

# **The Basic Laws of HK and Macao SARs aren't Subnational Constitutions in China**

**Liu Xiaomei    Han Bin**

**Abstract:** The source of legislative power is a fundamental standard to determine whether a law has the nature of subnational constitution. Legislation based on vertical separation of power creates a subnational constitution, while the legislation from authorized legislation fails to have the nature of subnational constitution. The People's Republic of China (PRC) is a unitary state by which Hong Kong Special Administrative Region (SAR) and Macao SAR have been created. The two SARs of HK and Macao exercise their powers under the policy of 'one country, two systems' and 'autonomy in a high degree'. On the one hand, the Basic Laws of HK and Macao have more applicable effect than the other laws in the two SARs. The Court of Final Appeal of the Region is vested not only in the power of final adjudication, but also in reviewing other laws in breach of the Basic Law. On the other hand, the enactment of the Basic Law of HK and Macao SARs and the high autonomy of the two SARs are based on the authorization of article 31 of the Constitution. Further, legislative subject of the Basic Law is National People's Congress (NPC) which is a central legislature. Therefore, the Basic Laws are not the subnational constitutions of PRC although they have more applicable effect than the others in the two SARs. Additionally, it is still consistent with the form of the unitary state structure though the two SARs enjoy autonomy in the high degree.

**Key Words:** Basic law, Subnational Constitution, Legislation Based on Separation of Power, Authorized Legislation

## **I Introduction**

In 1997 and 1999 respectively, the Chinese government resumed exercise of sovereignty over Hong Kong and Macao, set up the PRC Hong Kong Special Administrative Region (HKSAR) and Macao Special Administrative Region (Macao SAR) and began the formal implementation of the Basic Laws of HKSAR and Macao SAR. The Basic Laws of HKSAR and Macao SAR not only ensure the smooth transition and successful reunification of HKSAR and Macao SAR, but also providing legal protection for maintenance of social

stability and economic prosperity of HKSAR and Macao SAR after their returning. During the more than ten years implementation process of the Basic Laws of HKSAR and Macao SAR after HKSAR and Macao SAR's returning to the motherland, the Basic Laws of HKSAR and Macao SAR withstood the test of practice, but scholars are still controversial about some respects, among which is the issue of the nature or legal status of the Basic Laws of HKSAR and Macao SAR. Some scholars view the Basic Law as the constitution of the Hong Kong (Macao) SAR<sup>1</sup> as well as 'mini-constitution'.<sup>2</sup> However, more scholars do not agree to this view. Identifying the nature of the Basic Laws of HKSAR and Macao SAR are not only issue of jurisprudence, but also an issue concerning the practical operation of the systems of China's special administrative regions, and even the practical operation of the PRC Constitution.<sup>3</sup> Therefore, it is necessary to value and analyze this issue in an academic manner.

The purpose of this article is to illustrate the Basic Laws of HKSAR and Macao SAR fails to have the nature of subnational constitution. Part II mainly provides the introduction to the drafting of the Basic Laws, which includes legislative background, legislative bodies and legislative processes of the Basic Laws. Part III accords the theory regarding to the subnational constitutions. Part IV argues the Basic Laws are not subnational constitution. Part V is the conclusion, which states that the Basic Laws are not the subnational constitutions of PRC although they have more applicable effect than the others in the two SARs. Additionally, it is still consistent with the form of the unitary state structure though the two SARs enjoy autonomy in the high degree.

## **II A formulation of the Basic Laws of HKSAR and Macao SAR**

### **A Background to the Basic Laws of HKSAR and Macao SAR**

Hong Kong and Macao have been parts of the territory of China since ancient times. Hong Kong was occupied by Britain after the Opium War in 1840.<sup>4</sup> Macao was gradually occupied

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<sup>1</sup> See Lorenz Langer, 'The Elusive Aim of Universal Suffrage: Constitutional Developments in Hong Kong' (2007) 5 *International Journal of Constitutional Law* 419

<sup>2</sup> ZHENG Xianjun, 'The Development of Interpretative Technology of Our Constitution' (2000) 4 *China Legal Science* 133

<sup>3</sup> LI Qi, 'The Basic Law of Special Administrative District: A Special Law of the Constitution' (2002) 5 *Journal of Xiamen University (Arts & Social Sciences)* 15

<sup>4</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter Basic Law of HKSAR) <<http://www.lawinfochina.com/law/display.asp?ID=1210&DB=1>> accessed 5 October 2010, Preamble.

