

Study on the Conflict and Solution of the Administrative Regulations Formulation Competence in the Macao SAR from a Jurisprudent Perspective

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I. Background and major issues on the competence for formulating administrative regulations

1.1 Issues on a number of controversial rulings

Over a period after April 2006, a number of rulings concerning specific administrative regulations, mandated by the Court of Second Instance and the Administrative Court in the Macao Special Administrative Region (hereinafter as “the Macao SAR”) gave declaring them to be inconsistent with the Basic Law of the Macao Special Administrative Region of the People’s Republic of China (hereinafter as “the Basic Law”) and hence invalid. The core reasoning given by judges included: a) the Legislative Council is the sole legislative body of the Macao SAR and the Chief Executive does not have legislative powers; b) the Chief Executive has the power to issue administrative orders and regulations which shall not supersede or contravene existing laws; administrative orders and regulations shall be effective only as rules for execution and enforcing the laws promulgated by the Legislative Council, or with its authorization, or over matters within boundaries of government administrative power; c) no any administrative regulations shall be made by executive body to increase monetary and personal burdens on the public and individual residents, nor to impose administrative penalties.

1.2 Divergent views of legal professionals and academics

Intense debate in the legal circle of Macao focused on definition of legislative power, the nature of the Chief Executive’s power to issue administrative orders and rules, the possibility of parallel tracks for lawmaking, and respective powers and definition of law and administrative regulations. The debate also concerns complex practical issues in addition to divergent theoretical notions, i.e. how to regulate the Chief Executive’s power to issue administrative regulations , whether such power is independent from the law-making Legislative Council, whether administrative regulations previously issued could be maintained valid, and how should the Legislative Council monitor the process of administrative rule-making.

Those controversy over aforementioned court decisions mainly concerns a) Laws enacted by the Legislative Council and administrative regulations by the Chief Executive are all based on the Basic Law which does not specify which shall prevail. It cannot be based on logic reasoning or the legal system of mainland China to argue administrative regulations to be inferior in legal standing

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to laws. It is not clearly provided by law that administrative regulations must be made in accordance with and not in contravention to existing laws. b) The power of the Chief Executive to issue administrative regulations is in fact a form of independent lawmaking and thus the law-making power is not solely vested to the Legislative Council; therefore it should be acknowledged that a dual-track law-making system does exist in the Macao SAR and the Chief Executive also exercises relevant lawmaking power as a lawmaking body. c) The Chief Executive's administrative regulations should enjoy at the least the same level of legal authority as those made by Governor of Macao before the handover and retained as existing laws. d) Macao operates under an executive-oriented political system. The power of the Chief Executive to make administrative regulations is a mechanism of such system and should not be subject to legal constraints.¹

Those opposed to the above views argued: a) According to the Basic Law, the Legislative Council is the legislative body of the Macao SAR and has the right to enact, amend, suspend or repeal laws. No other political institutions can exercise such legislative power to enact laws. This shows that the legislative powers enjoyed by the Legislative Council are complete and exclusive. Any rule-making authority for regulating public conduct by any other political institutions should be subordinate to the power of legislature, and be based on and consistent with, existing legal framework. b) Although the Chief Executive's powers are not limited to the executive power, this does not imply that such powers can exceed defined boundaries. It would be inappropriate for the Chief Executive to have duplicate power to enact laws as the Legislative Council or establish a rule-making process independent from the Legislative Council. Equating the power of the Chief Executive to make administrative regulations with that of the Governor before the handover will lead to confusion in understanding the nature and boundaries of their authorities. To expand the scope of executive as such in fact deviates from the logic of excising executive power according to the law. c) Administrative regulations shall not be equated to the law. If the Chief Executive was to have power to enact laws independently, the power of the Legislative Council would be curtailed, rendering ineffective the mechanism whereby the Standing Committee of the National People's Congress (NPC) reviews the law reporting for record by the Macao SAR Legislative Council. d) The dual track legislative system that existed in Macao before handover should not be used as basis for interpreting and regulating the new legislative system established in accordance with the Basic Law after the handover. Although specific remnants of the old system have persisted as it is required in the historic transition that orders and decrees issued by the former governor be reviewed and retained, a proper understanding of the new relationship between law and administrative orders must be based on the Basic Law.²

