

A Preliminary Discussion on the Mechanism of Interpreting the Basic Law of the Macao SAR

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I. Introduction

Under the guidance of the policy of “One Country, Two Systems”, the Basic Law of the Macao Special Administrative Region of the People’s Republic of China (hereinafter as “the Basic Law”) formed a mechanism of its interpretation. This mechanism of interpreting the Basic Law plays an important role during the course of implementing the Basic Law because “no matter how wise the legislators are, it is impossible for the regulations and provisions to cover all rules of conducts and all concrete cases. Therefore, we may conclude in certain sense that the inherent restriction of the law itself is the source of the science of construction of law. On the contrary, the law can only obtain its flexibility of adaptive application through discovery by interpretation, addition and revision.”¹

Nevertheless, how to interpret the Basic Law accurately and properly is a relatively difficult problem. Although the Basic Law is only one of the basic national laws as compared with the Constitution of the People’s Republic of China (hereinafter as “the Constitution”) and other Chinese laws, it is the law which no laws, decrees, administrative regulations and other normative acts in the Macao Special Administrative Region (hereinafter as “the Macao SAR”) can contravene.² And in this sense, the interpretation of the Basic Law to the Macao SAR is exactly like the interpretation of the state constitution.

Regarding the interpretation of the constitution, there are different meaning and contents under different systems and institutions, and the interpretation is of different level and effect. Constitutional interpretation in this article refers exclusively to the interpretation by the competent authority which is provided in the constitutional norms. That is, “the concept of constitutional interpretation is restricted to the level of constitutional interpretation authority, it is the authoritative interpretation instead of unauthorized interpretation by other authorities and other people.”³

At present, there are four models of mechanisms to interpret constitution or constitutional documents worldwide: firstly, interpretation by the legislature; secondly, interpretation by the common law court as created by Marshall in 1803; thirdly, interpretation by the constitutional court as established in Austria in 1940; and fourthly, interpretation by the constitutional committee established in France in 1950. In many circumstances, constitutional interpretation is related to the safeguard of constitution such as constitutional review or judicial review.

The interpretation of the Basic Law obviously does not fall under any of the four typical

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mechanisms of interpretation, instead, it is a dual interpretation mechanism composed of both the legislative interpretation by the National People's Congress (NPC) of the People's Republic of China (PRC) and the judicial interpretation by the courts of the Macao SAR under the policy of "One Country, Two Systems". Therefore, thorough study of this new mechanism of constitutional interpretation is very necessary.

In practice, since Macao's return, it never occurs that the Court of Final Appeal seeks interpretation of the Basic Law from the Standing Committee of the NPC during the course of implementation of the Basic Law, and it also never occurs that the Standing Committee of the NPC interprets the laws on its own initiative, let alone any conflicts and debates arising due to the interpretation of the Basic Law by the Standing Committee of the NPC as the cases in the Hong Kong SAR. But it does not mean that there is no problem during the implementation of the interpretation of the Basic Law in the Macao SAR.

II. Interpretation of the interpretation mechanism of the Basic Law

Article 143 of the Basic Law provides the interpretation system of the Basic Law. Even though the provision is short, it establishes a model to interpret the Basic Law, and it actually contains rich contents. We now analyze this issue from the following aspects:

2.1 Dual interpretation by both the NPC Standing Committee and the SAR courts

Firstly, the legal authority to interpret the Basic Law is vested in the Standing Committee of the NPC. Both Article 67.4 of the Constitution and the Article 42 of the Legislation Law of PRC stipulates that the Standing Committee of NPC has power to interpret the laws. The Basic Law is a law made by the NPC and it is a national law, and should certainly be interpreted by the Standing Committee of the NPC, which embodies the unification and sovereignty of our country and the "One Country" of the policy of "One Country, Two Systems".⁴ Besides, interpretation by the Standing Committee of the NPC not only complies with the unitary principle of the state sovereignty, but also ensures the uniform understanding and implementation of the Basic Law nationwide.⁵ Within the circle of theorists, there's discrepancy toward the legislative interpretation by the Standing Committee of the NPC, some are for and some are against it.⁶ In my opinion, under the current system, we must first of all have clear knowledge of the actual legal provisions and understand them accurately.