by Portugal after the mid-16th century.<sup>5</sup> After the founding of New China in 1949, the Chinese government has repeatedly stated basic position on the Hong Kong and Macao. On March 8, 1963, *People's Daily* published an article systematically describing the position of Chinese government: for some outstanding issues left over from history, we have always maintained, when the conditions are favorable, peaceful settled through negotiation, maintaining the status quo before solution is proposed, such as the issues of Hong Kong and Macao<sup>6</sup>. Early 1972, the United Nations Special Committee on Decolonization used to list Hong Kong and Macao in the scope of colonies, to which China's Permanent Representative to the United Nations Huang Hua, stated the Chinese government position on Hong Kong and Macao to the United Nations: Hong Kong and Macao are parts of Chinese territory, occupied by the United Kingdom and the Portuguese authorities, to resolve Hong Kong and Macao issues are entirely within China's sovereignty, does not belong to the usual so-called 'colonial' areas at all. Therefore, they should not be included in the colonial area list suitable for *Anti-Colonial Declaration*. On June 15 the same year, United Nations Special Committee on Decolonization passed a resolution, suggested to the United Nations General Assembly the deletion of Hong Kong and Macao from the list of colonial. November 8, 1972, 27th United Nations General Assembly approved the report, confirming China's position and requirements of sovereignty of Hong Kong and Macao.<sup>7</sup> The reason why the Chinese government asked the United Nations Special Committee on Decolonization removed Hong Kong and Macao from the list of colonial is that, under normal circumstances, areas listed in the colonial area list, ultimately to achieve independence, which become an independent sovereign state. While the essence of Hong Kong and Macao issues are the result of British and Portuguese authorities imposing series of unequal treaties on China in history.<sup>8</sup> United Nations General Assembly's acceptance of the Chinese government request, also explained the admittance to these historical facts, which has laid a foundation of international law for resolving Hong Kong and Macao issue, making the solution of Hong Kong and Macao issue become a matter within Chinese sovereignty. After the negotiations between the Chinese Government and the British Government and the Portuguese government respectively, the Chinese and British Governments signed the Joint Declaration on the Question of Hong Kong on 19 December

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<sup>5</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter hereinafter Basic Law of Macao)

<<http://www.lawinfochina.com/law/display.asp?ID=531&DB=1>> accessed 5 October 2010, Preamble.

<sup>6</sup> Jiao Hongchang, YAO Guojian(eds.), Introduction to the Basic Law of Hong Kong and Macao (China University of Political Science and Law Press, Beijing 2009) 3

<sup>7</sup> *Jiao Hongchang* (n 6) 4

<sup>8</sup> *Jiao Hongchang* (n 6) 4

1984, which affirm that the Government of the PRC will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997<sup>9</sup>, and on 13 April 1987, the Chinese and Portuguese Governments signed the Joint Declaration on the Question of Macao, affirming that the Government of the PRC will resume the exercise of sovereignty over Macao with effect from 20 December 1999.<sup>10</sup> After Chinese government passing the Sino-British and the Sino-Portugal Joint Declaration, the National People's Congress under the Constitution decided to set up the Hong Kong and Macao Special Administrative Region, formulate the Basic Laws of HKSAR and Macao SAR. Therefore, Basic Laws of HKSAR and Macao SAR, after the United Kingdom and Portugal respectively returning the sovereignty of Hong Kong and Macao to China, the Chinese government authorized the establishment of HKSAR and Macao SAR according to the Constitution, are made according to the Constitution. This illustrates the high degree of autonomy of Hong Kong and Macao originated from central authority, neither inherent in Hong Kong and Macao, nor directly 'return power to the people' by the United Kingdom and Portugal.

## **B Legislative Basis**

The formulation of the Basic Laws of HKSAR and Macao SAR are based on the Constitution.<sup>11</sup> Constitution is the fundamental law of a country, which has supreme legal authority and other laws must be based on the Constitution.<sup>12</sup> The formulation of Basic Laws of HKSAR and Macao SAR is primarily authorized and made through Article 31 of the Constitution. Article 31 stipulates:

The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions.

The enactment of Basic Laws of HKSAR and Macao SAR is primarily authorized and made through Article 31 of the Constitution. This article contains two meanings, one is to establish Special Administrative Region, this kind of Special Administrative Region is a first-class

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<sup>9</sup> *Basic Law of HKSAR*(n 4) Preamble

<sup>10</sup> *Basic Law of Macao*(n 5) Preamble

<sup>11</sup> *Basic Law of HKSAR*(n 4) Preamble, *Basic Law of Macao*(n 5) Preamble.

