency, another for functional constituency. The Democratic Party’s draft is much closer to the “double universal suffrages” than the original one, and the HKSAR Government finally accepted this version and successfully passed it in the Legislative Council with a two-third majority.

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Table 3 The 2012 Election Committee of Chief Executive

	Total	Constituent Parts in Newly Added Members		
		District Councillors	Newly Added Member in the Legislative Council	Others
Group 1	300			
Group 2	300			
Group 3	300			
Group 4	300	75	10	15

4.4.3 Taiwan: De Jure Independence?

Article 8 of the Anti-secession Act 2005 of the People's Republic of China reads: "In the event that the 'Taiwan independence' secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity."³¹⁶ This article empowers the People's Republic of China an arbitrary discretion on using military forces against the Taiwanese

³¹⁶ The Anti-secession Law, art 8.

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independence movement, as well as renders the KMT in Taiwan a suspensive position across the Taiwan Strait.

As the founding force of the Republic of China (ROC), the KMT has been hexed by the symbolic set of the ROC apparatus. The national flag is the partisan flag of the KMT in a red grounding; there is little difference between the ROC national emblem and the KMT partisan emblem. In this sense, the KMT does not prefer to replace the ROC title with something else, e.g. a “Republic of Taiwan” or “Republic of Formosa”. On 14 March 1991 the National Unification Council in Taiwan issued the “Guidelines for National Unification” that declared both Taiwan and the Chinese mainland are Chinese territory; based on Chinese culture, humanity, human rights, democracy and rule of law, the Chinese unification will be accomplished eventually, but the timing and means of unification shall benefit residents in Taiwan first.³¹⁷ Although in the KMT eyes the “one China” is the “Republic of China” in constitutional terms, the KMT shares the 1992 Consensus, which equates to the “one China principle” in Chinese communist eyes. That is why the Communist Party of China (CPC) or the PRC does not identify the KMT as “Taiwan independence’ secessionist” in political discourse, and since 2005 the old foes have revived their contact that was lost in the 1930s.

Nevertheless, there are also many unachieved aspirations of the KMT, especially when being in charge of the Taiwanese authorities. The PRC never accepts a “double recognition” to both Beijing and Taipei. The PRC terminates diplomatic relations whenever a third state accepts Taiwanese ambassadors. In the United Nations, the PRC successfully took over the Chinese seat in the General Assembly and the Security Council in accordance with the United Nations General Assembly Resolution 2758 that “expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the

³¹⁷ The Guidelines for National Unification.

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organisations related to it”.³¹⁸ Before the resolution was passed, the KMT representatives unilaterally declared the “ROC” would withdraw the seat in the United Nations; but this interpretation of the relation between the Taipei authorities and the United Nations only prevails in KMT historical documentations so far. The Taiwanese authorities may send economic and cultural delegations to most states that have a diplomatic relation with the PRC. Yet the head of the Taiwanese authorities, i.e. the “President of the Republic of China” never participates in major international summit because of pressure from Beijing; nor did the famous China-friendly Taiwanese and KMT leader, Mr Ma Ying-jeou make a change in this regard.

As the largest opposition party in Taiwan, the Democratic Progressive Party (DPP) has an alleged “Taiwanese independence” Party Platform, the most important extract from which reads:³¹⁹

Territorial sovereignty and self-government are the preconditions for modern nations to establish the rule of law and to develop international relations. The facts that Taiwan is sovereign and independent, that it does not belong to the People's Republic of China, and that the sovereignty of Taiwan does not extend to mainland China, reflect historical realities as well as the present situation, and at the same time form part of the consensus of the international community. According to this reality of sovereignty and independence, Taiwan should draw up a constitution and establish a nation. Only then is it possible to guarantee respect and security for Taiwanese society and for individual citizens, and to offer the people the opportunity to pursue freedom, democracy, prosperity, justice and self-realization.

The DPP accuses the KMT of unlawfully maintaining the “five Yuan system” in Taiwan, which actually was tailored for the Chinese mainland and does not suit the Taiwanese society. Based on the idea that “popular sovereignty” should rest in the

³¹⁸ The United Nations General Assembly Resolution 2758, 26th Session, A/RES/2758(XXVI) (1971).

³¹⁹ The Party Platform of the Democratic Progressive Party.

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Taiwanese people, the DPP demands to overthrow the 1946 Constitution and establish an independent “Republic of Taiwan” or “Republic of Formosa” as early as possible. The DPP is generally a party of ethnic Hoklo, a subgroup of Han Chinese, but in Taiwanese population there are also 15% mainland migrations arriving with the KMT and another 15% ethnic Hakka people that is another subgroup of Han Chinese. The radical and exclusive aspiration of the DPP to create an indigenous Taiwanese state threatens the non-Hoklo Taiwanese residents, to say nothing of the fact that the PRC obviously cannot tolerate this. Against this background, the DPP on 8 May 1999 passed a Resolution on Taiwan’s Future. The resolution realises that the confrontations of national identity and constitutional aspirations between the DPP and other political forces, especially the KMT in Taiwan remains severe. Under this condition the DPP needs more pragmatic measures to implement the party platform rather than pushing the KMT and Chinese communists to the corner. The mostly referred part of the Resolution of Taiwan’s Future says: “Taiwan is a sovereign and independent country. In accordance with international laws, Taiwan's jurisdiction covers Taiwan, Penghu, Kinmen, Matsu, its affiliated islands and territorial waters. Taiwan, although named the Republic of China under its current constitution, is not subject to the jurisdiction of the People's Republic of China. Any change in the independent status quo must be decided by all residents of Taiwan by means of plebiscite.”³²⁰ Actually the new resolution has changed the DPP aspirations to (i) Taiwan is a sovereign and independent county in the name of the “Republic of China”; (ii) Taiwan’s jurisdiction – not “sovereignty” in rhetoric – does not cover the Chinese mainland, thus reconciles with the constitutional framework of the ROC in Taiwan; (iii) Taiwan’s future shall be determined by Taiwanese residents directly, as it opposes the PRC Anti-secession

³²⁰ Resolution of Taiwan’s Future of the Democratic Progressive Party.

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Act 2005 that prefers cross-Strait negotiations instead of democracy in settling futuristic reunification down.³²¹

4.5 CONCLUDING REMARKS

So far we have reached another milestone towards a conception of “constitutional law of peoples”. This chapter exhibited a series of Constitutions promulgated by the Chinese State since the end of the Second World War. The 1946 Constitution was drafted by a Chinese social democrat in the mainland and legendarily survives in Taiwan after regime changes and Taiwanese democratisation. The PRC government’s Constitutions are all political products. The 1954 and 1982 Constitutions were produced after a process of deliberation and consultation and hence are modest in substance and style; the 1975 and 1978 Constitutions were made by Maoists and are comparatively radical as well as rough. Additionally we have also seen the outlines of the PRC government’s “ethnic regional autonomy” and “one country, two systems” policies. These materials have positively forged the conception of “constitutional law of peoples”, but the conception is also shaped by the apparent tension between the PRC central government’s effort to retain a unitary form of state and the unachieved constitutional aspirations of the peripheral societies.

The PRC central government may recognise the distinctiveness of the peripheral societies from ordinary administrative divisions to a larger or lesser degree, but it never accepts that “international dual recognition” to both the PRC central government itself and any territorial authority of the peripheral societies could be an option; the PRC central government may keep its hands off existing representation systems of the peripheral societies that are employed to select political agencies, but

³²¹ An account of the Taiwanese independence movement see WANG, MEI-LING T., *The Dust that Never Settles : the Taiwan Independence Campaign and U.S.-China Relations* (University Press of America. 1999).

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it is very reluctant to enhance and solidify democracy in the peripheral societies because even territorial representative government would defy the legitimacy of the central regime; the PRC central government is willing to reconcile, but it does not hesitate to maintain and develop military advantages in case reconciliation would not be possible; the PRC central government welcomes reciprocity warmly, so long as the peripheral societies do not push it too hard in the other three directions. However, this chapter has illustrated that the peripheral societies of Tibet, Hong Kong, and Taiwan may have their own constitutional agendas. For them, reciprocity is good but not necessary if other demands would be fulfilled; reconciliation is preferred to conflicts, but the peripheral societies are wary of the authoritarian regime of the PRC and its mighty force essentially deployed by Chinese communist elites in the politburo; emigrated Tibetans, Hong Kong democrats, and Taiwanese politicians all endorse the enhancement of representation in decision-making process; at last, a due recognition is the ongoing aim of the peripheral societies concerned. The new conception of Chinese constitutional law will not be successful unless it has attended to the constitutional aspirations of each and every peripheral society. Finally it is this tension between the PRC central government and the peripheral societies that definitely indicates the direction of “constitutional law of peoples”.

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Chapter 5 Asymmetric Autonomy

5.1 INTRODUCTION

This chapter will focus on the asymmetry of the autonomous powers of Sinitic peoples. Chapter 4 examined Chinese constitutional accommodation of, and integration with, the peripheral societies of Tibet, Hong Kong and Taiwan in terms of “ethnic regional autonomy” and “one country, two systems”, which indicated that despite the progress in the last thirty years, a number of constitutional aspirations of peripheral societies are still unachieved. In this context, further constitutional reform is probably needed to reflect the principles of recognition, representation, reconciliation, and reciprocity. This chapter will look at the cases with a comparative eye, arguing that the differences between one peripheral society and another are numerous. They have fundamentally shaped contemporary Chinese constitutional law, and are very likely to remain central in shaping the positive dimension of a new conception of “constitutional law of peoples”. Although there is no official “separation of powers” in Chinese constitutional system, in this chapter the following sections are organised in a sequence of “legislature”, “administration”, and “judiciary”. Each and every section will exhibit how asymmetric the three cases are. Against this background it would be unrealistic to pursue any symmetric ideal in the Chinese context, e.g. a liberal democratic federation or confederation of identical territorial units.

It is unavoidable that the three peripheral societies will be compared. In addition to the political reason of enhancing the pressure to the state, the societies are learning from others whose success or failure happened in the same system when competing with the same rivalry. As some have noticed, emigrated Tibetans endorse the Hong Kong model while Taiwan disputes it.³²² By comparing the territories, the

³²² For the point that the PRC should use Hong Kong model to accommodate Tibet see DAVIS, *Establishing a Workable Autonomy in Tibet*. The positive comparison between Hong Kong and

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asymmetry of their autonomous powers inevitably attracts scholarly attention. The term “autonomy” refers to the territorial self-governance constitutionally recognised by the host state, which enables the territory to be independent or at least different in running internal affairs from the rest of the state. Many recommend autonomy as a method to resolve ethnic, religious, and cultural conflicts within a sovereign state, Deng Xiaoping also utilised a constitutional design of territorial autonomy to embrace Hong Kong in a late communist state as we have already seen. Because these settlements are all aiming at specific conflicts of historical particularity and political peculiarity, the constitutional designs applied to each cannot be identical.³²³ If there are multiple cases within a single state, they are also inclined to evolve unevenly based on a variety of territorial strength and weakness in asserting autonomy. Our three cases are not alone in developing asymmetric autonomy, but may be relatively classical in this regard.³²⁴

5.2 LEGISLATURE

5.2.1 Separate Constitutions

The first issue with regard to territorial law-making power is whether it has a separate constitution that governs an autonomous legal system. In this regard,

Taiwan see, ALLEN, *Recreating 'One China': Internal Self-Determination, Autonomy and the Future of Taiwan*. A slightly negative one between Hong Kong and Taiwan see COONEY, S, *Why Taiwan Is Not Hong Kong: A Review of the PRC's One Country Two Systems Model for Reunification*, 6 Pacific Rim Law & Policy Journal 497, (1997).

³²³ WELLER, M. & NOBBS, K., *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (University of Pennsylvania Press.), pp. 1-13.

³²⁴ The United Kingdom also has classical asymmetry of territorial autonomies among Wales, Scotland, and Northern Ireland. WARD, ALAN J., *Devolution: Labour's Strange Constitutional "Design"*, in *The Changing Constitution*, (Jeffrey L. Jowell & Dawn Oliver eds., 2007), pp. 111-136. HIMSWORTH, CHRIS, *Devolution and its Jurisdictional Asymmetries*, 70 *The Modern Law Review* 31, (2007).

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Taiwan and the Hong Kong Special Administrative Region (hereinafter HKSAR) are more advanced than the Tibet Autonomous Region (hereinafter TAR). The Taiwanese authorities have taken over the 1946 Constitution made in and for the Chinese mainland with a list of “Additional Articles”. The People’s Republic of China (hereinafter PRC) and the Communist Party of China (hereinafter CPC) officially do not recognise the legality and legitimacy of this Constitution. However, the 1946 Constitution contains a provision indicating Chinese territorial boundaries should not be changed which implies a unity between Taiwan and the Chinese mainland under an imagined Chinese State. Hence the CPC prefers to maintain the 1946 Constitution in Taiwan rather than to replace it with a new constitution to be made by and merely for Taiwanese residents. In previous chapters the constitutional institutions of Taiwanese authorities have been introduced, and the crucial point is under the 1946 Constitution and the Additional Articles Taiwan is exceedingly self-consistent. The 1946 Constitution should be a truly “separate constitution” in term of being different from the PRC 1982 Constitution.

Hong Kong, on the other hand, does not have a one hundred percent separate constitution of its own. The Hong Kong Basic Law has three faces: it is a “mini-Constitution” of the HKSAR, and it is also a by-product of an international treaty – the Sino-British Joint Declaration – and, finally, one of the constitutional acts of the PRC.³²⁵ In other words: “The Basic Law is a unique document. It reflects a treaty made between two nations. It deals with the relationship between the Sovereign and an autonomous region [that] 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”. The separateness of the Hong Kong Basic Law is emphasised by Hong Kong lawyers and legal academics by linking it

³²⁵ HKASR v. Ma Wai-Kwan [1997] HKLRD 761, [1997] 2 HKC 315. Cited from JIANG, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China* at 38.

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with the international treaty.³²⁶ On the other side, mainland scholars stress that since the PRC National People's Congress (hereinafter NPC) promulgated the Hong Kong Basic Law, it has already joined the legal family tree descending from the PRC 1982 Constitution. Nevertheless, the Hong Kong Basic Law is considerably rigid in contrast to other PRC constitutional acts because the Sino-British Joint Declaration and numerous political commitments of CPC paramount leadership have endorsed it. In procedural terms, the PRC NPC should consult its Hong Kong Basic Law Committee first before formally proposing an amendment of the Hong Kong Basic Law, which is also different from the ordinary procedure of amending a PRC act. Hence the uniqueness of the HKSAR Basic Law is overwhelmingly granted.

By contrast, there is no separate constitutional act in any sense for the Tibet Autonomous Region (hereinafter TAR). The PRC Ethnic Regional Autonomy Act 1984 provides: (i) that each and every "ethnic autonomous region" is entitled to promulgate its own "autonomous regulation" and "special regulation"; (ii) these ethnic autonomous regions shall have a list of powers to circumscribe national policy, vary national laws, and favour one or several nationalities (ethnic groups) in their administrative regions. But the texts of PRC Ethnic Regional Autonomy Act 1984 are considerably abstract, and the ethnic autonomous region's extraordinary conduct shall always be re-authorized or approved by a higher-level state organ. It is usually not a problem with regard to an ethnic autonomous region's "special regulation", which is a regional law that changes some provisions of a national law. An interesting instance of a "special regulation" is the TAR Regulation for Implementing the PRC Marriage Act of 1981 (hereinafter, Tibetan Marriage Regulation). The Tibetan Marriage Regulation on the one hand implements the national act to terminate some Tibetan customary rules such as polygamy and the

³²⁶ Ng Ka Ling and Another v. The Direction of Immigration [1999] 1 HKLRD 315; (1999) 2 HKCFAR 4. See also GHAI, *Hong Kong's New Constitutional Order : the Resumption of Chinese Sovereignty and the Basic Law*.

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unilateral burden for the maternal parent to raise *filius nullius* child.³²⁷ On the other hand, it adjusts the age of legitimate marriage in Tibet from a national standard of 22(male)/20(female) to 20(male)/18(female), while declaring not to actively challenge existing Tibetan polygamy if the partners themselves remain silent.³²⁸ Yet the “autonomous regulation” is a different case. Two sorts of cases exist. For lower level ethnic autonomous regions, the autonomous regulation usually goes through the approval process smoothly. However, for province-level ethnic autonomous regions the “autonomous regulation” becomes a “mission impossible”. Because the PRC Ethnic Regional Autonomy Act 1984 promises so many powers to ethnic autonomous regions, once province-level ones may contextualise these powers in respective administrations, there would be five new “mini-Constitutions” emerging. At least in symbolic terms, five new indentificatory sites could be a pressurising phenomenon for a notionally unitary state. Besides, the respective state ministries of the PRC State Council are all extremely reluctant in sharing powers with ethnic autonomous regions. The TAR may request its fiscal power according to the national act, but given the ministerial interests, the NPC cannot approve the Tibetan Autonomous Regulation with ease.

5.2.2 Separate Systems of Law

If a separate “constitution” may symbolise the *grundnorm* in each respective periphery, there are now at least three “legal systems” or less arguably, “systems of law” headed by the abovementioned basic documents.

Imperial Chinese law and the civil law system through Japanese colonialism but also modern Chinese laws that imitate German laws have historically influenced the

³²⁷ The Tibetan Marriage Regulation, arts 2 and 6.

³²⁸ The Tibetan Marriage Regulation, arts 1-2.

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Taiwanese system of law.³²⁹ Since the 1950s breakaway, the Taiwanese system of law has been successful and sustainable reproducing in the jurisdiction of Taiwan, Penghu, Kinmen, and Matsu. But whether it theoretically qualifies an integrated “system of law” depends on: (i) whether Taiwanese laws apply to somewhere other than the Taiwanese jurisdiction, especially in the Chinese mainland, and (ii) whether PRC laws apply in Taiwanese jurisdiction? It is understandable that the attitudes of the Taiwanese authorities and the PRC government differ in answering these two questions. The Taiwanese authorities never officially clarify their attitude on the legality of law of the “Republic of China” in its notional territory of the Chinese mainland. Article 11 of the Additional Articles provides that the “relation” between people in (Chinese) free area and those in the Chinese mainland shall be attended by special laws, however, in narrowest sense, to apply “ROC” laws to mainland people or not is not a genuinely *relational* issue between two areas but one of categorical nature.³³⁰ The ambiguity for Taiwanese authorities is: on the one hand, in accordance with the Act Governing Relations Between The People Of The Taiwan Area And The Mainland Area (hereinafter “Cross-Strait Relations Act”) mainlanders who have confessed anti-ROC activities to the Taiwanese authorities in the first place while arriving in Taiwan shall be given immunity from treason, which means mainlanders are still bound by “ROC” criminal laws; but on the other hand, Article 41 of that Act reads:

Civil matters between the peoples of the Taiwan Area and the Mainland Area shall be subject to the laws of the Taiwan Area except otherwise provided for in this Act.