Secondly, the courts of the Macao SAR are authorized by the Standing Committee of the NPC to interpret on their own, in adjudicating cases, the provisions of the Basic Law which are within the limits of the autonomy of the SAR. According to the stipulations on the legal interpretation, only the Supreme People's Court is authorized to make judicial interpretation, no other local courts can exercise such power. But, in the Macao SAR, the Basic Law grants the courts at all levels the power to interpret the provisions of the Basic Law within the limit of autonomy in adjudicating cases.

Thirdly, the SAR courts can also interpret other provisions of the Basic Law in adjudicating cases. In other words, the scope of interpretation by the SAR courts also cover provisions which fall out of the limit of autonomy, but there are conditions and restrictions for such interpretation by SAR courts, that is, if the courts of the SAR, in adjudicating cases, need to interpret the provisions

of the Basic Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the SAR, and if such interpretation will affect the judgments in the cases, the courts of the SAR shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the NPC through the Court of Final Appeal of the SAR. Once the Standing Committee of the NPC gives interpretation, it shall become the legal basis for the SAR courts in adjudicating cases. But The Standing Committee of the NPC shall consult its Committee for the Basic Law of the Macao SAR before giving an interpretation of the Basic Law.

Fourthly, the interpretation by the Standing Committee of the NPC does not affect the judgments previously rendered. In order to solve the problem of whether the interpretation of the Standing Committee of the NPC has retrospective effect, it is clearly stipulated in the Basic Law that the interpretation by the Standing Committee of the NPC does not affect the judgments previously rendered, that is, it has no retrospective effect. This attributes to the stability of the final judgments in SAR and indicates respect to the judicial adjudication of the SAR.

Therefore, the above stipulations are the expression of the philosophy of checks and balances. The Basic Law on one hand, provides that the Standing Committee of the NPC shall authorize the courts of the Macao SAR to interpret the Basic Law, and on the other hand, creates a mechanism of seeking an interpretation from the Standing Committee of the NPC through the Court of Final Appeal of the SAR before the final judgment is made in order to avoid the discrepancy between the interpretation by the SAR courts and the understanding of the Standing Committee of the NPC of provisions relating to the affairs of central government, which is a restriction on the exercise of the authorized power upon authorization. At the same time, the Standing Committee of the NPC is required to consult its Committee for the Basic Law of the Macao SAR before giving an interpretation of this Law, which is a check on the power of interpretation exercised by the Standing Committee of the NPC in order to ensure that the Standing Committee of the NPC makes the interpretation on the basis of the advice from both mainland and the SAR instead of interpreting simply on its own. Further, in order to respect the judicial independence of the SAR, the interpretation by the Standing Committee of the NPC will not affect the judgments previously rendered even though the interpretation by the courts of the SAR is different from it.

2.2 Relationship between the dual interpretations by the NPC Standing Committee and by the SAR courts

2.2.1 The distinction between the interpretation by the NPC Standing Committee and that by the SAR courts

(1) Distinctions on the source and the nature of the power of interpretation

Under the Chinese constitutional system, the Standing Committee of the NPC is the standing institution of the NPC, the component of the supreme authority of the state power, and the authority to exercise the state legislative power. In accordance with the Constitution and the Legislation Law,⁷ the Standing Committee of the NPC has the power to interpret the Constitution and the laws; further, the Basic Law also provides that the power to interpret the Basic Law is vested in the Standing Committee of the NPC. Therefore, the power of the Standing Committee of the NPC to interpret the Basic Law finds its basis in both the Constitution and the Legislation Law and the Basic Law as well. This type of power of interpretation is inherent and original. Furthermore, "according to Chinese theories of constitution, the power to interpret law is a power incidental to

the legislative power, interpreting laws is one of the important functions of the Standing Committee of the NPC as the legislature. Therefore, its interpretation of laws is of legislative nature and shall be deemed as a special legislation.”⁸ In contrast, the power of interpretation by the courts of SAR originates from the central government, and is authorized by the Standing Committee of the NPC. The interpretation of the Basic Law by the courts during adjudication of cases is the exercise of judicial power.

(2) Distinctions on the effectiveness of the interpretation

The effectiveness of the interpretation by the Standing Committee of the NPC is higher than that by the courts of SAR, and is final and authoritative. In the event when the Court of Final Appeal seeks an interpretation from the Standing Committee of the NPC pursuant to the provisions of the Basic Law, the courts of SAR, in applying those provisions, shall follow the interpretation of the Standing Committee.

