

# Acts of the State in the Basic Laws of the Special Administrative Regions

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Article 19.3 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter as "the Hong Kong Basic Law") and the Basic Law of the Macao Special Administrative Region of the People's Republic of China (hereinafter as "the Macao Basic Law") stipulates that the Special Administrative Regions (SARs) courts have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the SARs shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government. So, what is the implication of the acts of state in the Basic Laws of the Special Administrative Regions? What are the contents? Hu Jinguang explored the issue for the first time in his work *Study of the Issues of the Chinese Constitution*.<sup>1</sup> Here I attempt to make a preliminary analysis of this issue according to my shallow learning from foreign jurisprudence.

## I. The concept of the acts of state

The concept of acts of state first appeared in Article 12.1 of Administrative Procedural Law of the People's Republic of China, it provides that the people's courts shall not accept suits brought by citizens, legal persons or other organizations against any of the following matters: acts of state in areas like national defence and foreign affairs, etc. Article 2 of the Interpretation of the Supreme People's Court's on Several Issues Concerning the Administrative Procedural Law of the People's Republic of China 2000 (hereinafter as "the Interpretation") explained the acts of state Article 12.1 of the Administrative Litigation Law: the acts concerning defence and foreign affairs which the State Council, the Central Military Commission, the Ministry of National Defense and the Ministry of Foreign affairs implement under the authorization of the Constitution and laws on behalf of the state, as well as the annunciation of state of emergency, the implementation of martial law and the mobilization, etc. by the state organs under the authorization of the Constitution and laws. However, this interpretation did not play a role in clarifying the implied function of the acts of state, on the contrary, it made the problem more complicated. Firstly, is the Central Military Commission an administrative body? In China, administrative bodies mainly refer to the government and

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government departments. In accordance with the Constitution, the Central Military Commission is the highest military authority. Secondly, what are the state organs at all under the "authorization of the Constitution and law"? In China, the state of emergency is declared often by the State President;<sup>2</sup> martial law is implemented by the State Council and provincial governments under Article 9 of the Martial Law; the mobilization order is issued by the State President, and the implementation of mobilization is jointly organized by the State Council and Central Military Commission under Article 47 of the National Defense Law, however, are the President and CMC administrative bodies? Of course, here it does not mean that acts of state can only be conducted by the administrative bodies. However, since the Administrative Procedural Law makes such a provision, it is inevitable to give the impression that the acts of state are conducted by the administrative bodies; otherwise the Administrative Litigation Law does not need to exclude these. Lastly, Article 2 of the Interpretation is not focused on the specific meaning of "national defense, diplomatic behavior", but rather on explaining the meaning of "etc." in Article 12.1 of the Administrative Litigation Law, that is, in addition to national defense and diplomatic behavior, acts of state also include declaring state of emergency, implementing martial law and mobilization, and etc.<sup>3</sup> Unfortunately, in Article 2 of the Interpretation, the word "etc." is used one more time. Does it mean that there are other acts of state except national defense, foreign affairs, state of emergency, martial law, and mobilization? Then, what are the other acts at all?

Acts of state are called acts of governing in Germany (*Regierungsakte*), acts of government in France (*acte de gouvernement*). It is generally believed that the acts of governing in Germany were derived from the acts of government in France.<sup>4</sup> In French laws, the common term "acts of government" refers to the relation with the Parliament, or the relation between the government and other countries or international organizations. The relation is a legal act which stems from executive power but not subject to judicial review.<sup>5</sup> An act of government has the following characteristics: (1) it is derived from the behavior of the executive power; (2) it is a legal act, not a factual act; (3) it is an administrative act, not subject to court review; (4) it is an administrative act confined to two specific areas. Internally, it is an administrative act in relation to the Parliament, externally; it is an administrative act involving diplomacy, international relations and other areas.<sup>6</sup> At present, the French acts of government mainly include: (1) acts of government of domestic effects. For example, the Presidential Order to open and close a special meeting of Parliament, the Presidential Order to dissolve the Parliament, the Presidential Order for promulgation of the law or, to ask the Parliament to review the law, the President and the Prime Minister's decision to submit the bill to the Constitutional Council, the government's exercise of the power to propose bills, the President's decision to put a bill to referendum, the president's power for emergency orders, the Presidential Decree for cabinet installation and resignation, official speeches and proclamations of the President, the Prime Minister and Cabinet members, behavior of Cabinet members in the Parliament. (2) acts of government of international effects. For example, the government's attitudes and treaty negotiating approaches, the government's decision to sign, ratify or approve the treaty, the fulfillment or non fulfillment of international commitments, suspension and cancelation of the treaty, wave interference with foreign radios, designation of safe areas in international waters for nuclear tests, the operation of diplomatic protection power, the relationship between the government and international organizations.<sup>7</sup>

