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**“One Country Two Systems”
a Semi-federalism?**

Yuandi Li

Comparative Constitutional Law

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Introduction

Hong Kong, as a part of China's territory since ancient times, was occupied by Britain after the Opium War in 1840. Fifteen years ago, on July 1, 1997, Hong Kong was returned to China and became the Hong Kong Special Administration Region ("HKSAR") under the "One Country, Two Systems" ("OCTS") framework, which allows Hong Kong to retain its previous capitalist system and the way of life for at least 50 years.¹ After Hong Kong's return to China, the unusual combination of the Chinese legal system with Hong Kong's common law system, along with their opposite perspectives regarding values of human rights, self-autonomy, and justice, has provoked a variety of controversies. As the expiration date of the "50 years unchanged" guarantee is approaching (June 30, 2047), it is appropriate and beneficial for us to consider if there is any objective ground for China to reform the OCTS framework, and if there is, how the OCTS framework shall be reformed. By developing a comparative theory of federalism, this paper is aiming to discuss the experiences that the Chinese government could learn from other federal states in reforming the OCTS system.

Part I of this paper introduces different categories of federalism and four main federalism models in the world. Part II examines the constitutional framework of mainland China. Part III explores the constitutional framework of Hong Kong, the history and structure of the OCTS framework. This section also compares the OCTS framework with typical federalist systems. Part IV discusses the impact of the OCTS framework after Hong Kong's reunification, especially the controversies over interpretations on the HKSAR Basic Law. Part V tackles the issue of the reformation of the OCTS framework. In particular, this section comments on the lessons that the

¹ Chan, and Harris. (eds.) *Hong Kong's Constitutional Debates* (Hong Kong: Hong Kong Law Journal Limited, 2005).

Chinese government could learn from other federal states' experiences, and puts forward possible proposals. Part VI provides conclusions gleaned from Parts I, II, III, IV and V.

I. Categorization of Different Federalism

Federalism is a political concept in which a group of members are bound together by covenant with a governing representative head.² The characteristic of any federal system is a hierarchy of governments with a delineated scope of authority exists that each government is autonomous within its own sphere of authority.³

Currently there are around 26 federations in the world.⁴ These federal states diverse greatly and there are different criteria of analysis that can be used to classify these federations.⁵ For example, from the perspective of the rationale of the division of subnational governments, federal systems have their basis in either cultural diversity or territorial division of powers.⁶ Depending on the form of government, federation can be either presidential or parliamentary.⁷ From the perspective on the division of powers, powers are divided between the national and subnational governments in either legislative or administrative mode, according to whether subnational governments make their own laws or just implement and administer national laws. Moreover, federations vary in the degree to which the form of governance and distribution of effective powers are centralized or dispersed.⁸

² Federalism, <http://en.wikipedia.org/w/index.php?title=Federalism&oldid=520519345> (last visited Oct. 30, 2012).

³ Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 *Vand. L. Rev.* 1629, 1630 (2006)

⁴ THOMAS O. HUEGLIN & ALAN FENNA, *COMPARATIVE FEDERALISM, A SYSTEMATIC INQUIRY* 56 (Broadview Press ed. 2006).

⁵ Deborah Jones Merritt, *Three Faces of Federalism: Finding A Formula for the Future*, 47 *Vand. L. Rev.* 1563, 1564 (1994).

⁶ Thomas Hueglin, *supra* note 4, at 57.

⁷ *Id.* at 58.

⁸ *Id.* at 35.

(1) The United States Model

The United States is the first modern federation.⁹ Justice Kennedy has called federalism “the unique contribution of the Framers to political science and political theory.”¹⁰ The United States has a strong ideological commitment to individual liberalism. Federalism is mainly seen as a governmental mechanism in which all powers play their constitutionally assigned parts in promoting individual freedom.¹¹ The United States federalism emphasis on power dispersal instead of the balance of power among different cultures, and hence it is an example of territorial federalism. The United States model is also an example of presidential federalism where the president is both the governing chief executive and the representative head of state. The executive government is independent from the legislative branch, and the judiciary branch exercises the function of judicial review, thus striking a balance between the other two branches. The division of powers in the United States also suggests its legislative federalism characteristic. Historically, the form of division of powers has been called “dual federalism,”¹² with the co-existence of state governments and a federal government, each possessing its own sphere of autonomy and contact with the citizens.¹³ Only the powers given to the Congress are listed in the Constitution, with the assumption that all other powers remain the preserve of the states.¹⁴ Case law has been developed and articulated that the Court should be the institution who draws the line between federal enumerated powers and state sovereignty.¹⁵

⁹ K.C. WHEARE, *FEDERAL GOVERNMENT* 12 (New York: Oxford University Press, 3rd ed., 1953).

¹⁰ *United States v. Lopez*, 115 S. Ct. 1624, 1638 (1995).

¹¹ Thomas Hueglin, *supra* note 4, at 64.

¹² Edward S. Corwin, *The Passing of Dual Federalism*, 36 *Va. L. Rev.* 1, 1(1950).

¹³ Michael S. Greve, *Against Cooperative Federalism*, 70 *Miss. L. J.* 557, 1 (2000).

¹⁴ U.S. CONST. art. I, §8.

¹⁵ See *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *New York v. United States*, 505 U.S. 144 (1992); *United States v. Lopez*, 514 U.S. 549 (1995); and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

(2) The German Model

The German federal system has worked well since it was reestablished in 1949.¹⁶ Because most of the state (German: “Länder”) boundaries were redrawn artificially,¹⁷ the construction of German federalism followed the rationale of territorial federalism. Since unification in 1990, the Federal Republic of Germany has consisted of sixteen Länder: the ten of Länder the former West Germany, the five new Länder of the former East Germany.

The German federation is a system of administrative federalism. Legislative powers were concentrated at the center. Federal government is responsible for most legislation, and the Länder administers the laws on their own responsibility.¹⁸ As a compensation for this loss of autonomous legislative powers, the Länder governments are given the right to codetermine national legislation and implement most of those laws and policies.¹⁹ The federal government can exercise authority only in those areas specified in the German Basic Law.²⁰ For instance, the Basic Law divides the federal government’s legislative responsibilities into exclusive powers,²¹ concurrent powers,²² and framework powers.²³ The exclusive legislative jurisdiction of the federal government extends to areas such as defense and foreign affairs. The concurrent powers are shared by the federal and Land governments in areas such as civil law, public welfare, and land management. In the areas that are covered by framework powers, the federal government may offer general policy guidelines, which the Länder then acts upon by means of specific legislation.

¹⁶ Arthur B. Gunlicks, State (Land) Constitutions in Germany, 31 Rutgers L. J. 971, 998 (2000).

¹⁷ Thomas Hueglin, *supra* note 4, at 7.

¹⁸ Arthur B. Gunlicks, German Federalism and Recent Reform Efforts 3.

¹⁹ Thomas Hueglin, *supra* note 4, at 161.

²⁰ Grundgesetz [Constitution] [GG] art. 30 (F.R.G.).

²¹ *Id.* art. 71 & 73.

²² *Id.* art. 72 & 74.

²³ *Id.* art. 75.

A significant characteristic of the German federalism is the general fiscal equalization among the Länder, which provides equivalent living conditions to all Länder. However, concerns have been raised that such equalization payments hinder the Länder's incentives of promoting economic development.²⁴

(3) The Canadian Model

The construction of the Canadian federation followed the cultural rationale. Federalism was unavoidable in Canada for cultural reasons and the only option for a political settlement between Quebec and English Canada.²⁵ The cultural dividing line runs between Anglophone provinces and the Francophone province of Quebec.²⁶

Canada follows the American approach of legislative federalism. Each level of government is responsible for legislation, implementation, and administration within its respective sphere of jurisdiction. There are two lengthy lists of powers for each level of government with residual powers assigned to Parliament rather than the provinces.

The Canadians chose separate lists of power allocation for different levels of government and added a provision that intended, by contrast, to give residual powers to the central government.