1.3 Appealing by the Macao SAR Government against the rulings

First, the government argued that it can share the legislative power or excise an independent rulemaking power which should be equal to and coexist with the legislative power. Second, although the new legislative system created according to the Basic Law does not adopt the dual track legislative system that existed before handover, the Chief Executive has been provided with authority to make administrative regulations which at least in certain areas reserving the same status and function as legal decrees of the previous system, if the institutional and substantive significance of such power is carefully examined. Third, issuance of administrative regulations falls in the realm of independent rulemaking. Administrative regulations are different from implementing rules to laws and require no prior legal authorization. Fourth, there is no provision

within the Basic Law that prohibits independent regulations or requires administrative regulations to be subordinate to specific laws. Matters that need to be subject to “laws”, “legal precedence”, “legal protection” and “legal constraints” are specifically defined in the Basic Law, beyond which the Chief Executive has the power to independently make administrative regulations. The SAR government also publicly stated that the mandate for the Chief Executive to make and issue administrative regulations comes directly from the Basic Law. The Basic Law does not specify demarcations of respective areas of competence for laws and administrative regulations. Therefore it is imperative to understand the nature and value of administrative regulations from the perspective of the executive-led political system. In such system the Chief Executive is at the core, as dictated by the principles of the Basic Law in its definition of SAR political system.³

1.4 Conflicting rulings by courts at two levels

On July 18, 2007, Court of Final Appeal of Macao SAR ruled on CFA Case No. 28/2006 and sent back Case No. 223/205 to the Court of Second Instance for retrial. It is cited that the Court of Final Appeal holding that although the Chief Executive has no legislative power and laws enacted by the Legislative Council enjoy the highest status in the legal hierarchy of SAR, the Chief Executive does have the power to make administrative regulations in accordance with only the Basic Law, including regulations independent without any specific legal authorizations, as long as such regulations are outside areas subject to legal constraints and are consistent with the principle of laws always taking precedence.⁴

However, the Court of Second Instance stated, in its ruling at the retrial on December 13 of the same year, that “the original intent of the Basic Law implied that the Chief Executive does not have the power to make independent and initial administrative rules and regulations.” The ruling of the Court of Second Instance rebutted the conclusion of the Court of Final Appeal that the Chief Executive could independently make administrative regulations. The conclusion had been based on a reasoning citing analogies with Chinese mainland and French legal notions and on the assertion that the Basic Law contained no provisions against administrative regulations defining obligations and restrictions on an individual. The retrial ruling stated that “analogies can only be applicable if they are within the same current legal system”, and have “no legal power unless specifically provided for by law for defining powers of public authority.” The ruling further stated that the opinion of the Court of Final Appeal touched upon the political system of Macao SAR and its relationship with the central authorities, which was outside the realm defined for SAR government and in effect amounted to an attempt to change distribution and restraints of powers of the Legislative Council and the Chief Executive, in lawmaking and administrative regulation respectively, under the current SAR political system as defined by the Basic Law. Therefore, the matter should be submitted, in accordance with Article 143 of the Basic Law, to the NPC Standing Committee for its interpretative ruling on the power of the Chief Executive in making administrative regulations as specified by the Basic Law.⁵

II. A legal analysis of the core issues of the contention

It is highly necessary to provide a legal analysis based on facts and legal background of the contention concerning definition of executive rulemaking. This analysis should be made by

examining the nature, role and function of administrative regulations and their implications.

2.1 Unique facts and legal background of the contention

2.1.1 The Basic Law established the political system for the Macao SAR without specific provisions defining the relationship between the Legislative Council and the Chief Executive in their respective powers of legislation and administrative rulemaking.

2.1.1.1 The Basic Law provisions for Legislative Council and its power

There are four such stipulations in the Basic Law: Articles 2, 17, 18 (section 1), and 67-81. These provisions in essence define that "The Legislative Council of the Macao Special Administrative Region shall be the legislature of the Region" with the power "To enact, amend, suspend or repeal laws in accordance with the provisions of this Law and legal procedures."

It has been noted perceptively that the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao (hereinafter as "the Joint Declaration"), which has served as policy basis for the Macao Basic Law, states clearly in section 3 of annex 1 that "The legislative power of the Macao Special Administrative Region shall be vested in the legislature of the Macao Special Administrative Region." This wording is not repeated at verbatim, but its spirit has been reflected, in the aforementioned clauses of the Basic Law. Based on the wording of these clauses, "legislature" means "Legislative Council" which are the same and equal in both documents. The term of legislative power used refers to the power in a specific and narrow sense to enact laws, which is used in the same and consistent manner throughout the two legal documents, i.e. the Joint Declaration and the Basic Law. It is therefore only logical to conclude that equating the making of administrative orders and policies to establish public norms with the narrowly defined legislative power, implying that the Chief Executive and the Legislative Council have parallel "legislative powers", is a form of evasive and misleading argument, let alone being a loose interpretation inconsistent with the logic of the Basic Law.

Section 3 of Article 50 and Articles 51, 52 and 54 of the Basic Law define the substantive power of the Chief Executive to sign bills and to promulgate law, without which a law will not be effective. Further, the Chief Executive has the power to return any particular piece of legislation to the Legislative Council for reconsideration or dissolve the Legislative Council as a form of checks and balance against the Assembly. The Chief Executive can also be forced to resign in the event of serious unresolved political differences with the Legislative Council, as a mechanism of checks and balances against the executive power. However, this does not imply that the Chief Executive and the Legislative Council share legislative power, as at the very least: a) the Basic Law does not make such a clear provision, b) the Chief Executive can not substitute, or directly participate in, deliberations over bills by the Assembly, a power of lawmaking which is totally different from Chief Executive's power for making administrative regulations.