<sup>12</sup> Constitution of the People's Republic of China(hereinafter Constitution)<<http://www.lawinfochina.com/law/displayModeTwo.asp?ID=1&DB=1&keyword=>> accessed 2 October 2010,article 5(2)

local administrative region of China; another is the system of special administrative regions shall be stipulated by other laws, that is to say, it can implement the system different from other provinces, autonomous regions and municipalities, no need to carry out the socialist system.<sup>13</sup> Thus, it embodies the policy of ‘one country, two systems’, which refers to in the premise of one country, China can exercise two systems which are the socialist system and capitalist system. ‘One country’ is the premise and the foundation of ‘two systems’.<sup>14</sup> From the point of legislative intent, the Constitution Article 31 was originally added for solving the Taiwan issue.<sup>15</sup> As early as 1979, when Deng Xiaoping was visiting the United States, for the first time he explained to Members of Congress of the United States the Chinese government's Taiwan policy, using ‘one country, two systems’ approach to resolving the Taiwan issue.<sup>16</sup> In 1981, the NPC Standing Committee Chairman Ye Jianying declared Nine Statements to Taiwan (proposed nine principles to achieve peaceful reunification of the motherland) proposed the idea of ‘special administrative region’, further enriched the contents of one country two systems concept. Early 1982, Deng Xiaoping, summarized the idea of solving the Taiwan issue as ‘one country, two systems’ policy of peaceful reunification for the first time. To make this policy be based on the Constitution, current Constitution promulgated in 1982, made specifically provision for the Special Administrative Region in general principles, thereby providing constitutional guarantees for the use of ‘one country two systems’ principle for peaceful reunification of motherland. For the enactment basis of Basic Laws of HKSAR and Macao SARs, some argues that the two joint statements of Britain and Portugal on the Hong Kong and Macao issue are their legislative basis, as the Joint Declaration set forth the Chinese government's basic policies on Hong Kong and Macao, the formation of the Basic Laws also referred to the two joint statements, and embodied principles of the statement in the form of the Basic Law provisions. This view is not appropriate in law, the Basic Laws of HKSAR and Macao SAR did have referred to these two joint statements, but in the nature, the Joint Declaration is an international treaty, reference is only the performance of fulfilling China’s international obligations.

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<sup>13</sup> XIAO Weiyun, *On Basic Law of Hong Kong* (Peking University Press, Beijing 2003) 44

<sup>14</sup> LI Chang-dao, “‘One Country, Two Systems’: The Jurisprudential Core of Hong Kong Basic Law” (2004) 6 *Fudan Journal (social science)* 56

<sup>15</sup> In 1982, vice chairman of Committee for Revision of the Constitution, PENG Zhen had given detailed instructions on this, ‘to achieve peaceful reunification, Taiwan can serve as a Special Administrative Region, enjoy a high degree of autonomy’ .see *Constitution of the People’s Republic of China* (People Press, Beijing 1982) 72

<sup>16</sup> WANG Shuwen, *Introduction to the Basic Law of Hong Kong Special Administrative Region* (Press of Chinese Democratic Legal System, Beijing 2006) 1

In short, Article 31 of the Constitution is the main constitutional basis for enactment of the Basic Laws of HKSAR and Macao SAR. However, the legislative basis for Basic Laws of HKSAR and Macao SAR is not limited to this provision. In PRC Constitution, in addition to Article 31, the Constitution stipulation that, the NPC has the right to decide the establishment of the Special Administrative Region and its system, Special Administrative Region directly under the Central People's Government (the State Council) and other provisions all illustrate that, the basis of Basic Laws of HKSAR and Macao SAR, is consistent with the Preambles contained in the Basic Law of HKSAR (Macao SAR) 'formulate the Basic Law according to the Chinese Constitution'.

### **C Legislative Subject**

The National People's Congress of China is the highest organ of state power, which consisted by nearly 3,000 representatives elected from provinces, autonomous regions and municipalities and military, representing the people to exercise the legislative power.<sup>17</sup> In accordance with Article 62(13) of the 1982 Constitution, the NPC exercises the functions and powers 'to decide on the establishment of special administrative regions and the systems to be instituted there'. In addition, under the Article 62(3) of the 1982 Constitution, the NPC exercises the functions and powers 'to enact and amend basic laws governing criminal offences, civil affairs, the state organs and other matters'. Although Basic Laws of HKSAR and Macao SAR have their distinctive characteristics, for legislature they are the same as other basic laws, namely, developed by the NPC. Since the Basic Law is significant and has no precedent to follow in legislation, the drafting work is complex and difficult, for this, in the development process, the NPC decided to set up a special drafting committee, responsible for drafting the Basic Law.<sup>18</sup> Additionally, the Basic Law Drafting Committee is consisted of people and experts from all walks of life including Hong Kong (Macao) compatriots.<sup>19</sup> Take Hong Kong Basic Law Drafting Committee for example, 59 members from the Chinese mainland and Hong Kong together form the Drafting Committee, of which 36 from the