### **1.1 Acts of governments and acts of governing**

As mentioned earlier, acts of governing in Germany came from the French acts of government. However, subsequent development led to different contents. In Germany, Smend was the first scholar who studied acts of governing, he began from the distinction between governing and administration, and thought that the scope of governing belonged to the political field, which had the function of leading a state and making national policies while administration dealt only with separate or technical problems.<sup>8</sup> Meanwhile, German scholars' recognition of acts of governing was not limited to the exercise of executive power unlike France. Some brought the acts of the Parliament or the presidential acts into the category of acts of governing. For example, German Bundestag's confirmation of the Federal Chancellor's consent right, of the budget, of the Federal President's signing and publication of law, German Bundestag's confirmation of a state of war. In addition, there were some factual acts such as the Federal President or the Federal Chancellor's message of congratulation or the New Year reception of guests, interviews and so on.<sup>9</sup> Scholar Schneider made a list of acts of governing, including: (1) the Parliament's decisions; (2) acts of diplomatic high power, such as diplomatic immunity decisions, the recognition of foreign countries or governments, granting of diplomatic protection; (3) the commander's acts, such as police or military action decisions; (4) acts of government, such as the Federal Chancellor's determination of policies, government financial decisions; (5) presidential acts, such as acts of amnesty, granting honors or medals.<sup>10</sup> This showed that the German definition of acts of governing is not only different in actors from the French definition, but also in the French contents of acts of government. The most obvious was the amnesty act. Since the Gombert verdict in 1947, the French scholars have removed the amnesty act from the list of the acts of government.

### **1.2 Acts of government and political questions**

The political questions are the concept of American law, then, are political questions equal to acts of government? The political questions first appeared in the *Marbury v. Madison* case in 1803, Justice Marshall expounded the view that the political affairs could not be reviewed by the court. Afterwards, political questions were defined as: administrative discretion was immune from judicial review.<sup>11</sup> Thereafter, in the *Luther v. Borden* case in 1849, Justice Taney explicitly pointed out that the judgment of the republican government system belonged to political issues.<sup>12</sup> Since then, the US Supreme Court, according to this principle, often refused to rule on the cases in question, but its scope was not settled yet. In the *Baker v. Carr* case in 1962, Justice Brennan identified six factors to help in determining which questions were political in nature. Cases that are political in nature are marked by: (1) textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>13</sup> From the current view, the United States Supreme Court deemed the cases as political including: (1) cases related to the republic nature of the country; (2) the procedure to amend the constitution; (3) the Congress' self-discipline and legislative procedures; (4) electoral district division, (5) military or war; (6) foreign affairs or international problems; (7) the Congress' impeachment power

exercise.<sup>14</sup> The US political questions scope is obviously larger compared with the French acts of government, the actors are not confined to administrative organs. In a way, the content of the US political questions are comparable with that of Germany's acts of governing. But the difference from Germany's acts of governing is that the United States scholars see political questions from the angle of the constitution, and the German scholars see acts of governing from the angle of the administrative law. That is, the American scholars mainly discuss whether the Federal Supreme Court should accept political questions or not while German scholars mainly discuss whether the Federal Administrative Court shall accept acts of governing. However, German scholars made a radical change in the study of acts of governing in 1960. Germany enacted the Administrative Court Law in 1960, the Law designated that the scope of the cases the Administrative Court shall accept was of the nature of non-constitutional public law disputes, thus, the acts of governing were classified into constitutional disputes, and scholars' discussion shifted from whether the Administrative Court could accept the acts of governing to whether the Constitutional Court could accept the acts of governing.

### **1.3 Acts of state: a concept with national characteristics**

From the above-mentioned theories on acts of state in France, Germany, the United States, the term each country uses is different, and the connotation is also different, so it is difficult to sum up a universal connotation of the acts of state. But, from this we can also find the two clues to the discussion of the acts of state: first, the constitutional definition of acts of state is different from that of the Administrative Law, the research scope of the acts of state in the Constitutional Law is larger than that in the Administrative Law. Second, there is a common factor in each country's theory on the acts of state, that is, the political nature of acts of state. But what is exactly this political nature? It is extremely difficult to define, even the six standards of the US Justice Brennan are widely vilified by scholars. People are more willing to describe the result of the political acts, that is, court review is unacceptable. But, this reminds us of the first question. Here in the statement "court review is unacceptable", does the court refer to the Administrative Court or the Constitutional Court? What the Administrative Court cannot review does not mean that the Constitutional Court cannot review, it is necessary to distinguish between the acts of state in the Administrative Law and the Constitutional Law.

## **II. The reasons the administrative litigation shall not review the acts of state**

From the discussion of the French scholars, the reasons the administrative litigation shall not review the acts of state include: (1) the national interests theory, which says that the acts of state are based on the national public welfare needs, the acts that administrative power can not choose but to do, or the national existence will be threatened; (2) the case ruling policy theory, which says that the acts of state are a political art of the justices. Through this policy skill, the justices can avoid direct confrontation with the Parliament, or getting involved in international affairs to add troubles to the government in international activities; (3) the government power theory, which says that the acts of state are the exercise of the special executive power (government power). The result of the exercise of general executive power is an administrative act whose characteristic is to obey the law, but the acts of state are characterized by the power from the constitution, not the legislative

