

# *The path towards sovereign territory: Reading China's (anti)federal idea against its modern territorial constitutional imaginary*

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*This article aims to shed light on how China has (re)imagined the geographical distribution of authority on its path towards modern statehood by unpacking the debate surrounding the constitutional status of Hong Kong in China's territorial constitution. Challenging the conventional wisdom that China is constitutionally impervious to the federal idea, it makes a threefold argument. First, elements of federalism do exist in China, as intimated in its territorial constitution regarding Hong Kong, but have become nearly invisible as the relationship between mainland China and Hong Kong is traveling in the opposite direction. Second, the opposite development is attributable to the antifederal idea embedded in China's modern constitutional imaginary, which has been shaped by its multifaceted experience with federalism in history. Under the antifederal idea, intimations of federalism in China's territorial constitution are far from the bridge to a full-fledged Chinese federation, but only meant to be instrumental and transitional. Third, the antifederal idea reflects China's modern territorial constitutional imaginary under which variegated imperial frontiers are reimagined as homogenized state territory. In conclusion, China's encounter with Western legal concepts is formative of the Chinese modern constitutional imaginary and thus further influences its attitude towards federalism in framing the territorial constitution.*

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## 1. Introduction: The Hong Kong question and the constitutional imaginary

Constitutionalism is facing multiple challenges in the changing world order. How to steer the center-province relationship under “the geographical distribution of authority within the state” in a constitutional order—i.e., “the territorial constitution”<sup>1</sup>—is emerging front and center in this challenging political landscape.<sup>2</sup> Against this backdrop, federalism, including its various “manifestations,” has attracted much attention in comparative constitutional scholarship for its perceived institutional capacity to enable a stable territorial constitution.<sup>3</sup> To this development of neofederalism, China stands as a puzzling exception. Despite its vast land expanse and ethnocultural diversity, *constitutionally* China seems to be impervious to various styles of federalism talk.<sup>4</sup> Does this suggest that China is somehow immune from challenges posed by the center-province relationship? Or does it prove that it has found an alternative to those inspired by the federal idea in its design of the territorial constitution?

The political crisis in Hong Kong triggered by the protest against the 2019 extradition bill casts doubt on the foregoing Chinese exceptionalism.<sup>5</sup> At the root of the conflict between Hong Kong citizens and the Chinese central government in Beijing, as well as its local proxy, lies China’s territorial constitution regarding Hong Kong: the constitutional status of Hong Kong as a “Special Administrative Region” (SAR)<sup>6</sup> in the People’s Republic of China (PRC) under the “One Country, Two Systems” (OCTS) arrangement. Notably, it is the legal framework set out before the British handover<sup>7</sup>

<sup>1</sup> Neil Walker, *The Territorial Constitution and the Future of Scotland*, in *THE SCOTTISH INDEPENDENCE REFERENDUM: CONSTITUTIONAL AND POLITICAL IMPLICATIONS* 247, 248 (Aileen McHarg et al. eds., 2014). For other understandings of the territorial constitution, see *id.* at 247–8; cf. Oran Doyle, *The Silent Constitution of Territory*, 16 INT’L J. CONST. L. 887 (2018).

<sup>2</sup> Examples include Kashmir in India, Biafra in Nigeria, Catalonia in Spain, and Scotland in the United Kingdom.

<sup>3</sup> See, e.g., FRANCESCO PALERMO & KARL KÖSSLER, *COMPARATIVE FEDERALISM: CONSTITUTIONAL ARRANGEMENTS AND CASE LAW* 34–42, 50–60, 448–50 (2017); *THE UNITED KINGDOM AND THE FEDERAL IDEA* (Robert Schütze & Stephen Tierney eds., 2018).

<sup>4</sup> Suli Zhu, “Federalism” in *Contemporary China: A Reflection on the Allocation of Power Between Central and Local Government*, 7 SING. J. INT’L & COMP. L. 1 (2003). Notably, nonconstitutional discussion of federalism in China abounds in political economics: e.g., Gabriella Montinola, Yingyi Qian, & Barry R. Weingast, *Federalism, Chinese Style: The Political Basis for Economic Success in China*, 48 WORLD POL. 50 (1995); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1 (1995); Lizhi Liu & Barry R. Weingast, *Taobao, Federalism, and the Emergence of Law, Chinese Style*, 102 MINN. L. REV. 1563, 1570 (2018). My focus is on the constitutional variety of federalism.

<sup>5</sup> This is not to suggest that Hong Kong is the only territory in China posing a center-province challenge to Beijing. Tibet and Xinjiang are other noted examples. For present purposes, I will focus on the constitutional question of Hong Kong and its implications for discussion of federalism in China.

<sup>6</sup> Macau is another Chinese SAR. Unless otherwise specified, references to SAR in this article are concerned with Hong Kong only.

<sup>7</sup> Britain first acquired the Island of Hong Kong in 1842 and then part of the mainland peninsula of Kowloon in 1860 from the Qing Empire under the treaties that concluded the First and Second Opium Wars, respectively. The Qing Empire further leased an area known as the New Territories to Britain under another treaty in 1898. YASH GHAI, *HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW* 3–6 (2d ed. 1999). When the 99-year-long lease of the New Territories ended in 1997, Britain handed the Island of Hong Kong and Kowloon, together with the New Territories, over to China.

to govern the post-1997 constitutional relationship between Hong Kong and Beijing that sparked an early wave of federalism talks in China.<sup>8</sup> Under that legal framework, Hong Kong as a Chinese SAR managed to maintain rigorous protection of human rights and to preserve the rule of law in general<sup>9</sup> until Beijing's forceful turn in its policy towards Hong Kong following the 2019 civil unrest.<sup>10</sup> The showpiece in China's territorial constitution aimed at national unification—i.e., the SAR—thus appears to be another constitutional design inspired by the federal idea in the world.<sup>11</sup> Seen in this light, what makes the ostensible Chinese exceptionalism unique amid the global neofederalism movement is not so much the disappointing implementation of the OCTS principle as the general antipathy towards the federal idea in the Chinese constitutional discourse.<sup>12</sup> Despite efforts to distance China from federalism, the arrangement with Hong Kong in China's territorial constitution has been framed around federalist concepts such as subsidiarity and the composite state.<sup>13</sup> What should we make of the Chinese ambivalence about federalism? Does the surface aversion to federalism suggest outright rejection of any constitutional arrangement evoking the federal idea? Are elements of federalism in China's territorial constitution nothing but constitutional window dressing?

To answer these questions, I suggest that how China has (re)imagined the relationship between the center and the periphery in its territorial construct and the attendant geographical distribution of authority on its path towards modern statehood informs the Chinese attitude towards federalism. My ambition is to draw out the significance of the complex experiences of “modern China”<sup>14</sup> with federalism in light of its

<sup>8</sup> See Arthur Waldron, *Warlordism and Federalism: The Revival of a Debate?*, 1990 CHINA Q. 116, 121; see also Michael C. Davis, *The Case for Chinese Federalism*, J. DEMOCRACY, April 1999, at 124; Guobin Zhu, *The Composite State of China Under “One Country, Multiple Systems”*: *Theoretical Construction and Methodological Considerations*, 10 INT'L J. CONST. L. 272, 284 (2012); Peter T.Y. Cheung, *Toward Federalism in China? The Experience of the Hong Kong Special Administrative Region*, in FEDERALISM IN ASIA 242 (Baogang He, Brian Galligan, & Takashi Inoguchi eds., 2007).

<sup>9</sup> See Cora Chan, *Thirty Years from Tiananmen: China, Hong Kong, and the Ongoing Experiment to Preserve Liberal Values in an Authoritarian State*, 17 INT'L J. CONST. L. 439, 443 (2019).

<sup>10</sup> See Rana Mitter, *One Country, Two Systems?*, 166 RSA J., no. 2, 2020, at 42.

<sup>11</sup> The OCTS principle is regarded as the lynchpin of China's unification strategy towards its claimed irredentas on its frontiers. See also Ho-fung Hung & Huei-ying Kuo, “One Country, Two Systems” and Its Antagonists in Tibet and Taiwan, 24 CHINA INFO. 317, 318 (2010). Targets of Chinese irredentism include Hong Kong, Mongolia, and Taiwan. HARRY HARDING, CHINA AND NORTHEAST ASIA: THE POLITICAL DIMENSION 59 (1988). It should be noted that irredentism is a contentious notion, with implications for the legal status of the territories concerned—i.e., irredentas—in both international and constitutional law. See Francesco Palermo, *Irredentism*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (online ed. Rüdiger Wolfrum ed., October 2010). In this article, “irredenta” is used only to connote the (once) contested status of relevant territories claimed by China.

<sup>12</sup> See Zhu, *supra* note 8; see also MARIA ADELE CARRAI, SOVEREIGNTY IN CHINA: A GENEALOGY OF A CONCEPT SINCE 1840, at 180–1 (2019).

<sup>13</sup> See, e.g., Zhu, *supra* note 8, at 291–2 (composite state); Xingzhong Yu, *Subsidiarity, Authority and Constitutional Experimentalism in Hong Kong*, 49 H.K.L.J. 315, 318–19 (2019) (subsidiarity). Cf. GHAI, *supra* note 7, at 137–42, 144–53, 182–7.

<sup>14</sup> Compare ANDREW J. NATHAN, MODERN CHINA, 1840–1972: AN INTRODUCTION TO SOURCES AND RESEARCH AIDS (1973) (suggesting 1840 as the beginning of modern China), with JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA (1990) (situating the continuing search for modern China in the historical context as starting from 1600). In this article, modern China instead refers to the period starting from the late Qing when

territorial constitutional imaginary—which will be further discussed—by unpacking the debate surrounding the constitutional status of Hong Kong in China’s territorial constitution. Challenging the conventional wisdom that China is constitutionally impervious to the federal idea, this paper makes a threefold argument. First, elements of federalism do exist in China, as intimated in its territorial constitution regarding Hong Kong, and they are more than constitutional window dressing, although the relationship between mainland China and Hong Kong is traveling in the opposite direction. Second, the opposite development gives expression to the antifederal idea embedded in China’s modern constitutional imaginary, which has been shaped by its multifaceted experience with federalism in history. Under the antifederal idea, intimations of federalism in China’s territorial constitution are far from the bridge to a full-fledged Chinese federation, but only meant to be instrumental and transitional. Third, the antifederal idea reflects China’s modern territorial constitutional imaginary, under which variegated imperial frontiers are reimagined as homogenized state territory.

