

Status and Function of the Special Administrative Region System in the Socialist Legal System with Chinese Characteristics

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On 10th March 2011, Mr. Wu Bangguo, Chairman of National People's Congress (NPC), announced at the 4th Session of the 11th NPC that by the end of 2010, the total number of laws, administrative regulations, local laws and regulations which had been formulated by China and were in effect then reached respectively 236, more than 690 and more than 8,600. A socialist legal system with Chinese characteristics had thus taken shape, with the Constitution at the top and constitutional, civil and commercial laws as its key branches, encompassing multiple layers of laws, administrative regulations and local laws and regulations. They are applicable to various areas including economic construction, political, cultural and social development and ecological and environmental protection in China. The goal for the full establishment of a socialist legal system with Chinese characteristics by 2010 was accomplished on schedule. The great significance of a socialist legal system with Chinese characteristics coming into shape timely is reflected in the following:

(1) It represents a great accomplishment of China's socialist modernization. Through democratic and systematic legislative work, this legal system reflects the will of the people and instills a safeguard for the interests and rights of the people. It serves to constantly strengthen and reaffirm the legal foundation of state authority, including that of the "One Country, Two Systems" policy, the legal basis of socialist revolution, construction and reform, and the legal authority of the Chinese Communist Party (CCP) in its rule by law. It also defends and boosts, to the greatest extent possible, China's socialist modernization drive.

(2) It represents a major achievement in encoding into law the fundamental principles and policies adopted since the start of reform and opening up in China. The establishment of this legal system implies that adherence to the fundamental policies of reform and opening up in China will not change and progress on the chosen path of socialism with Chinese characteristics is irreversible. It also indicates that the pursuit of happiness and better living by the Chinese people is unwavering, and the goal of great rejuvenation of the Chinese nation is ultimately achievable.

(3) It is an important indication of full implementation of the fundamental principle of government according to law. It shows adherence to rule of law by the ruling party, democratic legislative process by the legislature, administration according to law by executive authorities, fair and just judicial process by the judiciary, and achievement by all citizens in their learning of, abiding by and using the laws, over the past three decades of reform and opening. It is a milestone in nationwide efforts to promote the spirit and culture of rule of law and in adhering to and

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implementing the national strategy of rule of law. It also provides a good platform for continuous improvement and unwavering strengthening of the socialist legal system with Chinese characteristics. It marks a new starting point for the further and full implementation of the basic strategy of government according to law and accelerated socialist construction under rule of law.

(4) It also marks the beginning of a new phase in implementing the principles of “One Country, Two Systems” and governing Hong Kong and Macao in accordance with law. With full establishment of the legal system, the policy of “One Country, Two Systems” has been not only enshrined in the *Constitution of the People’s Republic of China* (hereinafter as “the Constitution”) but also implemented in economic, political, social, cultural, ecological, and environmental spheres covered by the legal system. It provides not only a comprehensive system of legal norms and protection for development through reform and opening up on the mainland, but also a strengthened constitutional and legal foundation for safeguarding and promoting long-term prosperity, stability and development in Hong Kong and Macao. What’s more, the formulation and implementation of national laws applicable in the Special Administrative Regions (SARs), the prudent and effective legal interpretation by the NPC, and the comprehensive and thorough implementation of the fundamental national strategy of rule by law have provided a systematic constitutional and legal basis, and more effective and comprehensive legal protection, for:

- the implementation of the “One Country, Two Systems” policy,
- the handling of relations between central authorities and the SARs,
- a complete realization of the principles of governing Hong Kong and Macao according to law, “Hong Kong People Ruling Hong Kong”, “Macao People Ruling Macao”, and SARs’ high degree of autonomy.

It marks a new phase in the nationwide implementation of the “One Country, Two Systems” policy and governing Hong Kong and Macao according to law.