(4) The India Model

India won its independence from the British in 1947. The setup of legislative, executive, and judicial institutions was uniformly prescribed. By means of extraordinary emergency

²⁴ Howard Newcomb Morse, *The Communal Spirit in German Law*, 10 Ga. B.J. 327, 327-34 (1948).

²⁵ Thomas Hueglin, *supra* note 4, at 67.

²⁶ Chad E. Tepper, *The Effects of Quebec's Municipal Merger Law on Montreal: Mega-City or Mega-Blunder?* 11 *Cardozo J. Int'l & Comp. L.* 1127 (2004).

powers, the central government could effectively and unilaterally take over the administration of individual states.²⁷

The national government of India retains strong powers, which allow it to impose presidential ruling and take over certain state governments, and hence the degree of centralization is higher comparing to many other federal states.²⁸ The Congress Party is the only broadly based national party in India, which has dominated the politics and governed India unchallenged. The central government also has control over the economy, setting most economic laws and regulations, leaving state governments with only some discretion in revenue raising and spending.²⁹ Central government's retaining too much control over the economy has been criticized as compromising the benefit that should accrue from state sovereignty under federalism,³⁰ and an intrusion of state independence.

II. The Constitutional Framework of Mainland China

(1) System of Government in Contemporary Mainland China

China is a unitary state with no constitutional division of powers.³¹ The governmental system in the mainland China is designed to achieve a centralized decision making system instead of checks and balances among governmental powers. The country is divided into 23 provinces, 5 autonomous regions and 2 special administrative regions for both legislative and administrative purposes. The governmental organs of state power are primarily made up of the National People's Congress ("NPC"), its Standing Committee (NPCSC), and the State Council.

²⁷ Thomas Hueglin, *supra* note 4, at 137.

²⁸ Sunita Parikh & Barry R. Weingast, *A Comparative Theory of Federalism: India*, 83 Va. L. Rev. 1593 (1997).

²⁹ GREWAL, B.S. (BHAJAN SINGH), *FISCAL FEDERALISM IN INDIA* 15-18 (Canberra ed. Illustrated ed. 1974).

³⁰ *In Search of a Dream*, *The Economist*, September 29th, 2012 (Magazine), at 13.

³¹ YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER* 99 (2nd ed. 1997).

The government adopts unicameral legislature, with NPC as the supreme organ of the state body, exercising legislative and executive powers.³² The Constitution grants the people's congresses of provinces and municipalities to adopt local regulations, on the condition that these local regulations shall not contravene the Constitution and the law.³³ As provided by the Constitution, people exercise their supreme power through the NPC,³⁴ which, however, is merely a symbolic right as in reality people only have extremely limited influence over its composition. It is customary to describe the NPC as a rubber stamp of decisions made by the State Council and the CCP. As a large body with around 3000 representatives, NPC only meets for two weeks annually, and its main role is to ratify bills proposed by state authorities rather than to engage in detailed legislative work. NPCSC, the permanent body of NPC,³⁵ with the number of members at around 159³⁶, passes and interprets laws in China.³⁷ In addition to exercising the legislative power, the NPC and NPCSC also enjoy supervisory power. The State Council, the Supreme Court and the Supreme Procuratorate are all appointed by the NPC, reported to and are responsible to the NPC. For example, the NPC can elect or remove certain top officials, approve work reports of the Supreme People's Court and the Supreme People's Procuratorate.

The State Council is the chief administrative authority of China and the primary source of legislative bills and statutes.³⁸ The Premier of the State Council submits proposals for the organization of the Council into ministries and commissions for the approval of the NPC or its Standing Commission. It has the power to establish agencies directly under itself for specialized

³² Xianfa Art. 57 (1982) (P.R.C.).

³³ Xianfa Art. 22 (1982) (P.R.C.). Also, the Organic Law of the Local People's Congresses and Local People's Councils of the PRC, adopted by the First Session of the First NPC on 21 September 1954.

³⁴ Xianfa Art. 2 (1982) (P.R.C.).

³⁵ Xianfa Art. 65 (1982) (P.R.C.).

³⁶ The Website of the National People's Congress (Nov. 29, 2012), http://www.npc.gov.cn/huiyi/cwh/1129/node_19380.htm

³⁷ Xianfa Art. 67 (1982) (P.R.C.).

³⁸ Xianfa Art. 85 & 89 (1982) (P.R.C.).

tasks, and the Hong Kong and Macau Affairs Office is one of these specialized bodies.³⁹ The State Council plays a crucial role in making laws. Most of the legislative bills submitted to the NPC or its Standing Committee are proposed and drafted by the State Council.

Despite the above, it is impossible to understand the Chinese government and its relation with Hong Kong without knowing the influence of the Chinese Communist Party (CCP). China is a single party totalitarian dictatorship regime, in which, from 1949, the CCP has been dictating the government of China for 63 years. In the preamble of the Party Constitution, it is emphasized that the Party has the primary role in directing and guiding policies and administration of the country as well as in controlling the armed forces.⁴⁰ On all levels of governmental institutions, the CCP committees maintain a vital role. The Party controls all state organs, and such control also extended to non-state sectors, such as employment and cultural activities.

(2) The Judiciary in Mainland China

The judicial body of mainland China is composed of the Supreme People's Court and various lower level courts. The Supreme People's Court is the highest court in mainland China. The Supreme People's Procuratorate is the highest agency responsible for both criminal prosecution and investigation in mainland China. Courts in mainland China cannot review legislation to ensure conformity with the Constitution.⁴¹ Although the Constitution acknowledges the independence of the judiciary, given the political realities of China, the judiciary system are always entangled with or even directed by the CCP's "guidance" and control. While the Constitution provides the basic structure of government among other things, in practice it serves

³⁹ Zuzhifa Art. 11 (1949) (P.R.C.).

⁴⁰ The latest version of the Constitution of the Communist Party of China, adopted in 1992.

⁴¹ ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF REPUBLIC OF THE PEOPLE'S REPUBLIC OF CHINA 46 (1992).

merely as a facade for the Party, and conducts by the Party cannot be reviewed or even disputed. Judges of the people's courts are appointed by the people's congress at the same level. The courts' finance is controlled within the hands of local governments. The Supreme People's Court can only interpret national law regarding the application of laws, and such interpretation is subject to the NPCSC's interpretation.

The current political realities and highly centralized Communist control are likely to affect the central authorities' attitude towards Hong Kong. On the other hand, these same factors inevitably led to and are still causing Hong Kong people's profound mistrust of the central government.

III. Constitutional Framework of Hong Kong under the “One Country Two Systems” Principle

This section will discuss the historical background of the OCTS framework before Hong Kong's reunification with PRC, the current political and legal systems in Hong Kong, and the subsequent impact from the imposition of the OCTS framework. To illustrate the subsequent controversies after the reunification, this sector will focus on the controversies over the interpretation of the Hong Kong Basic Law.

The constitutional framework of Hong Kong involves two levels of institutional relationships: a political system within Hong Kong itself and the central-regional relationship between Hong Kong and mainland China. The OCTS framework is the political system that connects Hong Kong with mainland China and was first proposed by Deng Xiaoping in the early 1980s.⁴² This mode was originally designed for resolving the Taiwan issue, but was firstly put into practice in Hong Kong and Macao. In the proposal, Deng suggested that there would be

⁴² Deng Xiaoping (1904-1997) was the politician and reformist leader of the Communist Party of China who led China towards a market economy.

only one China, but certain regions such as Hong Kong, Macau, and Taiwan, could have their own capitalist economic, political, and judicial systems. The rest of China retains the socialist system.⁴³

(1) The Sino-British Joint Declaration

The Sino-Britain Joint Declaration is a pre-condition of the OCTS principle in Hong Kong. Before Hong Kong's return, the PRC and the United Kingdom issued a Joint Declaration, which laid the foundation for the OCTS principle and the subsequent enactment of the Hong Kong Basic Law. In the Joint Declaration, signed by the two governments on December 19th, 1984 in Beijing, the PRC government declared its decision to resume the exercise of sovereignty over Hong Kong starting from July 1st, 1997.⁴⁴ Taking into account the history and realities of Hong Kong, the PRC government determined to establish a Hong Kong Special Administrative Region (HKSAR) in accordance with Article 31 of the Chinese Constitution.⁴⁵

A critical principle that was agreed upon in the Joint Declaration was the OCTS principle. "One country" stands for Chinese sovereignty as a whole. It also implicates that Hong Kong as a special administrative region should show its patriotism to the motherland. "Two systems" represents socialism in the mainland and capitalism in the HKSAR, which indicates that the HKSAR would not practice socialist system, and could retain its capitalist system and its way of life for a period of 50 years until June 30, 2047. Under the OCTS framework, the HKSAR will enjoy a high degree of autonomy, except with respect to foreign and defense affairs which are the responsibilities of the central authorities. For instance, HKSAR will be vested with

⁴³ Joseph R. Crowley Program, Tenth Annual Philip D. Reed Memorial Issue Report: One Country, Two Legal Systems? 23 *Fordham Int'l L. J.* 1, 18 (1999).