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<sup>17</sup>XIAO Weiyun(n 13) 57

<sup>18</sup> On April 10, 1985, the third session of the Sixth National People's Congress decided the establishment of the Hong Kong SAR Basic Law Drafting Committee, responsible for drafting the Hong Kong Basic Law. The decision states: Hong Kong SAR Basic Law Drafting Committee is responsible to the National People's Congress, inter-session of the National People's Congress, is responsible to the National People's Congress. See WANG Shuwen (n16) 8. On April 13, 1988, the first session of the Seventh National People's Congress decided the establishment of the Macao SAR Basic Law Drafting Committee, responsible for drafting the Basic Law of Macao. See Jiao Hongchang (n 6) 17

<sup>19</sup>WANG Shuwen (n16) 8

Mainland, 23 from Hong Kong. Simultaneously, Basic Law Drafting Committee held its first plenary meeting in July 1985, decided to entrust the Hong Kong members to co-sponsor and form a private, broadly representative Basic Law Consultative Committee by all walks of people in Hong Kong, consulting public opinion on the formulation of the Basic Law of Hong Kong. December 1985, 180 members formed Basic Law Consultative Committee was formally established.<sup>20</sup>

#### **D Legislative Process**

The legislative process of Basic Laws of HKSAR and Macao SAR can be divided into four stages, namely the preparatory stage, the Basic Law drafting request for comments stage, the Basic Law draft formation stage and the stage from the Basic Law draft to draft passing stage. In the legislative process, the Basic Law (Draft) requesting for comments and the Basic Law (Draft), request for comments of people of all walks of life and the mainland provinces, autonomous regions and municipalities and central government departments, political parties, mass organizations twice. Since its establishment in July 1985 to April 1990 the passing of Basic Law (Draft) by far, the working time of Hong Kong Basic Law Drafting Committee is up to 4 years and 10 months. During this period, the Drafting Committee has held nine plenary meetings, 73 theme group meetings.<sup>21</sup> The working time of Macao Basic Law Drafting Committee is up to 4 years and 4 months from July 1988 to April 1993.<sup>22</sup>

To sum up, the formulation of Basic Laws of HKSAR and Macao SAR is mainly through Article 31 of the Constitution authorized the NPC, ‘according to the circumstances.....stipulated by law’ the system shall be enacted in SARs. The formulation subject and the process of Basic Laws of HKSAR and Macao SAR itself, fully illustrate Basic Laws of HKSAR and Macao SAR are not made by HKSAR and Macao SAR, but by the National People's Congress aiming for HKSAR and Macao SAR, though the Basic Law stress ‘high degree of autonomy’ of the SAR, the process of formulation and revision of the Basic Law embodies centralized feature of the unitary state.<sup>23</sup>

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<sup>20</sup> WANG Shuwen (n16) 9

<sup>21</sup> Jiao Hongchang (n 6) 12

<sup>22</sup> Jiao Hongchang (n 6) 17

<sup>23</sup> ZHANG Qianfan, ‘On Reunification of the Country and Local Autonomy’ (2007) 4 Journal of East University of Political Science and Law 11

### III Subnational Constitutions and Criteria for Judging Subnational Constitutions

Research on subnational constitutions and subnational constitutional space<sup>24</sup> have attracted a great deal of scholars though ‘subnational constitutions have been, and generally remain, low-visibility constitutions’<sup>25</sup> in the contemporary world, which due to the fact that scholars increasingly realize that the national constitution is ‘incomplete’ as a governing constitutional document, and thus leaving ‘space’ in the federal nation's constitutional systems in most federal states.<sup>26</sup> In addition, as Robert F. Williams and G. Alan Tarr pointed, ‘the subnational perspective can reveal a wealth of new information about a federal system's constitutional arrangements that would likely be ignored or slighted from the national perspective’.<sup>27</sup>

Subnational constitutions can be described as legal documents which govern the affairs of subnational units – states, provinces, cantons, *Länder* – in federal states.<sup>28</sup> The form and character of subnational constitutions varies throughout the world as the makers of subnational constitutions, the subnational governments, are ‘variety to the contexts within which they have been established and operate’.<sup>29</sup> Ronald Watts points out that:

[A]n important factor affecting the character of subnational governments, and with important implications for their constitutions, is the degree to which the territory of the subnational government coincides with the territorial concentration of historical, economic, linguistic, religious, cultural or social interests.<sup>30</sup>

Moreover, the subnational constitution within each federal state is somewhat different from each other provided that a federal state may adopt different model of federalism. Further, as G. Alan Tarr argues that the era in which the constitution are written, the ease with which subnational units can either revise or amend their constitutions, the regional difference

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<sup>24</sup> Robert F. Williams, G. Alan Tarr, ‘Subnational Constitutional Space: A View from the States, Provinces, Regions, Lander, and Cantons’ in G. Alan Tarr, Robert F. Williams, and Josef Marko, ed., *Federalism, Subnational Constitutions, and Minority Rights* (Praeger Publishers, Westport 2004) 3

<sup>25</sup> *Ibid.*, at 4-5.

