SIBLINGS OF THE DRAGON: CHINA’S TERRITORIES AND CONSTITUTIONAL LAW

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I. INTRODUCTION

China’s territories are asymmetrical. Ideologically, statist socialism remains the People’s Republic of China (PRC)’s orthodoxy, but Hong Kong retains a “free market” of speech and belief in accordance with the Basic Law of the Hong Kong Special Administrative Region (HKSAR). Societally, in China’s peripheries, ethnic minorities, as territorial majority groups, are entitled to preserve their languages and cultures in autonomous (administrative) regions. Only in China proper have ethnic Han Chinese retained demographic dominance. Constitutionally, the Chinese state is a hybrid of various constituent units – special administrative regions, ethnic autonomous regions, and others of diverse legal statues – the theoretically “unitary” nature is under questions. According to Chinese legend, a dragon can have nine siblings and each of them are different – one who loves music sits on a lute; another who has good eyes resides up on the roof. This article argues that the asymmetry of Chinese territories, like the differences among the dragon’s siblings, has set the Chinese territories apart from ordinary administrative divisions, and created a unique regime of jurisprudential significance.

As a matter of scope, this article will explore only three phenomena. The first section addresses the heterarchy of authorities in the Chinese context. The PRC central government and the territories are neither of equal authority, nor do they form a heterarchy of authorities with the PRC central government at the top. Ordinary administrative divisions are subordinate to a central government, but the territories may vary in institutions, cultures, and political attachments. The second section goes to the relationship between the authorities and citizens/nationals. The PRC, as a theoretically unitary state, still does not offer homogenous citizenship to all Chinese nationals. In fact, Chinese nationals registering residentship in different jurisdictions are entitled to various rights and legal treatments; in many circumstances, Chinese nationals are neither citizens nor aliens in a Chinese territory. This, nevertheless, has much outstripped what ordinary administrative divisions are supposed to do. In the third section, the article addresses the territories’ relationship with the international community. The structure of this article may be understood as a tripartite covering the relationship between the territorial authorities
and the PRC central government with territorial authorities, individuals and foreign states respectively. Hypothetically, a unitary state’s relationship, legal or political, with its citizens/nationals should be simple and direct. As modernist constitutionalism presumes, the constituent power shall vest in a singular “people” as the demos of a liberal democracy and the constituted power ought to be primarily provided by a single Constitution. However, as the following sections will illustrate, the Chinese cases obviously depart from this presumption.

II. HETERARCHY OF AUTHORITIES

A. Mainland and Taiwan

In Chinese territory, there are two main opposing political stances on each side of the Taiwan Strait – the Chinese mainland and Tai-wan. Because the Communist Party of China (hereinafter CPC) does not seek democratic legitimacy for the regime, the narrative of historical triumphs against “national enemies” is possibly the only legitimization of its reign. The Preamble of the 1982 PRC Constitution provides:

“The people of all nationalities in China have jointly created a splendid culture and have a glorious revolutionary tradition. Feudal China was gradually reduced after 1840 to a semi-colonial and semi-feudal country. The Chinese people waged wave upon wave of heroic struggles for national in-dependence and liberation and for democracy and freedom. Great and earth-shaking historical changes have taken place in China in the 20th century. The Revolution of 1911, led by Dr. Sun Yat-sen, abolished the feudal monarchy and gave birth to the Republic of China. But the Chinese people had yet to fulfill their historical task of overthrowing imperialism and feudalism. After waging hard, protracted and tortuous struggles, armed and otherwise, the Chinese people of all nationalities led by the Communist Party of China with Chairman Mao Zedong as its leader ultimately, in 1949, overthrew the rule of imperialism, feudalism and bureaucrat capitalism, won the great victory of the new-democratic revolution and founded the People’s Republic of China. Thereupon the Chinese people took state power into their own hands and became masters of the country.”

1 Xianfa (宪法) [Constitution Law] (promulgated by Nat’l People’s Cong., Dec. 4, 1982) (Chinalawinfo).
Yet the CPC never fully accomplished the triumph over the Chinese Nationalist Party or the Kuomintang (hereinafter KMT). In 1949 the CPC had overthrown the KMT regime in the Chinese mainland, but at that time it had no capacity to destroy the KMT remainders in Taiwan of which the KMT had taken over control after the Second World War.

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

On the south side of the Strait, Article 4 of the “Constitution of Republic of China (hereinafter “ROC”)”, which was promulgated in the Chinese mainland in 1946, states: “The territory of the Republic of China within its existing national boundaries shall not be altered except by a resolution of the National Assembly.” What are “existing national boundaries?” The direct interpretation should be the international boundary of China in 1946 when the Constitution was made, whose territory includes both Taiwan and the Chinese main-land. Yet the reality is the Taiwanese authorities only control Taiwan and some tiny islands, which makes the claim rather bizarre.

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3 Fan Fenlie Guojia Fa (反分裂国家法) [Anti-Secession Law] (promulgated by Nat’l People’s Cong., Mar. 14, 2005, effective Mar. 14, 2005) art. 3(1) (Chinalawinfo) (the Taiwan question is one that is left over from China’s civil war of the late 1940s).


5 The PRC central government actually enacted a law to protect Taiwanese residents’ investment in the Chinese mainland, see Taiwan Tongbao Touzi Baohu Fa (台湾同胞投资保护法) [Law on the Protection of Taiwan Compatriots' Investment] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 5, 1994, effective Mar. 5, 1994) (Chinalawinfo). The PRC parliamentary act is also translated as “Law of the People’s Republic of China on Protection of Investment by Compatriots From Taiwan”.

