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## **ON THE POLITICAL, LEGAL, AND CONSTITUTIONAL LEGITIMACY OF THE SYSTEM CONSTRUCTION OF SPECIAL ADMINISTRATIVE REGIONS**

**ABSTRACT:** The theoretical explanations provided by the academic community around the construction of the special administrative region are currently showing a diversified trend, including ‘One Country, Two Systems’, achieving peaceful reunification of the motherland, the Basic Law, Article 31 of the Constitution, the comprehensive governance power of the central government, and the high degree of autonomy of the special administrative region, all of which provide legitimacy for the construction of the special administrative region system from different perspectives. However, among the aforementioned theoretical foundations, there is currently a lack of theoretical and logical sorting, and effective theoretical connections have not been established amongst various theoretical foundations. There is also a lack of classification and hierarchical research on various theoretical foundations from the perspective of theoretical systems. In fact, President Xi Jinping’s important speech at the celebration of the 25th anniversary of Hong Kong’s return to the motherland and the inauguration ceremony of the 6th Hong Kong Special Administrative Region government comprehensively and systematically elaborated on the theoretical basis of the construction of the special administrative region system from the perspectives of political, legal and constitutional legitimacy, providing ideological methods and action directions for a scientific understanding of the nature of the special administrative region system and exploring a reliable institutional framework for the construction of the special administrative region system. To implement the spirit of the President Xi Jinping’s important speech conscientiously, it is necessary to establish a scientific and reasonable theoretical connection between the political, legal, and constitutional aspects of the construction of the special administrative region system, and strengthen the political, legal, and constitutional responsibilities of the central and special administrative regions in the construction of the special administrative region system.

**KEYWORDS:** ‘One Country, Two Systems’, Special Administrative Region System, Basic Law, The Constitution, Political Legitimacy, Legal Legitimacy, Constitutional Legitimacy

On July 1, 2022, President Xi Jinping delivered an important speech at the celebration of the 25th anniversary of Hong Kong's return to the motherland and the inauguration ceremony of the 6th Government of Hong Kong Special Administrative Region.<sup>1</sup> This important speech revolves around important theoretical and practical issues in the 25 years since Hong Kong's return to the motherland, such as the comprehensive governance of the central government, the high degree of autonomy of the Special Administrative Region, and the patriot's governance of Hong Kong. Starting from the 'One Country, Two Systems' policy, the Basic Law, and the Constitution, it profoundly elaborates on the political, legal, and constitutional legitimacy of the construction of the special administrative region system, providing a solid theoretical basis for the future social stability and economic prosperity of the Hong Kong Special Administrative Region, and opening up a new chapter in the history of the Hong Kong Special Administrative Region. This article is based on the spirit of President Xi Jinping's important speech mentioned above, combined with the current Constitution, Basic Law, and the 'One Country, Two Systems' policy, and seeks comprehensively and systematically to analyse the political, legal, and constitutional legitimacy of the construction of the special administrative region system, as well as the logical relationship between the three kinds of legitimacy mentioned above, in order to establish confidence in the path, theoretical system, institutional and cultural confidence to facilitate further the unwavering maintenance of Hong Kong and Macao's stability and prosperity as they embark on a successful path of national and local governance with Chinese characteristics.

## I. Theoretical System for Scientific Construction of Special Administrative Region System

The system of special administrative regions is a basic constitutional system established in Article 31 of the current Constitution of China.<sup>2</sup> It corresponds to the central system and, together with the general local

<sup>1</sup> Xi Jinping, 'Speech at the Celebration of the 25th Anniversary of Hong Kong's Return to the Motherland and the inauguration ceremony of the 6th Hong Kong Special Administrative Region Government' *People's Daily* (Beijing, 2 July 2022) 2.

<sup>2</sup> Article 31 of the current Constitution stipulates that the state may establish special administrative regions when necessary. The system implemented within the special administrative regions shall be prescribed in law by the National People's Congress according to specific circumstances.

system and the system of regional ethnic autonomy, constitutes the local system in the form of national structures established in the Constitution of China. The system of special administrative regions is a complete constitutional system, which includes the method of establishment and geographical scope of the administrative regions, the nature and types of special administrative regions, the relationship between special administrative regions and the central government, the relationship between the special administrative regions, the high degree of autonomy and comprehensive central governance of the special administrative regions, the systems implemented within special administrative regions, the place of national defence and foreign affairs in the special administrative regions, the legal responsibilities of special administrative regions, and so on. The special administrative region system established in Article 31 of the current Constitution of our country is a legal system, and its value goal is mainly to achieve the political concept of 'One Country, Two Systems' and to achieve peaceful reunification of the motherland.