(3) Distinctions on the scope of interpretation

The power of interpretation by the Standing Committee of the NPC is complete since the Standing Committee of the NPC only authorizes such power to the Courts of SAR, instead of separating it with the SAR. Therefore, the Standing Committee of the NPC has power to interpret all provisions of the Basic Law,⁹ that is, the scope of interpretation is complete. In contrast, the scope of interpretation by the courts of SAR is restricted, and it includes mainly two aspects: firstly, the courts of SAR can interpret on their own the provisions of the Basic Law which are within the limits of the autonomy of the Region. Secondly, the courts of the SAR may also interpret other provisions of the Basic Law in adjudicating cases, but with restriction, that is, if the courts of the SAR, in adjudicating cases, need to interpret the provisions of the Basic Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the SAR, and if such interpretation will affect the judgments in the cases, the courts of the SAR shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the NPC through the Court of Final Appeal of the SAR.

(4) Distinctions on the initiation procedure

The interpretation by the Standing Committee of the NPC is abstract interpretation which can be made actively or passively. The Standing Committee of the NPC may, on its own initiative, interpret the provisions concerning the relationship between the Central Authorities and the SAR when necessary.¹⁰ And of course, it can also interpret relevant provisions passively upon the request of the Court of Final Appeal of the SAR. Besides, it can also interpret the provisions within the limits of the autonomy passively upon the request of the Court of the Final Appeal and the chief executive of the SAR¹¹. In contrast, the interpretation by the courts of the SAR are obviously passive, the courts can only interpret part of the Basic Law provisions during the adjudication of cases.

(5) Distinctions on the interpretation procedure

The Standing Committee of the NPC shall exercise its power of interpretation in compliance with certain procedure, that is, the Standing Committee of the NPC must consult its Committee for the Basic Law of the Macao SAR before giving an interpretation of the Basic Law. In contrast, the courts of the SAR may interpret on their own, in adjudicating cases, the relevant provisions of the Basic Law, and it only seeks interpretation from the Standing Committee of the NPC when required by the law.

2.2.2 The relationship between the interpretation by the NPC Standing Committee and that by the SAR courts

(1) The linking of the two interpretations

The mechanism of interpreting the Basic Law combines the legislative interpretation by the Standing Committee of the NPC and the judicial interpretation by the courts of the SAR. To illustrate it in details, the power to interpret the Basic Law is vested basically in the Standing Committee of the NPC which then authorizes certain power to the courts of the SAR in their adjudication of cases through the Basic Law to interpret on their own the provisions of the Basic Law which are within the limits of the autonomy of the SAR. Such interpretation is relatively independent, and in general circumstances also final, which generally will not lead to the legislative interpretation by the Standing Committee of the NPC. With respect to other provisions outside the limits of the autonomy of the SAR, the courts of the SAR also have some power of interpretation with some restrictions, i.e., under legal condition, the Court of Final Appeal of the SAR shall seek the interpretation from the Standing Committee of the NPC. In another word, the request by the courts will initiate the legislative interpretation by the Standing Committee of the NPC. And the relevant legislative interpretation will become the legal basis to be cited by the courts of the SAR.

(2) The interpretation by the courts of the SAR is subject to the supervision and restriction of the interpretation by the Standing Committee of the NPC

The power to interpret the Basic Law is exercised by both the Standing Committee of the NPC and the courts of the SAR. While the power of interpretation with two different natures coexists with one another, the interpretation by the Standing Committee of the NPC is legal and final. Between the legal power of the Standing Committee of the NPC to interpret the Basic Law and that of the courts of the SAR, there is a relationship of authorization instead of a relationship of separation of powers. Even though the courts of the SAR may interpret on their own the provisions of the Basic Law within the limits of autonomy, the Standing Committee of the NPC is not excluded to exercise the power of interpretation under certain conditions, and the final interpretation is still vested in the Standing Committee of the NPC. In the event where the interpretation should be sought from the Standing Committee of the NPC, once the interpretation is given by the Standing Committee, the courts of the SAR shall follow such interpretation by the Standing Committee in applying such provisions. Further, since the Standing Committee of the NPC is the legal body to interpret the Basic Law, it may still give interpretation on its own if it regards the interpretation by the courts of the SAR as inaccurate or deviated. Therefore, we can put it in another way that the legislative interpretation by the Standing Committee of the NPC to some extent supervises and restricts the judicial interpretation by the courts of the SAR.

