

Some Reflections on the Review of Compliance with the Macao Basic Law

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The *Basic Law of the Macao Special Administrative Region of the People's Republic of China* (hereinafter as “the Macao Basic Law”) is the constitutional law with highest status in the legal system of the Macao Special Administrative Region (SAR), and its force and safeguarding mechanism is a significant aspect. If such aspect cannot be carried out, the Macao Basic Law will become a castle built on sands, the regime will not be securely safeguarded with laws no matter how meticulously designed it is, and the concepts of democracy, freedom and rights will become empty no matter how magnificent they are described to be. Nevertheless, there still exists disagreement among the scholars and practitioners with respect to the legal ground, subject, scope and the limit of the review of compliance with the Macao Basic Law.

I. Subject of the Review

The correct understanding and implementation of the Macao Basic Law relates to the development of the whole Macao SAR and the effective protection of the basic rights and interests of Macao residents, and the review of compliance of the Macao Basic Law especially involves the operation of and the check and balance between the legislative, executive and judicial powers. As an important constitutional legal system, the review of compliance with the Macao Basic Law can only be exercised with sufficient constitutional legal ground. As the constitutional law with legal status below the *Constitution of the People's Republic of China* (hereinafter as “the Constitution”), the Macao Basic Law has the supreme legal status in the legal system of the Macao SAR, and it is also explicitly provided that no other laws, decrees, administrative regulations and other normative documents shall contradict with the Macao Basic Law; however, according to the provisions of the Macao Basic Law, the Macao Basic Law only seems to provide the possibility for the review of compliance with the Macao Basic Law, there are no detailed provisions about issues such as the subject and scope of such review. At present, there exists different points of views with respect to the subject of the review among the theoretical researchers and practitioners, and the Court of Final Appeal in the Macao SAR holds that the Macao courts have jurisdiction over cases about the review of compliance with the Macao Basic Law which originates from the joint interpretation of several provisions of the Macao Basic Law.¹ Some scholars are of the view that the Macao courts have no jurisdiction in this respect and the Standing Committee of the National People's Congress (NPC) has the final authority to review the compliance with the Macao Basic Law.² Some scholars are of the opinion that the courts in the Macao SAR exercise power to review the compliance with the Macao Basic Law by interpreting the Macao Basic Law, however, the Standing Committee of the NPC has the final power to review the compliance with the Macao basic laws.³ Still some

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scholars are of the opinion that there is no explicit legislative intention in the Macao Basic Law with respect to the review of the compliance with the Macao Basic Law by the courts, and the courts cannot claim that they enjoy such significant political right, and an interpretation of the relevant provisions of the Macao Basic Law by the Standing Committee of the NPC should be sought in this respect according to Article 143 of the Macao Basic Law since the review power relates to the “provisions on the relationship between the affairs to be administered by the Central People’s Government and those to be administered by the Macao Special Administrative Region”.⁴

1.1 The Standing Committee of the NPC enjoys the power to supervise the implementation of the Macao Basic Law and the final power to review the compliance with the Macao Basic Law

With respect to the wording in the laws of a state, “authorization of powers” and “separation of powers” are two distinctive legal concepts expressing two different kinds of power relationship. Authorization of powers refers to the authorization of powers by the authority which enjoys such powers to the body which has no power. The authorized body originally has no power, and starts to enjoy such power due to authorization; and the authorizing authority has the power to supervise whether the authorized power is duly exercised. Under the concept of separation of powers, two or more authorities exercise their own power respectively according to the separation of powers; and the disputes over the allocation of powers should be resolved according to the original agreement, no authority has power to supervise the other authority. Under the concept of separation of powers, besides explicit provision regarding the powers enjoyed respectively by each authority, there also exists a problem of who enjoys the residual power. However, under the concept of authorization of powers, the authorized enjoys the powers within the limit of authorization, any powers which are not authorized still remain with the authorizing authority, and there is no problem regarding the residual power.⁵

China adopts unitary state structure, as an SAR, the Macao SAR is the same as other local administrations in China, and the powers of Macao including the powers of the courts in the SAR are all authorized by the central authorities. According to the provision of Article 143 of the Macao Basic Law, the power of interpretation of this Law shall be vested in the Standing Committee of the NPC. Although the Standing Committee of the NPC authorizes the courts of the Macao SAR to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the SAR, the courts of the Macao SAR as the authorized enjoy limited powers under the concept of authorization of powers, and the Standing Committee of the NPC, as the authorizer, enjoys the power to supervise whether the authorized exercises the power duly.