⁴⁴ Joint Declaration on the Question of Hong Kong, Sept. 26, 1984, Gr. Brit.-P.R.C., 23 *I.L.M.* 1366 [hereinafter Joint Declaration]. The Joint Declaration was ratified by the parties and came into force on May 27, 1985.

⁴⁵ Xianfa Art. 31 (1982) (P.R.C.).

independent executive, legislative and judicial powers, including final adjudication of local issues; the government of HKSAR is composed of local inhabitants, and the members of the legislature of the HKSAR are elected by Hong Kong people; the financial and trade systems of the HKSAR remain separate from those in the mainland, and Hong Kong dollars continue to be used as the currency in Hong Kong; HKSAR does not need to pay any tax to the mainland government. HKSAR is also authorized to use its own regional flag and emblem, to administer its own system of entry and exit controls on persons, to preserve its separate customs, and to sign international agreements relating to non-sovereign business. In addition, Hong Kong people are entitled to preserve their own lifestyle, and rights of freedom and private property will be protected by law.

(2) The Hong Kong Basic Law

The OCTS framework has been implemented through the Basic Law of HKSAR.⁴⁶ As the constitutional document of the HKSAR, the Basic Law was an enactment by the NPC in 1990 and went into effect right after Hong Kong's reunification with PRC. Drafted in accordance with the Joint Declaration, the Basic Law stipulates the basic policies of the PRC towards the HKSAR and establishes the foundation of the mainland-HKSAR relationship. Although the Basic Law is frequently described as a "mini constitution" or the "constitutional document of Hong Kong",⁴⁷ it is different from other constitutions in that it is a formal delegation of autonomy by a central government to a special administrative region, not self-authored by independent and sovereign people.⁴⁸ The Basic Law of HKSAR is a constitutional-like document that is stuck in an awkward position: the Basic Law tries to function in a common

⁴⁶ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted by the National People's Congress on April 4, 1990, 29 I.L.M. 1511 (1990) [hereinafter HK Basic Law].

⁴⁷ Ghai, *supra* note 31, at 137.

⁴⁸ Owen Fiss, *Hong Kong Democracy*, 36 Colum. J. Transnat'l L. 493, 497 (1998).

law legal system and a democratic society, but to a certain and increasing high degree, it has to be subjected to the influence from a completely different legal and political system.

(3) The Government of HKSAR

Under the Basic law and the OCTS principle, HKSAR retains its former colony's political system, a separation of powers among the three traditional branches of government. The HKSAR government is financially independent of the central authorities. The government consists of the Chief Executive, who is also the Head of the government, Executive Council, Department of Finance, Department of Justice, and various bureaux, divisions and commissions.⁴⁹ The affairs of the government are decided by the secretaries.⁵⁰ The Chief Executive is elected by an Election Committee instead of through universal suffrage.⁵¹ The Executive Council, an indispensable institution of the government and described as an organ that assists the Chief Executive in policy-making, makes decisions on matters of public policies, the introduction of bills to the Legislative Council and the drafting of legislation. The Legislative Council, described as the legislature body of the HKSAR,⁵² enacts, amends, and repeals laws in accordance with the provisions of the Basic Law.⁵³

(4) The Legal System in the HKSAR

The Basic Law stipulates that the HKSAR “shall be vested with independent judicial power,”⁵⁴ and the HKSAR courts should exercise the powers of final adjudication.⁵⁵ Since its

⁴⁹ HK Basic Law, art 60.

⁵⁰ Government of Hong Kong, http://en.wikipedia.org/w/index.php?title=Government_of_Hong_Kong&oldid=515949803 (last visited Nov. 4, 2012).

⁵¹ HK Basic Law, art. 45, Annex I.

⁵² Id. at art. 66.

⁵³ Id. at art. 73(1).

⁵⁴ Id. at art.19.

return, the HKSAR has had its own separate judicial system based on British common law tradition, and according to the Basic Law, the PRC laws do not apply in Hong Kong unless listed in Annex III of the Basic Law.⁵⁶ Moreover, HKSAR courts may not hear cases concerning “acts of state such as defense and foreign affairs.”⁵⁷

With respect to the judicial system, the general principle is that HKSAR courts continue to perform the roles they had before the return. HKSAR courts are to adjudicate cases in accordance with the Basic Law, Hong Kong local law, and the common law.⁵⁸ The HKSAR courts are made up of the Court of Final Appeal (“CFA”), High Court, District Courts and other special courts. As provided by the Basic Law, a bilingual court system was put in place, in which Chinese, English or both can be used.⁵⁹ The CFA has the power of final interpretation of all laws in force in the HKSAR. However, its power of interpretation with regard to the Basic Law is limited as it could only interpret Basic Law provisions that “are within the limits of the autonomy of Hong Kong.”⁶⁰ CFA’s interpretative power is also not exclusive because such power is shared with the NPCSC by virtue of Article 158 of the Basic Law.⁶¹ This sharing of interpretative power has caused controversies which will be further discussed in Part IV.

⁵⁵ *Id.*

⁵⁶ “The following national laws shall be applied locally with effect from 1 July 1997 by way of promulgation or legislation by the Hong Kong Special Administrative Region: Resolution on the Capital, Calendar, National Anthem and National Flag of the People’s Republic of China; Resolution on the National Day of the People’s Republic of China; Order on the National Emblem of the People’s Republic of China Proclaimed by the Central People’s Government Attached: Design of the national emblem, notes of explanation and instructions for use Declaration of the Government of the People’s Republic of China on the Territorial Sea; Nationality Law of the People’s Republic of China; Regulations of the People’s Republic of China Concerning Diplomatic Privileges and Immunities.

⁵⁷ HK Basic Law art. 19.

⁵⁸ *Id.* at art. 84.

⁵⁹ *Id.* at art. 9

⁶⁰ *Id.* at art. 158.

⁶¹ Art. 158: 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

(5) A Comparative Approach to Federalism and the OCTS Framework

Deng Xiaoping, the proposer of the OCTS, has been quoted as saying, “the design of One Country Two Systems does have some characteristics of federal system, but we cannot call it federalism because it can be easily interpreted as ‘two Chinas’ or ‘one and a half Chinas’ if we do.”⁶² No matter what this obscure statement means, it seems clear that the chief architect agrees that the OCTS principle shares some similarities with federalism.

Similar to federalism, the OCTS framework is a constitutional arrangement under which a regional government enjoys autonomy with regard to a specified range of domestic affairs.⁶³ So has the high degree of autonomy of Hong Kong and Macau under the OCTS framework transformed PRC from a unitary state into a semi-federal state? The answer probably is no. While it is true that the mainland-HKSAR relationship resemble a type of federal arrangement on some superficial level, and the HKSAR is in many ways even more autonomous than federal states in some federations,⁶⁴ the degree of autonomy that a subnational region enjoys does not by itself determine the nature of a country’s system. In federal states, subnational regions share sovereignty with the central government and the subnational regions have powers that cannot be unilaterally revoked by the central authorities.⁶⁵ In addition, a codified constitution is an essential part of a federal system, because it provides a reference and guarantee for the division of powers as agreed to among the members of a federation. By contrast, the formula for division of power of the mainland-HKSAR relationship is not entrenched in the Constitution of China. Although

provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region.