authorization.<sup>15</sup>

But from recent trends of French court decisions, administrative litigation which does not review the acts of state is becoming flexible. First, for the acts of state with international effects, the Administrative Court is minimizing the acts of state which are free from the review of the administrative litigation through a series of theories. (1) The separation act theory. The so-called separation acts refer to the acts of state which are not directly linked to the international relations, in other words, the acts involve simply the domestic laws, and the court, of course, has the right to review. For example, in the *Gisit and Mrap* case, French Ministry of Education ordered all universities to refuse the admission applications from Iraqi students and reject the admission permits issued as a result of the outbreak of the Gulf War. The measure provoked the dissatisfaction from immigration groups and anti-racial discrimination communities who filed a lawsuit to the Central Administrative Court for cancellation. As regards to the case, scholars thought that it was an act of the state to suspend the French-Iraqi educational, scientific, and cultural cooperation. But the measure of banning the admission applications from Iraqi students was a separable act the court may review because the French university admission application procedures and qualifications were purely a question of domestic law. For another example, in the *European atomic energy accelerator* case, the court said that it was an act of state whether or not to join the atomic energy accelerator construction project, but it was not an act of state to choose the site for the atomic energy accelerator construction for this involved related domestic laws (such as land planning), so a separable act. (2) The internationalization of the Administrative Law. Since the fourth Republic of France, France has adopted the principle of the international law being superior to the domestic law. Therefore, in most cases the justice based his review on the treaty or agreement so that the scope of the acts of state was spontaneously reduced. For example, in a 1993 case, a Austrian French woman and her Austrian brother were in a lawsuit for heritage, this lady, on the one hand, requested the French Foreign Affairs Ministry to demand legal assistance from the Austrian government according to the civil litigation in the Hague Convention, and on the other hand asked the French consulate in Austria to appear in court on her behalf and was refused, then she appealed to the Administrative Court to cancel the lawsuit. The Court did not refuse to accept for it was an act of state. On the contrary, the Court reviewed the case according to relevant international treaties. Scholars thought that many international treaties protected individuals, and were also signed and published by France. In this case, it was extremely difficult for the Court to refuse to accept such cases. What's more, according to Protocol 9 of the European Convention on Human Rights, individuals can bring a lawsuit to the European Court of Human Rights. So, if the domestic courts give up jurisdiction, it means giving up jurisdiction to the International Court. So, the domestic courts have to get involved in the traditional fields of the acts of state.<sup>16</sup> Next, as to the acts of state with domestic effects, with the establishment of the Constitutional Committee, it confirmed the constitutional status of the Administrative Court in two important rulings so that the power of the Administrative Court was strengthened, and ensured the due power for review, although the administrative court can't slash the acts of state or review the acts of state, but this does not mean that the administrative organs can do what they like about the acts of state, and the Administrative Court still requires the acts satisfy the legitimacy of the legal requirements.<sup>17</sup>

In Germany, the acts of state are recognized by the academia, but this kind of act is not entirely free from the Administrative Court review. According to Article 19.4 of the German Basic Law, if the acts of state violate the rights of the people, the Administrative Court shall review. In

other words, the acts of state are free from judicial review because they have not directly violated the rights of the people, not because they are purely based on their political nature. For example, in modifying the boundaries with neighboring countries, the land rights of the people are somewhat influenced; or in signing a foreign trade or goods agreement, the rights of the relevant practitioners are affected or when government officials are questioned in the Parliament, the rights of reputation are infringed, etc., all these can be used as the subjects of administrative litigation.<sup>18</sup>

This shows that freedom of the acts of state from the review of the administrative litigation is dramatically narrowing. One reason is that some of the acts of state are not administrative acts, they can not enter administrative litigation at all. Another reason is that the possibility is being weakened of refusing the review of the administrative litigation based on the political nature of the acts. In the face of the rights of litigation requests, it only creates the impression of rejecting justice.

### **III. Whether the acts of state should accept review of the constitutional litigation?**

#### **3.1 The United States**

Not every American scholar agrees on the judicial review of the political questions, on the one hand, because the connotation of the political questions is not specified, on the other hand, because of the worries that the political questions will impair the significance of judicial review. But some scholars show support for the political questions, and put forward many theories such as “judicial self-control”, “separation of powers”, “lack of legislation”. M. Finkelstein thinks that the judge does not review the political questions because the court lacks processing skills and the difficulty of subjective identification is too high, or because the court is concerned that the ruling may cause serious incidences such as public outrage. At this time, the judge should be adhering to the pursuit of good instinct, and transfer the responsibility of identification to other suitable government departments. Therefore, the political questions are still judicial self-limitation of respect for other constitutional departments.<sup>19</sup> Weston emphasizes the differences between judicial questions and political questions, and thinks the separation of the three constitutional powers comes from the sovereign’s appointment, and the sovereign entrusts the court with the identification of juridical questions, but entrusts the political departments (executive, legislative) with the identification of the political questions. So, the political questions are the result of the court’s interpretation of the constitutional jurisdiction.<sup>20</sup> Field thinks because the court lacks the applicable laws and regulations, the court has to shirk from judging without the presence of the standards. For example, foreign affairs have important policy considerations, and most of them lack meticulous standard rules, and are not easily subject to the restraints of the rules. In these cases, the court is unwilling to impose judicial blame on the government departments which achieve an important national state purpose.<sup>21</sup>