At the same time, the Standing Committee of the NPC has the power to review the original laws in Macao and the new laws made after the return of Macao. In accordance with the provisions of the Macao Basic Law, “upon the establishment of the Macao Special Administrative Region, the laws previously in force in Macao shall be adopted as laws of the Region except for those which the Standing Committee of the National People’s Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the provisions of this Law and legal procedure.” (Article 145) “Laws enacted by the legislature of the Macao Special Administrative Region must be reported to the Standing Committee of the National People’s Congress for record.” (Article 17) “If the Standing committee of the National People’s Congress, after consulting the Committee for the Basic Law of the Macao Special Administrative Region under it, considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, the Standing Committee may return the law in question but shall not amend it. Any law returned by the Standing Committee of the National People’s Congress

shall immediately be invalidated. This invalidation shall not have retroactive effect, unless otherwise provided for in the laws of the Region.” (Article 17) Therefore, the Standing Committee of the NPC has the power to review the laws applicable in the Macao Special Administrative Region, and such review power is ultimate.⁶ Once the original laws in the Macao SAR are held to be in contravention with the Macao Basic Law, they must be amended or invalidated through legal procedure and can no longer be applicable in the Macao SAR. Further, the Standing Committee of the NPC also has power to review the laws made by the Macao SAR which are not in conformity with the provisions of the Macao Basic Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the SAR, the laws returned by the Standing Committee of the NPC after its review are invalidated immediately, and the invalidation generally has no retroactive effect.

1.2 The courts of the Macao SAR enjoy the power of the judicial review of the compliance with the Macao Basic Law

There is no explicit provision in the Macao Basic Law that the courts in the SAR enjoy the power of the judicial review of the compliance of Macao laws with the Macao Basic Law. Do the courts in the Macao SAR enjoy the power of the judicial review of the compliance of Macao laws with the Macao Basic Law? One point of view is that the courts in the Macao SAR do not enjoy the power of the judicial review of the compliance of Macao laws with the Macao Basic Law, the ground for such point of view is stated in Article 19 of the Macao Basic Law: “the courts of the Macao Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Macao shall be maintained.” Since before the return of Macao, the courts in Macao had no judicial review power, and the power to review the constitutionality of the laws made by the legislature in Macao was exercised by the Constitutional Court of Portugal, which shall be a legal system and principle previously in force in Macao. Thus, after the return of Macao, such principle should be maintained and the courts in the Macao SAR also enjoy no judicial review power. The author is of the opinion that such point of view is arguable. Pursuant to the provision of Article 67 of the Constitution, the Standing Committee of the NPC has the power to interpret the Constitution, to supervise its implementation, to annul those administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or the statutes and to annul those local regulations or decisions of the organs of state power of provinces, autonomous regions and municipalities directly under the Central Government that contravene the Constitution, the statutes or the administrative rules and regulations. After the return of Macao, the established Macao SAR is one local administrative region of China, and it is indisputable that the courts in the Macao SAR do not have judicial review power, which is in conformity with Article 19 of the Macao Basic Law.

Nevertheless, the problems are: should this provision apply to the Macao Basic Law as the constitutional law of Macao? Do the courts in the Macao SAR have power to review the compliance with the Macao Basic Law? Before the return of Macao, the judicial review of the questions of law concerning the constitutionality by the Constitutional Court of Portugal involved preliminary review and post review. Preliminary review was a general review of specific issues of the legislature while post review referred to the review of specific provisions of the legislature with respect to the special circumstance in the actual case under hearing. The preliminary review by the Constitutional Court of Portugal before the return of Macao is now replaced by the reporting of the laws enacted by the legislature in Macao for record to the Standing Committee of the NPC as prescribed in Article 17 of the Macao Basic Law. However, with respect to the review of the detailed provisions in actual cases, there is no explicit provisions in the Macao Basic Law regarding the actual body which exercises such power to review the compliance with the Macao Basic Law since there is no such constitutional court like the Constitutional Court of Portugal in China, and

Article 11 only contains the principle that no law, decree, administrative regulations and normative acts of the Macao SAR shall contravene the Macao Basic Law.