Since the current Constitution of 1982 clarified the system of special administrative regions as an important part of the Constitution, as a local system in the form of a national structure, the system of special administrative regions has been formulated by the National People's Congress through the formulation of the Basic Law of Hong Kong<sup>3</sup> and the Basic Law of Macao,<sup>4</sup> the single law related to special administrative regions formulated by the National People's Congress and its Standing Committee,<sup>5</sup> the interpretation of the Basic Law by the Standing Committee of the National People's Congress,<sup>6</sup> the special resolutions and decisions of the National People's Congress and its Standing Committee on

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<sup>3</sup> The Basic Law of Hong Kong was passed at the Third Session of the Seventh National People's Congress on April 4, 1990, and promulgated by Order No. 26 of the President of the People's Republic of China on April 4, 1990. It came into effect on July 1, 1997.

<sup>4</sup> Approved by the First Session of the Eighth National People's Congress on March 31, 1993, and promulgated by Order No. 3 of the President of the People's Republic of China on March 31, 1993, and effective from December 20, 1999.

<sup>5</sup> For example, on June 30, 2020, the 20th meeting of the Standing Committee of the 13th National People's Congress held its second plenary session, third plenary session, and closing session. The meeting voted to pass the Hong Kong Special Administrative Region Law of the People's Republic of China on Safeguarding National Security, and the President Xi Jinping signed Presidential Decree No. 49 to make it public.

<sup>6</sup> For example, the Interpretation of Article 13, Paragraph 1 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, passed at the 22nd meeting of the Standing Committee of the 11th National People's Congress on August 26, 2011.

the Hong Kong and Macao Special Administrative Regions,<sup>7</sup> the laws formulated by the legislative organs of the Hong Kong and Macao Special Administrative Regions, and the original capitalist legal system that does not conflict with the basic principles of the two basic laws, etc., forming a series of theoretically consistent, institutionally and functionally complete and practically feasible laws. This institutional system reflects the requirement of governing the country according to law and is an orderly promotion of the construction of the special administrative region system on the track of the rule of law.

Of course, in the practice of the construction of the special administrative region system, especially after the return of Hong Kong and Macao, when promoting the effective operation of the special administrative region system in accordance with the provisions of the Constitution and the Basic Law, there have been situations where the political, legal, and constitutional aspects of the special administrative region system are guided in parallel, and there is a legal tendency of prioritising political principles. In fact, from a theoretical logic perspective, the political, legal, and constitutional legitimacy regarding the system of special administrative regions lie at different levels of the theoretical system, with close logical connections and respective theoretical functions between them.

Political legitimacy is about why it is necessary to establish a special administrative region as a local autonomous system, and what political goals the establishment of a special administrative region system aims to achieve. Specifically, the special administrative region system stipulated in China's Constitution requires the establishment of a special administrative region to implement the political concept of 'One Country, Two Systems', so that the political concept of 'One Country, Two Systems' can be institutionalised and normalised through the special administrative region system, and ultimately achieve the peaceful reunification of the motherland. Therefore, 'One Country, Two Systems' and achieving peaceful reunification of the motherland are the biggest political goals and value pursuits behind the special administrative region system.

Legally speaking, the special administrative region system refers to the sum of a series of behavioral rules formulated by the National People's Congress and its Standing Committee, as well as the legislative organs of special administrative regions, based on the Constitution, around

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<sup>7</sup> For example, on May 28, 2020, the Third Session of the 13th National People's Congress passed the Decision of the National People's Congress on Establishing and Improving the Legal System and Implementation Mechanism for Safeguarding National Security in the Hong Kong Special Administrative Region.

the specific institutional construction of special administrative regions. From a systematic perspective, it can be referred to as the 'Special Administrative Region Legal System' on which the special administrative region system is established. Legal legitimacy aims to explain how the 'legal system' surrounding the system of special administrative regions shapes them in law, and especially how to achieve the 'politics' that special administrative regions aim to pursue effectively through legal means. Among the various legal principles in the construction of the special administrative region system, the principles and specific provisions of the Basic Law also reflect the legal legitimacy of the special administrative region system. So, when it comes to the 'special administrative region system', it must be based on 'legal legitimacy'. Without legal principles, various specific institutional designs become passive waters, and 'One Country, Two Systems' can only remain political speculation and empty talk.

Constitutional legitimacy entails a legal method of using 'political legitimacy' to revise 'legal legitimacy' in an ongoing way, especially when there are deviations in legal theory. For example, it cannot effectively integrate various legal provisions on the special administrative region system in theory and practical logic, and cannot scientifically and reasonably explain the structure and function of the special administrative region legal system by itself. It is necessary to use constitutional theory to reveal the 'political theory' and 'legal theory' behind the special administrative region system. The Basic Law of Hong Kong and the Basic Law of Macao are the basic laws concerning the system of the Special Administrative Regions, but these two basic laws only fulfil most of the functions of the construction of the legal system of the Special Administrative Region, and do not resolve all legal issues. Therefore, it is necessary effectively to amend the deficiencies in the design of the system of the Special Administrative Region based on the provisions of the Constitution, so that the two basic laws can better adapt to the requirements of realising the political concept of 'One Country, Two Systems'. In addition, through the theory of the Constitution itself, the legal status of the two Basic Laws in the legal system of the Special Administrative Regions can be further clarified, and the important role of other legal provisions in the construction of the Special Administrative Region system and the realisation of the political concept of 'One Country, Two Systems' can be further utilised.