III. Thoughts on the problems facing the interpretation mechanism of the Basic Law

The interpretation of the Basic Law is a well-designed and very special mechanism of legal interpretation which combines the legislative interpretation in mainland with the judicial interpretation in the SAR meeting the requirement of both "One Country" and "Two Systems" at the same time.¹² The actual practice of such interpretation mechanism shows that it is practical, yet with some problems. Based on the actual situation in Macao, such problems are summarized into

the following three categories:

Firstly, problems relating to the former legal culture, tradition, philosophy and the former systems, which were objectively existing reality even before the Basic Law was implemented or even enacted. Secondly, problems due to the unclear definition in the system designed in the Basic Law itself or different understanding of such system, that is, issues to be clarified or agreed on with respect to the system itself. And thirdly, problems to be resolved during the course of actual implementation of the relevant system, which relates to a level lower than the system design of the Basic Law.

3.1 Problems relating to legal culture and traditions

3.1.1 Distinctions on legal culture and traditions

(1) When we look at the conflicts resulting from the interpretation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the NPC, the discrepancy and the conflicts are caused to a great extent by the distinctions on the legal culture and traditions. In the mainland, interpretation of law by the Standing Committee of the NPC is taken for granted; however, legislative interpretation is not familiar to people in common law areas, and people living under common law do not have sufficient understanding of it and even regard it incredible because under common law system, the power of interpretation is vested in the courts. Under the common law system, after the laws are made, the legislature no longer has any say, and the fate of the law is in the hands of the courts. Since judicial independence is practiced very strictly, the judiciary will not consult with the legislature or administration when it needs to interpret laws in adjudicating cases. If the legislature opposes to the interpretation by the courts, it can revise, repeal or even remake the relevant law instead of interpreting the law.¹³

Macao and mainland both belong to civil law system, and as compared with the distinction between mainland and Hong Kong which belongs to common law system, the distinction between mainland and Macao is relatively small. However, with respect to the interpretation system, there still exists some distinctions. Macao's legal interpretation system is affected by the Portuguese legal tradition, the laws are interpreted by the common courts during the application of the laws, and final interpretation and adjudication of the Constitution and constitutional laws are vested in the constitutional court. So, such relevant system is different from the legal interpretation system in mainland. Therefore, the legislative interpretation system in mainland is also strange to the Macao SAR. It is undisputed reality that the respective legal culture, tradition and philosophy in mainland and Macao are distinctive from each other.

3.1.2 Distinctions of legal interpretation systems

The constitution vests the power to interpret the constitution and the laws in the Standing Committee of the NPC, which is the system of legislative interpretation of the constitution and the laws, i.e., legislative interpretation system. Interpreting law is a power vested by the Constitution in the Standing Committee of the NPC, a power incidental to legislative power, and interpreting law is one of the major functions of the Standing Committee of the NPC as legislature. Therefore, interpreting law is deemed as a special legislation. The Standing Committee of the NPC will interpret law when the meaning of the stipulations of the law requires further clarification or when the legal basis needs to be defined in the event of new circumstances after the law is made.¹⁴ Although the Chinese legal interpretation system also includes judicial interpretation and specific

application interpretation,¹⁵ for example, interpretation given by the supreme people's court, the scope of interpretation is only limited to the specific problems of application of laws during the adjudication. Such interpretation cannot contravene the original meaning of the law. Compared to the legislative interpretation, judicial interpretation is ancillary, and the legislative interpretation is primary.¹⁶ So, compared to other interpretations, legislative interpretation by the Standing Committee of the NPC is the interpretation of final authority and has supreme effectiveness.

Before Macao's return, the Portuguese legal system was applied in Macao. And in Portugal, constitutional laws are interpreted by the special constitutional court. Under the principle of separation of powers, the legislative power and judicial power are exercised by two different authorities with the parliament exercising legislative power and the judiciary exercising judicial power. Theoretically speaking, adjudication is the activity to hear and determine the actual dispute according to the legal rules, it certainly includes the investigation and ascertaining of the disputed facts, understanding and interpretation of legal rules and careful determination of the dispute according to the legal rules as understood. And the essential issue during this process is the interpretation of the legal rules. It is this interpretation that distinguishes the legal rules made by the legislature from those interpreted by the judges in adjudication, and thus constituting the distinction between the legal positivism and legal realism. Interpreting law is the essential element of the concept of adjudication since the legal basis for the determination and decision at the end of the adjudication is the understanding and interpretation of the legal rules by judges. The whole judicial activity is carried out in accordance with the interpretation of law. Therefore, adjudicating power certainly includes the judge's power to interpret law.¹⁷ That is to say that the judges have power to interpret laws. But, having power to interpret laws does not mean having power to interpret constitution, and the mechanism to interpret the constitution by special authority and to safeguard the implementation of the constitution is based on the theory of the Fourth Power. According to this theory, the constitution is the state's supreme law and the interpretation of constitution is the most important power of the state, the authority exercising such power should be higher than the general authorities to have the ultimate standing, and only in this way can significant issues under the political system be well-resolved and the authority of the constitution be maintained.¹⁸ It is under the guidance of such theory that many countries establish constitutional courts which are in charge of the legal issues relating to constitutional laws.