Although the Macao Basic Law contains no explicit provision that the courts in the Macao SAR have power to review the compliance with the Macao Basic Law, the courts in the Macao SAR should enjoy the power to judicially review the compliance with the Macao Basic Law in hearing cases from the perspectives of interpretation power and judicial power. In accordance with the provisions of the Macao Basic Law, the courts in the Macao SAR have the power to interpret and adjudicating the Macao Basic Law. According to the provisions of Article 12, 19 and paragraph 2 of Article 143, the Macao SAR enjoys a high degree autonomy authorized by the Central authorities, and enjoys judicial power over all cases in the Macao SAR within the limit of autonomy; the courts in the Macao SAR enjoy the power vested by the Standing Committee of the NPC to interpret the provisions of the Macao Basic Law within the limit of the autonomy and those which do not involve affairs which are the responsibility of the Central Government, or the relationship between the Central Authorities and the SAR. The judicial power enjoyed by the courts in the Macao SAR also includes the power to interpret laws. Thus, the courts in reality exclude the application of laws which are not in compliance with the Macao Basic Law, which actually safeguards the status and implementation of the Macao Basic Law.

On the other hand, in accordance with Article 2 and Section 4 of Chapter 4 of the Macao Basic Law, the Macao SAR exercises a high degree autonomy and the courts in the Macao SAR exercise independent judicial power and adjudicating power, they shall conduct adjudication independently and shall be subordinated to nothing but law and shall not be subject to any interference; the judges of the Macao SAR shall exercise judicial power according to law, instead of according to any order or instruction, except in the situation as prescribed in paragraph 3 of Article 19 of this Law; and the courts of the Macao SAR are obligated to maintain the judicial justice in the SAR. The Macao Basic Law is the supreme law in the SAR except for the Constitution, and it certainly falls within the laws which the courts of the Macao SAR should follow in adjudicating. Pursuant to Article 11 of the Macao Basic Law, no law, decree, administrative regulations and normative acts of the Macao SAR shall contravene the Macao Basic Law. So, the exclusion by the judges of the application of laws and regulations contravening the Macao Basic Law in the trial of actual cases is actually based on the observance of the prevailing status of the Macao Basic Law and of Article 11 of the Macao Basic Law. Therefore, it is concluded that the judicial power of the courts of the Macao SAR within the limit of autonomy actually includes the power to review the compliance with the Macao Basic Law.

1.3 The Legislative Council of the Macao SAR exercises in certain extent the power to review the compliance with the Macao Basic Law within the limit of autonomy

From the above statement, if the courts discover that the laws to be applied contravene with the Macao Basic Law in hearing cases, they will exclude the application of such laws since the Macao Basic Law prevails over general laws, which actually safeguards the implementation of the Macao Basic Law. However, under current system, the courts cannot make amendment to, suspend the implementation of or annul the laws (provisions) which contravene the Macao Basic Law; instead, they can only render orders not to apply such laws (provisions). In practice, due to the different legal tradition in the Macao SAR and the Hong Kong SAR, a decision made by the same court will have different legal effects in two different SARs which both apply the Basic Laws.

With respect to the legal tradition, the legal system in Hong Kong originates from the common law system. If the courts of the Hong Kong SAR hold certain laws (provisions) incompliant with the the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (hereinafter as "the Hong Kong Basic Law") in hearing cases and decide not to apply such

laws (provisions), such laws which are incompliant with the Hong Kong Basic Law will no longer be legally effective in essence due to the doctrine of precedent in case law system; thus, the uniformity in application of the laws will be maintained and the effective implementation of the Hong Kong Basic Law will be ensured.

However, the legal system in Macao originates from the civil law system, and the precedents are not regarded as the formal source of law and ground for deciding cases. Without the doctrine of precedent which is available in Hong Kong legal system, if the courts of the Macao SAR hold certain laws (provisions) incompliant with the Macao Basic Law in hearing cases and decide not to apply such laws (provisions), such laws which are incompliant with the basic law will not lose its effectiveness despite the decision of its inapplicability by the courts. Thus, the application of the same law might lead to two different situations of legal effectiveness, which is against the principle of justice and rule of law and prejudice the right of individuals to be treated equally before the law.

On the other hand, the Standing Committee of the NPC has the power to review the laws already existing in Macao according to the Macao Basic Law, if the Standing Committee of the NPC, upon review, considers that any law enacted by the legislature of the SAR is not in conformity with the Macao Basic Law, such law must be amended or suspended according to the legal procedure, and it can no longer be applied in the Macao SAR.

According to Article 67 and 71 of the Macao Basic Law, as the legislature of the Macao SAR, the Legislative Council of the Macao SAR has the legal power to enact, amend, suspend or repeal laws. Thus, the decision to amend, suspend or repeal the laws which are incompliant with the Basic Law should be made by the Legislative Council of the Macao SAR.