In short, to analyze the legitimacy of the construction of the special administrative region system, it is necessary to combine the three

principles of ‘political theory’, ‘legal theory’, and ‘constitutional theory’ organically, in order to grasp the direction, identify the essence of the problem, and closely combine political value and legal system in theoretical logic. Only from the perspective of constitutional theory, especially from the perspective of constitutional review, can we survey the theoretical logic behind the special administrative region system from a macro perspective, and more effectively respond to various doubts about the legitimacy and legality of the special administrative region system in practice.

## II. The Policy of ‘One Country, Two Systems’ is a Political Requirement for the Construction of the Special Administrative Region System

In his important speech at the celebration of the 25th anniversary of Hong Kong’s return to the motherland and the inauguration ceremony of the 6th government of the Hong Kong Special Administrative Region, President Xi Jinping gave a very in-depth and thorough explanation of the ‘political theory’ behind the institutional construction of the Special Administrative Region, which is the guiding ideology and action guide for promoting the institutional construction of the Hong Kong and Macao Special Administrative Region in the current and future period. President Xi Jinping pointed out in his speech that ‘One Country, Two Systems’ is an unprecedentedly great initiative. The fundamental purpose of ‘One Country, Two Systems’ is to safeguard national sovereignty, security, development interests, and maintain long-term prosperity and stability in Hong Kong and Macao. Everything the central government does is for the good of the country, for the good of Hong Kong and Macao, and for the good of our compatriots in Hong Kong and Macao.<sup>8</sup>

Seriously studying and understanding the spirit of the President Xi Jinping’s aforementioned speech, ultimately, in the construction of the Hong Kong and Macao Special Administrative Region system, we must adhere to the correct political direction and firmly grasp the main line of ‘One Country, Two Systems’. Throughout the process of the emergence and construction of the Hong Kong and Macao Special Administrative Region, various tasks were carried out to implement the political concept of ‘One Country, Two Systems’. ‘One Country, Two Systems’ is the political principle behind the system of special administrative regions. To speak of ‘One Country, Two Systems’ is to grasp the overall situation

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<sup>8</sup> Xi (n 1) 2.

and direction of the construction of the system of special administrative regions, which is closely combined with major national interests, security, and political values such as national sovereignty, ethnic interests, and special economic zone interests. So, when considering Hong Kong and Macao issues, if we deviate from the basic premise and starting point of the 'One Country, Two Systems' political concept, it is impossible scientifically to grasp the basic characteristics of the construction of the special administrative region system, nor can we point out a clear future for the Hong Kong and Macao special administrative regions. In fact, the 'One Country, Two Systems' policy is understandable in the Hong Kong and Macao Special Administrative Regions, and has achieved great success. It is in the interests of national sovereignty, security, and development, as well as the fundamental interests of the residents of the special administrative regions. Therefore, to maintain the prosperity and stability of Hong Kong and Macao, there is no reason not to adhere to the 'One Country, Two Systems' policy. For this reason, President Xi Jinping said at the celebration of the 20th anniversary of Hong Kong's return to the motherland that the central government adheres to two principles in implementing the 'One Country, Two Systems' policy: first, to remain steadfast and ensure that it will not change or waver. Second, so as to be comprehensive and accurate, to ensure that there is neither deviation nor deformation. In an important speech delivered at the celebration of the 25th anniversary of Hong Kong's return to the motherland and the inauguration ceremony of the 6th government of the Hong Kong Special Administrative Region, President Xi Jinping once again emphasised that 'One Country, Two Systems' has been repeatedly tested in practice, is in line with the fundamental interests of the country and the nation, and the fundamental interests of Hong Kong and Macao. It has received strong support from over 1.4 billion Chinese people, unanimous support from the residents of Hong Kong and Macao, and universal support from the international community. In consequence, this kind of good system has no reason to change and must be adhered to in the long term.<sup>9</sup>

The Fourth Plenary Session of the 19th Central Committee of the Communist Party of China formulated in its decision to list 'One Country, Two Systems' as one of the 13 significant advantages of China's national system and governance system, and, as the twelfth item in this list, it clearly pointed out the need both to adhere to and to improve the 'One Country, Two Systems' and promote peaceful reunification of the

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<sup>9</sup> Xi (n 1) 2.