I should clarify what I mean by constitutional imaginary before proceeding. As with existing works deploying the notion of constitutional imaginary,<sup>15</sup> this article draws on the idea of the social imaginary in social theory. Yet, far from constructing an integrated conceptual framework that systematically reworks theories of the social imaginary,<sup>16</sup> my aim is to make sense of the constitutional significance of territory and geographical distribution of authority in the way that the meaning of modern social practices is revealed through examination of “[how] our contemporaries imagine the societies they inhabit and sustain”—to which Charles Taylor refers as “social imaginary.”<sup>17</sup> Specifically, to make sense of a society through the social imaginary is to recognize collective practices by finding out “the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations.”<sup>18</sup> Obviously, this way of understanding a society and social phenomena, including normative constructs such as the constitution, is “cultural.”<sup>19</sup> Yet, compared to the “multiplicity of ... referents and the studied

the Chinese state began its winding journey to modernity and continuing into the People’s Republic of China (PRC) era. Republican China, which succeeded the Qing Empire and its dynastic predecessors, was brought to life by the revolutionary Nationalists in 1911 and adopted the title of the Republic of China (ROC) until the Communists defeated the Nationalist government in 1949. The PRC then replaced the ROC as the title of the continuing Chinese state.

<sup>15</sup> See, e.g., ZORAN OKLOPCIC, BEYOND THE PEOPLE: SOCIAL IMAGINARY AND CONSTITUENT IMAGINATION (2018); Alexander Latham-Gambi, *Political Constitutionalism and Legal Constitutionalism: An Imaginary Opposition?*, 40 OXFORD J. LEGAL STUD. 737 (2020); Jiří Příbáň, CONSTITUTIONAL IMAGINARIES: A THEORY OF EUROPEAN SOCIETAL CONSTITUTIONALISM (2021); Jiří Příbáň, *A Social Theory of Constitutional Imaginaries: Beyond the Unity of Topos-Ethnos-Nomos and Its European Context*, in CONSTITUTIONALISM UNDER STRESS 175 (Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias eds., 2020).

<sup>16</sup> Alexander Latham-Gambi attributes the notion of social imaginary to Cornelius Castoriadis with a helpful distinction between the imaginary and other ways of understanding the legal-political divide in constitutional ordering. See Latham-Gambi, *supra* note 15, at 738 n.2, 746–51.

<sup>17</sup> CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 6 (2004).

<sup>18</sup> *Id.* at 23; see also CHARLES TAYLOR, A SECULAR AGE 171–6 (2007).

<sup>19</sup> Charles Taylor, *Two Theories of Modernity*, HASTINGS CTR. REP., Mar.–Apr. 1995, at 24.

vagueness” overburdening the term “culture,”<sup>20</sup> the notion of social imaginary helps dissect social phenomena by pointing particularly to “the background understanding against which our beliefs are formulated.”<sup>21</sup> As Taylor further explains, such background understanding is “unstructured and inarticulate” and reaches “a wider grasp of our whole predicament” beyond “the immediate background understanding.”<sup>22</sup> Thus, the social imaginary is “schematic”<sup>23</sup> and “nebulous”<sup>24</sup> at once. So is the constitutional imaginary.

Through the lens of the imaginary, a constitutional order as part of social practices operates in the particular ways in which people—i.e., all constitutional agents, including nonjudicial ones—imagine their existence and how they fit together with others under it. Thus, the constitutional imaginary refers to the “common understanding that *enables* [constitutional agents] to carry out the collective practices that make up [the constitutional order]” and thus gives such practices “legitimacy.”<sup>25</sup> Just as the social imaginary “is carried in images, stories and legends,”<sup>26</sup> so bringing out the constitutional imaginary involves examining constitutional images, stories, and legends that are not fully represented in constitutional master texts or doctrines.

To advance my argument, I first take up the question of whether federalism exists in China, with a focused discussion of the constitutional status of Hong Kong as an SAR in China (Section 2). Although China is not a federal state, Hong Kong under the OCTS principle, properly understood, can be seen as a manifestation of the federal idea in China’s territorial constitution. To understand how China’s OCTS arrangement with Hong Kong has traveled in the current direction despite its federal intimations, I then extend discussion of the Chinese attitude towards federalism to historical experiences shaping the constitutional imaginary about territory in modern China (Section 3 and 4). Read through the lens of China’s quest for statehood by transforming imperial frontiers into sovereign territory, the disappointing experiment with federalism in modern China is formative of China’s modern constitutional imaginary, rendering elements of federalism in its current territorial constitution instrumental and transitional.

## 2. Finding intimations of the federal idea in China’s territorial constitution

To discover the federal idea implied in China’s territorial constitution regarding Hong Kong, this section attempts a constitutional rendering of Hong Kong’s status in the

<sup>20</sup> CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 89 (1973).

<sup>21</sup> Taylor, *supra* note 19, at 28.

<sup>22</sup> TAYLOR, *supra* note 18, at 172–3.

<sup>23</sup> TAYLOR, *supra* note 17, at 30.

<sup>24</sup> Latham-Gambi, *supra* note 15, at 746. That is why the social imaginary is far from causing or determining social phenomena, but nevertheless enables their formation.

<sup>25</sup> See TAYLOR, *supra* note 17, at 23–4 (emphasis added). Cf. Latham-Gambi, *supra* note 15, at 737–8; Přibáň, *supra* note 15, at 185–7.

<sup>26</sup> TAYLOR, *supra* note 17, at 23.

Chinese legal framework under the OCTS principle. Two caveats should be added in the first place. First, the constitutional reading in the following does not aim to judge China's constitutional character in terms of what Karl Loewenstein called "ontological classification."<sup>27</sup> Granted, the authoritarian character of the PRC party-state often frustrates attempts to make sense of Chinese institutions in constitutional terms.<sup>28</sup> Nevertheless, as Ernst Fraenkel taught us a long time ago, an authoritarian rule is not equal to a lawless regime,<sup>29</sup> and thus we should take a hard look at the space of the "normative state" in China's "dual state" structure before lumping it together with elements of the "prerogative state" when studying China's authoritarian constitutional order.<sup>30</sup> It should be noted that, as in all dual states, the boundary between the "normative state" and the "prerogative state" in China is far from a line in the sand,<sup>31</sup> and the normative space seems to be shrinking in China.<sup>32</sup> Thus, the constitutional rendering to be submitted will not tell us much about the genuine character of constitutional arrangements—including the relationship between mainland China and Hong Kong—under China's political system. Second, the proposed constitutional rendering does not pretend to offer a doctrinal commentary—or, rather, a legal dogmatic—on the Chinese constitution. Rather, it is only intended to bring out an alternative reading of China's territorial constitution regarding Hong Kong that is not doctrinally dictated by the character of the Chinese state constructed around "democratic centralism."<sup>33</sup>

With the two caveats in mind, the three-pillar structure of China's territorial constitution regarding Hong Kong is first dissected and followed by an analysis of its intimations of the federal idea.

<sup>27</sup> Karl Loewenstein classified constitutions into "normative," "nominal," and "semantic" types ontologically. KARL LOEWENSTEIN, *POLITICAL POWER AND THE GOVERNMENTAL PROCESS* 147–53 (1957).

<sup>28</sup> Thomas E. Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the "Urgency" of Political Reform*, 11 U. PA. ASIAN L. REV. 337 (2018); but cf. Yan Lin & Tom Ginsburg, *Constitutional Interpretation in Lawmaking: China's Invisible Constitutional Enforcement Mechanism*, 63 AM. J. COMP. L. 467 (2015).

<sup>29</sup> ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (Oxford University Press, 2017) (1941). Ernst Fraenkel's study of the early Nazi German legal order covers the 1933–38 period. After 1938, the Nazi state became lawless, with elements of the normative state stripped away, defying the analysis framed around the dual state. *Id.* at xiii–xv.

<sup>30</sup> For an application of Fraenkel's concept of the dual state to the Chinese constitutional order, see Sophia Woodman, *Legislative Interpretation by China's National People's Congress Standing Committee: A Power with Roots in the Stalinist Conception of Law*, in *INTERPRETING HONG KONG'S BASIC LAW: THE STRUGGLE FOR COHERENCE* 229, 235–36 (Hualing Fu, Lison Harris, & Simon N.M. Young eds., 2007); Hualing Fu, *Duality and China's Struggle for Legal Autonomy*, 2019 CHINA PERSPECTIVES 3; see also JENS MEIERHENRICH, *THE REMNANTS OF THE RECHTSSTAAT: AN ETHNOGRAPHY OF NAZI LAW* 247–8 (2018).

<sup>31</sup> See FRAENKEL, *supra* note 29, at 57–63; Woodman, *supra* note 30, at 236–8.

<sup>32</sup> Susan L. Shirk, *China in Xi's "New Era": The Return to Personalistic Rule*, J. DEMOCRACY, Apr. 2018, at 22.

<sup>33</sup> ZHONGHUA RENMIN GONGHEGUO XIANFA (中华人民共和国宪法) [THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, hereinafter PRC CONST.] art. 3. <http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml>. This reflects the socialist and Leninist-Stalinist ideological underpinnings of the Chinese legal system. Woodman, *supra* note 30, at 229–30; see also Chan, *supra* note 9, at 440.

## 2.1. Uncovering China's three-pillar constitution regarding Hong Kong

What underlies the current constitutional status of Hong Kong in China is the OCTS principle, under which Hong Kong was first promised “a high degree of autonomy” as a Chinese SAR.<sup>34</sup> The legal instrument that fleshes out this skeletal political formula is the Hong Kong Basic Law (Basic Law), which has been called Hong Kong’s “mini-constitution.”<sup>35</sup> As the term mini-constitution suggests, there is an overarching constitution—i.e., the PRC Constitution<sup>36</sup>—that sits atop the Basic Law in China’s legal system. In this light, the OCTS political formula—or, rather, constitutional principle—seems to be derived from and embedded in the PRC Constitution. On close examination, however, the PRC Constitution is not as overarching as it seems. Neither its preamble nor its body refers to Hong Kong.<sup>37</sup> More strikingly, the OCTS principle is not even mentioned in the PRC Constitution. It only appears in the preamble to the Basic Law instead.<sup>38</sup>

That said, the PRC Constitution does bear on the constitutional status of Hong Kong. To begin with, the status of Hong Kong as a Chinese SAR is stipulated in article 31 (call it the SAR clause). Yet, the SAR clause itself does not provide for the rights or privileges attached to an SAR. In terms of the structure of the PRC Constitution, the SAR clause follows the local government clause in article 30, which provides for the “administrative division of the [PRC]” into “provinces, autonomous regions and municipalities directly under the Central Government” at the highest and provincial level of local government.<sup>39</sup> Notably, the rights and privileges of all three types of local government at the provincial level are laid down in the chapter “Structure of the State,”<sup>40</sup> reflecting the fundamental principle of a unitary state enshrined in the constitutional preamble.<sup>41</sup> By contrast, the PRC Constitution leaves the rights, privileges, and duties of the SAR to be provided in legislation by the National People’s Congress (NPC).<sup>42</sup>

<sup>34</sup> Miles Goslett, *My Regrets over Hong Kong by Lady Thatcher*, THE TELEGRAPH (June 10, 2007), <https://www.telegraph.co.uk/news/uknews/1554095/My-regrets-over-Hong-Kong-by-Lady-Thatcher.html>.