2.1.1.2 The Basic Law provisions on administrative rules and their making by the Chief Executive

References to "administrative regulations" in the Basic Law are in Article 8, Section 2 of Article 11, Section 5 of Article 50, Article 58 and Section 5 of Article 64. According to the principle of consistency in definitions for the same term within one legal document, the term "administrative regulations" referred to in the four clauses should mean specific regulations formulated after the founding of the Macao SAR, i.e. administrative regulations made by the Chief Executive in

accordance with Section 5 of Article 50 of the Basic Law. “The laws, decrees, administrative regulations and other normative acts previously in force in Macao” in Article 8 refers to conditions prior to the handover. As the concept of administrative regulations did not exist in the legal framework of pre-handover Macao, such a reference can only be interpreted as a collective term subject to specific definitions.

2.1.1.3 The Basic Law provisions for the enactment of laws and making of administrative rules

Article 18 of the Basic Law refers to the scope of legislative power in the SAR, specifically providing for the power of the Legislative Council of Macao SAR to enact laws on all matters within the limits of the autonomy of the Region as specified by the Basic Law.

The necessary conditions for the Legislative Council to enact laws include: first, compliance without exception with the Basic Law in accordance with Article 11; second, any law enacted by the legislature of the Region shall not restrict, weaken and infringe upon the power of the central authorities in its administration of the region in accordance with Article 17; third, compliance with the provisions of the Basic Law and legal procedures when enacting, amending, suspending or repealing laws in accordance with Section 1 of Article 71.

The necessary conditions for the Chief Executive formulating administrative regulations include: first, compliance of all administrative regulations with the Basic Law in accordance with Article 11; second, the Chief Executive shall consult the Executive Council before formulating administrative regulations, in accordance with Article 58 of the Basic Law.

It is therefore evident that: first, the Basic Law has separate provisions for the powers of the Legislative Council and the Chief Executive, without elaborating clearly the demarcation and relationship of these two powers. Second, although the Basic Law does not explicitly require Chief Executive’s compliance with laws enacted by the Legislative Council when formulating administrative regulations, it does state in Section 2 of Article 50 that the Chief Executive should “be responsible for the application of this Law and other laws which, in accordance with this Law, apply in the Macao Special Administrative Region.” The wording of “application” apparently does not imply amending laws or formulating regulations in parallel. In addition, the provision in Article 65 for the SAR government to “implement laws passed by the Assembly and already in force” clearly implies the Chief Executive’s obligation to implement laws, and by logical reasoning, to ensure compliance of administrative regulations with the laws of the SAR. Third, the Basic Law clearly stipulates that certain matters can only be regulated by laws enacted by the SAR legislature. Fourth, although the Basic Law does not explicitly state that laws take precedence over administrative regulations, sequential order of the various clauses imply laws take precedence and that a higher level of authority for laws over administrative regulations is logically consistent with principles of the rule of law.

2.1.2 Law No. 3/1999 (*The Promulgation and Format of norms*) is helpful in understanding the concept of administrative regulations. The actual formulation of administrative regulations is worthy for further investigation and analysis.

Article 3 and 13 of the Basic Law clearly define “administrative regulations”, as a standard legal format term, as those specifically formulated by the Chief Executive in accordance with Section 5 of Article 50 of the Basic Law, which are separate and different from other normative documents including executive orders, Chief Executive’s instructions and instructions by departmental heads. However, the Basic Law definitions only concern the format and promulgation of administrative regulations, not the legal principles and norms upon which the Chief Executive

can base his formulation of regulations, nor the boundaries of and limits to such power and the scope of matters subject to administrative regulations.

During the period from the establishment of the SAR to the first half of 2006, a total of about 230 administrative regulations were issued by the Chief Executive, which was two and half times the number of laws (92 in total) passed by the Legislative Council and covered wide ranging matters. In the absence of clear guidelines and rules within the Basic Law and Macao local laws regarding the nature, level of authority, boundaries and procedures for administrative regulations, and in the absence of a clear consensus on the relationship and demarcation of powers of legislation and rulemaking, it is understandable that the number of administrative regulations, significantly greater than that of laws being passed by the legislature, would cause a debate over the nature, authority and boundaries for administrative regulations.

2.1.3 The legislative system under Portuguese administration before the handover and the evolving constitutional theories on the Chinese mainland, both as historical background and contemporary basis for legal theories, have inevitably impacted on the selection of relevant systems and rules in the Macao SAR.