From the 1950s to 1960s, American scholars began to make theoretical summarization of the political questions. Wechler thinks that political questions stem from the judge’s neutral principle, namely if the Constitution does not appoint who is to resolve the question, the judge should take the position of neutrality, and imagine and compare with the future possible cases, consider the disputes of the case, keep neutral and consistent principles in judging. And if the principle is not sufficient to overthrow the choice of value of other government departments, the court should reserve and avoid that.<sup>22</sup> Bickel thinks political questions are skills the court uses to avoid legal

judgment. Bickel summarizes political questions in this way: (1) it is difficult to find guidelines for the solution to the case; (2) the extreme seriousness of the question makes it hard to arrive at a balanced decision; (3) the worries that if a verdict is reached, it will be ignored and fail to be observed. (4) in a mature democracy, the judiciary does not bear responsibility of election in the system, and thus lacks effective means of participation, and displays apprehensions and self-restraints to avoid being scorned.<sup>23</sup> Like Bickel, Scharpf thinks that political questions are a means of the court's reaction to the disputes of the litigation. When the court is in the face of special tasks unfit for it, it may expand its means or limit its tasks, and the political question is one of the procedure's limits.<sup>24</sup> He classified the political questions into three categories: (1) the data affecting the decision cannot be obtained; (2) it is necessary to announce the consistency of the political decision made by the political department; (3) adequate respect for the extensive responsibility of the political departments.<sup>25</sup>

After 1960, American scholars voiced their negative sound for the political questions. Henkin thought that the Federal Supreme Court never applied the political question to exempt its obligation of review. The courts' identification of the political question was only out of general respect for the political departments, not a special withdrawal. He thought that the court did not need to avoid judgment of review if the case had the essential documents for litigation.<sup>26</sup> Redish also launched a savage attack on the political question: (1) the political question itself lacks objective standards, and has no constitutional basis. It is true that the Constitution does not textually require reviewing the decisions made by other political departments, but it can not be inferred that the Constitution requires review to be exempted. (2) the political question has no real value for the judicial review system. He thought that the biggest defect of the political questions was to make the Constitution, as the highest national organizing regulator, lose the mechanism function of controlling the political departments.<sup>27</sup> He doubted that once the review of the political department acts was given up, the benefits lost would be substantially higher than the result of the indifference from the political departments towards the court judgment.<sup>28</sup> McCormack did not agree with the political question adopted by the court, thinking of it as a pretense and a theory leading to incorrect practice. If the court gives up judicial review on the basis of lack of the rules for resolving the dispute, this will distort the system of judicial review. If it is a legal courteous compromise based on the undemocratic nature of law, this view has not provided us with the basis for judging the disputes of political questions and other constitutional disputes. If there is fear that the judicial authority will be eroded by the resistance of the decision from the political department, we can see that there have been rare instances of disregarding the legal announcements by the various government departments in the American constitutional history.<sup>29</sup>

Although fiercely criticized, the United States Supreme Court has not entirely given up the political question; the Court is more cautious in attitude. On the one hand, this is because the Court cannot really review all the controversies, on the other hand, it is for the separation of powers, because the right to interpret the constitution is not solely in the hands of the judicial organs, but shared by the judicial organs and other political organs. So, some scholars point out that, in the United States, the political question is not really free from "review", it is only free from "review by the judicial organs".<sup>30</sup>

### **3.2 Germany**

Early German scholars generally agreed that there existed the so-called fields of acts of

governing in which judicial review was eliminated, on the one hand, perhaps influenced by the state legal person theory of the Age of Empire. The theory suggested the power of the state was only and inseparable. The state organs, including the constituent power and administration, legislation, and judiciary, were just a distribution of functional power, the theory did not highlight the superior position of the Constitution. On the other hand, the disputes between the empire's highest organs, between the empire and the states, and between the states were not resolved by the Empire Court ruling, but by mediation. Early scholars such as Otto Mayer, Rudolf Smend both followed W. Jellinek and others' separation of governing from administration so as to explain that the Administrative Court had no jurisdiction over the acts of governing. But after Germany's Administrative Court Law in 1960 designated the scope of administrative litigation: non constitutional public litigation, scholars began to explore, from the angle of the nature and function of judicial power, whether the acts of governing should accept the review from the Constitutional Court. Kaufmann thought the Constitutional Court could decide any purely constitutional disputes, the so-called political questions referred to those that had no legal rules to rely on for resolution. So regardless of the political nature of the constitutional disputes, it shall be decided whether there were any applicable rules for the disputes. Schneider's point of view was similar to this. He thought that the so-called freedom from court review did not mean it was not restrained by law in a general sense, but meant that although the act was restrained, it was still free from review for lack of legal rules.<sup>31</sup> Bolewski thought that acts of governing and administration had no differences in nature, they both must abide by the principle of legitimacy, so there did not exist fields of not restrained by law, nor did the possibility of freedom from court review. Meanwhile, under the concept of the Basic Law and rule of law, the acts of governing must abide by the boundaries of the basic principles formed by the constitution order, such as republican, democracy, social state, federal state, separation of powers. Wolff divided the acts of governing into acts of governing in a factual sense and acts of governing in a legal sense. He thought that the acts of governing in a legal sense, such as revision of treaties, dissolution of the Parliament, election of the Prime Minister and acts in the international law, should be subject to court review.<sup>32</sup>