<sup>26</sup> Robert F. Williams, G. Alan Tarr (n 24) 3

<sup>27</sup> Robert F. Williams, G. Alan Tarr (n 24) 5

<sup>28</sup> James A. Gardner, ‘In Search of Subnational Constitutionalism’, Buffalo Legal Studies Research Paper Series, Paper No. 2007-016 (Prepared for Seventh World Congress, International Association of Constitutional Law Athens, Greece, June 11-15, 2007 <<http://ssrn.com/abstract=1017239>>, at 1

<sup>29</sup> Ronald Watts, ‘Foreword: States, Provinces, Länder, and Cantons: International Variety among Subnational Constitutions’ (1999) 31 Rutgers L.J. 945

<sup>30</sup> Ronald Watts (n 29) 946



reflecting distinctive political or legal traditions, and the extent to which component units have copied their constitutional provisions from those of other component units within federal system all could be the possible explanations for the differences among subnational constitutions.<sup>31</sup> As a result of the varieties of subnational constitutions, there is in fact difficult to ascertain criteria for judging what document qualifies as a sunational constitution.

Given that the subnational constitution is mainly the picture of sunational government in a federal country, which illustrates that subnational unit has legislative power to the local affairs. In a federation, 'the central feature is the division of powers between national and subnational governments so that each has some independent jurisdiction and neither is sovereign over the other'.<sup>32</sup> Subnational government provides one of the two spheres of government between which powers are divided and to which they are allocated and derives its authority from the constitution rather than another order of government.<sup>33</sup> Further, in federal countries, subnational constitutions are entirely formulated by the decisions of the subnational units themselves for governing regional affairs, federal constitutions only prohibits the subnational governments to exercise some specific powers.<sup>34</sup> Therefore, the source of legislative power of sunational unit is based on vertical separation of power.

Comparing to the federalism, in a unitary system the responsibility for all matters including the scope of jurisdiction assigned to subnational governments and indeed their constitutions, rests with the central or national government, thereby the authority of the subnational governments is derived not from the constitution of the union but from its central government.<sup>35</sup> Further, from the view of the construction of a legal system in unitary system, unitary state only has a constitution or the basic law which applicable on a national scale.

Consequently, it could be argued that the source of legislative power was a fundamental

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<sup>31</sup> G. Alan Tarr, 'Subnational Constitutional Space: An Agenda for Research' (Prepared for delivery at the World Congress of the International Association of Constitutional Law, in Athens, Greece, June 11-15, 2007.)  
<<http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Tarr.pdf>> accessed 7 October 2010, at 15-16

<sup>32</sup> Brian Galligan, 'Federalism, Subnational Government and Rights Protection' (Paper presented at 2007 APSA Conference Monash University 24-26 September)  
<<http://arts.monash.edu.au/psi/news-and-events/apsa/refereed-papers/au-nz-politics/galligan.pdf>> accessed 6 October 2010, at 5.

<sup>33</sup> *Ibid.*, at 12-13.

<sup>34</sup> ZHANG Qianfan (n 23) 11

<sup>35</sup> Ronald Watts (n 29) 948-949

standard to determine whether a law had the nature of subnational constitution. Legislation based on vertical separation of power creates a subnational constitution, while the legislation from authorized legislation fails to have the nature of subnational constitution.

#### **IV The Basic Laws Failing to have the Nature of Subnational Nature**

##### **A Reason for Basic Laws being Mistaken for Constitutions**

Basic Laws of HKSAR and Macao SAR are enacted in accordance with the principle of ‘one country, two systems’, and their content fully reflect the principle. China is a socialist country, China's provinces, autonomous regions and municipalities implement the system of people's congress, the socialist economic system, while HKSAR and Macao SAR implement original capitalist social and economic systems. The Preamble of the Basic Law of Hong Kong (Macao) prescribes that:

Hong Kong (Macao) Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the People’s Republic of China, and that under the principle of ‘one country, two systems’, the socialist system and policies will not be practised in Macao.

