

Legal Protection of the Rights and Interests of Hong Kong and Macao Residents in Applying to be Civil Servants of Mainland China

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Abstract—With the major changes in the situation of the world and China, the appeals of Hong Kong and Macao residents become more and more increased and diversified, and they gradually desire to participate in the political life of the country. Many Hong Kong and Macao residents are eager to be able to apply to be civil servants, so as to join in the enactment of national policies. However, Chinese laws and regulations cannot meet the requirements of Hong Kong and Macao residents to apply for civil service at the present time. In order to reduce the cost of legislation and coordinate the Civil Servant Law with other laws and regulations, it is necessary for China to stipulate clearly in the Civil Servant Law that Hong Kong and Macao residents have the right to apply to be civil servants of mainland China, and also provide for the enforcement of these rights in detail, so as to encourage Hong Kong and Macao residents to participate in the national politics.

Keywords—Hong Kong and Macao residents; apply to be civil servants; the rule of law

I. INTRODUCTION

The right to hold public office, that is, the right for citizens to hold office in state organs and other public institutions [1]. The second paragraph of Article 21 of Universal Declaration of Human Rights provides that: “Everyone has the right to equal access to public service in his country [2].” Article 25 of International Covenant on Civil and Political Rights American provides that: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions...To have access, on general terms of equality, to public service in his country.” [3]. Hence one can see that the international community attaches great importance to the protection of the rights of a citizen to hold public office. However, Chinese constitution doesn't clearly provide for the rights to hold public office, but the third paragraph of Article 2 of The

Constitution of People's Republic of China provides that: “The people administer state affairs and manage economic, cultural and social affairs through various channels and in various ways in accordance with the provisions of law.” Thus, it can be seen from the viewpoint of the spirit of Chinese constitution, China affirms the legal protection of the right of her citizens to hold public office.

In the past, China has been mainly focusing on the economic rights and interests, the right to social protection and the right to leave and return of Hong Kong and Macao residents, and ignoring the political rights and interests of them. As a result, it is difficult for them to act as an owner in the establishment of the rule of law and democracy. Without the full participation of Hong Kong and Macao residents, there can not truly draw on the precious views of Hong Kong and Macao residents, some laws, regulations and policies are hardly capable of reflecting the appeals of Hong Kong and Macao residents. In recent years, with the major changes in the situation of the world and China, the appeals of Hong Kong and Macao residents have become more and more increased and diversified, and they gradually desire to participate in the political life of the country. To affirm the right of Hong Kong and Macao residents to participate in the national politics at the institutional level, especially the right to hold public office, it will be favorable to the defense of their political rights, and the promotion of the rule of law in China. In China, the most important of the right to hold public office is the right, which is enjoyed by citizens, to enter oneself for the civil office examination and be appointed as a civil servant. Most national staffs are able to enter into the forefront of the establishment of the policies at the state or local level. Therefore, to clearly provide for the rights of Hong Kong and Macao residents to enter oneself for the civil office examination by law, and establish relevant implementation procedures, relief approaches and accountability mechanism,

will help to stimulate Hong Kong and Macao residents to enter the troops of civil servants, thereby enter the forefront of establishment of the recruitment laws, regulations and policies of civil servants. Therefore, this article will discuss the right to enter oneself for the civil servant office examination in detail, which is the most important of the right to hold public office.

II. EXISTING PROBLEMS IN THE REGISTRATION OF HONG KONG AND MACAO RESIDENTS FOR MAINLAND CHINA CIVIL OFFICE EXAMINATION AND THEIR CAUSES

A. *At the State Level: the Deficiency in the Protection of the Rights and Interests of Hong Kong and Macao Residents to Register for Mainland China Civil Office Examination*