⁶² FAN ZHONGXIN, ONE COUNTRY, TWO SYSTEMS AND TRANS-CENTURY CHINA 181 (Hong Kong Culture & Education Publishing Ltd, 1998).

⁶³ MODELS OF AUTONOMY (Yoram Dinstein ed., 1981); HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATIO (1990).

⁶⁴ E.g. India, South Africa, Germany; YASH GHAI, A COMPARATIVE PERSPECTIVE, IN HONG KONG’S BASIC LAW: PROBLEMS AND PROSPECTS (Peter Wesley-Smith ed., 1990).

⁶⁵ E.g. in the United States, power is shared between the U.S. federal government and the U.S. states.

the Basic Law of HKSAR vaguely addresses the power allocation between the central government and HKSAR, the provision can be unilaterally amended or even revoked by the central government. Therefore, the reality is that, no matter how much autonomy that the HKSAR appears to enjoys, its powers are derivative instead of independent and legally and politically guaranteed and it can only exercise powers that the central government chooses to delegate.

There are other key differences between federalism and the OCTS framework. Unlike most federal states,⁶⁶ no national Supreme Court exists under the OCTS framework that could arbitrate and resolve jurisdictional disputes between the central government and the HKSAR. The highest authority for the interpretation of powers division in the mainland-HKSAR relationship is the NPCSC, a pure political institution rather than a legal one.

Furthermore, federalism is based on the implicit assumption that subnational governments within a federal system are more or less equally sized and equally influential as to national policies.⁶⁷ Under the OCTS theory, however, there are only two special administrative regions in China, and the size and population of mainland is substantially disproportionate as compared to Hong Kong and Macau.⁶⁸ In most federal states, residents of different subnational regions are able to travel from region to region without restrictions. On the contrary, the mobility of population between mainland and the HKSAR is restricted by the “Two-way

⁶⁶ E.g. United States, Canada, and Australia.

⁶⁷ Roger D. Congleton, *Asymmetric Federalism and the Political Economy of Decentralization*, George Mason University (2006).

⁶⁸ The total area of mainland China is about 8732 times larger than HKSAR. The amount of population of mainland China is about 192 times larger than HKSAR.

Permit,⁶⁹ which is issued to mainland Chinese as entry and exit travel document for the purpose of travel to HKSAR.

IV. Impact of the OCTS framework after Hong Kong's Reunification

(1) The Irony of the OCTS Framework

The central government of the PRC described the OCTS framework as “the best solution to the Hong Kong’s historical issues and the best institutional arrangement for the long-term prosperity and stability of Hong Kong after its return to the motherland.”⁷⁰ Granted, the OCTS framework is an unusual and unique instrument. However, as a framework operating at the intersection of two completely opposite legal and political systems, the OCTS framework is full of ironies. First of all, the handover of Hong Kong is a great complement from the PRC to Britain, and PRC has shown keen hostility towards British’s ruling in Hong Kong; on the other hand, the OCTS preserves the colony’s system established by the UK. More significantly, while the Basic Law of the HKSAR appears to be seeking and maintaining a political system that values human rights, free elections, accountability and justice, the validity of the Basic Law depends on a tightly controlled authoritarian system dictated by the CCP, whose powers, as demonstrated repeatedly in mainland China, trump almost everything certainly including the rule of law. To sum up, while the central government appears to be providing the HKSAR with a high degree of democracy and liberty that the Hong Kong people cherishes, the central government itself, however, believe in neither of these values.

⁶⁹ People's Republic of China Exit-Entry Permit for Travelling to and from Hong Kong and Macao, (Chinese: 中华人民共和国往来港澳通行证), colloquially known as a Two-way Permit, (Chinese: 双程通行证), are issued to mainland Chinese as entry and exit travel document for purpose of travel to Chinese Special Administrative Regions of Hong Kong and Macau. Bureau of Exit and Entry Administration of Chinese Ministry of Public Security of the People's Republic of China is responsible for the issuing, and exit endorsements of Two-way Permits.

⁷⁰ Chinese President Hu Jintao delivers a speech at the swearing-in ceremony of the fourth-term government of the Hong Kong Special Administrative Region (HKSAR) in Hong Kong, south China, July 1, 2012.

The alleged general objective of the OCTS framework is to strike a balance between adhering to the “one country” principle and respecting the differences of the “two systems”, between upholding the authority of the central government and ensuring a high degree of autonomy of the HKSAR, and turn the HKSAR into an international metropolis with “economic prosperity, political democracy, and social harmony.”⁷¹ If something sounds too good to be true, it probably is. The objective of maintaining structural and political democracy would not be accomplished as long as the central government has unlimited authority over the HKSAR. Without political structural democracy, the central government’s objective of “harmonious society” would not be achieved as well.⁷² The PRC government claimed that resuming the exercise of sovereignty over Hong Kong “fulfilled the long-cherished common aspiration of the Chinese people for the recovery of Hong Kong”.⁷³ However, the Hong Kong people apparently do not agree with this claim. Let alone Hong Kong people’s long-existing fear, anger and distrust towards the CCP, the Tiananmen Square massacre, that just occurred a few years before Hong Kong’s reunification, profoundly diminished Hong Kong people’s trust on the central authorities and any good will, if any, towards the CCP. Since the handover, as social and political stresses mount and the influence from the CCP increases, Hong Kong people have been becoming increasing cynical and anxious and hold countless protests against the central government every year.

The OCTS formula has become inefficient and ineffective in meeting the many political and economic needs and challenges faced by the mainland and Hong Kong today. The

⁷¹ Id.

⁷² The phrase Socialist Harmonious Society (Chinese: 和谐社会), often shortened to Harmonious Society, is a socio-economic vision that is said to be the result of Chinese leader Hu Jintao's signature ideology of the Scientific Development Concept.

⁷³ HK Basic Law, Preamble.

framework is too complex due to the mainland's and HKSAR's completely different political, legal, and social systems and the central government's lack of accountability and transparency. The political discretion and authority retained by the central government substantially compromise the qualities of the OCTS framework.

(2) Tip of the Iceberg: Three Illustrations of the OCTS Dilemma

Fifteen years after HKSAR's reunification, the gulf separating people in the former British colony and those in the mainland appears to be widening. Hong Kong people, according to a recent opinion poll,⁷⁴ now have less trust in the central government than at any time since the 1997 handover. Frictions between Hong Kong residents and mainlanders have risen sharply. This section will illustrate the impact of the OCTS framework by examining three main controversies between the mainland and HKSAR that arose after Hong Kong's handover. These controversies are examples that reveal how the HKSAR took steps to limit the central government's authority over the HKSAR's society and courts. The third controversy will be examined in further details, which illustrates how the CFA has contributed to shaping the constitutional relationship between the CCP dictated system in the mainland, and Hong Kong's tradition of judicial independence and the rule of law.

(i) Protest Against the “National Education”

The most recent controversy in the mainland-HKSAR relationship is Hong Kong people's hunger strike against the patriotic education. The controversies stemmed from central government's intent to intrude one most fundamental aspects of Hong Kong people's daily life--- school education. The “National Education” plan has been introduced in 2003, when officials in

⁷⁴ The University of Hong Kong, Public Opinion Programme, press release on June 19, 2012. <http://hkupop.hku.hk/english/release/release936.html#5>

the central government, all of whom, at least officially, equate patriotism with supporting or even loving the CCP, began worrying about and questioning whether Hong Kong people were patriotic enough. What ignited the recent fury was a textbook titled “The China Model” which was set to be provided to students in October 2012. The sections in the book on modern history are a crude rehash of CCP propaganda, omitting any mentioning of the Tiananmen Massacre or the Cultural Revolution, and extolling the virtues of one-party rule with statements like this: “multiparty politics could victimize people, whereas concentrated political power creates a selfless government and stable society.”⁷⁵ The alleged purpose of the “National Education” program is to promote Hong Kong students’ greater awareness of and identification with the motherland. In September 2012, tens of thousands of Hong Kong people gathered on the streets to protest against the educational or, as many Hong Kong as well as mainland people call it, brain-wash program. After weeks of protests, the Chief Executive of HKSAR, succumbed to the pressure and announced that the program would not be imposed in schools. This incident shows how much Hong Kong people want to prevent the central government’s involvement and influence in the areas that supposed to be governed by the regional government and in aspects relating to people’s private lives.