Before Macao's return, according to the provision of Macao Constitution, the Macao courts could interpret the Constitution of Portugal and the Estatuto Orgânico de Macau (Organic Statute of Macao) in adjudicating cases, and could also reject to apply any norms which contradict with the Constitution of Macao and the Estatuto Orgânico de Macau.¹⁹ Meanwhile, according to Article 280 of the Constitution of Portugal,²⁰ relevant decisions can be appealed to the constitutional court of Portugal for the final interpretation or decision by the constitutional court. Under such system, the interpretation of the constitution and the laws are not carried out separately, and are not a special power either, instead, it is to interpret the constitution and the laws during the application of laws and constitutional review.

After Macao's return, the courts of the Macao SAR may still interpret laws according to the principle of basically keeping the former system unchanged, and the Standing Committee of the NPC vests the power to interpret the Basic Law in the courts of the SAR according to the provisions of the Basic Law. Therefore, the interpretation systems in mainland and Macao are essentially distinctive from each other: in Macao it is the judiciary that always exercises the power

of interpretation while in mainland the legislature has the power of interpretation.

The above distinctions, whether relating to legal culture, tradition and philosophy or to the actual interpretation system, are allowed by the policy of “One Country, Two Systems” and safeguarded by the Basic Law. So, there is no need to talk about whether it should be changed or not. The key issue is the need to consider how the different legal cultures and systems can be coordinated with each other to make the two distinctive interpretation systems compatible with and complementary to each other as the system to interpret the Basic Law is a combination of the two distinctive interpretation systems and it is necessary to connect them under certain conditions. And to resolve such problems, it is first of all necessary for both Macao and mainland to understand the mutual systems and perform the respective duties conferred by the Basic Law based on the mutual respect of the systems of one another.

3.2 Problems relating to the interpretation system itself

3.2.1 Judging the provisions of the Basic Law

In accordance with the Basic Law, the courts of the SAR may interpret on their own, in adjudicating cases, the provisions of the Basic Law which are within the limits of the autonomy of the SAR, and it is not necessary to seek the interpretation from the Standing Committee of the NPC in this respect. The SAR courts may also interpret other provisions of the Basic Law in adjudicating cases, however, if they need to interpret the provisions of the Basic Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the SAR, they should seek an interpretation of the relevant provisions from the Standing Committee of the NPC through the Court of Final Appeal of the Region under certain legal condition. So, it involves the “provisions within the limits of the autonomy of the SAR” and the “provisions concerning affairs which are the responsibility of the Central People’s Government or concerning the relationship between the Central Authorities and the SAR”, and we need to determine and distinguish whether a provision concerns affairs which are the responsibility of the Central People’s Government or the relationship between the Central Authorities and the SAR in order to judge whether interpretation should be sought from the Standing Committee of the NPC. Two issues are involved in making such judgment: firstly the standard of judgment, and secondly the subject of judgment.

The dispute over Right of Residence in Hong Kong involves Article 24 of the Basic Law of Hong Kong, attorneys representing the government and the judges of the Court of Final Appeal have different standards of judgment.²¹: the Court of Final Appeal held Article 24 to be a provision within the limits of autonomy since it is to distinguish one type of permanent residents with right of residence and it does not concern relationship between the Central Authorities and the SAR. But, according to the interpretation by the Standing Committee of the NPC later, this Article defining the permanent residents concerns the relationship between the Central Authorities and the SAR. So, the Court of Final Appeal claimed to be the only authority to make judgment at the beginning, but in the end it acknowledged that the effectiveness of the interpretation by the Standing Committee of the NPC is higher than that by the Court of Final Appeal, i.e., the Standing Committee of the NPC is the subject of judgment with the highest authority. Therefore, with respect to whether certain provision concerns the relationship between the Central Authorities and the SAR, the courts of the SAR should be entitled to making judgment in adjudicating cases; in the event of any discrepancy or dispute, the final judgment should be made by the Standing Committee of the NPC.