I. The SAR system is one of China’s basic political systems

Some scholars have questioned whether designating the SAR system as a basic political system would mean capitalist system becoming one of the basic political systems of China, as it is practiced in the SARs. This view is incorrect. The core of the SAR system is the principle of “One Country, Two Systems”, with one country under socialism as a prerequisite and “two systems” as foundation. Of the “two systems”, one is socialism and the other capitalism, with the former applying to the mainland and being the mainstay, and the latter to the SARs and being secondary and dependent. In a similar way, the coexistence of public ownership, being the mainstay, and other forms of ownership is a key feature of China’s basic economic system, with its socialist nature not being impaired by the existence of a large number of economic entities not under public ownership. Likewise, the SAR system under the “One Country, Two Systems” policy will not fundamentally change the nature of China’s political system. On the contrary, it reflects the inclusiveness and innovation of China’s basic political system. Some scholars further argued that the SAR system is a legal system with Chinese characteristics, not a basic political system of China’s, as it is designed for a certain phase, though such a phase could of a long-term nature. We believe the SAR system should be added as the fifth basic political system in addition to the fundamental political system of NPC, and the basic political systems of autonomy for regions of minority nationalities, multi-party

cooperation and political consultation, and community-level self-governance. This proposition is based on the following four reasons:

(1) The "One Country, Two Systems" policy has been designated as a fundamental policy by the ruling party and the state. The SAR system, as a basic form of political system practicing the "One Country, Two Systems" policy, shall be in place and under development for the long run. This system conducive to reunification of motherland will remain in existence over the long term, even though some aspects of the system and way of life in the SARs may be subject to certain adjustment and change. It will help ensure national sovereignty and territorial integrity, "Hong Kong People Ruling Hong Kong", "Macao People Ruling Macao" and a high degree of autonomy of the SARs. The question regarding how long exactly such system will remain in existence should not prevent it being a basic political system of China's.

(2) Political significance shall primarily determine if a system can become a basic political system. The establishment and status of any political system is ultimately decided by necessity. The SAR system, being conducive to the realization of national reunification, ensures sovereignty and territorial integrity of the state, peaceful resolution of legacy problems left behind by history, maintenance of stability and prosperity in Taiwan, Hong Kong, Macao regions, and the advancement of China's modernization. It provides a fine example for peaceful resolution of international disputes and is of historic significance to the world. It provides a unique precedent in China's constitutional development, enriching and expanding traditional theories of political and constitutional sciences. The SAR system has not only important practical relevance but also significant theoretical value, in China as well as to the world, which are justifications for it to be designated as one of China's basic political systems.

(3) The nature of a basic political system is also determined by its constitutional status. Article 31 of the Constitution stipulates that the "State may establish special administrative regions when necessary. The systems to be instituted in SARs shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions." Its Article 62 of Chapter III (the Structure of the State) stipulates that the NPC shall exercise the function and power "to decide on the establishment of special administrative regions and the systems to be instituted there." These constitutional provisions, though few in number, accord significant legal and, especially, constitutional status to the SAR system.

(4) A supporting legal system, based on fundamental laws and established by the highest organ of state power, is a prerequisite for a basic political system. The NPC formulated two Basic Laws respectively for the two SARs, whose level of authority is second only to that of the Constitution and above other laws in the legal hierarchy. The term "Basic Law" is unique and not found in legal context anywhere else except in the socialist legal system with Chinese characteristics. In addition, in order to implement the "One Country, Two Systems" policy and effectively enforce the two Basic Laws, the highest organ of state power has also enacted a number of national laws applicable in the SARs and made legislative interpretations to improve legal systems of the SARs. All this amply demonstrates that SAR system has become part of the basic political systems in China. It was thus proposed that the highest organ of state power should, in appropriate manner and as early as possible, accord constitutional status to the SAR system as one of the basic political systems of China.

II. The unitary nature of legal system with Chinese characteristics under the conditions of “One Country, Two Systems”

There are chiefly two criteria for judging if a legal system is unitary or plural:

(1) The nature of law of highest authority. In unitary legal system, only the constitutional authorities or the country’s highest legislature, barring all other state organs or local entities, is empowered to formulate laws of highest authority. Regulations formulated by state administrative organs with power entrusted to them and laws and regulations formulated by local entities shall not contravene constitutional laws and national laws and regulations. The highest laws and regulations of a state have the highest authority in all locations and on all applicable matters within its territory, with limitations of their effectiveness to be imposed by themselves. Local laws and regulations will not have the power to limit the conditions, scope and methods for implementation of the highest or national laws and regulations, and can only be formulated within the scope allowed by the highest or national laws and regulations.

