Multi-level Governance and Constitutions of 'Plurality-in-Unity': 'One Country, Two Systems' in the Hong Kong Special Administrative Region (1997-2019)

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Introduction

On 1 July 1997, the British colony of Hong Kong was reconstituted as a 'Special Administrative Region' of the People's Republic of China (PRC). It became governed by a new constitutional instrument known as the Basic Law of the Hong Kong Special Administrative Region (HKSAR) of the PRC. The 1997 handover of Hong Kong was a direct legal consequence of the signing in 1984 of the Sino-British Joint Declaration on the Question of Hong Kong, which enshrined the concept of 'One Country, Two Systems' developed by the late Chinese statesman Deng Xiaoping when he inaugurated the new era of 'reform and opening' in the late 1970s. The 'One Country, Two Systems' policy as applied to Hong Kong refers to the preservation of the existing economic and social systems -- and to a large extent also the existing legal system -- which were different and separate from the relevant systems in mainland China. The HKSAR was granted a 'high degree of autonomy', with 'Hong Kong people ruling Hong Kong'.

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This paper seeks to understand the nature of the constitutional order of 'One Country, Two Systems' from global and comparative perspectives. The paper consists of two main parts, followed by a concluding section. Part I develops a theoretical framework for studying constitutions involving multi-level governance of states. The framework amounts to a taxonomy of constitutions and constitutional orders, which include a wide array of constitutional and inter-state arrangements, ranging from alliance, confederation and federation to devolution and decentralisation. Part I also identifies the key aspects of any constitutional system of multilevel governance -- its formation, its institutions, its distribution of power, and its rules of amendment. Part II of this paper then studies the constitutional order of 'One Country, Two systems' in the case of the HKSAR of the PRC. It is mainly designed to provide factual details of the case of Hong Kong by focusing on the key aspects of the constitutional order of multi-level governance of the HKSAR. Part III of the paper draws on the theoretical framework in part I in order to analyse the case of the HKSAR. It seeks to understand the extent to which the Hong Kong case conforms to any particular model within the taxonomy developed in part I, as well as the extent to which relatively unique features that may not have counterparts elsewhere are present in the case of Hong Kong. Finally, the concluding section of this paper summarises our analysis of the case of the HKSAR in the light of the theoretical discussion in part I of this paper.

I Constitutions of Multi-level Governance

Constitutions are not only the result of rational deliberation about the features each constitution ought to have. They are also the result of authoritative determinations made on the basis of existing patterns of political power and influence. Constitutions are made in circumstances where certain configurations of authority and power therefore play a two-fold role: they are understood to be normatively required features of the constitution-making process and they are the practically determinative

conditions under which the constitution is established. These configurations of authority and power may be contested by those who object to them, but some particular configuration of authority and power nonetheless usually prevails, shaping the specific features of the constitution accordingly.

These configurations of power and authority can be referred to as the effective constituent authority underlying each constitution: *effective* because they are so widely accepted that they constitute the presupposition upon which the making of each federal constitution practically proceeds, *constitutive* because they concern the underlying reasons why each federal constitution has attributed to it the nature of a fundamental law, and *authoritative* because they concern the reasons why such fundamental laws are considered morally and legally binding on political actors and political institutions. The effective constitutive authority underlying the formation of a constitution has a decisive effect on the constitution because it shapes deliberation about the features the constitution-making process ought to have and it determines the political context in which strategic negotiating about those features occurs.

Each constitution is thus premised on a unique configuration of effective constitutive authority. The particularity of that configuration offers a basis for explaining the unique features each constitution exhibits. One of the most fundamental distinguishing features concerns the unity or plurality of the effective constitutive authority underlying a constitution. The constitutions of unitary states, even when they involve substantial decentralisation, are generally established through formative processes in which the effective constituent authority is understood in fundamentally unitary terms. The unitary character of the state is premised on the unitary character of the nation or people that constitute the state. Federations, on the other hand, even when they involve substantial centralisation, are generally established through formative processes in which the effective constituent authority is understood in plural terms. The federal character of the system is premised on the plurality of nations, peoples or states that constitute the federation.

Between these two categories are devolutionary states, in which the underlying constituent authority is unitary, but autonomous powers of regional self-government have been constitutionally established and guaranteed.

Further important distinctions can be drawn between constitutional systems based on the extent to which the unitary or plural characteristics of the system are instituted at an executive, legislative or constitutional level. Thus, a unitary state may adopt a system of *decentralisation* pursuant to which executive powers to implement state legislation are delegated to regional or local administrators. A unitary state may also institute a system of *devolution* pursuant to which both executive and legislative powers are delegated to regional or local institutions. Such a system may be said to be fully *federated* where those executive and legislative powers are guaranteed by a written constitution. On the other hand, a plurality of states may enter an *alliance* through a treaty agreed to by their respective executive governments which their respective executive governments are responsible to implement. A plurality of states may also establish a *confederation* through a compact agreed to by their respective legislatures under which general policy-making legislative powers are vested in an institution in which the plurality of states are represented, but in which the execution of those laws remains the responsibility of the separate states. Such a system may be said to be a *federation* where not only legislative but also executive powers are vested in institutions that exercise direct authority over all individuals within the federation, and where the these features of the system are guaranteed by a written constitution.

All six of these kinds of constitutional system involve elements of both unity and plurality. They each preserve a degree of unity-in-plurality or plurality-in-unity. However a constitutional system can also evolve in even more radical directions, where a region within a unitary state may *secede* from the state altogether to form its own independent state, or where a plurality of states agree to be consolidated into a *union* under which legislative and possibly executive power is entirely unified. The

overall result is a continuum or spectrum of constitutional systems premised on either a progressive disaggregation of a single unitary state or a progressive aggregation of a plurality of states as set out in the following table.

<table>
<tr><td rowspan="2">Unitary state
>>></td><td>Decentralised state</td><td>Devolved state</td><td>Federated state</td><td colspan="3">Secession</td><td></td></tr>
<tr><td>Executive</td><td>Legislative</td><td colspan="2">Constitutional</td><td>Legislative</td><td>Executive</td><td rowspan="2">Plurality of states
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<tr><td></td><td colspan="3">Union</td><td>Federation of states</td><td>Confederation of states</td><td>Alliance of states</td></tr>
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The term *multilevel governance* is often used as an umbrella term to designate these many different types of constitutional system. Such systems can be understood to consist of four key aspects. The first aspect concerns the formation of the system. On the basis of what authority, through what processes and towards what ends has the system been established? Is the effective constitutive authority unitary or plural in character? Has the constitution been formed through a process of aggregation of independent states or disaggregation of a unitary state, or perhaps through some combination of aggregating and disaggregating processes? The second aspect concerns the legislative, executive and judicial institutions that exercise governing power within the system. What are these institutions, how are they appointed and composed, and who or what are they meant to represent? The third aspect concerns the distribution of governing power within the system. What are the particular legislative, executive and judicial powers conferred on the institutions, and how are those powers distributed among the various levels or orders of government within the system? The fourth aspect concerns the capacity to amend the fundamental features of the system. What are the particular institutions and prescribed procedures through which the system can be altered? To what extent do these institutions and procedures reflect the unitary or plural characteristics of the system?