Before 1997, because Hong Kong and Macao have not returned to China, China has not established the institution for Hong Kong and Macao residents to register for mainland China civil office examination. Still, China has been paying great attention to the introduction of overseas talents, including those in Hong Kong and Macao. In 1983, China's State Council promulgated the Temporary Regulation of Civil Servants, which officially provided that civil servants shall be recruited through public examination. However, this regulation didn't clearly provide that Chinese civil servants shall have Chinese citizenship. The Civil Servant Law of the PRC that was put into effect on January 1st, 2006 declared officially and clearly that Chinese civil servants shall have Chinese citizenship. Hereafter, the recruitment of state or local civil servants has been through public examination without exception, which has signified the formal establishment of institution of recruitment of civil servants by examination. According to the regulations of the Civil Servant Law, among Hong Kong and Macao residents are some citizens who have Chinese citizenship, and they should enjoy the right to register for the mainland China civil office examination. However, up to now, the laws, regulations and policies at the state level or state department level still have not clearly provided that Hong Kong and Macao residents have the right to apply for office as civil servants or as public institution officers, in state organs or in state-owned company, enterprises, public institutions and people's organizations, that is, the protection institution for Hong Kong and Macao residents to register for civil office examination is still deficient.

B. *At the Local Level: the Legitimacy of Regulations of Local Governments Is Questionable*

Although institutions at the state level haven't clearly declared whether Hong Kong and Macao residents have the right to apply for the mainland China civil office examination, some provinces, such as Guangdong Province, have already begun to carry out the institutions of the protection of the rights of Hong Kong and Macao residents to register for civil office examination. According to Chinese law system, whether local governments have the right to make fundamental regulations about the right of Hong Kong and Macao residents to register for the civil office examination is to be discussed. First of all, the Legislation Law of the PRC already authorized the State Council to decide the creation, structure and authority of the state organs, that is, the State Council can enact

normative documents about the right to hold public office. Secondly, the articles from Article 14 to Article 20 of the Civil Servant Law already clearly provided that the decision of the post and level of civil servants is due to the central government or the State Council; even the decisions about disciplinary measures to civil servants, according to Article 2 in the Punishment Ordinance for Civil Servants Working in Administrative Organs, apart from regional laws, departmental rules and regulations, regional governmental rules and regulations, which can supplement regulations about illegal and undisciplined actions and their punishments, should all be made by relevant central state organs. Finally, Article 8 and Article 9 of the Provisions On Civil Service Recruitment (for Trial Implementation) already clearly provided that the central ministries shall draft the laws, regulations and policies about the recruitment of civil servants; while local governments are only to carry out the laws, regulations and policies about the recruitment of civil servants drafted by the central ministries. Thus, it can be seen in the instance where at the central government level the group who can register for civil office examination is not clear, while at the regional level local governments provide that Hong Kong and Macao residents are able to register for the civil office examination, the suspicion of violating superior laws is hard to avoid; in addition, some regions allow Hong Kong and Macao residents to register for the civil office examination, while some other do not, and these allowing locals shut Hong Kong and Macao residents out because they can't show papers that can prove their Chinese citizenship; all these cause that Chinese institution of registration for the civil office examination is very chaotic. From the point of Chinese law system, since most Hong Kong and Macao residents originally hold Chinese citizenship, it is a historic advance that some regions allow them to register for the civil office examination; but on a long view, the establishment of relevant regulations needs central government to issue corresponding papers.

C. *At the Judicial Level: the Cost of Remedies Is Extremely High*

"No remedies, no rights", viewing from the current, from the point of judicial protection of the right of Hong Kong and Macao residents to register for the civil office examination, there are two main difficulties. On the one hand, it is difficult to win the lawsuit. From the current legal framework, the levels of legislation and enforcement haven't fully protected the right of Hong Kong and Macao residents to register for the civil office examination; and if they rashly seek protection through administrative litigation, the outcome will be hard to predict. In some regions where the Civil Servant Law hasn't been fully enforced, Hong Kong and Macao residents are probable to lose the lawsuit. On the other hand, it is difficult to enforce. They might get the right to register for the civil office examination through litigation, but viewing from current pattern of civil office examination, formal inequity can't paper over essential inequity. Since most Hong Kong and Macao residents live abroad all year round, especially the new generations among them, they have been educated in the foreign environment since childhood. At the same time, the topics of the civil office examination are often domestic situation; for Hong Kong and Macao residents, it is hard to

show them essential equity. The judiciary authorities are impossible to take the place of administrative authorities to recruit Hong Kong and Macao residents, and this causes that they might get the right to register for the examination, but they get no essential help from judicial protection. In one word, although the current judicial level haven't given them essential protection to their right to register for the civil office examination, they might through judicial approaches, force the legislation and the enforcement of protection; however, this might get very costly.