motherland. The Fourth Plenary Session of the 19th Central Committee of the Communist Party of China emphasised that 'One Country, Two Systems' is an important system under which the Party leads the people to achieve peaceful reunification of the motherland, and is a great initiative of socialism with Chinese characteristics. The principle that 'one country' is the prerequisite and foundation for implementing the 'two systems', which are subordinate to and derived from 'one country' and unified within it must be adhered to. Strictly in accordance with the Constitution and the Basic Law, governance over the Hong Kong Special Administrative Region and the Macao Special Administrative Region will be exercised so as firmly to safeguard national sovereignty, security, and development interests, maintain the long-term prosperity and stability of Hong Kong and Macao, and never to tolerate any behavior that challenges the bottom line of 'One Country, Two Systems' nor any behavior that splits the country. 'One Country, Two Systems' as mentioned in the above decision is an important system for the Party to lead the people to achieve the peaceful reunification of the motherland. The system refers to the political sense, which is a directional and guiding political design created by the CPC through the Party's policies. Therefore, from the perspective of political theory, 'One Country, Two Systems' has gained the support of all people, including residents of the Hong Kong and Macao Special Administrative Regions and the entire Chinese people. As a political concept, it plays a crucial role in promoting peaceful reunification of the motherland, which is in line with the common interests of the entire Chinese people and has full legitimacy. Therefore, in his important speech at the celebration of the 25th anniversary of Hong Kong's return to the motherland and the inauguration ceremony of the 6th government of Hong Kong Special Administrative Region, President Xi Jinping also emphasised the importance of reviewing the past and learning from it. The rich practice of 'One Country, Two Systems' in Hong Kong has left us with valuable experience and profound insights. 25 years of practice have taught us that only by deeply understanding and accurately grasping the practical laws of 'One Country, Two Systems' can we ensure that the cause of 'One Country, Two Systems' always moves steadily in the right direction.<sup>10</sup> The report of the 20th National Congress of the Communist Party of China highlights the adherence to 'One Country, Two Systems', indicating that from the perspective of 'political theory', 'One Country, Two Systems' has become the best political concept for promoting

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<sup>10</sup> Xi (n 1) 2.



national reunification and is a great initiative of socialism with Chinese characteristics.<sup>11</sup>

### III. The Basic Law Is the Legal Foundation for the Construction of the System of Special Administrative Regions

Objectively speaking, the political concept of ‘One Country, Two Systems’ reflects a political desire and an ideal. Whether it can be realised in real life depends upon the existence of a comprehensive institutional carrier. ‘One Country, Two Systems’ as the ‘political principle’ for establishing special administrative regions can only provide a rough value framework for the existence and development of the system of special administrative regions. ‘One Country, Two Systems’ is an institutional goal, not the system itself. In practice, it is necessary to rely on legal systems to clarify and safeguard how to combine two systems with completely different natures within one country. As a code of conduct, law must provide specific time and space for the institutionalised existence of ‘One Country, Two Systems’. That is to say, within the scope of a sovereign state, at what time and space socialist and capitalist systems can be allowed to operate effectively together and not hinder each other. This practical issue cannot be achieved solely through the wishful thinking of the ruling party or the good wishes of the general public. It is necessary to design a rigorous legal system for scientific demarcation. From the actual situation that two social systems of different natures coexisted before the special administrative region system stipulated in the current Constitution, the central government solved the problem of Xizang’s serfdom under the socialist New China for a certain period after the founding of the People’s Republic of China through the ‘Seventeen Articles Agreement’. This experience indicates that through legal systems, two completely different social systems can be arranged and effectively operated within the jurisdiction of sovereign states.

After the founding of New China, in 1951, the Central People’s Government and the local government of Xizang signed the Agreement on the Measures for the Peaceful Liberation of Xizang (referred to as the

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<sup>11</sup> Xi Jinping, ‘Holding High the Great Banner of Socialism with Chinese Characteristics and Uniting for the Construction of a Modern Socialist Country’ (The 20th National Congress of the Communist Party of China, Beijing, October 2022).

‘Seventeen Articles Agreement’ for short),<sup>12</sup> which freed Xizang from the yoke of imperialist aggression and achieved peaceful liberation, creating the basic premise for Xizang and the whole country to achieve common progress and development.

The Seventeen Articles Agreement affirms the necessity of reforming Xizang’s social system<sup>13</sup> and emphasises that ‘Xizang’s local governments should carry out reforms automatically’. However, taking into account the special circumstances of Xizang, the central people’s government has taken a very cautious attitude towards reform and, with great patience, tolerance and sincerity, persuaded and waited for Xizang’s local upper ruling groups to take the initiative to carry out reforms. However, with the instigation and support of imperialist forces, some people in Xizang’s upper ruling group, in the face of the people’s growing demand for democratic reform, were fundamentally opposed to reform, stubbornly adhering to the principle of ‘no change for a long time, no change for ever’, and trying to maintain the feudal serfdom of political and religious unity forever. On March 10, 1959, they publicly tore up the Seventeen Articles Agreement and launched an all-out armed rebellion. Under such circumstances, in order to safeguard the national unity and the fundamental interests of the people in Xizang, the central people’s government, together with the people in Xizang, resolutely quelled the armed rebellion. At the same time, a vigorous mass democratic reform movement was launched in Xizang, abolishing the feudal serf system of political and religious unity, liberating millions of serfs and slaves, and ushering in a new era for the people in Xizang people to be masters of their own country. This is the most extensive, profound and greatest social change in the history of Xizang’s development. It is an epoch-making historical event in Xizang’s social development and human rights progress, as well as progress of great significance in the history of human civilization and the history of world human rights.