Multilevel systems of government vary considerably in relation to each of these four aspects. Some, as has been seen, are formed by an aggregation of several pre-existing states which agree to form themselves into a federation. Broadly speaking, Australia, Switzerland and the United States are examples. Others are formed when a unitary state devolves constitutionally guaranteed autonomous powers of self-government on particular regions within the state. Belgium, Italy and Spain are examples. Some systems involve processes of both aggregation and disaggregation. For example, the Canadian federation was formed through the disaggregation of the old province of Canada into the distinct provinces of Ontario and Québec, which were then federally aggregated with the maritime provinces of Nova Scotia and New Brunswick to form the federated Dominion of Canada. Another complicating factor is that some systems are formed under the supervision or control of a third power, such as an imperial government in the cases of Australia and Canada, or the allied occupying forces in the cases of Austria and Germany.

When systems of multilevel government are formed through aggregation, they generally involve the *establishment* of legislative, executive and judicial institutions at a federal level, while the pre-existing legislative, executive and judicial institutions *continue* to operate at a state level. In such systems, legislative, executive and judicial powers over *specific* topics are usually vested in the federal institutions, while the state institutions continue to exercise *general* legislative, executive and judicial powers, subject to the powers vested in the federal institutions. Moreover, these institutions and their powers are guaranteed by a written constitution which can only be amended pursuant to procedures that lie beyond the powers of either the federation or any particular constituent state. By contrast, when systems of multilevel government are formed through devolution, it is the legislative, executive and judicial institutions at a regional level that are newly established, and it might be expected that the institutions of the original unitary state will continue to exercise general powers, while the regional institutions will exercise the specific powers conferred upon them. It might also be expected that the

institutions of the original unitary state will continue to have the power to alter the devolutionary arrangement; however, devolutionary systems are often entrenched in the constitution and can only be altered through the special processes prescribed by the constitution for its amendment.[1]

While virtually all constitutions are created through particular formative processes, establish particular governing institutions, empower those institutions, and prescribe formal amendment procedures, constitutions that establish systems of multilevel governance do so in ways that reflect the unity-in-plurality and plurality-in-unity that characterises each system. For example, while a unitary constitution may be formed through the procedures of a constituent convention or assembly, a federal constitution which comes into being through the union of several formerly distinct political communities will typically be formed through a convention or assembly that is some way representative of, or which reflects an agreement between, the constituent political communities.[2] Likewise, while a unitary constitution will, under democratic conditions, typically establish governing institutions (especially the legislature but also the executive) which are representative of the people of the political community conceived as a unified whole, a federal constitution will under democratic conditions typically provide for the representation of not only the people of the federated political community as a whole, but also the peoples of the constituent political communities. Further, while a unitary constitution will typically confer general legislative competences upon the legislature of the political community (subject only, perhaps, to constitutional restrictions such as those imposed by a bill or charter of rights), a federal constitution will typically prescribe or affirm some sort of distribution of legislative competences among the legislature of the federated political community and the legislatures of the constituent political communities. Finally, while a unitary constitution will, under democratic conditions, typically provide for its own amendment through processes that are representative of the people of the political community, a federal constitution will typically provide for its amendment through processes that recognise the

constitutive roles of the people of the federated political community as a whole as well as the peoples of the constituent political communities of which it is composed. However, while federal constitutions usually display features having these general characteristics, each federal constitution does so in unique ways, and this diversity among federal constitutions becomes more and more apparent as the specific features of the many different institutions, powers and processes established by the great variety of federal constitutions are considered. The legislative, executive and judicial institutions established by each constitution and the powers conferred upon them will display certain structural and procedural characteristics unique to that constitution.

Constitutions usually have both a preservative and a transformative aspect. In aggregative federal systems, the pre-existing plurality of political communities is preserved and yet these communities are transformed into constituent members of a federated political community. In devolutionary systems, the pre-existing state is preserved and yet transformed from a unitary state into a federated state composed of a plurality of constituent states. Such constitutions are therefore always preservative and transformative in this sense: they preserve aspects of an existing constitutional state of affairs while simultaneously transforming it into a new state affairs that is federal in character. Thus, for example, several formerly independent states may agree, on negotiated terms, to the formation of a federal union, altering the constitutional state affairs from one in which a particular configuration of authority and power (one which recognises, say, the sovereign equality of the constituent states) is transformed into one in which the constituent states become part of a federal union of states (a state of affairs, perhaps, in which specific domains of authority and power are conferred upon federal institutions of government and the amendment of the federal constitution is committed to a process over which each constituent state no longer has a veto power). Alternatively, a unitary state, under which authority and power is formally unified and concentrated in centralised institutions of government, may decide (usually under political pressure from below) to

devolve particular domains of power and authority to political institutions established in particular regions or localities in a manner which is constitutionally binding.

In most systems of multilevel governance the constitutional establishment of institutions and distributed powers is authoritatively interpreted and applied by the courts, ensuring that the powers of the legislative assemblies and executive governments established at a national, regional and local levels are exercised within the constraints of the constitution. There are, however, exceptions. In Switzerland, only cantonal legislation is subject to judicial review, and in Ethiopia there is no judicial review of federal or state legislation at all. In these countries, the constitutional balance between federal and state power is maintained through the participation of the constituent states in federal lawmaking. This brings into focus the important relationship between the composition of governing institutions and the distribution of governing powers within systems of multilevel governance. The constitutional balance between federal and state power can be maintained in both ways: through the representation of the states in federal institutions (such as the federal legislature and perhaps also the executive) and through the constitutional distribution of powers enforced by an independent judiciary. Most systems of multilevel governance make use of both techniques, but with different emphases. In Austria, Germany, and especially Switzerland and Ethiopia relatively more emphasis is placed on the participation of the constituent states, while in Australia, the United States and especially Canada, relatively more emphasis is placed on the constitutional distribution of powers and the exercise of judicial review.

II ‘One Country, Two Systems’: Introducing the Case of the HKSAR

We will now introduce the constitutional framework for ‘One Country, Two Systems’ as practised in the HKSAR. Focusing on the key aspects of the constitutional order of governance of the HKSAR by at the national level and the municipal level, we will divide the discussion into the following sections: (1) historical origins of the ‘One Country, Two

Systems' policy and constitutional developments in colonial Hong Kong in the last two decades of British rule; (2) the distribution of national and local powers of governance over the HKSAR under the Basic Law; (3) the internal political system of the HKSAR; (4) the dynamics of constitutional reform in the HKSAR.

(1) Historical origins of 'One Country, Two Systems'

The British colony of Hong Kong was created by three treaties between the Qing Empire in China and the British Empire in the nineteenth century.[3] By the Treaty of Nanjing 1842, signed by China after its defeat in the Opium War, the island of Hong Kong was ceded to the British. A subsequent war leading to the Anglo-French invasion of Beijing ended with another treaty, signed in 1860, under which Kowloon Peninsula was added to the colony of Hong Kong. In 1898, the third treaty provided for a 99-year lease by the Qing Dynasty to Britain of the "New Territories" (north of Kowloon Peninsula).[4]

Colonial Hong Kong was ruled by the British[5] on the basis of a rudimentary constitution contained in the Letters Patent and Royal Instructions issued by the British monarch.[6] Power was concentrated in the hands of the Governor, who ruled with the assistance of an Executive Council and a Legislative Council appointed by him. Leading members of the local business and professional elite were co-opted into these Councils.[7] There was no democratic election[8] except to a municipal council (called the Urban Council, with responsibilities in the domains of public health, environmental hygiene and recreational facilities) on the basis of a very limited franchise.[9] The English legal system based on the common law, the rule of law and judicial independence was transplanted to Hong Kong.[10] There was no bill of rights in the colonial constitution, and laws enacted by the colonial regime placed considerable restrictions on freedoms of speech, publication, assembly and association.[11]