6 Minguo Xianfa (民国宪法) [Constitution of “ROC”] art. 4 (1946) (China).
But the Taiwanese authorities cannot recklessly alter the provision either, as it is arguably the most important symbol of Chinese unity.

The Taiwanese authorities attempt to lay this question aside. In facing challenges from pro-independence Taiwanese politicians, the “ROC” Judicial Yuan, which is the constitutional court in Taiwan, made a judicial interpretation on 26 November 1993 indicating the meaning of “existing national boundaries” is a political question and ought to be answered by a political organ. As a result, politicians can interpret the constitutional provision with great liberality. The “President” of the Democratic Progressive Party (hereinafter DPP), Mr. Chen, regards Taiwan and China as two sovereign countries; but the incumbent “President” from the KMT reversed the position. The KMT leader’s understanding arguably has the judiciary’s support. The “ROC” Supreme Court’s binding precedence in the form of the No. 8129 case in 1982 is precise and clear: crime in the Chinese mainland shall still be regarded as having been made in the “national territory” of the “ROC”.

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

As a result of cross-Strait conflicts and long-term political pluralism in the aftermath of Taiwanese democratization, the political attachments of Taiwanese residents have been diversifying. It is not important whether politicians portray Taiwanese residents as ethnically distinct people from Chinese mainlanders – the Taiwanese
population consists of at least four constituent groups: Hoklo (70%), Hakka (15%), post-war migrants from the mainland (13%) and around 2% Taiwanese aboriginals. The ethnic similarities between Taiwanese Han groups (Hoklo, Hakka, and mainland migrants) and Han Chinese in the mainland are manifest. The crucial point is individuals from the same ethnic group may have very different political attachments and they probably and possibly can inhabit in separate states or establish those for their own. In Taiwan, arguably the most reliable opinion poll on Taiwanese attitudes towards political reunification with the Chinese mainland, which is made by the “ROC” Mainland Affairs Council, illustrates that the PRC central government should not be too optimistic about the prospect: although more than 80% of Taiwanese adults in the poll agree with the status quo, 24% prefer independence to re-unification, and another 30% would join them in some circumstances – uncertainties about the Chinese economic miracle and the survival of CPC regime would both determine how they think about the future.

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

(1) to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people on Taiwan, as well as the people on the China mainland and all other peoples of the Western Pacific area;

(2) to declare that peace and stability in the area are in the political, security, and economic interests of the United States, and are matters of international concern;

(3) to make clear that the United States decision to establish diplomatic relations with the People’s Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means;
(4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States;

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

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

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

B. Hong Kong

Taiwan and the PRC may be on an arguably equal footing in political terms, but Hong Kong as a special administrative region of the PRC, undoubtedly stands lower in a hierarchy than the PRC central government, especially the omnipotent Chinese parliament. The Basic Law of the Hong Kong Special Administrative Region (hereinafter HKSAR) was promulgated by the PRC National People’s Congress (hereinafter NPC), and the special administrative region is organized in accordance with a “unitary state” according to the PRC central government. The NPC can make whatever law for

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12 Fan Fenlie Guojia Fa (反分裂国家法) [Anti-Secession Law] (promulgated by Nat’l People’s Cong., Mar. 14, 2005, effective Mar. 14, 2005) art. 8 (Chinalawinfo) (“In the event that the "Taiwan independence" secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity.”).
13 Xianggang Jiben Fa (香港基本法) [Hong Kong Basic Law] art. 12 (promulgated by Nat’l People’s Cong., Apr. 4, 1990, effective Jul. 1, 1997) (Chinalawinfo) (“The Hong Kong Special
Hong Kong, despite the fact that it would be politically unwise to breach the Hong Kong Basic Law.

However, in terms of political attachments, the PRC central government lacks of the capability and competence to homogenize Hong Kong residents’ allegiance. As an international metropolis and financial center, there are numerous Hong Kong residents holding non-Chinese passport and from non-Chinese families. They are not required to defer to the PRC central government but only to the HKSAR if necessary. In fact the only obligation that the HKSAR requires of their residents is that they shall obey the law, and the territorial administration is not yearning for any sort of emotional attachment or patriotism from its residents. Hong Kong’s political pluralism actually encourages Hong Kong residents to confront the CPC’s reign within the scope of Hong Kong’s constitutionalism. Article 23 of the Hong Kong Basic Law prescribes that the HKSAR shall enact territorial law to prohibit treason, secession, sedition, sub-version against the PRC central government. However when the HKSAR administration attempted to promulgate an ordinance to fulfill the article’s requirement, Hong Kong residents strongly opposed its proposal and it was later shelved after a number of demonstrations. Hong Kong residents are wary that a new ordinance would force them to succumb to criminal prosecution for disobedience to the government (of the HKSAR or the PRC). The HKSAR proposal attempted to demand allegiance from all residents in the territory based on case law – Lord Jowitt, L.C. said allegiance “is owed to their Sovereign Lord the King by … those who, being aliens, reside within the King’s realm”. However, this is not the reality in the circumstances.