Civil matters between any two or more of the people of the Mainland Area and those between any of the people of the Mainland Area and any foreign national shall be

³²⁹ ALLEE, MARK A., *Law and Local Society in Late Imperial China: Northern Taiwan in the Nineteenth Century* (Stanford University Press. 1994). WANG, T. AI-SHENG, *Legal reform in Taiwan under Japanese Colonial Rule, 1895-1945: the Reception of Western law* (University of Washington Press. 2000).

³³⁰ The Additional Articles, art. 11.

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subject to the provisions of the Mainland Area except otherwise provided for in this Act.³³¹

Hence the Taiwanese authorities have given up the application of “ROC” laws to “civil matters” among mainlanders or between mainlanders and legal aliens. Besides, Article 41 of the Cross-Strait Relations Act also indicates how the Taiwanese authorities treat PRC laws, though in the name of “provisions of the Mainland Area”. Under the condition of “civil matters” and “excluding Taiwanese residents”, the Taiwanese authorities have recognised not only the validity but also the legality of PRC laws applying in the Chinese mainland. But in Taiwan, the PRC laws are merely involved in cases in need of applying “private international rules” when mainlanders are of concern.

The Hong Kong legislature may have less control over the system of law than the Taiwanese authorities because of its subordination to the PRC central government. Article 8 of the Hong Kong Basic Law says: “The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.”³³² These laws include the common law and rules of equity applying in England on 30 June 1997 but exclude Westminster parliamentary acts. Actually parliamentary acts did not apply unconditionally to Hong Kong in the past either. On 5 April 1843 Hong Kong incorporated then English laws to the territory, but after that only parliamentary acts specifically referring to Hong Kong would apply. In 1966 a new Hong Kong ordinance omits the “cut-off” day and indicates English common law and rules of equity apply to Hong Kong so far as they are not abolished by legislation affecting Hong Kong. To ignore the “cut-off” day is welcome, but a bizarre consequence is a few of Hong Kong judges thus want to

³³¹ The Taiwan-Mainland Relations Act, art 41(1-2).

³³² The Hong Kong Basic Law, art 8.

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revive outdated common law rules because they were abolished by parliamentary act not affecting Hong Kong. After all the more reasonable understanding held in the case of *Gensburger v. Gensburger* is that the ordinance “was to bring the applicable common law up to date in the sense that it was the common law which existed in England on the day of decision that was to be in force, it was the amended common law which applied, whether the amending Act of Parliament took effect in Hong Kong or not”.³³³

Another issue concerns Article 18 of the Hong Kong Basic Law, which reads:

National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.

The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.

In the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.³³⁴

Some are wary that despite of the state of emergency, the PRC central government would add more national laws to the Annex III thus break up the Hong Kong system of law. But this is not really sufficient, because: (i) the contemporary Annex III only

³³³ WESLEY-SMITH, PETER, *An Introduction to the Hong Kong Legal System* (Oxford University Press 3rd ed. 1998), pp. 40-41.

³³⁴ The Hong Kong Basic Law, art 18.

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contains several laws in regard with national symbols and national boundary, and Article 18 (3) has prescribed that new laws to be added shall also be confined in similar areas while not in contrast to the autonomy of Hong Kong; (ii) even if the PRC would have lengthened the list, new laws shall not be applied until incorporated by Hong Kong local legislation; (iii) the most crucial point is as a common law jurisdiction, the final say is held by common law courts that the PRC and Hong Kong legislative institutions could not control. Hence it would be unlikely for the PRC central government to change the Annex III, while it rather politically prefers to declare a state of emergency, but both are politically unwise.

The Tibet Autonomous Region is incorporated in the PRC system of law, and the PRC national laws apply in judicial courts in Tibet. The autonomy of TAR law is and can be undermined by the sovereign legislature of the PRC whenever it considers necessary. Yet this is a superficial argument. The TAR legislature, i.e. the Tibetan people's congress, is entitled to make two sorts of law: (i) local regulations,³³⁵ and (ii) autonomous regulations and separate regulations.³³⁶ In the PRC all provincial people's congress and dozens of provincial capitals and metropolitan cities are also authorised by the NPC to make their own local regulations to explicate the national provisions. The PRC Legislation Act also allows said institutions to formulate local regulations before a related national law is promulgated. Yet "once the laws or administrative regulations formulated on such matters by the State come into effect, the provisions in local regulations which contradict the said laws or administrative regulations shall be null or void, and the organs that have formulated such regulations shall promptly amend or annul the provisions."³³⁷

³³⁵ The Tibetan Legislation Regulation, art 8.

³³⁶ The Tibetan Legislation Regulation, art 7.

³³⁷ The PRC Legislation Act 2000, art 64(2).

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Having taken local regulations for granted, the Tibet Autonomous Region should also promulgate one territorial autonomous regulation and multiple separate regulations. The sort (ii) here is different with sort (i) because local regulations shall be a by-product of respective national laws, while national laws do not bind autonomous and separate regulations. In other words, the Tibetan people's congress is entitled to promulgate laws that contradict national laws – it seems if there are a significant number of such laws, it is not impossible to envisage a separate Tibetan system of law emerging eventually. The restriction nevertheless reads:

Where [autonomous and separate regulations] are concerned, adaptation on the basis of the characteristics of the local nationality (nationalities) may be made in autonomous regulations and separate regulations, but such adaptation may not contradict the basis principles of the laws and administrative regulations; where the provisions of the Constitution and the Law on Regional National Autonomy as well as the provisions in other laws and administrative regulations specially formulated to govern the national autonomous areas are concerned, no adaptation may be made.³³⁸

First, these autonomous and separate regulations may contradict national laws in literal expression occasionally, *in principle* a contingency between the two tiers of law remains irremovable; second, if national laws specified for ethnic autonomous regions are already explicitly drafted, the respective ethnic autonomous region could not use regional laws to challenge them. This demonstrates that the PRC central government has been fully aware the danger of Tibet and other minority nationalities maximising autonomous and separate regulations in their territories thus creating fragmental jurisdictions across the country.

5.2.3 Law-making Procedures

The crucial difference between the law-making procedures of Taiwan and the other two cases is the Taiwanese authorities have added a referendum process.³³⁹ The

³³⁸ The PRC Legislation Act 2000, art 66(2).

³³⁹ The Referendum Act, art 2(2).

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referendum process is formulated to replace the abolished National Assembly of the “ROC” that had been convened to ratify important national laws made by the Legislative Yuan or to amend the 1946 Constitution. However, the referendum with respect to ordinary laws and that of amending the Constitution result in different theoretical interpretations.³⁴⁰ The “constitutional referendum” symbolises a constituent subjectivity in deciding the political future of its independent and general will, which is the cornerstone of the Taiwanese independence movement in constructing a narrative of Taiwanese “popular sovereignty”. This idea is critically refuted by the PRC central government, which has been threatened by the impression that the unity of the “Chinese people” would thus split. However, it may comfort the PRC in a way that since 2004 the six referenda held in Taiwan had all failed because of the low percentage of turnout. The Taiwanese Referendum Act dictates a simply majority out of a turnout of half of the national electorate.³⁴¹ Article 30 of the Referendum Act reads:

As regard to the result of voting for a proposal of referendum, if the number of voters reaches not less than 1/2 of the total persons having the right of voting in the country, municipality or county (city) and more than 1/2 of the valid ballots agree, the proposal is adopted.

If the number of voters does not reach the quantity prescribed in the preceding Paragraph or the consenters are not more than 1/2 of the valid ballots, the proposal is vetoed.

So far no Taiwanese referendum has successfully stimulated enough voters, which is a consequence of the tremendous gap between the two political and indentificatory camps of Taiwanese residents – the Blues and the Greens, or the Kuomintang (hereinafter KMT) and the Democratic Progressive Party (hereinafter DPP). For instance, the third proposal of referendum raised by the DPP is whether

³⁴⁰ TIERNEY, STEPHEN, *Constitutional Referendums: A Theoretical Enquiry*, 72 *Modern Law Review* 360, (2009).

³⁴¹ The Referendum Act, art 30.

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the alleged “illegitimate” partisan property of the KMT shall be returned to Taiwanese people, while the fourth simultaneously raised by the KMT is whether the corrupted leadership shall be investigated by an independent commission set up by the Legislative Yuan and cooperated by other governmental branches. The background is that in the authoritarian era the KMT had processed a great deal of public property while a “ROC” President from the DPP is convicted to the crime of embezzlement.³⁴²

The more interesting cases are the fifth and sixth proposals of referendum. The DPP in the fifth proposal asked: since being replaced by the People’s Republic of China in 1971, the “Republic of China” had lost its seat in the United Nations, in this situation Taiwan has been an “international orphan”, do you agree the government shall *join in* the United Nations *in the exact name of Taiwan*? While the KMT in the sixth proposal, which is meant to be an alternative to the DPP one, suggested: do you agree our country shall *return* to the United Nations and other international organisations *in any name of feasibility and dignity*, e.g. the Republic of China, Taiwan, or others, in accordance with *a realistic and flexible strategy*? The fifth and sixth proposals embodied the profound disagreement in identity to the “Republic of China” and its political history, while also demonstrating the difference of international and cross-Strait policies between the independence-attached DPP and the ROC-attached KMT. Unless either party would command a confident majority of the Taiwanese electorate, the referendum in Taiwan is hardly productive as a constitutional referendum should be, which is of significant meaning to the political life of the people.

For Tibet and Hong Kong, their law-making autonomy is more or less controlled by the PRC legislature. Besides to add new laws to the Annex III of the Hong Kong

³⁴² Mr Chen Shui-bian has been charged and jailed by Taiwanese judicial courts for his illegally laundering money and other crimes. He is an ex-president of the Taiwanese authorities and the Democratic Progressive Party.

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Basic Law, the PRC central government does not have sufficient mechanisms to impose any law to Hong Kong. However, for statutes made by the HKSAR itself, the PRC retains the power to disagree and annul. Article 17(2) of the Hong Kong Basic Law reads: “Laws enacted by the legislature of the Hong Kong Special Administrative Region must be reported to the Standing Committee of the National People's Congress for the record. The reporting for record shall not affect the entry into force of such laws.”³⁴³ While Article 17(3) explains:

If the Standing Committee of the National People's Congress, after consulting the Committee for the Basic Law of the Hong Kong Special Administrative Region 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 Standing Committee may return the law in question but shall not amend it. Any law returned by the Standing Committee of the National People's Congress shall immediately be invalidated. This invalidation shall not have retroactive effect, unless otherwise provided for in the laws of the Region.³⁴⁴

The provisions are clear. However, in the past decade the NPC Standing Committee has not returned any statutes to the HKSAR Legislative for said reasons.

The NPC and its Standing Committee are also entitled to annul the provincial regulations made by the Tibet Autonomous Region's people's congress or its standing committee. But in the Tibetan case, the PRC central legislature shall do this in a similar but more complex manner. After the local regulations have been promulgated by the Tibetan people's congress, they shall be reported to the NPC Standing Committee for the record. The Standing Committee shall assign one or several committee(s) to review the regulation and submit a report indicating whether the regulation is in conformity with the 1982 Constitution and other national laws, if not, the review committee(s) will return the regulation to the local legislature and

³⁴³ The Hong Kong Basic Law, art 17(2).

³⁴⁴ The Hong Kong Basic Law, art 17(3).

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request amendment. If the local legislature refuses to amend, the reviewing committee could appeal the Standing Committee, or through it to the NPC, to annul the local regulation eventually.³⁴⁵ It is necessary to point out that the reviewing process for ordinary local regulations and those of “autonomous and separate regulations” will be different. For, the autonomous and separate regulations shall literally contradict national laws, so the NPC and its Standing Committee are required to prevent a collapse of unitary legal system in the first place. The autonomous and separate regulations for ethnic autonomous regions are not valid until approved by the higher legislature, and in the Tibet case, that is the NPC and the Standing Committee.³⁴⁶ Emigrated Tibetans oppose this process of approval that seems to undermine Tibetan autonomy to the extent of a less ordinary province,³⁴⁷ but they misunderstand the difference between ordinary local regulation and those of autonomous and separate nature.

In concluding this section, it is helpful to recall the principles of recognition, representation, reconciliation, and reciprocity towards a conception of “constitutional law of peoples”. The PRC central government’s attitudes towards the separateness of territorial constitution and system of law illustrate its variety of recognition to the peoplehood of the peripheral societies of Tibet, Hong Kong, and Taiwan. In fact the PRC central government is reluctant to recognise any substate peoplehood at all, but the Taiwanese authorities have used the 1946 Constitution, Additional Articles, and the Cross-Strait Relations Act to successfully draw a boundary separating Taiwanese residents from Chinese mainlanders. Due to the heritage of Hong Kong common law, the separateness of Hong Kong system of law

³⁴⁵ The Procedure to Record and Review Administrative Regulation, Local People’s Congress Regulation, Autonomous and Special Regulation of Ethnic Autonomous Region, and Regulation of Economic Special Zone.

³⁴⁶ The PRC Legislation Act 2000, art 66(1).

³⁴⁷ Memorandum on Genuine Autonomy for the Tibetan People.

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has also been recognised by the PRC central government eventually. So the weakness of Tibet in this regard is apparent. The principle of representation urges the Sinitic peoples to make reasonable decisions in addressing the relationship with the PRC central government, and vice versa. The law-making procedures of the peripheral societies may more or less reflect their relative competence to reach decisions of reasonableness. In the Taiwan case, Taiwanese residents have from time to time refused to vote in controversial referenda that could provoke anger and anxiety in and outwith Taiwan. So the PRC central government does not need to dread devolving more legislative powers to Hong Kong and especially Tibet. The limited recognition of PRC laws in Taiwan, the existence of the Annex III of the Hong Kong Basic Law, and the coordination between Tibetan regulations and PRC national laws all exemplified the peripheral societies' acceptance of the principle of reconciliation. Despite the tension and turbulence, long-term peace in this region is also a sign of the PRC central government's desirability to reconcile. If all parties are prepared to compromise, it is possible that they may develop a reciprocal relationship too.

5.3 ADMINISTRATION

5.3.1 Head of Administration

The autonomous power of each and every head of administration in the three societies has all broadened in the last three decades, but the extent varies. Chapter 4 has briefly introduced that the Taiwanese administration endures a premier-presidential system while swaying to a consolidating presidential system since the making of the Additional Articles. The 1946 Constitution mandates a parliamentary consent to the appointment of the head of the Executive Yuan, which is the contemporary administration of the "ROC" government in Taiwan, while the Taiwanese president now may appoint the head of the Executive Yuan without such an approval from the Legislative Yuan. Against this background, although the administrative powers of the Taiwanese authorities legally reside in the Executive Yuan rather than the President of the "ROC", who, in constitutional terms, shall be

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merely in charge of defence and foreign affairs and mediate five Yuan-s, the President in practical terms has taken control over the entire administration due to his power to nominate the head of the Executive Yuan. Combining the two offices of the President and the head of the Executive Yuan – say, the Taiwanese “Premier” – together, the administration in name of the “ROC” has been efficient and effective in self-governance of almost all aspects of internal affairs.

However, the role of the President in managing external affairs is not yet satisfactory for the Taiwanese residents. Because the “ROC” government is recognised by few states across the world, the President never enjoys many state receptions. Heads of both sides of the Taiwan Strait are not yet ready to meet in international summits. The pragmatic arrangement is to allow a lower level Taiwanese official to take part in instead. When the DPP was incumbent, only ministerial representative could appear in the Asia-Pacific Economic Cooperation (hereinafter APEC) meetings. Since the alleged “China-friendly” President from the KMT took over, a former Deputy President of the “ROC” has participated the APEC meetings as “the representative of the leadership” yearly. The PRC President and the Taiwanese representative of the leadership encounter in APEC meetings in the name of partisan heads: the PRC president is also the Party Chief of the Communist Party, while the Taiwanese representative is the honourable chairperson of the KMT. This scenario shows how the PRC “shortens” the Taiwanese authorities on the international stage as the Taiwanese independence movement claims, but on the other hand, both sides also seek to establish a footing as “equal” as possible in this circumstance.

Modelled on the British Hong Kong Governor who “was not merely the head of the executive, but also the head of the legislature and responsible for the appointment and dismissal of the judiciary”,³⁴⁸ the Chief Executive of the HKSAR secures a

³⁴⁸ GHAI, Hong Kong's new constitutional order : the resumption of Chinese sovereignty and the Basic Law. p. 282.

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wide scope of powers in his pocket, while losing his formal role in the other two branches of the government.³⁴⁹ The powers of the Chief Executive may be understood more clearly through Article 62 of the Hong Kong Basic Law, which provides the Hong Kong administration to “(i) formulate and implement policies; (ii) conduct administrative affairs; (iii) conduct external affairs as authorised by the [Central Government]; (iv) draw up and introduce budgets and final accounts; (v) draft and introduce bills, motions and subordinate legislation; and (vi) designate officials to sit in on the meetings of the legislature and represent the government.”³⁵⁰ There is no wonder that this so-called “executive-lead system” conforms to the interests of the PRC central government that may control the HKSAR executive branch merely through the appointment of the Chief Executive. By stressing the supremacy of the Chief Executive, the PRC central government does find a way to syncretise the policies of the central and the local governments.

But even so, there is a difference between internal and external situations. In the international stage, the PRC central government never appears to stand together with the HKSAR administration in parallel. To use the same instance of the APEC, the Chief Executive of the HKSAR as the head of a member of the organisation also takes part in the summits and meetings regularly. But in face-to-face meetings between the PRC president and the Chief Executive, the two do not use an equal footing.

The role of the Chairperson of the Tibetan administration is not entirely clear. The PRC Act for Local People’s Congress and Local Government (Local Government Act) prescribes the powers and functions of PRC local governments generally. Article 62(1) provides that the head of administrations shall be responsible for

³⁴⁹ WESLEY-SMITH, An introduction to the Hong Kong Legal System. p. 27. Wesley-Smith argues there is still a “gubernatorial government” in Hong Kong with a powerful head of Chief Executive.