In making the decision to amend, suspend or repeal the laws, the Legislative Council of the Macao SAR needs to review whether such laws are in compliance with the Macao Basic Law. Only when such laws are held to be incompliant with the Macao Basic Law after review, the decision to amend, suspend or repeal such laws which are incompliant with the Macao Basic Law can be made in according to Article 11 and 71 of the Macao Basic Law. In this case, the review of such laws by the Legislative Council of the Macao SAR must involve the essential "judgment" on whether such laws are incompliant with the Macao Basic law and the final disposal of such laws which are incompliant with the principles and provisions of the Macao Basic Law to enable its compliance with the Macao Basic Law. Such judgment is in essence a kind of review of such laws with respect to its compliance with the Macao Basic Law. Therefore, the author is of the opinion that the Legislative Council of the Macao SAR exercises in some sense the power to review the laws with respect to their compliance with the Macao Basic Law within the limit of autonomy.

With respect to the dispute whether Item 8 of Article 71 of the Macao Basic Law provides an independent or ancillary power to the Legislative Council of the Macao SAR to summon persons concerned to testify or give evidence, some members of the Legislative Council believe that such power is an independent power while Lau Cheuk Va, the former president of the Legislative Council interpreted such power to conduct hearing as an ancillary power. He held that the power to conduct hearing granted to the Legislative Council by the Macao Basic Law is not an independent power although it is regarded as an independent power in the current rules of procedures of the Legislative Council, and it is thus necessary to amend the current rules of procedures to be in conformity with the Macao Basic Law. If the rules of procedures of the Legislative Council is finally proposed to the Legislative Council for amendment due to this reason, a judgment will have be made with respect to the compliance of the current provision regarding the power to conduct hearing in the rules of procedures with the Macao Basic Law no matter whether such provision will be amended or not, and such judgment itself is a review of the law with respect to its compliance with the Macao Basic Law.

It is worth noting that the power exercised by the Legislative Council of the Macao SAR to review the laws with respect to its compliance with the Macao Basic Law is distinctive from the

traditional “judicial review” in the United States, it is a power to review the local laws by exercising the legal power granted by the Macao Basic Law to amend, suspend or repeal the laws according to the provisions and legal procedures of the Macao Basic Law to protect the right of the residents to be treated equally before the law, to safeguard the implementation of the Macao Basic Law and to ensure the uniform order of the law.

II. Legal Limit

As stated above, the Standing Committee of the NPC, the courts and the Legislative Council of the Macao SAR can all exercise the power to review the compliance with the Macao Basic Law in the SAR, then, we need to further clarify some practical problems, such as how to draw the limits of the power enjoyed by each body, how to draw the legal line of the scope of review by each body and how to initiate the review by each respective body.

2.1 Review of the laws previously in force before the return of Macao

According to Article 145 of the Macao Basic Law, “upon the establishment of the Macao Special Administrative Region, the laws previously in force in Macao shall be adopted as the laws of the Region except for those which the Standing Committee of the National People’s Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the provisions of this Law and legal procedure.” On 31st October 1999, the Standing Committee of the NPC passed the *Decision on Disposition of the Existing Laws in Macao Pursuant to Article 145 of the Basic Law of the Macao Special Administrative Region* (hereinafter as “the Decision”), which illustrates in details about the general information on the existing laws in Macao and the scope of review, and also provides different ways of disposition in the case when the entire laws or regulations are in contravention of the Macao Basic Law, when only partial provisions of such laws are in contravention of the Macao Basic Law and when the existing laws in Macao will be discovered to be in contravention of the Macao Basic Law in future. The Decision also provides the principles of applying the existing laws in Macao which have been adopted as laws of the SAR, including title, the principle of replacing words and sentences, and the way to deal with the Portuguese laws applicable in Macao is provided in the Decision as well. A thorough systematic review of the existing laws in Macao with respect to their compliance with the Macao Basic Law was then conducted, and 855 pieces⁷ of existing laws in Macao were reviewed mainly including the laws, decrees, administrative regulations and other normative documents made by the legislature of Macao and excluding the Portuguese laws applicable in Macao and the laws specially made by Portugal for Macao.

Due to objective reasons, the lump sum review by the Standing Committee of the NPC in October 1999 cannot completely resolve the problem of compliance of the laws previously in force with the Macao Basic Law. The laws previously in force in Macao include laws made by the legislature of Macao and those made by the Portuguese authorities generally for Portugal and particularly for Macao; they are mainly in the forms of laws, decrees, orders, approvals and resolutions. These laws are many in quantity and also complex. Portuguese side could not provide a definite number of the laws in force in Macao before the return of Macao, and it only provided to China side by the China-Portugal Liaison Group a list of 877 pieces⁸ of current laws and decrees made by the Legislative Council of Macao and the Governor of Macao during 1976 to 1997. Due to various reasons, the Preparation Committee of the Macao SAR reviewed only the laws and decrees of the laws previously in force in Macao instead of all the laws previously in force; and some laws and decrees were not reviewed since there were no Chinese versions of them. Besides, some

normative documents such as laws and decrees were passed by the legislature of Macao during the period from the enactment of the Decision on 31st October 1999 to the establishment of the SAR on 20th December 1999, all these laws were not reviewed, and such laws previously in force which were not reviewed may contain provisions in contravention of the Macao Basic Law.