Hong Kong is also allowed to use territorial symbols to express its difference from the Chinese mainland. Appendix 3 of the Basic Law prescribes the PRC national anthem, national flag, national anniversary, and national emblem shall be respected in Hong Kong. At the same time, the HKSAR is entitled to use its own territorial flag and a territorial emblem. The HKSAR flag is a “red flag with a
bauhinia highlighted by five star-tipped stamens.” The HKSAR emblem is “a bauhinia in the center highlighted by five star-tipped stamens and encircled by the words ‘Hong Kong Special Administrative Region of the People’s Republic of China’ in Chinese and ‘HONG KONG’ in English.” The Regional Flag and Regional Emblem Ordinance provides: “In the Hong Kong Special Administrative Region, whenever the national flag is flown together with the regional flag, or the national emblem is displayed together with the regional emblem, the national flag or the national emblem is to occupy a more prominent position. When both the national flag and the regional flag are raised in procession, the national flag is to precede the regional flag. When the national flag is flown alongside the regional flag, the national flag is to be on the right and the regional flag on the left.” In Chinese culture this is an explicit way to show which flag is higher in status. This can be contrasted to the United Kingdom, where the Union Jack, the Saint Andrew’s Cross, and the European Union flag may fly side by side. Even so, the HKSAR still surpasses ordinary Chinese administrative divisions, since the latter have nothing at all.\textsuperscript{19}

\textbf{C. Tibetan Communities}

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

There is no agreement on what Tibet is. The traditional ethnic Ti-bet covers Tibetan areas in the PRC, Ladakh, Sikkim, Bhutan, and South Tibet, which is the Arunachal Pradesh state under Indian actual control but claimed by the PRC. Ethnic Tibet is now governed by three sovereign states: China, India, and Bhutan; it is the largest geo-graphic concept of Tibet. In the PRC, Tibetan areas consist of the Tibet Autonomous Region (TAR), and several autonomous Tibetan prefectures and counties in other provinces. However, the


\textsuperscript{19} The symbols are protected in Hong Kong from desecration even in sake of “freedom of speech and freedom of expression”. See HKSAR v. Ng Kung Siu and Another [1999] 3 HKLRD 907; (1999) 2 HKCFAR 442.
Dalai La-ma’s “Central Tibetan Administration” insists on a “Great Tibet”:

Tibet here means … Cholka-Sum (U-Tsang, Kham and Amdo). It includes the present-day Chinese administrative areas of the so-called Tibet Autonomous Region, Qinghai Province, two Tibetan Autonomous Prefectures and one Tibetan Autonomous County in Sichuan Province, one Ti-betan Autonomous Prefecture and one Tibetan Autonomous County in Gansu Province and one Tibetan Autonomous Prefecture in Yunnan Province.  

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

In speaking of Tibetan institutions, we have to skim through some historical pages. In the 18th century, the Manchu Crown in China and the Gelug sect of Tibetan Buddhism developed a politico-religious bond. Tibetans regard this as a “patron-priest” relationship, but Chinese literature emphasizes the secular side of the coin. The Crown re-shaped the entire governance of Tibet and empowered the Dalai Lama with a theocracy that combined both the religious and the secular. The Tibetan local government (Kashag) was set up, which composed of four ministers (Kalön) under the Dalai Lama and supervised by two commissioners (amban).

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21 Memorandum on Genuine Autonomy for the Tibetan People (2009).

appointed to represent the Crown in Tibet. In counties neighboring Shigatse, the Panchen Lama was also empowered with a series of secular powers; the Kashag did not levy tax in the Panchen Lama’s domain, nor in Amdo and Kham where local feudatories were subject to the provincial direct rule of the Crown.

The last Manchu emperor abdicated in 1911, which led to the establishment of the Republic of China. The Republic of China declared a “five-face republic” policy towards ethnic groups once under the Manchu Crown, i.e. Han Chinese, Manchu, Mongol, Tibetan, and Hui Muslim. The 13th Dalai Lama did not accept that. When the British army invaded Tibet, the 13th Dalai Lama fled to Outer Mongolia and visited Beijing following a call from the Manchu Crown. The imperial court cherished him well but changed the manner of encounter between the Emperor and the Dalai Lama: when previous Emperors embraced the Dalai Lama, the Emperor should step down from the throne and welcome the religious figure warmly, then sit the Dalai Lama next to himself slightly lower. However, the Crown at this time asked the Dalai Lama to kowtow, perhaps because his exile was not agreed upon and the Crown had already prepared to start its modern state-making process regardless of ancient rituals. The Dalai Lama was not satisfied. When the Crown decided to re-shape Tibet’s governance and establish direct rule, the Dalai Lama fled to British India. The empire then collapsed and the 13th Dalai Lama returned. He forced Chinese commissioners and troops to leave and for the first time took Tibet’s affairs into his own hands. The era of the 13th Dalai Lama was the only chance Tibet had to modernize without external interference, but the overwhelming majority of conservative lords and lamas opposed it. The 13th Dalai Lama died in 1933.

In 1949 the Chinese communist revolution replaced the Republic with the PRC, and the CPC decided to reintegrate Tibet into its direct control. After the People’s Liberation Army (hereinafter PLA) had occupied Eastern Tibet, the 14th Dalai Lama, who just took over from a regent lama, sent an envoy to Beijing to negotiate a deal. The “17-point Agreement” is a milestone for Tibetans, which marks the CPC’s taking over of Tibet; another milestone is the Tibetans’ 1959 revolt, after which the CPC demolished the Kashag and

23 The appointment of the commissioners in late Qing era see Dahpon David. Ho, The Men Who Would Not Be Amban and the One Who Would: Four Frontline Officials and Qing Tibet Policy, 1905–1911, 32(4) MOD. CHINA 210 (2008) (“Initially the Manchu Crown only appointed Manchu and Mongol amban, but in late Qing era there were Han Chinese appointments being made.”). 
emancipated all Tibetan serfs. The PRC established the Tibet Autonomous Region (hereinafter TAR) as an administrative division but promised autonomous powers to Tibetans. The 10th Panchen Lama was appointed in high posts along with many *tulku* and lords who decided not to flee with the 14th Dalai Lama. When the 13th Dalai Lama tried to launch his state-making project, he forced the 9th Panchen to flee to China proper to take over the Panchen domain. Since then the Dalai and the Panchen Lamas have not enjoyed good relations.