III. THE REASON AND SIGNIFICANCE OF THEIR REGISTRATION FOR THE CIVIL OFFICE EXAMINATION

A. *The Demands of Overall Establishment of Rule of Law*

Since the fourth plenary session of the 18th CPC Central Committee, the party and state had begun to change the approach to govern Hong Kong and Macao, from govern by policies to govern by rule of law; the government of Hong Kong and Macao becomes part to the overall establishment of rule of law in China. Under the circumstances of overall establishment of rule of law in China, Hong Kong and Macao residents, as Chinese citizens, ought to enjoy the rights and, being subjects of rights, shoulder corresponding obligations, thereby show the consistency of rights and obligations by the perform of the rights and obligations. If only mainland citizens have fully enjoyed the right to register for the civil office examination, while Hong Kong and Macao residents, who are abroad all year round, have not, then, the weak position of them will be particularly outstanding; this reality will conflict with the demands of the establishment of rule of law in China, and will eventually go against the carrying out of the rule of law. Lately, Hong Kong had witnessed some political turmoil, which arose mostly from the discontent of Hong Kong and Macao residents towards government's policies. Behind these political turmoil, apart from the foreign interference of hostile forces, China's policies towards Hong Kong and Macao have some deficiency in themselves. Present policies towards are almost entirely made by those who think they know the situation of Hong Kong and Macao well; They rarely conduct field visits, therefore do not know well the real demands of Hong Kong and Macao residents. If they are allowed to register for the civil office examination, and enter into the formulation of the policies towards Hong Kong and Macao, not only will the policies be made to be more scientific, but also they will be sincerely convinced, thereby the establishment of rule of law will be pushed further. Therefore, Chinese government should clearly provide for the right of Hong Kong and Macao residents to register for the mainland China civil office examination as soon as possible.

B. *The Demands of the Protection of the Rights and Interests of Hong Kong and Macao Residents*

The aim of stipulation of obligation in law is to make sure the enforcement of the protection of the rights provided for in law. Various countries in the world have never seen absolute rights or liberties. Under the circumstance that China is paying more and more attention to the protection of human rights, if Hong Kong and Macao residents fail to enjoy fully the right to

hold public office, then, the other rights of them will be hard to protect effectively. Hong Kong and Macao residents usually have interests in China, such as land, house property, etc. Therefore they care for the fortune of China, especially the change of policies towards the recruitment of civil servants, because these will affect their self-interests. Although most Hong Kong and Macao residents are abroad away from mainland China, or only stay for a short time, they also will try their best to participate in the administration and discussion of state affairs, especially by being a civil servant through registration for the civil office examination, in order to be able to participate in the enactment of the policies towards the recruitment of civil servants. They ask for the right to hold public office, which not only ask for the protection of their self-interests, but also ask for the protection of public interests. At present, in the process of comprehensive establishment of the rule of law, it is time to reassert the protection of their right to hold public office, and the time couldn't be better. On the one hand, it shows China doesn't treat Hong Kong and Macao residents as the privileged; on the other hand, it will help to urge them to participate in the national politics while they enjoy the conveniences provided by the nation, thus their identity of Chinese citizens could be made clear [4]. E•Bodenheimer thought that equity could refer to the rights to participate in public affairs and the income distribution system, or could also refer to the social and legal status of the underprivileged [5]. If the political rights of Hong Kong and Macao residents are different from those of mainland China residents, or even incomplete, then the equal status of Hong Kong and Macao residents is only empty word.