In practice, the most disputed law is the Decree No. 101/99/M *Aprova o Estatuto das Linguas Oficiais (Approval of the Status of the Official Language)*, which was approved by the Macao Governor Vasco Joaquim Rocha Vieira on 7th December 1999 and effective upon promulgation on 13th December 1999. Article 4 of this Decree provides that the laws or administrative regulations which are not officially promulgated in both official languages are not legally effective, and Article 7 provides that all printed documents, forms or other equivalent documents provided by the administration should be made in both official languages. The above two provisions are greatly disputed, and they are regarded as incompliant with the Macao Basic Law according to some scholars.

Due to the above problem and the fact that there would be some undiscovered contravention of the Macao Basic Law among the laws previously in force which have been reviewed by the Preparation Committee, the Standing Committee of the NPC provides in Article 7 of the Decision on 31st October 1999 that "the existing laws of Macao adopted as the laws of the Macao Special Administrative Region may be amended or abolished pursuant to the provisions of the Basic Law and legal procedures if found conflicting with the Basic Law subsequently" to resolve such problems, maintain the status of the Macao Basic Law and safeguard the implementation of the Macao Basic Law.

However, who will find such laws as conflicting with the Macao Basic Law subsequently? How to amend or abolish such laws pursuant to the provisions of the Macao Basic Law and legal procedures if they are found conflicting with the Macao Basic Law? The author believes there are three cases in this respect:

1) If the Standing Committee of the NPC finds after the establishment of the SAR the existing laws conflicting with the Macao Basic Law, the Standing Committee of the NPC can review them pursuant to the provision of the Macao Basic Law and dispose of them according to the Decision. That is, the Standing Committee of the NPC makes judgment according to the principles prescribed by the Decision, reviews the details of such provisions to determine the specific classification in the Annex to the Decision they fall within and then decides the relevant disposition. The Standing Committee of the NPC may dispose of such existing laws which are in contravention of the Macao Basic Law by classifying them as one of the classification in the Annex by way of amending the Decision, or dispose of them by making a new decision.

2) If the courts of the Macao SAR find certain provisions conflicting with the Macao Basic Law in hearing cases, the Court of Final Appeal in the Macao SAR may apply to the Standing Committee of the NPC for interpretation with respect to the provisions involving the affairs to be administered by the Central Government and the relationship between the Central Government and the Macao SAR since the judicial organs in Macao do not have the power to amend, suspend or repeal the laws pursuant to the Macao Basic Law. In accepting the application for interpretation, the Standing Committee of the NPC will make relevant interpretation as requested; it will also review whether such law is conflicting with the Macao Basic Law and have the disposition accordingly. With respect to the conflicts of laws involving internal affairs of the SAR, if the courts of the Macao SAR regard the relevant legal provisions conflicting with the Macao Basic Law, they can only decide that such legal provision should not be applied in the specific case since the power to amend, suspend or repeal the laws belongs to the Legislative Council of the Macao SAR.

3) If the legislative organ of the Macao SAR finds the existing laws conflicting with the Macao Basic Law, the Legislative Council of the Macao SAR can promptly review the laws according to the legal procedures and amend, suspend and repeal such laws to ensure the legality of

the law, uniformity in applying the laws and maintain the authority of the Macao Basic Law since the Macao Basic Law vest in it such power.

2.2 Review of the local laws enacted by legislature in Macao after the return of Macao

With respect to the review of the local laws enacted by legislature in Macao after the return of Macao, the Legislative Council of the Macao SAR must stick to the legislative principle of following the basic principle and spirit of the Macao Basic Law and conduct general and detailed review of the drafts of bills or drafted amendments to laws to ensure their compliance with the Macao Basic Law in making the local laws by exercising the legislative power vested by the Macao Basic Law. Through such legislative review by the Legislative Council, the opportunity of passing the local laws which are in conflict with the Macao Basic Law and of enacting such laws will be reduced