However, by the 1970s, colonial Hong Kong had acquired a fair reputation among Asian jurisdictions in terms of the rule of law and efficiency of government.[12] Controls on civil liberties in Hong Kong as of

the 1970s seemed to be more relaxed than those practised by the other three of the "Four Little Dragons" of East Asia – Singapore, Taiwan and South Korea.[13] The security of colonial rule in Hong Kong and popular support for its continuation[14] meant that the colonial government could afford to rule without severe repression of civil liberties. Hong Kong was on the southern coast of mainland China which had been under Communist rule since 1949. Many Hong Kong residents were migrants from the mainland, fleeing to the British colony as civil war raged in China in the late 1940s. The "Cultural Revolution" in China had a spillover effect in Hong Kong in the form of the riots against colonial rule in 1967, but the overwhelming majority of the population of Hong Kong stood on the side of the colonial government at the time.[15] Since then, and particularly since the introduction in the 1970s of new social policies[16] of by Governor MacLehose,[17] it was apparent that the people of Hong Kong supported the continuation of colonial rule, for they realised that the only alternative to colonial rule was integration into Communist China. Thus, despite the growth of a local identity (as "Hongkongers") among members of the new generation born in Hong Kong after the War,[18] who, unlike their parents who were refugees from mainland China, considered Hong Kong their home and never experienced living elsewhere in China, there was no independence movement in colonial Hong Kong.

With the death of Mao Zedong in 1976 and the rise to power of Deng Xiaoping in the late 1970s, a new era of "reforming and opening" began in China. A new policy towards Taiwan was also adopted, which subsequently became highly relevant to Hong Kong.[19] Instead of calling for the "liberation" of Taiwan, which implied the extension of communism to Taiwan, a new concept was developed for the purpose of reunification of Taiwan with the Mainland. This was "One Country, Two Systems", which would allow the peaceful co-existence of capitalism (in Taiwan) with socialism (in the Mainland), a high degree of autonomy for Taiwan under PRC sovereignty and the preservation of the existing social and economic systems in Taiwan after reunification. In the new (and fourth) Constitution of the PRC enacted in late 1982, Article 31 provides for the possibility of

the establishment of Special Administrative Regions in the PRC which practise social and economic systems different from those in the Mainland.

In September 1982, Britain and China began negotiations over the future of Hong Kong.[20] The negotiations were initiated because by the early 1980s, the British Government was concerned that there was no legal basis for its continued governance of the New Territories after 1997, and wanted to seek from the Chinese Government its agreement to continued British administration of the whole of Hong Kong after 1997.

The PRC considered all the three treaties constituting the legal basis for British rule in Hong Kong to be "unequal treaties" and not binding on the PRC. The creation of the British colony of Hong Kong as a result of the Opium War was part and parcel of the story of humiliation and shame for the Chinese people in the face of Western imperialism. Being fervent nationalists, the Chinese Communists ruled out completely the option of agreeing to continued British administration of Hong Kong. The concept of "One Country, Two Systems", though originally conceived for Taiwan, was at hand and thus offered to Britain as the solution for Hong Kong's constitutional future.

It was proposed that the whole of the Hong Kong colony would be returned to the PRC in July 1997, and it would become a Special Administrative Region (SAR) of the PRC enjoying a "high degree of autonomy". Its existing social and economic systems and laws, and the lifestyle and liberties of its people would all be preserved. The principle of "Hong Kong people ruling Hong Kong" would be applied, in accordance with a "Basic Law" in which China's promises for post-1997 Hong Kong would be translated into the text of a constitutional instrument. After nearly two years of strenuous negotiations, the British found that they had no choice but to accept the Chinese proposal. The result was the Sino-British Joint Declaration on the Question of Hong Kong, signed in late 1984, in which the details of the Chinese plan for the post-1997 governance of the Hong Kong SAR were solemnly set out.[21]

The drafting of the Basic Law of the Hong Kong Special Administrative Region began in 1985.[22] A Drafting Committee was

appointed by Beijing consisting of both Mainland and Hong Kong members. At the same time, a Consultative Committee was set up in Hong Kong consisting of Hong Kong people elected from different sectors and walks of life.[23] The first draft of the Basic Law was published for public consultation in April 1988. After extensive discussion and debates, amendments were made and the second draft was published in February 1989. The final version was enacted by the National People's Congress in April 1990.

The Basic Law provides for the modes of formation and operation of the government of the SAR, identifies the sources of law in the SAR, guarantees the human rights of its residents, stipulates the social and economic systems and policies to be practised in the SAR, and, most important of all, defines its relationship with the central government and the scope of its autonomous powers. The Basic Law establishes in the HKSAR political, legal, social and economic systems that are very different from those in force in mainland China, thus codifying the concept of "One Country, Two Systems". Although it was enacted in 1990, it only began to have legal force in Hong Kong upon the establishment of the HKSAR on 1 July 1997.

From the perspectives of Kelsenian legal theory, there was a shift in the "Grundnorm"[24] at the moment of the handover in 1997. As from that moment, Hong Kong's legal system, which hitherto had been based on the ultimate authority of the British Crown and Parliament, began to trace its validity from the Constitution of the PRC, particular article 31 thereof pursuant to which the Basic Law had been enacted in . From the perspective of public international law, the handover of Hong Kong in 1997 was legally a consequence of the Sino-British Joint Declaration of 1984. In a typical case of the establishment of a constitutional arrangement for devolution within a unitary state where the region to which power is now devolved was already an integral part of the unitary state before devolution, the effective constituent authority is entirely unitary. However, in the case of Hong Kong, what is framed within Chinese constitutional law as a case of devolution was simultaneously a process of transfer of a pre-existing

political and legal system (together with the people governed by it) from the jurisdiction of one sovereign state to that of another in accordance with the provisions of a treaty entered into between the two states. Although the PRC did not recognise the legal force of the three "unequal" treaties that gave rise to colonial Hong Kong (as reflected in the different wordings for the handover of Hong Kong in the Joint Declaration itself),[25] a full analysis of the effective constituent authority for the establishment of the constitutional arrangement for "One Country, Two Systems" in the HKSAR cannot neglect the role played by Britain.

The Sino-British Joint Declaration did not only provide for the handover of Hong Kong in 1997; it also contained detailed provisions on how the HKSAR was to be governed after 1997, and expressly stated that the relevant "basic policies … will remain unchanged for 50 years". These provisions subsequently found their way into the Basic Law. Although the Basic Law may be amended by the National People's Congress of the PRC, it expressly provides that no amendment may "contravene the established basic policies" set out in the Joint Declaration.[26] By negotiating these provisions with the Chinese government and ensuring that they were satisfactory and acceptable from Britain's point of view, Britain played a crucial role in co-determining – together with the PRC -- the content of the Basic Law. Indeed, during the process of the drafting of the Basic Law, the British government was in close communication with the Chinese government and sought to ensure that the provisions of the draft Basic Law were consistent with and implemented the Joint Declaration.[27]

The constitutional reforms launched by the colonial Hong Kong government in the 1980s also had a significant influence on the drafting of Basic Law provisions relating to the political system of the HKSAR. These reforms included the establishment of District Boards and the introduction of elections to the Legislative Council.[28] In 1982, the District Boards – advisory bodies at local levels – had been established consisting of members appointed by the Government as well members elected by universal suffrage. At the same time, the franchise for the existing Urban Council was broadened to become universal suffrage. In 1984, the colonial

government published an ambitious plan for the development of "representative government" in Hong Kong, so as to develop "a system of government the authority for which is firmly rooted in Hong Kong, which is able to represent authoritatively the views of the people of Hong Kong, and which is more directly accountable to the people of Hong Kong".[29] In pursuance of this plan, in 1985 some of the seats in the Legislative Council ("LegCo") – hitherto an entirely appointed body – were opened up for election for the first time in the colony's history.[30] Electoral colleges comprising the District Boards, the Urban Council, and the newly created Regional Council, elected twelve LegCo seats. Twelve other LegCo seats were elected by "functional constituencies" consisting of business and professional groupings, such as chambers of commerce, industrialists' federations, banks, trade unions and members of professions such as lawyers, doctors, engineers and teachers. The original logic of functional constituencies, as explained by the colonial government, was that they represented sectors of society from which appointed unofficial members of LegCo were formerly drawn, and in the course of democratization, it was appropriate that the corporate bodies or individual members of these sectors would elect their own representatives into LegCo.[31]