The HKSAR and Macao SAR exercise the high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final Adjudication.<sup>36</sup>The Hong Kong (Macao) Special Administrative Region are vested with independent judicial power, including that of final adjudication. The courts of the HKSAR and Macao SAR have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in HKSAR and Macao SAR have been maintained.<sup>37</sup>

Additionally, Basic Laws of SARs provides that the Basic Laws are the reference of the various systems, policies and laws in Hong Kong and Macao SARs, which are the basis of the legal system of the two SARs. For instance, article 11 stipulates that:

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<sup>36</sup> *Basic Law of HKSAR* (n 4), article 2, and *Basic Law of Macao*(n 5), article 2

<sup>37</sup> *Basic Law of HKSAR* (n 4), article 19, and *Basic Law of Macao*(n 5), article 19

In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law. No law enacted by the legislature of the Hong Kong Special Administrative region shall contravene this Law.

Further, According to general speaking, Basic Laws of HKSAR and Macao SAR is 'law' in Chinese legal system<sup>38</sup> and the state's basic law enacted by NPC. However, comparing to other China's basic laws, such as criminal law, civil law and others, it has something special. For example, amendments to the Basic Laws of HKSAR and Macao SAR can only be conducted by the National People's Congress<sup>39</sup>, while part amendment of other basic laws can be conducted by the Standing Committee of the National People's Congress.<sup>40</sup> It is important to note that China is a unitary state, provincial, autonomous regions and municipalities as the local administrative region, do not enjoy the high degree of autonomy as HKSAR and Macao SAR. Obviously, the above provisions of the Basic Law reflect principle and spirit of 'one country, two systems', which is a creation of the Chinese Constitution. However, the difference between the two SARs and other administrative regions of China, has become an important reason for some people mistakenly believe that Basic Laws of HKSAR and Macao SAR are the Constitution. In addition, Basic Laws of HKSAR and Macao SAR are very similar to the Constitution in the form, content, functionality, etc.. Therefore, the Basic Law of Hong Kong (Macao) is often mistaken for a HKSAR (Macao SAR)'s constitution by Chinese and foreign scholars. For this view, it can be argued that it is not true in law and will also have a negative impact in practice.

## **B Basic Laws of HKSAR and Macao SAR are not the Subnational Constitutions**

In fact, debate on the nature of Basic Laws of HKSAR and Macao SAR had appeared in the drafting process of the Basic Law of HKSAR and been repeated discussed. Participated in the

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<sup>38</sup> China's legal system includes the Constitution, laws, administrative regulations, local laws and regulations, the autonomous regulations and separate regulations etc. Law is divided into "basic law" and "law", the former developed by the National People's Congress, the latter enacted by the Standing Committee of National People's Congress.

<sup>39</sup> *Basic Law of HKSAR* (n 4), article 159 and *Basic Law of Macao* (n 5) article 144. 'The power of amendment of this Law shall be vested in the National People's Congress.'

<sup>40</sup> Constitution (n 12) article 67

drafting of the Basic Law of HKSAR, Professor Xiao Weiyun pointed out, 'one of the principles of HKSAR Basic Law Drafting is that structure of the Basic Law can refer to certain structures of the Constitution, but not too much like the Constitution'.<sup>41</sup> Therefore, the Basic Law of HKSAR has some similarities with the Constitution in form. But for drafters, the nature of the Basic Law of HKSAR is very clear, Professor Xiao then pointed out that 'the Basic Law is not a country's Constitution, HKSAR is a local administrative region in China enjoying high degree of autonomy, not a country, the Constitution and the Basic Law are quite different, their effectiveness are also different, the Basic Law is unable to take the form of the Constitution and be even called the Constitution.'<sup>42</sup> Professor Zhang Youyu has also given clear and accurate statement on this issue:

It is necessary for us to understand that HKSAR Basic Law is developed in accordance with the PRC Constitution, and it is not a 'constitution'. Despite the Basic Law of HKSAR has the highest legal status in the HKSAR laws, it has neither a constitutional nature, and at any time it is unable to be equal to the PRC Constitution in status. The status of HKSAR - it enjoys the high degree of autonomy - will be recognized by the Constitution of the PRC. The Basic Law of HKSAR is unable to be a mini-constitution, because China is a unitary country rather than a confederation or a federal state. Therefore, HKSAR is different from the joined states of the Federal Republic of Germany, union republic of former Soviet Republic, the different federal states of the United States.<sup>43</sup>

The above two professors support their argument in terms of the nature of Basic Law through analyzing China's unitary state structure and legal status of the HKSAR. Thus, to correctly identify the nature of the Basic Law, it is also necessary to analyze from China's state structure and the legal status of HKSAR and Macao SAR.