(ii) Universal Suffrage

Universal suffrage is a democracy-related issue that many Hong Kong citizens became concerned about after the reunification. The central government has given its blessing that Hong Kong may elect the fifth Chief Executive through universal suffrage in 2017. Until 2017, HKSAR's Chief Executive is chosen by an Election Committee composed of 1200 members,

⁷⁵ “The China Model” was produced by the Hong Kong National Education Services Center, a government-funded organization that seeks to promote greater knowledge and exposure to mainland Chinese culture and history to Hong Kong’s youth.

most of whom have ties to the central government, as a measure to ensure that the CCP plays an important role in the election.⁷⁶ In the election, the Election Committee first decides on the nomination of candidates and the final appointment would be made by the central government.

Since the handover, Hong Kong people have been demanding their rights to universal suffrage. While Article 45 of the HKSAR Basic Law stipulates that the Chief Executive should be elected by universal suffrage as an eventual goal, it also provides that the election should move towards universal suffrage in accordance with the principle of “gradual and orderly process”.⁷⁷ The vagueness of the term of “gradual and orderly process” suggests that issue of when and how the universal suffrage would be achieved remains largely open and controversial. Under the Basic Law, election laws could be amended to allow for universal suffrage as early as 2007.⁷⁸ However, on April 6, 2004, the NPCSC issued an interpretation of the Basic Law, stating that the electoral law could be amended only if the NPC approved the amendment proposal. On April 26, 2004, the NPCSC denied the possibility of universal suffrage in 2007.⁷⁹ In 2007, the central government decided that the election of the fifth Chief Executive in the year 2017 may be implemented through universal suffrage. The problem, as the democrats in the HKSAR see it, is that the central government has never defined what universal suffrage means. Suspicions are widespread and strong that the central government will insist on maintaining some part of the current political system in order to ensure that outspoken critics of the CCP have no chance of being elected as the Chief Executive.⁸⁰

⁷⁶ HK Basic Law, Annex I.

⁷⁷ Id. at art. 45.

⁷⁸ Id. at Annex. 1, Sect. 7.

⁷⁹ On 26 April 2004, the NPCSC at its 9th session of meeting adopted a Decision, which rejected universal suffrage in both 2007.

⁸⁰ Banyan: Post-merger integration, *The Economist*, Oct 11th 2012 (Magazine).

Undoubtedly, central government's postponing the universal suffrage disappointed and even enraged Hong Kong people. They thought they would have the power to decide their own future but, from where the city stands today, central government's influence is so strong that the promise of universal suffrage appears more like a dream than a reality.

(iii) The “Right of Abode” Case

As stated in Part III, interpretation of the HKSAR Basic Law is complicated by the fact that it is a national law of the PRC implemented in a common law system. After the return, the HKSAR courts had been struggling with the challenges of finding their place in the OCTS framework and in HKSAR's judiciary development. Some provisions in the HKSAR Basic Law are obscure, making further interpretations necessary. The “interpretation issue” has led to plenty of controversies. The controversies over the right of abode have highlighted the dispute over the proper interpretation of the HKSAR Basic Law.

Before getting into the CFA's ruling on *Ng Ka Ling*, it should be noted that while generally, HKSAR courts may interpret provisions in the Basic Law, the courts must seek an interpretation of the provision from the NPCSC, and shall follow such interpretation, if the provision in question concerns affairs which are the responsibility of the central government, or relation between the central government and the HKSAR.⁸¹

*Ng Ka Ling v. Director of Immigration*⁸² centers on an immigration ordinance that limited the right of abode to certain groups of children of Hong Kong residents.⁸³ In the complaint, the plaintiff children claimed their constitutional right of abode in Hong Kong, alleging that the

⁸¹ HK Basic Law, art. 158.

⁸² *Ng Ka Ling v Dir. of Immigration*, [1997] HKLRD 1081, [1997] 3 HKC 64.

⁸³ *Ng Ka Ling*, 1 H.K. Rep. & Dig. at 328-330. E.g. the children who were born on the mainland to women whose husbands were Hong Kong permanent residents living in Hong Kong.

ordinance was in contravention of Article 24 of the HKSAR Basic Law.⁸⁴ When CFA accepted the appeal from the lower court, a preliminary issue surfaces which is whether the nature of the case triggered Article 158's requirement for a Hong Kong court to seek an interpretation from the NPCSC.

The CFA believed that there is no need to seek an interpretation from the NPCSC. Although the CFA recognized that right of abode controversy was "arguably relevant" to affairs which fall within the scope of responsibilities of the central government or to the relation between the central government and the HKSAR, it believed that the controversy was "predominantly" a matter of local concern and hence fell within its jurisdiction of interpretation.⁸⁵ In its decision, the CFA held that it was unnecessary to solicit an interpretation from NPCSC⁸⁶ and invalidated the immigration ordinance as repugnant to Article 24 of the Basic Law.⁸⁷

The CFA's ruling bothered the HKSAR government because it would open Hong Kong to a flood of 1.6 million mainland immigrants,⁸⁸ imposing social and economic burden on the HKSAR. The Chief Executive of the HKSAR referred the case to the NPCSC and requested a clarification of the true legislative intent behind Article 24 of the HKSAR Basic Law.⁸⁹ In response to the request, the NPCSC provided an interpretation of Article 24, declaring that the CFA had failed to comply with Article 158's requirement to seek an interpretation from the central authorities, because the right of abode directly affected the central government's policies

⁸⁴ Art.24 of the HK Basic Law defines classes of people who are considered as permanent residents of the HKSAR.

⁸⁵ Ng Ka Ling, 1 H.K. Rep. & Dig. at 328-330.

⁸⁶ Id. at 345.

⁸⁷ Id. at 345-348.

⁸⁸ Maria Loventime U. Estanislao, Note, Right of Final Adjudication in Hong Kong: Establishing Procedures of Constitutional Interpretation, 1 Asian-Pac. L. & Pol'y J. 10, 16 (2000).

⁸⁹ Tung Chee-Hwa, Report on seeking assistance from the central people's government in solving problems encountered in the implementation of the Basic Law of the HKSAR, in Hong Kong's Constitutional Debate: Conflict over interpretation 474, 477 (2000).

on the travel privileges of mainland citizens.⁹⁰ Accordingly, the NPCSC believed that the case had a bearing on the relation between the central government and the HKSAR, which made it improper for the CFA to resolve the dispute and interpret the Basic Law independently.⁹¹

Unsurprisingly, the Chief Executive's decision to seek interpretation from the central authorities, and the NPCSC's reversal of CFA's decision had sparked a crisis in the HKSAR and provoked a great deal of consternation over the fate of the Hong Kong courts' independence. Critics were concerned that if the NPCSC was to exercise its interpretation power frequently, the judicial autonomy of HKSAR courts would be severely hampered. Fortunately, so far the NPCSC has practiced a degree of self-restraint in exercising its interpretation power. From the handover to this date, the NPCSC had exercised its interpretation power five times, and only on two occasions did it act on its own initiative. The other three interpretations were all issued in response to the HKSAR's requests.⁹²

As much as it may be explained as an unwillingness to interfere with the judicial independence supposedly enjoyed by the Hong Kong courts, the NPCSC's refraining from exercising its interpretation power more or less showed its incompetence in solving legal issues in the context of common law system. As shown in NPCSC's interpretations in *Ng Ka Ling* and other previous cases,⁹³ the NPCSC used disappointingly vague language and reasoning in all of

⁹⁰ Id.

⁹¹ Id. at 482.

⁹² The two occasions the NPCSC interpreted the Basic Law on its own initiative: (1). February 1997: the NPCSC ruled that 24 colonia-era ordinances contravened the Basic Law; (2). 2004: Universal suffrage in 2007 and 2008. The three occasions the NPCSC interpreted the Basic Law in response to HKSAR's requests: (1). 1999: the right of abode issue; (2) 2005: the term of the new Chief Executive after the original Chief Executive resigned; (3) 2011: *FG Hemisphere Associates LLC v. the Democratic Republic of Congo* concerning whether Hong Kong has a qualified state immunity rule or an absolute state immunity rule.