2.1.3.1 Legislative system before Macao's return

The author does not attempt to provide a comprehensive review of the evolution of legislative system under Portuguese administration. Instead, an examination of the features of the dual legislative structure at two levels that existed prior to the handover will be given on the basis of provisions in "*Estatuto Orgânico de Macau* (Organic Statute of Macao)" and conditions thereof. Laws and regulations issued by Portuguese sovereign authorities (including its President, the Assembly of the Republic, the government and court system), and were applicable to Macao, would take effect upon publication in the *Boletim Oficial de Macau* (Macao Official Bulletin).⁶ Macao exercised a level of autonomy in government administration, economic, financial, legislative and judicial matters, as long as compliance with the Portuguese Constitution and Macao Organization Charter was ensured and personal rights and freedoms specified by the two fundamental legal documents were protected.⁷ Under such a political system, the Portuguese sovereign authorities had the power to extend its national laws to or formulate specific laws and regulations for Macao, while the power of Macao local authorities to make local laws and regulations did not preclude application of Portuguese laws to Macao. Within Macao, the Governor and the Legislative Council both exercised legislative powers. The Governor could issue decrees on all matters except those subject to exclusive authority of the Portuguese sovereign organs or Macao Legislative Council, and exercised specific lawmaking authority in areas of supplementing the legal guidelines issued by the Portuguese sovereign organs and reviewing and endorsing laws concerning structure and procedures of the executive organ.⁸ Laws passed by the Macao Legislative Council could only concern matters specifically relating to the Assembly itself, and eight other categories within which the Legislative Council could either promulgate laws itself or authorize the Governor to make decrees accordingly. 12 additional categories were designated to joint competence of the Legislative Council and the Governor.⁹ In the dual legislative structure, the Governor and the Legislative Council each played an assigned or legislature-authorized role, with the Governor having the power of signing bills into law (which could be made null and void by his failure to sign), while the Assembly retaining power to initiate legislative procedures to veto Governor's decrees. The Governor and the Legislative Council could each request review by the Portuguese Constitutional Court on the constitutionality of any laws or administrative decrees issued.¹⁰ The

rigor, consistency and coherence of such a dual legislative system were assured by strict demarcation of powers and complex procedures for pre-authorization, veto and review.

2.1.3.2 Constitutional theories and legal practice relating to statutes and administrative regulations on the Chinese mainland

In the Mainland legal system, the term “administrative regulations” is widely used with complex meanings. It broadly refers to laws, regulations and other types of binding norms concerning administrative management formulated by authorized government institutions according to the Constitution. But as a specific legal term, Section 1 of Article 89 of the Constitution refers to the specific forms of “administrative regulations” to be formulated by the State Council in accordance with the Constitution and laws. This constitutes an important part of China’s current legislative system. In March 2000, National People’s Congress (NPC) passed “*The People’s Republic of China Law on Legislation*”, with specified provisions for the enactment, amendment and repeal of any national law, administrative regulation, local decree, autonomous decree and special decree. It was billed as “the law of laws.”

The Legislation Law states at the outset that the NPC and its Standing Committee exercise state legislative power and the scope and areas where only national law may be enacted. It further defines a system of authorization for rulemaking, i.e. the NPC and its standing committee having the power to make a decision to enable the State Council to enact administrative regulations over all matters in ten legally designated areas except if a matter relates to those areas reserved for NPC legislation. The enabled body may not delegate its authority to any other body. Upon promulgation of the specific national regulation, the relevant authority will be terminated. The Legislation Law further states that only the State Council can be authorized to formulate administrative regulations which should be done in accordance with the Constitution and national laws and not in contravention of them, failing which the relevant authority can be terminated. The administrative regulations are formulated to implement laws and for areas where the State Council exercises its functions and powers as specified by Article 89 of the Constitution. In the legal hierarchy, laws have higher authority than administrative regulations, which in turn are higher than local regulations and policies. Administrative regulations need to be reported to the Standing Committee of NPC for record. Legally authorized government organs have the statutory right to request in writing a review of legality of any administrative regulation by the Standing Committee of NPC. The Legislation Law provides comprehensive and detailed specification of the legal status, effectiveness, boundaries, formulation and review procedures for administrative regulations.

The Legislation Law was passed after the promulgation of the Basic Law, with evident advancement in legal thinking and principles. Yet, the basic concepts and principles regarding administrative regulations have remained consistent over time. An understanding of these and their actual application on the Mainland will benefit the understanding of the intent of the Basic Law and help clarify the relationship between the laws and administrative regulations.