In 1985 the drafting process for the Basic Law had just begun, and the shape of the political system of the HKSAR in 1997 and thereafter was yet to be determined by the Basic Law.[32] The Chinese government was concerned that the constitutional reform unilaterally introduced by the colonial government in Hong Kong would pre-empt the decision-making by the draftsmen of the Basic Law on the HKSAR's political system, as it would be difficult to dismantle in 1997 a political system already put in place by the colonial government before 1997. The Chinese government advocated the concept of "convergence", which meant that no fundamental change to Hong Kong's political system should be introduced by the colonial government in Hong Kong before the Basic Law was finalized, and thereafter Hong Kong's existing political system should be reformed in such a manner and direction as to

converge with the political model prescribed by the Basic Law.[33] In 1987, there was a great debate in Hong Kong during the colonial government's consultation exercise as regards whether direct election by universal suffrage should be introduced for at least a portion of LegCo seats in 1988. Negotiations between the British and Chinese governments finally resulted in a compromise: the colonial government announced that direct election by universal suffrage would not be introduced in the LegCo election of 1988, but in the next election of 1991, and that ten LegCo seats would be directly elected.

After the Tiananmen Incident of 4 June 1989, there was an upsurge in demands for democratisation in Hong Kong. In the final form of the Basic Law as enacted in 1990, allowance was made for 20 directly elected seats in the first of the LegCo of the HKSAR, as well as 30 LegCo seats elected by functional constituencies.[34] It is noteworthy that the concept of "functional constituencies", invented and practised by the British colonial government in Hong Kong since 1985, now found its place in the Basic Law. The Basic Law provision on directly elected LegCo seats cleared all obstacles to the introduction of direct election to a portion of LegCo seats in 1991. In that year, 18 of the seats in LegCo -- instead of the 10 seats negotiated in 1988 -- were opened to direct election by universal suffrage for the first time in Hong Kong's history. The pro-democracy politicians, who had led the massive demonstrations in Hong Kong in support of the student movement in Beijing in 1989, won a landslide victory.[35]

In 1992, the newly arrived Governor of Hong Kong, Christopher Patten, announced an ambitious plan for political reform in Hong Kong which involved a radical broadening of the franchise of functional constituencies (increasing the number of eligible voters in these constituencies from less than 100,000 to over two million).[36] The Chinese Government condemned the plan as being inconsistent with the Basic Law and the agreement reached in 1990 between the Chinese and British Governments.[37] In 1993, there were 17 rounds of negotiation between the two governments but no settlement was reached.[38] Governor Patten then

unilaterally put the bill for the reform to LegCo,[39] which was passed by a narrow majority, and the 1995 LegCo election was accordingly conducted under the new electoral scheme.[40] The Chinese Government responded, however, by, rescinding its previous consent to the LegCo elected in 1995 continuing as the first LegCo of the Hong Kong SAR at the point of handover in 1997.[41] Rather, arrangements were made by the Chinese government for the establishment of a Provisional Legislative Council in 1997 to take charge of Hong Kong legislative matters before the first LegCo could be elected in accordance with the Basic Law.[42]

Apart from the important question of the constitution of the LegCo, the other major development in the colonial legal system was the enactment of the Hong Kong Bill of Rights Ordinance in 1991.[43] This legislative measure was part of the British Hong Kong Government's response to the crisis of confidence in Hong Kong arising from the Tiananmen incident in 1989. The Hong Kong Bill of Rights Ordinance translated into domestic law the provisions of the International Covenant on Civil and Political Rights (ICCPR) which Britain had already applied to Hong Kong in 1976. Corresponding amendments were made to the Letters Patent, Hong Kong's constitutional instrument.[44] Under the new constitutional regime, Hong Kong courts were empowered to review and to strike down laws and administrative actions that the courts determined to be inconsistent with the human rights guarantees in the Hong Kong Bill of Rights or the ICCPR. Since 1991, a body of case law has developed in which the Hong Kong courts have exercised this power of constitutional review, and applied principles of "proportionality" to check whether a restriction on a relevant right is constitutional.[45] After the handover in 1997, Hong Kong courts have continued to exercise the power of constitutional review and further developed the jurisprudence of human rights.[46]

(2) The Basic Law and the distribution of powers over the HKSAR[47]

The "high degree of autonomy" of the HKSAR

The Basic Law confers on the HKSAR Government (including its executive, legislative and judicial branches) autonomous powers and jurisdiction over a wide range of subject-matters. Basically, all governmental affairs in the SAR other than defence, foreign affairs and constitutional change in the electoral system are within the jurisdiction of the SAR government. The following aspects are particularly noteworthy:

(1) More than 99% of the laws enacted by the national legislature (the NPC and its Standing Committee) are not applicable to the SAR, in which the pre-existing common law system is preserved. The only national laws that apply to Hong Kong are those listed in Annex III to the Basic Law, and there are 13 such laws at the moment, such as the Nationality Law, National Flag Law, Law on the Territorial Sea, Law on the Garrisoning of the Hong Kong SAR, Regulations on Diplomatic Privileges and Immunities, etc.[48]

(2) Cases litigated before the Hong Kong courts are dealt with entirely within the Hong Kong court system, with the Hong Kong Court of Final Appeal (CFA) being the highest appellate court, replacing the Judicial Committee of the Privy Council which served as the final appellate court in Hong Kong's colonial judicial system.[49] No appeal lies from a Hong Kong court to any court or institution in mainland China. The Basic Law requires the CFA to refer relevant provisions of the Basic Law to the NPC Standing Committee (NPCSC) for interpretation in certain circumstances.[50] However, interpretations made by the NPCSC cannot have the effect of overturning a final court judgment previously rendered, in the sense that litigants in the case that the court has already decided would not be affected by a subsequent NPCSC interpretation.[51]

(3) Hong Kong residents do not have to pay any tax to the central government, and the tax which they pay to the SAR government will be used for the SAR exclusively -- no part of

it has to be handed over to the central government.

(4) The SAR can continue to have and issue its own currency, the Hong Kong dollar.

(5) The SAR can control and regulate entry and exit of persons into and out of the SAR.

(6) The SAR is a customs territory separate from other parts of China.