The thought of ‘One Country, Two Systems’ originates from the idea of the first generation of the CPC leadership on the peaceful liberation of Xizang. Comrade Deng Xiaoping, the core of the second generation of the Party’s collective leadership, served as the first Secretary of the Southwest

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<sup>12</sup> Signed in Beijing on May 23, 1951 between the plenipotentiary of the Central People’s Government and the plenipotentiary of the local government of Xizang. Published in the People’s Daily on May 28, 1951. In 1992, it was included in the second volume of *Selected Important Documents Since the Founding of the People’s Republic of China*, published by the Central Literature Publishing House.

<sup>13</sup> In fact, the Seventeen Articles Agreement has given Xizang’s serf system the ‘legal status’ that it can continue to exist but needs to be thoroughly reformed in due course and needs to be reformed before thorough reform.

Bureau of the Central Committee of the Communist Party of China from November 1949 to July 1952. He presided over the overall work in the southwest region, oversaw the drafting of the guiding document on the peaceful liberation of Xizang, i.e. 'Ten Policies for Peace Negotiations with the Xizang Authorities', and participated in the formulation of the agreement between the central people's government and the Xizang local government on Measures for the Peaceful Liberation of Xizang, signed on May 23, 1951. Deng Xiaoping's experience of the peaceful liberation of Xizang, especially the experience of temporarily retaining the original serf system before Xizang's democratic reform, has opened up a theoretical and practical precedent for the future concept of 'One Country, Two Systems'.

In August 1981, Deng Xiaoping, during a meeting with well-known figures from Taiwan and Hong Kong, proposed that 'Taiwan does not pursue socialism, and the social system remains unchanged'. On September 30, 1981, Ye Jianying, Chairman of the Standing Committee of the National People's Congress, delivered a speech to Xinhua News Agency, proposing nine policies and suggestions for achieving national reunification.<sup>14</sup> Among them, after national reunification, Taiwan can be designated as a special administrative region, enjoy a high degree of autonomy, and retain its military. This is the first time that the term 'special administrative region' appeared in the central government's policy documents on Taiwan, and it has also become the basis for the provision of special administrative regions in Article 31 of the Constitution.<sup>15</sup> Although the phrase 'One Country, Two Systems' was not formally proposed at this time, its connotations had already been clearly formed, and in essence the idea then expressed was only a tiny step away from the concept of 'One Country, Two Systems', even if the name itself came later. On this basis, in January 1982, Deng Xiaoping first proposed the concept of 'One Country, Two Systems' during his meeting with friends such as the President of the Chinese American Association, and expanded the scope of application of this concept to the Hong Kong issue. On September 24, 1982, Deng Xiaoping proposed to resolve the Hong Kong issue in accordance with the 'One Country, Two Systems' policy during a meeting with visiting British Prime Minister Margaret Thatcher. In December of the same

<sup>14</sup> On September 30, 1981, Ye Jianying, Chairman of the Standing Committee of the National People's Congress, on behalf of the CPC, the Standing Committee of the National People's Congress and the State Council, issued nine guidelines on 'Taiwan's return to the motherland and peaceful reunification'.

<sup>15</sup> Han Dayuan, 'The Origin and Normative Connotation of the Term "Special Administrative Region" in Article 31 of the Constitution' (2020) 5 Journal of East China University of Political Science and Law 6.

year, the substantive content of the political concept of 'One Country, Two Systems' was incorporated into the Constitution, and from then on, the political concept of 'One Country, Two Systems' was officially incorporated into the fundamental law of the country,<sup>16</sup> and elevated to a constitutional national policy for peaceful reunification of the motherland and dealing with historical legacy issues.

In June 1984, Deng Xiaoping elaborated on the connotations of the 'One Country, Two Systems' concept during his meeting with the Hong Kong business community delegation visiting Beijing and well-known figures in Hong Kong. 'Specifically, in the People's Republic of China, the mainland with a population of 1 billion implements a socialist system, while Hong Kong and Taiwan implement a capitalist system. China's main body must be socialist, but certain regions within the country are allowed to implement capitalist systems, such as Hong Kong and Taiwan. China's main body is socialism.'<sup>17</sup> Regarding whether the 'One Country, Two Systems' policy will change, Deng Xiaoping clearly pointed out that it will remain unchanged for a long time. 'We have talked about it many times, and the National People's Congress has already passed this policy. Some people are worried that this policy will change, but I say it will not change.' The core issue, the determining factor, is whether this policy is right or not. If it is not right, it may change. If it is right, it cannot change. Our policy towards Hong Kong will remain unchanged for a long time and cannot affect socialism on the mainland. 'If China changes the socialist system with Chinese characteristics under the leadership of the CPC, Hong Kong's prosperity and stability will also be blown up.'<sup>18</sup>

From the above, it can be seen that according to the political concept of 'One Country, Two Systems' designed by Comrade Deng Xiaoping, the capitalist system is only allowed to exist 'on a small scale,' rather than being implemented on a large scale, and is not on par with the socialist system. In particular, the existence of the socialist system as the main body of the country cannot be threatened by the existence of the capitalist system on a small scale. From the perspective of 'political theory,' the meaning of 'within a small scope' may be relatively vague, but in order to define clearly the specific legally effective extent of 'within a small scope' in the system, strict 'legal principles' must be followed to limit the

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<sup>16</sup> Article 31 of the Constitution stipulates: 'The state may establish special administrative regions when necessary, and the system implemented within the special administrative regions shall be prescribed in law by the National People's Congress according to specific circumstances.'