³⁵⁰ The Hong Kong Basic Law, art 62.

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respective administration.³⁵¹ But being different from the HKSAR whose Chief Executive may or may not agree with consultative advice of the Executive Council that is appointed by the Chief Executive himself,³⁵² the Tibetan administration are not run by the Chairperson personally. Article 63 of the Local Government Act dictates the PRC administrations to deal with important issues based on collective decisions of an administrative council comprising the head and his deputies.³⁵³ In the Tibetan case, the administrative council sits with the Chairperson and a number of vice chairs, and the Tibetan Chairperson may not drive the TAR on his own.

Much more importantly, in the PRC one party-state the head of administration shall be politically subordinate to his respective Party Chief. The Tibetan Chairperson usually is the deputy Party Chief of the TAR, while the true leadership of Tibet should belong to the TAR Party Chief. The PRC uses the *nomenklatura* system to appoint officials and agents, which is a comprehensive list of posts to be filled by selected persons.³⁵⁴ The *nomenklatura* system is in hands of the party, so the TAR Party Chief takes the principal control over the administration. Against this background, the Tibetan head of administration becomes the weakest among the three cases, which mirrors the fact that the autonomous powers of Tibet are far less than Hong Kong, to say nothing of Taiwan. This explains the Tibetan Chairperson is not entitled to participate in international summits, although the Tibetan head once was an important figure in regional “diplomacy”.³⁵⁵

³⁵¹ The PRC Local Government Act 1979, art 62(1).

³⁵² The Hong Kong Basic Law, art 56.

³⁵³ The PRC Local Government Act 1979, art 63.

³⁵⁴ CHEN, An Introduction to the Legal System of the People's Republic of China. pp. 74-5.

³⁵⁵ An interesting historical account of the diplomatic role of the Panchen Lama see, TELTSCHER, The High Road to China : George Bogle, the Panchen Lama and the First British Expedition to Tibet.

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5.3.2 Social Policies

5.3.2.1 Custom Territory, Fiscal Policy and Taxation

Being separate custom territories of Taiwan and the HKSAR, there is no fiscal redistribution between these two territories and the PRC central government. For Taiwan, the de facto independence government may efficiently and effectively manage its own fiscal policy and taxation. The only harassment in the past for the Taiwanese authorities was whether goods from the Chinese mainland should be entitled “importation” in terms of inter-*national* trade. This leads to the question whether persons smuggling across the Taiwan Strait should be punished according to the very provision in the criminal law, or if it would be legitimate to transport goods between the two sides. The Cross-Strait Relations Act answered this question in Articles 29-32. Nevertheless, these articles are primarily concerned about the security issue since the Chinese civil war never officially ended. Article 29 provides: “Unless permitted by the competent authorities, no Mainland vessels, civil aircraft or other means of transportation may enter into the restricted or prohibited waters of the Taiwan Area or the controlled airspace of the Taipei Flight Information Region.”³⁵⁶ The Taiwanese Anti-Smuggling Act in its Article 12 also makes it clear that to transport goods across the Strait illegally should be regarded as illegal exportation/importation thus punished in accordance with the Act.³⁵⁷

After the 1997 sovereign handover, the status of a separate customs territory of Hong Kong became a challenging issue to the Taiwanese authorities. There are two interpretations in parallel. One is that the HKSAR has now been incorporated into the “Mainland Area” in terms of Taiwanese laws. For, Article 2(2) of The Taiwan-Mainland Relations Act reads: “2. ‘Mainland Area’ refers to the territory of the

³⁵⁶ The Taiwan-Mainland Relations Act, art 29.

³⁵⁷ The Anti-Smuggling Act, art 12.

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Republic of China outside the Taiwan Area.”³⁵⁸ Some argue that Hong Kong should fall into the category based on the sovereign handover. Thus also be regulated according to the aforementioned Article 12 of the Taiwanese Anti-Smuggling Act. But others dispute this argument by contending that the Taiwanese authorities have been fully aware of the autonomous status of the HKSAR and promulgated a separate law – Act Governing Relations with Hong Kong and Macau (hereinafter “Hong Kong Relations Act”) – to attend to the relation between Taiwan and Hong Kong. Article 1(2) of the Hong Kong Relations Act clarifies that “for matters not provided for in this Act, the provisions of other relevant laws or regulations shall apply”, but crucially the Cross-Strait Relations Act is not applicable except where explicitly specified in this Act.”³⁵⁹ Article 35 of the Act also provides: “Hong Kong or Macau goods imported or carried into the Taiwan Area shall be deemed as imported items. The inspection, quarantine, administration, and taxation of such items shall thus be carried out in accordance with relevant import laws and regulations. Goods exported to Hong Kong or Macau shall be deemed as export items and shall be treated in accordance with the relevant export laws and regulations.”³⁶⁰ Combining the two provisions, most judges on the bench of the criminal court of the “ROC” Supreme Court agreed to exclude the application of the Taiwan-Mainland Relations Act in combating smuggling between Taiwan and Hong Kong.³⁶¹

In the Sino-British Joint Declaration of 1984, the PRC has promised: “(6) The Hong Kong Special Administrative Region will retain the status of a free port and a separate customs territory. ... (8) The Hong Kong Special Administrative Region will have independent finances. The Central People's Government will not levy

³⁵⁸ The Taiwan-Mainland Relations Act, art 2(2).

³⁵⁹ The Taiwan-Hong Kong Relations Act, art 1(2).

³⁶⁰ The Taiwan-Hong Kong Relations Act, art 35.

³⁶¹ The Record of the Third Meeting of the Criminal Court of the Supreme Court.

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taxes on the Hong Kong Special Administrative Region.”³⁶² The provisions have been enacted by the arrangement of Hong Kong’s membership in the WTO as a separate custom territory and Article 106 of the Hong Kong Basic Law reads:³⁶³

The Hong Kong Special Administrative Region shall have independent finances.

The Hong Kong Special Administrative Region shall use its financial revenues exclusively for its own purposes, and they shall not be handed over to the Central People's Government.

The Central People's Government shall not levy taxes in the Hong Kong Special Administrative Region.

Accordingly, the HKSAR may manage its own finance, fiscal policy, and taxation independently, while at the same time: “The land and natural resources within the Hong Kong Special Administrative Region shall be State property. The Government of the Hong Kong Special Administrative Region shall be responsible for their management, use and development and for their lease or grant to individuals, legal persons or organizations for use or development. The revenues derived therefrom shall be exclusively at the disposal of the government of the Region.”³⁶⁴ In a nutshell, the PRC central government does not collect a single penny from Hong Kong.

The PRC central government did not promise identical arrangements to Tibet as to Hong Kong but in fact it would be unwise and arguably immoral to profit from one of the most undeveloped economies around the globe. The PRC Ethnic Regional Autonomy Act 1984 guarantees that ethnic autonomous regions may take advantage from territorial economy in priority to other administrative divisions, even that of the host state. For instance, Article 28 provides: “In accordance with legal

³⁶² The Sino-British Joint Declaration of 1984, arts 6 and 8.

³⁶³ The Hong Kong Basic Law, art 106.

³⁶⁴ The Hong Kong Basic Law, art 7.

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stipulations and unified state plans, autonomous agencies in ethnic autonomous areas may give priority to the rational exploitation and utilization of the natural resources that the local authorities are entitled to develop.”³⁶⁵ Another similar provision is Article 32.³⁶⁶

Autonomous agencies in ethnic autonomous areas have the power to autonomously administer the finances of their areas. All revenues accruing to the ethnic autonomous areas under the financial system of the state shall be managed and used by autonomous agencies in these areas on their own.

Regional autonomous governments enjoy preferential treatment from the next higher level of government when transfer payments are being calculated as part of the unified state financial system.

Article 34 formally empowers ethnic autonomous regions to vary local taxation. The provision reads: “While implementing the tax laws of the state, apart from those tax reduction items that should be centrally examined and approved by the state, autonomous agencies in ethnic autonomous areas may grant tax exemptions or reductions for certain items that belong to local financial revenue and that should be encouraged or given preferential tax terms. The decisions of autonomous prefectures and autonomous counties on tax reduction and exemption are reported to the people's governments of the relevant provinces, autonomous regions, or directly-administered municipalities for approval.”³⁶⁷ After 1994 the PRC state has distributed taxes between the central and local governments according to difference of sorts. The PRC central government mainly collects the customs as well as turnover taxes from major state-run corporations and industries, while the local governments rely on income tax and some others. Article 34 does not allow ethnic autonomous regions to vary national/central taxes, but they may give some local

³⁶⁵ The PRC Ethnic Regional Autonomy Act 1984, art 28.

³⁶⁶ The PRC Ethnic Regional Autonomy Act 1984, art 32.

³⁶⁷ The PRC Ethnic Regional Autonomy Act 1984, art 34.

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taxes up with the approval of a higher authority. However, it is interesting that the Tibet Autonomous Region does not establish a local taxation bureau in parallel with the national branch as other provinces and ethnic autonomous regions; in Tibet, the national branch also takes the burden of collecting “local taxes”. This does not mean the PRC central government will use this mechanism to shadow Tibet’s fiscal power; actually the reason is the Tibetan administration is not efficient and effective enough to collect taxes in the harsh environment, thus there is no need to build two taxation bureaux when even one lacks of staff. The taxes of Tibet all fall into the pocket of the TAR, additionally the PRC central government also pours a lot of money to Tibet each and every year: in a pound spent by the TAR, there are more than ninety pence from the centre. So the result is the PRC does not collect a single penny from Tibet after the 1950s reformation either, as it has done in Taiwan and Hong Kong.

5.3.2.2 Transportation and Security

With help from the United States, the Taiwanese authorities so far may defend the territory in a situation of cross-Strait homeostasis. The Taiwanese authorities never drop their alertness because in the PRC perspective the Chinese civil war has not been officially ended, which urges the Chinese authorities to complete the process of national unification whenever possible. This task is written down in both the 1982 Constitution and the PRC Anti-Secession Act 2005 where the Article 8 states if peaceful means are exhausted the PRC government will use military force to unify the nation.³⁶⁸ Against this background, the Taiwanese authorities, although having ceased the martial law repressing “communist rebels” in the 1990s, did not genuinely lower the special barrier to restrict mainland-related activities in Taiwanese society, especially with respect to cross-Strait transportation. This policy was encapsulated into “three no-s” in the Taiwanese side: no contact, no negotiation, no compromise; while in the Chinese mainland there are “three links”– the PRC government asked the Taiwanese authorities to revive direct links of postal service,

³⁶⁸ The PRC Anti-Secession Act 2005, art 8.

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transportation, and trade as soon as possible. For the Taiwanese denying the direct links, cross-Strait transportation should be made through a third territory, usually Hong Kong. This was originally a concern of the KMT, which is the old enemy of the Chinese communists. But in the 2000s the DPP, though differs with the KMT in many aspects, continued the “three no-s” voluntarily. The KMT, on the other hand, has moved away from this position after having revived communication with the Chinese Communist Party in 2005. In 2008 the KMT took over Taiwanese administration. Since then, a series of cross-Strait negotiations have produced a list of agreements on reviving the direct links of postal service, transportation, and trade across the Strait. The postal service across Taiwan Strait had been functioning in practice; the only arrangement of need was a formal recognition of the direct link, which eventually was reached on 4 November 2008. However, the direct link of airfreight is not that simple. On 4 November 2008 the two representative agencies of both sides of the Strait also agreed to open a direct airline between the Chinese mainland and northern Taiwan; on 26 April 2009 the airline connecting the Chinese mainland and southern Taiwan was also set up. For Taiwan’s benefit, it is better to include the “fifth freedom” in these agreements but the Chinese mainland so far is not willing to push that button. The “fifth freedom” means an airline may carry passengers from its own country to the second country, and go on from the second one to a third one. To restrict cross-Strait airfreight within the extent which concerns merely the two sides of the Strait can help to avoid the legal dispute of whether the airline is “national” or “international”. When a third country is involved, an international agreement should be signed among at least three parties, which eventually raises the issue of Taiwanese “international space” that principally pulls the Chinese mainland back; additionally, the Chinese mainland may provide far more midway stops than Taiwan, and it also lets the Chinese mainland down economically.

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The HKSAR has the legal competence and political capacity to manage its internal transportation and security, while external transportation and security partially rest on the shoulders of the PRC state. The Hong Kong Basic Law in Article 14 provides:³⁶⁹

The Central People's Government shall be responsible for the defence of the Hong Kong Special Administrative Region.

The Government of the Hong Kong Special Administrative Region shall be responsible for the maintenance of public order in the Region.

Military forces stationed by the Central People's Government in the Hong Kong Special Administrative Region for defence shall not interfere in the local affairs of the Region. The Government of the Hong Kong Special Administrative Region may, when necessary, ask the Central People's Government for assistance from the garrison in the maintenance of public order and in disaster relief.

In addition to abiding by national laws, members of the garrison shall abide by the laws of the Hong Kong Special Administrative Region.

Expenditure for the garrison shall be borne by the Central People's Government.

Hong Kong maintains a separate police force from the Chinese mainland to carry on the responsibility of Article 14(2), which since the 1840s has turned the city into one of the safest polities around the world. The PRC stations a People's Liberation Army (hereinafter PLA) garrison that recruits soldiers exclusively from the Chinese mainland, and local residents of the HKSAR are not obligated to serve the PLA within or outside Hong Kong because the Annex 3 of the Basic Law does not include the PRC Conscription Act, which in the Chinese mainland calls all citizens up to national service. Although only a tiny percent of Chinese male citizens are in active military duty – due to the great number of Chinese population – Chinese conscription remains mandatory regardless of individual ethnicity, career, religion, or education. In British Hong Kong, the United Kingdom also stationed a garrison in Hong Kong with soldiers from outside the territory, but on the other hand, there

³⁶⁹ The Hong Kong Basic Law, art 14.

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was the Royal Hong Kong Regiment (hereinafter “The Volunteers”) recruiting members from local residents voluntarily, which had been funded by the British Hong Kong government. However, it is hard to compare British military institution with the PLA. The PLA, as a communist military force, in each and every unit has a communist commissioner pairing the military commander, and the former not only secures a sort of civil control over the military force but also manages ideological discipline. If the PLA would start to recruit local residents from Hong Kong, it could be a problem to harmonise them with the PLA; but if the PRC would establish a separate local regiment without communist commissioners, the CPC might lose the control over a part of the military service, which indeed is a crisis in the Chinese context. It is not possible to extend the mandatory conscription to all Chinese citizens in Hong Kong, let alone non-Chinese residents, but if a few of Chinese citizens in Hong Kong would like to join the PLA voluntarily without discomfort to the communist way of military life, it is arguably not a problem for either side.

Article 24 of the PRC Ethnic Regional Autonomy Act 1984 provides: “Autonomous agencies in ethnic autonomous areas may, in accordance with the military system of the state and practical local need and with the approval of the State Council, organize local public security forces for the maintenance of public order.”³⁷⁰ The ethnic autonomous regions need the approval of the State Council to catch up the Hong Kong model where the police force has been separate and independent from central supervision for decades. There is no such “local public security forces” organised in that manner. In spite of the army, the PRC state maintains a system of “armed police” to guard tremendously important industrial sites, prisons, transportations, as well as to combat terrorists and suppress riots. The “armed police” is under joint command from the Central Military Commission (as a quasi-military force) and the State Council (as a part of the national police force), and in local administrative regions the armed police branch is commanded and supervised

³⁷⁰ The PRC Ethnic Regional Autonomy Act 1984, art 24.

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by both the central commander and the local administration's police department. So the Tibet Autonomous Region, as one local administration of the PRC rather than the "ethnic autonomous region", may also influence the armed police branch in Tibet. But the "local public security force" referred in Article 24 seems to be exclusively managed by the ethnic autonomous region, which obviously is a different institution from the armed police stationed in Tibet. The PRC does not establish any ethnically defined branch in military forces, so there is no "Tibetan regiment" in the PLA or the PRC armed police. Many ethnic Tibetans carry their national service in various parts of the country, while many soldiers of other ethnicities are stationed in Tibet as well.

Outside Tibet, the ethnic Tibetans once had a guerrilla force in the name of *Chushi Gangdruk* (literally, four rivers and six ranges) with support from the United States. They fought the Chinese in Sino-Nepalese border throughout the 1960s. Occasionally it also received assistance from the KMT in Taiwan. But in 1974, the United States stopped the funding. Under pressure from the Nepalese government, the Dalai Lama ordered them to surrender. Nowadays, ethnic Tibetans also form an Indo-Tibetan Border Police (hereinafter ITBP) of Indian armed force. The Indian government recruits emigrated Tibetans and trains them in the ITBP. Against the background of Sino-Indian War in the 1960s, the ITBP is not a positive presence to China, and more or less a military threat to the security of the Tibet Autonomous Region.

5.3.2.3 Language, Education, and Religion

Language, education, and religion are crucial in socialisation and formation of self-identity. Generally speaking, the Taiwanese authorities are once again advanced, but Hong Kong's autonomy is merely a bit less than Taiwan. The Tibet Autonomous Region's situation is unique, not only because it is integrated by the PRC system but also there is a Tibetan culture involved.

In Taiwan there are four main linguistic groups: the Hoklo, the Hakka, post-war migrants from the Chinese mainland, and the aboriginal ethnic groups. Except the

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aboriginals, the others all speak Chinese. But the three Han Chinese subgroups in Taiwan cannot understand each other's mother tongue. The traditional Chinese characters unite the Han Chinese subgroups. Few tried a sort of Hoklo literature with a Romanised form but had failed. In the 1950s the KMT brought Mandarin to Taiwan, and established it as the national language to bridge the four linguistic groups. The Mandarin language played that role in Taiwan before, but after 1895 the Japanese language replaced it until the end of the Second World War. The status of Mandarin remains. However, since the Taiwanese democratisation the Hoklo majority has been interrogating the legitimacy of using a mother tongue of 15% population as the official language rather than that of 70%. The DPP showed enthusiasm for promoting the "Taiwanese" language publicly, while pro-DPP media are also overwhelmingly using "Taiwanese" instead of Mandarin Chinese. On 12 February 2003 a Taiwanese act for promoting the "national language" was abolished, which once required all public media to use Mandarin.³⁷¹ Sometimes the Hoklo majority regards their mother tongue should be the true "Taiwanese", although the Hakka group arrived in the island no later than the Hoklo group, to say nothing of the aboriginals. The response from the Taiwanese authorities is to set up a television channel exclusively for the Hakka group.³⁷² Nevertheless because of the correspondence between the written form and Mandarin Chinese, as well as the international influence of the Mandarin language, it is not quite possible for any "Taiwanese" languages to replace Mandarin's status as the common language in the long term.