In a plural legal system, laws and regulations of highest authority have a plural nature. In addition to the constitutional organ formulating constitutional norms or national legislature formulating national laws and regulations, which have highest legal authority throughout the state territories, legislatures of local regions have authority to formulate laws and regulations with highest authority concerning matters under local independent administration within their territories. Their respective scopes of jurisdiction are defined as national laws and regulations governing matters in national public spheres, while local ones governing matters under local administration. The principle of “residual power” shall apply to “areas of ambiguity”, i.e. areas and matters that are not clearly defined as being subject to national laws and regulations shall be subject to local laws and regulations.

(2) The source of authority for law making. In the unitary legal system, there is a single source of authority for law making. The national constitutional authorities or the highest legislature has the power, which originates from a single source, for formulating highest laws or authorizing other entities to formulate laws and regulations. Only within the scope of such authorization, do lower level legislative and administrative organs have the power to formulate normative legal documents. Similarly, in relations between local and national legislatures, local legislative power is not inherent but rather delegated by national legislature or authorized by national laws. The rule-making power of administrative organs is not inherent either, but authorized by laws or entrusted by legislative organs.

In a plural system, authorization for law and rule making is plural. The system of authorization for making national laws and regulations coexists with that for local entities with self-government powers. The latter serves as a connecting point for the two levels of authority, i.e. self-government local legislative powers provide both a basis for authorizing national constitutional authorities or highest legislature to formulate national laws, and the maximum authorization to entities within their territories with no self-government powers to formulate laws or regulations for local self-government. Because of the fundamental nature of local self-government legislative powers, the power of formulating national laws has to be subjected to the limit allowed by “local consensus”. Out of respect for local self-government powers, national laws only regulate matters in the national public spheres, not matters under local administration. The principle of “residual power” applies to “areas of ambiguity” which are left to local administration.

The concept of "One Country, Two Systems" is based on the unitary state structure. An important difference between unitary and federal structures lies in (a) the former adopts the principle of "indivisibility of state sovereignty" and a unitary legislative system; (b) the latter adopts the principle of "sovereignty sharing" with a plural legislative structure. In a unitary state, there is only one highest legislative body, which is usually the constitutional authority with its constitutional or legislative powers conferred by the people in accordance with the principle of popular sovereignty, rather than delegated by sub-national units as in a federal state. Constitutional norms formulated by constitutional organs not only constitute the highest-legal norms of the unitary state, but also define the scope of legislative powers vested in other state organs. The powers to formulate local laws by the local entities that do not have inherent sovereignty are not inherent, nor granted by the people of the local entities, but rather are delegated by national constitutional or legislative bodies through the Constitution or national laws.

The "One Country, Two Systems" concept does not change the unitary nature of China's state structure, but has expanded the unitary system by establishing the SARs. The SARs enjoy a high degree of autonomy that allows them greater freedoms in certain areas (such as independent financial supervisory and regulatory powers, power of final adjudication, the standalone military forces, etc.) than those enjoyed by states in a federal nation. They are established with authorization by the central authorities in accordance with the Constitution. Their power of autonomy is not inherent but granted by the central government in accordance with the SAR Basic Laws. The legislative powers of the SARs are derived from the Basic Laws and the legal authority defined by the Basic Laws is derived from constitutional authorization. Therefore, the SAR legal system is not independent, but rather a part of the Chinese legal framework, with the Constitution rather than the Basic Law being its highest law. After the adoption of the "One Country, Two Systems" policy, the Constitution remains the law of the legal supremacy, from which the authority of all laws is derived. In addition, the powers for formulating laws by any state organ or local legislature are derived from the Constitution and authorization of the Central Government. Therefore, China's legal system under the "One Country, Two Systems" policy is still unitary rather than plural. It is important to note that the nature of judicial power and power of final jurisdiction should not be a criterion to judge if a legal system is unitary or plural. In some federal nations such as India and Malaysia, the legal system is pluralistic while the judicial system is unitary. Provinces States have neither supreme courts nor power of final jurisdiction, and their courts only have jurisdiction over ordinary cases, applying both federal and state laws in court proceedings. There is only one supreme court at the federal level with power of final adjudication and no lower level federal courts. Countries adopting a unitary judicial system are mostly federal nations with a tradition of strong central authorities. State governments subordinate themselves to the federal government on judicial matters. The scope of matters and areas subject to regulation by federal laws is extensive. Only in rare instances are state laws exclusively applicable. To these countries, the practice of unitary judicial system is cost effective and helps reduce disputes over jurisdiction, benefiting all parties concerned. However, as authorization for the highest level of law-making remains pluralistic, the unitary judicial system does not hinder legislative autonomy of the states/provinces or change the plural nature of their legal systems. Similarly, under the conditions of "One Country, Two Systems", given that the SARs have independent judicial power and power of final jurisdiction, China's judicial system is of plural nature. However, as the Constitution remains the highest law for all China and the source of authority for law making is unitary, the unitary nature of China's entire legal system