(7) The SAR, using the name of "Hong Kong, China", enters into economic and cultural relations with other countries and participates in some international organisations (such as the WTO) whose membership is not restricted to sovereign states (Mushkat 1997, 2006). The Basic Law authorises the SAR government to handle certain "external affairs" even though, generally speaking, "foreign affairs" are within the power of the Central Government.[52]

The powers of the Central Authorities

Under the Basic Law, the major powers which the central government has over the Hong Kong SAR are those provided for in articles 17 (invalidation of Hong Kong legislation), 18 (application of national laws to Hong Kong), 158 (interpretation of the Basic Law) and 159 (amendment of the Basic Law) of the Basic Law. In practice the central government has exercised a considerable degree of self-restraint in the exercise of some of these powers. For example, under article 17, the NPCSC has the power to nullify SAR laws that exceed the scope of the SAR's autonomy. However, since the Hong Kong SAR was established in 1997, the central government has never exercised this power to nullify an SAR law. Under article 18, national laws may be applied to the SAR, but after 1 July 1997, only three national laws have been applied in this way.[53] And the NPC's power to amend the Basic Law has never been exercised.[54]

Under article 158 of the Basic Law, the NPCSC may issue an interpretation of the Basic Law. In the history of the HKSAR so far, a total

of five interpretations have been issued, evidencing a considerable degree of self-restraint on the part of the Central Government (Mason 2011). The first interpretation was that in 1999, which was issued on articles 22 and 24 of the Basic Law relating to the right of abode in the SAR of children born in the mainland of Hong Kong permanent residents. This interpretation was issued because the SAR government submitted to the central government a request for interpretation after the Court of Final Appeal (CFA) rendered its decisions in early 1999 in the cases of *Ng Ka Ling*[55] and *Chan Kam Nga.*[56] The Government estimated that the CFA's interpretation of the relevant Basic Law provisions would result in 1.67 million mainland residents being entitled to migrate to Hong Kong in the next ten years. Responding to the Chief Executive's request for interpretation, the NPCSC issued its interpretation in June 1999, overruling the CFA's interpretation. Under article 158 of the Basic Law, the NPCSC's interpretation did not have the effect of reversing the CFA's judgments and orders concerning the litigants in the *Ng* and *Chan* cases; it only meant that Hong Kong courts in future cases must follow the NPCSC's interpretation instead of the CFA's interpretation of the relevant Basic Law provisions. In *Lau Kong Yung*,[57] the CFA considered the effect of the NPCSC interpretation and recognised its binding force.

After 1999, the NPCSC has exercised the power of Basic Law interpretation on four other occasions. In 2004, acting on its own initiative (instead of at the request of the Chief Executive of the HKSAR), the NPCSC issued an interpretation of the Basic Law provisions relating to the procedure of electoral reform. In 2005, upon the request of the Acting Chief Executive of the HKSAR, the NPCSC issued an interpretation to clarify the term of office of a Chief Executive who succeeds one who resigns before completing his term of office. In 2011, the CFA in the *Congo* case[58] used for the first time the reference procedure in article 158(3) of the Basic Law to refer certain Basic Law provisions relating to foreign affairs and "acts of state" to the NPCSC for interpretation. This *Congo* case concerned whether the applicable law of foreign sovereign immunity in the HKSAR was the same as that in the

Mainland. In November 2016, the NPCSC, acting on its own initiative, issued an interpretation of article 104 of the Basic Law, which relates to the oath-taking requirements applicable to officials, judges, and members of the Legislative and Executive Councils. This interpretation was particularly controversial, as it was issued three days after Hong Kong's High Court heard a case on oath-taking and before the court delivered judgment in that case. In this case,[59] the government argued that two pro-"Hong Kong independence" Legislative Councillors had been disqualified by reason of their failure to comply with the oath-taking requirements stipulated in article 104 of the Basic Law and other Hong Kong legislation.

(3) Hong Kong's political system

The political institutions established by the Basic Law in Hong Kong are largely modelled on the pre-existing colonial system, with offices and institutions such as the Chief Executive (CE) (equivalent to the former Governor), principal officials (appointed by the central government upon the CE's nomination), the Executive Council (a top advisory body of a similar nature as its colonial predecessor and appointed by the CE), the executive authorities (including the civil service), the Legislative Council (the legislature of the HKSAR with powers and functions similar to its colonial predecessor, such as law-making, financial control, and scrutiny of the administration), and the courts. The Basic Law provides that the HKSAR is a "local administrative region" of the PRC which "come[s] directly under the Central People's Government" (art 12). The CE is "accountable to the Central People's Government and the HKSAR in accordance with the provisions of" the Basic Law (art 43).

The Basic Law provides for the appointment of the CE on the basis of the outcome of an election within an electoral college known as a Selection Committee or Election Committee: the first CE to be chosen by a Selection Committee of 400 members, the second and third CEs (and, subject to the possibility of electoral reform as mentioned below, also subsequent CEs)

to be chosen by an Election Committee of 800 members. Following the elections, formal appointment of the CE is made by the Central People's Government . Annex I to the Basic Law specifies four sectors of society from which Election Committee members are to be drawn, with an equal number of members from each sector. The sectors are: (a) business (comprising mainly corporate voters in various commercial, financial, and industrial fields), (b) professional bodies, (c) labor and other social sectors, and (d) the political sector (including legislators, Hong Kong deputies to the NPC, and Hong Kong members of the Chinese People's Political Consultative Conference). Annex I to the Basic Law was subsequently amended in 2010, increasing the size of the Election Committee to 1,200 members, including 300 members from each of the four sectors.[60]

As regards the composition of the Legislative Council (LegCo), the Basic Law provides for three modes of election to different portions of its seats: (a) direct election by universal suffrage in geographical constituencies; (b) election by functional constituencies; and (c) election by the Election Committee (mentioned above) – this mode of election would however be phased out in the third-term LegCo. More precisely, the first LegCo consisted of 20 members elected by universal suffrage, 30 members elected by functional constituencies, and 10 elected by the Election Committee. As provided for in the Basic Law, the number of members elected by universal suffrage increased to 24 in the second LegCo, and to 30 in the third LegCo. In accordance with the Basic Law as amended in the political reform of 2010, as from 2012, the number of members of LegCo was also increased from 60 to 70, half of whom being elected by universal suffrage, and half by functional constituencies, including five District Councillors elected by "quasi" universal suffrage in the "super District Councils" functional constituency.[61]

Shortly after the handover, the colonial system of "three-tier" government (LegCo; Urban and Regional Councils; District Boards) was reformed to become a "two-tier" one. In 2000, the Government introduced a new framework for the administration of municipal affairs[62] under which

the Urban Council and the Regional Council were abolished. Their existing functions were partly transferred to the LegCo and partly to the Government itself. At the same time, the existing District Boards were reformed and reconstituted as District Councils, of which there are 18. These district bodies consisted of a majority of elected members and a minority of appointed members, but appointed seats were phased out in 2015, after which all District Councillors have been elected.[63]

Since elections were introduced in Hong Kong in the 1980s, a distinctive mode of political polarization developed in Hong Kong, which has continued to shape Hong Kong politics after 1997. This is the division of Hong Kong's political forces between pro-China forces (also known as "pro-Establishment" or "patriots") and pro-democracy forces (the "pan-democrats").[64] The pro-China camp supports the policies of the PRC government towards Hong Kong, including its cautious and gradualist approach to Hong Kong's democratization. The camp also supports, or at least does not question, one-party rule in mainland China, and generally refrains from criticizing its human rights record. On the other hand, the pan-democrats advocate Western-style liberal democracy for Hong Kong, and are critical of authoritarian one-party rule in China and its human rights record.

Since the pro-democracy camp came into existence in the 1980s, it has consistently enjoyed significant support from civil society and the electorate in Hong Kong. It is noteworthy that for a quarter of a century since direct election by universal suffrage was introduced in Hong Kong in 1991, the pro-democracy politicians have consistently succeeded in capturing approximately 55 to 60 per cent of the popular votes for that portion of LegCo seats elected by universal suffrage.[65] It is believed that Beijing has been concerned that if entirely free and unrestricted elections by universal suffrage were introduced in Hong Kong, and the CE and all LegCo seats were elected by universal suffrage, the office of the CE and the majority of LegCo seats would be captured by members of the pro-democratic camp.