<sup>17</sup> *Selected Works of Deng Xiaoping Volume III (1982-1992)* (Foreign Languages Press 1994) 58.

<sup>18</sup> *ibid* 215.

specific areas, matters, and aspects in which the 'capitalist system' in 'One Country, Two Systems' can take effect in special administrative regions through specific institutional design. Although Comrade Deng Xiaoping did not explain clearly how to limit the existence of capitalism in the legal system, he put forward clear and unambiguous 'legal principles' for the arrangement of 'two systems' in the legal system, which means that two basic legal boundaries must be followed. First, capitalism exists on a small scale; second, the existence of the capitalist system must not endanger the socialist system as the main system. So, the 'capitalist system' within the Special Administrative Region is the 'capitalist system' under the 'socialist system', and in many fields parallel situations develop between the 'capitalist system' and the 'socialist system'.

Therefore, the 'One Country, Two Systems' principle as the 'political principle' of the special administrative region system requires a series of legal systems to protect it. The 'legal principle' characteristic of the special administrative region legal system is that of ensuring that the 'political principle' of 'One Country, Two Systems' can be specifically implemented and realised in practice. In order to concentrate on elaborating the 'legal principles' of the special administrative region system, since Article 31 of the current Constitution of 1982 clearly stipulates that 'the state may establish special administrative regions when necessary. The systems implemented within special administrative regions shall be prescribed in law by the National People's Congress according to specific circumstances'. Based on the provisions of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and the Basic Law of the Macao Special Administrative Region of the People's Republic of China formulated by the National People's Congress, a special administrative region system that meets the requirements of Article 31 of the current Constitution has been established. In the establishment of the special administrative region system, the two basic laws are the concentrated embodiment of the legal principles of the special administrative region system and the core of the legal system that constitutes the special administrative region. In addition, according to the provisions of the two Basic Laws, the national laws listed in Annex III of the Basic Law also have legal binding force in the Special Administrative Regions.<sup>19</sup> Therefore, the national laws listed in Annex III of the Basic Law also constitute part of the 'legal principles' that support the existence of the Special Administrative Region system. Taking the National Laws included in Annex III of the Basic Law of

<sup>19</sup> Zhiwei Tong, 'The Special Administrative Region System has become the Basic Political System of China' (2011) 4 Politics and Law 56.

Hong Kong as an example, there are currently a total of 17 such laws, including the Resolution on the Capital, Annals, Anthem, and Flag of the People's Republic of China, the Resolution on the National Day of the People's Republic of China, the Declaration of the Government of the People's Republic of China on the Territorial Sea, the Nationality Law of the People's Republic of China, the Regulations on Diplomatic Privileges and Immunities of the People's Republic of China, the Flag Law of the People's Republic of China, the Consular Privileges and Immunities of the People's Republic of China, the National Emblem Law of the People's Republic of China, the Law of the People's Republic of China on the Territorial Sea and Adjacent Zones, the Garrison Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Exclusive Economic Zone of Law of the People's Republic of China on the Exemption of Judicial Compulsory Measures for the Property of the Central Bank of the People's Republic of China, and the National Anthem Law of the People's Republic of China. Except for the Resolution on the Capital, Annals, Anthem, and National Flag of the People's Republic of China, which was passed by the First Plenary Session of the Central People's Political Consultative Conference on September 27, 1949, the remaining 16 national laws are all basic laws formulated and promulgated by the Standing Committee of the National People's Congress.

In addition, 'capitalism that exists on a small scale' also provides necessary 'legal principles' to support the effective implementation of the political concept of 'One Country, Two Systems' in special administrative regions through laws formulated by the legislative organs of the special administrative regions and existing laws that do not conflict with the Basic Law. In general, the series of legal provisions on the system of special administrative regions and the legal principles contained therein constitute a 'legal principle' that ensures the institutionalisation of 'One Country, Two Systems'. 'Political principle' has been transformed into 'legal principle' condensed in the legal system of special administrative regions. The construction of the system of special administrative regions has a reliable legal basis and institutional guarantees. 'One Country, Two Systems' is no longer just a political desire at the policy level or a unilateral piece of 'wishful thinking' on the part of the ruling party, but a concrete legal practice accompanied by specific legal responsibilities and obligations. Under 'One Country', the effective control of the legal system can ensure the effectiveness of the main body. The socialist system and the small-scale capitalist system coexist effectively side by side.