3.2.2 Interpretation by the Standing Committee of the NPC on its own initiative

Regarding the interpretation by the Standing Committee of the NPC on its own initiative, it is generally held that it has the substantive power to give interpretation on its own initiative since the Basic Law provides no restrictions on it.²² But from the perspective of procedural law, there are different opinions on whether the Standing Committee of the NPC can interpret on its own initiative. Such different opinions do not deny the power of the Standing Committee of the NPC to interpret the Basic Law, but only hold it proper that the SAR executive authority should first of all report to the State Council which then seeks interpretation from the Standing Committee of the NPC.

With respect to the scope of interpretation by the Standing Committee of the NPC on its own initiative, some people hold that procedurally, the Standing Committee of the NPC shall not interpret on its own initiative the provisions within the limit of autonomy of the SAR, instead, it can interpret on its own initiative the provisions of the Basic Law concerning the relationship between the Central Authorities and the SAR when necessary. That is to say, the Standing Committee of the NPC may interpret on its own initiative when it considers it necessary or it regards the interpretation by the courts of the SAR as inaccurate or deviated, as it gave the interpretation on its own initiative of Article 3 of Annex 2 and Article 7 of Annex 1 of the Basic Law of the Hong Kong SAR in 2004.

3.2.3 Interpretation sought by the Court of Final Appeal

According to Article 143.3 of the Basic Law, the Court of Final Appeal shall seek interpretation from the Standing Committee of the NPC under certain legal conditions. There are different interpretation with regard to "shall seek" and the "consequence of failure to seek". So, it requires the court to be self-disciplined trying to avoid such failures, and to perform strictly its legal obligation to seek the interpretation from the Standing Committee of the NPC when the legal condition is met. Nevertheless, the fundamental reason for such problem is the lack of the mandatory procedure for seeking interpretation. Therefore, make-up work should be done with respect to the procedures in order to avoid such problem radically.

3.2.4 Possible interpretation by other entities

The Basic Law only prescribes interpretation from the Standing Committee of the NPC sought through the Court of Final Appeal, there are no stipulations regarding whether other entities are authorized to seek interpretation. According to the practice in Hong Kong, the Chief Executive reported respectively in 1999 and 2005 to the State Council proposing interpretation by the Standing Committee of the NPC according to the power conferred in Article 43 and Article 48(2) of the Basic Law of the Hong Kong SAR, and later the State Council proposed a bill to the Standing Committee of the NPC to initiate the interpretation procedure.

In fact, the Chief Executive only made proposal²³ to the State Council instead of directly seeking the interpretation of the Basic Law from the Standing Committee of the NPC. In accordance to the Legislation Law, making proposal is not a necessary procedure to initiate legislative interpretation, instead, proposing a bill is.²⁴ Therefore, under such circumstances, the Chief Executive is actually not the subject to seek interpretation; it only participates in seeking interpretation of the Basic Law under special condition.

3.3 Problems relating to the implementation of the interpretation system

3.3.1 Procedure to seek interpretation through the Court of Final Appeal

According to the provisions of the Basic Law, there are two situations where the Court of Final Appeal seeks the interpretation from the Standing Committee of the NPC: firstly, the cases adjudicated by the Court of Final Appeal itself meet the legal requirement for seeking interpretation; secondly, the cases adjudicated by other courts of the SAR meet the legal requirement for seeking interpretation. The Basic Law only stipulates that the Court of Final Appeal can seek interpretation. But in reality, cases adjudicated by other courts of the SAR may also meet the requirement for seeking interpretation according to the provisions of the current procedure law of Macao. On the other hand, the Basic Law only provides the legal conditions for seeking interpretation, but there are no provisions of relevant procedures. Therefore, in performing the relevant obligation of seeking interpretation, the relevant system should be improved within Macao's internal legal system.

3.3.2 Procedures applied by the NPC Standing Committee in interpreting the Basic Law

For the Standing Committee of the NPC to interpret the Basic Law, the issue of interpretation procedure cannot be avoided: are the relevant provisions of the Legislation Law applicable in the relevant interpretation of the Basic Law?²⁵ In the opinion of this author, the *Legislation Law* stipulates the general procedure of interpretation of the Standing Committee of the NPC while the Basic Law stipulates a special procedure of interpretation of the Basic Law by the Standing Committee of the NPC, the relationship between the two is that of the generality and particularity, and the general provision may be applicable when it does not contravene the special provision.