⁹³ After the CFA's decision in *Director of Immigration v. Chong Fung Yuen*, [2001] 2 H.K.L.R.D. 533 (C.F.A.), a spokesman of the NPCSC reported press statement pointed out that CFA's decision was "not consistent" with the NPCSC's prior interpretation, and "express concern" about the matter. However, no particular interpretation on the issue was issued by the NPCSC, even the HKSAR government had so requested.

its interpretations. When the NPCSC overruled the HKSAR courts' decisions, it did not address the specific issues in the cases, nor did it provide any legal reasoning for its interpretations. Clearly, in interpreting the Basic Law, the politician-filled NPSCS did not purport to act and was inherently incapable of acting, as a judicial body. The NPCSC's lack of necessary legal specialties and incapability in issuing more detailed and persuasive interpretations, among other things, could be a key reason for the NPCSC's passive approach in the judicial area.

V. Possibility and Constructive Advices for Reforming the OCTS Framework

(1) The CCP does have Incentives to Reform

From 1997 to 2012, Hong Kong has been returned to the PRC for 15 years. A realistic question arises as the "50 years without change" deadline is approaching: what would come next? Most people believe that the CCP is unlikely to adopt any framework or system comparable to federalism, because the federalist restrictions on the central government go against CCP's interests on the deepest levels. However, the CCP does have strong incentives in reforming the current OCTS arrangements for the sake of HKSAR's social stability and economic prosperity and, most importantly, for the sake of maintaining its dictatorship in mainland China. The increasing controversies and conflicts between the mainland and the HKSAR without a doubt disturb the central government. Social stability is critical to maintaining a well-functioning market and society in Hong Kong and more importantly is quintessential to CCP's efforts to retaining its status as the apparently legitimate ultimate ruler over Hong Kong and the mainland. Although there may be other ways to solve these conflicts than reforming the OCTC framework, including the appointment and removal of the HKSAR courts judges, amending the HKSAR Basic Law, or in the worst scenario, applying forces, these methods would harm the economic

prosperity and social stability of the HKSAR, which run afoul of central government's goal of building a "harmonious society".⁹⁴ Moreover, by making progressive reform of the OCTS framework, the CCP could use the HKSAR as a showcase to the international communicates and particularly to Taiwan as a solution of the Taiwan issue, which was the original objective of the OCTS proposal.⁹⁵

The realities also suggest that the CCP cannot deprive the HKSAR's relatively high degree of autonomy, as doing so will more than likely lead to a revolt against the central government and the CCP, which may very well spur supports among mainland residents who have long resented the increasingly corrupt government, and result in a nationwide revolution against the CCP regime. Balancing the costs of a possible nationwide revolution and accelerated collapse of its regime against the benefits that may be realized from imposing its dictatorship over Hong Kong, the CCP should find a decision to keep Hong Kong's autonomy as easy one.

Taking into account the current situation, it is necessary for the central government to conduct a political reform of the OCTS framework, and the central government does have incentives to reform. The risk of doing nothing would be not only a continued weakening of the relation between mainland and Hong Kong, but also a potential catalyst for revolt.

(2) Constructive Advices

(i) Clear Division of Powers between Central Authorities and the HKSAR

In federal systems, one of the primary objectives of the constitution is to spell out as precisely as possible how powers are allocated to different levels of government. The provisions

⁹⁴ The "harmonious society" serves as the ultimate goal for the ruling Communist Party of China, which aims for a "basically well-off" middle-class oriented society.

⁹⁵ Deng Xiaoping's scientific concept of "one country, two systems" was advanced in light of Taiwan's realities. Deng stated that the system both upholds China's state sovereignty and takes into full account the specific conditions of Taiwan.

are meant to safeguard political stability in federal systems.⁹⁶ In the United States, powers given to the Congress are specifically listed, with the understanding that all other powers remain the preserve of the states. In Canada, there are separate lists for both levels of governments and an extra provision that vest any residual powers to the central government. Earlier constitutions of the United States and Canada enumerated only a relatively small number of general powers, which created confusions and problems in interpretation. Germany and India learned from this by making their power lists more detailed and by adding specifically enumerated lists of joint or concurrent powers. As specified in Part I, the German Basic Law divides the federal government's legislative responsibilities into different categories such as exclusive powers, concurrent powers, and framework powers. In India, the power of the national government and states are divided into three categories---the union powers, the concurrent powers, and the state powers.⁹⁷

Unlike many federal states, provisions under the HKSAR Basic Law concerning the division and allocation of powers between the central authorities and the HKSAR are obscurely worded and overly broad, necessitating elaboration through judiciary interpretation. The precise demarcation of powers between the central authorities and the HKSAR is uncertain. As provided in the HKSAR Basic Law, the central authorities' legislative jurisdiction is limited to areas of foreign affairs⁹⁸ and defense,⁹⁹ and the HKSAR government's powers were broadly described as that HKSAR "shall enjoy a high degree of autonomy".¹⁰⁰ Although some of the provisions define areas where the central government is prohibited from legislating and areas

⁹⁶ Thomas Hueglin, *supra* note 4, at 43.

⁹⁷ ROBERT L. HARDGRAVE & STANLEY A. KOACHANEK, *INDIA: GOVERNMENT AND POLITICS IN A DEVELOPING NATION* 146 (Seventh ed. 2008).

⁹⁸ HK Basic Law art. 13.

⁹⁹ *Id.* at art. 14.

¹⁰⁰ *Id.*, preamble.

where national laws are not applicable in the HKSAR,¹⁰¹ no provision provides any hint as to who shall have the residual powers, nor does any provision use terms such as “exclusive” or “concurrent” to stipulate a clear line between the central and HKSRA governments. It is advisable that the HKSAR Basic Law shall, as do many federal states’ constitutions, provide more detailed lists of powers for the purposes of allocation, specify areas that shall be exclusively held or concurrently shared by governments, and articulate which government shall be vested with the residual powers.

(ii) Establishing Special Institution to Solve Constitutional Disputes between Central Authorities and the HKSAR

Federal systems require codified constitutions to demarcate the relation between two levels of governments. Constitutions require interpretation which is usually done by a judiciary body.¹⁰² Judicial review is thus of immense importance because of its role as a guardian of local sovereignty.¹⁰³ Under the federal system, interpretation of the constitution is usually performed by a constitutional tribunal or a high court, through providing authoritative determination of constitutional meaning and constitutionality.¹⁰⁴ For example, in the United States, the Supreme Court performs the ultimate judicial review of the U.S. Constitution.¹⁰⁵ In the European world, judicial review was formalized via the creation of separate constitutional courts.¹⁰⁶ The German Basic Law, for example, grants to the federation concurrent powers which can be claimed only if

¹⁰¹ Id. at 13, 14, and 20.

¹⁰² Keith E. Whittington, Extrajudicial Constitutional Interpretation: Three Objections and Responses, 80 N.C. L. Rev. 773 (2002).

¹⁰³ John C. Yoo, The Judicial Safeguards of Federalism, 70 S.Cal.L.Rev.1311. 2.

¹⁰⁴ Guy E. Carmi, A Constitutional Court in the Absence of A Formal Constitution? On the Ramifications of Appointing the Israeli Supreme Court As the Only Tribunal for Judicial Review, 21 Conn. J. Int'l L. 67, 68 (2005).

¹⁰⁵ JOEL K. GOLDSTEIN, The Presidency and the Rule of Law: Some Preliminary Explorations, 43 St. Louis U. L.J. 791, 792 (1999).