Meanwhile, the laws made by the legislature of the Macao SAR pursuant to Paragraphs 2 and 3 of Article 17 of the Macao Basic Law must be reported to the Standing Committee of the NPC for record. After consulting with the Committee for the Basic Law of the Macao SAR, if the Standing Committee of the NPC holds any laws made by the legislature of the Macao SAR as conflicting with the provisions on the affairs under the administration of the Central Government and on the relationship between the Central Government and the Macao SAR, it can return such laws without any amendment. The laws returned by the Standing Committee of the NPC will be invalid immediately. Such invalidation does not have retroactive effect unless otherwise provided by the laws of the Macao SAR. Therefore, the Standing Committee of the NPC has the power to review the parts of the newly enacted local laws which are conflicting with the provisions on the affairs under the administration of the Central Government and on the relationship between the Central Government and the Macao SAR. Such review is carried out through the recording system prescribed in Paragraph 2 of Article 17 of the Macao Basic Law. Through reporting the laws made by the legislature of the Macao SAR to the Standing Committee of the NPC for recording, the Standing Committee of the NPC will review such laws with respect to their compliance with the provisions on the affairs under the administration of the Central Government and on the relationship between the Central Government and the Macao SAR. If such new laws are found to be conflicting with the Macao Basic Law after the review, they will be invalidated.

However, is the review of the local laws enacted after the return of Macao by the Standing Committee of the NPC only limited to the compliance with the provisions on the affairs under the administration of the Central Government and on the relationship between the Central Government and the Macao SAR? Or Does the Standing Committee of the NPC have power to review the compliance with other provisions within the autonomy of the SAR? There are no explicit provisions in this respect in the Macao Basic Law, but the Standing Committee of the NPC has power to interpret the Macao Basic Law according to Article 143 of the Macao Basic Law. Pursuant to the theory of authorization, the power of the Standing Committee of the NPC to interpret the Macao Basic Law should be complete, and the power to interpret the provisions on the affairs under the administration of the Central Government and on the relationship between the Central Government and the Macao SAR belongs to the Standing Committee of the NPC only, which also has the power to interpret the provisions about the autonomy of the SAR. Nevertheless, taken into consideration of the practical operation and the respect for the high degree of autonomy of the SAR, the Standing Committee of the NPC will generally not interpret the provisions within the scope of autonomy, nor review the compliance of the provisions of the new laws within the scope of autonomy with the Macao Basic Law.

III. Dilemma in Practice

Since the provisions in the Macao Basic Law concerning the power of interpretation and judicial power are mainly general, and there are different understandings among the practitioners and researchers with respect to the interpretation of certain concepts of such provisions, the author will discuss several outstanding issues in practice in this part.

3.1 Do the courts of the Macao SAR have power to review the national laws applicable in the Macao SAR with respect to their compliance with the Macao Basic Law?

There are 11 pieces of national laws applicable in the Macao SAR, including the *Resolution on the Capital, Calendar, National Anthem and National Flag of the People's Republic of China*, the *Resolution on the National Day of the People's Republic of China*, the *Nationality Law of the People's Republic of China*, the *Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities*, the *Regulations of the People's Republic of China Concerning Consular Privileges and Immunities*, the *Law on the National Flag of the People's Republic of China*, the *Law on the National Emblem of the People's Republic of China*, the *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone*, the *Law of the People's Republic of China on Exclusive Economic Zone and Continental Shelf*, the *Law of the People's Republic of China on Garrisoning the Macao Special Administrative Region*, the *Law of the People's Republic of China on Judicial Immunity from Compulsory Measures Concerning the Property of Foreign Central Banks*.

From their contents, we can see that these laws are related to the state sovereignty and foreign relationship, and they are not within the limits of the autonomy of the Macao SAR. Therefore, the courts of the Macao SAR should not have judicial review power over such national laws which are applied locally in Macao.

From the perspective of legal tradition, Article 19 of the Macao Basic Law provides that "the courts of the Macao Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Macao shall be maintained." In the legal system previously in force in Macao, the judicial review over Portuguese laws applicable in Macao was conducted by the Constitutional Court of Portugal, which was an important restriction on the judicial power of the courts of Macao. Such restriction should remain after the return of Macao, thus, the courts in the Macao SAR do not have judicial power to review the compliance of the national laws listed in Annex 3 of the Macao Basic Law which are applied in the Macao SAR with the Macao Basic Law.

3.2 If the SAR interprets relevant provisions with respect to the affairs out of the scope of autonomy without requesting the Standing Committee of the NPC for interpretation, how effective will such interpretation be?

Pursuant to Article 143 of the Macao Basic Law, "the Standing Committee of the National People's Congress shall authorize the courts of the Macao Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region... However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments in the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region." However, if the Court of Final Appeal fails to seek an

interpretation of the relevant provisions from the Standing Committee of the NPC when the case requires it to do so and interprets the relevant provisions directly, how effective will such interpretation be? How to prevent the Court of Final Appeal from doing so?