Beijing's understanding of Hong Kong's autonomy under OCTS

seems to be that of Hong Kong people ruling Hong Kong (instead of mainland officials doing so), but the Hong Kong people who hold key governmental posts in Hong Kong must be "patriots", i.e. people whom Beijing considers acceptable and trustworthy for this purpose.[66] Hence Beijing has under the Basic Law reserved the power to appoint the CE (after an election held in Hong Kong) and other principal officials of the SAR. Mainland scholars and officials have always stressed that the power of appointment of the CE, who is accountable both to the Central Government and the HKSAR,[67] is a substantive power and not merely formal or ceremonial.[68] Since the 1990s, it has been stressed that Hong Kong's system of government is an "executive-led" system and must not be allowed to become a "legislative-led" one.[69] The emphasis on executive-led government may be understood in the light of the fact that it is the executive (including the CE and the principal officials) and not LegCo that is appointed by Beijing and enjoys the confidence and trust of Beijing, and derives powers and authority from it.

Since the establishment of the Hong Kong SAR, the effectiveness of the "executive-led" government in Hong Kong has depended on a loose coalition of pro-China political parties and independent legislators which have occupied the majority of seats in LegCo (Lui 2012). But there has never been any ruling party in the Hong Kong SAR. No single political party has ever occupied the majority of, or any number close to half of, the seats in LegCo. The CE is elected independently of LegCo by an Election Committee, which has never been dominated by political parties, but the majority of which are generally considered "pro-China" rather than supportive of the pan-democrats. Members of the pro-China camp in LegCo are generally supportive of the CE and her administration, although such support cannot be guaranteed in every instance of policy, bill or item of financial expenditure, because the elected legislators are answerable to their own constituencies. In practice, the Central Government in Beijing and its Liaison Office in Hong Kong have played a significant role – informal rather constitutional -- in promoting, coordinating among and supporting this pro-China camp of politicians in

Hong Kong.[70]

(4) The dynamics of constitutional reform

The Basic Law provides for the development of the political system of the HKSAR in the longer term. It declares that the "ultimate aim"[71] of the political evolution of the HKSAR is the election of both the CE and all members of LegCo by universal suffrage. Such political evolution will depend, however, on "the actual situation in the [HKSAR]" and should be "in accordance with the principle of gradual and orderly progress." The Basic Law does not provide any timetable for the eventual realization of universal suffrage. But Annexes I and II to the Basic Law expressly provide that the methods for electing the CE and LegCo may change after 2007. They also expressly provide for the procedure for such constitutional change,[72] which involves the support of a two-thirds majority in LegCo, the CE's consent, and the approval of (in the case of a change in the electoral method for the CE) or "reporting for the record" to (in the case of a change in the electoral method for LegCo) the NPCSC.

A major turning point in the post-1997 history of Hong Kong was the Hong Kong government's attempt to enact a national security law for the purpose of the implementing Article 23 of the Basic Law, which requires the HKSAR to enact laws on treason, secession, sedition, subversion and protection of state secrets. The legislative exercise was aborted after a march of an estimated half-million people on July 1, 2003.[73] The "pan-democrats", who led the movement against the bill, then launched a movement to demand the speedy democratization of the HKSAR.[74]

In early 2004, Beijing decided to respond to the democracy movement in Hong Kong. On April 6, 2004, the NPCSC issued an Interpretation of the Basic Law.[75] It elaborates upon Annexes I and II to the Basic Law by stipulating a procedure for initiating changes to the relevant electoral methods. The procedure requires the CE to submit a report to the NPCSC on whether there is a need to introduce electoral reform, whereupon the NPCSC will decide the matter in accordance with Articles 45 and 68 of the

Basic Law.

Since April 2004, three reports on electoral reforms have been submitted to the NPCSC by CEs in Hong Kong, in 2004, 2007 and 2014 respectively. In response to the 2007 report, NPCSC decided that "the election of the fifth CE of the HKSAR in the year 2017 may be implemented by the method of universal suffrage; that after the CE is selected by universal suffrage, the election of the LegCo of the HKSAR may be implemented by the method of electing all the members by universal suffrage."[76]

In 2013, activists proposed the idea of an "Occupy Central" campaign to put pressure on Beijing and the Hong Kong government to introduce a model for universal suffrage in 2017 that is consistent with international standards of democratic elections.[77] On July 15, 2014, Chief Executive C.Y. Leung initiated the procedure for electoral reform, and submitted a report to the NPCSC. On August 31, 2014, the NPCSC rendered its Decision on political reform in the HKSAR.[78] It stated that the "broadly representative nominating committee" that would nominate candidates for election of the CE by universal suffrage in accordance with Article 45 of the Basic Law should be modelled on the existing Election Committee.[79] "The nominating committee shall nominate two to three candidates ... Each candidate must have the endorsement of more than half of all the members of the nominating committee." The Decision explained as follows:

> "[T]he principle that the Chief Executive has to be a person who loves the country and loves Hong Kong must be upheld. This is a basic requirement of the policy of 'one country, two systems'. It … is called for by the actual need to maintain long-term prosperity and stability of Hong Kong and uphold the sovereignty, security and development interests of the country. The method for selecting the Chief Executive by universal suffrage must provide corresponding institutional safeguards for this purpose."

The Decision of the NPCSC was met by strong protests from

pro-democracy forces in Hong Kong, which condemned the electoral model as "fake universal suffrage" because it was perceived that only pro-China political figures and no pan-democrats would be able to gain majority support from the nominating committee so as to become candidates in the election of the CE by universal suffrage. Students and other democracy activists launched the "Umbrella Movement" or "Occupy Central Movement" that started in late September and continued until mid-December 2014.[80] The bill to introduce universal suffrage for the election of the CE was eventually rejected by LegCo on June 18, 2015; with the pan-democrats voting against the proposal, it failed to secure the requisite two-thirds majority for amendment of Annex I to the Basic Law. The veto meant that the existing system of the election of the CE by a 1200-member Election Committee would continue indefinitely.[81]

The failure of "Occupy Central" to achieve progress in Hong Kong's democratization does not mean an end to the demand for political reform. The demand for universal suffrage in the election of the CE and of all legislators was resurrected in the "anti-extradition bill" movement of 2019, and appeared as one of the "five principal demands" of the protestors.[82] Given that the Chinese government is unlikely to retreat from the "August 31 Decision" of 2014, and the pro-democracy politicians in Hong Kong are unlikely to drop their objection to that Decision as "fake universal suffrage", the impasse in Hong Kong's political reform will remain unresolved in the foreseeable future. The commitment to democracy as universal suffrage in the Basic Law results in "an inherently unstable regime, because [the regime] will be taken to task to deliver" the constitutional promise of the realisation of universal suffrage.[83] Thus a distinguishing feature of the case of Hong Kong as an autonomous regional entity is that its political system – which cannot be changed without the consent of the central government -- is unstable and lacks sufficient legitimacy, and this is not only a political reality but also flows from the Basic Law itself. In affirming the ultimate goals of universal suffrage in the election of the CE and of all legislators in the HKSAR, the Basic Law legitimizes the struggle for such universal

suffrage and, in a sense, de-legitimizes the existing political system that falls short of the ideal of universal suffrage. After the failure of "Occupy Central", some democracy activists in Hong Kong lost hope in achieving democratization within the framework of "One Country, Two Systems", and became advocates of Hong Kong's independence. They openly participated in the "anti-extradition bill" movement of 2019. Thus dissatisfaction with an existing system of autonomy may ultimately lead to demands for secession. The case of Hong Kong illustrates this logic at work, and this does not portend well for the future of "One Country, Two Systems".