In Hong Kong local residents mainly speak Cantonese instead of Mandarin, and in written form they use traditional Chinese characters. The Hong Kong Basic Law in Article 9 provides: "In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the

³⁷¹ The Method to Promote the National Language, art 11.

³⁷² The Hakka Basic Law, art 12.

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Hong Kong Special Administrative Region.”³⁷³ The praxis is in judiciary courts the English language remains dominant, while the executive and legislative branches are used to adopt Cantonese in everyday communication.

In the Tibet Autonomous Region the status of Tibetan language in official usage has been wobbling for decades. The Provisional Regulation of Learning, Using, and Developing the Tibetan Language in the Tibet Autonomous Region 1987 (hereinafter “Tibetan Language Regulation 1987”) was determined to champion for the Tibetan language after the Cultural Revolution. The Tibetan Language Regulation 1987 requested public sectors in Tibet must use Tibetan as the primary language in communication. The most astonishing provision reads: if there is no Tibetan version, lower level governmental organs may not accept any documentation from higher ones.³⁷⁴ If the Tibetan Language Regulation 1987 applies completely, the Tibetan language undoubtedly will take advantage in Tibet; however, the regulation as a local regulation promulgated by the Tibetan people’s congress is challenged by the PRC National Language and Character Act 2000, which prescribes that governmental organs should use the Mandarin language and simplified Chinese characters.³⁷⁵ The Act is a national law with a higher authority than the Tibetan regulation. Although the Act compromises that other law may take an alternative position, whether the Tibetan regulation qualifies a “law” (that in narrow definition should be promulgated by the National People’s Congress) in PRC terms is called to question. The consequence is that a new one replaced the Tibetan Language Regulation 1987 in 2002, which allows public sectors to use either Tibetan or Mandarin or both in everyday communication. The Tibetan Language Regulation 2002 loosens many provisions that favour the Tibetan

³⁷³ The Hong Kong Basic Law, art. 9.

³⁷⁴ The Tibetan Language Regulation of 1987, art 9(1).

³⁷⁵ The PRC National Language and Character Act 2000, art 9(1).

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language. Instead of being bound to learn Tibetan, individuals now may choose to speak either Tibetan or Chinese in Tibet.

Both Taiwan and Hong Kong manage separate educational systems from the Chinese mainland. For Taiwan, the authorities' main concern is to maintain the barrier between Taiwanese and mainland students to the extent that mainland students, as potential migrations, will not compete with Taiwanese students in the internal market. The process of amending the "mainland-student three laws" illustrates that point. In the past The Cross-Strait Relations Act only allowed Taiwanese students to study in Taiwanese-managed schools in the Chinese mainland, while other mainland educational qualifications were not recognised in Taiwan.³⁷⁶ Hence not only mainland students but also Taiwanese students studying in mainland educational institutions are barred from advanced education in Taiwan. This discrimination specially aiming at mainland students becomes inappropriate when they are becoming one of the largest consumer groups in the international educational market. In 2010 the provision barring mainland students in the Cross-Strait Act was abolished. But the traditional alertness towards mainland "Trojan Horse" remains. The revised University Act in Article 25, although opens arms for mainland students, prohibits them to study in institutions or departments "involving national security or secrets".³⁷⁷ The Cross-Strait Act also blocks mainland students from taking part in examinations for civil service and professional qualifications.³⁷⁸

In contrast to this attitude, the Taiwanese authorities have been more positive towards Hong Kong and emigrated Tibetan students, both are neither "legal alien" nor "mainland residents" in the "Republic of China".³⁷⁹ For Hong Kong, it is

³⁷⁶ The Taiwan-Mainland Relations Act, art 22-1.

³⁷⁷ The University Act, art 25.

³⁷⁸ The Taiwan-Mainland Relations Act of 2010, art. 22.

³⁷⁹ The Regulations Governing the Examination and Recognition of Educational Qualifications from Hong Kong and Macao, and the University Act, art 25.

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understandable because (British) Hong Kong has developed an educational system that deserves reasonable recognition around the world. Article 136 of the Basic Law also guarantees: “On the basis of the previous educational system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of education, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational qualifications.”³⁸⁰ The Hong Kong educational institutions shall be genuinely autonomous in recruiting staff from outside Hong Kong.³⁸¹ There is no worry for anyone including the Taiwanese authorities that the Chinese communist will initialise their “brain-washing” machines in the special administrative region.

For Tibetans, the territorial educational institutions are integrated into the national system generally. In fact the education in Tibet remains backward, and it is not the time to talk about an “autonomous” educational system that, hypothetically, should postpone the process to combat illiteracy without outside assistance. We do not need to take any political stand on this issue. The emigrated Tibetan communities are also eager to seek international aid in developing modern education, especially with regard to natural science and technology for which the Tibetan language is struggling in building up a comprehensive vocabulary. The PRC sets up many institutions in China proper to recruit and train ethnic Tibetan students with better equipments and living condition; additionally national examinations in Tibet also lower the standard of passing to qualify more Tibetan students to join the market. Are these integrationist or assimilationist policies? After all there is no politically irrelevant policy. The Taiwanese authorities’ favourite educational policy also echoes its “ROC” imagination, while emigrated Tibetan students should learn how

³⁸⁰ The Hong Kong Basic Law, art 136.

³⁸¹ The Hong Kong Basic Law, art 137.

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to carry on the cause to fight against the Chinese. What really matters is a number. The Dalai Lama envisions seven in ten students should learn the culture and tradition, others Chinese and science; others may think it should be the reverse.

The last part of this section examines the religious autonomy in the three territories, but this issue is slightly different from the other two issues mentioned in this section. For linguistic and educational autonomy, we are talking about whether and how much the territorial authority may control the social policy in these regards. However, the religious autonomy is merely in some parts concerning the territorial authority, in others it concerns the competence and capacity of religious authority. The religious freedom is well protected in Taiwan and Hong Kong. For instance, the Holy See of the Roman Catholic Church as the only European sovereign recognising the “Republic of China” may appoint bishops in Taiwan without governmental interference. In 1998 the late Pope John Paul II appointed Paul Shan Kuo-Hsi a Catholic cardinal in Taiwan, who is also the fifth Chinese cardinal in history. The sixth Chinese cardinal in Roman Catholic Church is Joseph Zen Ze-Kiun in Hong Kong appointed by Pope Benedict XVI. Article 141(4) of the Hong Kong Basic Law reads: “Religious organizations and believers in the Hong Kong Special Administrative Region may maintain and develop their relations with religious organizations and believers elsewhere.”³⁸² It should be noted that in the PRC 1982 Constitution Article 36(4) provides: “Religious bodies and religious affairs are not subject to any foreign domination.”³⁸³ So Article 141(4) of the Hong Kong Basic Law has moved a big leap in this regard in comparison with the Article 36(4) of the PRC Constitution.

We can go on to another instance of Buddhism. Despite originally coming from the Subcontinent, Buddhism is already an indigenous religion in Sinitic territories. There is no “foreign domination” involved, especially talking about the Chinese

³⁸² The Hong Kong Basic Law, art 141(4).

³⁸³ The 1982 Constitution, art 36(4).

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Buddhism thriving in China proper. An interesting case is Tzu Chi, a Chinese Buddhist organisation based in Taiwan, which carries on relief and charity around the world including the Chinese mainland. The PRC government determined to embrace Tzu Chi but refused the Holy See, partially because the latter has a “colonist” history while the former symbolises the cultural link across the Strait.³⁸⁴ However, talking about Tibetan Buddhism, the situation turns a bit intolerant. The PRC Administration for Religious Affairs issued a “method” in 2007 to regulate the process of finding Tibetan *tulkus*, which prescribes lamas should be recognised by governmental offices in accordance with their rankings.³⁸⁵ The lamas with tremendous influence should be recognised by the State Council, e.g. the 11th Panchen Lama; below the Panchen Lama, the 17th Karmapa was recognised by the Administration for Religious Affairs. In fact the Republic of China also had a series of acts regulating the registration, appointment, promotion, and process of finding Tibetan *tulkus*,³⁸⁶ but the Taiwanese authorities finally abolished them all. In the liberal democratic isle these acts have turn to be overwhelmingly meaningless: few *tulkus* live there, and the liberal democracy should theoretically be neutral to the religious affairs.

To conclude, there is powerful administration in all the three territories. The “ROC” President in Taiwan can appoint the Premier without approval of the Taiwanese legislature, the Chief Executive in the HKSAR is a gubernatorial head of the territory, and in Tibet the Tibetan Chairperson is also privileged, let alone the CPC Party Chief who is almost a despot because of the *nomenklatura* system. So the

³⁸⁴ For PRC’s attitude towards Taiwanese Buddhist organisation see *"Harmonious Society", "Peaceful Re-unification", and the Dilemmas Raised by Taiwanese Philanthropy*, in *The Chinese Party-State in the 21st Century: Adaptation and the Reinvention of Legitimacy*, (André Laliberté & Marc Lanteigne eds., 2008), pp. 78-105.

³⁸⁵ The Method of Regulating the Process of Finding Tulkus of Tibetan Buddhism.

³⁸⁶ The Method of Lama Registration. The Method of Lama Appointment. The Method of Lama Incarnation. The Method of Rewarding and Punishing Lama. The Regulation for Lama Monastery.

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democratic elements in all the three territorial governments are not as many as those in liberal democracies. In terms of representation, this situation is not perfection but relatively acceptable so long as the peripheral societies can sustain the existing representative or accountable government in Taiwan and Hong Kong, and at least guarantee there is a mechanism of consultation in Tibet. Ironically, the powerful administrations are not strong enough to be duly recognised by the PRC central government. Obviously, the PRC leadership is trying to prevent the “ROC” President from being visible on the international stage on an equal footing with the PRC President, and this policy seems also applicable to the Dalai Lama. The Chief Executive of the HKSAR and the Tibetan Chairperson are both inferiors, and this is the red line to be defended by the PRC central government. However, both the PRC central government and the peripheral societies are making progress in terms of reconciliation. The Taiwanese authorities have shown an attitude of more openness towards the Chinese mainland now, and the emigrated Tibetans abandoned their weapons decades ago. Lastly, the PRC central government is politically wise to give up the power of taxation in Hong Kong and hypothetically in Taiwan as well, and it also pours a lot of money to Tibet since the takeover. But the peripheral societies are not the only beneficiaries, as the PRC central government needs to use economic interests to gain support for its policies in other areas.

5.4 JUDICIARY

5.4.1 Judicial Independence

It is of no surprise that the judiciary in the Tibetan Autonomous Region is once again the weakest among Tibet, Hong Kong, and Taiwan. The Tibetan judiciary is determined to resolve increasing social disputes among persons and serve the common interests of Party-state in this way.³⁸⁷ The autonomy of Chinese judiciary

³⁸⁷ For courts’ role in China see LIEBMAN, BENJAMIN L., *China's Courts: Restricted Reform, in China's Legal System: New Developments, New Challenges*, (Donald C. Clarke ed., 2008).

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is limited. The Article 126 of the 1982 Constitution admits: “The people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.”³⁸⁸ The 1982 Constitution does not mention the legislature, neither the Party, nor internal interference from within the courts.

As the sovereign organ of the state, the National People’s Congress is entitled to “supervise” the courts and do whatever necessary it deems in its own will.³⁸⁹ There are rounds of debate concerning the legitimacy and feasibility of legislature “supervising individual cases”, however, the legislature itself has not yet stepped into the judicial field. It is obvious that the members sitting in the legislature lack the training and expertise, but the legislature never gives that possibility up in the context where no “separation of powers” exists. Secondly, Chinese judiciary remains under cast-iron control of the Communist Party of China. The CPC is not an ordinary “public organisation” in Chinese terms, which has a Political and Legislative Affairs Committee to control the intelligence, police, prosecutors, and judicial courts. The Committee stands behind a curtain so there is no reliable description of the relationship between the party and courts in everyday praxis. But this arrangement at least suggests the de-politicisation of Chinese courts remains to be finished. For internal interference within the judiciary, there is more information. In Chinese courts, there is an adjudicative committee consisting of the leadership of the courts and some senior judges. If the case before the bench is complex and beyond the confidence of judges in the panel – many in China are still lacking sufficient training and expertise in delivering the judgement by oneself – the panel should refer the case to the adjudicative committee for an advisory opinion. This procedure sounds not ideal because the adjudicative committee does not hear the case personally and their consciousness is built upon somewhat secondary

³⁸⁸ The 1982 Constitution, art 126.

³⁸⁹ The 1982 Constitution, art 67.

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impression from those sitting in the panel. But senior judges in the adjudicative committee may provide considerably better legal discretion while the leadership will deal with the political responsibility of the judgment, which though rare, would endanger a judge's career. A defence of the system is when the adjudicative committee is involved, there is an internal division of labour in the court: the juniors act as a "jury" deciding the issue of fact while the seniors address the law. But this after all raises the question that who is really running the trial?

Binding by the triple constraints, the Tibetan judiciary's autonomy is very limited. For the legislative constraint, Article 124 of the PRC 1982 Constitution reads: "The People's Republic of China establishes the Supreme People's Court and the local people's courts at different levels, military courts and other special people's courts. ... The organization of people's courts is prescribed by law."³⁹⁰ In the plain expression, only the Supreme People's Court is of an irremovable nature that has been guaranteed by the Constitution. Hypothetically, the entire Tibetan judiciary can be abolished by the sovereign legislature of the National People's Congress that is entitled to establish national institutions by law.³⁹¹ Historically, the modern Tibetan judiciary was indeed installed by the PRC central government after the "democratic reformation", which situation makes the said hypothesis even more convincing. For the one party-state constraint, the Tibetan judiciary is under the control and supervision of the CPC leadership. The CPC itself is a highly centralised organisation that also undermines the autonomy of the Tibetan judiciary. Even the legislature and the party would not interfere for political reasons, the Tibetan judiciary's autonomy is still limited. Because PRC laws are of a highly unitary nature and in Tibet except for a few the Tibetan laws are very similar and in consistency with national acts, the Tibetan judiciary cannot defend themselves by claiming expertise of local knowledge. On the contrary, Tibet is backward in

³⁹⁰ The 1982 Constitution, art 124.

³⁹¹ The 1982 Constitution, art 67.

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developing legal professionalism. The national bar exam has to lower the standard in Tibet to recruit enough lawyers and judges to fill in the posts. In addition to this, the Tibetan judiciary never gets the bigger and final say on any tribunal. The national Supreme People's Court always has a mechanism to take each and every case to its own jurisdiction. In spite of the ordinary appellate procedure, the national Supreme People's Court may use "response" to reference from lower courts to influence the discretion of Tibetan judiciary. Different from ordinary courts that are merely entitled to decide concrete disputes, the Supreme People's Court can also issue abstract law-like "judicial interpretation" to bind lower courts in interpreting the law. So the result is the Tibetan judiciary is the least possible option on which the Tibetan people may rely to sustain territorial autonomy. In fact the central authorities never admit there is a chance either. In establishing the "ethnic autonomous regions", the 1982 Constitution provides what "autonomous powers" shall be given to the legislature and administration of "ethnic autonomous regions", while saying: "The organs of self-government of national autonomous areas are the people's congresses and people's governments of autonomous regions, autonomous prefectures and autonomous counties."³⁹² The Constitution never accepts that the judiciary of "ethnic autonomous regions" shall be a part of the "organs of self-government", which implies there is no expectation that the territorial judiciary should stand out. On the contrary, the crucial responsibility for courts may be to "uphold the uniformity and dignity of the socialist legal system" as a whole.³⁹³

In contrast to the Tibetan case, judicial independence is one the most serious promises the PRC had written down in the Hong Kong Basic Law. Article 85 of the Basic Law provides: "The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial

³⁹² The 1982 Constitution, art 112.

³⁹³ The 1982 Constitution, art 5(1).

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functions.” To protect the autonomous performance of judicial functions, the Basic Law in the Article 88 prescribes: “Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.” To remove a judge from his position for misbehaviour, there must be a tribunal consisting of not fewer than three local judges appointed by the Chief Justice of the Court of Final Appeal.³⁹⁴ Only “The Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country”;³⁹⁵ other “Judges and other members of the judiciary of the Hong Kong Special Administrative Region shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions.”³⁹⁶ Secondly, in addition to the arrangement of appointment of local judges, the new Hong Kong courts have grasped the power of administration of justice in their own hands. In the British system, the Lord Chancellor’s multiple role has been long contested: for, as a member of the cabinet the Lord Chancellor was also the head of the judiciary and sat time to time as a judge on the Appellate Committee of the House of Lords before the UK Constitutional Reform Act of 2005, which although transforms judicial functions of Lord Chancellor to the Lord Chief Justice of England and Wales, does not cut all the connections between the Lord Chancellor and the judiciary off.³⁹⁷ However, as Colin Turpin and Adam Tomkins observes: “The Lord Chief Justice has an enhanced capacity to influence decisions in relation to the administration of the court system, including decisions

³⁹⁴ The Hong Kong Basic Law, art 88(1).

³⁹⁵ The Hong Kong Basic Law, art 90(1).

³⁹⁶ The Hong Kong Basic Law, art 92.

³⁹⁷ The discussion of the relation between Lord Chancellor and judicial independence see, TURPIN & TOMKINS, *British Government and the Constitution*, pp. 115-124.

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on resources for the administration of justice”.³⁹⁸ The confusion of ministerial and juridical roles disappears in the new system of Hong Kong. Now the Chief Justice of the Court of the Final Appeal is empowered to “be the head of the Judiciary and shall be charged with the administration of the Judiciary and such other functions as may from time to time be lawfully conferred on him.”³⁹⁹ The power to appoint local judges of the Chief Executive in accordance with recommendations of the Chief Justice is based on the Chief Executive’s role as the head of the region instead of head of the administration. Horizontally the judicial independence of the Hong Kong judiciary is stable.