<sup>35</sup> GHAI, *supra* note 7, at 137. The following discussion of the constitutional status of Hong Kong draws on Yash Ghai, who has been considered an authority on the Basic Law. The full title of the Hong Kong Basic Law is “The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China.” See HONG KONG E-LEGISLATION, <https://www.elegislation.gov.hk/hk/A101>.

<sup>36</sup> China’s current master-text constitution, which is the PRC’s fourth formal constitution since its establishment in 1949, was adopted by the National People’s Congress in 1982. See Chien-Chih Lin, *Constitutions and Courts in Chinese Authoritarian Regimes: China and Pre-Democratic Taiwan in Comparison*, 14 INT’L J. CONST. L. 351, 358–61 (2016). Unless otherwise specified, the PRC Constitution in this article refers to the current one adopted in 1982.

<sup>37</sup> It is noteworthy that in the PRC’s third formal constitution Hong Kong was first mentioned where the preamble included “compatriots in Taiwan, Hong Kong and Macao” as part of “the revolutionary united front.” PRC CONST. of 1978, pmbl., para. 6 (abolished). Yet, when it came to the “sacred territory” to be liberated by and reunified with “the motherland,” it listed only Taiwan. PRC CONST. of 1978, pmbl., para. 7 (abolished).

<sup>38</sup> BASIC L. pmbl., para. 2.

<sup>39</sup> PRC CONST. art. 30, para. 1(1).

<sup>40</sup> *Id.* ch. III, secs. 5–6 (arts. 95–122).

<sup>41</sup> *Id.* pmbl., para. 11.

<sup>42</sup> *Id.* art. 31.

Such constitutional formulation does not quite answer the question of the SAR's legal status: Should the delegation to the NPC in the SAR clause be interpreted as granting it unlimited discretion in the establishment of an SAR? Or should it be rendered in such a way that the SAR's constitutional distinctiveness vis-à-vis local governments at the provincial level can be preserved in legislation?<sup>43</sup> To answer this question, we need to take a closer look at how the SAR clause found its way into the PRC Constitution.

Notably, when the NPC adopted the current Constitution in 1982, it decided to add the SAR clause to the new constitution alongside the local government clause that had already existed in the 1978 Constitution.<sup>44</sup> In other words, when adopting the new Constitution, the NPC deliberately chose to provide for the SAR separately in article 31, instead of placing it with other types of local government in the existing local government clause of article 30. Thus, juxtaposed to the detailed provisions concerning the rights and privileges of local government, the omission from the 1982 Constitution of the rights and privileges to be vested in the newly designed SAR could not be by mistake or by accident. If so, does it mean that the NPC would enjoy total discretion in legislating the SAR's legal status? Let us recall the political formula turned constitutional principle in question: Hong Kong is granted "a high degree of autonomy" as an SAR under the OCTS principle. As noted above, this principle is stipulated only in the Basic Law. Yet, the "high degree of autonomy" enjoyed by Hong Kong originated in an international legal instrument—the Sino-British Joint Declaration of 1984 (the Joint Declaration).<sup>45</sup> Thus, alongside the PRC Constitution, the Joint Declaration legally underpins the Basic Law that sets out the rights and privileges of Hong Kong as a Chinese SAR.<sup>46</sup>

It is worth noting that neither the constitutional provision for SARs nor the corresponding high degree of autonomy and underlying OCTS principle made their first appearance in the three foundational legal instruments—the PRC Constitution, the Joint Declaration, and the Basic Law. Instead, they were first floated in a series of political statements pitched at Taiwan as part of China's strategy of national unification in 1981–82.<sup>47</sup> Paralleling those political statements, the current PRC Constitution,

<sup>43</sup> Cf. Xiaonan Yuan & Hualing Fu, *Revisiting Legislative Interpretations in China and the Implications to Hong Kong*, 49 H.K.L.J. 357, 377–78 (2019).

<sup>44</sup> Article 30 of the current PRC Constitution is a copy of article 33 of the (Third) PRC Constitution of 1978.

<sup>45</sup> The formal and full title of the Joint Declaration is the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong. It was signed on December 19, 1984, and came into effect on May 27, 1985.

<sup>46</sup> Ghai noted that "in relation to [Hong Kong], the scheme of the [PRC] Constitution ... has to be qualified by China's undertaking in the Joint Declaration." GHAI, *supra* note 7, at 143. Ghai later called the Joint Declaration and article 31 of the PRC Constitution the "twin foundations" of the Basic Law. Yash Ghai, *Litigating the Basic Law: Jurisdiction, Interpretation and Procedure*, in HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 3, 46 (Johannes M.M. Chan, H.L. Fu, & Yash Ghai eds., 2000).

<sup>47</sup> In 1981, Beijing's policy to seek a peaceful solution to the Taiwan question was sketched out in Marshall Ye Jianying's Nine Principles. It was the first time that the ideas of SARs and a high degree of autonomy were explicitly put forward as part of China's unification policy. Deng Xiaoping further referred to Marshall Ye's political statement as the OCTS principle in 1982. See *A Policy of "One Country, Two Systems" on Taiwan* [in Chinese], [https://www.fmprc.gov.cn/web/ziliao\\_674904/wjs\\_674919/2159\\_674923/200011/t20001107\\_7950011.shtml](https://www.fmprc.gov.cn/web/ziliao_674904/wjs_674919/2159_674923/200011/t20001107_7950011.shtml). In 1984, the OCTS principle was formally adopted as the policy towards Taiwan and Hong Kong as well as Macau. Waldron, *supra* note 8, at 126.



in which the SAR clause made its first constitutional appearance, was adopted in December 1982, but made no reference to the OCTS model or the principle of a high degree of autonomy. Not until the signing of the Joint Declaration in 1984, which concluded the negotiations between Beijing and London on the status of Hong Kong that had started in 1982, did the high degree of autonomy principle under the OCTS model find legal expression.<sup>48</sup>

What should we make of the winding road leading to the codification of the constitutional principle underpinning Hong Kong's legal status in China's territorial constitution? On the one hand, it seems straightforward that, apart from its legal status as an SAR, Hong Kong's rights and privileges are subject to the NPC's legislative discretion, despite the complexity behind the legal incorporation of the high degree of autonomy lying at the heart of the OCTS principle. Moreover, the Basic Law is merely a subconstitutional statute in China's domestic legal order, which is subject to interpretation by the National People's Congress Standing Committee (NPCSC), not to mention amendment by the NPC.<sup>49</sup> From this perspective, Hong Kong's mini-constitution is anything but constitutional, only reflecting the constitutional principle stipulating China as a unitary state.

Yet, the sequence of the codification of the three elements of the constitutional principle underpinning Hong Kong's status—the OCTS principle, the SAR organizational form, and the high degree of autonomy—and its relationship with the relevant political statements suggest an alternative constitutional rendering. Specifically, when the SAR clause was adopted in 1982, the future of Hong Kong had already loomed large.<sup>50</sup> Given the lack of substance in the SAR clause, it was clear that the substantive principles governing the creation of the Hong Kong SAR were to be hammered out through the prospective negotiations between China and Britain. Thus viewed, the void left by the SAR clause on the rights and privileges of SARs cannot be taken as an open-ended authorization to China's domestic legislation. Rather, the parsimony on SAR in the PRC Constitution amounts to a silent invitation to the most relevant legal instrument in the making—the Joint Declaration of 1984—to substantively define the would-be Hong Kong SAR.<sup>51</sup>

Read in this light, the SAR clause in the PRC Constitution is to be substantiated by the principle of a high degree of autonomy and the corresponding clauses stipulated in the Joint Declaration and its annexes.<sup>52</sup> While the organizational form of Hong Kong after its handover to China—which would distinguish it from other provincial-level local governments—is provided for by the PRC Constitution, the principle governing SAR-related substantive rights and privileges—the high degree of autonomy—is

<sup>48</sup> Chan, *supra* note 9, at 441. The Joint Declaration provides for “a high degree of autonomy” without explicitly mentioning “one country, two systems.”

<sup>49</sup> BASIC L. arts. 158–9.

<sup>50</sup> See Wanglai Gao, *Negotiating with China in Power Asymmetry: The Case of Sino-British Negotiations on the Handover of Hong Kong*, 14 INT'L NEGOTIATION 475, 480–88 (2009).

<sup>51</sup> Alternatively, it could be seen as choosing just to leave things open, reflecting the pragmatism characteristic of the PRC. I am indebted to Cora Chan for bringing this alternative interpretation to my attention.

<sup>52</sup> Of its three annexes, the first lays down the details of the high degree of autonomy to be enjoyed by Hong Kong after the handover.

enshrined in and substantiated by the Joint Declaration, which resulted from bilateral negotiations, not China's constitutional dictates.<sup>53</sup> Considering its foundational character, the Joint Declaration should not be treated as an ordinary treaty that is considered inferior to the constitution and may be subjected to subsequent limits set out in domestic legislation in cases of legal conflict under the Chinese doctrine on treaty law.<sup>54</sup> Instead, it stands as a constitutional complement to the SAR clause to frame and guide the NPC's legislation on Hong Kong as an SAR after the 1997 handover. Taken together, the Basic Law and the provisions of the PRC Constitution as applied to Hong Kong should be construed in light of the substantive principle of a high degree of autonomy laid down in the Joint Declaration. In respect of Hong Kong, China's territorial constitution rests on three pillars: the PRC Constitution, the Joint Declaration, and the Basic Law.

## 2.2. Measuring “one country, two systems” against the federal idea

The rights and privileges vested in Hong Kong under the Basic Law are substantial. As an SAR, Hong Kong not only enjoys “executive, legislative and independent judicial power”—including “[the power of] final adjudication”<sup>55</sup>—but also has the power to issue its own currency.<sup>56</sup> Hong Kong is further recognized as “a separate customs territory”<sup>57</sup> and is not subject to taxation by the central government in Beijing.<sup>58</sup> Moreover, it is vested with substantial competences in external relations, including joining some international organizations and entering into international agreements under certain conditions.<sup>59</sup> Yet, as Yash Ghai perceptively noted shortly after the handover, the high degree of autonomy stipulated in the Joint Declaration “suffered something of a sea change” when it was translated into the Basic Law.<sup>60</sup> To put it bluntly, the Basic Law itself is potholed only with a diluted guarantee of a high degree of autonomy, as Hong Kong's executive, legislative, and independent judicial power are subject to the NPC's or the NPCSC's legal intervention.<sup>61</sup> Moreover, in light of issues surrounding

<sup>53</sup> It is true that the expression “high degree of autonomy” was put forward by the Chinese side at the beginning of the Sino-British negotiations leading to the handover of Hong Kong. Moreover, the principle governing the high degree of autonomy to be granted to Hong Kong—the OCTS principle—and its ingredients had been prepared by China even before the negotiations began. Nevertheless, the details that eventually bore out the high degree of autonomy resulted from the winding negotiations with some concessions on the Chinese part. See Gao, *supra* note 50, at 487–8; but cf. Ma Ngok, *The Sino-British Dispute over Hong Kong: A Game Theory Interpretation*, 37 *ASIAN SURV.* 738, 742, 744 (1997). Whether this could be considered Britain's victory is another matter. See GHAI, *supra* note 7, at 55.