#### IV. The Constitution is the Basis for the Legitimacy of the Construction of the Special Administrative Region System

The system of special administrative regions was established by the current Constitution. In practice, it is based on the legitimacy of the 'One Country, Two Systems' policy, and has specific operational legitimacy based on the provisions of the Basic Law of Hong Kong and Macao. However, as a fundamental law formulated by the National People's Congress, the Basic Law of Hong Kong and Macao is itself constrained by the Constitution as the fundamental law. This constraint is not only that the legal effect of the Constitution is higher than that of the Basic Law, but, more importantly, the content of the Basic Law must also be consistent with the Constitution and not contradict its provisions and spirit. Especially when the Basic Law comes from the Constitution, and the connotation of the Basic Law needs to be effectively interpreted through the Constitution, when the Basic Law is unable to coordinate the relationship between 'legal' and 'political' in special administrative regions effectively, it must look to the Constitution as the Basic Law. In this regard, the most typical and vivid examples are the interpretations of Article 13, Paragraph 1, and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which was passed at the 22nd meeting of the Standing Committee of the 11th National People's Congress on August 26, 2011. It is clearly stated in the interpretation of Article 13, Paragraph 1 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region that,

*regarding the first (1) issue submitted for interpretation by the Court of Final Appeal of the Hong Kong Special Administrative Region. According to Article 89, Paragraph (9) of the Constitution of the People's Republic of China, the State Council, i.e. the Central People's Government, exercises the power to manage the country's foreign affairs. The rules or policies of state immunity belong to the category of foreign affairs in the country's foreign affairs, and the Central People's Government has the right to decide on the rules or policies of state unified implementation within the territory of the People's Republic of China. Based on the above, according to Article 13, Paragraph 1 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which stipulates that 'the Central People's Government is responsible for managing diplomatic affairs related to the Hong Kong Special Administrative Region', the management of diplomatic affairs related to the Hong Kong Special Administrative Region belongs to the power of the Central People's Government, which has the power to decide on the national exemption rules or policies applicable in the Hong Kong Special Administrative Region.*

The most important statement in the above explanation is 'based on the above'. Based on the above, it is obvious that the above is the provision of Article 89 (9) of the Constitution of the People's Republic of China. The Interpretation of Article 13, Paragraph 1 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China uses the provisions of Article 89, Paragraph 9 of the

Constitution of the People's Republic of China as the 'legal basis' for the provision in Article 13, Paragraph 1 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, that 'the Central People's Government is responsible for managing foreign affairs related to the Hong Kong Special Administrative Region'. This is the strongest evidence that the current Constitution directly applies to the Special Administrative Region in the legislative field or in legal interpretation. In the above interpretation, if the provisions of Article 89 (9) of the current Constitution are not directly cited, it would be difficult for the interpretation of Article 13 (1) of the Basic Law by the Standing Committee of the National People's Congress to have sufficient legal persuasiveness and authority. The use of the Constitution to address legal issues arising from the operation of the special administrative region system is referred to as constitutional reasoning. From the perspective of the legal characteristics of the Constitution as the fundamental law, 'constitutional theory' is more rigorous in its logic than 'legal theory', which can better reflect the value requirements of 'political theory' and maintain the necessary value communication and institutional coordination between 'legal theory' and 'political theory'. Therefore, in practice, further improving and perfecting the implementation mechanism of the Constitution in special administrative regions is not simply an expression of political demands, but more importantly, a question of whether the constitutional principles provided by the Constitution can endow the system of special administrative regions with a more than sufficient legitimacy.

From the theoretical logic of 'constitutional theory', the legal perspective of 'constitution' is far broader than that of the basic law. If we only look at the Constitution from the perspective of the Basic Law in practice, we may consider the Basic Law as a 'minor constitution',<sup>20</sup> or even consider it to be a 'constitution' applicable in special administrative regions. But if viewed from the perspective of the Constitution, the Basic Law is only the most important legal form for implementing the special administrative region system stipulated in the Constitution, but it is not the only legal form. From the perspective of legal logic, there is a value gap between the Basic Law of Hong Kong and Macao and the Constitution, which is the fundamental law. In other words, the close legal connection between the Basic Law and the Constitution must be supported by other legal

<sup>20</sup> Yash Ghai, 'Litigating the Basic Law: Jurisdiction, Interpretation and Procedure' in Johannes Chan, Hualing Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflicts over Interpretation* (Hong Kong University Press 2000) 3.



documents of a certain nature. In terms of the Basic Law of Hong Kong, it not only lacks constitutional nature, but also requires the support of two other important legal documents to complete the specific task of the special administrative region system stipulated by the Constitution.