In Taiwan, Article 80 of the 1946 Constitution provides: “Judges shall be above partisanship and shall, in accordance with law, hold trials independently, free from any interference.”⁴⁰⁰ This provision intentionally emphasise that political parties shall not interfere with judges. The Judicial Yuan’s committee consisting of 24 members from the Judicial Yuan, the Supreme Court, the Supreme Administrative Court, and the Committee on the Discipline of Public Functionaries is in charge of the appointment of local judges in Taiwan.⁴⁰¹ The Judicial Yuan, except its Council of Grand Justices, is generally an organ for administration for justice. The ordinary civil and criminal cases flow to the Supreme Court, while the administrative courts in Taiwan are to decide disputes with regard to administrative law with the Supreme Administrative Courts as their head. The Discipline of Public Functionaries is responsible for internal discipline and disputes in civil service. These organs have

³⁹⁸ Id. at 119.

³⁹⁹ The Hong Kong Court of Final Appeal Ordinance, sec. 6(2) in Chapter 484 available at the Bilingual Laws Information System operated by the HKSAR Department of Justice.

<http://www.legislation.gov.hk/eng/home.htm>. Retrieved on 19 May 2011.

⁴⁰⁰ The 1946 Constitution, art 80.

⁴⁰¹ The Personnel Appointment Committee of the Judicial Yuan Rule for Personnel Appointment, arts 1-3.

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together formed the highest layer of Taiwanese final appeal.⁴⁰² Since the committee persons and judges to be appointed all come from the judicial system or at least are qualified based on a high standard of professionalism, the autonomous judiciary is by and large free from political appointment. The only place where the administration may have a say in judgeship appointment is the Council of Grand Justices, which consists of nine Grand Justices who shall be nominated by the “ROC” President and approved by the Legislative Yuan. But the Council of Grand Justices as the organ to interpret the Constitution has a very different nature from ordinary courts of justice. The Grand Justices do not have lifetime tenure and each shall sit in the council no more than eight years except the President and Deputy President.⁴⁰³

Different from the Hong Kong case, in Taiwan it is not unnecessary for the Council of Grand Justices to clarify that in the panel the chief justice does not have powers more than others in deciding the cases. We have seen in the PRC courts, junior judges shall from time to time submit cases to the judicial committee for opinions from senior judges and the leadership of the court. To avoid this, the Grand Justices in their Interpretation No, 539 explain: “... the chiefs of the panels of the courts are to supervise the matters of the panels, which are auxiliary judicial administrative matters to facilitate judicial functions. The chiefs may serve as the presiding judge on a panel. However, if there is no chief of a panel or if he is not available, a senior judge may be appointed presiding judge. The chief judge serving as the presiding judge on a panel has the power to direct the proceeding of the case. In addition to such power, there is no difference between the presiding judge and other judges of the panel. The post of a presiding judge is designed for the purpose of conducting

⁴⁰² LUO, *The Legal Culture and System of Taiwan*, pp. 13-17.

⁴⁰³ The Additional Articles, art 5.

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the proceedings of the lawsuit uniformly. It differs from the post of a chief judge, which is administrative in nature.”⁴⁰⁴

5.4.2 Constitutional Jurisdiction

It is of interest that the three cases or judiciaries are representing three very different as well as typical models of constitutional jurisdiction so long as there is constitutional jurisdiction at all in Tibet. Scholars as early as Hans Kelsen have categorised judicial review over administrations and (delegated) laws into two forms: one is based on the praxis of common law courts that deal with the administrative misuse and alleged unconstitutional laws in hearing real cases; the other is embodied in continental designs that establish one special organ to review the constitutionality.⁴⁰⁵ Whereas the communists never trusted the undemocratic judiciary, many state-socialist countries including the PRC insist the parliamentary organ shall have a monopoly over the power in deciding constitutionality. The PRC 1982 Constitution authorises the Standing Committee of the National People’s Congress to “interpret the Constitution and supervise its enforcement” as well as to annul unconstitutional laws, regulations, and decisions alike.⁴⁰⁶ Since this model of constitutional review is not a judicial discretion but essentially renders a political organ the power to check itself, whether it can be called constitutional “jurisdiction” is a question.

This brings us to the most serious concern in the recent Hong Kong constitutional history starting from the sovereign handover. Based on the common law model, the Hong Kong judiciary reckons the courts rather than the political organs shall decide

⁴⁰⁴ The English version of the Interpretation cited from LUO, *The Legal Culture and System of Taiwan*, p. 16.

⁴⁰⁵ KELSEN, HANS, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 *The Journal of Politics* 183, (1942).

⁴⁰⁶ The 1982 Constitution, art 67.

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the constitutionality of administrative actions or laws in hearing cases. Actually the Hong Kong judiciary has become even more active and radical than it was before the sovereign handover. Under the British rule, the Hong Kong judiciary could not challenge primary acts promulgated by the Westminster Parliament in accordance with the Diceyan theory of “parliamentary sovereignty”. They could even be more humbled because in the colony the institution of courts itself was never constitutionally secured. Metamorphosing from this old body, the Hong Kong High Court once held that the Hong Kong judiciary couldn’t challenge the laws and decisions issued by the NPC or its Standing Committee either. The newly created HKSAR Court of Final Appeal does not agree so:⁴⁰⁷

Under the Chinese Constitution (Articles 57 and 58), the National People's Congress is the highest organ of state power and its permanent body is the Standing Committee and they exercise the legislative powers of the state. So their acts are acts of the Sovereign. The jurisdiction of the Region's courts to examine their acts to ensure consistency with the Basic Law is derived from the Sovereign in that the National People's Congress had enacted pursuant to Article 31 of the Chinese Constitution the Basic Law for the Region. The Basic Law is a national law and is the constitution of the Region.

...

In *HKSAR v Ma Wai Kwan David*, which concerned the survival of the common law in the new order and the legality of the Provisional Legislative Council, the Court of Appeal (Chan CJHC, Nazareth and Mortimer VPP) held, accepting the Government's submission, that the Region's courts have no jurisdiction to query the validity of any acts of the National People's Congress since they are acts of the Sovereign. It was held that the jurisdiction of the Region's courts is a limited one to examine the existence (as opposed to the validity) of the acts of the Sovereign or its delegate. In our view, this conclusion of the Court of Appeal as to the jurisdiction of the Region's courts is wrong. The correct position is as stated above.

⁴⁰⁷ Ng Ka Ling v. The Director of Immigration [1999] 1 HKLRD 315; [1999] 2 HKCFAR 4.

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We may understand this holding as a Hong Kong version of bi-polar sovereignty recently developed by common law radicalism that argues the common law – in fact the Crown in the courts – shall have a parallel status with the Crown in the parliament, or, the so-called parliamentary sovereignty only ever existed because the common law courts accept it while this attitude is not unchangeable.⁴⁰⁸ But the Hong Kong judiciary finds an even better stand than British unwritten constitution in supporting their argument: for Hong Kong, the “mini-Constitution” of Hong Kong Basic Law explicitly admits the courts’ status and powers that originally derives from the Chinese sovereignty per se resting in the NPC. The court declares:

In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. Although this has not been questioned, it is right that we should take this opportunity of stating it unequivocally. In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law.

Neither the British Privy Council nor the Court of Session or Queen’s Bench had said so, but actually the HKSAR Court of Final Appeal has identified itself as functioning like the Supreme Court of the United States, which is another common law court of final appeal under a rigid written constitutional document with a capital letter “C”.

⁴⁰⁸ See Sir Stephen Sedley [1995] PL 386, 389, in TURPIN & TOMKINS, *British Government and the Constitution*, p. 66.

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The Council of Grand Justices in Taiwan has been fully aware the Taiwanese model of constitutional jurisdiction belongs to the continental category, in the J. Y. Interpretation No. 371, which is also one of the most important constitutional interpretations issued by the Council, says:

Based on the constitutional principle of separation of powers, modern countries with a written constitution and rule of law have set up a judicial review system. Those which do not have a special judicial tribunal for judicial review delegate this power to their ordinary courts through precedents, as the United States does, or through explicit constitutional provisions, as Japan does (Article 81 of the 1946 Constitution). In those countries which have special judicial tribunals for judicial review, the constitutionality of statutes is reviewed by the special judicial tribunals, such as the Constitutional Courts of Germany (Articles 93 and 100 of the 1949 Basic Law), Austria (Articles 140 and 141-1 of the 1929 Constitution), Italy (Articles 134 and 136 of the 1947 Constitution), and Spain (Articles 161 and 163 of the 1978 Constitution). Different countries with different situations could not be expected to have the same systems and applications. Nonetheless, their purposes are all to protect the constitution's highest authority in law, as well as to maintain a judge's independence in exercising his duties, in order that in trying a case, a judge shall obey nothing but the constitution and statutes without any interference. Because our legal system mainly adopted the statutes of continental countries, the development of our judicial review system has been very similar to those of the abovementioned continental countries since our Constitution went into effect.

The Council rules that the procedure of constitutional review shall be:

A judge shall have no capacity to hold a statute unconstitutional, and shall not refuse to apply a statute for that reason. Nonetheless, since the Constitution is the state's highest authority, judges have an obligation to obey the Constitution over any other statutes. Therefore, in trying cases where judges of different levels have suspected, with reasonable assurance, that the statute applicable to the cases is unconstitutional, they shall be allowed to petition for interpretation of its constitutionality, regardless of the levels where the cases are pending. This may eliminate a judge's dilemma of obeying the Constitution and applying the controversial statute, as well as avoid the waste of judicial resources. In the abovementioned situation, judges of different levels may suspend the pending procedure on the ground that the constitutionality of the statute is a prerequisite issue. At the same time, they shall provide concrete reasons

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for objectively believing the unconstitutionality of the statute, and petition to the Justices of the Yuan to interpret its constitutionality.

However, to block unbearable case flow towards the Council, the Grand Justices also explain in J. Y. Interpretation that they will consider no specific disposition of the administration, but merely carry on the duty of review statues by interpreting the Constitution.

5.5 CONCLUDING REMARKS

This chapter has shown the asymmetry of territorial autonomous powers among Tibet, Hong Kong, and Taiwan. The three peripheral societies of Tibet, Hong Kong, and Taiwan can rely on the legislative, judicial, and administrative branch of the government respectively in responding or resisting the pressure of the PRC central government. For Tibet, the Tibet Autonomous Region is unusually the weakest of the three in asserting its autonomy, but the most promising governmental branch for Tibet would be the legislature if it can promulgate autonomous and separate regulations inconsistent with national provisions of the PRC. Although there is not yet an autonomous regulation as such, which may qualify another sub-Constitution, it is a legal promise that will be realised in due course. For Hong Kong, this chapter has mentioned that the Hong Kong judiciary always stands in the front line to defend regional autonomy and luckily their work has been widely regarded as a success. For Taiwan, the de facto independent entity's only deficient capacity has been unconditional autonomy in amending the constitution. Besides that in all branches the Taiwanese authorities has been so far running the regime efficiently, especially in the aftermath of democratisation and the abolition of martial law. But it is the Taiwanese administration that has a direct contact with the PRC central government in cross-Strait negotiations. This is the feasible way to construct the relationship between the two sides, and it is also preferred by the PRC central government that has no intention to confront pro-independence Taiwanese politicians in the territorial legislature. The asymmetric autonomy of the territories lays down the foundation of any feasible agenda of constitutional reform, so it is hardly possible to establish any symmetric federation of identical units. These

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should be the positive features a new conception of Chinese constitutional law will incorporate, but to inform the projection we once again need a flashback to the principles set out in chapter 3.

The principle of recognition notes the PRC central government shall recognise a sort of peoplehood of the peripheral societies of Tibet, Hong Kong, and Taiwan in constitutional terms. In this chapter and chapter 4 we have seen the PRC central government generally has been very reluctant to do so. But on the other hand, the PRC central government's reluctance varies with respect to different societies. Despite the overall denial to any statehood of the territorial polities, the PRC central government has already recognised the validity of the regime of the Taiwanese authorities as well as the legality of autonomous Hong Kong and Tibetan governments. The Taiwanese and Hong Kong representatives secure an equal footing with those from the Chinese mainland in several international organisations; in cross-Strait negotiations the two sides have also found a modus vivendi to do business. The principle of representation calls for a reasonable mechanism to make decisions, which is needed not only by the PRC central government but also each and every peripheral society. This chapter and previous chapters all demonstrated that Taiwan and Hong Kong's system of representation or consultation is effective. There is absolutely no liberal representative government in Tibet, but Tibetan elites may have a say in the PRC governmental system as head of administrations or members of the central and local legislatures or advisory bodies. In constitutional arrangements the PRC central government can accept what representation mechanisms the peripheral societies already have, but it is not willing to enhance the democratic elements rapidly. In fact the referenda in Taiwan demonstrated that there is no prospect of danger if the PRC central government keeps a modest and open mind towards the peripheral societies' democratisation. Of course, it is unknown what the result of referenda would be if the PRC central government completely conceded the right of the peripheral societies to freely decide whether they should break away. Meanwhile, it is the principle of reconciliation that is mostly endorsed by the PRC central government and the peripheral societies. Almost all parties concerned have ruled out the option to use massive military forces to suppress the

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opposition. The danger remains, but it is extremely unlikely we will see another civil war in the headlines of newspapers tomorrow. Against this background, it is possible to talk about the principle of reciprocity eventually. Now it is mostly the PRC central government that relinquishes interests to the peripheral societies in order to balance the deficiency with respect to the principles of recognition and representation. But if the PRC central government will improve in recognition and respect for the representative government of the peripheral societies, the latter should also be more active in a positive relationship between them and the PRC central government.

Bearing this in mind, we will move to the sixth and last chapter in this thesis that will discuss Chinese constitutional reform in the future. Some possibilities may provide insights and inspirations, but it seems others are not flexible enough and have overlooked the asymmetric feature of Chinese constitutional arrangements to Tibet, Hong Kong, and Taiwan. If there is a constitutional reconfiguration at all, it will be still asymmetric in nature.

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Chapter 6 Constitutional Reform

6.1 INTRODUCTION

The last chapter in this thesis is built to provide a futuristic perspective for constitutional reconfiguration of the People's Republic of China (hereinafter PRC). The previous chapters have introduced the fact that the peripheral societies of Tibet, Hong Kong, and Taiwan are already entitled to a variety of autonomous status in Chinese constitutional law. Yet the constitutional aspirations of political forces in these territories usually exceed what the PRC state aims to offer. This is probably the main reason why the PRC occasionally needs to re-configure the constitutional apparatus to accommodate the territories. However, even many "Utopian figures" may not expect legal solutions will create on earth a harmonious Garden of Eden or Shangri-la – Immanuel Kant said either an international legal order or the end of humanity will eventually arrive, thus he did not rule out the possibility that the mankind is incapable of reaching a social contract for good. In other words, there are numerous uncertainties on the road to a brighter constitutional future for both the PRC central government and the peripheral societies. The Dalai Lama's fate and that of thousands of emigrated Tibetans without citizenship are some of the difficulties to be addressed. There is a continuous civil war between the two sides of the Taiwan Strait waiting to be officially finished. Hong Kong, though very peaceful and prosperous, is in need of democratic transition in the next decade. It is the political forces that have the final word in these issues, but constitutional law nevertheless can signal some ways forward and help politicians and the Sinitic peoples to reach there. The futuristic perspective thus becomes necessary. If there is no preparation of a constitutional solution at all, we probably have to approach the second end Kant once showed to us.

Constitutional scholarship did not do much in seeking solutions for divided societies before the 1990s. The dominant paradigm of troubleshooting between host states and substate societies since the end of Second World War has been rooted in

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international legal conventions informed by dated political philosophies. The United Nations' international conventions granted ex-colonised societies the right of self-determination that eventually resulted in newly created sovereign states in the overwhelming majority of cases. Yet for societies not governed by colonial rule yet unconformable with the host state of a somewhat alienating nature, international academia has been sharply divided in recognising a similar right of "internal determination," or "secession". With the statist left being defeated in the 1980s and many ex-communist states released from two Leninist unions – Soviet Union and Yugoslavia – more liberals are confident to talk about internal determination under conditions of discrimination and injustice. Allen Buchanan, among others, went further to contend the moral right of "political divorce" between discordant substate societies and the host state based on a more purist liberal commitment.⁴⁰⁹ Even if the moral argument was sound, it is far from a legal rule internationally accepted. Margaret Canovan reminds us: "Liberals who theorise international justice and human rights do not in general think of themselves as Utopians whose ideas have no practical relevance; nevertheless, they show little interest in the possible sources of the power that would be needed to implement such ideals. Remarkable as it may seem, many contemporary political theorists rarely think about the sources, costs and limitations of political power at all, tending to assume that popular, consensual, non-coercive power will be available as required."⁴¹⁰ This is why John Rawls's idea of "realistic utopia" is dispensable, which shows the importance that theoretical reconstruction should reconcile with the political situation first before the ideals will transcend the real.

Constitutional solutions may hopefully reduce naivety and become more realistic and flexible because there is no either-or paradigm in a constitutional way of

⁴⁰⁹ BUCHANAN, ALLEN, *Secession: the Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Westview Press. 1991).

⁴¹⁰ CANOVAN, MARGARET, *Nationhood and Political Theory* (E. Elgar. 1996), p. 114.

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thinking. It is still possible to create separate constitutional regimes with sovereign status when the constitutional deal is worked out. But many constitutional scholars rather believe the legal and moral right of self-determination can be realised in various forms and that sovereign statehood is merely one extreme among them. In chapter 3 four principles of reconciliation, recognition, representation, and reciprocity were advanced in informing a legitimate constitutional project, and it is essential that the principles should be balanced in concrete cases while external sovereignty mostly undermines existing reconciliation and reciprocity even it may lift recognition and representation to some new levels. Nevertheless, the first section of this chapter will still include the option of sovereign independence for the territories in consideration. Suffice it to say that the author endorses no single option at this stage, nor one option among non-sovereign status options set out in following sections. Each and every constitutional solution has pros and cons, and it remains for the people to decide the constitutional prospects of China, peacefully if we are fortunate. This chapter can only contain some of the options of interest promoted by politicians and academics since the 1990s. The hope nevertheless is that academic research and political context may give birth to a Chinese constitutionalism satisfying our principles by and large, and take the Chinese people, or the Sinitic peoples, to a better future.

6.2 SOVEREIGNTY?

The traditional Westphalian model, simplistically speaking, offers an either-or solution for the unsatisfied substate societies: they may either establish their own sovereign states or remain under governance of the host state. Yet the traditional model also tolerates some variables, though the number of these is limited.

6.2.1 Tibet

There is indeed a lot of literature addressing one or several peripheries seeking to become independent from Chinese sovereignty. Alen Brouder illustrates one of the latest examples. Alen Brouder insists: “Tibet satisfies every condition by even the most cautious commentator in meeting the criteria for the right of self-determination.