IV. Conclusion

There is no precedent to follow for the policy of "One Country, Two Systems", the system of the Basic Law itself is innovation. The Basic Law will be improved and developed during the course of its implementation through interpretation. According to the practice, the interpretation mechanism created by the Basic Law is practical. Meanwhile, we also need to confront with the existing problems. We can only resolve the distinctions on legal culture, traditions and systems between the mainland and the Macao SAR through strengthening mutual understanding and mutual respect.

Notes:

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- ¹ Shen Zongling (1993). On the Interpretation of Law. *Chinese Legal Science*. Volume 6. 57-64.
 - ² See Article 11 of the Basic Law.
 - ³ Xu Xiuyi and Han Dayuan (2001). *Basic Theory of Modern Constitutional Interpretation*. Beijing: Chinese People's Public Security University Press. 157.
 - ⁴ Xiao Weiyun (2003). Brief Discussion on the Judgment of the Court of Final Appeal in Hong Kong and the Interpretation by the Standing Committee of the NPC. In Xiao Weiyun. *On the Hong Kong Basic Law*. Beijing: Peking University Press. 861-862.

- ⁵ Xu Chongde (1994). *Study of the Basic Laws of Hong Kong and Macao*. Beijing: Renmin University of China Press. 67.
- ⁶ Opinion for the legislative interpretation is: legal interpretation must comply with the original meaning of the legislation, the legislative purpose of the legal norms, and with respect to the legislative purpose, nobody is clearer about it than the legislators themselves. There are several different opinions against the legislative interpretation, but many hold the separation of the legislation from the interpretation and finally claim to adopt the judicial interpretation currently practiced in many countries.
- ⁷ The Legislation Law stipulates in details issues such as the legislative system and the legislative procedures, so, it shall be regarded as a constitutional law.
- ⁸ Wang, Zhenmin (2004). A Brief Analysis of Certain Constitutional Issues during the Implementation of the "One Country, Two Systems". *Studies in Law and Business*. Volume 4. 3-12.
- ⁹ Xu Chongde (1994). *Study of the Basic Laws of Hong Kong and Macao*. Beijing: Renmin University of China Press. 67.
- ¹⁰ Lok Wai Kin (2008). On the Relationship between the Interpretation by the Standing Committee of the NPC and the Interpretation Sought by the SAR. In Wang Yu (Ed.). *Study on the Basic Law*. Volume 1. Macao: Associação de Estudos Jurídico de Hou Kong. 14-23.
- ¹¹ There is no provision of the procedure for seeking or proposing interpretation by the Standing Committee of the NPC by the Chief Executive. The experience of proposing interpretation by the Standing Committee of the NPC by the Chief Executive in Hong Kong In 1999 and 2005 establishes the relevant system. Shangguan Piliang (2008). Serious Treatment of Interpretation Procedure of the Hong Kong Basic Law. In Wang Yu (Ed.). *Study on the Basic Law*. Volume 1. Macao: Associação de Estudos Jurídico de Hou Kong. 24-34.
- ¹² Wang, Zhenmin (2004). A Brief Analysis of Certain Constitutional Issues during the Implementation of the "One Country, Two Systems". *Studies in Law and Business*. Volume 4. 3-12.
- ¹³ *Ibid.*
- ¹⁴ See Article 42 of the Legislation Law.
- ¹⁵ "The Resolution of the Standing Committee of the NPC concerning the Strengthening of the Legal Interpretation" passed at the 19th meeting of the 5th NPC conference on 10th June 1981 stipulates: (1) If the laws and decrees themselves need to be further defined and complemented, the Standing Committee of the NPC will give interpretation or the complementary provisions of the decree will be made; (2) any issues within the scope of application of the laws and decrees in adjudication by the courts will be interpreted by the Supreme People's Court. Any issues within the scope of application of the laws and decrees by the prosecutor will be interpreted by the Supreme People's Procuratorate. If the Supreme People's Court and the Supreme People's Procuratorate have any principal discrepancy, it shall be submitted to the Standing Committee of the NPC for interpretation or determination; (3) any issues of application of law which do not fall within the scope of adjudication and public prosecution shall be interpreted by the State Council and the competent authorities; (4) If the local laws and decrees themselves need to be further defined and complemented, the standing committee of the NPC in the respective province, autonomous region or municipality under the direct administration will give interpretation or the complementary provisions of the decree will be made. Any issues of application of local laws shall be interpreted by the competent authorities of the people's government of the respective province, autonomous region or municipality under the direct administration.
- ¹⁶ Zhang Zhiming (1998). System of Legal Interpretation in China. In Liang Zhiping (Ed.) *Issues of Legal Interpretation*. Beijing: Law Press of China. 165.
- ¹⁷ Qiang Shigong (2003). Who Interprets Constitution? *Peking University Law Journal*. Volume 5.
- ¹⁸ Li Jianfeng. Comparative Analysis of the Interpretation Procedures of Constitution. In *Theories of Constitution and*

Problem Analysis (5th Edition).