<sup>54</sup> For the Chinese doctrine on the status of treaties in domestic law, see Hanqin Xue & Qian Jin, *International Treaties in the Chinese Domestic Legal System*, 8 *CHINESE J. INT'L L.* 299, 301–05 (2009).

<sup>55</sup> BASIC L. arts. 2, 19 (emphasis added).

<sup>56</sup> *Id.* arts. 110–12.

<sup>57</sup> *Id.* art. 116.

<sup>58</sup> *Id.* art. 106, para. 3.

<sup>59</sup> *Id.* arts. 13, 150–7. See also GHAI, *supra* note 7, at 457–92.

<sup>60</sup> GHAI, *supra* note 7, at 146.

<sup>61</sup> See, inter alia, BASIC L. arts. 2 (providing that Hong Kong enjoys the above powers under the NPC's authorization), 17, para. 3 (subjecting the legislation passed by the Hong Kong SAR to the NPCSC's scrutiny), 18, paras. 3 and 4 (authorizing the NPCSC to extend the application of Chinese legislation to Hong Kong under certain circumstances), 158 (granting the NPCSC interpretive jurisdiction over the Basic Law).

the interpretive and supervisory jurisdictions and the emergency power reserved to the NPCSC, it is even suggested that the Basic Law reflects the socialist character of the Chinese state in general.<sup>62</sup> Taken as a whole, China's three-pillar territorial constitution regarding Hong Kong only gives expression to the principle of a unitary state, while the latter ultimately determines the interpretation of the former. Is this constitutional rendering sound?

As comparative constitutional studies show, more and more unitary states have chosen to constitutionalize the powers devolved on local governments without subscribing to federalism,<sup>63</sup> defying the conventional contrast drawn between the principle of a unitary state and federalism.<sup>64</sup> Thus, the principle of a unitary state does not necessarily lead to a national government commandeering a subnational constituent unit as its subordinate or subsidiary.<sup>65</sup> Instead of a self-evident interpretive rule, the principle of a unitary state itself is subject to interpretation. Seen in this comparative light, the principle of a unitary state referenced in the preamble to the PRC Constitution does not command an interpretation of the Basic Law that would reduce Hong Kong to a mere subsidiary of the central government, as are other provincial-level governments under China's territorial constitution.

Alternatively, a careful reading of the Basic Law suggests that it does not automatically reduce Hong Kong to a provincial subordinate of the Chinese central authority,<sup>66</sup> when compared with other jurisdictions where a gap also exists between substance and organizational form in the constitutional arrangement concerning the center-province relationship.<sup>67</sup> As the implementing legislation of both the SAR clause of the PRC Constitution and the Joint Declaration, the Basic Law should instead be read in light of the three-pillar constitutional structure in its entirety. The genuine meaning of the high degree of autonomy laid down and substantiated in the Joint Declaration itself and its annexes, which stand apart from ordinary treaties,<sup>68</sup> must not be equated with Beijing's unilateral interpretation of the Basic Law.<sup>69</sup> Rather, provisions in the Basic Law should be interpreted in light of

<sup>62</sup> Johannes Chan, *A Shrinking Space: A Dynamic Relationship Between the Judiciary in a Liberal Society of Hong Kong and a Socialist-Leninist Sovereign State*, 72 CURRENT LEGAL PROBS. 85, 88–9 (2019).

<sup>63</sup> See, e.g., PALERMO & KÖSSLER, *supra* note 3, at 50–61; Barbara Gustafarro & Lucia Payero, *Devolution and Secession in Comparative Perspective: The Case of Spain and Italy*, in THE UNITED KINGDOM AND THE FEDERAL IDEA, *supra* note 3, at 123.

<sup>64</sup> Paolo Dardanelli, *Conceptualizing, Measuring, and Mapping State Structures: With an Application to Western Europe, 1950–2015*, 49 PUBLIUS 271, 272 (2018).

<sup>65</sup> Robert Schütze, *Introduction: British "Federalism"?*, in THE UNITED KINGDOM AND THE FEDERAL IDEA, *supra* note 3, at 1, 24–26.

<sup>66</sup> Albert H.Y. Chen, *The Autonomy of Hong Kong under "One Country, Two Systems"*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY HONG KONG 33, 39–40 (Tai-lok Lui, Stephen W.K. Chiu, & Ray Yep eds., 2019).

<sup>67</sup> Cf. Jeroen Kiewiet, *Legal Unity as Political Unity? Carl Schmitt and Hugo Krabbe on the Catalanian Constitutional Crisis*, 34 UTRECHT J. INT'L & EUR. L. 56, 58–62 (2018).

<sup>68</sup> See *supra* text accompanying notes 51–4.

<sup>69</sup> Even if much of the text of the Joint Declaration and its annexes—all of which are international legal instruments—has been transposed to the Basic Law, which is a domestic statute of China, it does not change the canon of legal interpretation that the genuine meaning underlying the former should guide the latter, not the other way around. John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 318–19 (1992).

the principle of a high degree of autonomy as set out in the Joint Declaration—another pillar of China’s territorial constitution regarding Hong Kong—alongside the PRC Constitution.<sup>70</sup> As an SAR, Hong Kong should enjoy more autonomy than does a province under the Chinese constitutional order.<sup>71</sup> Thus, Hong Kong in China is comparable to a special region in a state under a constitutional framework of “regionalism” or “asymmetrical federalism.”<sup>72</sup>

The foregoing constitutional reading shows that the special status of Hong Kong in China’s territorial constitution bears some resemblance to the constitutional status of constituent units of some federal states.<sup>73</sup> It should be emphasized that such resemblance does not make China’s territorial constitution one of federalism. Nor does the fact of a country having two or more systems turn it into a federal state. Yet, as Francesco Palermo and Karl Kössler note, “federalism is not in itself a form of government but rather its ideological underpinning. It is an idea—and an ideal.”<sup>74</sup> Read in this light, “high degree of autonomy,” “regionalism,” and “asymmetrical federalism” are all various “manifestations” of the federal idea under which subnational units are vested with substantial powers without being subordinated to the central government.<sup>75</sup> Thus, the three foundational instruments governing the constitutional status of Hong Kong can be read as intimating some features of federalism in China’s territorial constitution, albeit in an imperfect way. If so, are the flawed design in the Basic Law and the resulting imperfect manifestation of the federal idea to blame for Hong Kong’s shrinking autonomy in the reality of China’s territorial constitution? To answer this question, it is necessary to look beyond China’s positive territorial constitution and its socialist legal system.

<sup>70</sup> For example, through the prism of the high degree of autonomy principle, the provision describing Hong Kong as a “local administrative region ... com[ing] directly under the Central People’s Government” only reflects the fact of Hong Kong as an SAR sitting at the highest and provincial level in the structure of local government. BASIC L. art. 12 (emphasis added).

<sup>71</sup> Zhu, *supra* note 8, at 289.

<sup>72</sup> Cf. Marco Olivetti, *The Special Administrative Regions of the PRC in Comparison with Autonomous Regions Models*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS: PERSPECTIVES OF EVOLUTION—ESSAYS ON MACAU’S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA 777, 797 (Jorge Costa Oliveira & Paulo Cardinal eds., 2009).

<sup>73</sup> Andrew Harding, *Subnational Constitutionalism in Asia: Federalism and Other Forms of Territorial Governance*, in THE OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN ASIA (Holning Lau, David S. Law, & Alex Schwartz eds., forthcoming); see also GHAI, *supra* note 7, at 185–6; cf. Chen, *supra* note 66, at 37–41.

<sup>74</sup> PALERMO & KÖSSLER, *supra* note 3, at 1.

<sup>75</sup> *Id.* at 34–42, 50–60; see also Chen, *supra* note 66, at 38; Harding, *supra* note 73; Johannes Chan, *Asymmetry in the Face of Heavily Disproportionate Power Relations: Hong Kong*, in ASYMMETRIC AUTONOMY AND THE SETTLEMENT OF ETHNIC CONFLICTS 121 (Marc Weller & Katherine Nobbs eds., 2010); Paulo Cardinal & Yihe Zhang, *Subnational Constitutionalism in the SARs of the People’s Republic of China: An Exceptional Tailored Suit Model?*, 4 PERSP. ON FEDERALISM, no. 2, 2012, at E-101, 108–09, <https://www.on-federalism.eu/component/jdownloads/?task=download.send&id=29&catid=4&m=0&Itemid=101>; cf. Giancarlo Rolla, *The Development of Asymmetric Regionalism and the Principle of Autonomy in the New Constitutional Systems: A Comparative Approach*, in ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS, *supra* note 72, at 461, 472–5.

### 3. Discovering the (transient) moments of federalism in modern China

As indicated above, the Basic Law is inscribed with leeway, whereby the OCTS arrangement can be moved in the current direction to the detriment of Hong Kong's high degree of autonomy.<sup>76</sup> Yet, that legally inbuilt leeway does not in itself condemn the implementation of the OCTS arrangement to that detrimental way.<sup>77</sup> After all, poorly designed legislation can be fairly redressed through interpretation in the phase of implementation<sup>78</sup> and the foregoing attempted constitutional rendering shows how this can be done in the case of Hong Kong. Then does the cause of Hong Kong's recent moving away from "two systems" to "one country" under the OCTS arrangement boil down to China's socialist legal system?<sup>79</sup> If so, it would suggest that the OCTS arrangement is intended to rest the relationship between mainland China and Hong Kong on a stable, enduring constitutional foundation, only to be negated by the socialist character of China's legal system. Yet, both the Joint Declaration and the Basic Law indicate otherwise. The OCTS arrangement—the closest thing China has ever had to federalism in its history—is provisional and instrumental by design.<sup>80</sup> Moreover, as noted above, Hong Kong did not see a precipitous decline of the rule of law and human rights after the handover until the 2019 political crisis.<sup>81</sup> Thus, to understand the current constitutional quagmire Hong Kong finds itself in, we need to look into the deeper normative notions and images that underpin the expectations and legitimacy of China's territorial constitution that are connoted in its current socialist legal system – i.e., the Chinese constitutional imaginary. The way federalism has been imagined in modern China holds the key to it.