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There is a clear case of an unjustifiable historical grievance, evidence of genocide, torture, murder, arbitrary arrests and executions and religious intolerance. Tibet is treated as a colony by the Chinese leadership and it used primarily as a military base.”⁴¹¹ He thus prefers the comprehensive independence of the Great Tibet that covers a quarter of the territory of the PRC no matter whether there is a regime change or not in China proper towards liberal democracy. At the same time the international community must raise “human rights concerns and [the] plight of Tibetans and those in the Xinjiang [Uyгур] Autonomous Region as well as Inner Mongolia ... at every available opportunity with the Chinese dictatorship”.⁴¹²

For an independent Great Tibet, Alen Brouder has provided a sort of argument of need that is necessarily different from the more radical idea of secession promoted by Allen Buchanan and others. As a more “purist” liberal, Allen Buchanan contends there is a moral right of secession because fundamentally each and every adult shall voluntarily decide his own form of political life.⁴¹³ Allen Buchanan’s sophisticated theory, however, concedes secession based on cultural claims is weaker than that on “discriminatory redistribution”; yet the overall commitment that the “boundary of states should as far as possible depend on individual content” is the core of Allen Buchanan’s ideal. “This might seem to be nothing more than a recipe of anarchy,” says David Miller.⁴¹⁴ Allen Buchanan’s ideal essentially implies liberty’s absolute superiority over democracy and enables minorities to become a new majority whenever convenient. David Miller is right that “the practical implication of [Buchanan’s ideal] is that any sub-community in any state has the right to vote to secede from that state, provided that it is in turn willing to allow any sub-sub-

⁴¹¹ BROUDER, *Self-determination for Tibet: Prospects in International Law*, p. 200.

⁴¹² *Id.* at 200-201.

⁴¹³ BUCHANAN, *Secession: the Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*.

⁴¹⁴ MILLER, DAVID, *On Nationality*, (Clarendon Press. 1997), p. 111.

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community the equivalent right, and so on indefinitely”, however, “the principle for fixing the borders of states is simply the will of the majority in any territorial area”.⁴¹⁵ Bearing this in mind, it is understandable that Alen Brouder’s idea, which is not that radical, becomes the more convincing liberal argument in the context. First, even though there is no unconditional moral right of secession, political self-determination as the reaction to longstanding discrimination and “genocide” of states is universally accepted and respected. Secondly and importantly, Alen Brouder does not forget to describe Tibet as China’s colony – external or at least internal – that means even if Tibet had a legal connection with Chinese sovereignty, it still qualifies for self-determination in terms of decolonisation.

Few may justify the historical grievance in Tibet. After the 1950s lamas and nuns were arrested and monasteries destroyed, but the accusation that Chinese communists are intentionally executing genocide in Tibet, physically or culturally, seems to be untrue. Many who feel nothing for the communists have questioned the illusion. Barry Sautman in his systemic examination asked where is the explanation for the alleged 1.5 million executions – the number used by Tibetan sympathisers and politicians – “that can be one-fifth of a Tibetan population that the [Tibetan] émigrés always peg at 6 million”?⁴¹⁶ Others in their fieldwork find that Tibetan population has been growing in Tibet/the Chinese mainland after the 1950s, and there is no birth control policy applying to ethnic Tibetans in rural Tibetan areas in the PRC.⁴¹⁷ Barry Sautman in another lengthy article also explains there is no “cultural genocide” in Tibet: “There is, however, no evidence of an ongoing PRC government plan to destroy religion in Tibet, nor is there any indication that Tibetan religious institutions or religiosity are in sharper decline than those in other societies. Nor can it be interred from available evidence that Tibetans in Tibet are

⁴¹⁵ Id. at 111.

⁴¹⁶ SAUTMAN, *Is Tibet China's Colony: The Claim of Demographic Catastrophe* at 93.

⁴¹⁷ FISCHER, *"Population Invasion" versus Urban Exclusion in the Tibetan Areas of Western China*.

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losing their native language or that PRC authorities intend it to erode. Finally, the process of cultural hybridization in Tibet is not unusual or negative in a world context.”⁴¹⁸ He thus reckons it would be extremely unwise to use distortion to legitimatise any political agenda, either for the Chinese State or for Tibetan sympathisers, otherwise no reconciliation can be reached.

The 14th Dalai Lama himself does not agree with scholars like Alen Brouder probably because of the *realpolitik*. The Dalai Lama’s demands have already decreased from overall autonomy to somewhat cultural autonomy in decades,⁴¹⁹ and he has been very cautious to gain support from Chinese dissenters rather than turning the political confrontation into an ethnic gap. On the contrary, Alen Brouder’s words referring to Inner Mongolia, which is long regarded as the communist model of an “ethnic autonomous region”, are highly likely to exhaust Chinese patience in listening and engaging. Zhu Weiqun, the Party Chief of United Front Department of the Communist Party of China (CPC) that is in charge of negotiation and cooperation with non-communist political forces, once accused the Dalai Lama of having a secret agenda to disintegrate Chinese sovereign territory into small pieces, e.g. Tibet, Xinjiang, and Inner Mongolia. Alen Brouder’s suggestion just authenticates this is an intention backed up by “foreign forces” in communist eyes, thus makes more complex the situation.

Even if the Tibetans could have established an independent state of their own, there would be a series of constitutional problems to be addressed. First, where should be the new Sino-Tibetan international boundary? According to the memorandum submitted to the PRC central government by emigrated Tibetans in 2009, all Tibetan autonomous areas in the PRC should be incorporated into a single administration of a refined “Great Tibet”. This boundary is clear but will break up many Chinese provinces adjoining the Tibet Autonomous Region. Because the “Tibetan Charter”

⁴¹⁸ SAUTMAN, *Cultural genocide and Tibet* at 208.

⁴¹⁹ HE & SAUTMAN, *The Politics of the Dalai Lama's New Initiative for Autonomy*.

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only recognises Tibetan citizenship based on ethnicity and naturalisation for marriage, there would be a danger that the Tibetan administration might expel other ethnic groups out of Tibet. Some pro-PRC lamas would be banished too. After the 13th Dalai Lama expelled the *amban* and Chinese troops, he also forced the 9th Panchen Lama to leave Tibet – it is likely this history may be repeated. Hence it would take some time to rebuild reconciliation and reciprocity, depending on what the political situation would be. But in terms of representation and recognition, a state-like Tibetan administration definitely will meet the aspirations of emigrated Tibetans.

6.2.2 Taiwan

The Taiwanese political forces do not need a basis of sovereign independence that roots either in “discriminatory redistribution” or in “cultural preservation”, while a significant advantage for them is the Taiwanese authorities in the name of “Republic of China” (hereinafter ROC) has been recognised by around twenty states in the world. So for Taiwan, the next move is to change the entity’s name and cut off the constitutional connection across the Taiwan Strait. This is unlikely to be feasible, given the PRC central government’s opposition and enhancing military might that is prepared to prevent the Taiwanese authorities to become de jure independent. However, if the Taiwanese people did accomplish the goal of establishing a Taiwanese republic, there would be two issues of concern. First, although the Taiwanese authorities have already decriminalised most mainlanders from a trial of treason, they still notionally regard CPC-related activities as anti-governmental behaviour in law and strongly refuse the possibility that a Taiwanese resident could link himself officially with any PRC institutions of political nature. A completely independent Taiwan may equalise the treatments to legal aliens, including then Chinese mainlanders. For now the Taiwanese authorities request mainland migrants to spend a much longer period of time in the process of naturalisation, and the only reason is to prevent a “Troy” accident which would not happen any longer as there would have already been a political settlement with respect to Taiwan’s relationship with then Chinese State. Secondly, an independent Taiwan’s territory would be

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another issue. As David Mill reminds us, a secession-like agenda inevitably leads to redistribution of territory and property that once belonged to the existing sovereign state.⁴²⁰ The more “purist” liberal Allen Buchanan also agrees that secession, albeit morally positive, shall not create a political, economic, and cultural enclave that would result endless conflicts in the future.⁴²¹ Combining these ideas, for the Taiwan case politicians must be cautious in constitutionally addressing Kinmen, Matsu, and isles in South China Sea respectively. Kinmen and Matsu never in history belong to the Taiwanese administration, and they are now under Taiwanese governance merely because the CPC failed, probably intentionally, in taking them over from the KMT in the 1950s civil war. The Taiwanese authorities administratively confer Fujian province instead of Taiwan province to guide the two island counties too, and the two counties for long have been supportive for both Chinese unification and pro-China political figures. A county head of Kinmen declares he is keen to construct the island as an experiment for Deng Xiaoping’s “one country, two systems”, hence it is wondered that the county might finally decide to reuse the self-determination mechanism to secede from the to-be-created Taiwanese republic. In addition to this, the Taiwanese authorities are also in charge of administrating the biggest island in the Spratly Isles in South China Sea, which ownership derives from its historical lineage with China. The Taiwanese republic seems much weaker in defending the uninhabited isles than China, legally and politically, and it could be a possibility that Taiwan might exchange these isles for a better relationship with China.⁴²²

⁴²⁰ MILLER, DAVID, On Nationality.

⁴²¹ BUCHANAN, Secession: the Morality of Political Divorce from Fort Sumter to Lithuania and Quebec.

⁴²² ALLEN, *Recreating 'One China': Internal Self-Determination, Autonomy and the Future of Taiwan*.

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6.2.3 Lhasa “Holy See”

This section in the beginning accentuates that the approach of “sovereign independence” in line with the Westphalian idea of sovereignty is an either-or solution. However, in the last part of this section we will observe the limited flexibility that the international legal scholarship has. Dating back to Oppenheim’s classic, a series of entities had been noticed that did not fit a trichotomy of unitary state, federation, and confederation – that is of less importance.

These variations include but are not limited to a protected independent state, a vassal state, or a Condominium. Both a protected independent state and a vassal state have their powers controlled by, say, a guardian state, and the two differ in that the former should never be part of the protector and “is not ipso facto bound by treaties of the protector”, while the latter is regarded as a suzerainty where “the suzerain holds the source of the governmental authority of the vassal state whose ruler he grants the right to exercise the authority autonomously.”⁴²³ In this sense a protected independent state retains its general control over foreign relations except those it gives up itself to the protector usually by a treaty between them, while the protected independent state may cease the relationship at any time as it wills theoretically. Here we see a guest and a host, and when the former is preparing to leave the latter must not hold him back. While the relation between a vassal state and its guardian state resembles one between junior and senior family members, the bond is too strong to be cut off unilaterally.

It is actually of interest that “vassal state” or “suzerainty” was a legal term invented by Westerners, probably Britons, to describe Asian entities under the aegis of imperial powers such as the Ottoman Empire and the Qing Empire. The inventor might have seen the dissimilarity between Asian ways of hierarchising feudal lords

⁴²³ HANNUM, HURST, *Autonomy, Sovereignty, and Self-Determination : the Accommodation of Conflicting Rights* (University of Philadelphia Press. 1990), pp. 16-17.

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and that of Medieval Europe and found it necessary to use new terms to apply, or he could merely introduce the difference between some entities and other part of imperial territory under an Asian monarch when European states were endeavouring to homogenise their territorial units and people in terms of nation-building. Tibet per se played a very crucial role in helping the terms become legally meaningful. In Article 2 of the Simla Accord the British government proposed:

The Governments of Great Britain and China recognising that Tibet is under the suzerainty of China, and recognising also the autonomy of Outer Tibet, engage to respect the territorial integrity of the country, and to abstain from interference in the administration of Outer Tibet (including the selection and installation of the Dalai Lama), which shall remain in the hands of the Tibetan Government at Lhasa. The Government of China engages not to convert Tibet into a Chinese province. The Government of Great Britain engages not to annex Tibet or any portion of it.⁴²⁴

The use of “suzerainty” alienated Tibetan areas under Dalai Lama’s control from (other part of) China, and this indeed was the reason why the Chinese government did not sign the accord and never accepted it is a solution. The British government, on the other hand, continuously defined Tibet is an *autonomous* part of China that makes the position symbolically different from other states around the world. While the problem is: as protected independent states disappeared, vassal states vanished in the contemporary system of states too. The British position that “Tibet belongs to China but being autonomous” so far has been meaningless. So the British Foreign Secretary issued a written statement on 29 October 2008 finally recognising Tibet is part of China and that is Chinese *sovereignty* over Tibet. It thus could be the end of a chapter in history, as well as the odyssey of “suzerainty” or “vassal state” as valid legal terms since the Colonising era.

⁴²⁴ The Simla Accord, art 2. This position is repeated in an official document issued by the British government to the United States government. INTERNATIONAL COMMISSION OF JURISTS. Tibet and the Chinese People's Republic (International Commission of Jurists. 1960), p. 318.

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So much for this, what about other variations? In 2009 a British delegation of Parliamentarians undertook a visit to Tibet at Chinese invitation, and during the visit Lord Steel of Aikwood and Lord Alton of Liverpool both provided personal recommendations to the Chinese government in creating a reformed Tibet. Lord Steel was once the Presiding Officer of Scottish Parliament and his suggestion is China may learn lessons from British devolution of powers to three constituent units, i.e. Wales, Scotland, and Northern Ireland. Lord Alton's idea sounds interesting too, which urges "consideration be given to the making of a religious Concordat with the Dalai Lama, which might designate Lhasa as a holy city, comparable to the standing enjoyed by the Pope and the Holy See in the Vatican City within Italy."⁴²⁵ Of course in the short report of the delegation no details can be revealed about what Lord Alton had suggested. Presumably, however, Lord Alton might not have said much since the Chinese or the emigrated Tibetans both dislike the idea of a Lhasa version of "Holy See", albeit comparing Lamaist Lhasa with Catholic Vatican City has been a long-standing phenomenon in Western media and academia. The Chinese have long regarded the only problem to be solved to be the Dalai Lama's return to the People's Republic of China, for whom the Chinese prepare a high-ranking political post. On the other side, the emigrated Tibetans demand at least "meaningful autonomy" for the entire "Great Tibet" in exchange for giving up independence, and a "Holy See" in Lhasa may be too small for them.

While Lord Alton did say China/Tibet should replicate the Vatican model, it remains disputable what the Vatican model actually is. The Catholic Holy See is not a full member of the United Nations – an observer as the Palestinian state – but it sets embassies around the world; the sovereign status of the Vatican City is guaranteed by the Italian state in Lateran Pacts that is also confirmed by the Italian constitution; there is a Concordat between the Holy See and the Italian state on

⁴²⁵ THE ALL PARTY PARLIAMENTARY CHINA GROUP [OF THE UNITED KINGDOM], Tibet: Breaking the Deadlock, (2009), see 3.8.

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religious matters; and “forming part of the Vatican City, St. Peter's Square shall continue to be normally open to the public and shall be subject to supervision by the Italian police authorities”,⁴²⁶ but the arrangement is changeable by the Vatican City with Italian assistance. One of these features might be feasible in a Concordat between the Chinese State and the Tibetan Buddhist spiritual leadership, probably the Dalai Lama himself, to the extent which does not challenge Chinese sovereignty over Tibet as well as Lhasa. China in the 1950s did accept a status quo of the spiritual leadership of the Dalai Lama under the condition that the Kashag should restore the late Panchen Lama's conventional status in Tibet.⁴²⁷ Although most religious sectors in China enjoy much lower status than the state, an equal footing agreement of a contractual nature is not impossible if the Dalai Lama wishes to come back and compromise too. It is also imaginable that a part of Lhasa could be drawn as a “special administrative region” by constitutional law so long as it would not impact on other parts of Tibetan areas. The Lhasa city has expanded greatly in decades with many non-Tibetans now living in urban areas. The special zone may be designed in line with the wall surrounding Potala Palace, as the Vatican City is a tiny part of Rome. Yet the Potala Palace zone can never be sovereign. Neither could the Potala Palace send embassies, while the Dalai Lama's personal representatives may be welcomed as usual.

But all of these can be possible only because the Dalai Lama – the individual as well as the office – can truly reach a papal status in and outside China/Tibet. However, the Dalai Lama is not a Buddhist Pope, and this is what observers always ignore. In Tibetan Buddhism, not only “Peter” but also all apostles have established their sectors by incarnation; the Dalai Lama's importance has been due to his role in Tibetan administration backed up by imperial powers – Qing and Britain; in past

⁴²⁶ The Lateran Treaty, art 3. The document is available at the official website of the Vatican City State, at <http://www.vaticanstate.va>. Retrieved on 19 May 2011.

⁴²⁷ The 17-Point Agreement.

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centuries minor Dalai Lamas have faded from time to time, and this is a crisis probably to happen when the incumbent Dalai Lama incarnates. Before emigrated Tibetans find a way to manage an era of no/minor Dalai Lama, it seems no Concordat is agreeable for China. The Karmapa case demonstrates the danger. After the 16th Karmapa passed away, there are two competing candidates for the 17th Karmapa. Trinley Thaye Dorje was found by the Shamar Rinpoche who is in charge of a trust set up by the 16th Karmapa for administrating the Kagyu monastery in Sikkim. Ogyen Trinley Dorje is recognised by both the Dalai Lama and the Chinese government and claims right of succession to the Sikkim monastery and procession left by the 16th Karmapa. The Indian Supreme Court has to decide who is entitled to own the Kagyu monastery in Sikkim eventually.⁴²⁸ This implies controversies around the Panchen Lama and the Dalai Lama in the future can be more deleterious, because the Karmapa roughly ranks the third – lower than the “big two” – in Tibetan Buddhist hierarchy of prestige and the Kagyu sector is much smaller than the Gelug sector of the Panchen and the Dalai Lamas. If the Chinese should interfere in face of such controversies, does a “Potala Holy See” really matter? This is the weakest part of Lord Alton’s idea.

6.3 STATUS QUO

Before envisioning constitutional reforms, status quo is also an option especially for the Taiwan case. The incumbent president of the Taiwanese authorities, Ma Ying-jeou declares a “three-no” policy of cross-Strait relations, which is “no unification, no independence, and no military conflict”. He does not support a rapid political unification between the Chinese mainland and Taiwan, neither Taiwanese independence, nor any possibility of using military means (by the PRC side) to change the contemporary equilibrium. Ma Ying-jeou supposes this policy representing the “greatest common divisor” or overlapping consensus of Taiwanese people, because the official polls in the long-run shows “status quo” – in a broad

⁴²⁸ The Supreme Court of India, SLP (C) No. 22903 of 2003, Item No. 41, Court No. 5, Section XIV.