From a legal and logical perspective, without the pre-emptive decisions of the National People's Congress, there would be no constitutionality and legitimacy for the existence of the Basic Law. Before the Third Session of the Seventh National People's Congress passed the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China on April 4, 1990, in accordance with Article 31 of the current Constitution, which stipulates that 'special administrative regions may be established when necessary', the Third Session of the Seventh National People's Congress first passed the Decision on the Establishment of the Hong Kong Special Administrative Region. The Decision stipulated that the Third Session of the Seventh National People's Congress, in accordance with Article 31 and Article 62 (13) of the Constitution of the People's Republic of China, had decided to establish the Hong Kong Special Administrative Region from July 1, 1997. The area of the Hong Kong Special Administrative Region includes Hong Kong Island, Kowloon Peninsula, as well as the islands and surrounding waters under its jurisdiction. The administrative map of the Hong Kong Special Administrative Region was to be separately announced by the State Council. It can be seen that the establishment of the Hong Kong Special Administrative Region was carried out by the National People's Congress in accordance with the provisions of Article 31 and Article 62 (13) of the current Constitution, through the Decision on the Establishment of the Hong Kong Special Administrative Region. It is an active act of the National People's Congress to fulfill its constitutional responsibilities in establishing the Special Administrative Region. From the perspective of legislative logic, the first step should be to establish a 'Special Administrative Region' through law, and then formulate the 'Basic Law of the Special Administrative Region' based on the already legally established 'Special Administrative Region', establishing the 'Special Administrative Region system' or the 'system implemented within the Special Administrative Region'. Therefore, the 'Decision on the Establishment of the Hong Kong Special Administrative Region' is significantly better than the 'Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China' in terms of constitutionality and legislative legitimacy. Without the 'Decision on the Establishment of the Hong Kong Special Administrative Region', there

would be no 'Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.' Therefore, the 'Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China' is regarded as being the applicable 'constitution' or 'constitutional law' in the Hong Kong Special Administrative Region. This system lacks a direct constitutional and legal basis for qualitative analysis, and there are obvious logical flaws in its legal theory. If the National People's Congress were to revoke or modify its own decision on the establishment of the Hong Kong Special Administrative Region in legislation, then the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China would naturally lose its constitutional basis for existence due to the lack of applicable spatial scope. Therefore, attempting to replace the highest legal authority of the current Constitution through the system of the Hong Kong Special Administrative Region by elaborating on the importance of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China is untenable in legal terms. In addition, on April 4, 1990, after the Third Session of the Seventh National People's Congress passed the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the same Session also passed the Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China to strengthen the constitutionality and legitimacy of the Basic Law in designing the system of the Special Administrative Region or the system implemented within the Special Administrative Region. From this, it was concluded that the Basic Law of the Hong Kong Special Administrative Region was formulated in accordance with the Constitution of the People's Republic of China and with the specific situation of Hong Kong, and is in line with the Constitution. The systems and policies implemented after the establishment of the Hong Kong Special Administrative Region are in accordance with the Constitution. From the perspective of legislative logic, based on the Basic Law of the Hong Kong Special Administrative Region, while the Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China has also established an effective legal connection between the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and the current Constitution, and played a role as a 'constitutional protector' in confirming the constitutionality of the systems implemented within the special administrative region. From a legal and logical perspective,

without the Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the constitutional basis of the Basic Law of Hong Kong might be questioned and challenged, and similarly, the Basic Law of Macao is in a very similar situation. In addition, from the perspective of constitutional theory, the basic institutional goal of establishing a special administrative region system in the Constitution is to achieve peaceful reunification of the motherland. The resolution of the issue of ultimate reunification of the motherland involves three regions: Taiwan, Hong Kong, and Macao. Hong Kong and Macao, due to their relatively complete conditions in various aspects, were the first to establish a special administrative region system in accordance with the provisions of the Constitution. From the perspective of the constitutional goal of national reunification, in order to better reflect the value goals of the Constitution, there are two other forms of special administrative region system design in terms of 'constitutional principles'. Firstly, before the establishment of any special administrative region, the National People's Congress formulated and promulgated the 'Basic Law of the People's Republic of China Special Administrative Regions' applicable to all local administrative regions that may become special administrative regions in accordance with the provisions of the Constitution, establishing various legal principles, policy frameworks, and operational mechanisms related to special administrative regions as envisioned by 'constitutional principles'. After the return of Hong Kong and Macao to the motherland, the Basic Law of the Special Administrative Region of the People's Republic of China could be directly applied, and special basic laws applicable to Hong Kong and Macao could be formulated and promulgated in accordance with the Constitution and the Basic Law of the Special Administrative Regions. Therefore, from a constitutional perspective, the Basic Law of Special Administrative Regions itself is a legal system based on the special administrative region system determined by the Constitution, and can be an organic combination of general law and special law. It is difficult to clarify the issue of 'reason' here without distinguishing it from 'constitutional principles'. Therefore, in the construction of the special administrative region system, without constitutional principles, there can be no scientific legal principles, and it would be impossible to reflect the requirements of political principles effectively.

In a word, as a constitutional system, the system of Special Administrative Regions is an important institutional design aiming to deal comprehensively

with the relationship between the central government and local government. The system of Special Administrative Regions has three resources of legitimacy, from the perspective of political, legal and constitutional angles, it is possible to accept the legitimacy of Special Administrative Region system as a constitutional institution. 'One Country, Two Systems' as a political principle manifests the inclusiveness of political mechanism with Chinese characteristics under a unified constitutional system. It implies that diversified political systems might coexist under a scientific and comprehensive constitutional system and that constitutionality can offer the best route to legitimacy for political practice.

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