2.1.3.3 Influence of the Portuguese constitutional theories

The dual legislative system in Macao before handover was consistent with the principle that organs of supreme authority should be separate and interdependent as defined by the Portuguese Constitution. The Constitution provides that respective acts of the state include legislative acts, government regulations and Regional legislative decrees. The general laws of the Republic comprise laws and decree-laws. Laws and decree-laws have the same force, without prejudice to the organic laws having more force, to the decree-laws enacted under legislative authorization

being subordinated to the corresponding laws and to the decree-laws developing the general principles of legal systems being also subordinated to the corresponding laws (article 115). The President has the power to promulgate and order publication of laws, decree-laws, and regulative decrees (Article 137). The Assembly of the Republic has exclusive legislative powers and relatively reserved legislative powers on all matters save where the Government has been authorized by the Constitution to the same effect (Articles 164, 167 and 168). The Government has the powers to issue decree-laws on matters concerning its own organization and working, on matters not reserved to the Assembly of the Republic, matters relatively reserved to the Assembly of the Republic subject to its authorization, and in application of laws laying down legal principles or bases (Article 201). In order to safeguard authority and consistent application of the Constitution, an adequate review regime for constitutionality resides with the Constitutional Court. According to Portuguese academic writings, such complex and interdependent systems provides the basis for a modern constitutional order, in accordance with principle of "the organs of supreme authority being separate and interdependent", discarding the old model of defining power separations according to state organ functions, creating a complex structure whereby some organs of the supreme authority having different functions and some functions being performed by the same organ of supreme authority. The Constitution provides that the Assembly of the Republic has the power to legislate (i.e. the legislative power), and that the Government has parallel powers for legislative, planning, administrative and military matters, so as to exercise overall public administration. The tripartite structure of the President, the Assembly of the Republic and the Government is a unique character of the Portuguese constitutional government system, with interdependent organs of supreme authority each having its power and counterbalancing power. It is also described as a "mixed parliamentary and presidential system."¹¹

2.2 Theoretical analyses of the core issues surrounding debate on power demarcations

2.2.1 Ownership of legislative power and legislative system

The legislative power is a state political power exercised on behalf of the people, reflecting their opinions and formulating norms, a power that is based on democratic values and exercised in accordance with the principle of openness and public participation. It provides the basis for legitimacy and authority of the executive and judicial powers.¹² Any political organ not elected by the people and norms established without open and public participation can only be subordinated to and governed by force of law. Various government regulative decrees are always subordinate to the Constitution and legislative acts, and reside within the system of general laws of the republic.

The definition of law is subject to broad or narrow interpretations. So is definition of legislative power. In a general sense, law takes the form of compulsory state norms or decrees, universally enforceable. In accordance with constitutional supremacy and legal hierarchy, legislative power is a collective term for the different powers residing within this hierarchical system of laws and decrees. In a strict sense, law refers to specific acts established by an organ of representative democracy, i.e. the Legislative Council. Legislative power in this context is an exclusive power of the assembly.

Legislative system is defined as "the establishment and division of legislative authority, the nature and boundaries of legislative powers of different organs of the state, and the power arising from and dependent on the legislative power to formulate other documents of legal norms."¹³ The

key factor determining a state's legislative system is the nature and form of its political system and its government structure in particular. China's current legislative system is one with division of legislative powers existing at multiple levels and is a combination of different categories. It is under the unified leadership of the central authorities with a certain degree of decentralization. The Portuguese system employs the principle of the organs of supreme authority being separate and interdependent and is dual track with dual levels. Both the Chinese and Portuguese systems are based on their respective historical traditions, evolution of legal systems and policy choices, a reflection of the deep-seated national conditions.

2.2.2 The nature and characteristics of administrative regulations

The Macao Basic Law provides for the Chief Executive to formulate administrative regulations which, in a general sense, belong to the realm of regulative decrees.

It is useful to examine the necessity and rationality of administrative regulations in Macao SAR from the following two angles (both pointing to a clear and persuasive value orientation): First, as a special administrative region established with unique historical background, its simplicity as a regional administrative entity has made it necessary as well as possible to adopt a unitary legislative system. Second, proceeding from the need for effective administration by Macao Government with authorization by the central authorities, the administrative regulations play an important role which is authorized by law and enshrined in the Basic Law. This was because there had been an incomplete legal system and public apathy and alienation regarding the law before handover, as historically the legal system was transplanted to Macao from a foreign base. As there had also been a lack of sufficient human and technical resources for Macao Government, a lack of capabilities, experience and technical support and certain legal constraints in proposing bills by the Legislative Council, it was practical for the Chief Executive under an executive led system to use priority right in proposing regulative decrees. The issue is how to define the relationship between the powers of the Legislative Council in legislation and the Chief Executive in formulating administrative regulations. The key is to understand if it is an inclusive or mutually exclusive relationship, and if the demarcation is relative or absolute under a system whereby the Assembly fully exercises the legislative power as authorized by the Basic Law. The interplay of values and balancing of the relationship requires an analysis of the specific implications based on Macao reality, historical tradition and government policy inclinations for the development for a legislative structure that is both in compliance with the Basic Law and the internal logic of the Macao political system.