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sense – has most supporters in Taiwan. One of the most reliable public-opinion polls as such is Taiwanese Mainland Affairs Council’s research on attitudes towards unification/independence. In this decade, around 35% of Taiwanese people continuously express their preference of “status quo now” and keep an open attitude towards alternative solutions – either unification or independence. Since Ma Ying-jeou has taken over the presidency, the number of supporters of “status quo indefinitely” is mounting up impressively from 20% to 30% of pollees. If supporters of rapid independence and gradual independence are combined, they cover around 20% of pollees; the number is 10% for those for rapid unification and gradual unification. In Ma Ying-jeou’s calculation the “gradualists” – for independence or unification – nevertheless do not oppose the status quo at this stage, so the overall supporters of status quo, in one way or another, are 85% Taiwanese population thus have definitively marginalised supporters of rapid constitutional change no matter for independence or unification. This is the basis for Ma’s three-no policy that endorses the cross-Strait status quo, and indeed succeeded in appointing him in 2008 election where the pro-independence DPP lost calamitously.

Yet the paradox is that between extremes of “(political) unification” and “independence” there are also infinite possibilities towards which the political pendulum swinging back and forth, and an absolutely stagnant “status quo” never exists. Before Ma Ying-jeou’s presidency, a diplomatic contest between Beijing and Taipei had erupted. Macedonia terminated the diplomatic relationship with Taiwanese authorities in 2001 and recognises the PRC as the solely legitimate government of China, following which Liberia in 2003, Dominica in 2004, Grenada in 2005, Senegal in 2005, Chad in 2006, Costa Rica in 2007, and Malawi in 2008 all shifted their recognition to Beijing. Ma Ying-jeou decides not to challenge Beijing’s authority on the international stage in exchange for Beijing’s abeyance to shut down Taiwanese embassies. This works till now, but in the long-run losing diplomatic recognition probably is fated for Taiwanese authorities. Other significant changes are also in process. Since 2008 the Chinese quango in charge of cross-Strait relations and its Taiwanese counterpart have resumed regular communication in which direct postal, transportation, and trade links between the Chinese mainland

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and Taiwan have been set up. A representative office in the other's territory is also about to be established by both. Most importantly, the Economic Cooperation Framework Agreement signed by both parties on 29 June 2010 is expected by many to bring the two parties into a new era of further integration, at least as regards economics. This is no one-way process, yet it is a stagnant one. To avoid a war, there must be a legal/constitutional deal one way or another between the two sides; the status quo cannot last forever.

For the Hong Kong Special Administrative Region (hereinafter HKSAR) one of the most concerning uncertainties is what the situation will be after fifty-year remaining of "capitalist system and way of life". Article 5 of the Hong Kong Basic Law promises: "The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years."⁴²⁹ Actually Deng Xiaoping himself in a speech to the drafters of the Hong Kong Basic Law said there is no need of change after the fifty-year term so long as Hong Kong will have been stable and prosperous in the period of time and the People's Republic of China per se does not have regime change with the Chinese communists staying in power.⁴³⁰ Deng is politically wise to say so because no one can expect Hong Kong's status quo if there would be a dramatic societal change in Hong Kong or China. The promise was made by the communist leadership in name of the PRC central government; if the one party-state itself would have changed – democratised or returned to a Maoist state – the relation between Beijing and Hong Kong is highly likely to be reconfigured. However, if in fifty years the PRC regime will stand still, Deng's words might count but it is up to the next political generations to decide.

⁴²⁹ The Hong Kong Basic Law, art 5.

⁴³⁰ DENG, *Speech at a Meeting with the Members of the Committee for Drafting the Basic Law of the Hong Kong Special Administrative Region*.

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For Hong Kong society the turning point that matters more is not as far as 2046. The PRC central government has allowed Hong Kong residents to elect the Chief Executive directly in 2017 by universal suffrage instead of an electoral college that makes more complex the representative proportionality, while in 2020 or later the Hong Kong people may elect directly the Legislative Council by universal suffrage too.⁴³¹ The majorities in the current Electoral College for the Chief Executive and in the Legislative Council are supportive to a pro-centre Hong Kong government in opposition to the minority “democrats” who are anti-communists, if not anti-Chinese. In this circumstance the PRC central government may easily be cooperated by the Chief Executive in addressing Hong Kong affairs and by the Legislative Council too at most times. Once the Chief Executive becomes freer from the central government’s influence, disputes surrounding distribution of powers between the region and the centre could emerge and the centre’s reserved power of appointing the Chief Executive may be legitimately undermined since the Chief Executive will be the democratic choice of the Hong Kong people. In that case there will be no arbitrator in the judiciary because the PRC has already given up the jurisdiction of the Supreme Court over Hong Kong and the relation between the region and the centre, which may further deteriorate the disputed matters.

From Beijing’s perspective, the Tibet Autonomous Region is almost perfect so status quo will be sufficient. Yet Beijing also admits that “the Dalai Lama issue” needs to be addressed and the best solution is if the Dalai Lama himself decides to return to Tibet/China as well as accepts a political post in the PRC central government. This is far from emigrated Tibetan people’s expectation. No matter

⁴³¹ Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012, see Instrument 211 available at the Bilingual Laws Information System operated by the HKSAR Department of Justice at <http://www.legislation.gov.hk/eng/home.htm>. Retrieved on 19 May 2011.

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whether the social unrest in March 2008 demonstrated Beijing's Tibet policy has failed or not, at least both parties recognise the Dalai Lama's refuge is a political embarrassment to be corrected. If so, the status quo of Tibet is hardly near perfection at all.

6.4 ALTERNATIVE MODELS

6.4.1 Tibet

Marc Weller recently contends that there are at least three sorts of autonomy: personal, functional or cultural, and territorial. In some Muslim countries the state allows non-believers to practise their non-Islamic religion in private sphere, if there is one, but the Islamic religion remains the legally established faith in society. Other countries may set up a number of public funds or communitarian organisations to take care of entitled ethnic group(s) or to preserve particular culture(s) or life style(s). While most countries still use territorial administration as the autonomous unit, which functions just like the host state although lacking some political capacities or legal competences in providing public goods and consolidating the relation between the unit and the corresponding society that it aims to represent.⁴³² We already have a Tibet Autonomous Region in line with the territorial model. The personal autonomy is generally irrelevant to Tibetan people. There is no "established religion" in China and they are not forced to convert so long as not promoting separatist activities for religion's sake. So at last Weller's trio helps a lot in highlighting the "functional or cultural" model in projecting the autonomous agenda, which may likely turn out to be the best alternative in the context.

We must return to the "Great Tibet" aspiration of emigrated Tibetans for a while. The "Great Tibet" is the territory where emigrated Tibetans demand to establish their genuine autonomy (before getting a chance to move on to sovereign

⁴³² WELLER & NOBBS, *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, pp. 1-13.

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independence, probably). The territory covers all areas inhabited by ethnic Tibetans under control of the People's Republic of China – Chinese claimed “South Tibet”, i.e. Indian “Arunachal Pradesh”, has been excluded by the Dalai Lama who has to be cautious to avoid offending the Indian government. In the latest memo sent by the Dalai Lama's representatives to the Chinese central government, the provincial capital of Xi'ning in Qinghai, i.e. Tibetan Amdo province, is also absent from “Great Tibet”. The city is co-inhabited by Tibetans and a larger number of Mandarin-speaking ethnic Hans and Huis, but once played a historic role in Tibetan history. According to the 2008 memo, the “Great Tibet” comprises all Tibetan autonomous administrations in contemporary China, that are not only the Tibet Autonomous Region but also many Tibetan prefectures and counties in neighbouring provinces. The emigrated Tibetans argue that there is no reason to refuse to merge these “autonomous” administrations into one that will represent and administer all ethnic Tibetans since the PRC already admits the autonomies are established to benefit Tibetans. The PRC refutes the alleged “Great Tibet” will damage other ethnic groups' interests because the imagined administration obviously would promote a Tibetan-first policy while existing Tibetan prefectures and counties are required to balance territorial and ethnic preferences, and the PRC leadership also points out that no Dalai Lama or Lhasa regime had ever administrated the vast land.

As said, the territorial model for autonomous Great Tibet is rootless no matter it is the variation promoted by emigrated Tibetans or another endorsed by a group of Chinese studies scholars, which is to copy Hong Kong's “one country, two systems”. Among them, Michael Davis finds that Article 31 of the PRC Constitution of 1982 allows the state to create “special administrative regions” with separate constitutional systems as the Hong Kong SAR, and he also contends for Tibet, the policy of “ethnic regional autonomy” based on Article 4 of the Constitution is insufficient to accommodate the constitutional aspirations of (immigrated) Tibetan

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people any more, even if it had been before.⁴³³ The crucial point here is still to remove the communist oversight to Tibet, which will be a fundamental change to the system of the Tibet Autonomous Region as well as the People's Republic of China as a whole. The realistic consideration for military capacity and social consequence needs also to be taken. The PRC officials have repeatedly showed their unwillingness to apply "one country, two systems" to Tibet, and the demolishing of the communist infrastructure is a highly unlikely voluntary action of the CPC leadership. A watered-down variation could be to let the communists stay there. Option one is to appoint a couple of communist *amban* from non-Tibetan ethnic groups, such as a Han Chinese Party Chief plus a deputy from Tibet-related smaller ethnoses. The Tibetan government might be localised and nationalised in this option, which roughly is how the Qing Empire addressed Tibet. Another option is to recreate a Tibetan Communist Party as a subsidiary organisation of the CPC, which in Tibet may run some campaigns (if Tibet would have democratised) or prioritise Tibetan interests in partisan and governmental systems. Either will be a way of enhancing subsidiarity but both are fantasies as long as the economic basis of Tibet does not dramatically change in the near future. The entire system of Tibet now completely relies on financial subvention from both the central government and prosperous coastal provinces, so these ideas would probably not genuinely help.

A functional autonomy, however, is a choice that has never been tried. The Chinese "New Left" thinkers try to match the "ethnic regional autonomy" with Austrian Marxists who had envisaged establishing some national associations across the country in parallel with territorial units after socialists' taking over the government.⁴³⁴ They did not succeed but confronted numerous critics from the leftwing of then socialists, e.g. Luxembourg and Lenin. The radicals deem the

⁴³³ DAVIS, *Establishing a Workable Autonomy in Tibet*.

⁴³⁴ This point of view available at Professor Zhiyuan Cui's personal website

<http://cui-zy.cn/Recommended/China/CuiNYUchineseversion.pdf>.

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alleged national associations would encourage division and cleavage within the communist party that is supposed to be solid and united, and there was no need to complicate the then Austrian constitutional system because the socialist government could work out in line with national self-determination what would create a group of sovereign states who could decide for themselves whether or not to reunite in a larger socialist union. The CPC leadership is distant from their Austrian comrades and have faithfully followed the Leninist idea although they did not endorse the union of sovereign socialist states but favoured non-sovereign administrative units mixing up ethnic and territorial management. However, despite the failure of Austrian Marxists, Belgium's sophisticated federal system somehow demonstrates a constitutionally functional autonomy is not impossible. Overlapping the regions and provinces, linguistic communities in Belgium also have administrative offices to provide public service in cultural, educational, and linguistic matters.

If ethnic and administrative boundaries are not the same, there always is a need to adjust rather than to ignore. In 1973 the PRC State Council consigned Inner Mongolia to convene a meeting amongst representatives from Inner Mongolia and the other seven provinces to coordinate Mongolian textbooks publishing for primary and middle schools. In 1975 Jilin province and two others had a meeting for Korean textbooks too. For Tibetans, in 1985 a "Tibetan Textbook Coordinating Committee for Tibet, Qinghai, Gansu, Sichuan, and Yunnan" was convened, which distribute assignments to respective administrations to normalise Tibetan scripts, unify terminology, raise money, etc. In 1990 the National Commission for Education and the National Commission for Ethnic Affairs joined to establish a "Leading and Coordinating Committee for Tibetan Education of Five Administrative Regions" as replacement to the 1985 organisation and the new leading committee is in charge of not only the textbooks but also all significant matters in Tibetan education. The 1990 Committee consists of a deputy minister of the National Commission for Education as its head, a deputy minister of the National Commission for Ethnic Affairs as the deputy head, five deputy provincial governors as the leading team, ten deputy chiefs of provincial educational and ethnic affairs agencies as the coordinating team. The 1990 Committee never weighs much in the PRC system

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because they are merely low ranking deputy officials, nor genuine “Tibetans” in terms of the few in the committee who are ethnic Tibetans. Yet the existence of the legally established organisation could be some warm-up for a functional autonomy for the Tibetan people in cultural, educational, and religious areas. The latest “Working Convention for Tibet” in 2010, which is the fifth in PRC history and indeed the highest leadership in making PRC Tibet policy, for the first time includes Tibetan areas outside the Tibet Autonomous Region in its final report; and emigrated Tibetans have occasionally played down the tone of cultural autonomy. A high ranking official committee or council, some admixture of the 1990 Committee and the 2000 Convention focussing on Tibetan cultural preservation and educational development, could echo the longstanding voice of emigrated Tibetans for “Great Tibet” and symbolise Tibetan unity beyond Tibet proper as a public site. This may in a way satisfy the principle of recognition and simultaneously does not contravene the principle of reciprocity. The functional and cultural autonomy for Tibetan people cannot decrease the interests of any other ethnic groups in the PRC; on the contrary, a vivid and creative Tibetan culture may enhance the common heritage of PRC citizens eventually.

The functional and cultural autonomy for Tibetan people may also lend itself to the solution for two other problems. The first is in relation with the principle of representation. The so-called six million Tibetans in the PRC remain an iceberg in the ocean of Han Chinese population. In the PRC parliament ethnic Tibetan representatives can never reach a significant number. While the situation is better in the Chinese People’s Political Consultation Conference, ethnic Tibetans still cannot veto constitutional change regarding Tibet and Tibetan affairs. The 10th Panchen Lama thought this issue through before his reincarnation, where he conceived a powerfully enlarged National Commission for Ethnic Affairs whose opinion should counterpoise Han Chinese parliamentary majority in initiating and repealing national laws for ethnic affairs. The National Commission for Ethnic Affairs in PRC convention is composed of ethnic minorities with few Han Chinese, which may give ethnic Tibetans a bigger say. This reminds us of Charles Taylor’s discussion on Canadian constitutional reform in face of Quebec nationalism. On the one side, the

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communication between Quebec and other Canadian provinces may enhance the French presence in North America thus reducing the Quebecers' pressure of being surrounded by a more homogeneous English culture – this point is closer to principle of reciprocity; on the other side, Charles Taylor himself suggests the Canadian federation should give Quebec a constitutional veto right and a bigger say to differentiate Quebec from ordinary Canadian provinces that once and again have used their majority blocking constitutional reform to accommodate Quebec within the federation.⁴³⁵ Similarly, the refurbished leading and coordinating committee representing Tibetan areas in all five Tibetan-inhabiting administrative regions in the PRC may be entrusted in representing Tibetans in addressing laws for and merely for Tibetan welfare, and in this case the committee can be given an equal footing with other provinces combined. This sounds far too optimistic at this stage, frankly, so does the next solution we discuss.

The emigrated Tibetans can be divided into three categories. The first group is legal immigrants holding Chinese or other national passports and citizenship that are ethnic Tibetans and can freely attach to respective authorities. The second group is illegal immigrants crossing the border after the 1980s that are criminals as well as nationals in the PRC except they obtain other citizenship later and Chinese immunity before returning to Tibet/China. The third group is Tibetans going along with the Dalai Lama in the 1950-60s that usually have been given asylum in India and many of their descendants have been issued other national passports outside India. One of the most painful experiences “in exile” for Tibetans is migration incompetence. Most refugees are not entitled to travel freely in India with asylum status, and it is extremely difficult for them to go abroad without a national passport, let alone to return to Tibet/China. The Indian government does not issue legal passports or citizenship to the second or third generation exile Tibetans, and the

⁴³⁵ TAYLOR & LAFOREST, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, pp. 140-154.

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future of the one hundred thousand Tibetans is at stake. It is not easy to resume the second generation's PRC citizenship unconditionally and ever harder for later generations born outside Tibet/China. There is a possibility that functional autonomous administration for Tibetans may issue a travel document to those to replace the Indian certificate of identity, which may not be more useful but won't be any worse. This is to urge the PRC state to redefine the responsibility to the Tibetan people, while assorting with the diversified political and social attachments as well. This will be the final reconciliation between emigrated Tibetans and the PRC state.

6.4.2 Hong Kong

For Hong Kong and Taiwan, every "alternative model" inevitably should alter one aspect or others in the original design of "one country, two systems". The logic is: on the one hand the alternative model does not pursue separate sovereignties for China and peripheries so "one country" is acceptable to some degree; on the other hand "status quo" cannot satisfy them in all aspects so there is some need for change. Yet Hong Kong and Taiwan differ. Although there was suspicion that the PRC state would have failed to keep its promise of sustaining Hong Kong's autonomy at the initial stage after the 1997 handover – George Edwards in 1998 remarks there was no "one country, two systems" but "one country, one and one-half systems" because the constitutional praxis had been emphasising the "one country"⁴³⁶ – the past decade has seen a prosperous and generally stable Hong Kong despite the annual protest for enlarging democracy. Few now are seriously attempting to overthrow Hong Kong's constitutionalism; Hong Kong's main political parties including the self-labelled "democrats" in opposition are all supportive for the ideal of "one country, two systems" and the Hong Kong Basic Law. The "democrats" demanding rapid democratisation are often antagonistic and always annoying to the PRC central government, but the implementation of universal suffrage in elections for the Chief Executive and the Legislature has been the CPC leadership's own

⁴³⁶ EDWARDS, *Applicability of the "One Country, Two Systems" Hong Kong Model to Taiwan*.

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words and appears in black letters of the Basic Law. The timing selections, no matter which prevail eventually, will not principally change the system in theory – in practice, a democratically elected Chief Executive is likely more independent from the PRC centre and accountable to the Hong Kong people, but no one could predict this will happen for sure after 2012.