The 14th Dalai Lama restored his “Kashag” in Dharamsala, India. In the early days, the “Kashag” still wanted to fight back. Emigrated Tibetans set up an army in Nepal with US supplies, which later was demilitarized by the Nepalese government for security reasons. Emigrated Tibetans reformed the “Kashag”, and the Dalai Lama be-came the head of it. Although there is no scientific method to investigate Tibetans’ political attachments, it is acknowledged that not all emigrated Tibetans are loyal to the “Kashag”. The Sakya, the Kagyu, and other sects of Tibetan Buddhism have all made stunning development in the West. After the 1959 revolt that was led mostly by Eastern Tibetans, the revolt organization survived. The revolt organization did not kneel to the “Kashag”, and made an agreement with the “Republic of China” in Taiwan that it would accept the “ROC” claim over Tibet in exchange of a high level autonomy after the “ROC” would have re-unified China.

To summarize, the Tibetan Autonomous Region sitting in Lhasa is barely distinct from other administrative divisions in the PRC, although it is an “ethnic autonomous region” with a series of autonomous powers in theory. It was established by the PRC central government and can be demolished unitarily by the PRC central government. The Dalai Lama, who in legal terms is an international refugee, keeps disseminating that he and his followers still hope to resume the citizenship of the PRC one day, but they will not surrender to the PRC central government without appropriate conditions.

III. CITIZENSHIP AND NATIONALITY

This section goes on to investigate the political situation based on a differentiation between citizenship and nationality. The basic idea

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


is individuals in peripheral societies and the Chinese mainland/China proper are entitled to a variety of political rights, residency, and protection of territorial administration in accordance with their legal statutes. They are mostly recognized as Chinese nationals, but this does affect in certain circumstances, the fact that they are even inferior to legal aliens in a Chinese territory. This section contends that the three cases of Chinese territories may disturb the classic notion that citizenship and foreigners are mutually exclusive and exclusionary terms of membership, identity, and legal treatment. As a result, some are neither “others” nor hundred-percent “we”.

Even immigrants in the European Union “typically came to enjoy a full set of negative freedoms, including free access to the labor market, and they also gradually acquired a reasonable level of positive social security rights, limited political participation rights, and protection against sudden expulsion from the country”. 29 Chinese nationals, however, in Chinese territory can be barred from free movement, holding public office, or protection against expatriation because they have no membership of a Chinese territory. Rainer Bauböck notes “free movement within state territories and the right to readmission to this territory has become a hallmark of modern citizenship. Yet, in the international arena citizenship serves as a control device that strictly limits state obligations towards foreigners and permits government to keep them out or remove them, from their jurisdiction”. 30 In this sense, the relationship between peripheral societies and their members has much outstripped that between ordinary administrative divisions and citizens, but resembles that between states and residents to some extent.

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

A. Mainland and Taiwan

First, we will examine the Taiwan case. Section 1 has briefly touched upon the cross-Strait mutual decriminalization process in which residents on both sides of the Taiwan Strait have been relieved of the threat of prosecution if they were inevitably involved in political activities against the regime on the other side of the Strait.

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This section will reveal in more details how the regimes regard residents under control of the other side. The PRC Nationality Act 1980 prescribes:

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

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

- **Article 6** Any person born in China whose parents are stateless or of uncertain nationality and have settled in China shall have Chinese nationality.\(^{31}\)

The PRC Nationality Act 1980 combines jus sanguinis and jus so-lì, but the former weighs more. If an infant’s parent or parents are Chinese nationals, she can be a Chinese national; or, if an infant is born in China, she can be a Chinese national too. Besides birth, there are other ways of acquiring PRC nationality, e.g. adoption, legitimation, naturalization, etc.; but birth is the primary way of “becoming Chinese”.

The PRC Nationality Act 1980 does not recognize dual nationality:

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

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

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

Two consequences of the PRC’s non-recognition of dual nationality are: on the one hand, the PRC has abandoned overseas

\(^{31}\) Guoji Fa (国籍法) [Nationality Law] (1929) art. 10 (Chinalawinfo).
Chinese holding other nationalities (as Article 5 and 9 indicate); on the other hand, the PRC government insists that Chinese nationals with dual nationality are not entitled to foreign consular protection in the Chinese mainland. If any Chinese nationals hope to apply for foreign consular protection in the Chinese mainland, they should renounce their Chinese nationality in the first place through certain official procedures; otherwise their application will not succeed.\(^{32}\)

The latest Chinese nationality law before the PRC Nationality Act 1980 was that promulgated on 5 February 1929 by the Republic of China. The “ROC” Nationality Act 1929 did not refuse dual nationality. Secondly, the “ROC” Nationality Act 1929 primarily decided an infant’s nationality by her father’s Chinese nationality; the mother’s Chinese nationality would not count unless the father is unknown or stateless. In other words, the 1929 law is overwhelmingly jus sanguinis based on patrilineal descent and it did not consider whether an infant was born in China or not. Thirdly, the “ROC” Nationality Act 1929 was stricter than the PRC Nationality Act 1980 in naturalization. It required applicants to “have basic linguistic ability of the national language.” In that decade this read as who wished to naturalize to the Republic of China must have been able to speak Mandarin.