From the discussion of the German scholars, some scholars agree that the acts of state shall be free from the constitutional litigation review,<sup>33</sup> but most scholars argue that the political nature of the acts of state can not afford the conclusion that they are free from judicial review. At the same time, over the years in the Federal Constitutional Court rulings, the terms acts of state and political questions have not been used, and the Federal Constitutional Court has rarely refused to resolve the constitutional disputes of political nature.<sup>34</sup> Instead, the German Federal Constitutional Court developed different benchmarks for review, and applied the modes of strong or weak judicial review to the acts of state. (1) The review of evidence control. Unless the act or decision by the political departments is evidently, any one with half an eye can see, is against the Constitution, the Court shall not blame it for being unconstitutional. The acts are common in national defense, foreign policies and volatile economic policies that slightly influence basic business rights. This is because in these matters, the function is more likely to be performed by the government departments which master complex relations and frequently changing information. So the special prediction space of the political departments should be respected. For example, in the Basic Relations Treaty between the Two Germanys case, the Federal Constitutional Court made constitutional explanations without avoiding the acts of state. The Constitutional Court thought that the judiciary could not criticize the methods of the government and parliamentary majority, so it



was unfit for the judiciary to express views on the possibility of the policy success as to the goal of approaching the national reunification. But with regard to the goal of the national reunification, the Constitution forbade giving up the realization of the goal in the name of the law, at this point, the Court has the lowest standards of identifying if it was constitutional or not. In the case, the treaty was made without worries about the loss of the law's name in realizing unity and self-determination. The law's name was suspended only in politics, not discarded. It was clear that the Federal Constitutional Court did not give up review of the highly political, diplomatic matter, instead, abode by the lowest review principle. (2) The supportability review. Concerning substantial review of the decision content by the political departments, assessment of the rationality of the prediction space, and provision of support, the Constitutional Court may have to make the judgment. Generally, as to the economic policies involving the basic economic rights of the people, the Federal Constitutional Court applies this standard. (3) The intensive content control. From the perspective of the essence correctness, the Constitutional Court makes a detailed and careful study of the decision content of the political departments, and decides if it is a right or wrong decision. At this point, the political departments shall bear the burden of proof and prove the measure is not against the Constitution. For serious violations of the right to life, personal freedom or other basic rights by the political departments, the Federal Constitutional Court applies intensive content control review.<sup>35</sup>

### **3.3 Comparisons of the United States and Germany**

Because of the United States centralized court system, the judicial review has a dual character of administrative litigation and constitutional litigation. Through the comparison of the attitudes towards the constitutional litigation of the acts of state (political questions), it is clear that the United States is more negative than Germany. Of course, this negative attitude of the United States is related to the different government systems of the United States and Germany. The United States implements the separation of the three powers, therefore, the political questions highlight the sharing, not monopoly of the right to interpret the Constitution. But Germany implements the responsible parliamentary system, administration and legislation are mainly derived from the same majority, and the combination of administration and legislation results in the significance of the function of the judicial system as an external monitor. Thus judicial intervention can enter the fields of the political questions in Germany, but only puts blame of low intensity on the obvious flaws. However, at the same time, we have to notice that in the United States, the negative attitudes are becoming cautious, and constitutional review of the acts of state (political questions) is being strengthened. The reasons for this are: first of all, no matter how strong the political nature of the acts of state is, they still belong to the category of the state power, so the boundaries for the state power are the boundaries for the acts of state, Secondly, the acts of state are mostly missions that the Constitution empowers the state organs to directly implement without law as a medium, so it is natural for the acts of state to accept constitutional review (review of constitutionality) since the acts of state are based on the Constitution. Finally, before the court's "no review" of the political questions, it must decide first whether the question is political. So, it is not that the court does not review all the political questions, but that after preliminary review, the court finds a political question and refuses to declare further judgment.

## **IV. The acts of state in the Basic Laws of the SARs**

### **4.1 The definition of the acts of state in the Basic Laws of the SARs**

What is the definition of the acts of state?

First, the subject of the acts of state: In the Interpretation, the subject of the acts of state seems to be every state organ. As for this, Hu Jinguang thought it should be treated differently. In the administrative litigation of mainland China, the subject of the acts of state mainly is the supreme administrative organ (the State Council), because the acts of the supreme organ of power shall be the object of review in mainland Chinese courts. For SARs courts, the subject of the acts of state is not only the supreme administrative organ power (the State Council), but the supreme organ of power (the National People's Congress and its Standing Committee) and the Central Military Commission. The SARs courts have the judicial power over all legal disputes, including making a judgment on whether the laws and regulatory documents applied to resolve the legal dispute are in accordance with the Basic Laws.<sup>36</sup> For this reason, the author thinks that the subjects of the acts of state should be divided into administrative litigation and constitutional litigation. The mainland courts can only conduct administrative proceedings, not constitutional proceedings; therefore, the subject of the acts of state is mainly the administrative organs in mainland China. Hong Kong practices the Common Law system, and its courts have a dual character of administrative litigation and constitutional litigation, so the subject of the acts of state should include all the state organs of power, especially the organ that can perform duties in Hong Kong on behalf of the Central People's Government.<sup>37</sup> According to the research of Wang Yu, in addition to the State Council, the subject includes the Ministry of Foreign Affairs, the Ministry of National Defense, the National People's Congress and its Standing Committee and the Central Military Commission, the President and Vice President of the State, SARs troops, the Office of the Commissioner of the Ministry of Foreign Affairs.<sup>38</sup>