C. *The Demands of Drawing from the Talent of Hong Kong and Macao Residents*

Since Chinese Economic Reform and open up, many Hong Kong and Macao residents have come back to China and made indelible contributions to China's modernization construction. Up to now, they have formed an important force in the matter of economy, politics and society. Along with the continual improvement of China's economic strength and comprehensive national power, not only old generations of Hong Kong and Macao residents have frequently come back to mainland China to visit relations, offer sacrifice to ancestors and seek medical advice, but also new generations of them have come back to mainland China to attend school, invest and even settle down. At present, Hong Kong and Macao residents are many and widespread; meanwhile, most of them are powerful in economy, influential in politics, high in society status, accomplished in culture. If we simply emphasize on the protection of rights of them, while ignoring to let those who are Hong Kong and Macao residents and know Hong Kong and Macao well to enter into the formulation of the policies of the protection of the rights of Hong Kong and Macao residents, then, the protection of their rights will be harmed, and it will be difficult to fully show their demands. Therefore, based on the new circumstance of comprehensive establishment of the rule of law, the protection of Hong Kong and Macao resources, the endeavor for them to enter into politics in China, particularly for them to enter into the management of public affairs concerning foreign affairs, will eventually be favorable to the unification of China, the expansion of public diplomacy

and the improvement of China's international influence and comprehensive power [6].

IV. THE IMPROVEMENT OF THE LEGAL PROTECTION OF THE RIGHT OF HONG KONG AND MACAO RESIDENTS TO REGISTER FOR MAINLAND CHINA CIVIL OFFICE EXAMINATION

In the past, under specific historical circumstances, China chiefly employed policy measures to ensure the protection of the rights and interests of Hong Kong and Macao residents. Because of the flexibility of policies, the easiness for them to come out when compared to laws or regulations, the convenience of their formulation, they were apt to solve various problems of Hong Kong and Macao residents meet in mainland China. With the deepening of market economy, on account of the weak principle and stability of policies, particularly the weak constraint of policies, policies are hard to adapt to the demands of the protection of the rights and interests of them under the new circumstances, particularly the demands of the protection of the right of them to hold public office. China's use of stable, authoritative and strongly bounding laws and regulations to protect Hong Kong and Macao residents' rights and interests, is the trend of history and the direction of the people. Therefore, present protection of their rights and interests emphasizes on the aspect of laws, instead of policies.

A. *Legislative Protection: Oriented Towards the Law on the Protection of the Rights and Interests of Residents of Hong Kong and Macao to Improve Relevant Institutions*

First, we should make sure the principles of protection. The legal protection of the right of Hong Kong and Macao residents to register for the civil office examination should be based on legality, fairness, promptness and convenience. Above all, in the process of the comprehensive establishment of the rule of law, the administrative departments should administer by law, and make sure the protection of their right to register for the civil office examination. In the next place, the spirit of the rule of law requires that before law all people are equal, and that there should not be the privileged who are above law. When the administrative departments are dealing with Hong Kong and Macao residents' registration for the civil office examination, they shouldn't discriminate the poor, instead, they should stick to fairness and quality. Same situation, same treatment. Furthermore, owing to Hong Kong and Macao residents' registration for the civil office examination influences the overall image of Chinese society in their heart, the administrative departments should protect their right according to law, for example, when residents are doing cognizance of their Hong Kong and Macao identity, the administrative departments should stick to the principle of promptness, improve the efficiency of administration, so as to build up good image of Chinese government. Finally, on account of the fact that the cost of travel between Hong Kong and Macao and mainland China is very high, the administrative departments should stick to the principle of convenience, lessen unnecessary formalities.

Second, we should clearly provide in law that Hong Kong and Macao residents are able to register for the civil office examination. At present, the Civil Servant Law is under

revision. Being national norm of law, the Civil Servant law shoulders the responsibility of leading the protection of various rights and interests of Hong Kong and Macao residents. The right to hold public office is one of the political right, so in the Civil Servant Law we should clearly provide that Hong Kong and Macao residents do have the right to register for the civil office examination rather than could. On account of the particularity of Hong Kong and Macao residents, if we provide in law that their application requirements are the same with those of mainland China residents, the unity of form and substance will be difficult to come true. Therefore, we should make clear the application threshold, the design of examination, the setting of positions and other aspects of Hong Kong and Macao residents' registration for the civil office examination could be different from those of mainland China residents. To cut down the cost, after the Civil Servant Law has made provisions of principle and before Hong Kong and Macao Affairs Office of the State Council has the independent right to formulate departmental regulations, the Ministry of Human Resources and Social Security and Hong Kong and Macao Affairs Office of the State Council could jointly formulate the detailed regulations for implementation for Hong Kong and Macao residents to register for the civil office examination, and the more detailed regulations for procedures in implementation, including the registration procedures for Hong Kong and Macao to register for the civil office examination, relief approaches, the accountability mechanism and other aspects.