Conventional wisdom has it that the inadvertent alignment of federalism with the political chaos inflicted by warlordism in the 1920s is responsible for China's deep-rooted skepticism of federalism reflected in its conception of the territorial constitution: federalism points to national disunity and the eventual dismemberment of the state.<sup>82</sup> This view is partial in two ways. First, it only explains why the label of federalism has been deliberately shunned in the Chinese constitutional discourse, without telling us why federalism-related ideas such as the composite state and subsidiarity continue to float in discussion about China's territorial constitution.<sup>83</sup> Also, it is partial

<sup>76</sup> China's National Security Law concerning Hong Kong enacted in 2020 illustrates the constitutional weakness of the high degree of autonomy vested in Hong Kong. See Mitter, *supra* note 10; cf. Eric C. Ip, *The Politics of the Constitutional Common Law in Hong Kong Under Chinese Sovereignty*, 25 WASH. INT'L L.J. 565, 573–6 (2016).

<sup>77</sup> The caveats noted *supra* at the beginning of Section 2 apply here. The factor of the prerogative state is not considered for present purposes. See *supra* text accompanying notes 27–33.

<sup>78</sup> See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 61–80 (2005).

<sup>79</sup> Cf. Chan, *supra* note 62.

<sup>80</sup> The high degree of autonomy enjoyed by Hong Kong has a limited life span of fifty years. Joint Declaration § 3(12); BASIC L. art. 5. On constitutional issues surrounding the extension of the OCTS arrangement in Hong Kong beyond June 30, 2047, see GHAI, *supra* note 7, at 142–3.

<sup>81</sup> See *supra* text accompanying notes 7–10.

<sup>82</sup> Zhu, *supra* note 8, at 283.

<sup>83</sup> See *supra* text accompanying note 13.

because it is based on a curtailed account of history that suggests a monolithic view of federalism in modern China. To properly appreciate China's checkered encounter with federalism and how the Chinese constitutional imaginary has been set in the antifederal direction, we need to look beyond the horizon of the 1920s.<sup>84</sup>

The 1920s were not China's first encounter with federalism. Nor was political chaos the defining feature of federalism when it made its first appearance on Chinese soil. As early as the 1890s, federalism had been introduced into China by the reformist and revolutionary movements.<sup>85</sup> In the twilight of the empire, reformists enthusiastically drew on Western ideas in attempts to save it by liberating China from its status as a semicolony of Western powers. Inspired by federalism, Chinese reformists considered provincial autonomy to be the way forward.<sup>86</sup> Unshackled by the centralized power wielded from the imperial court in Beijing, provinces could become the fertile ground for civil society, which would further breathe life into reforms at the provincial level. Provincial autonomy was a reformist tool to bring impetus to the urgently needed shake-up to save the Qing Empire.<sup>87</sup>

This is revolutionary. Historically, China had long been imagined as an entity under centralized administration, ever since its unification under the Qin Empire in the third century BCE,<sup>88</sup> which ended the centuries-long chaotic feudal political system in ancient China. While the feudal system (*fengjian*) was seen as the incubator of disorder predating the Qin unification, prefecture/county-based administrative division under a central authority (*junxian*) was credited with laying the foundations for mostly unified imperial China since the Qin Empire.<sup>89</sup> The feudal system thus stood as the antithesis of national unity in Chinese history.<sup>90</sup> Departing from the long tradition of centralized administration, late-Qing reformists in modern China went against the grain in conceiving of provincial autonomy.<sup>91</sup>

Against this backdrop, it came as no surprise that the reformists' first affair with federalism did not last long. Juxtaposed to centralized administration, provincial autonomy and its source of inspiration—federalism—were easily associated with the antithesis of national unity—the feudal system. Thus viewed, federalism amounted to a poisoned chalice that would only further weaken the central authority by fueling

<sup>84</sup> To explain how federalism became demonized in China, Steven Phillips refers to the 1920s as “a key transitional period.” Steven Phillips, *The Demonization of Federalism in Republican China*, in DEFUNCT FEDERALISMS: CRITICAL PERSPECTIVES ON FEDERAL FAILURE 87, 90 (Emilian Kavalski & Magdalena Zolkos eds., 2016).

<sup>85</sup> *Id.* at 88; PRASENJIT DUARA, *RESCUING HISTORY FROM THE NATION: QUESTIONING NARRATIVES OF MODERN CHINA 180–4* (1995); see also ROGER R. THOMPSON, *CHINA'S LOCAL COUNCILS IN THE AGE OF CONSTITUTIONAL REFORM, 1898–1911* (1995).

<sup>86</sup> Waldron, *supra* note 8, at 117; Phillips, *supra* note 84, at 88.

<sup>87</sup> DUARA, *supra* note 85, at 180–1; see also THOMPSON, *supra* note 85.

<sup>88</sup> It should be noted that the notion of centralized administration in Chinese history is different from the modern concept of sovereignty. Also, it is questionable how effective such historical centralized administration in Chinese history was in the real world. See G. Zhiyong Lan & Guoquan Chen, *Intergovernmental Relations in Mainland China*, in PUBLIC ADMINISTRATION IN EAST ASIA: MAINLAND CHINA, JAPAN, SOUTH KOREA, TAIWAN 75, 79 (Evan M. Berman ed., 2010).

<sup>89</sup> Waldron, *supra* note 8, at 126; DUARA, *supra* note 85, at 186–7.

<sup>90</sup> Phillips, *supra* note 84, at 87–9; DUARA, *supra* note 85, at 200–01.

<sup>91</sup> DUARA, *supra* note 85, at 184–5. During this period, feudalism (*fengjian*) resurged and was associated with an imagined gentry-based civil society. Provincial autonomy was then delegitimized. See *id.* at 147–75.

provincial autonomy. Federalism was thus not the way for the empire's survival, not to mention national resurgence. For example, in the eyes of Sun Yat-Sen, the attributed founder of republican China, there was no place for federalism in framing the relationship between provinces and the central government,<sup>92</sup> despite his brief convenient embrace of the federal idea.<sup>93</sup> A strong central authority was widely believed to be the key to China's liberation from Western imperialism.

Even so, the federal idea did not vanish from the political landscape of Chinese state building. Soon after a mutiny in central China triggered a widespread armed rebellion in October 1911, more than a dozen provinces declared "independence" from the Qing Empire. Although this "secessionist" move was only nominal, and those seceding, independent provinces soon (re)joined republican China, it played a critical role in forcing the Qing emperor's abdication, which led to the birth of republican China.<sup>94</sup> Notably, the revolutionary movement of provincial independence was regarded as a political action modeled on federalism. Yet, with the Qing Empire replaced by republican China, the federal idea soon yielded to the tradition of centralized administration.<sup>95</sup> In the meantime, republican China was plunged into political chaos. As the strongman Yuan Shikai emerged as a dictator after being elected president in 1912, disaffected provinces rebelled with allusions to federalism, but conceded before long.<sup>96</sup> Nevertheless, when Yuan further attempted to crown himself as the new Chinese emperor in 1915, several provinces drew on the experience of 1911, declaring "independence" from Yuan's national government in Beijing.<sup>97</sup> This time, Yuan backed down. An interim report is warranted: experiences in the infancy of republican China suggest that federalism served a purpose in ousting or resisting the corrupt central government in order to build the modern Chinese state. In this light, federalism is instrumental.

Not long after his forced retreat amid the provincial independence moves, Yuan died in 1916 and the rebellious provinces were turned into the fiefdoms of their military governors.<sup>98</sup> China was then plagued with warlordism until the insurgent Nationalist Chiang Kai-Shek defeated other provincial warlords on the battlefield in 1928.<sup>99</sup> Interestingly, federalism saw its genuine moment when warlordism engulfed China.

As warlords were busy battling each other, a political debate took place over the way out of political chaos in the 1920s. To some opinion leaders, warlordism resulted from the lack of a strong central authority. Military power was thus the answer to political chaos. Warlords could only be brought to their knees by force. This echoed the long tradition of centralized administration in Chinese history.<sup>100</sup> Yet, against the strategy of unification by force arose calls for federalism. For the federalists, the root cause of

<sup>92</sup> *Id.* at 197–8; Phillips, *supra* note 84, at 95.

<sup>93</sup> Phillips, *supra* note 84, at 90.

<sup>94</sup> See DUARA, *supra* note 85, at 184–5.

<sup>95</sup> *Id.* at 184.

<sup>96</sup> See *id.*; Phillips, *supra* note 84, at 89–90; see also EDWARD A. McCORD, THE POWER OF THE GUN: THE EMERGENCE OF MODERN CHINESE WARLORDISM 161–204 (1993).

<sup>97</sup> McCORD, *supra* note 96, at 205–45.

<sup>98</sup> Phillips, *supra* note 84, at 89.

<sup>99</sup> *Id.* at 90–1.

<sup>100</sup> Waldron, *supra* note 8, at 118–19, 120–1.

warlordism was militarism and authoritarianism, both of which were the pathology of power centralization. To break the tragic cycle of centralized power and warlordism in early republican China, the path towards national unification was to start political reform and build civil society in individual provinces instead of appealing to force as manifested in Chiang's militant policy.<sup>101</sup>

Surprisingly, it was the provincial warlords that took up the federal idea. Riding the wave of federalism talk, some launched and coordinated reform policies across the boundaries of their provincial fiefdoms in the movement of "united provincial autonomy" or "federal self-government" (聯省自治 [*lianshengzizhi*])<sup>102</sup> as a way to deflect Chiang's military pressure.<sup>103</sup> This was considered the closest experience to federalism in Chinese history before the OCTS arrangement about Hong Kong.<sup>104</sup>

As with the early experiences of provincial independence at the end of the Qing Empire and in resistance to Yuan's dictatorship, the federalist movement of united provincial autonomy in the 1920s was transitory, with little impact on real-world politics. Yet, it is not without historical significance. Defined by its coincidence with warlordism, federalism evokes the failed state the warring military governors jointly created in early republican China. Given that the political chaos caused by warlordism was ended by Chiang's military campaign, Chiang's success in unification by force further strengthened the Chinese conventional belief in pivoting the state to a strong central power. Read through this lens, the federal idea was put into practice in the form of united provincial autonomy only by military governors on the losing side in the historic struggle for national unity in the early Chinese state building. Federalism has since been tied to warlordism, the "demon" standing in the way of China becoming a modern state.<sup>105</sup>

Despite its being associated with the losing side in the historic struggle, there is no denying that the experience of the united provincial autonomy movement in the 1920s was where federalism came close to reality in Chinese history.<sup>106</sup> Short-lived as it was, this experiment of federalism, together with modern China's early brief encounters with the federal idea, is integral to the grand narratives about political reform before the ending of warlordism by Chiang's forces at this critical juncture in

<sup>101</sup> *Id.* at 122–3.

<sup>102</sup> DUARA, *supra* note 85, at 188–93. Phillips observes that "federalism was often translated at [*sic*] *liansheng* [聯省], literally meaning a federation or confederation of provinces." Phillips, *supra* note 84, at 88.

<sup>103</sup> Phillips, *supra* note 84, at 91–3.

<sup>104</sup> Waldron, *supra* note 8, at 116.

<sup>105</sup> *Id.*; Phillips, *supra* note 84, at 88–93; *see also* DUARA, *supra* note 85, at 199.