The “ROC” Nationality Act 1929 is comparatively significant because: on the one hand, it is a former version of the contemporary one applying in Taiwan; on the other hand, although “the 1929 law was never formally in force in the territory of the PRC, … a number of its provisions were still tacitly applied by the PRC authorities on assorted occasions [until the 1980s].”\(^{33}\)

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

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\(^{32}\) Id. art. 14. (“Persons who wish to acquire, renounce or restore Chinese nationality, with the exception of cases provided for in Article 9, shall go through the formalities of application.”).

nationals recognized by the PRC and by the “ROC” in Taiwan should not be the same in theory.

Furthermore, although the “ROC” Nationality Act 1929 was adopted by Taiwan, Taiwan has also amended it many times. Taiwan’s contemporary Nationality Act accepts the combination of jus sanguinis and jus soli, and both parents’ Chinese nationality counts in deciding that of an infant. The linguistic ability condition for naturalization remains. Besides, Taiwan restricts naturalized nationals’ opportunity to hold public office. Unless they have fulfilled a 10-year residency, naturalized nationals cannot be elected as “President, leaders of five Yuan-s, local officers, legislative representatives, etc.”34 Although dual nationality is acceptable to Taiwan, foreign nationality holders are not entitled to hold public office. Comparatively, The PRC Nationality Act 1980 accepts people who are relatives of Chinese nationals or who have settled in China to naturalize with no condition of linguistic ability or restriction to public office.

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

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

All who have Chinese nationality in accordance with the Nationality Law of the People’s Republic of China are entitled to have our consular protection. In other words, as long as you are Chinese citizens – regardless of settling abroad or temporarily travelling abroad; regardless of the mainland

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34 Guoji Fa (国籍法) [Nationality Law] (1929) art. 10 (Chinalawinfo).
residents, or Hong Kong, Macao and Taiwan compatriots – you are our target of providing consular protection.35

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

On the other side, Taiwan’s attitude is also controversial. Taiwanese law defines national as those “living with the household registration in Taiwan, and nationals living abroad.”36 The Legislative Grounds of that article reads: “nationals’ includes nationals living in Taiwan, the mainland, abroad, and Hong Kong and Macau.”37 There are two interpretations: (1) Chinese nationals living in the mainland are recognized by the Taiwan authorities as its “nationals”, as well as those in Hong Kong, Macau and abroad; (2) there are some “nationals” of Taiwan who have settled in the mainland. They have lost their Taiwan household, but they are still recognized as Taiwan’s “nationals” because: (a) they have not yet renounced their “ROC” nationality in accordance with Taiwan’s law; (b) even if they have acquired/restored their PRC nationality, this could be in some sense tolerated as Taiwan accepts duality nationality. Interestingly, their “ROC nationality” does not count in the PRC. So they are not holding duality nationality, which would have offended the PRC law.

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

36 Ruchuguo ji Yimin Fa (入出国及移民法) [Immigration Act] art. 3(3) (1998) (Taiwan) (Lawbank).
and national security laws, under which Chinese mainlanders are to be kept out.

However, on the other hand, Taiwan has not yet disposed of the possibility that mainland residents could also be “Chinese nationals”. This attitude is applied by a series of cross-Strait relationship laws, under which Chinese mainlanders are to keep in. The “ROC” Act Governing Relations between the People of the Taiwan Area and the Mainland Area (hereinafter “the ROC Cross-Strait Relations Act”) provides: 38

Article 1

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

Article 2

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

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

2. “Mainland Area” refers to the territory of the Republic of China outside the Taiwan Area.

3. “People of the Taiwan Area” refers to the people who have household registrations in the Taiwan Area.

4. “People of the Mainland Area” refers to the people who have household registrations in the Mainland Area.

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

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38 TaiwanDiqu yu Dalu Diqu Remin Guanxi Tiaoli (台灣地區與大陸地區人民關係條例) [Act Governing Relations between the People of the Taiwan Area and the Mainland Area] (Chinawinfo).
Taiwan does beg the nationality question, but “before national unification”, an answer to the question is difficult. It is politically efficient that the “ROC” Cross-Strait Relations Act uses “household registration” to differentiate “people of the Taiwan Area” from “people of the Mainland Area”. Actually, in the Act for Exchanges between Chinese Nationals in the Mainland and in Taiwan of the PRC 1992 (hereinafter “the PRC Cross-Strait Exchanges Act”) “household registration” is also involved.\(^{39}\) The PRC central government provides that if mainland residents would like to travel to Taiwan, the household registration in the mainland is necessary for the authorities to grant travel permission.\(^{40}\) Taiwanese residents who would like to travel to the mainland can acquire the permission from the PRC using their household registration in Taiwan, but other travel documents are also acceptable. Even though the PRC imagines all “Taiwan compatriots” are “Chinese nationals”, at the end it has to politically and legally differentiate “Taiwanese residents” from “mainland residents”. That is inevitable.

**B. Hong Kong**

After the 1997 handover of Hong Kong, the PRC Nationality Act 1980 applies in the special administrative region. However, for Hong Kong, the “permanent resident” is a more meaningful term than “Chinese national”, because in Hong Kong civic and political rights are granted in accordance with the former status instead of the latter. Article 24 of the Hong Kong Basic Law states:\(^{41}\)

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

1. Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
2. Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;

\(^{39}\) [Cross-Strait Exchanges Act] art. 2 (Chinalawinfo) (“The law is enacted to regulate exchanges between the mainland and Taiwan of Chinese citizens, including Chinese citizens residing in the mainland and Chinese citizens residing in Taiwan.”).

\(^{40}\) Id.