If the Court of Final Appeal should seek the interpretation from the Standing Committee of the NPC but it fails to do so, instead, it makes its own interpretation directly and makes decision as well, the decision made by the court will not be affected before the Standing Committee of the NPC makes interpretation pursuant to Paragraph 3 of Article 143 of the Macao Basic Law. Therefore, if the court makes interpretation of the relevant provisions directly and makes decision, such decision is binding on both parties of the case, and the parties cannot claim such decision invalid due to failure of the court to request for interpretation.

Such result is by every means a pity since it violates not only the state sovereignty under the “One Country, Two Systems” policy but also the legal rights and interests of the parties. According to the author, the parties can petition to the Chief Executive if the Court of Final Appeal fails to seek an interpretation from the Standing Committee of the NPC before the courts make a final decision. If the Chief Executive considers it necessary to seek an interpretation from the Standing Committee of the NPC after investigation, he can, pursuant to Article 45 and Paragraph 2 of Article 50 of the Macao Basic Law, report to the State Council and ask the State Council to request the Standing Committee of the NPC to interpret the relevant provisions. If the Chief Executive also fails to request for interpretation, the Standing Committee of the NPC may, based on its power to supervise the implementation of the Macao Basic Law, take initiative to interpret the relevant provisions after discovering such problem. After the Standing Committee of the NPC makes interpretation, the courts of the Macao SAR shall follow such interpretation in citing such provisions, but the decisions made previously are not affected.

3.3 Should the Standing Committee of the NPC make interpretation upon the request by the SAR of the provisions within the scope of autonomy?

Pursuant to Article 143 of the Macao Basic Law, the courts of the Macao SAR can interpret on their own, in adjudicating cases, the provisions of the Macao Basic Law which are within the limits of the autonomy of the SAR. Only when the courts of the SAR, in adjudicating cases, need to interpret the provisions of the Macao Basic Law concerning affairs which are the responsibility of the Central Government, or concerning the relationship between the Central Authorities and the Macao SAR, and if such interpretation will affect the judgments in the cases, will the Court of Final Appeal of the Macao SAR need to seek an interpretation of the relevant provisions from the Standing Committee of the NPC. Can the Court of Final Appeal seek an interpretation of the relevant provisions from the Standing Committee of the NPC if there is dispute over the interpretation of the provisions within the limits of the autonomy of the SAR? Or, if the Chief Executive directly reports to the State Council with regard to whether certain provisions of the Macao Basic Law are within the limits of the autonomy of the Macao SAR, can the Court of Final Appeal seek an interpretation of the relevant provisions from the Standing Committee of the NPC?

If in adjudicating cases by the courts of the Macao SAR, there exists dispute as to whether certain provisions of the Macao Basic Law are within the limits of the autonomy of the SAR, and if such interpretation will affect the judgments in the cases, the Court of Final Appeal shall, before making their final judgments which are not appealable, need to seek an interpretation of the relevant provisions from the Standing Committee of the NPC according to Paragraph 3 of Article 143 of the Macao Basic Law; and the Chief Executive can also report to the State Council according to Article 45 and Paragraph 2 of Article 50 of the Macao Basic Law, proposing the request to the Standing Committee of the NPC for interpretation of the relevant provisions. The Standing Committee of the NPC should accept such request and makes the review. If the relevant provision is regarded as within the limits of the autonomy of the Macao SAR, the courts of the

Macao SAR should be ordered to make interpretation pursuant to Article 143 of the Macao Basic Law; if the Standing Committee of the NPC deems the relevant provision as the affairs under the administration by the Central Government or provision on the relationship between the Central Government and the SAR, the Standing Committee of the NPC will make the review.

However, theoretically, if the courts confront with difficulties in interpreting the provisions of the Macao Basic Law within the limits of autonomy in adjudicating cases, they should be able to request the Standing Committee of the NPC which has the final power of interpretation to make interpretations. Pursuant to Article 143 of the Macao Basic Law, the power to interpret the Macao Basic Law belongs to the Standing Committee of the NPC, the power of the courts of the Macao SAR to interpret the Macao Basic Law is authorized by the Standing Committee of the NPC. The Standing Committee of the NPC has complete power to interpret the Macao Basic Law, and it also has power to make interpretation in such circumstance, and responds to the request of the courts.

3.4 Does the SAR have the right to further petition if it has objection to the interpretation of the Standing Committee of the NPC?