remains unchanged.

III. Relationship between the SAR and the national legal systems

The legal systems of the SARs and the Chinese mainland are sub-systems within national legal framework. It should be noted that the legal system of the mainland does not equal to the overall legal framework of China. The former comprises all laws in force on the Chinese mainland, including national laws as well as local laws enacted by various levels of local legislatures. Laws enacted by the SAR legislatures within the context of autonomy are not part of the legal system of the Chinese mainland where their effect does not extend, but are part of national legal framework, as SAR legal system is a sub-system of such framework. Similarly, some of the national laws are only applicable to the mainland and not in the SARs, and some are applicable only in the SARs but not in other regions. National laws not applicable in the SARs naturally are not part of the SAR legal system, but are still an integral part of the national legal framework. In fact, the “One Country, Two Systems” policy reflects the unitary nature of national legal framework and plural nature of its sub-systems. The unitary structure of “One Country” determines the unitary nature of national legal framework while different social, political and legal systems adopted in local regions determine the plural nature of the sub-systems.

3.1 The status and effect of constitution under conditions of “One Country, Two Systems”

The unitary nature of the national legal framework is demonstrated by the Constitution having the highest legal effect in all jurisdictions of the country. However, there is a unique situation with its application in the SARs. As the fundamental law of the country, the Constitution has the highest legal authority, which overall should apply to the SARs as local administrative regions of China. However, given that the SARs practice capitalism rather than socialism in accordance with the “One Country, Two Systems” principle, there have been disputes on applicability of the Constitution in the SARs.

Some scholars believe that China’s current Constitution does not apply to the SARs, citing provisions in Article 31, the Preamble and Articles 1 and 5 which require all laws not to contravene the Constitution. The Preamble stipulates adoption of the Four Cardinal Principles. Article 1 defines socialist system as the fundamental political system of China, prohibiting any organization or individual to undermine the socialist system. Article 5 requires all laws not to contravene the Constitution. However, given that SAR Basic Laws formulated in accordance with Article 31 of the Constitution seem to contravene provisions in the Preamble and other sections of the Constitution with regard to socialism, some scholars have concluded that the Constitution should not apply to the SARs. Otherwise, the SAR Basic Laws would be in contravention of the Constitution and thus nullified. However, it is inappropriate here to pitch the Constitution and its certain provisions against other laws or the SAR Basic Laws. Within the Constitution, not only is there the exception provided for in Article 31, there are also other exceptions to accommodate special circumstances. For example, Article 19 stipulates, “the state promotes the nationwide use of Putonghua (common speech based on Beijing pronunciation),” while Article 4 provides that “the people of all nationalities have the freedom to use and develop their own spoken and written languages.” Article

5 stipulates, "The state upholds the uniformity and dignity of the socialist legal system," while Article 115 provides that the organs of self-government of autonomous regions "implement the laws and policies of the state in the light of the existing local situation." These provisions may seem to contradict each other, but in fact it is the result of unique circumstances being accommodated under universal principles. The exceptions for unique circumstances form an integral and indispensable part of the Constitution. Yet other scholars have argued that only Article 31 of the Constitution applied to the SARs. This again is an extreme view. Provisions of the Constitution concerning the state organs and their powers, basic rights and obligations of citizens, national flag, emblem and capital and many other areas all fully or partially apply to the SARs, without which "One Country" would be empty talk. There are of course differences in certain areas between the SARs and the Chinese mainland. The scope of the SAR residents' rights is broader; residents of Hong Kong and Macao who are also citizens of the People's Republic of China do not have obligation for military service; residents of Taiwan have obligation for military service in accordance with the laws of Taiwan region. These exceptional differences have been adequately accommodated in accordance with Basic Laws and the spirit of "One Country, Two Systems".