B. *Enforcement Protection: Protect the Right of Hong Kong and Macao Residents to Register for the Mainland China Civil Office Examination through Various Channels*

First, different text papers in one exam for different persons. Since most Hong Kong and Macao residents stay abroad from mainland China for years, especially some residents of new generations, who have received foreign education from childhood, maybe even speak a foreign tongue, their Chinese are probably somewhat poor. Apart from this, most Hong Kong and Macao residents' Chinese education is that of traditional Chinese character, therefore they are not very familiar with simplified Chinese character. Instead, mainland China residents widely use simplified Chinese character in every field. On account of the particularity of Hong Kong and Macao residents, the approaches for them to register for the civil office examination should be varied according to different persons. It is not right and impossible to fully impose the regulations in mainland China on them. Therefore, the text papers of the civil office examination could, referring to the national judicial examination, have minority languages, traditional Chinese character, simplified Chinese character and even foreign languages. Limited by Chinese education system and the common language in the international community, and for the purpose to lower the difficulty for the civil office examination to reform and the cost of it, the foreign language here, is temporarily defined as English and Portuguese. Besides, if having got past through the discussion of the relevant departments in China, but having not suitable circumstances to be enforced throughout China, the multilingual civil office examination could make experiments in some areas that allow Hong Kong and Macao

residents to register for the civil office examination. After these area have mature experience, we can extend the experiment to other parts of China step by step.

Second, increase positions according to distinction. Equality of opportunity is the primary requirement of the right to hold public office. The positions of public affairs are limited; therefore not everyone can hold a public office. But we should first make sure that every citizen has equal access to public affairs and public office. Most of Hong Kong and Macao residents stay abroad for years, maybe they are not so familiar with the situation in mainland China, while the civil office examination often have it in test papers, which is unfair to the eye of Hong Kong and Macao residents. However, their familiarity with the situation abroad is usually deeper than that of mainland China residents. Under the circumstance of comprehensive promotion of the One Belt One Road strategy, for the purpose of extending China's public diplomacy, improving China's international influence and attracting more foreign capital to invest in China, it is necessary to fully make use of the precious human resource of Hong Kong and Macao residents [7]. In the departments, which are concerning Overseas Chinese, foreign affairs, Hong Kong and Macao or business, we can set up some positions reserved for Hong Kong and Macao residents. If in that year has not enough registration of Hong Kong and Macao residents, we can extend the examination to returned overseas Chinese, relatives of overseas Chinese, overseas students and other groups. We could gradually increase the number of Hong Kong and Macao residents who are familiar with the situation abroad, entering into the civil office service, so as to really show the equality of opportunity in the registration for the civil office examination.

Third, advance the status of the HKMAO and establish the regular maintenance system. For many years, being an institution of the State Council, Hong Kong and Macao Affairs Office of the State Council, has been in a passive position in the legislation work, on account that it lacks independent administrative functions and the right to enact departmental regulations, and could only draw up and propose relevant laws and regulations. While the Ministry of Human Resources and Social Security, the Ministry of Foreign Affairs, the Ministry of Public Security, the Ministry of Education and other ministries concerning foreign affairs, which are not familiar with situation in Hong Kong and Macao, being constituent departments of the State Council or its direct subordinates, own the right to establish departmental regulations. Their efforts to protect the political rights of Hong Kong and Macao residents are difficult to guarantee success. Therefore, it is necessary for China to upgrade the status of the HK and Macao as a direct subordinate to the State Council, conferring independent administrative functions on it and allowing it to own the independent right to establish departmental regulations. After the up gradation of the status of the departments concerning Hong Kong and Macao affairs in government offices, these departments will have the power to enact detailed regulations about the protection of the rights and interests of Hong Kong and Macao residents to register for the civil office examination, which will be favorable to the protection. Moreover, the departments concerning Hong Kong and Macao affairs at different levels should strengthen

supervision, and could set up inspection teams when necessary to supervise relevant departments' enforcement of the regulations about the protection of the rights and interests of Hong Kong and Macao residents to register for the civil office examination, discover problems found in the supervision and solve them.