The Preamble of PRC Constitution states that: 'The People's Republic of China is a unitary multi-national state created jointly by the people of all its nationalities.' The basic content of a unitary system in China is that the Central People's Government produced according to the Constitution uniformly exercises management of the country on behalf of the Chinese people of all nationalities, for national management needs, the country is divided into provinces,

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<sup>41</sup> XIAO Weiyun(n 13) 562

<sup>42</sup> XIAO Weiyun(n 13) 562

<sup>43</sup> LIANG Meifen, 'The Fruit of Chinese Law and Common Law' [2007]<<http://hm.people.com.cn/GB/42280/85539/85542/5833544.html>>accessed 6 October 2010.

municipalities, autonomous regions and special administrative regions, four kinds to implement the management of administrative areas. The biggest difference between unitary China and the federal state is that in federal countries, state or federation come first, these states or federations form a new country for the common good, each state or federation transfer part of the power to the federal government, with residual power still belonging to the states or federations. In China's unitary system, the power of local administrative regions comes from the central authority.<sup>44</sup> China is a unitary state is mainly reflected in: China has only one highest organ of state power, that is the National People's Congress, with NPC Standing Committee is its permanent body, which exercises legislative power; China has only one highest state administrative organ, namely, the State Council, which is the executive body of highest organ of state power; local people's governments at different levels are all organs of state administration under the uniform leadership of State Council, subordinate to the State Council; China has only a constitution, the Constitution of the PRC.<sup>45</sup>

Viewing from the legal status of HKSAR and Macao SAR, in accordance with Article 12 Hong Kong (Macao) Basic Law, HKSAR (Macao SAR) is a local administrative region of the PRC, which enjoy the high degree of autonomy and come directly under the Central People's Government.' Considering together with Article 1 of HKSAR (Macao SAR) Basic Law, which stipulates that HKSAR (Macao SAR) is an integral part of China, it can entirely description of the legal status of the HKSAR and Macao SAR, namely, HKSAR and Macao SAR are the local administrative area enjoying high degree of autonomy directly under the central government. In addition, the high degree of autonomy of HKSAR and Macao SAR comes from of the central authority, so they do not have so-called residual power. The NPC Standing Committee Chairman Wu Bangguo, stressed at the forum of the commemoration of the implementation of the tenth anniversary of the Hong Kong Basic Law, that:

China is a unitary state. The high degree of autonomy of Hong Kong is not inherent to HKSAR, but granted by the Central Government.....how much power the central grant Hong Kong SAR, the SAR will have much power, there is no clear regulation, according to Article 20 of the Basic Law, the Central Government can grant even more powers. There is no so-called 'residual power' problem.<sup>46</sup>

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<sup>44</sup> ZHU Yucheng, *Basic Laws of Hong Kong and Macao*(The Commercial Press, Beijing 2009) 35

<sup>45</sup> WANG Shuwen (n16) 35

<sup>46</sup> WU Bangguo, 'The High Autonomy of Hong Kong are Based on the Central

From the point of high degree of autonomy granted to the HKSAR and Macao SAR, Basic Laws of HKSAR and Macao SAR are authorization law. Article 2 states that 'The National People's Congress authorizes the Hong Kong (Macao) Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final Adjudication, in accordance with the provisions of this Law.' There are two concepts need to explain to this article that the 'a high degree of autonomy' and 'in accordance with the provisions of this Law'. On the one hand, the high degree of autonomy means that the autonomy of the SAR is very broad, on the other hand, it also illustrates the high degree of autonomy is not completely autonomous, in other words, the autonomy is limited. Where is this limit? This involves another important concept in the above provision, which is the notion of 'in accordance with the provisions of this Law'. 'In accordance with the provisions of this Act' means the scope of the high degree of autonomy enjoyed by the two SARs should be limited in accordance with the Basic Laws of the two SARs. Therefore, it proposes a question: if the Basic Laws of HKSAR and Macao SAR require the power that do not be covered by the Basic Law, what to do? Therefore, Article 20 of HKSAR (Macao SAR) Basic Law provides that: 'the Hong Kong (Macao) Special Administrative Region may enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress or the Central People's Government.' In other provisions in the Hong Kong (Macao) Basic Law, there are statements regarding to the authorization or specific authorization, which all explain that the Basic Law is an enabling act, all provisions of which form a complete authorization system. Based on authorization theory, powers as long as have not been specifically granted to the SARs by Basic Laws, is the central power.

Ultimately, the high degree of autonomy enjoyed by the SAR is granted by the highest organ of state power, and therefore the relationship between the Central Authorities and the HKSAR and Macao SAR is specifically expressed as the relationship between grant and be granted. As a result, according to the logic of a unitary state, it is unable to be said that HKSAR (Macao SAR) has a Constitution, or that it has a mini-constitution. There cannot be other constitution exist and take effect other than the Chinese Constitution in China.

