

On Supervision Power in the Executive-Legislative Relationship

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The society of the Macao Special Administrative Region (SAR) often calls on the Legislative Council to strengthen its supervision on the SAR Government. The Legislative Council and the Legislators are also requested to supervise the SAR Government, and the SAR Government itself believes that it should accept the supervision of the Legislative Council. Seemingly all three sides recognize and accept the supervision. However, is there consensus on the understanding of the supervision? Are there uniform criteria? In fact there is no consensus. So, there has been a wide range of understandings on supervision power. If we do not first address the definition of supervision power in order to seek common understanding, that is, what is supervision power, what is the real meaning and the specific content of supervision power, then we cannot solve supervision issues in practice, nor can we improve the supervision of the Legislative Council on the SAR Government, and it will not improve the relationship between the executive and the legislature bodies.

I. The Definition of “Supervision Power”

1.1 Different interpretations of “supervision power”

What is the supervision power of the Legislative Council? Academically, there are different understandings, mainly the “broad” and the “narrow” understandings.

(1) Jiang Jinsong mentioned in the “Six Points of Supervision in the Legislature in Developed Countries”, parliaments in developed countries generally hold two views on this issue. One is to make a strict division between supervision and legislation. The British Parliament holds this view. The legislature aims at determining government policies; supervision is used to investigate and supervise the law-implementing activities of the government. Another view is to unify legislation and supervision work. For example, the supervision power of the German Parliament has made conscious penetration into the legislative power. Inquiries, one-hour debates on hot issues between Parliament members and ministers, investigation of the Inquiry Commission all reflect the supervision power of the Parliament. Deliberations on government bills conducted by the Parliament are not purely legislative activities, but have been granted supervision connotation.¹ Liu Dexue noted in the article “On the Supervision Ability of the Legislative Council under the Administration-oriented System”, that “From the point of view of comparative study, whether in

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countries of ‘parliamentary cabinet system’ or ‘presidential system’ or ‘semi-presidential system’, parliamentary functions can be divided into two categories, one of legislative functions, another of supervision functions, despite different distinctions in practical activities. But anyway, parliamentary functions and roles in political systems can be divided into the legislative functions and supervision functions. Therefore, as for the supervision power range of the Legislative Council, supervision can be understood as the possibility of containment or control measures defined in the Constitution on government administrative activities, and in this case, other functions beyond the legislation are included in the scope of the supervision power. Listening to policy address and debates on administrative policies, debates on issues of public interest, of course, belong to supervision range, while the right to question the government’s work, the right to a hearing, impeachment, or even dealing with the public’s right to petition can be attributed to the scope of supervision power.”² Therefore, the broad understanding of supervision advocates that other powers exclusive of the legislative power of the legislature belong to the supervision power.

(2) Ma Ling mentioned in the “Analysis of the Nature of Parliamentary Budget Voting Rights”, that some scholars put the financial rights of the parliament in the discussion of the legislative power. Some scholars believe that they belong to the parliamentary supervision power, taking the parliamentary voting rights on budgets and final accounts as financial supervision. Other scholars characterized them as decision-making rights. For example, the parliament has decision-making rights on government-proposed budgets, that is, the voting rights for budgets. They believe that the budget right is juxtaposed with the legislative and supervisory power, and is one of the three independent powers of the parliament. Still other scholars believe that the parliament’s financial right has dual properties: legislative and supervisory properties. It has both a legislative nature – because state financial budget and tax programs generally take the form of special legislation, and a supervisory nature – because parliamentary control over the executive budget and funding also means control over its executive power itself. However, Ma Ling believes that the power of the parliaments of all countries has “the decision-making power on major issues” in addition to legislative, supervisory, appointment and removal power. Unlike the parliamentary legislative power which determines abstract rules in advance, nor like parliamentary supervision which belongs to post supervision on specific matters, decision-making right is neither rule-making before the exercise of governmental authority, nor is inspection and acceptance after the exercise of governmental authority, but is its own direct exercise of power – direct decision-making on specific and important matters.