<sup>106</sup> Federalism has since attracted only limited attention from time to time. Neither the Nationalists nor the Communists then ever came around to federalism. Waldron, *supra* note 8, at 120–1, 124; Phillips, *supra* note 84, at 91–5, 98–101; DUARA, *supra* note 85, at 202. Notably, the Republic of China (ROC) Constitution 1947, which was drafted under the guidance of Sun Yat-Sen's doctrines and is still the working constitution for Taiwan, includes detailed provisions concerning local government in chapter XI (arts. 112–28). Yet, the system of local government should be read together with the allocation of powers between the central and local governments in chapter VI. Taken as a whole, the ROC Constitution 1947 is far from (quasi-)federal, but only provides for "a form of limited local autonomy within a unitary state." *See* Jiunn-rong Yeh, *Evolving Central-Local Relations in a Contested Constitutional Democracy: The Case of Taiwan*, in *CENTRAL-LOCAL RELATIONS IN ASIAN CONSTITUTIONAL SYSTEMS* 37, 39–41 (Andrew Harding & Mark Sidel eds., 2015).



Chinese modern history.<sup>107</sup> As part of the narratives about Chinese state building, the role of federalism in modern China has thus featured as a way station to the destination of national unity under a strong central government.<sup>108</sup>

Granted, the foregoing account of the rise and fall of federalism in modern China is schematic. Even so, it shows that the response to federalism was far from monolithic in modern China. Situated in the formation of the modern Chinese state, federalism is indeed reminiscent of the periods of political chaos. Against the tradition of centralized administration, federalism is even considered “anti-Chinese.”<sup>109</sup> Yet, through the lens of Chinese modern state building, the intermittent attempts at federalism in early republican China suggested that it could be instrumental to national unity and a strong state. Thus, the transient moments heralding the realization of the unifying authority at the center are where federalism has found itself in the Chinese narratives about the center-province relationship.

#### 4. (Re)imagining frontiers in China’s modern territorial constitution

With the imagination of federalism in modern China revealed, the way in which intimations of federalism in the Basic Law have been rendered nearly invisible should become transparent. In the Chinese territorial constitutional imaginary, federalism is never meant to be long-lasting. It is transitional in nature. When necessary, elements of federalism can be incorporated into the grand constitutional design of the geographical distribution of authority within the Chinese state alongside other arrangements. In other words, federalism can be a convenient makeshift for those who have conceived of China’s territorial constitution for tactical reasons, although it is certainly not their darling. That is why manifestations or intimations of federalism are not wanting in China’s territorial constitution. Yet, such constitutionalization is instrumental in character, simply paving the way to a unitary state steered by a strong central government. This is how constitutional intimations of federalism are imagined and expected by constitutional agents when federal elements are included in the territorial constitution. The limited duration of the OCTS arrangement as noted above—which is but an instance of the transitional and instrumental character of federalism in China’s territorial constitution—illustrates the deeper normative image informing the constitutional expectations about the legitimate organization of the center-province relationship. Underlying the intimations of federalism in China’s territorial constitution regarding Hong Kong is the imaginary framing an instrumental view of federalism. In sum, the Chinese modern territorial constitutional imaginary is antifederal.

If Hong Kong’s current constitutional status virtually mirrors the Chinese antifederal constitutional imaginary, can we even assume that China’s territorial

<sup>107</sup> See DUARA, *supra* note 85, at 177–204.

<sup>108</sup> See Phillips, *supra* note 84, at 89–90.

<sup>109</sup> DUARA, *supra* note 85, at 186.

constitutional imaginary actually casts a shadow on the entire design of the three-pillar constitutional structure regarding Hong Kong? Also, as intimations of federalism regarding Hong Kong's status as a Chinese SAR are oriented towards national unification of a frontier territory that was once severed from China proper, the center-province relationship is not the only concern in the Chinese antifederal constitutional imaginary. At stake is the construct of state territory in building the modern Chinese state.<sup>110</sup> Before we look into how the Chinese state-building project plays out in structuring China's territorial constitution regarding Hong Kong, the modern construct of state territory in China will first be examined.

#### 4.1. Making territory out of frontiers: The desuzeraintization of Tibet

As has been well documented in the literature, statehood, territory, boundary, and other attributes of the modern state did not exist in the traditional Chinese epistemic system. Conventional ideas such as the China-centered universe (*tianxia*),<sup>111</sup> the concentric spheres of civilization with Chinese superiority, undefined frontiers, and personal patronage structured the imagination of the traditional Chinese state and its relationships with neighboring powers.<sup>112</sup> That underlying epistemic system of the premodern Chinese state was shaken to its foundations amid China's painful encounter with modern international law following the First Opium War (1839–42).<sup>113</sup> How to translate China's traditional (external) relations with neighboring powers and the world pivoting on the Sinocentric ritual and tributary system into the *ius publicum Europaeum*-based international legal system became a central issue in imperial China's transfiguration into a modern state.<sup>114</sup> The relationship between the frontiers outside China proper—which were colonized and subjected to the sphere of Chinese superiority only by the Qing Empire—and the Chinese central government posed a special

<sup>110</sup> CARRAI, *supra* note 12, at 73–80, 123–42.

<sup>111</sup> *Tianxia* (天下, “all under Heaven”) is a central concept in the ontology of the traditional Chinese political order, referring to a particular “complete” political entity, which constitutes “the unity of the Empire, identifying the frontiers of China with the limits of the Universe.” Mingming Wang, *All Under Heaven (Tianxia): Cosmological Perspectives and Political Ontologies in Pre-Modern China*, HAU: J. ETHNOGRAPHIC THEORY, Spring 2012, at 337, 338 (citation omitted).

<sup>112</sup> See CARRAI, *supra* note 12, at 33–46.

<sup>113</sup> Simon Chesterman, *Asia's Ambivalence About International Law and Institutions: Past, Present and Futures*, 27 EUR. J. INT'L L. 945, 951 (2016); see also Jean d'Aspremont & Binxin Zhang, *China and International Law: Two Tales of an Encounter*, 34 LEIDEN J. INT'L L. 899 (2021). Notably, it is questionable whether the negotiations between the Qing Empire and Russia resulting in the Treaty of Nerchinsk of 1689 constituted the first instance of the Chinese state conducting foreign relations in accordance with European international law. Compare Zhiguan Yin, *Heavenly Principles? The Translation of International Law in 19th-Century China and the Constitution of Universality*, 27 EUR. J. INT'L L. 1005, 1008 (2016), with Prasenjit Duara, *The Legacy of Empires and Nations in East Asia*, in CHINA INSIDE OUT: CONTEMPORARY CHINESE NATIONALISM AND TRANSNATIONALISM 35, 41, 44 (Pal Nyiri & Joana Breidenbach eds., 2004). The systematic introduction of knowledge of modern international law into China followed the translation of Henry Wheaton's *Elements of International Law* by W.A.P. Martin in 1863. See LYDIA H. LIU, *THE CLASH OF EMPIRES: THE INVENTION OF CHINA IN MODERN WORLD MAKING* 113–24 (2004).

<sup>114</sup> CARRAI, *supra* note 12, at 18–46; Yin, *supra* note 113, at 1008–10; Amanda J. Cheney, *Tibet Lost in Translation: Sovereignty, Suzerainty and International Order Transformation, 1904–1906*, 26 J. CONTEMP. CHINA 769, 769–71 (2017); see also LIU, *supra* note 113, at 144.

challenge to the intersystem translation, of which the struggle over the status of Tibet offers an illuminating example.<sup>115</sup>

Signs of a political relationship between China and Tibet can be traced back to the seventh century.<sup>116</sup> Considering the inconsistent character of the tenuous connection, the historical Sino-Tibetan relations are hard to define,<sup>117</sup> although the early links between the leaders of the Tibetan Buddhist theocracy and the Qing emperors were reminiscent of a priest-patron relationship.<sup>118</sup> Even so, due in part to its geographical proximity to China, Tibet was then subject to further political influence from the Qing Empire with the latter's appointment of imperial residents and stationing of garrison forces in Lhasa, the capital of Tibet, following the Chinese military interventions in the early eighteenth century. Yet, China was unable to maintain a meaningful administrative role in Tibet in the second half of the nineteenth century when the Qing Empire continued to concede grounds to Western powers. As a result, China was no longer the unquestioned dominant force in Tibet and the adjacent regions. Whether the Qing held sovereignty over Tibet and how to characterize the Sino-Tibetan relations in terms of international law in general came to the fore when the Chinese and the British clashed over the Qing Empire's southwestern frontier.<sup>119</sup>

With the Chinese administrative grip on Tibet loosened, the British were eager to extend influence from India into Tibet and further into Inner Asia in the late nineteenth century.<sup>120</sup> Unsure of the legal nature of Sino-Tibetan relations, they acknowledged the Qing's special status in Tibet. Yet, the British government further questioned whether China ever held sovereignty over Tibet, as Tibet's continuing rejection of the Qing-approved delegations sent by its viceroy of India suggested the Qing's lack of effective control over Tibet.<sup>121</sup> Invoking the ambiguous concept of suzerainty,<sup>122</sup> the British position held that Tibet was merely a vassal state in relation to the Qing, not a territory of the Chinese state, and Britain should contact Lhasa directly instead of by way of Beijing.<sup>123</sup>

<sup>115</sup> Wang, *supra* note 111, at 373–5. The “outer territories” that lay outside China proper included Inner Mongolia, Tibet, Xinjiang, and other Chinese frontier regions as well as Mongolia. CARRAI, *supra* note 12, at 7.

<sup>116</sup> Maria Adele Carrai, *Learning Western Techniques of Empire: Republican China and the New Legal Framework for Managing Tibet*, 30 LEIDEN J. INT'L L. 801, 804 (2017).

<sup>117</sup> *Id.* at 804–06; R.P. ANAND, *STUDIES IN INTERNATIONAL LAW AND HISTORY: AN ASIAN PERSPECTIVE* 103–04 (2004).

<sup>118</sup> Cheney, *supra* note 114, at 774; Carrai, *supra* note 116, at 804.

<sup>119</sup> See Carrai, *supra* note 116, at 805–07.

<sup>120</sup> Cheney, *supra* note 114, at 773.

<sup>121</sup> *Id.* at 775–76; Carrai, *supra* note 116, at 807–10; ANAND, *supra* note 117, at 105.

<sup>122</sup> As a relic of medieval feudalism, suzerainty was revived in the nineteenth century as a loose concept to refer to the privileged status of Western powers vis-à-vis the subdued semisovereign entities within their respective spheres of influence. See W.H.H. Kelke, *Feudal Suzerains and Modern Suzerainty*, 12 LAW Q. REV. 215 (1896); see also Geddes W. Rutherford, *Spheres of Influence: An Aspect of Semi-Suzerainty*, 20 AM. J. INT'L L. 300 (1926).