- ¹⁹ Article 207 of the Constitution of Portugal provides that the courts shall not apply any provisions which contravene the Constitution or any provisions in violation the constitutional principles in adjudicating cases.
- ²⁰ Article 280 of the Constitution of Portugal stipulates the mechanism of appeal to the constitutional court, Paragraph 1 and 2 of this Article stipulate the circumstance when appeals can be made to the constitutional court, including: when the judgment is made on the ground that any legal norm violates the Constitution and such norm is rejected to be applied, or when the judgment is made on the ground that any norm within the legislation violates any laws with higher effectiveness and such norm is rejected to be applied and when the judgment is made on the ground that a norm within the jurisdiction violates the general rule of the autonomous region or common law of the Republic, and such norm is rejected to be applied.
- ²¹ Attorney Joseph Paul Fok who represented the executive authorities proposed “substantial effect test standard”, i.e., the test standard to determine whether a provision is outside the limit should be whether the implementation of such provision in the Hong Kong Basic Law would cause substantial but immaterial effect on the affairs under the governance of the Central People’s Government or on the relationship between the central authorities and the Hong Kong SAR. But the Court of Final Appeal rejected such standard holding that the disputed article is to define the permanent residents who have permanent residence and it does not involve the relationship between the Central People’s Government and the Hong Kong SAR. Refer to the judgment of the Court of Final Appeal of the Hong Kong SAR: FACV14/1998, FACV15/1998, FACV16/1998. <http://sc.info.gov.hk/gb/legalref.judiciary.gov.hk/>.
- ²² Wang, Zhenmin (2004). A Brief Analysis of Certain Constitutional Issues during the Implementation of the “One Country, Two Systems”. *Studies in Law and Business*. Volume 4. 3-12.
- ²³ Proposal is not a necessary procedure of initiating legal interpretation, the subject which is entitled to proposing the bill may accept or reject the relevant proposal. It is held that anyone or any units may make proposals, the legal status of the proposal made by anyone is the same. It is only because of the possible higher quality of the proposal made by the SAR executive as compared with others that it would probably be accepted by the National Council or the Standing Committee of the NPC. Wang Lei (2007). On the Interpretation by the Standing Committee of the NPC and its Relationship with the Judicial Interpretation in Hong Kong: In Memory of the 10th Anniversary of the Implementation of the Hong Kong Basic Law. *Jurist Review*. Volume 3. 17-21.
- ²⁴ Wang Lei (2007). On the Interpretation by the Standing Committee of the NPC and its Relationship with the Judicial Interpretation in Hong Kong: In Memory of the 10th Anniversary of the Implementation of the Hong Kong Basic Law. *Jurist Review*. Volume 3. 17-21.
- ²⁵ Section 4 of the Legislation Law stipulates legal interpretation. The relevant procedures include: firstly, initiation of the legislative interpretation. The State Council, the Central Military Committee, the Supreme People’s Court, the Supreme People’s Procuratorate, the various special committees of the Standing Committee and the Standing Committee of the People’s Congresses of various provinces, autonomous regions and municipality directly under the Central People’s Government may make a request for legislative interpretation to the Standing Committee of NPC. Secondly, drafting interpretation and inclusion into the agenda of the Standing Committee of the NPC. Thirdly, deliberation of the draft interpretation. After deliberation by the session of the Standing Committee of the NPC, the draft legislative interpretation shall be deliberated and amended by the Legislative Committee based on comments made by members of the Standing Committee of the NPC, and it shall submit a voting version of the draft legislative interpretation. Fourthly, adoption and issuance. The voting version of the draft legislative interpretation shall be adopted if affirmed by more than half of all members of the Standing Committee of the NPC, and shall be promulgated by the Standing Committee of the NPC by way of a public announcement. See Articles 43, 44, 45, 46 and 47 of the Legislation Law.