The narrow understanding of legislative supervision power advocates that legislative organs have decision-making rights in addition to legislative and supervisory rights. Supervisory rights cannot include other rights.

1.2 Criteria for defining the concept of “supervisory power”

Whether we should take the broad or the narrow understanding of supervision power? The author believes that before making the decision, two issues need to be addressed.

1.2.1 The difference of “supervision” and “restriction”

From the point of view of separation of powers, the power of the legislature is used to restrict the government, which may be considered as restrictive power. However, restrictive power can be divided into several specific rights of different nature. Let’s take legislative and supervisory power as example. Although both belong to restrictive power, legislative power is not equal to supervision,

and vice versa. So, logically speaking, legislative or supervisory power cannot equal restrictive power. Restrictive power is a bigger concept, in which legislative and supervisory powers are different kinds of restrictive power. Supervision is one kind of restrictive power and restrictive power is abstract while supervision is specific. All the functions and the rights of the Legislative Council can be understood as restrictions on the government, but the restrictive power does not belong to supervision power on the government. Therefore, "supervision power" should not be understood and defined from its restrictive sense.

1.2.2 The difference between "broad" and "narrow" concepts of supervision

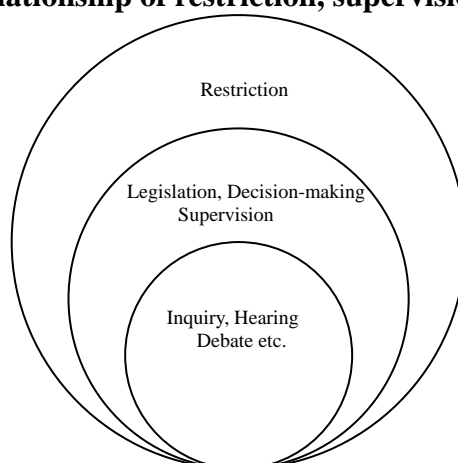
The broad and narrow concepts of supervisory power can exist side by side. However, the concept of "broad supervision", that is, including the "approval authority", "decision-making right" in the "supervision", does not negate the existence of "narrow supervision" concept, because an in-depth analysis will reveal that broad supervisory power is an abstract concept. If asked to list the specific contents of supervisory power, "approval authority", "decision-making right", "inquiry right", "right of debate" "investigative right" and so on must be mentioned in accordance with the broad definition of supervision. However, there is a difference between these rights. They can basically be divided into two categories. One kind of them is: one body exercising its supervision power on the power exercised by another body, which forms a power relationship between the two bodies. For example, "question authority," "right of debate", and "investigative right" belong to this category. The other kind is: a single body can exercise its own problem-solving power without the agreement or cooperation of other bodies, such as "approval authority," "decision-making right". The difference between them is that, "supervisory power" can neither decide whether the bodies under supervision can exercise their power, nor negate their exercise of power. "Supervisory power" cannot make decisions on the matter itself, but can supervise whether the matter is conducted right or wrong. Supervision power is to supervise on effective conduct by another body. Supervisory power is oversight on the government executive power not on its own executive power. "Decision-making right", "approval authority" can make effective decisions on their own matters. Therefore, "supervision power", "legislative power", "approval authority", and "decision-making right" are not only different in wording, but in content.

"Supervision power" and "decision-making right" have at least the following differences. First, they are different in exercising bodies. "Supervision power" is restrictive conduct of one body. Supervision power involves power relationship between two different bodies, and it is discipline on others. "Approval authority", and "decision-making right" are conducts of a body itself, and it is a problem of how to exercise the powers of its own, which is, therefore, self-discipline. Secondly, they have different nature. "Supervision" is a power of mutual cooperation in nature. As the supervising body cannot make its own decisions, but supervise the decision-making of others, so it can only produce real effects when recognized and accepted by the supervised. The "approval authority" and "decision-making right" are exclusive rights, which can independently make unilateral disposal of matters without acceptance or agreement of other bodies. Thirdly, they have different effectiveness. "Supervisory power" cannot directly change or reject the policy made by other bodies. Yet the "approval authority" can "decision-making right" can directly decide whether the policy will be approved or not. Fourthly, they have different responsibilities. "Supervisory power" does not bear direct responsibility for policy mistakes, having at most indirect ineffective oversight responsibility, while "approval authority", "decision-making right" have to bear direct responsibility for policy mistakes.