<sup>123</sup> Cheney, *supra* note 114, at 774–5; Carrai, *supra* note 116, at 810–13. In the 1890s, Britain and the Qing Empire entered into two bilateral agreements concerning Tibet. Assuming that the Qing Empire controlled Tibet's external affairs, both treaties left the legal status of its authority over Tibet unsettled. Notably, Tibet did not consider itself bound by these bilateral agreements. Cheney, *supra* note 114, at 776.

In the meantime, the British tried hard to establish a direct relationship with Lhasa as Tibet attempted to rid itself of the Qing's nominal administrative control and "internationalize" its relationship with the imperial court in Beijing and the world in general.<sup>124</sup> In 1904, the British-Tibetan Lhasa Convention was eventually signed, without the Qing's consent.<sup>125</sup> Notably, its article IX provided, *inter alia*, that without the prior consent of the British government no "foreign power" was permitted to intervene in Tibet, raising the question of whether China was a foreign power for the purpose of the treaty.<sup>126</sup> With this crucial provision, the British effectively challenged the Chinese sovereign claim to Tibet head-on. On the other hand, the Qing did not consider itself bound by the bilateral agreement between Britain and Tibet.<sup>127</sup> Paralleling its efforts to substantiate its control over Tibet, the Qing carefully chose the neologism "sovereignty" (translated as 主權 (*zhuquan*) in Chinese) instead of "suzerainty" (translated as 上邦之權 (*shanbangzhiquan*) or 宗主權 (*zongzhuquan*) in Chinese) in respect of its status in Tibet in its official documents and diplomatic correspondence.<sup>128</sup> Facing the Qing's recalcitrance and remaining influence in Tibet, the British returned to Beijing to secure its "adherence" and sort out the issues left unresolved by the Lhasa Convention.<sup>129</sup>

Resulting from the meandering negotiation between Britain and the Qing Empire was the Adhesion Agreement of 1906.<sup>130</sup> On the one hand, the Adhesion Agreement explicitly excluded China from the term "foreign power" in the Lhasa Convention, acknowledged its special status in Tibet, and made no mention of suzerainty.<sup>131</sup> On the other hand, the Qing essentially acquiesced to the British insistence that Tibet was not an integral part of China by conceding that the most-favored-nation clause inscribed in the web of "unequal treaties" China had struck with other foreign powers would not apply to Tibet.<sup>132</sup> With the omission of suzerainty, the Adhesion Agreement kept China from being identified as merely a suzerain over Tibet, thereby avoiding the formal suzerainization of the Sino-Tibetan relations and allowing China legal space for subsequent claims.<sup>133</sup>

<sup>124</sup> ANAND, *supra* note 117, at 105–07.

<sup>125</sup> The Qing imperial resident resisted pressure from the British to become a signatory to the Lhasa Convention. Cheney, *supra* note 114, at 777.

<sup>126</sup> Carrai, *supra* note 116, at 810. Referring to the provision concerned, R.P. Anand contends that "the general tenor of the Treaty, and [the relevant clauses] of Article IX, clearly conveyed the impression that China was regarded as a foreign power in Tibet." ANAND, *supra* note 117, at 108–09.

<sup>127</sup> Cheney, *supra* note 114, at 777.

<sup>128</sup> Carrai, *supra* note 116, at 812–13. Notably, in its telegram instructing the imperial resident not to sign the Lhasa Convention on September 8, 1904, Beijing referred to its status vis-à-vis Tibet as 主權 (*zhuquan*) in Chinese, meaning sovereignty. Yet, when the telegram was intercepted by the British, they deliberately translated the Chinese term *zhuquan* as suzerainty. Cheney, *supra* note 114, at 777.

<sup>129</sup> Cheney, *supra* note 114, at 777.

<sup>130</sup> See *id.* at 777–81; Carrai, *supra* note 116, at 811–12.

<sup>131</sup> Cheney, *supra* note 114, at 781.

<sup>132</sup> Under the terms of the so-called unequal treaties into which the Qing Empire entered with foreign powers, the privileges it granted to one country within its territory would be automatically extended to the rest by operation of the most-favored-nation clause in such treaties. Thus, by excluding other foreign powers from the privileged access to Tibet granted to the British, the Adhesion Agreement assumed that Tibet was not an integral part of Chinese territory. *Id.* at 779, 781.

<sup>133</sup> Tibet maintained its *de facto* independence until China established effective control after 1951. See Carrai, *supra* note 116, at 823.

It should be noted that the Adhesion Agreement was not the end of the Sino-British wrangling over the status of Tibet, and the sovereignty vs. suzerainty controversy was much more complicated than discussed above.<sup>134</sup> Still, the foregoing account offers a glimpse into the tenacity China has shown in resisting any textual manifestation in the law that would relegate its status in Tibet to suzerainty, even in the depth of its long “century of national humiliation.”<sup>135</sup> Although China’s sovereignty claim was not recognized in the Adhesion Agreement, leaving out both suzerainty and sovereignty allowed China to create important legal space for itself in its pursuit of territorial integrity and other sovereign claims in respect of Tibet.<sup>136</sup>

As I have suggested, the sovereignty vs. suzerainty controversy in Sino-British relations was not just a result of two empires clashing on the roof of the world. Tibet was another actor in this story of desuzeraintization.<sup>137</sup> With the hard-won strategic opening noted above, China then set about its tortuous path towards the territorialization and “interiorization” of Tibet—along with other frontiers—paralleling its resistance to the suzeraintization of its relationship with Tibet by foreign powers.<sup>138</sup> Through such national integration and territorial consolidation policies, which continued from the late Qing into republican China, frontier regions were gradually turned into provinces or other administrative units under the Chinese state’s direct rule.<sup>139</sup> It should come as no surprise that the process of consolidating the Chinese position in Tibet from the late Qing onwards was not straightforward as Tibet persistently resisted being treated as a mere subordinate of the Chinese state. At the center of the conflict between Lhasa and the Chinese central government was the meaning of Tibetan autonomy: Did Tibet actually enjoy “full autonomy” vis-à-vis China? Or was it only granted self-government under the principle of a high degree of autonomy within the Chinese state?<sup>140</sup> The question of autonomy did not go away when the Nationalists were forced out of mainland China in 1949. Only when the Dalai Lama accepted the 17-Point Agreement for the Peaceful Liberation of Tibet (the 17-Point Agreement) under Beijing’s threat of a full Chinese military occupation of Tibet in 1951 did China begin to exercise effective control over Tibet.<sup>141</sup> Instead of bringing “national regional autonomy” to Tibet

<sup>134</sup> Notably, Tibet did not consider itself bound by this bilateral treaty. On the subsequent trilateral conflicts in diplomacy, see Carrai, *supra* note 116, at 814–16. The sovereignty vs. suzerainty controversy between Britain and China lingered on until the former recognized the latter’s sovereignty over Tibet in 2008. Cheney, *supra* note 114, at 782.

<sup>135</sup> The long century of national humiliation in Chinese nation-building narratives started around 1839 when the First Opium War broke out. ZHENG WANG, NEVER FORGET NATIONAL HUMILIATION: HISTORICAL MEMORY IN CHINESE POLITICS AND FOREIGN RELATIONS (2012).

<sup>136</sup> Cheney, *supra* note 114, at 782.

<sup>137</sup> See *supra* text accompanying notes 124–5.

<sup>138</sup> See Susette Cooke, *Constructing Qinghai Province: Chinese State-Making in a Tibetan-Mongol Frontier Region 1907–1957*, EURASIAN GEOGRAPHY & ECON. (forthcoming), <https://doi.org/10.1080/15387216.2022.2032240>; see also Carrai, *supra* note 12, at 132, 137; Thomas S. Mullaney, *Ethnicity, Nationalism, and Identity in the Study of Modern China*, in *A COMPANION TO CHINESE HISTORY* 290, 296 (Michael Szonyi ed., 2017).

<sup>139</sup> See Cooke, *supra* note 138.

<sup>140</sup> See Carrai, *supra* note 116, at 817–22.

<sup>141</sup> It is interesting to note that the 17-Point Agreement is later seen as the source of inspiration for the OCTS arrangement vis-à-vis Taiwan and Hong Kong as well as Macau. See Hung & Kuo, *supra* note 11, at 318, 320–4.

as promised, the 17-Point Agreement eventually paved the way for China's complete control of Tibet after the Dalai Lama's escape to India following the Tibetan uprising in 1959.<sup>142</sup>

The long and winding desuzeraintization of Tibet that eventually culminated in its full conversion into a Chinese "Autonomous Region"<sup>143</sup> tells a story of how China evolved from a once pluralist empire into a modern unitary state. From its experiences on the frontiers, China learned one hard lesson by heart: differential treatment of frontiers risks sovereign claims; sovereignty builds on unity, not diversity. Frontiers must be turned into territory defined by fixed boundaries with effective control.<sup>144</sup>

#### 4.2. Merging an irredenta into the motherland: Sovereignty and the antifederal imagination of Hong Kong

The way that China fought for its strategic space in the desuzeraintization of Tibet not only reflects its modern reimagination of frontier territory but also foreshadows its design of the three-pillar territorial constitution regarding Hong Kong. As in the case of Tibet, the legal status of Hong Kong and who held sovereignty over it before the 1997 handover were at the center of the diplomatic wrangling between Britain and China over the Joint Declaration.<sup>145</sup> Refusing to recognize British title to Hong Kong before 1997,<sup>146</sup> China held to its position through tenacious and adroit legal maneuvers. From this resulted the odd coexistence of two unilateral declarations in essence—articles 1 and 2—one of the most distinctive aspects of the Joint Declaration.<sup>147</sup> Article 1 provides: "The [PRC] has decided to *resume the exercise of sovereignty* over Hong Kong with effect from 1 July 1997." This formulation of the legal status of Hong Kong before July 1, 1997, is not unambiguous. At first glance, it seems to suggest that sovereignty over Hong Kong had never been ceded to the British and that Britain merely administered Hong Kong under (suspended) Chinese sovereignty. This interpretation would uphold the long-held Chinese stance.<sup>148</sup> Yet, given the complex history leading

<sup>142</sup> See generally Yash Ghai, *Dilemmas of "Genuine Autonomy" for Tibet*, in REGIONAL AUTONOMY, CULTURAL DIVERSITY AND DIFFERENTIATED TERRITORIAL GOVERNMENT: THE CASE OF TIBET – CHINESE AND COMPARATIVE PERSPECTIVES 67 (Roberto Toniatti & Jens Woelk eds., 2017).

<sup>143</sup> *Id.*; see also Cooke, *supra* note 138.

<sup>144</sup> CARRAL, *supra* note 12, at 134; Duara, *supra* note 113, at 36.

<sup>145</sup> CARRAL, *supra* note 12, at 177–80.

<sup>146</sup> On the different nature of the British territorial claims concerning the constituent parts of Hong Kong, see *supra* note 7.