III Analysis of the Constitutional Framework of 'One Country, Two Systems'

Both the text of the PRC Constitution and the writings of Chinese scholars of constitutional law testify unequivocally that the PRC is a unitary state. Indeed the very idea of federalism has been rejected as inconsistent with the theory and practice of the Chinese constitution. The introduction of the policy of 'One Country, Two Systems' has not resulted in any change to the official doctrine that the PRC is a unitary state. As will be elaborated below, the Basic Law has made it clear that the powers of the HKSAR government have been delegated to it by the National People's Congress by means of the enactment of the Basic Law of the HKSAR. Chinese scholars writing on the Basic Law unanimously emphasise that such delegation of power (*shouquan* 授权) is different from separation of powers (*fenquan* 分权), and that there is no element of federalism in the constitutional arrangement of one country two systems.

The theoretical framework developed in part I of this paper suggests that one possible model of multi-level governance is that of devolution, under which a unitary state decides to establish a constitutional arrangement whereby one or more of its regional units is granted broad executive and legislative powers of self-government. The typical case involves a process of disaggregation, as opposed to aggregation in the case of the formation of a new federation or federal state. Devolution

involves disaggregation insofar as the regime of the unitary state decides to create and empower new local political institutions at the regional level. The existence and powers of such local institutions may or may not be expressly provided for in the national constitution. If they are so provided for and thus constitutionally entrenched, the system may be said to be 'federated', even though it does not amount to a full federation or federalism.

From the perspective of the PRC state and its constitutional law, the establishment and operation of the HKSAR fits well into the model of devolution within a unitary state. The political institutions of the HKSAR which became operational on 1st July 1997 -- the moment of the establishment of the HKSAR -- were in law newly created institutions that had not existed before. But what is interesting and remarkable about the case of Hong Kong is that these matters may be viewed from another perspective which is to some extent different from the Chinese mainland perspective. This is the perspective of either the colonial Hong Kong government, or those among the people of Hong Kong who identify themselves as members of Hong Kong as a political community separate and distinct from the political community of all PRC citizens. Thus, under pre-1997 Hong Kong law, ethnically Chinese persons born in Hong Kong were in law British Dependent Territories Citizens (BDTC) or British Nationals (Overseas) (BNO). After 1997, under the law of the HKSAR, these people all became Chinese nationals with the right of abode in the HKSAR.

For purpose of convenience of description and discussion, we can refer to the perspective of such Hong Kong people (including also that of the colonial Hong Kong government or British government) as the 'Hong Kong perspective'. From the Hong Kong perspective, the establishment of the HKSAR is not simply the creation by means of devolution of new political institutions of self-government or autonomy -- a process of disaggregation to some extent. From the Hong Kong perspective, the establishment of the HKSAR is also a phenomenon of aggregation, in which the pre-existing political community of Hong Kong and its

institutions became connected to those of the PRC. For many Hong Kong people, therefore, the terms ‘reunification’ or ‘unification’ -- rather than devolution -- may more directly convey the meaning of what happened in 1997. Whereas the mainland Chinese perspective sees the Basic Law as an instrument of devolution and disaggregation, the Hong Kong perspective sees the Joint Declaration and Basic Law as serving the function of protecting the rights and self-governing institutions of the pre-existing political community of Hong Kong as it undergoes unification and aggregation or integration with the PRC. The difference between the Chinese perspective and the Hong Kong perspective as outlined above can have far-reaching implications for the practical operation of ‘One Country, Two Systems’.[84]

Apart from aggregation and disaggregation, two other concepts also used in the theoretical discussion in part I are the preservative and transformative aspects of a new constitutional arrangement for multi-level governance. It is pointed out that in the formation of a federal system, existing political communities are preserved as member states of the new federation, while the transformative aspect of the new constitutional order involves the creation of a new federal system of government. In the case of devolution, an existing unitary state is preserved, while transformation is achieved insofar as the unitary state devolves new powers to a regional government. In the case of the creation of the HKSAR, we can observe both preservative and transformative features. As mentioned above, from the Chinese perspective, there is a process of devolution that preserves the unitary state while at the same time transforming it by establishing a new SAR. And from the Hong Kong perspective, what is preserved is the existing system of Hong Kong as one of the ‘two systems’ in ‘One Country, Two Systems’ arrangement, while the transformation involves the Hong Kong system becoming a component of the ‘one country’ of the PRC. What is interesting and remarkable in the case of Hong Kong is that what is seen to be preservative from the Hong Kong perspective is what is transformative from the Chinese perspective, while what is seen as

preservative from the Chinese perspective may be seen as transformative from the Hong Kong perspective.

The concept of 'effective constituent authority' discussed in part I of this paper may also be usefully employed to analyse the making of the Basic Law of the HKSAR. In a typical case of devolution or decentralisation within a unitary state, the effective constituent authority is unitary, and it is this authority that is exercised in the establishment of regional institutions and the conferral of autonomous powers of self-government upon them. This may be contrasted with the formation of a federal state, in which the effective constituent authority is plural in nature and involves the peoples of states agreeing to become member states of the federation. Part I of the paper also mentions the possible scenario of a 'third power' playing a role in the formation of a constitutional arrangement of multi-level governance, and that this role can be in the nature of supervision or control. Employing these comparative perspectives, the case of 'One Country, Two Systems' is not a simple case of devolution where the effective constituent authority is unitary. An important element of plurality is introduced by the participation of the British government in the negotiation of the terms of the Joint Declaration which were subsequently codified in the Basic Law. Furthermore, although the people of Hong Kong were not represented in the negotiation process, public opinion and the views of the business and political elites of colonial Hong Kong played a significant role in the consultative processes during the drafting of the Basic Law.

As regards the "high degree of autonomy" promised for Hong Kong under the Joint Declaration and the Basic Law, it is noteworthy that the HKSAR Government (including its executive, legislative and judicial branches) enjoys a wide scope of autonomy in terms of the subject-matters over which the Hong Kong Government may exercise jurisdiction. It may be said that the scope of autonomy enjoyed by the HKSAR is more extensive than that enjoyed by member states of many federal states.[85] On the other hand, in assessing the degree of autonomy exercised by the people of Hong Kong, the range of subject-matters within the autonomous powers

of the HKSAR government is not an exclusive criterion. Another important criterion is whether the constitutional arrangement for the creation of and selection of personnel or officials for the HKSAR government is such that it is able to represent effectively the will and interests of the people of Hong Kong. This means that the manner of selection of the office-holders of the internal political system of the HKSAR matters.

In most other systems of multi-level governance around the world, both the political system at the national level and that at the regional level are liberal-democratic in nature, with free elections, multi-party competition and elected assemblies. In such systems, political parties that operate at the national level may also participate in regional politics, even though some political parties may be active or successful only at the regional level (in the region that practises autonomy) and not at the national level.[86] The distinguishing feature of "One Country, Two Systems" in the case of the HKSAR is that whereas an authoritarian Party-State led by the Chinese Communist Party ("CCP") exists at the national level, the political system of the HKSAR is largely liberal-democratic (in terms of the protection of civil liberties and human rights, free elections and multi-party competition, despite the fact that the Chief Executive is not elected by universal suffrage). The CCP does not publicly operate in the HKSAR. And, as noted, the political spectrum of Hong Kong includes both "pro-Beijing" forces and "pro-democracy" forces that are highly critical of the PRC regime.