Second, the content of the acts of state: As mentioned above, it is a failure to define the category of the acts of state from the subject of the acts of state, on the one hand, the subject of the acts of state is extensive in the Basic Laws of the SARs, on the other hand, the acts which the subject implements are not all acts of state. For instance, Hu Jinguang thinks that the administrative organs' recruiting troops, organizing militias for military training, issuing diplomatic passports, approving of investigation trips abroad, visits, tours and etc. are not acts of state.<sup>39</sup> Wang Yu also thinks that if the SARs' garrisons are not performing their duties, then their acts are not acts of state.<sup>40</sup> In the past, the controversy over the content of the acts of state was focused mainly on "national defense and foreign affairs, etc." in Article 19.3 of the Basic Laws of the SARs such as what is "inside etc.", or "outside etc.". The mainland law tends to be "outside etc.", but the traditions of the Common Law and the court precedents in the SARs tend to be "inside etc." As for this, the author thinks that the "outside etc." viewpoint is more appropriate. Seen from either foreign theories and practices, or the practices of the SARs, these acts such as the Central People's Government's appointment of the Chief Executives of the SARs belong neither to defense affairs, nor to foreign affairs, but can the courts of the SARs review? Of course, seen from the nature of the acts of state, the content should be political. But what is political? It is extremely hard to define.<sup>41</sup> Therefore, the author thinks that the stress shall be laid upon the "court reviewability" of the acts of state, not upon the political nature of the acts of state, i.e. analysis on the range of the acts of state should begin from the limits of the SARs courts' power of review. According to Article 19.2 of the

Hong Kong Basic Law and the Macao Basic Law, the courts of the SARs shall have jurisdiction over all cases in the SARs, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force shall be maintained. The reason for the SARs courts to enjoy such extensive jurisdiction is closely linked to Article 158, Clauses 2-3 of the Hong Kong Basic Law and Article 143, Clauses 2-3 of the Macao Basic Law. According to the two clauses, the Standing Committee of the National People's Congress shall authorize the courts of the SARs to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the SARs. The courts of the SARs may also interpret other provisions of this Law in adjudicating cases. Just because the courts of the SARs enjoy the extensive power of interpretation of the Basic Laws, the courts of the SARs shall enjoy the extensive judicial power. But Article 158.3 of the Hong Kong Basic Law and Article 143.3 of the Macao Basic Law impose restrictions on the power of interpretation of the courts of the SARs, that is, the courts of the SARs shall have no power to interpret the provisions of the laws concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the SARs, this means that the courts of the SARs shall have no jurisdiction over the affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the SARs, and this can be regarded as the content of the acts of state.

#### **4.2 The attitudes of the courts of the SARs towards the acts of state**

What are the attitudes of the courts of the SARs towards the acts of state?

According to Article 19.3 of the Hong Kong Basic Law and the Macao Basic Law, if the plaintiff brings a lawsuit directly against the acts of state, the SARs courts should not accept it. If the plaintiff is not bringing a lawsuit directly against the acts of state, but against other courts which may accept the dispute, and resolving the dispute is related to the affirmation of the existence of the acts of state such as a traffic accident in which one party claims himself to be a diplomat of the Ministry of Foreign Affairs performing a diplomatic mission, then resolving the case needs to determine "the existence of fact of diplomatic acts". In this point, the SARs courts shall have no jurisdiction, either. The courts of the SARs shall obtain a certificate from the Chief Executive on questions of fact whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government. This practice is similar to the viewpoint of German scholar Ipsen, who thought that when the court determined it to be totally an act of governing (acts of state), the case would accept no review; if it was partly an act of governing, the dispute should be decided by the organ which had the power of identification, the court should obey and make a judgment.<sup>42</sup>

But, does the Central People's Government have the power to determine the acts of state? The author thinks that according to Article 158.3 of the Hong Kong Basic Law and Article 143.3 of the Macao Basic Law, only the Standing Committee of the National People's Congress has the power of final interpretation of the articles concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the SARs. Therefore, only the Standing Committee of the National People's Congress shall decide the existence of fact of the acts of state. So the State Council (the Central People's Government), before issuing a certifying document, should seek a request of interpretation from the Standing

Committee of the National People's Congress according to Article 43 of the Legislative Law.