During drafting of Basic Laws for the Hong Kong and Macao SARs, some argued that the Basic Laws should make clear which provisions of the Constitution did not apply to the SARs, to remove uncertainty on applicability. However, the majority of the Basic Law Drafting Committee members believed that the Constitution being the fundamental law, limitation to its applicability would violate the provision concerning Constitutional interpretation in Article 67, and run counter to the constitutional principle that no laws and regulations should contravene the fundamental law. Furthermore, it would be technically difficult in legislative context to define which specific provisions of the Constitution apply to the SARs and which do not. Such a task would even be impossible for those constitutional provisions that are only partially applicable to the SARs. Therefore, it was agreed that the applicability of provisions of the Constitution to the SARs would not be specifically defined. Instead, the Basic Laws would deal with these through their specific provisions. In such a way, the supremacy of the Constitution is intact and the special circumstances of the SARs are accommodated with a view to facilitate implementation of the Basic Laws.

3.2 The convergence of the SAR legal system and the national legal framework

Convergence indicates relationship between the main and sub- legal systems, while lack of such convergence is an indicator of independent legal system. The SAR legal system as a sub-system of the national legal framework connects with the main system through the SAR Basic Laws and the national laws applicable to the SAR as defined by the Basic Laws. The Basic Laws of SARs are constitutional laws and are part of China's fundamental laws with legal authority second only to the Constitution. In accordance with relevant provisions of the Constitution, other laws and administrative regulations, local laws and regulations shall be invalid if they contravene fundamental laws.

The main content of the SAR Basic Laws concerns political, economic, social and cultural systems and their implementation in the SARs, as well as delineation of powers of the central authorities in connection with the SARs and the SARs' relationship with other regions. The SAR Basic Laws are to be observed by all, including Chinese citizens and foreign nationals, in the SAR, in keeping with requirements of rule of law.

As the SAR system, defined and guaranteed by specific provisions of the Basic Laws, is

different from that of the mainland, the Basic Laws must have a high enough legal status and authority so as to effectively implement the “One Country, Two Systems” policy and ensure protection of legitimate rights and interests of the SAR residents. Given provisions of the Basic Laws, elements in the previously existing laws that contravened the Basic Laws would have been nullified if they were not amended. This shows the important status of the Basic Laws in the context of SAR legal system, which was reason behind their being called by some “minor constitutions”. Given their significant legal status, the Basic Laws contain stringent provisions regarding their amendment. The power of their amendment is vested in the NPC. The power to propose bills for amendments is vested in the Standing Committee of the NPC, the State Council, and the SARs. Amendment bills from the SARs shall be submitted to the NPC by delegations of the SARs to the NPC after obtaining the consent of two-thirds of the deputies of the Region to the NPC, two-thirds of all the members of the Legislative Assembly of the Region, and the Chief Executive of the Region in question. For the sake of prudence, before a bill for amendment to the Basic Laws is put on the agenda of the NPC, the Committee for the Basic Law of the SAR shall study it and submit its views. For the sake of safeguarding the “One Country, Two Systems” policy, the SAR Basic Laws all stipulate that no amendment to the Basic Laws shall contravene the established basic policies of the People’s Republic of China regarding the SARs. Such stringent provisions regarding the process and limitations for the Basic Law amendment illustrates the important status and requirements of the Basic Laws.