2.2.3 Legislation and regulation formulation under an executive-led system

The principles and salient features of Macao SAR's political structure are its executive-led government, the cooperation and checks and balances of the executive and legislative powers, and judicial independence. However, the political system is based on authorization by the central authorities. The executive-led structure does not imply power being centralized with or dictated by the Chief Executive. Executive power must not be supersede or encroach on legislative or judicial powers. The executive-led system is intended to ensure the Chief Executive has sufficient power over legislative matters with procedural mechanism in place to guide legislative direction, making it absolutely unnecessary to pursue a parallel structure for administrative regulations outside the existing legislative system that has the same legal status as laws. Simply advocating that the administrative regulations issued by the Chief Executive can replace laws by the Legislative Council, and that they are of the same or even higher legal authority than laws, contravenes the

modern democratic principles and rule of law.

2.2.4 Delineation of Legislative Authority

The legislative system in Macao, as a local level legislature, is mandated to establish norms for all matters within the confines determined by the high degree of autonomy for the SAR. The Legislative Council is also mandated with exclusive legislative powers. The space beyond matters reserved for the exclusive legislative powers are subject to powers of both the Chief Executive for formulation of regulative decrees and the Legislative Council. Any further delineation will entirely depend on need. The legislative system of Macao must be based on the Basic Law and the practical needs of the region, as any deviation from this basis would be difficult to justify.

III. Answers derived from the Law No. 13/2009 of the Macao SAR

The Law No. 13/2009 enacted by the Macao SAR Legislative Council on 14th July 2009, i.e. the Regime Jurídico de Enquadramento das Fontes Normativas Internas (Regulation on the Formulation of Internal Norms), provided legal solutions to the conflict over definitions of the power for making administrative regulations.

3.1 The significance of the Law No. 13/1999

The law provides a set of key procedural rules for the legislative system of the Macao SAR.

First, it explicitly states that the Legislative Council has full legislative power, which is not expressly defined in the Basic Law, though implications of such power can be deduced from the constitutional intent of the Basic Law and related legal documents. The Legislative Council exercises the power to enact laws on any matter within the realm defined by "a high degree of autonomy", including the power to pass laws to adjust matters over which the Chief Executive has issued independent administrative regulations. Such provision establishes an all-encompassing power on legislative matters, which is in keeping with basic principles of power separation and demarcation and conducive to maintaining the integrity and coherence of the legislative system.

Second, while the Basic Law provides that the Chief Executive has the power to formulate administrative regulations, this law further divides administrative regulations into independent administrative regulations and supplementary administrative regulations, clearly delineating the Chief Executive's power in formulating regulative decrees, defining their level of authority in legal hierarchy and areas of applicability. This unique and precedent-setting arrangement has been based on the practical needs of Macao.

Third, while the Basic Law has separate provisions for enactment of laws and formulation of administrative regulations without clear guidelines for their levels of authority, the law for the first time defines clearly their hierarchical relation. This constitutes the fundamental principle for the levels of authority in the Macao legislative system.

Finally, the law provides guidelines for handling the laws and regulations that existed under the Portuguese administration.

3.2 A preliminary analysis of issues unresolved by the Law

Based on reasoning in the aforementioned discussions, with reference to the specific provisions of the law, the author proposes a tentative analysis of some perceived issues.

3.2.1 The nature and related procedures for independent administrative regulations

“Independent administrative regulation” is a new concept introduced by this law.

“Independent administrative regulations establish primary norms on matters not regulated by law.” However they shall “not make, with an external effect, any interpretation, amendment, modification, suspension or repeal of provisions in any laws.” They create norms for the seven areas clearly defined by the Law. Questions can be asked regarding the definition of an independent administrative regulation, a clear and exact definition of “independent”, on if the independent and supplementary administrative regulations have the same effectiveness while their contents are different, if the legal requirements for independent administrative regulations are practically feasible, and if the monitoring system to ensure legality and rationality of such regulations and the correction mechanism are in place, and on how to prevent a lack of legal basis for matters adjusted by independent administrative regulations.

The Law only provides partial answers to these questions. First, the power to formulate independent administrative regulations resides with the Chief Executive and procedures are the same as that for supplementary regulations. Second, being “independent” does not preclude compliance with the Basic Law and the principle of laws being superior to regulations. Primary norms are established on matters not regulated by law without the need to have prior legal authorization. Third, independent and supplementary administrative regulations exist in parallel, are applicable to different matters and of equal effect. In the event of any conflict, such conflict should be dealt with in accordance with principle of special law being superior to general law and newer laws being superior to older laws. Fourth, given the absence of provisions for legal authorization, ratification, and reporting for record and review system, organs of state powers at various levels, including the standing committee of NPC, the State Council and the Legislative Council, have no monitoring and correction mechanism to control the scope and procedures of formulating regulations. Five, given the special mechanism whereby the Chief Executive directs and even controls legislative bill proposing, leading to a legislative system under which administrative regulations coexist with laws and creating a situation where laws apply to certain areas while administrative regulations to other areas.