C. Judicial Protection: Reversely Force the Legislation and Enforce the Law of Protection

In China, the manners of the judicial protection for the rights and interests of citizens, are chiefly legislative protection, which is in plain text, and the "reverse forcing out" of legislative protection by judicial practice. The so-called legislative protection in plain text, take the example of the protection of the right of Hong Kong and Macao residents to register for the civil office examination, is that after the perfection at the legislative level, we should correspondingly design the judicial relief approaches in case that right is violated. The court of justice is to make judgment to protect that right in accordance with the law. The so-called "reverse forcing out" of legislative protection by judicial practice, which means that even at current legislative level that right haven't been clearly provided for, the judicial relief, being the last approach for the relief of citizens' rights and interests, should force the legislation so as to protect that right. Hong Kong and Macao residents, being Chinese citizens, have the title to the judicial relief of that right, which make sense both to law and reason.

At present, China has in total three judicial relief approaches for Hong Kong and Macao residents to "walk on".

1) *Administrative litigation*: If thinking the recruitment department has violated his legal right, or that the administrative actions made by the recruitment department is unfair and want to challenge it, the administrative counterpart could institute legal proceedings in accordance with the Administrative Procedure Law. The above-mentioned relief approaches, should all have unified accountability mechanism. Specifically speaking, the administrative supervisory departments or the departments in charge of appointment and removal should, in concurrence with the departments in Hong Kong and Macao, jointly carry out investigation into the illegal actions done by the recruitment department that violate the right of Hong Kong and Macao residents to register for the civil office examination. If the case is true, the persons directly responsible should be held for administrative responsibility; and if there is suspicion of violation of the Criminal Law, the case should be referred to the judicial departments.

2) *Prosecutorial supervision*: In China, procuratorial organs are also the constituent part of judiciary authorities. Being legal supervising organ, procuratorial organs could guard the protection of the right of Hong Kong and Macao residents to register for the civil office examination. On the one hand, the procuratorial organs should supervise and urge the administrative departments to enforce the protection of that right and administer justice towards the illegal actions of

the administrative departments and their staffs of violation of that right in accordance with the law. On the other hand, when met by the misconduct or negligence in the procedure of the recruitment of civil servants, Hong Kong and Macao residents should make courage to report it to the procuratorial organs so as to protect their own rights.

3) *State compensation*: In the procedure of registration for the civil office examination, when encountered by the violation by administrative subjects and their staffs of personal rights and property right and the violation has made harm, Hong Kong and Macao residents could make application for state compensation against the involved administrative subject.

V. CONCLUSION

In the past, on account of the lack of full participation of Hong Kong and Macao residents, some laws, regulations and policies concerning Hong Kong and Macao are difficult to really reflect the demands of Hong Kong and Macao residents. In recent years, the demands of Hong Kong and Macao residents have become more and more increased and diversified, which shows that they are eager to enter into China's politics. Their entrance into Chinese politics is beneficial to the comprehensive promotion of the rule of law, the protection of legal rights of Hong Kong and Macao residents and the motivation of their talents. China government should perfect the protection of the right of Hong Kong and Macao residents to register for the civil office examination at the legislation, enforcement and judicature level. Specifically speaking, from the point of legislative protection, the protection of the right of Hong Kong and Macao residents to register for the civil office examination, should be centered around the protection of the rights and interest of Hong Kong and Macao residents, which must show the principle of legitimacy, fairness, promptness and convenience. China should be oriented by the Civil Servant Law, complete the relevant laws and regulations non-stop. From the point of law enforcement of the protection, we could complete the law enforcement of the protection through the establishment of the recruitment system on the principle of "suitable care" of Hong Kong and Macao civil servants, improvement of relief approaches and regular protection system. From the point of judicial protection, we should improve relief approaches and accountability mechanism, so as to ensure the fair protection of the rights of Hong Kong and Macao residents to register for the civil office examination both in form and substance.

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