Basic Laws of HKSAR and Macao SAR as the supreme law of HKSAR and Macao SAR, their effective implementation in the HKSAR and Macao SAR regions are undoubtedly important guarantee for the principle of 'one country, two systems' as well as HKSAR and Macao SAR 's economic prosperity and social stability. In practice, the effective implementation of Basic Laws of HKSAR and Macao SAR is mainly through the Basic Law interpretation system. According to Article 158 of the Basic Law of Hong Kong (Article 143 of Macao Basic Law), the power of interpretation of the Basic Law is vested in the Standing Committee of the NPC, which shall authorize the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of Basic Law which are within the limits of the autonomy of the Region. The courts of the HKSAR (Macao SAR) may also interpret other provisions of Basic Law in adjudicating cases. However, the interpretation of the provisions of Basic Laws concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the NPC through the Court of Final Appeal of the Region.<sup>47</sup> When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.<sup>48</sup>

Since the practice of Basic Laws in HKSAR and Macao SAR, the Standing Committee of the NPC has interpreted the stipulations of the Basic Law of HKSAR three times.<sup>49</sup> The first time to interpret the relevant provisions of the Basic Law of HKSAR by the Standing Committee of the NPC in 1999 in the case of *Ng Ka Ling v. Director of Immigration*<sup>50</sup>. In *Ng Ka Ling*

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<sup>47</sup> *Basic Law of HKSAR* (n 4) article 158 and *Basic Law of Macao*(n 5)article 143

<sup>48</sup> *Ibid.*

<sup>49</sup> Interpretation of the Standing Committee of the National People's Congress on Paragraph 4, Article 22 and Section 3, Paragraph 2, Article 24 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the 15th Session of the Standing Committee of the 10th National People's Congress on April 27, 2005); Interpretation of Article 7 of Annex I and Article 3 of Annex II to the Basic Law of the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China by the Standing Committee of the National People's Congress (Adopted by the eighth meeting of the Standing Committee of the 10th National People's Congress (NPC) on 6 April 2004); Interpretation of the Standing Committee of the National People's Congress on Paragraph 2, Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the 15th Session of the Standing Committee of the 10th National People's Congress on April 27, 2005)

<sup>50</sup> *Ng Ka Ling & Others v Director of Immigration Case*, FACV14Y/1998.

case, the Court of Final Appeal of HKSAR stated that the courts of HKSAR had right to review laws enacted by the SAR legislature or the acts of the executive authorities with the Basic Law, and had right to review the Standing Committee of NPC and its behavior in order to ensure that these actions were consistent with the Basic Law.<sup>51</sup> On June 26, 1999, the Standing Committee of the NPC's first time interpretation to the Basic of HKSAR explicitly expresses its disagreement with the views of this judgment and it believes that the courts of HKSAR are not entitled to the rights to rule the acts of the highest organ of state power and legislature with the Basic Law. The Standing Committee of NPC exercise power of judicial interpretation in accordance with the provisions of Article 158 of the Basic Law of HKSAR provides for the further validation of the Basic Laws of HKSAR and Macao SAR are not subnational constitutions.

Constitution is the product of sovereignty acts, do not need nor should take positive law as its premise, while Basic Laws of HKSAR and Macao SAR take the constitution as positive law as their premise and basis. Hence, legally speaking, Basic Laws of HKSAR and Macao SAR are unable to be defined as constitution. Further, as mentioned above, the legislature and the process of drafting the Basic Laws both illustrates that Basic Laws of HKSAR and Macao SAR are not subnational constitutions.

In short, Basic Laws of HKSAR and Macao SAR are not subnational constitutions of HKSAR and Macao SAR. The Basic Laws of HKSAR and Macao SAR provide the social system implemented in HKSAR and Macao SAR, replaced the functions should be exercised by the Constitution in a sense, and thus they enjoy the status of constitutional law in HKSAR and Macao SAR, and together with the Chinese Constitution to constitute the two SARs' constitutional law basis.

## **V Conclusion**

In conclusion, the PRC is a unitary state by which HKSAR and Macao SAR have been created. The two SARs of HK and Macao exercise their powers under the policy of 'one country, two systems' and 'autonomy in the high degree'. The enactment of Basic Laws of HKSAR and Macao SAR and the high autonomy of the two SARs are based on the

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<sup>51</sup> *Ibid.*



authorization of article 31 of the Constitution. Further, legislative subject of the Basic Laws of HKSAR and Macao SAR is National People's Congress which is a central legislature. Therefore, the Basic Laws of HKSAR and Macao SAR are not the subnational constitutions of PRC although they have more applicable effect than the others in the two SARs. Correctly identifying the nature of the Basic Law is conducive to strengthening the authority of Basic Laws of HKSAR and Macao SAR in HKSAR and Macao SAR and ensures their effective implementation.

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