1.2.3 The “narrow concept of supervision” is more practical.

To address the relationship between the executive and the legislature, the use of a narrow concept of the right to supervise has more practical significance. The broad concept of supervision puts emphasis on an explanation from the purpose of the executive power, whereas the narrow concept emphasizes an explanation from its nature of the power. The former is easy to blur the boundaries of the supervisory power, because from the perspective of purpose, even the legislative power to establish rules for government activities is also supervision on the government. However, “the parliamentary oversight is mainly directed at the government, but the parliament has decision-making right over the government (that is, the parliament makes decisions, and the government executes them) in addition to supervision, so we cannot take it as one kind of supervision power just because the budget voting right is directed at the government.”³ Adopting the narrow concept of supervision is able to accurately define the scope of supervision, making a clear differentiation between decision-making (legislative power, decision-making right) and supervision (the right to supervise), because decision-making and supervision are two different rights in nature, which cannot replace nor deny each other. (See Figure 1)

Figure 1: Relationship of restriction, supervision and inquiry



II. The Role and Purpose of Supervision

The *Basic Law of the Macao Special Administrative Region of the People’s Republic of China* (hereinafter as “the Macao Basic Law”) stipulates that the Legislative Council is entitled to supervise, but what role does it hope the Council will play through supervision? In this regard, there are different understandings and expectations.

As for the role and purpose of supervision of the Council, we often hear that the Legislative Council had weak supervision or lacked in supervision on the SAR Government, which is discussed below. First, people give examples to illustrate that the SAR Government’s policies, including the bus priority scheme (which draws more public criticism), can be implemented by their own. Public works may be approved and granted without the Legislative Council’s review. In short, the SAR Government can unilaterally make decisions, without any restriction from the Legislative Council. No restriction, so no supervision. Secondly, the reason for poor supervision of the Legislative Council is that, the Legislative Council does not have the authority for approval on

these matters, and therefore, its supervision is powerless. Thirdly, to solve this problem is to empower the Legislative Council to review and make decisions on these matters. Their proposal for improvement is to expand the decision-making power of the Council, such as in land grants, public works, franchise contracts. If the role of supervisory power is identified as the “veto” or “approval” on the SAR Government decision, it is, in fact, a misunderstanding about the role and purpose of supervision, giving supervision inappropriate expectations. Therefore, the role of “supervision” should return to its statutory standard.

2.1 The roles of supervision as error correction and accountability

The roles of supervision are: first, prior supervision to prevent governmental abuse of power; second, post-supervision to correct mistakes in decision-making and in work; third, investigate into mistakes or failures for accountability in order to supervise effectively. Error correction is to correct policy mistakes for remedy, or for perfection. Accountability is to investigate for the responsibility of those who make major mistakes. Error correction and accountability are two aspects of the roles of supervision in the common understanding of all parliaments. “An expert of the French Parliament wrote: in Sir Kenneth Wheare’s words, the most important role of the modern parliament is, ‘keeping the government on the right track of the law’...Democratic people expect the Parliament to ensure that the administration is under supervision at any moment, and that there is no abuse of power.”⁴