3.2.2 Division on competence between laws enacting and administrative regulations formulating and the specific significance of such normative acts

Law No. 13/1999 lists the competence for the two types of normative acts. With comprehensive legislative competence of the Legislative Council as prerequisite, it defines on the one hand a total of 19 matters to be subjected to judicial norms which are to be made by the law, effectively delineating the exclusive authority of the legislature. On the other hand, it also lists seven matters that can be regulated by independent administrative regulations. The two lists clearly defines two very different sets of normative acts, with the former being a mandatory power indicated by the wording of “to be made” and the latter an optional right denoted by the wording of “can be”. However, there are still concerns that such parallel listings can lead to contention regarding limits of powers. The following issues are worthy further examination: First, Paragraph 7 of Section 2 in Article 7 regarding matters to which independent administrative regulations are applicable in effect extends the scope of regulative norms to all matters beyond those reserved for the exclusive legislative power. Second, the intent for laying down six matters to which independent administrative regulations are applicable was apparently to make special provisions in response to questions regarding the legality of administrative regulations. Third, with the approach

of listing two categories of normative acts in parallel, an otherwise useful debate on whether the exclusive legislative functions of the Legislative Council should be further divided into absolute and relative functions was ignored. Fourth, given conditions of the rule of law in Macao, most of the matters whereby there existed a legal limbo concerning special aspects of special sectors. Seldom did such legal limbo affect an entire sector or system. Therefore, if only all these specific areas to which no existing laws applied are set aside for "independent administrative regulations", and other related areas where there are already applicable laws are designated as areas for administrative regulations for the application of relevant laws, the legal framework of Macao would be made rather fragmented. Even more likely, such an approach in reality would make clear definitions and demarcation impossible in legislative practice.

3.2.3 Monitoring the Power for Formulating Administrative Regulations and Preventing its Abuse

There need to be institutionalized control for any public power. This is an inherent requirement in modern democratic political process. The Law No. 13/1999 provides the function of formulating administrative regulations by the Chief Executive, unprecedented in Macao's administrative and political history, without instituting effective monitoring mechanism. This would make it difficult to promptly correct any error should it occur, potentially creating a political paralysis, a critical problem that the existing legal framework is incapable of resolving.

For various reasons, neither the Basic Law nor relevant laws enacted in SAR contain provisions regarding a procedure exercised by the Legislative Council over the administrative regulations formulated by the Chief Executive, for ratification in reviewing administrative regulations, or the judicial power for review of legality or constitutionality. Legislative Council's authorization to the Chief Executive to formulate relevant regulations, Article 88 of the Administrative Procedural Law provides a competence dispute review procedure for administration regulations, but with a deliberate omission of their potential violation of constitutional provisions and laws. Further, since independent administrative regulations are designed to formulate for areas in legal limbo, this removes the basis for reviewing if they are in violation of related laws. Against such a background, the author intends to make an extremely bold assumption here that in the event the Chief Executive were to make an unusually large number of independent administrative regulations for whatever purposes to adjust matters not yet regulated by law, without needing to go through the Legislative Council, and that these regulations contain deficiencies or errors in theory or practical implications, no other government organs, with the exception of the Chief Executive, would be able to intervene or correct. Even if the courts may assert the right for judicial review, they would be incapacitated due to lack of legal ground. Such an arrangement for executive power is rather extraordinary. Even laws passed by the Legislative Council could be nullified if they were to be retuned for reconsideration by the Standing Committee of NPC following the filing for record by the Assembly in accordance with the Basic Law. Meanwhile, the administrative regulations that can be formulated at Chief Executive's personal initiative need not be filed with NPC for record. Given the lack of constraint mechanism, the risk of abuse is easy to imagine and should be a cause for alert and concern.

3.2.4 Refinement of certain terms and descriptions to be considered

Stature No. 13/2009 was promulgated in bilingual versions with Chinese as prevailing language. Certain terms and descriptions still leave room for deliberation and refinement. For example, the law's title and content refer to as "Regulation on the Formulation of Internal Norms" In fact, it only deals with three types of normative acts, i.e. laws, independent and supplementary administrative regulations, without covering such "other documents" as written instructions by the Chief Executive and departmental secretaries.¹⁴ If for some reason the law had to be short of being comprehensive, its title can perhaps be modified to truthfully reflect a narrower scope. Another example is Paragraph 3 of Section 1 in Chapter 7 which refers to "organization of government." This was repeated in Paragraph 4 in a different wording of "structure and organization of public administration and its services and organization units." Such varying references for seemingly the same matter do not conform to formal logic. The same problem also appears in Paragraph 6 with two repeated descriptions of penalty amount: MOP500,000.00 and (Five Hundred Thousand Patacas), while one would have been sufficient. Further, abbreviations used in Chapter 6 for the term of "judicial rules" and the punctuations (colons instead of semicolons) in Section 2 of Chapter 4, all in the Chinese version, are prone to cause confusion. These are technical flaws that can be corrected.