Pursuant to Article 57, Item 11 of Article 62 and Article 69 of the Constitution, the NPC of the People's Republic of China is the supreme organ of state sovereignty, the Standing Committee of the NPC is responsible for the NPC as its permanent body, and the NPC has power to amend or repeal decisions which the Standing Committee of the NPC deems improper.

Therefore, if the SAR has objection towards the interpretation of the Standing Committee of the NPC, e.g., it believes that the interpretation of the Standing Committee of the NPC erroneous and the autonomy of the SAR is violated, theoretically, it can petition to the NPC. Pursuant to Article 45, Item 2 of Article 50 of the Macao Basic Law, the Chief Executive of the Macao SAR shall be the head of the Macao SAR and shall represent the Macao SAR. The Chief Executive of the Macao SAR shall be accountable to the Central Government and the Macao SAR in accordance with the provisions of the Macao Basic Law. The Chief Executive of the Macao SAR shall be responsible for the implementation of the Macao Basic Law and other laws which, in accordance with the Macao Basic Law, applicable in the Macao SAR. If the SAR has objection towards the interpretation of the Standing Committee of the NPC, the Chief Executive may request the State Council to submit a report to the NPC and request the NPC to review the relevant interpretation of the Standing Committee, if the NPC deems the interpretation of the Standing Committee as improper after review, it may modify or revoke the decision of the Standing Committee ex officio.

Besides, Article 3 of *the Law of the People's Republic of China on the Deputies of the National People's Congress and the Local People's Congresses at Various Levels* provides that the people's representatives have the rights to submit proposals for bills, addressing inquiries and make proposals for the removal of officers together with other deputies. Therefore, in this case, the Macao SAR may also make proposal to the NPC through Macao Delegation of the NPC to request the NPC to review the scope of power of the Standing Committee of the NPC to interpret and the contents to be interpreted. If the NPC deems the interpretation of the Standing Committee of the NPC as improper after review, it can modify or revoke the decision of the Standing Committee of the NPC ex officio.

IV. Conclusion

The Macao Basic Law is the foundation and soul of the legal system in the Macao SAR, and its legislative spirit is to maintain the stability, prosperity, development of the Macao SAR and the prosperous and contended life and lasting peace of the residents. With respect to the design of the provisions of the Macao Basic Law, many provisions about the individual rights and freedoms are

provided besides those regulating the political system, economic and social affairs and policies. Such detailed provisions make the Macao Basic Law to be implementable in practice, and enable it to permeate into every aspects of modern democracy and rule of law becoming a significant part of the rule of law in the SAR. However, as an important way to safeguard the Macao Basic Law, the mechanism of review of compliance with the Macao Basic Law is still in the rudimentary phase. In order to make the interpretation and implementation of the Basic Law better regulated, legalized and safeguarded with procedures so as to protect the basic rights and freedoms of the residents, maintain the uniformity of law in the SAR and safeguard the legal status and authority of the Macao Basic Law, it is necessary to enact relevant special laws to further clarify the principles, contents, methods, procedures and effect of the review of compliance with the Macao Basic Law improving such system of review further.

Notes:

- ¹ Refer to the Decision No. 28/2006 of the Court of Final Appeal of the Macao SAR for the relevant viewpoints at the website of the Courts of the Macao SAR: <http://www.court.gov.mo/c/cdefault.htm>. 20th April 2012
- ² Dong Likun and Zhang Shudian (2010). The Judicial Review Power of the Courts of Hong Kong Special Administrative Region. *Chinese Journal of Law*. Volume 3. 3-25
- ³ Lok Wai Kin (2009). “One Country, Two Systems” and the Implementation of the Basic Law of the Macao Special Administrative Region. Guangzhou: Guangdong People’s Publishing House. 258-269.
- ⁴ Wang Yu (2008). *Authorization and Autonomy*. Macao: Associação de Estudos Jurídico de Hou Kong. 193.
- ⁵ Xiao Weiyun (1994). “One Country, Two Systems” and the Basic Law of Macao Special Administrative Region. Beijing: Peking University Press. 136.
- ⁶ Wang Yu (2008). *Authorization and Autonomy*. Macao: Associação de Estudos Jurídico de Hou Kong. 260
- ⁷ See the explanation by Qiao Xiaoyang, the then Vice Chairman of Legislative Affairs Commission, on the *Decision on Disposition of the Existing Laws in Macao Pursuant to Article 145 of the Basic Law of the Macao Special Administrative Region (Draft)*. In Zheng Yanshi (Ed.) (2000). *Collection of the Important Documents Enacted during the Transitional Period of Macao*. Macao: Macao Foundation. 116.
- ⁸ *Ibid.*