Measuring whether the Legislative Council exercises proper oversight cannot be simplified to an equation, that is, the SAR Government accepting the opinions of the Legislative Council is being supervised by the Legislative Council. Otherwise, there is no supervision. In fact, the nature of the supervisory power determines that supervision does not take the SAR Government’s acceptance of the opinions as the only result. If the SAR Government can only be dictated to, then the relationship between the SAR Government and the Legislative Council becomes one of a subordinate relationship, rather than supervision relationship. The Legislative Council’s supervision power indicates the Legislative Council has its own position and views on the matters under supervision, which, of course, are not always right. So, there are three possible outcomes of supervision: one is that the SAR Government accepts supervision and improves policies. Another is that the SAR Government adheres to the original policy. The third is that the Legislative Council accepts the SAR Government’s explanation of the policy. If reasonable, three results are acceptable. However, legislative power and decision-making are different. The Macao Basic Law has clearly defined that the SAR Government should implement laws passed by the Legislative Council. As long as the legislature passed a bill, including the budget bill, the government must comply, and there is no other choice. This is the biggest difference between the supervisory power, decision-making, and the approval authority.

2.2 The supervisory power cannot replace decision-making right.

In the above analysis, the main difference between “supervision”, “approval authority”, and “decision-making” is that “supervision” is to oversee the decisions of others, while “approval authority” and “decision-making” are to make their own decisions. If the roles of “supervision” and “decision-making” are confused, logical error will occur. Strengthening the Legislative Council’s “supervisory power” is to expand the “approval authority” and “decision-making” of the Legislative Council. If the government accepts the supervision of the Legislative Council, it means

it will surrender the policy-making right. Obviously, this conclusion is not right. Instead, strengthening supervision of the Legislative Council is not redistribution of power, not turning supervision into decision-making power. The government accepting supervision does not mean giving up decision-making right. Strengthening the “supervisory power” of the Legislative Council should not lead to decision-making power shift between the legislature and the government. Otherwise, it is no longer a problem of supervision between the executive and the legislature, but becomes a problem to expand or limit their power.

2.3 Understanding of the budget audit authority

When we discuss the role and purpose of supervision, we cannot avoid a problem raised by three Chairmen of the Legislative Council. Susana Chou pointed out “the Council’s supervision on the government’s finance remains relatively weak... Supervision on government revenue and expenditure, and those of major public works cannot be carried out because there is no effective mechanism.” “Since the Legislative Council has power to approve the government’s budget, including specific items of expenditure, it should be entitled to full control over additional expenses.”⁵ Lau Cheok Va said “Currently, only the total fiscal budget of the government needs the approval by the Legislative Council, but in the implementation process, the government can modify the budget without the approval of the Legislative Council and it can move the budget of a project to another project as long as the total amount remains the same.” So we should revise the Budget Framework.⁶ Ho Iat Seng noted that “significant government expenditure involving tens of millions are handed over to the Legislative Council for approval, but after the budget is approved, the budget removal between projects will be the largest loophole and cost overruns are difficult to control. The two former presidents of the Legislative Council repeatedly stressed on project-specific expenditure, and for budget shortfalls, the government can apply to the Legislative Council again but cannot misappropriate... One budget for one project, the problem will be solved.”⁷ Issues raised by the three presidents are essentially whether the Legislative Council should be entitled to the approval of the budget changes in the implementation process. From the perspective of power properties, this is not in the scope of supervision, but in the scope of approval or decision-making. If we try to solve this problem in the name of strengthening supervision, not only the reason will become a controversial issue, but it will be difficult in practice, and it will be hard for the executive and the legislature to reach a consensus. If the supervision power of the Council becomes so inclusive, even to enjoy approval and decision-making rights, then the government is bound to worry whether its policy decision power will therefore be continuously reduced, thus inviting more government concerns.

Therefore, we should return to the problem itself to discuss Paragraph 2 of Article 71 of the Macao Basic Law – Functions and Powers of the Legislative Council. Does “audit and approve fiscal budgets proposed by the government” include auditing budget adjustments in the process of implementing the budget?