Does this mean that the acts of state shall be entirely identified by the SARs courts or partly by the Standing Committee of the National People's Congress? The author does not agree with it. Even if the SARs courts refuse to accept the cases concerning acts of state, it does not mean the validity of final determination. On the one hand, if the SARs courts refuse to accept the case that does not belong to the acts of state, the litigants can appeal. On the other hand, if the SARs courts accept and review the case that belongs to the acts of state, the Standing Committee of the National People's Congress may reverse the verdict. Of course, it is not the valid verdict rendered by the SARs courts that the Standing Committee of the National People's Congress has reversed.<sup>43</sup> It is the "attitude of the court towards future such cases" that the Standing Committee of the National People's Congress would like to reconstruct. Therefore, the identification of the acts of state by the SARs courts has only case effects.

## Notes:

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- <sup>1</sup> Hu Jinguang (1998). *Study of the Issues of the Chinese Constitution*. Beijing: Xinhua Publishing House. 319-341.
- <sup>2</sup> This aims at the state of emergency decided by the Standing Committee of the National People's Congress, no rules are found on who will declare the state of emergency decided by the State Council.
- <sup>3</sup> Of course, do announcement of a state of emergency, implementation of martial law and general mobilization belong to defense, diplomatic behavior? Or is "etc." in Article 12.1 of the Administrative Procedure Law "inside etc." or "outside etc."? The state of emergency and implementing martial law do not belong to national defense, foreign affairs acts, but general mobilization, seen from Chapter 8 of the National Defense Law, is clearly an act of national defense. So, here is it not completely "inside etc.", or "outside etc.". But seen from the number, "outside etc." is more likely.
- <sup>4</sup> Lee, Chie-Liang (2003). *Constitutional Theories and Practices (1)*. Taipei: Academia Culture Enterprise Co., Ltd. 325.
- <sup>5</sup> Chen Chunwen (1997). On the Concept of Acts of Government in French Public Law from Recent Cases. *Humanities and Social Sciences*. Volume 9, No. 4.
- <sup>6</sup> *Ibid.*
- <sup>7</sup> *Ibid.*
- <sup>8</sup> Lee, Chie-Liang (2003). *Constitutional Theories and Practices (1)*. Taipei: Academia Culture Enterprise Co., Ltd. 347.
- <sup>9</sup> *Ibid.* 363.
- <sup>10</sup> *Ibid.* 369.
- <sup>11</sup> 5 U.S. 137 (1803).
- <sup>12</sup> 48 U.S. (7 Howard) 42-44 (1849).
- <sup>13</sup> 369 U.S. 217 (1962). And, of course, Standard 6 is applicable alone or jointly? In 1993, in Nixon v. U.S. case it was pointed out that the six standards put forward by Brennan were not lone factors. The standard that the "Constitution textually entrusts other political departments to decide" is the precondition, the rest are complementary reasons to the first reason. 506 U.S. 224 (1993).
- <sup>14</sup> Lee, Chie-Liang (2003). *Constitutional Theories and Practices (1)*. Taipei: Academia Culture Enterprise Co., Ltd. 325.

- <sup>15</sup> Chen Chunwen (1997). On the Concept of Acts of Government in French Public Law from Recent Cases. *Humanities and Social Sciences*. Volume 9, No. 4.
- <sup>16</sup> *Ibid.*
- <sup>17</sup> In France, even there are theories denying the acts of state: (1) The mixed act theory. If the act of administrative power is not reviewed by the court, it is not because of government power, it has other reasons. First of all, as to the administrative act in the Parliament, both parties must be the chief of executive power and one of the two Houses of Parliament, if the of the executive power can be a litigant in the administrative court, but the Parliament Houses or its representatives do not have the qualifications of a litigant in the Administrative Court. Second, as to the foreign government administrative acts, foreign governments, based on the principle of sovereignty, shall not be reviewed by the French Administrative Court. (2) The limit of court theory. The power of the Administrative Court is only to review administrative acts, the disputes concerning the power of the administration, legislation lie with the Constitutional Court. The disputes concerning foreign governments are resolved by the International Court. So, Eisenmann points out that if there are administrative acts not affected by the review of the French law, which is because of the defects in the nature of the French judicial system: on the one hand, the judges generally have limited legal power, on the other hand, there is a lack of the judges with real power – the constitutional judges. (3) The judicial self-limitation theory. The so-called acts of state are only a kind of administrative discretion, the concept of administrative discretion is enough to cover it. So there is no reason for an independent kind.
- <sup>18</sup> Lee, Chie-Liang (2003). *Constitutional Theories and Practices (1)*. Taipei: Academia Culture Enterprise Co., Ltd. 325.
- <sup>19</sup> Finkelstein, M. (1923). Judicial Self-Limitation. *Harvard Law Review*. Vol. 37. 338-340, 344-345.
- <sup>20</sup> Weston, M. F. (1924). Political Questions. *Harvard Law Review*. Vol. 38. 296-302.
- <sup>21</sup> Field, O. P. (1924). The Doctrine of Political Question in the Federal Court. *Minnesota Law Review*. Vol. 8. 486-510.
- <sup>22</sup> Wechsler, H. (1959). Toward Neutral Principles of Constitutional Law. *Harvard Law Review*. Vol. 73. 6.
- <sup>23</sup> Bickel, A. M. (1962). *The Least Dangerous Branch: the Supreme Court at the Bar of Politics*. Indianapolis: Bobbs-Merrill. 184.
- <sup>24</sup> Scharpf thinks that the political questions are one of the procedures which the court self-limits its own task because he thinks that except avoiding political questions, the court can adopt other procedures or methods of jurisdiction to achieve it, for example, understate the dispute to avoid legitimacy, delay the verdict to buffer the dispute, identify the error to reject the request, and etc.
- <sup>25</sup> Scharpf, F. W. (1966). Judicial Review and the Political Question: A Functional Analysis. *The Yale Law Journal*. Vol. 75. 517-520.
- <sup>26</sup> Henkin, L. (1976). Is There a Political Question Doctrine? *The Yale Law Journal*. Vol. 85. 600.
- <sup>27</sup> Redish, M. H. (1991). *The Federal Courts in the Political Order: Judicial Jurisdiction and American Political Theory*. Durham: Carolina Academic Press. 134-139.
- <sup>28</sup> Redish, M. H. (1985). Judicial Review and the Political Question. *Northwest University Law Review*. Vol. 79. 1033.
- <sup>29</sup> McCormack, W. (1987). The Justifiability Myth and the Concept of Law. *Hastings Constitution Law Quarterly*. Vol. 14. 626-633.
- <sup>30</sup> Liao Yuanhao (2002). From Political Question Theories, the Judicial Character of the Cross-Strait Relations by the Constitutional Positioning. *Political University Law Review*. Vol. 71.
- <sup>31</sup> Lee, Chie-Liang (2003). *Constitutional Theories and Practices (1)*. Taipei: Academia Culture Enterprise Co., Ltd. 325.
- <sup>32</sup> Tsou, Cheng-Chung (2003). *On the Legal Principle of "Political Avoidance" in the Constitutional Interpretation*.