Given that the Hong Kong Basic Law has already set the trajectory, ideas for future change in Hong Kong constitutionalism are few. The most heartfelt and probably fruitful discussion is about the prospective role of the Hong Kong Basic Law Committee in the PRC parliament, which is now an advisory committee for the Standing Committee of the PRC National People's Congress. In previous chapters the unease between the Hong Kong Final Appeal Court and the PRC NPC Standing Committee has been repeatedly visited. In a nutshell, the Hong Kong Final Appeal Court, being entitled to the power of final judgement, obviously prefers to avoid applying for any aid from the NPC Standing Committee in regard to interpreting the Hong Kong Basic Law.⁴³⁷ The Basic Law does authorise Hong Kong courts to interpret, "in adjusting cases", the Basic Law, only save:

If the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region."⁴³⁸

⁴³⁷ LO, P. Y., *Rethinking Judicial Reference: Barricades at the Gateway*, in *Interpreting Hong Kong's Basic Law: the Struggle for Coherence*, (Hualing Fu, et al. eds., 2007).

⁴³⁸ The Hong Kong Basic Law, art 158 s 3.

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However, the Hong Kong Final Appeal Court contrives a formula in applying the provision. While the Court in the famous Ng Ka Ling case declares it is for the Court alone to decide whether there is a provision concerning the responsibility of the PRC centre or the relationship between PRC centre and Hong Kong, or whether there is necessity to request reference from the NPC Standing Committee. The Court's opinion is if Hong Kong courts feel no difficulty in interpreting the Basic Law even those provisions concerning the PRC centre, no reference is needed from the centre through a request of the Hong Kong Final Appeal Court.⁴³⁹ Beneath the doctrinal reasoning is the Court's belief that the NPC Standing Committee as a communist political organ with no judicial neutrality or expertise at all is essentially incompatible with Hong Kong's liberal common law. So far the PRC centre would rather enforce its will straightforwardly, and the NPC as the sovereign organ in China is indeed constitutionally entitled to compel the courts to yield. But a better deportment for the PRC centre may be to respect the Hong Kong or, accurately, common law jurists' way to interpret the law. Chinese academics are talking about establishing a judicial committee in the Chinese parliament as the United Kingdom did – possibly by transforming the Hong Kong Basic Law Committee – and conferring the judicial committee with competence in both PRC and common law to issue judicial references in response to Hong Kong requests, which model is somehow similar to the European Union's praxis in bridging the European Court of Justice and national courts across the Union. This innovation will on the one hand qualitatively change the current constitutional system, and on the other hand create a common law institution in the Chinese mainland. Is this scenario attractive? At least it is in line with all principles abovementioned. The institution may reduce distrust of Hong Kong courts to the PRC centre as well as consolidate Chinese recognition to Hong Kong's particularity and peculiarity; it will help Hong Kong lawyers to secure several seats in PRC parliament as well as facilitate the PRC centre to be conjunctive with Hong Kong legal system, which now has been cut off by the Hong

⁴³⁹ Ng Ka Ling v. The Director of Immigration [1999] 1 HKLRD 315; (1999) 2 HKCFAR 4.

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Kong Final Appeal Court's power of final adjudgement. The only impediment is the further jumbling between PRC legislative and judicial power that can disastrously complicate the system, which, frankly, has already been too abstruse.

6.4.3 Taiwan

It is extremely difficult to replicate the Hong Kong model without modifications in Taiwan. The previous chapters have mentioned that Taiwan remains recognised by around twenty states with the title of "Republic of China"; the Taiwanese military might has declined in face of China's rise, but the Taiwanese authorities may still resist the Chinese People's Liberation Army for a couple of weeks at most and thus make time for the United States to prepare military interference, if at all; most importantly, as Sean Cooney puts it, the Taiwanese authorities have become an accountable government after the democratisation, which must subordinate to the Taiwanese electorate in decision-making, while there is never a democratic and comprehensively accountable Hong Kong government despite the fact that the Hong Kong government serves the Hong Kong residents well.⁴⁴⁰

Yet it is a misunderstanding that the PRC leadership unrealistically wants to clone the Hong Kong model in Taiwan, or thinks the "one country, two systems" ought to apply equally in the two territories. From the start Deng Xiaoping has made it clear that the prospective Taiwanese government shall be entitled to much greater powers after the national unification. Deng Xiaoping himself proposed that Taiwan should maintain its partisan, governmental, and military institutions as well as be provided some high-ranking posts in the PRC centre. It seems in Deng's mind, the Taiwanese authorities must trade international recognition for this, but there was an opinion that Taiwan would be internationally derecognised sooner or later. The updated proposal for national unification from the PRC leadership can be seen in the PRC

⁴⁴⁰ COONEY, *Why Taiwan Is Not Hong Kong: A Review of the PRC's One Country Two Systems Model for Reunification*.

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Anti-Secession Act. Most Taiwanese observers focus on the Article 8 of the Act, which reads: “In the event that the "Taiwan independence" secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity.”⁴⁴¹ For them it is unacceptable that the PRC still does not give up “non-peaceful means” in addressing the problem, since so many decades have gone after the de facto truce across the Strait. However, they probably miss some positive signals in Article 7. The Article 7(2) provides:

The two sides of the Taiwan Straits may consult and negotiate on the following matters:

- (1) officially ending the state of hostility between the two sides;
- (2) mapping out the development of cross-Straits relations;
- (3) steps and arrangements for peaceful national reunification;
- (4) the political status of the Taiwan authorities;
- (5) the Taiwan region's room of international operation that is compatible with its status; and
- (6) other matters concerning the achievement of peaceful national reunification.

The PRC leadership has finally been aware that the “political status of the Taiwan authorities” needs to be settled as the “room of international operation” for Taiwanese people. The simplest answers would be: Taiwan shall become a “special administrative region” as Hong Kong whose government notionally derives from authorisation of the unitary state, while the Taiwanese people may participate in international organisations with a non-sovereign membership as the Taiwanese authorities already do in WTO, APEC, and as the “Chinese Taipei” committee in

⁴⁴¹ The PRC Anti-Secession Act 2005, art 8.

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the Olympics. But Chapter 3 has shown that the Taiwanese constitutional aspirations have gone far beyond the said solution. The PRC leadership hopes “the achievement of peaceful reunification” may be reached “through consultations and negotiations on an equal footing between the two sides of the Taiwan Straits”, but as an accountable government it is in no way the Taiwanese authorities would make a deal with the PRC side without a overwhelming majority in Taiwan endorsing.

The subsequent alternatives all acknowledge Taiwan’s resistance to Hong Kong model that will undermine Taiwan’s international status, which is much higher than Hong Kong. But what they save for Taiwan in alternative proposals may lead to uncertainty in the Chinese response. Neither of the following alternatives has been officially discussed by the PRC state.

The first is “one China, three constitutions” promoted by a Taiwanese academic. Although the Hong Kong model also creates a mini-constitution for the territory, it theoretically remains the outcome of the PRC Constitution that shall be the only constitution in unified China. The idea of “one China, three constitutions” departs from this point, urging the PRC side to recognise there is another separate constitutional system in Taiwan that stems from the 1946 constituent moment in the mainland and thrives in Taiwanese isles. This argument is generally right. When the PRC Anti-Secession Act declares that the civil war never ends, it implies the constituent process is not complete either. The Chinese People’s Political Consultation Conference, originally being the constituent organ, survives but takes no place officially in the Chinese governmental hierarchy. This also reminds us that some jobs remain unfinished and the CPPCC may resume its work again. The idea of “one China, three constitutions” suggests the Chinese people can learn from the European Union. The EU states “pool” their sovereign powers together and have established a unique supranational entity for the benefits of EU citizens. Notionally the Chinese sovereignty processed by the entire Chinese people in both sides of the Strait never splits, so the two sides do not even need to “pool” their powers. The next step is to promulgate the third constitution for the entire Chinese people and finalise the longstanding constituent process starting in the 1940s. The third

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constitution needs not to be a codified document, and probably it will be a “constitutional treaty” between the two sides. The crucial point is the PRC side shall recognise that the Taiwanese constitutional system remains legitimate while the Taiwanese side shall agree to make a political deal for constitutional unification in exchange.

The second alternative can be called a “unification referendum”. The means to realise “one China, three constitutions” is inter-governmental negotiation as PRC Anti-Secession Act suggests. But the second alternative imagines a “company merge process” for futuristic national unification. Whenever the PRC side wants to unify, it needs to make a detailed proposal for Taiwanese people and the Taiwanese authorities shall be constitutionally bound to test the PRC proposal in a territorial referendum. If the proposal is accepted by a majority of the Taiwanese people, the national unification may happen “that very night”; while if the proposal does not pass, the PRC side is still entitled to propose again but there shall be a temporal gap for around ten or more years. The alternative does not allow the Taiwanese people to use referendum to legitimatise de jure Taiwanese independence, but since the “possibility of unification” never disappears, the PRC side shall have no reason to invade Taiwan. It sounds attractive that the second alternative leaves the Taiwanese people the final say as well as reassures the possibility of Chinese unification for the PRC; nevertheless, the question is the “political status of Taiwanese authorities” remains vague.

The third is Taiwanese “Finlandisation”. Bruce Gilley contends:

To understand the evolution of the Taipei-Beijing relationship, it is useful to consider the theory and practice of what has become known as "Finlandisation" in the field of political science. The term derives its name from Finland's 1948 agreement with the Soviet Union under which Helsinki agreed not to join alliances challenging Moscow or serve as a base for any country challenging Soviet interests. In return, the Kremlin agreed to uphold Finnish autonomy and respect Finland's democratic system.

For Taiwan, Bruce Gilley suggests “Taiwan would reposition itself as a neutral power, rather than a U.S. strategic ally, in order to mollify Beijing's fears about the

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island's becoming an obstacle to China's military and commercial ambitions in the region. It would also refrain from undermining the CCP's rule in China. In return, Belling would back down on its military threats, grant Taipei expanded participation in international organizations, and extend the island favourable economic and social benefits.”⁴⁴² The “Finlandisation” removes the obligation of Taiwan to be waiting for eventual national unification. But in any way the Taiwanese people cannot stand side by side with the military presence of the United State in Chinese seas. There is indeed a chance for the PRC side to ignore a harmless political entity off shore, which can be internally sovereign as well as internationally visible in proper name so long as it cannot be a rebellious base for anti-China/anti-communist activities. But the bad news is after the fifty-year KMT anti-communist propaganda and eight-year DPP anti-Chinese education, the Taiwanese people could not easily become PRC-friendly, and the United States’ China/Taiwan-policy is ambiguous to boot. In 2009 a DPP major successfully welcomed the Dalai Lama to pay to visit to Taiwan, which was seen as a betrayal to the reconciliation policy by the CPC. Against this background, the Taiwanese president Ma Ying-jeou concedes that Finlandisation is not an option at this moment.⁴⁴³ It probably is my conclusion too.

6.5 CONCLUSION

Many liberals based on the modernist constitutionalist paradigm envision that a late communist Chinese State is incompetent and incapable of managing antagonistic peripheral societies successfully, and for them the best way to do justice to the politics is to allow self-governing political units to establish states of their own in accordance with liberal democratic ideals. Some may compromise that those small liberal democracies can re-unite in one way or another, say, they can create a

⁴⁴² GILLEY, BRUCE, *Not So Dire Straits*, 89 Foreign Aff. 44, (2010).

⁴⁴³ Ma Ying-jeou, his point of view in Chinese available at

<http://www.nownews.com/2010/01/01/301-2553327.htm>. Retrieved on 2 January 2010.

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federation, or a confederation, or even an international organisation that grants membership to all Sinitic peoples. But the quintessential idea is there should be a symmetric order of liberal peoples regardless of their experience and expectation. This thesis does not exclude the possibility that an order of Sinitic peoples with symmetric liberal democratic government can be a good option, but it seems that prospect does not reconcile with the political situation easily. Chapter 2 has described although the Sinitic people-s, are not integrated into a unitary domestic order, they do not qualify as liberal democratic self-governing entities independent from a host state. The host state, which is not a liberal democracy, survives and thrives against the liberal hypothesis. It is this cognition that sets this thesis apart from the modernist constitutionalist paradigm. Given the existence of the mighty non-liberal host state, there is still the possibility to talk about a just constitutional structure that can accommodate multiple societies for peace and prosperity.

Leaning against John Rawls's theory of "law of peoples", this thesis generates four principles of recognition, representation, reconciliation, and reciprocity to inform Chinese constitutional arrangements to the peripheral societies of Tibet, Hong Kong, and Taiwan. The conception of "constitutional law of peoples" in the normative dimension prescribes related people-s in a constitutional order should put peace on top of other values so long as none is waging war or fails to fulfil a minimised standard of human rights protection and thus provokes serious humanitarian concern. If the peoples are qualified to a decent level of representation or consultation in decision-making, which guarantees they are not only rational but also reasonable, other peoples are not entitled to interfere by military means. Moreover, the "constitutional law of peoples" differs from the "law of peoples" in the principle of reciprocity. The theory of "law of peoples" does not request peoples to aid each other merely because some are in social crisis. But the conception of "constitutional law of peoples" distributes the peoples a heavier burden to assist others because there is a stronger bond among them. As we have seen, a constitutional order, no matter how similar to an international order, does not completely alienate peoples and persons in constitutional terms. But in concrete context, we need balance the four principles in order to do justice to every people in that constitutional order.

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The “constitutional law of peoples” is also a descriptive conception, which attempts to capture some basic attributes of Chinese constitutional law. The first attribute is the PRC central government has already recognised Sinitic peoples are not ordinary administrative divisions, say, Chinese provinces, in Chinese constitutional structure. The Tibetan Autonomous Region is established to carry a Chinese “ethnic regional autonomy” over the Tibetan case. The Hong Kong Basic Law guards Hong Kong’s special status. The PRC central government does not recognise the title or the legitimacy of the Taiwanese authorities, but at least there is cross-Strait negotiation between semi-official agencies on both sides of the Strait. The second attribute is within the same constitutional order Sinitic peoples have to a larger or lesser degree created a separate system of representation or consultation. The *demoi* of Hong Kong and Taiwan both are embodied in an electorate. In the PRC Tibet Autonomous Region, the right to elect or to stand is assigned to residents who are overwhelmingly ethnic Tibetan; in Dharamsala, there is also an emerging democratic institution that will in some measure manifest the Tibetan people’s will and reasonableness. The third attribute is Sinitic peoples are joining in a process of reconciliation. Although not unanimous, political forces among the Sinitic peoples have already become more moderate and tended to accept some constitutional solutions. Finally, the economic cooperation and mutual assistance among Sinitic peoples reflect that the constitutional order is more reciprocal than international relations.

Chapter 5 reveals Chinese constitutional arrangements to Tibet, Hong Kong, and Taiwan are asymmetric by nature. In the PRC Tibet Autonomous Region, the communist leadership has supervised the administration and the Tibetan judiciary is incorporated into a unitary PRC system of judicial courts. This encourages the Tibetan legislature to be the autonomous institution that probably can make a difference. The Tibetan legislature is entitled to enact autonomous regulations and special regulations, which can be different from the PRC parliamentary acts and take care of special demands of ethnic Tibetans. In Hong Kong, the judiciary is constitutionally independent and has been regarded as the most antagonistic institution in the “special administrative region”. This situation may change after the

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Chief Executive and the Legislative Council will be elected by universal suffrage, but the Hong Kong common law courts will continue their disobedience to administrative and political interference from the territorial or the central government. Taiwan, as an alleged de facto state, obviously possesses a great deal of autonomous powers; so the PRC central government's offer to reunify Taiwan is much more generous in comparison with the other two. Chapter 6 has discussed some options of constitutional reform in the future. As we have seen, it is unlikely a symmetric constitutional structure will be created in the Chinese context. The asymmetry of constitutional solutions, eventually and essentially, may defy the traditional constitutional dichotomy of unitary/federal state.

The Sinitic cases can be drawn into a bigger picture. The modernist constitutionalism has been a trinity of nation-state, constitutional discourse, and liberal democracy. The nation-state lays the foundation for a modern constitutional site, which sets up a closed legal configuration for the state with a pivot concept of "popular sovereignty". The *raison d'état* of a state therefore should be to promote the interests of citizens and protect their liberty, which is in contrast to totalitarian regimes that put its own survival in priority over the people. However, the last 30 years are so dynamic that an alternative conception of constitutionalism has emerged in contemporary academia – constitutional pluralism. Neil Walker says: "constitutional pluralism recognises that in the post-Westphalian world there exists a range of different constitutional sites and processes configured in a heterarchical rather than a hierarchical pattern, and seeks to develop a number of empirical indices and normative criteria which allow us to understand this emerging configuration and assess the legitimacy of its development."⁴⁴⁴ The "constitutional law of peoples", in this sense, is a variation of constitutional pluralism, which is rooted in a heterarchy of authorities and attempts to do justice to the constitutional configuration with a series of normative ideals. The uniqueness of this conception, if

⁴⁴⁴ WALKER, NEIL, *Idea of Constitutional Pluralism*, *The*, 65 *Modern Law Review* 317, (2002).

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there is one, is that it attends to a non-ideal situation where the authoritarian state is more powerful than peripheral liberal or decent societies. For peace and the good, the conception designs an asymmetric constitutional structure in which multiple self-governing units as peoples can sustain healthy constitutional relations and abstain from violent conflict. The host state should recognise the self-governing units' peoplehood as long as they are well representing individuals qua members of society, and the peoples must seek reconciliation with the host state if there are sufficient reciprocal conditions, which can persuade them to stay under the same constitutional umbrella with the host state. In this world there are many other developing countries with a low level of democratisation and human rights protection, which are unlikely to become liberal democracies like Western nations immediately. For them, liberal nationalists' union state or European union are theoretic and unapproachable. The "constitutional law of peoples" may thus provide a new way of thinking about their future.

This eventually raises a fundamental question: how to assess China and her constitutional law? The widespread concern in the West is since China will exceed the United States in terms of GDP in one or two generations and recover her millenarian lead, is she a threat to the West and thus a model for the Rest? After the navigation from one provision to another in Chinese constitutional law, this thesis does not predict China will go in that direction. Some traditional comprehensive moral doctrines may inspire peoples and persons in several occasions, but the ever developing political and reasonable pluralism has determined no singular doctrine can monopoly the politics or the constitutional law, no matter it is Confucianism, Buddhism, or Marxism. So there is no authentic "Chinese" model to be set up for the Rest, at least none in constitutional accommodation of, and integration with, peripheral societies. On the other hand if Chinese constitutional reform will be informed by the conception of "constitutional law of peoples", it definitely will be no threat to the West either. It aims at upholding a liberal umbrella for Sinitic peoples, under which they can enjoy peaceful cohabitation and prosperous cooperation.

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This is in essence a “Western” Kantian idea, but it is irrelevant whether this idea derives from a Western philosopher or Mandarin after all. Liberal constitutionalism, if we understand it with liberality, can still be used to gradually tame the dragon.

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