<sup>147</sup> The styling of the 1997 agreement as a joint declaration instead of a treaty is another. See GHAI, *supra* note 7, at 53–4; John D. Wong, *From the Treaty of Nanking to the Joint Declaration: The Struggle for Equality through State Documents*, 30 LAW & LITERATURE 309, 322 (2018). Notably, the only difference between the Sino-British Joint Declaration on Hong Kong of 1984 and the Sino-Portuguese Joint Declaration on Macau of 1987 lies in the provisions on the legal status of the territories in question. In contrast to the legal formulation of §§ 1 and 2 in the former, § 1 of the latter provides that "[Portugal and the PRC] declare that the Macau region ... form part of Chinese territory and that the [PRC] will resume the exercise of sovereignty over Macau with effect from 20 December 1999." On Portugal's changing views on the legal status of Macau under its administration, see Richard Louis Edmonds & Herbert S. Yee, *Macau: From Portuguese Autonomous Territory to Chinese Special Administrative Region*, 1999 CHINA Q. 801, 803–05.

<sup>148</sup> See CARRAL, *supra* note 12, at 178–89.

to British rule over Hong Kong in the late nineteenth century,<sup>149</sup> Britain could not subscribe to this position.<sup>150</sup> Alternatively, article 1 in its final formulation could be interpreted as meaning that Chinese sovereignty would be exercised again after it was recovered from Britain. Obviously, this position was not something with which the Chinese could come to terms. Yet, the inbuilt ambiguity in article 1 allowed both sides to reach an agreement to disagree, although its unilateral character suggested the prevalence of the Chinese understanding.<sup>151</sup> More importantly, article 2—the British counterpart of the Chinese unilateral declaration in article 1—did not so much express the British stance as allow China the space for further legal maneuvers. In contrast to article 1, article 2 simply states that “[Britain] will restore Hong Kong to the [PRC] with effect from 1 July 1997.” Yet, what would be restored to the PRC? By failing to set out its stance on the status of sovereignty over Hong Kong during its administration in article 2, Britain virtually conceded ground to China so the latter could assert its stance as formulated in article 1.<sup>152</sup> In sum, China preserved its long-term stance on the legal status of prehandover Hong Kong by avoiding any textual manifestation in the Joint Declaration that could suggest that China had at some point relinquished sovereignty over any constituent part of Hong Kong. Why is this important?

Through the close reading of the Joint Declaration above, China’s territorial constitution regarding Hong Kong holds that China never relinquished sovereignty over it. Thus, the handover does not implicate two entities of different sovereigns “coming together” as manifested in early modern federations such as the United States, the German Reich of 1871, or the dominions of Canada and Australia.<sup>153</sup> On the other hand, China did not administer Hong Kong before the handover. Nor did Hong Kong interfere in Beijing’s administration of China during that period. Thus, the posthandover relationship between mainland China and Hong Kong cannot possibly be construed as an arrangement aimed to “hold together” two quarreling political units under an existing national flag as illustrated in the move towards (quasi-)federalism in Belgium, Italy, and Spain.<sup>154</sup> As a result, the “holding together” model of federalism does not apply to Hong Kong as a Chinese SAR either. Taken as a whole, by excluding suggestions that China relinquished sovereignty over Hong Kong in the Joint Declaration, China seems to render the two principal models of federalism—“aggregative/integrative (coming together)” and “devolutionary (holding together)”<sup>155</sup>—inapplicable to the situation of Hong Kong.<sup>156</sup> Thus, despite the substantive rights and the high degree of autonomy that manifest the federal idea under China’s three-pillar territorial constitution regarding Hong Kong, such rights are not expected to be implemented in such a way

<sup>149</sup> See *supra* note 7.

<sup>150</sup> JAMIE TRINIDAD, SELF-DETERMINATION IN DISPUTED COLONIAL TERRITORIES 109–10, 112 (2018); see also William H. Overholt, *Hong Kong and the Crisis of Sovereignty*, 24 *ASIAN SURV.* 471, 472 (1984).

<sup>151</sup> Cf. Overholt, *supra* note 150, at 484.

<sup>152</sup> TRINIDAD, *supra* note 150, at 112.

<sup>153</sup> PALERMO & KÖSSLER, *supra* note 3, at 42–3.

<sup>154</sup> *Id.* at 43.

<sup>155</sup> *Id.* at 42–6; see also Donald L. Horowitz, *The Many Uses of Federalism*, 55 *DRAKE L. REV.* 953, 956–7 (2007).

<sup>156</sup> See Cora Chan, *Subnational Constitutionalism: Hong Kong*, in *CONSTITUTIONALISM IN CONTEXT* 377 (David S. Law ed., 2022).

as to pave the way for a genuine federal arrangement between mainland China and Hong Kong.

China's insistence on the legal status of Hong Kong during British rule as suggested in the Joint Declaration mirrors the Chinese attitude towards the sovereignty vs. suzerainty dispute over Tibet at the turn of the twentieth century. In both cases, legal ambiguities are not meant to allow for governance pluralism in frontier regions but rather to pave the way for homogenized territory. Both the attempt to integrate Tibet into an imaginary homogeneous China following the successful resistance against the attempted suzerainty designation<sup>157</sup> and the insistence on the suspension instead of cession of Chinese sovereignty over Hong Kong in history show the aversion to any sign of heterogeneity in the Chinese territorial constitutional imaginary.<sup>158</sup>

To see how the constitutional imaginary emerging from the Chinese state-building project has featured in Hong Kong, let us reimagine the “constitutional moment” when China's three-pillar territorial constitution was framed.<sup>159</sup> To the designers of China's territorial constitution in the lead-up to the eventual handover, Hong Kong appeared as an irredenta to be reunified with China. For that purpose, intimations of federalism were allowed simply to facilitate the process of territorial reunification and integration. With China's position on the legal status of Hong Kong during British rule upheld, neither the “coming together” nor the “holding together” scenario would account for or frame the relationship between Hong Kong and mainland China after the handover. Thus, no room could be made for federalism as the underlying principle in the interpretation of the Joint Declaration under the posthandover grand project of territorial reconstruction. Considering that federalism also evokes diversity and pluralism—which were characteristics of imperial frontiers predating the modern Chinese state—intimations of the federal idea in the current territorial constitution would not be allowed to give rise to full-fledged federalism. After the constitutional moment, a recovered frontier territory—even with SAR status—becomes an integral part of the state and needs to be further merged into the motherland.<sup>160</sup> Read against the Chinese modern territorial constitutional imaginary, the constitutional design of Hong Kong and its intimations of federalism mark another chapter of China's long process of reconstructing variegated imperial frontiers into homogenized state territory.

## 5. Conclusion

China has a tortuous relationship with its frontier territory throughout its millennia-long history. Its current mode of governance in its frontier regions such as Xinjian

<sup>157</sup> See *supra* text accompanying notes 133–43.

<sup>158</sup> Duara, *supra* note 113, at 35–6.

<sup>159</sup> I borrow Bruce Ackerman's term here, but without suggesting that the making of China's constitutional arrangement with Hong Kong fits into the analytical framework of constitutional moment. Cf. BRUCE ACKERMAN, *WE THE PEOPLE*, vol. 1, FOUNDATIONS 266–90 (1991).

<sup>160</sup> China's 2020 National Security Law regarding Hong Kong gives evident expression to this attitude. See Ming-Sung Kuo, *China's Legal Blitzkrieg in Hong Kong*, *THE DIPLOMAT* (Aug. 8, 2020), <https://thediplomat.com/2020/08/chinas-legal-blitzkrieg-in-hong-kong/>; <https://thediplomat.com/2020/08/chinas-legal-blitzkrieg-in-hong-kong/>.



and Inner Mongolia raises a whole array of issues ranging from international human rights law to the status of national minorities in its own legal system.<sup>161</sup> The territorial constitution—understood as the geographical distribution of authority—is another raised by China’s policy towards its periphery. Instead of joining in the debate as to whether China can better manage the constitutional relationship between its central government and frontier provinces through federalism,<sup>162</sup> I approach China’s territorial constitution differently. Why federalism-inspired ideas such as the composite state and subsidiarity continue to float in the Chinese constitutional discourse, while federalism is treated with deep skepticism, is my leading question.

To shed light on Chinese ambivalence over federalism, I have tried to examine China’s antifederal stance on the territorial constitution through the lens of the constitutional imaginary, with a focus on the constitutional status of Hong Kong as a Chinese SAR and its manifestations of the federal idea. I argued that China’s territorial constitution regarding Hong Kong incorporates elements of federalism, even if the Chinese territorial constitutional imaginary is antifederal. With the complexity of China’s stance on the constitutional steering of the center-periphery relationship revealed, my contention is that China’s consideration of federalism is not a binary choice and is far more subtle than ostensible Chinese exceptionalism suggests. China’s attitude towards federalism can be better understood through the lens of how state territory is imagined and how such imagined territory is given legitimacy—i.e., the Chinese constitutional imaginary. Shaped by its multifaceted historical experience, China entertains an antifederal territorial constitutional imaginary in which a full-fledged federation has long been perceived as a threat to the imagined homogenized sovereign territory. Seen in this light, the intimations of federalism regarding Hong Kong turn out to be instrumental and transitional.

The literature on how China has evolved as a modern state through critical engagement with Western legal concepts is thriving.<sup>163</sup> By reading China’s territorial constitution regarding Hong Kong through the lens of the Chinese constitutional imaginary, this article aims to extend the scope of that discussion, which has so far been focused on China’s attitude towards foreign powers.<sup>164</sup> Beyond international law, China’s encounter with the Western legal system also influences the way that Chinese constitutional agents have imagined and framed the center-province relationship in domestic law. The constitutional imaginary suggests a new way of understanding the “Chinese characteristics” that define China’s various constitutional arrangements.<sup>165</sup>

<sup>161</sup> Julia Emtseva, *Sanctioning the Treatment of Uighurs in China: Targeted Sanctions and Accountability Avenues for Human Rights Violations in Xinjiang*, VERFASSUNGSBLOG (Apr. 25, 2021), <https://verfassungsblog.de/sanctioning-the-treatment-of-uighurs-in-china/>; Thomas White, *Pastoralism and the State in China’s Inner Mongolia*, 120 (827) CURRENT HIST. 227 (2021).

<sup>162</sup> See Zhu, *supra* note 4.

<sup>163</sup> For examples of scholarship on China’s encounter with modern law, see references in d’Aspremont & Zhang, *supra* note 113 at 902–09.

<sup>164</sup> *Id.*

<sup>165</sup> “Socialism with Chinese characteristics” has been the dominant theme in discussions of constitutional development and the rule of law in China. See, e.g., Larry Catá Backer, *Chinese Constitutionalism in the “New Era”: The Constitution in Emerging Idea and Practice*, 33 CONN. J. INT’L L. 16 (2018); cf. Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT’L J. CONST. L. 215 (2009).