- Taipei: National Taiwan Normal University Ph.D Thesis. 90-91.
- <sup>33</sup> For example, from the nature of jurisdiction, Forsthoff thinks that a country under the rule of law should have essential legal control, but it does not mean law is omnipotent. Legislation makes risky decisions on national existence and order, and as part of the order, it is not a suitable role of responsibility, on the one hand, it is easy to get into trouble, on the other hand, it confuses judicial independence, and it is politically irresponsible to distinguish from elected government departments. *Ibid.* 89-90.
- <sup>34</sup> The Secretariat Department of the Justices of the Constitutional Court, Judicial Yuan of Taiwan (1991). *German Federal Constitutional Court Cases (II)*. Taipei: Judicial Yuan. 116-149.
- <sup>35</sup> Lo, Ming-Wei (1991). The Control Limits of Unconstitutional Review Power over Legislation in Germany. *The Constitutional Review*. Vol. 24 (2), 1991.
- <sup>36</sup> Hu Jinguang (1998). *Study of the Issues of the Chinese Constitution*. Beijing: Xinhua Publishing House. 325-326. Meanwhile, Hu Jinguang thinks that the work departments of the State Council can not be the subjects of the acts of state, but it is not in line with Article 2 of the Interpretation, because the Interpretation lists the Ministry of Foreign Affairs, the Ministry of National Defense as the subjects of the acts of state, on the other hand, it contradicts the reality because the specific implementation of the acts of state is fulfilled by the State Council work departments. For example, Article 10 of the Military Service Law prescribes that the Ministry of National Defense, under the leadership of the State Council, the Central Military Committee, is responsible for the military service work.
- <sup>37</sup> Macao practices civil law system, its administrative litigation is accepted by the specialized administrative court; the common court traditionally accepts civil, criminal cases, but Article 143 of the Macao Basic Law authorizes the SAR court to interpret the Basic Law, the Law is constitutional law, so the administrative court and the common courts of the SAR have the qualities of administrative litigation and constitutional litigation respectively.
- <sup>38</sup> Wang Yu (20085). *Study of the Constitutional Spirit of "One Country, Two Systems"*. Guangzhou: Guangdong People's Publishing House. 148-154.
- <sup>39</sup> Hu Jinguang (1998). *Study of the Issues of the Chinese Constitution*. Beijing: Xinhua Publishing House. 319-341.
- <sup>40</sup> Wang Yu (20085). *Study of the Constitutional Spirit of "One Country, Two Systems"*. Guangzhou: Guangdong People's Publishing House. 151.
- <sup>41</sup> Taiwan scholar Chen Ai-Er gives four definitions of politics, but she thinks that whatever the definition is, the power of review of the Constitutional Court can not be denied. See Chen, Ai-Er (1999). The Limits to the Chief Justice's Power of Constitutional Interpretation: from the Functional Law. In *The 50th Anniversary of Justice's Interpretation of the Constitution Academic Seminar Minutes*. Taipei: Justices Yuan. 320-321.
- <sup>42</sup> Tsou, Cheng-Chung (2003). *On the Legal Principle of "Political Avoidance" in the Constitutional Interpretation*. Taipei: National Taiwan Normal University Ph.D Thesis. 90-91.
- <sup>43</sup> The identification by the Standing Committee of the National People's Congress is not retroactive according to Article 17.3 of the Hong Kong Basic Law and the Macao Basic Law.