On this issue, the SAR Government and the Legislative Council’s positions are different. But the Macao Basic Law leaves room for discussion. The current opinions can be summarized as three solutions. One is to clearly stipulate that projects of a certain amount of budget have to be audited and approved by the Legislative Council. Another solution is that budget removal to other projects has to be approved by the Legislative Council. The third is the need for the SAR Government to report to the Legislative Council with enquiry and debate as necessary procedures, when any

changes in budget execution occur. The first two solutions are to clarify that the approval authority belongs to the Legislative Council, while the latter is to strengthen the supervision of the Legislative Council. I believe that these solutions can be explored, seeking solutions from the perspective of division of power and clarifying the scope of authority, or to be improved in the monitoring process, setting the necessary auditing process so as to achieve the purpose of supervision.

III. Measures to Strengthen Supervision

3.1 The SAR Government should actively cooperate in strengthening supervision of the Legislative Council

Chou thinks that "cooperation between the legislature and the executive has always been a two-way rather than one-way street. There is no doubt that the Legislative Council should obey and serve the executive-led overall interests, respect and maintain the authority and power of the SAR Government under the leadership of the Chief Executive and fully cooperate with the government's administration. But on the other hand, the SAR Government must respect the powers enjoyed by the Legislative Council, respect its independence and legal status and actively cooperate with the work of the legislature. Only in this way is it conducive to the functioning of the legislature."⁸ In order for the Legislative Council to do a good job in supervisory work, the SAR Government should take the initiative to accept supervision, changing the negative impression of the SAR Government's inadequate cooperation and passive acceptance of supervision. The SAR Government should uphold the cooperative attitude, strengthen cooperation with the Legislative Council in policy formulation and implementation process and accept supervision.

The SAR Government should do a good job in three aspects. First, conduct prior communication, that is, before submitting a major motion or a bill to the Legislative Council, inform and informally exchange views with the Council, absorbing useful comments. Secondly, conduct communication in the process. In the auditing process, the SAR Government should introduce a detailed policy context, policy intent, purpose, provide information needed for discussion to the Legislative Council and make good policy interpretation, therefore seeking legislative support from the Legislative Council. Thirdly, conduct post communication. When necessary, the SAR Government informs the Council about the effects of policy and law implementation, any problems encountered, lessons learned, so that the administrative authorities and the legislature will continue to work cooperatively.

3.2 Strengthen and make good use of supervision of the Legislative Council

Supervisory work of the Legislative Council focuses on two basic aspects.

3.2.1 Supervision on the government decision-making

Debates on government policies and on issues of public interest are the primary means of monitoring the government decision-making, which the Legislative Council should make good use of. Legislator Cheang Chi Keong believes that the Legislative Council needs to consider "institutionalizing the debate practice on public interest issues" in strengthening oversight on the SAR Government. "We should provide good channels both to the Legislators to strengthen oversight and reflect public opinions, and to the government officials to make clear their policy and

governance systems to the Council”.⁹ We have to explore new forms of debates on policy and on public interest issues, review and improve the existing rules of procedure, consider using more conducive debate forms to reach practical results, not just debating for debate’s sake, in order to help the SAR Government in making the right decisions.

3.2.2 Supervision on the implementation of government policies

First, improve the quality of the inquiry. Although the number of questioning of the Legislative Council is increasing year by year, it is still not satisfactory for many reasons, but a problem cannot be avoided: the quality of the questioning should be improved. Lawmakers should consider what is good questioning. Improving the level of the questioning and pointing out the problems in the government’s work should be based on facts and can stand testing, and should have sufficient grounds to withstand debating. They should point out the conditions and the possibilities for improvement, which can withstand practice. If the question raised is not specific, or ambiguous, it often fails to achieve the purpose of improvement. If the questioning is just criticism and accusation without any constructive suggestions, it will not have any real effect.