Notes:

- ¹ Qi Yun (2006). Legal Professionals Debate the Ruling by the Court of Second Instance: Legislative Power of the Chief Executive Mandated by the Basic Law. *Macao Daily News*. 12th May 2006. B06; Qi Yun (2006). Contending Views of the Legal Circle: Discussion on the Broad and Narrow Interpretation of Legislative Power. *Macao Daily News*. 13th May 2006. A06; Lok Wai Kin (2006). Rethinking on Legislative System in the Macao SAR. *Macao Daily News*. 4th December 2006. B08; Leng Feng (2006). Rethinking on Debates over Application of Administrative Regulations. *Son Pou Daily*. 12th August 2006. 01.
- ² Jeong Wan Chong (2006). Legislation, Legislative Power and Legislative System. *Journal of Macao Studies*. Volume 37. 1-10; Yong Yi (2006). Higher-level Law and Lower-level Administrative Regulation with Unequal Effectiveness. *San Wa Ou Daily*. 15th May 2006; Wang Yu (2006). On Legal Status of Administrative Regulations. *Macao Daily News*. 30th July 2006. D07; Wang Yu (2006). On Legal Status of Administrative Regulations: Part 2. *Son Pou Daily*. 21st October 2006. 05; Wang Yu (2007). On Legal Status of Administrative Regulations – Part 3 (first installment). *Macao Daily News*. 14th March 2007. F03; Wang Yu (2007). On Legal Status of Administrative Regulations – Part 3 (second installment). *Macao Daily News*. 21st March 2007. E08; Wang Yu (2007). On Legal Status of Administrative Regulations – Part 3 (third installment). *Macao Daily News*. 4th April 2007. E03.
- ³ Florinda da Rosa Silva Chan, the Secretary for Administration and Justice, gave her comments on related topic given at the Legislative Council at the end of 2006. See General Regulations of Public Spaces Repealed: Florinda da Rosa Silva Chan Asserts No Legal Vacuum. *Macao Daily News*. 23rd October 2006. A01.
- ⁴ Case No. 28/2006, by the Collegial Panel of the Court of Final Appeal of the Macao SAR, in the website of the Court of the Macao SAR: <http://www.court.gov.mo/pdf/tui/tui-s-28-2006-vc.pdf>. 3rd August 2009.
- ⁵ Case No. 536/2007, by the Court of Second Instance of the Macao SAR, in the website of the Court of the Macao SAR: <http://www.court.gov.mo>. 3rd August 2009. Also see Macao SAR Not Empowered to Change Local Political System, Court of Second Instance Calls for Interpretative Ruling by the NPC on Ruling by the Court of Final Appeal. *Macao Daily News*. 25th December 2007. B07.

- ⁶ *Organic Statute of Macao*, Article 69. In Editorial Board (1996). *Compilation of Macao Laws*. Beijing: China Social Sciences Press. 8.
- ⁷ *Organic Statute of Macao*, Article 2. In Editorial Board (1996). *Compilation of Macao Laws*. Beijing: China Social Sciences Press. 3.
- ⁸ *Organic Statute of Macao*, Article 12. In Editorial Board (1996). *Compilation of Macao Laws*. Beijing: China Social Sciences Press. 3.
- ⁹ *Organic Statute of Macao*, Article 31. In Editorial Board (1996). *Compilation of Macao Laws*. Beijing: China Social Sciences Press. 5.
- ¹⁰ *Organic Statute of Macao*, Article 11, 13, 14, 15, 30, 31, 36 and 40. In Editorial Board (1996). *Compilation of Macao Laws*. Beijing: China Social Sciences Press. 3-6.
- ¹¹ Gomes Canotilho and Vidal Moreira (2003). *Constitutional Basis*. (Chinese translation by Fong Man Chong, Vong Hin Fai and Ao Ieong Kei). Macao: Faculty of Law of the University of Macao. 151-153, 166, 172.
- ¹² Li Lin (2005). *Legislative Theories and Systems*. Beijing: China Legal Press. Chapter 2: Legislative Power and Democratization of Legislative Process.
- ¹³ Xu Waicheng (2002). *The Encyclopedia of China (Hardbound Edition)*. Beijing: Chinese Encyclopedia Publishing House. 857.
- ¹⁴ Cheang Kam Yiu proposed "Bill on Law and Regulations" see references attached to Recommendation 3/III/2009 by the First Standing Committee of the Legislative Council, in the website of the Legislative Council of the Macao SAR: <http://www.al.gov.mo/porposta/lei/parecer-cn.pdf>, 3rd August 2009. The current legislative tendencies are believed to have arisen from concerns to avoid the sensitive issues regarding if the Legislative Council is mandated to enact laws impacting on the legislative system.