IV. Development trend of the legal system with Chinese characteristics

First, the SAR legal system has expanded the scope of the legal system with Chinese characteristics and provides a useful framework of reference for improving the legal system on the Chinese mainland. The establishment of socialist legal system with Chinese characteristics has addressed the problem of a lack of complete legal framework. However, volume of future legislative work on the Chinese mainland remains to be daunting, and continuous improvement of its legal system will be a task for the long term. By comprehensively reviewing and learning from the SAR legislative practice, improvement to legal system on the Chinese mainland can be achieved in the following areas:

(1) A shift from quantitative achievement to qualitative improvement in legislative work. Benchmark should be established not only for quantity of legislations completed, but also for their quality and effectiveness.

(2) A shift in focus from law-making to coordinated legislative work covering law-making, and review, compilation, interpretation, revision, amendment, or where appropriate, repeal of laws, so that the cleanup, improvement and updating of the legal system can become systematic, standardized and regular and the legal system will become more scientific, stable, authoritative and vigorous.

(3) A shift from the trial and error approach of “crossing river by feeling stones on the riverbed”, whereby laws or legal provisions are enacted when requisite conditions are ripe, to a more scientific legislative mode whereby systematic planning, holistic coordination and well-developed processes will be guided by legislative development strategy and implementation plans.

(4) Expand legal norms to regulate societal relations and behavior on a rational basis; speed up legislative work on laws concerning political parties, private organizations, freedom of religious belief, prevention of domestic violence, self-administration of residential communities, anti-corruption, salary, personal property declaration by public servants, government organizational structure and headcount, residency registration, mental health, protection of farmers' rights, protection of residential property, social credit, protection of personal information, nature conservation, land boundaries, etc.

(5) Further improvement in handling of key relations in legislative work: i.e. democratic vs. scientific legislative processes; legislative democracy vs. efficiency; central vs. local legislative initiatives, law making vs. revision and amendment; economic vs. social legislations; law making vs. enforcement.

(6) Continuous enhancement of technical capacity for legislative work; vigorous and effective supervision and review to ensure constitutionality and legality of laws and regulations.

(7) Periodic and systematic review and cleanup of the legal system.

(8) Further enhancement of codification process in law making.

Second, under the conditions of "One Country, Two Systems", the relationship between the legal systems of the SARs and the Chinese mainland will continue to be mutually complementary whereby best practice sharing and learning, continuous improvement and coordinated development will be its key features. Although socialist and capitalist systems, which are practiced respectively on the mainland and in the SARs, have many differences in ideology and political beliefs, there are also areas of commonality and similarity. They are evident in the practice of legal systems and efforts for reconstructing a legal system with Chinese characteristics. The relationship between legal systems of the SARs and the Chinese mainland is not one of contradictions, but of peaceful coexistence, best practice sharing and learning, continuous improvement and coordinated development. In future, there should be greater emphasis on the study of and solutions for issues concerning relations between "three legal systems" and "four jurisdictions" under "One Country, Two Systems".

Third, both Chinese mainland and the SARs should pay more attention to inherit the fine elements of Chinese cultural and legal legacies and achieve synergy of traditions and modern legal theories. This can be done through further theoretical and institutional innovation to meet the needs of reform, opening up and "One Country, Two Systems". At the same time, efforts should be made to review and draw on useful best practices in legislative work of other countries. In the international context, we should examine and adopt, but not simply copy, the latest achievements in continental and common law studies, so that Chinese legal system can be in keeping with both Chinese national conditions and the "One Country, Two Systems" policy, and the trend of legal development and rule of law around the world. The legal system with Chinese characteristics should be vigorously inclusive and open, demonstrating a unique cultural character.

Finally, both Chinese mainland and the two SARs should use the essential elements of legacy of ancient Chinese law and useful lessons from legal traditions of the world as basis for improving existing legal systems. Both should focus on "One Country, Two Systems, three legal systems and four jurisdictions" in their study on contemporary legal systems. Both should adopt an innovative, open-minded, scientific and inclusive mindset in developing principles and methodology for improving current legal systems. Both should use public, private, social, general and international as basic categories for delineating law systems. Both should adopt gradual integration of

continental, common and socialist laws as a goal for development, to achieve comprehensive improvement and development of the legal system with Chinese characteristics, and achieve ascendance to a higher level in all areas encompassing theory, methodology, and best practice sharing.