Secondly, strengthen accountability on the SAR Government. Power consistent with responsibility is the principle of legal administration of the government, and abuse of power will be held accountable. Accountability is the necessary part of supervision by the Legislative Council. At present what is most needed is consensus about what action or behavior should be held accountable, and what should not be held accountable, and about what are the standards of accountability. This is what the government and the residents should be considering and exploring. Accountability cannot be simplified and it is not equal to officials’ stepping down. The purpose is to improve the responsibility of officials first, followed by taking responsibility and holding accountability. Standards of accountability should be objective and be able to use facts to prove fault, avoiding the use of subjective judgments. Society interests are diverse, and each policy will always reflect and protect certain interests, or make a balance between diverse interests, which may not be able to get the same recognition and acceptance. So accountability standards should not adopt some value criteria for judgment and accountability, but should adhere to an objective standard of fault. In the early establishment of the accountability system, Macao can consider obtaining a consensus between the society and civil servants as the basis. First, in accordance with the standards of legal execution of power, any illegal abuse of power, abuse of discretion should take accountability. Secondly, based on the principle of addressing public affairs in accordance with statutory procedures, procedure faults will be held responsible. Thirdly, according to the principle of loyalty, weak implementation of policies will take accountability. In short, we will improve the systems and procedures of accountability on officials, and will also need a rational and healthy culture of accountability.

3.2.3 Strengthen the role of the committees

“As one expert said, the special committees ‘enable the Members to raise a series of more detailed questions and problems to the Ministers, than during the questioning conference or the debating sessions of the parliament meeting.’ Special committees may request the relevant government departments or experts to provide written information,” “allow lawmakers to get information from the heads of administrative bodies or even summon the head of the government to give its policy explanation.”¹⁰ In fact, the Macao SAR Legislative Council has successful cases in this regard. Chou specifically mentioned two Interim Committees of the Legislative Council in the summary report of two-decade work of the Legislative Council, that is, the Public Finance

Follow-up Committee and Land and Public Works Committee, which invited government representatives to give briefings on relevant issues, analyzed problems and took measures, and therefore played a positive role for remedy of the situation. Therefore, the Council should strengthen the work of the committees based on the experience. In addition to the review of bills, the committees can consider holding discussions and hearings on some special issues, and play a role in supervision on government work.

Notes:

- ¹ Jiang Jinsong. Six Points of Supervision in the Legislature in Developed Countries. In the website of Zhejiang People's Congress: <http://www.zjrd.net/rdzz/InfoBox/InfoViewSimple.aspx?docid=7405>.
- ² Liu Dexue (2009). On the Supervision Ability of the Legislative Council under the Administration-oriented System. *Academic Journal of One Country Two Systems (Chinese version)*. Volume 1. 78-83.
- ³ Ma Ling (2012). Analysis of the Nature of Parliamentary Budget Voting Rights. In the website of 21ccom.net: http://www.21ccom.net/articles/zgyj/ggzhc/article_2012041057259.html.
- ⁴ Whaley, J., I. Doherty and et. al (2005). Strengthening Legislation's Capacity in the Relationship between Administration and Legislation. *Comparative Economic and Social Systems*, Number 2. 81-88.
- ⁵ Susana Chou (2009). Summary Report of the Decade of Work by the President of the Legislative Council. In the website of the Macao SAR Legislative Council: <http://www.al.gov.mo/download/Balanco-c.pdf>.
- ⁶ Lau Cheok Va's Parting Suggestions: Budget Framework Law must Reform. In the website of the Southern Network: http://epaper.oeeee.com/N/html/2013-08/22/content_1919600.htm. 22nd August 2013.
- ⁷ Author (2003). New Members of the Legislative Council Inaugurated Yesterday. *Macao Daily*. 17th October 2013. A2.
- ⁸ Susana Chou (2009). Summary Report of the Decade of Work by the President of the Legislative Council. In the website of the Macao SAR Legislative Council: <http://www.al.gov.mo/download/Balanco-c.pdf>.
- ⁹ Weng Iat (2006). Revise the Rules of Procedures of the Legislative Council to Ensure the Exercise of Supervisory Powers. *Jornal San Wa Ou*. 24th August 2006. P01.
- ¹⁰ Whaley, J., I. Doherty and et. al (2005). Strengthening Legislation's Capacity in the Relationship between Administration and Legislation. *Comparative Economic and Social Systems*, Number 2. 81-88.