Adopting a policy of "patriots" ruling Hong Kong, the Chinese central government, through its Liaison Office in the HKSAR, coordinates among and renders support for the "pro-Beijing" political forces in Hong Kong so as to ensure that they occupy the majority of LegCo seats and of the seats in the Election Committee for the Chief Executive. This objective has been achieved so far (as of early 2020) because approximately 40% of the voters in elections by universal suffrage and a significant number of business and professional groups in functional constituencies support the "pro-Beijing" camp. However, there is no constitutional mechanism that guarantees that support for the

"pro-Beijing" camp will not decline, and support for the "pro-democracy" camp will not increase, to such levels that the "pro-Beijing" camp loses the majority in LegCo or even the Election Committee. This scenario is not entirely impossible, given the surge of support for the "pro-democracy" camp resulting from the "anti-extradition bill" movement of 2019, as evidenced by the outcome of the District Councils election in November 2019.[87] Thus even the "pro-Beijing" camp needs to be responsive to public opinion and develop policy platforms that can appeal to large numbers of Hong Kong people.

Finally, we now turn to the judicial aspects of "One Country, Two Systems" as practised in the HKSAR. In most arrangements for multi-level governance around the world – whether they take the form of devolution or federalism, there exist a judicial forum for the resolution of constitutional questions and jurisdictional disputes arising from the practice of autonomy at the regional level. The judicial forum usually takes the form of a highly respected court at the apex of the national judicial system. It is an independent and impartial tribunal with a high degree of legitimacy and sufficiently well trusted by all parties concerned for the purpose of resolution of constitutional questions. In the case of the HKSAR, the courts led by the Court of Final Appeal at the apex of the Hong Kong court system provide such a judicial forum. However, a distinguishing feature in the Hong Kong case is that the authority of the Hong Kong court to interpret the Basic Law is subject to the overriding authority of the NPCSC, which as an institution of the PRC Party-State and is not considered by a significant section of the members of the public, including many members of the legal community in Hong Kong, to be an impartial, legitimate and trustworthy interpreter and guardian of the Basic Law for the purpose of deciding constitutional questions and jurisdictional disputes arising from the practice of autonomy by the HKSAR.[88]

On the other hand, it may also be noted that in most other systems of multi-level governance, the final court of appeal in cases litigated before the courts of the regional unit is the national supreme court or the national

constitutional court. From the perspective of autonomy, the case of the HKSAR compares favourably with these other systems, as the HKSAR has its own Court of Final Appeal with no channels of appeal to any national court. In the absence of any relevant interpretation of the Basic Law by the NPCSC, all questions of interpretation of the Basic Law litigated before the Hong Kong courts are decided by the Hong Kong courts themselves. Furthermore, it is noteworthy that the NPCSC has since 1997 issued only five interpretations of the Basic Law; none of them relate to civil liberties or core human rights, and only two of them relate to jurisdictional questions arising from the practice of autonomy or devolution: the 2004 interpretation on the respective roles of the central government and the HKSAR government in the process of political or electoral reform in the HKSAR, and the 2011 interpretation on whether the power to determine the content of the law of foreign sovereign immunity in Hong Kong vests in the central government or the Hong Kong court.

IV Conclusion

The "One Country, Two Systems" ("OCTS") scheme practised by the PRC in the HKSAR as described in part II of this paper may be analysed in terms of the theoretical framework in part I of this paper for the study of constitutions of multi-level governance. Formally speaking, OCTS was a product of the effective constituent authority of the unitary PRC state. Nevertheless, Britain as Hong Kong's former colonial ruler made a significant contribution to the establishment of the constitutional order of OCTS.

The constitutional arrangement for OCTS was defined in the Basic Law of the HKSAR. This law was drafted by a committee appointed by the PRC government consisting of both Mainland and Hong Kong members, and a Hong Kong-based consultation committee was also established to advise the drafting committee. While the Basic Law of the HKSAR was enacted in 1990 by the National People's Congress pursuant

to the PRC Constitution, the terms on which sovereignty or jurisdiction over colonial Hong Kong was transferred from the UK to the PRC were negotiated between the British and Chinese governments and codified in the Sino-British Joint Declaration of 1984. As the terms of the Joint Declaration as a treaty in international law were implemented by the Basic Law, it may be said that, in a practical sense, Britain participated in and shared with the PRC the exercise of effective constituent authority in the establishment of the HKSAR.

Consistent with the "One Country, Two Systems" policy, the Basic Law built upon and preserved many of the features of the legal and political institutions that had come to characterise the system of government prevailing in Hong Kong prior to 1997. Its establishment was not, therefore, a simple case of the central governing institutions of a unitary state unilaterally determining to devolve power to a region within the state. In many devolutionary systems, such as those established in the United Kingdom and Spain, the decision to confer autonomous powers of government was made in circumstances of spirited advocacy by regional peoples for constitutionally-guaranteed local self-government. In the case of Hong Kong, a constitutional scheme of devolution and autonomy under the OCTS policy was introduced in recognition of and to protect the interests of the people of Hong Kong in the process of and after decolonisation and unification with or integration into the PRC.

The formation of the HKSAR under these conditions has far-reaching implications for the governing institutions and distribution of powers established under the Basic Law. The basic design of the HKSAR's executive, legislative and judicial institutions has both preservative and transformative aspects. The constitutional roles of the Chief Executive, Legislative Council and judiciary of the HKSAR are essentially the same as those of the colonial Governor, Legislative Council and judiciary. However, instead of the Governor being appointed by the British government, the Chief Executive is now chosen by an Election Committee but appointed by the Chinese government. The Legislative Council continues to be what it was in the 1990s -- a body partly elected

by universal suffrage, but the Basic Law also provides that it will become wholly elected by universal suffrage at some indeterminate time in the future, as will be the Chief Executive. As in colonial Hong Kong, the HKSAR courts continue to interpret and apply the law of Hong Kong, including its constitutional instrument (now the Basic Law instead of the Letters Patent) in accordance with their tradition of judicial independence. However, the apex of the Hong Kong judicial system is now a newly created Court of Final Appeal, which has replaced the Privy Council in Hong Kong's hierarchy of courts. The HKSAR courts' judicial power is now subject to potential interpretive intervention by the NPCSC.

There has been preservation of, and continuity before and after 1997 in, the autonomous powers of the Legislative Council. It continues to exercise general legislative powers over the broad range of matters that it exercised power in the past, subject only to the reservation of a small number of nonetheless significant powers to the PRC, including the power to invalidate Hong Kong laws, apply national laws to Hong Kong, issue overriding interpretations of the Basic Law, and amend the Basic Law. This is not unlike the list of reserved powers reserved to the British Parliament under the system of devolution established in the United Kingdom, but with the important qualification that the devolution statutes cannot, as a matter of binding constitutional convention, be altered by the British Parliament without the consent of the devolved parliaments in Scotland, Wales and, in principle, Northern Ireland.

In the case of the HKSAR, the Basic Law may be amended by the National People's Congress, though the Basic Law provides that no amendment can "contravene the established basic policies" of the PRC towards Hong Kong as enshrined in the Joint Declaration. The "One Country, Two Systems" arrangement also bears a certain similarity to the system established in Spain, where the powers of the autonomous communities are formally derived from the unitary Spanish state under the national constitution. However, unlike the case of the HKSAR, the autonomous powers of self-government of autonomous communities in Spain, once granted, are guaranteed under the Constitution.

Finally, as in Scotland within the United Kingdom, Catalonia and the Basque country within Spain, and Québec within Canada, there is growing agitation in Hong Kong for stronger guarantees of regional autonomy and democratic self-government. The unique features of the HKSAR under OCTS are that (a) there are significant liberal-democratic elements in Hong Kong's political system that are absent in the PRC political system which is authoritarian; (b) the Basic Law itself promises further democratization in the HKSAR in the future. The limits to such democratization set by the PRC state have resulted in legitimacy deficit and political instability in the HKSAR.

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