(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2).

This article also states which non-Chinese Hong Kong residents are eligible to become “permanent residents” of the HKSAR, but the crucial part is regarding ethnic Chinese. The first problem is that there are a great number of Chinese residents in Hong Kong holding “British Dependent Territories Citizens passport” or “British Nationals (Overseas) passport”, but the PRC Nationality Act refuses “dual nationality”. When the PRC Nationality Act 1980 applies in Hong Kong, would these people lose their Chinese nationality automatically or not? These people are estimated to be around 3.4 million that is around a half of Hong Kong’s total population. If they were not “Chinese nationals” after the handover, the HKSAR’s political participation would be much undermined. The PRC then realized that their Chinese nationality should be maintained. On 15 May 1996 the PRC Standing Committee of the National People’s Congress issued an “explanation” saying:

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

2. All Hong Kong Chinese compatriots are Chinese nationals, whether or not they are holders of the “British Dependent Territories Citizens passport” or “British Nationals (Overseas) passport”. With effect from 1 July 1997, Chinese nationals mentioned above may, for the purpose of travel-ling to other countries and territories, continue to use the valid travel documents issued by the Government of the United Kingdom. However, they shall not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People’s Republic of China on account of their holding the abovementioned British travel documents.42

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

The second and more crucial question is about the interpretation of the third section of Article 24. The issue is: if the parent who has resided in Hong Kong for the period of seven years but has not yet been a Hong Kong permanent resident, is her/his child a Hong Kong permanent resident according to the category (3)? The Director of the Immigration of the HKSAR gave a negative answer, but judges of the Court of Final Appeal of the HKSAR (HKSFA) adjudicated that the immigration office was wrong. The judgment brought the first constitutional crisis after 1997, which I will discuss in chapter 4. Here the point is: since the Chief Executive of the HKSAR was scared – he suspected that there would be over one and a half million Chinese mainlanders able to enter into Hong Kong according to the judgment – he requested the Standing Committee of the NPC, via the State Council of the PRC, to interpret the Basic Law. Later, the Standing Committee stated: “… the provisions of art 24(2)(3) means that, to qualify as a permanent resident within it, both parents or either parent of the person concerned must be a permanent resident within arts 24(2)(1) or 24(2)(2) at the time of birth of the person concerned.”

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

C. Tibetans

Who are Tibetans? The “Tibetan” status in the PRC is legally identified. The PRC authorities register an infant born to “Tibetan”

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41 The Director of Immigration v. Chong Fung Yuen [2001] 2 HKLRD 533; [2001] 4 HKCFAR 211.
parents as a “Tibetan”, and this status guarantees the infant a number of civic and political rights, which ordinary Han Chinese lack in certain times and places. For instance, an ethnic minority is entitled to priority entrance for college admission, privileges in taking public office, and irregularity of the birth planning. This encourages many Han Chinese to change their nationality/ethnicity status. In the 1980s many did so, but since the 1990s alleged “restoration” of minority status has been prohibited. The authorities now request individuals who wish to change nationality status to have their parents’ status changed first. Besides, no one is allowed to register as a non-recognized “nationality”. Only 56 officially recognized nationalities are accepted, including Han Chinese, Tibetan, and Hui Muslim, Uygur, Mongol, Zhuang, etc; Hui Muslim and the other three mentioned minority nationalities have also established autonomous regions. Han Chinese minors’ nationality status may change by adoption or their parent’s remarriage, but adults’ status remain unchanged. Minority individuals usually are not able to change their status to an-other minority nationality. Hence, if a Zhuang female is married with a Tibetan male, the female’s children born in her previous marriage with a Han male are able to change their Han status to Tibetan, but the female herself could not change. It would be easier for the female to gain admission to a PRC college compare to a Han student, but in the Tibetan Autonomous Region she is not eligible to be elected as President.

The major PRC criteria for identification or registration of nationality status are objective (descent, language, parents’ legal nationality status registered by law), but there are still some subjective criteria, which apply. The eminent Chinese anthropologist Fei Xiaotong’s “Yi-Tibetan aisle” theory highlights the complexity. Alongside the border between the Tibetan Autonomous Region and China proper, where different nationalities live together, people speak a great number of languages, including various dialects of Tibetan, Chinese, Yi, Qiang (another Chinese minority), etc. This area also belongs to “Great Tibet”, where during the past centuries, Tibetan-speaking people’s ancestors were arriving from the west, Hans from the east, Yi from the south, and Qiang

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45 In rural areas ethnic Tibetans have been untouched by the policy of birth planning, see Andrew Martin Fischer, “Population Invasion” versus Urban Exclusion in the Tibetan Areas of Western China, 34 Population & Dev. Rev. 631, (2008).
from the north. In accordance with the objective “scientific” criteria of the PRC’s “nationality identification”, in this area people ought to be identified and registered by languages and descent, but in fact several Yi-speaking and Qiang-speaking groups have been recognized as “Tibetans” based on their manners and identity.49 Secondly, although parents register child’s nationality after birth, one could change it after the age of 18 years old. Then one may select either a matrilineal or patrilineal nationality so the decision is subjective. Another case is naturalized people. Naturalized people in China could register with an identical or similar nationality within the scope of the 56 recognized nationalities.50

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

Article 8.