¹⁰⁶ Sarah Wright Sheive, Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review, 26 Law & Pol'y Int'l Bus. 1201 (1995).

it is “essential” or “required”,¹⁰⁷ but the regional governments are entitled to argue with the central government on whether an issue should be considered as “essential” or “required,” and the umpire is the independent judiciary system.¹⁰⁸

As mentioned in Part II, the judiciary in mainland China does not possess any power of judicial review. In the HKSAR, judicial review is performed by the CFA. While both the NPCSC and the HKSAR are entitled to interpret the HKSAR Basic Law, according to Article 158 of the Basic Law, matters concerning affairs falling within the responsibilities of the central government or concerning the relation between the central authorities and the HKSAR are not subject to review by the HKSAR judiciary, and when presented with such matters, the CFA should seek an interpretation from the NPCSC.¹⁰⁹ The definition on what constitute matters concerning mainland-HKSAR relationship is ambiguous. Without a third party tribunal, in cases like *Ng Ka Ling*,¹¹⁰ the CFA often has difficulties deciding whether seeking interpretation from the NPCSC is necessary. Such legal uncertainty and unpredictability undermines the integrity of the HKSAR’s judicial system.

Generally, the central government could not be trusted to perform the function of judicial review because it has insufficient incentives to observe the boundaries of its power.¹¹¹ Hence, it is advisable that a special institution to be established to function as a neutral arbiter and solve constitutional disputes between the central authorities and the HKSAR. As mentioned in Part IV, after the reunification, only on two occasions did the NPCSC exercise its power of interpretation on its own initiative. Such a passive role indicates two problems of the current OCTS

¹⁰⁷ Grundgesetz [Constitution] [GG] art. 72 (F.R.G.).

¹⁰⁸ Lucas L. Burns, Federal Administration of Conservation in Australia: Cooperative Intent and Political Reality, 33 U. Pa. J. Int'l L. 997, 998 (2012).

¹⁰⁹ HK Basic Law, art. 158

¹¹⁰ *Ng Ka Ling*, 1 H.K. Rep. & Dig.

¹¹¹ *Lopez*, 115 S. Ct. at 1639 (Kennedy, J., concurring).

framework, and a special institution would lessen the severity of both. Firstly, as discussed in Part IV, the NPCSC does not have common law experience, and situation is further complicated by the fact that the HKSAR's common law system is intertwining with mainland's socialist legal system. Hence, to order a clear and convincing legal interpretation is a crucial and difficult task, especially for a political-trained institution like NPCSC. By reading the NPCSC's five interpretations from 1999 to 2011 together, all of the interpretations share the same characteristics: short and lack of legal reasoning.¹¹² For example, in response to the *Ng Ka Ling* case, what the NPCSC did was just outlined the statutes and gave a conclusion. The interpretations were neither convincing nor persuasive. It did not address the key points made in the CFA's decision, nor did it provide any reasoning to back up its conclusion. A well-organized special institution composed of legal professionals and scholars from both HKSAR and the mainland, with experienced in both mainland's legal system and Hong Kong's common law legal systems would be better equipped to solve constitutional disputes between the mainland and the HKSAR.

Another problem resulting from the NPCSC's passive interpretation role is an increasing legal uncertainty and unpredictability in the HKSAR. The central government's refraining from exercising its interpretation power was trying to send a message to the HKSAR and the world that the OCTS framework does grant the HKSAR a high degree of self-autonomy as promised. However, NPCSC's exercising such a passive role in the legal area is not necessarily a good thing. In federal states, constitutional disputes such as controversies over allocation of powers between the central and regional governments are common. Such disputes should be solved, instead of covered, so that the federation could function. In China, under the complexity of the

¹¹² NPCSC's interpretations over the HK Basic Law (Aug. 26, 2011) <http://cpc.people.com.cn/GB/64093/64387/15521544.html>.

OCTS framework, constitutional disputes between the central and the HKSAR governments frequently happen, and in some occasions, the CFA or the executive of the HKSAR found it is necessary to refer to the central government for reference.¹¹³ As the role of judicial review is vested on the central government instead of an independent tribunal, it is understandable that in most cases, the CFA chose to keep the cases to itself over putting HKSAR's judicial autonomy at risk by seeking interpretation from the central government. Granted, the degree of independency of a special institution would not be comparable to tribunals in federal states, because the NPCSC could still abuse its political influences to sway the institution's decision. Such an institution, however, could serve as a procedural safeguard, which at least guarantees that the constitutional disputes between the central and HKSAR governments would not be rested directly on the central government. Moreover, a special institution would be a platform for the NPCSC and the HKSAR courts to share their legal experiences and introduce new ideas.

(iii) Central Government's Self-restraint

“That government is best which governs least, because its people discipline themselves.”¹¹⁴ Federalism does not automatically or inevitably leads to democratization and economic prosperity. Other conditions, such as the central government's self-restraint from abusing its power, need to be satisfied in order to fully highlight the advantages of federalism. South Africa and India are federal states with mature constitutions regulating national-local relations. However, since the central governments of both countries were playing a negative role in balancing their relation with the sub-national regions, the countries have not achieved what

¹¹³ The Hong Kong SAR government has sought the NPCSC to interpret the Basic Law twice: In 1999: The Right of Abode issue; 2005: The term of the new Chief Executive after the original Chief Executive resigned. One other occasion the Court of Final Appeals requested an interpretation from the NPCSC In 2011: *FG Hemisphere Associates LLC v. the Democratic Republic of Congo* concerning whether Hong Kong has a qualified state immunity rule or an absolute state immunity rule.

¹¹⁴ By Thomas Jefferson.

was expected both economically and politically. South Africa, nearly two decades after apartheid ended, is becoming a de facto one-party state.¹¹⁵ The incompetence and outright corruption of the governing party African National Congress is one of the main causes of South Africa's sad decline. Moreover, to democracy, some officials within the South Africa central government seem increasingly uncomfortable with the Constitutional Court's independence and the tendency of its judges to criticize the Party.¹¹⁶ Similarly, in India, the central government retains enormous control over the economy, including setting most economic laws and regulations, while the subnational governments have little discretion in revenue raising and spending.¹¹⁷ This imbalance of power has been criticized as one of the core factors that put the country in slow economic growth.

The performance of different federal systems in the world differs in part because federalism is not the only relevant variable influencing a country's economic and political success. Other conditions, such as central government's self-control, are of vital importance. Likewise, a well-reformed OCTC system alone does not guarantee a favorable result. Enforcement is always a critical problem, which makes central authorities' commitment to refrain from arbitrarily abusing their power important.

No matter what reform the central government is going to perform, a fundamental requirement is that the central authorities shall refrain itself from intruding, or otherwise, reform would be meaningless. For a long period of time, the Chinese government has been trying to combine HKSAR's economic growth with political stability. This task is proving to be

¹¹⁵ The African National Congress is now the governing Party in South Africa. The liberal opposition, the Democratic Alliance ("DA"), led by a white woman, has the right ideas. But most blacks see the DA as too white, and still have a deep-seated loyalty to the ANC.

¹¹⁶ Cry, the beloved country, *The Economist*, October 20th, 2012 (Magazine).

¹¹⁷ Sunita Parikh & Barry R. Weingast, *A Comparative Theory of Federalism: India*, 83 *Va. L. Rev.* 1593 (1997).

increasingly difficult. Slowing economic development, non-universal suffrage, along with myriad legal and social problems are causing growing frustration among Hong Kong people. Coping with these tensions, the central government can continue to clamp down on discontent, or it can start to loosen its grip. For the OCTS framework to proceed with reform, the central government must commit itself not only to economic liberalism, but also to political reform and civic freedoms. This does not mean shrinking government everywhere, but it does mean that the central government should leave those sectors alone where it has no business to be in. The central government should take the reform seriously, which is to say, desist from fussing with the management of local education, judicial practice, elections, and countless other chores customarily in the ambit of regional governance. Engineering such a disengagement on a full scale is difficult, as the line between local and national authority is sometimes blurry, which is also a challenge frequently faced by federal states. Responding to this challenge, some federal states' experience could be valuable to the Chinese government. For example, Germany amended certain provisions of the German Basic Law in 1994 to grant to the federation concurrent powers which can be claimed only if it is "essential" or "required" and not just the result of a perceived "need".

VI. Future Proposals

(1) Two Systems Cannot Coexist In One Country

While a political reform of the OCTS framework may reduce the current controversies, it is not a permanent solution to the troubled relationship between the central government and the HKSAR. If history has told us anything about one country with different legal and political

systems, it would be that it will never work. The American Civil War and the German reunification are perfect examples.