(1) All Tibetans born within the territory of Tibet and those born in other countries shall be eligible to be citizens of Tibet. Any person whose biological mother or biological father is of Tibetan descent has the right to become a citizen of Tibet; or

(2) any Tibetan refugee who has had to adopt citizenship of another country under compelling circumstances may retain Tibetan citizenship provided he or she fulfills the provisions prescribed in Article 13 of this Charter; or

(3) any person, although formally a citizen of another country, who has been legally married to a Tibetan national for more than three years, who desires to become a citizen of Tibet, may do so in accordance with the law passed by the Tibetan Assembly.51

This provision obviously adopts a jus sanguinis categorization rather than jus soli. If in the English texts “born within the territory of Tibet” is misleading, in Tibetan and Chinese texts “all Tibetans” are all emphasized. That is to say, non-Tibetan descendants, though

49 This is similar to the “dense central belt from northern Italy through the Rhineland to the Low Countries” that Michael Keating described. See MICHAEL KEATING, THE NEW REGIONALISM IN WESTERN EUROPE 10 (1998).
born in Tibet, are not eligible to become “Tibetans”.

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

IV. AUTHORITIES IN INTERNATIONAL EYES

A. Taiwan

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

Taiwan is an inalienable part of China. All the facts and laws about Taiwan prove that Taiwan is an inalienable part of Chinese territory. In April 1895, through a war of aggression against China, Japan forced the Qing government to sign the unequal Treaty of Shimonoseki, and forcibly occupied Taiwan. In July 1937, Japan launched an all-out war of aggression against China. In December 1941, the Chinese government issued the Proclamation of China’s Declaration of War Against Japan, announcing to the world that all treaties, agreements and contracts concerning Sino-Japanese relations, including the

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53 For emigrated Tibetans’ nationality and citizenship, see JUI LA HESS, IMMIGRANT AMBASSADORS: CITIZENSHIP AND BELONGING IN THE TIBETAN DIASPORA (2009); ANNE FRECHETTE, TIBETANS IN NEPAL: THE DYNAMICS OF INTERNATIONAL ASSISTANCE AMONG A COMMUNITY IN EXILE (2002).
Treaty of Shimonoseki, had been abrogated, and that China would recover Taiwan. In December 1943, the Cairo Declaration was issued by the Chinese, the U.S. and British governments, stipulating that Japan should return to China all the territories it had stolen from the Chinese, including Northeast China, Taiwan and the Penghu Archipelago. The Potsdam Proclamation signed by China, the United States and Britain in 1945 (later adhered to by the Soviet Union) stipulated, “The terms of the Cairo Declaration shall be carried out.” In August of that year, Japan declared surrender and promised in its instrument of surrender that it would faithfully fulfill the obligations laid down in the Potsdam Proclamation. On October 25, 1945, the Chinese government recovered Taiwan and the Penghu Archipelago, resuming the exercise of sovereignty over Taiwan.54

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

Secondly, the “Republic of China” in Taiwan also founds its argument partially on the Cairo Declaration and the Potsdam Proclamation, but here one document neglected in the PRC argument is the “Treaty of Peace between the Republic of China and Japan”. On 28 April 1952, the Japanese government and then “Republic of China” in Taiwan signed a “peace treaty” to formally end the war. The Chinese State did not enter the “Treaty of Peace with Japan” signed in San Francisco on 8 September 1952 because of the disagreement over the legitimate representative of China since 1949. The “ROC” government as the recognized authority in Japanese eyes thus made another treaty with Japan that repeats the notion that Japan has renounced all rights, titles, and claims to Formosa and the Pescadores (i.e. Taiwan and Penghu); the treaty also recognized that all treaties between China and Japan signed before 1941 have been annulled because of the war, which means the Treaty of Shimonoseki is included and thus abolished by the two parties too; in the treaty, the Japanese government also reckons that “ROC” nationals includes those of Taiwanese connections who have resumed Chinese nationality. The “Republic of China” in Taiwan relies on this treaty

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as one of the footholds of its legitimate rule on the island. However, the tricky points are: (i) the entire territory controlled by the Taiwanese authorities comprised not only of those islands renounced by Japan after the war but also some close to the mainland never occupied by Japan, which belong to the Chinese State without dispute, and an independent Taiwanese state would not be entitled to own based on any treaties; (ii) as the Japanese government shifted the recognition of the Chinese government from the “ROC” in Taipei to the PRC in Beijing, the validity of the 1952 Sino-Japanese treaty become ambiguous since 1979.

Thirdly, the argument that “the legal status of Taiwan has not been decided” is held by a group of political activists for Taiwanese independence. The last argument contests that Japan did renounce its rights, titles, and claims, but there is nothing suggests that the Chinese State shall resume to exercise the sovereignty over Taiwan; Chiang Kai-shek did send an army to recover Taiwan, yet he represented the allies not the Chinese State at that moment; Taiwan should be a trusteeship of the allies, or the United Nations as the successor of the allies, or the United States as the leader of the allies, and eventually the legal status of Taiwan should be determined by a Taiwanese referendum. Nevertheless, the last argument is every theoretic. The PRC government is hardly challenged in the United Nations for most countries have accepted the so-called “one China principle/policy” in setting up diplomatic relations with the PRC; while even the United States does not see the Taiwanese authorities as a civilian administration under US military supervision!

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

Taiwan Relations Act is that the application of US laws with respect to Taiwan shall be not affected. As a result the US domestic law creates an independent jurisdiction for the Taiwanese authorities in US eyes. The US courts thus note: Taiwanese regulations shall be considered “foreign laws”; governmental acts shall fall under the “Act of State Doctrine”; the US Foreign Sovereign Immunity Act shall also apply to Taiwanese public enterprises, governmental agencies, and officials.\(^56\) The United Kingdom as the first Western state that shifted recognition from the “ROC” to the PRC, did not issue an act as the US did; but Pasha L. Hsieh argues: “Instead, by basing judicial interpretations of the Taiwan’s legal status on the common law, British courts have granted Taiwan State status, thus achieving the same result as the US courts achieved through interpreting the [Taiwan Relations Act]”.\(^57\) In challenging the exclusive province of the executive branch of the government, the common law courts offer a pragmatic way to deal with separate jurisdictions and their regulations, persons, and property, among them Taiwan has been typical. This seems the only feasible option at this moment to prevent the problem of two parties claiming the Chinese title and the international community being trapped in endless confusions around the issue.