Before the Civil War, the United States was essentially a country with two systems. “Sectionalism”, referring to the difference in economies, social structure, customs and political values of the North and South before the Civil War, increased steadily as slavery was being phased out by the North and retained by the South.¹¹⁸ Aiming to end slavery-induced conflicts, Stephen A. Douglas advocated popular sovereignty, under which settlers in the North and South could decide the status of their own states as either a slave or free state.¹¹⁹ Abraham Lincoln, on the other hand, believed that popular sovereignty would inevitably lead the Union to become either all slave or all free. In a significant speech, Lincoln stated, “a house divided against itself cannot stand. I believe this government cannot endure, permanently, half slave and half free. I do not expect the Union to be dissolved, I do not expect the house to fall, but I do expect it will cease to be divided. It will become all one thing or all the other.”¹²⁰ Eventually, the United States was preserved as a united nation through the War Between the States. This can be applicable to the current mainland-HKSAR situation. The central government and the HKSAR hold distinct positions in various aspects of fundamental values regarding freedom and democracy, and increasingly, this sharp and profound distinction has come to permeate every other political issue in the mainland-HKSAR relations. More significantly, this distinction also represents the core conflicts between the Chinese people in the mainland and the CCP, as demonstrated by a quickly rising number of public protests and violent confrontations between the people and the government in the recent decade. With the increasingly strong demand for

¹¹⁸ Sectionalism, <http://en.wikipedia.org/w/index.php?title=Sectionalism&oldid=520376133> (last visited Nov. 10, 2012).

¹¹⁹ The Lincoln–Douglas Debates of 1858.

¹²⁰ Abraham Lincoln, June 16, 1858, at the then Illinois State Capitol in Springfield, upon accepting the Illinois Republican Party’s nomination as the state’s United States senator.

freedom and democracy by the awakening Chinese people, the time will soon come when the CCP will no longer be able to maintain control under the current system and the whole nation will be facing a critical choice.

Similarly, the Germany reunification shows that an identical system is of crucial importance in realizing a country's true unification. After World War II, Germany was divided and evolved into two states---East Germany and West Germany. The western sectors, which were controlled by France, the United Kingdom, and the United States, later merged and form the Federal Republic of Germany. The east sectors, the Soviet zone, became the German Democratic Republic. West Germany and East Germany adopted different social and economic systems. Under the Soviet style command economy governance, many East German citizens looked to the west for freedom and prosperity. With the collapse of communism in Central and Eastern Europe, East German people voted to dissolve itself and accede to the Federal Republic of Germany, ending the half-century long separation.

Besides United States and Germany, other countries' experiences, such as Vietnam, South and North Korea, also proves that two systems cannot coexist in one country. With completely different political systems, a country will inevitably end of in either separation, or one system's complete take over of the other. Coexistence, as good as it sounds, is simply not sustainable, and the OCTS framework, as harmonious as advertised by the central government, is nothing but another "Berlin Wall" stands between freedom and oppression.

(2) Federalism, the Way to the Future?

Intellectuals have been questioning whether 90 years is about the maximum a single party can remain in power in a country, based on the records set by the Soviet Communist Party and

Mexico's Institutional Revolutionary Party. Now, as the CCP has been governing mainland China for 63 years and facing mounting social pressures and opposition, a discussion on future possibilities after the final collapse of the Party would be appropriate and even prudent.

Large countries are more likely to adopt a federal form of governance. Among the world's eight largest countries, China is the only one that is not formally constituted as a federation.¹²¹ Taking into consideration the reality, culture, and history of mainland China, Taiwan, Hong Kong, Macau and Tibet, a federalist political system would be a feasible way to realize a democratic unification. China is made up of fifty-six distinct ethnic groups and a large number of subnational regions with diverse languages, religions, cultures and traditions. In a country of this size and diversity, a central government would find it extremely difficult and would be incompetent in designing public policies to suit specific regional and local circumstances. A federal-style power allocation would allow regional and local governments, who are equipped with better knowledge of their people and land, to make local policies and to serve their people. More importantly, a high-degree regional self-governance would particularly allow different ethnic groups to preserve their diverse cultures, religions and ways of life, thus fundamentally solving the ethnical issues that have been driving China apart. Moreover, with a secure political foundation provided by a federalist constitution, subnational regions and their governments will have plenty of room in exercising legislation and administration, and thus promoting democracy in ways a centralized governmental system would not allow.

Establishing a federalist system in China has been proposed by some scholars including Liu Xiaobo, a human rights activist and Nobel Peace Prize winner, who is currently incarcerated

¹²¹ Of the world's eight largest states, Russia, Canada, China, the United States of America, Brazil, India, Australia and Argentina, seven are formally constituted as federations.

as a political prisoner in China. Liu is also one of the authors of Charter 08, a manifesto that was published in 2008 that calls for political reforms and an end to the single-party dictatorship in China, and was signed by more than 10,000 Chinese people both within and outside of the country.¹²² Among all the proposed reforming changes, Section 18 of the Charter proposes that a Chinese “Federal Republic” should be established.¹²³ The section says, in particular, that “[a] Federal Republic...in Hong Kong and Macao, we should support the freedoms that already exist. With respect to Taiwan, we should declare our commitment to the principles of freedom and democracy and then, negotiating as equals and ready to compromise, seek a formula for peaceful unification...we should aim ultimately at a federation of democratic communities of China.”¹²⁴

Another proposal is to restore the Republic of China. The Republic of China was founded in 1912 following the Hsin-Hai Revolution, ending the Qing Dynasty together with over two thousand years of imperial rule in China and moved to Taiwan in 1949, when the CCP established its governance in the mainland after the Chinese Civil War. With the restoration of the Republic of China, which was founded on the “Three Principles of the People,”¹²⁵ meaning that “the Republic of China shall be a democratic republic of the people, to be governed by the people and for the people”, and the entire nation will be structured and organized on these same principles. The government would be reorganized into five different branches of Yuans (departments), namely the Executive Yuan, Legislative Yuan, Judicial Yuan, Examination Yuan, and the Control Yuan. The Executive Yuan would serve as the executive branch of the government and be headed by a president. The Legislative Yuan is the parliament, with the power to pass legislation.

¹²² Why China's leadership should talk to the Charter 08 movement, Washington Post, 30 January 2009.

¹²³ Ding Xiao (4 January 2010). "Jailed Dissident Appeals", Radio Free Asia.

¹²⁴ Section 18 of the Charter 08.

¹²⁵ A political philosophy developed by Sun Yat-sen, the first president and founding father of the Republic of China.

VII. Conclusion

This paper examined different models of federalism, the constitutional relationship between mainland China and the HKSAR under the principle of OCTS, and the similarities and differences between these two devices. This paper has also undertaken a detailed examination of the status of the HKSAR within the Chinese legal and political system and the impact of the framework after Hong Kong's reunification. Theoretical questions regarding the possibility of reforming the OCTS framework, and how to reform the framework have been raised and discussed, particularly with respect to the feasibility of learning from other federal states' experiences.

The OCTS framework is unique. It operates at the intersection of two significant ideologies of politics and economy, namely capitalism and socialism. The OCTS framework appears to be seeking to maintain and strengthen a political system marked by openness, free elections, accountability and respect for human rights. However, the validity and destiny of the OCTS framework largely depends on a tightly controlled authoritarian system and essentially a dictatorship. Despite the Chinese government's claim about the remarkable value of the OCTS framework to solve problems in the HKSAR, under the OCTS principle, Hong Kong was placed in an unfamiliar context, with its future being a matter of considerable speculation.

There is no a simple answer to the issues facing the OCTS framework. Certain reforms have to be launched by the Chinese government in order to save the trust of Hong Kong people. However, simply a reform cannot solve fundamental issues and conflicts between the central government and the HKSAR, and world history has taught us that the coexistence of two

political systems in one country is not sustainable. Therefore, this paper also discussed the advantages and reasoning for adopting a federalist system in the post-communist China.