The Taiwanese authorities have been trying to secure an international space in international organizations. The worst performance of the Taiwanese authorities is their endeavor to “re/join” the United Nations. The People’s Republic of China has replaced the “Republic of China” in the United Nations for more than three decades, since then Taiwan’s participation in the UN has always been a major concern for people on the island. The “ROC” employs the rhetoric that the “ROC” itself quitted the UN before the UN would expel “representatives of Chiang Kai-shek”. To “rejoin” the most important international organization around the world, the “ROC” in Taiwan has raised the issue yearly since 1993 through states maintaining diplomatic relation with the “ROC”. However the proposal of “ROC rejoining the UN” is hardly accepted in the face of PRC pressure. The Democratic Progressive Party (DPP) on the other side prefers to “join” the United Nations with the name of Taiwan rather than the “Republic of China”. Although not challenging the PRC’s seat in the UN, the DPP proposal, as a potential means to realize “de jure Taiwanese independence”, could never be reconciled with the PRC stance either. In 2008 two referenda took place along with the Taiwanese presidential election, but the KMT’s “ROC”


\(^57\) Id. at 782.
proposal and the DPP’s “Taiwan” proposals both failed due to the low turnout.

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

B. Hong Kong and Tibet

As a full-member or member, the HKSAR joins in a number of international organizations, e.g. the Asian Development Bank (ADB), the Asia-Pacific Economic Cooperation (APEC), and the World Trade Organization (WTO). In ADB, APEC, and WTO, the PRC is also a “member”. This is rare. The Soviet Union once


allowed communist Ukraine and Belarus to join the United Nations as “sovereign” states, but the Soviet Union had a dual sovereignty doctrine. A traditional unitary state is unlikely to copy that model theoretically, but the reality speaks for itself. Although being excluded from “sovereign” organizations on the international stage, territorial units in changing “unitary” states may find a place in non-sovereign organizations or regional co-operations due to the downgraded controversy and upgraded relevance and necessity, in the sense that these territories are more usually influential entities in concerned regions.

Hong Kong’s international status is rather clear, but the case of Tibet is also worth considering. With regards to Tibet’s status under positive international law, it had been regarded as a suzerainty of imperial China or the Manchu Crown. The Oriental praxis had been that the Manchu Crown supported Tibet’s theocracy in political, military, and financial matters and the Dalai and Panchen Lamas would reciprocate the Crown in religious matters. Even if the term “suzerainty” could apply to the Tibet case, it is still an anomaly in 20th century international law. After the human rights covenants’ promulgation, the rhetoric is that “Tibet is a Chinese colony”, which at-tempted to grant the territory the right to decolonize in accordance with the covenants. However, this argument misapprehends the complex relation between Tibet’s modernization and China’s century-long revolution, as well as their participation to the process of globalization. Barry Sautman concludes: “None of the main contours of classic colonialism are found in the Tibet case”. Some, mostly emigrated Tibetans, are now starting to use the discourse of “minority rights” and “internal secession” to find a third answer. For that, they have to describe the PRC state as a totalitarian regime executing a “cultural genocide” project to annihilate the Tibetan people.

Article 31(1) of The PRC Ethnic Regional Autonomy Act 1984 provides that “in accordance with state provisions, autonomous agencies in ethnic autonomous areas may pursue foreign economic and trade activities and may, with the approval of the State Council, open foreign trade ports.” However, the article is rather vague in

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63 Barry Sautman, *Cultural genocide and Tibet*, 38 TEX. INT’L L. J. 173, 196-197 (2003) (arguing that Sautman himself refutes the emigrated Tibetans’ claim that China has been executing a “cultural genocide” project in Tibet).
practice. On the other side, the 14th Dalai Lama has developed strong international contacts around the world, which have been severely criticized by the PRC central government. Yet no state recognizes Dharamsala in international legal terms, and the 14th Dalai Lama’s activities are widely deemed as his personal campaign.

V. CONCLUSION

As we have seen, the territories of Tibet, Hong Kong, and Taiwan to a larger or lesser degree have evolved into political units that are questioning the unitary preposition of the PRC central government. In a heterarchy of authorities, the peripheral societies are fostering different political attachments from the PRC central government’s: political pluralism and liberal values are respected in Taiwan and Hong Kong; whereas the Tibet Autonomous Region is ideologically coherent with the PRC central government, the Dalai Lama and his followers in Dharamsala have distinctive ideals. Moreover, in institutional terms, the peripheral societies’ roots lie in the variety of legal status of Chinese nationals whose citizenships are not identical in Chinese territories. The territorial authorities sustain a unique bond with citizens of relatively exclusive membership in a territorial jurisdiction; hence there is no wonder why political attachments may vary in accordance with territorial boundaries rather than international boundaries between Chinese territory and foreign land. Finally, the territories are also special in international eyes, which means the international community distinguishes the territories from ordinary administrative divisions of the PRC. Accordingly, the “siblings of the dragon” may engage with the international community, with differing levels of ease and, sometime, regardless of the powerful dragon’s approval.