

# **A Comparative Study on the Relations of the Executive to the Legislature and the Judiciary in the Hong Kong SAR and the Macao SAR**

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The executive-led system is the political system set for the two Special Administrative Regions (SARs) by the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (hereinafter as “the Hong Kong Basic Law”) and the *Basic Law of the Macao Special Administrative Region of the People's Republic of China* (hereinafter as “the Macao Basic Law”). The relations of the executive to the legislature, and to the judiciary are an integral part of the political system. The specific configuration and organizational principles of the executive, the legislature and the judiciary, as well as the SAR political, economic and cultural systems are stipulated by the two basic laws and the SAR Governments exercise their duties and authority in accordance with the Basic Laws. For more than 10 years since the handovers of Hong Kong and Macao, it should be admitted that the executive-led political system is an effective political framework and accords with the status quo of Hong Kong and Macao, meanwhile continuous improvement and perfection need to be implemented to adapt to the new circumstances, in order to prevent the executive-led system from being weakened or strengthened.

## **I. The Basic Framework of the Relations of the Executive to the Legislature and to the Judiciary under the SAR Executive-led System**

The political system refers to the organizational structure and management system of the national government and its relevant laws, as well as the system of the executive, the legislature and the judiciary. There are two important aspects in the organizational structure of the Hong Kong and Macao SAR Governments: Firstly, the SAR Governments belong to the category of “local governments” in the political system of the People's Republic of China (PRC). Article 1 and 12 of the Hong Kong Basic Law and the Macao Basic Law prescribe that the SARs are integral parts of the PRC and local administrative regions enjoying a high degree of autonomy in China, directly under the Central Government. Secondly, about the organizational structure of the SARs. As Deng Xiaoping remarked, “Hong Kong's political system cannot be completely westernized or copied from the Western system”. It is not the polity mode of Hong Kong and Macao governors' centralization, nor is the “Separation of Powers” system of the western countries and even less the form of the National People's Congress (NPC), but a new type of democratic polity mode suiting the SARs' characteristics, that is, the executive-led system with mutual cooperation and mutual

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check between the executive and the legislature, and judicial independence.

### **1.1 The executive-led political system reflects new relations of the legislature to the executive.**

The executive-led system is relative to the legislative-led system, meaning that the administration headed by the Chief Executives take charge of the SARs' management. According to the Basic Laws, the Chief Executives of the SARs have the same dual legal status: They are both heads of the SARs, the highest local governors and heads of the SAR Governments, leading the SAR Governments. This kind of dual status means the chief executive is at the core of the structure and operation of the government agencies, which is reflected by his/her high legal status. Specifically, the Basic Laws have created a brand-new system with Chinese characteristics for the SARs, first and foremost confirming the SARs' legal status – the SAR Governments belong to the category of "local governments" in the political system of the PRC.

The Hong Kong and Macao Chief Executives enjoy special and important status, different from the former governors. The former governor system put more emphasis on solving the power relations between the local and the central governments, and less on the relations of the executive, legislative, and judicial power, which was decided by the nature of the colonial governance and the interests of the colonial countries.

Firstly, sources of power are different. The Hong Kong Governor was appointed by the Queen of England and authorized by the British Royalty as the British plenipotentiary and symbolic representative of the Queen's ruling. Their power came from *Hong Kong Letters Patent* and *Hong Kong Royal Instructions*, which were constitutional documents for Hong Kong. The Macao Governor as the Portuguese plenipotentiary was the supreme ruler of Macao. His power was authorized by the constitutional documents such as *the Estatuto Orgânico de Macao (Organic Statute of Macao)*. After Hong Kong and Macao's handovers, the Chief Executives are elected in the SARs and appointed by the Central Government. They are not the representatives of the Central Government in the SARs and their power comes from the two Basic Laws. The appointment of the Chief Executives means that they can only exercise sovereignty with the recognition and authorization of the Central Government.

Secondly, they have different power in scope. The Hong Kong Governor had great power, commanding the executive and legislative power as the chairmen of the Executive Council and the Legislative Council, presiding over two council meetings. Meanwhile, they were commanders-in-chief of the Army, the Navy, and the Air Force. After signing the *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong* (the Sino-British Joint Declaration) on 26<sup>th</sup> September 1984 by the two governments, the handover of Hong Kong entered a transitional period. In order to protect their interests after evacuation and contain China's exercise of sovereignty, the Hong Kong and British authorities introduced elected members to the Legislative Council to gradually increase the power of the Council.

In the same way, the Macao Governor also had considerable power with the legislative, executive and military, and security power in one person, with the Chief Secretary and the Security Force Commander assisting him in exercising duties. The Macao Governor headed the Macao Government, signed the laws, and enacted the laws and regulations. The Governor was also responsible for the public security, and set, and coordinated in, security guidelines through the

Security Supreme Council. When the Macao Governor was exercising his legislative duties or performing executive tasks, the Consulting Council attached to him played a role of consultancy and assistance. The executive council and the legislative council were the consultative agencies presided by the Macao Governor. The *Estatuto Orgânico de Macao* enacted after the decolonization gave the Legislative Council part of legislative power. By contrast, the Chief Executives of the Hong Kong and Macao SARs cannot have such great power as the former Governors, because they are not heads of the Hong Kong and Macao garrisons. According to the Basic Laws, the SARs' troops are deployed by the Central Government, and are responsible for the defense of the SARs. The Macao Chief Executive enjoys only limited executive and legislative power. Even so, they do have a lot of power, yet with no comparison to that of the former Governors.

Thirdly, there is difference whether the legislatures are entitled to impeachment. Whether it is the Legislative Council in former Hong Kong or the Executive Council or the Legislative Council in former Macao, they had been the consultative agencies for the Governors in a long period of time, and had no rights to impeach the Governors of Hong Kong and Macao. However, according to the Basic Laws, if the chief executives have serious breach of law or dereliction of duty, the Legislative Councils of the SARs can impeach them in accordance with legal procedures. But the Hong Kong Basic Law prescribes that the impeachment against the chief executives needs the joint motion of a quarter of the members of the council, while in Macao it needs one third. In comparison, Macao requires more members for impeachment than Hong Kong, which is stricter and more difficult. This is conducive to the stability of the legislative-led system<sup>1</sup>.

## **1.2 Mutual cooperation and restriction of the executive and the legislature**

The executive and the legislature should have mutual cooperation with and restraint on, each other. Chapter IV of the Hong Kong Basic Law and the Macao Basic Law, On political system, makes provisions for checks and balances. The main points are: First, executive constraints on the legislature: the Chief Executive in the legislative process can refuse to sign, and even dissolve the Legislative Council. Second, the legislative constraints on the executive: the Chief Executive is responsible for and has to report to the Legislative Council and the Legislative Council has the right to impeach the Chief Executive, who must resign if uncoordinated with the Legislative Council. However, two Basic Laws stipulate that in order to ensure political stability of the SARs, they can only exercise the power to dissolve the Legislative Council once in one term (five years); The Chief Executive must resign when he or she still refused to sign on the original controversial bill approved again by 2/3 majority of the re-elected Legislative Council.

### **1.2.1 Macao executive and legislature have mutual restriction and cooperation, with emphasis on the latter.**

The Macao Basic Law stipulates that the administration and the legislature have responsibilities to cooperate with each other, but also rights to balance each other. However, cooperation is subordinate to checks and balances, both of which have different status. Specifically, they have mutual restraints and mutual cooperation, with emphasis on the latter, of which mutual restraints as the purpose, checks and balances as the means, in order to prevent the checked side from making unnecessary errors and mistakes. Emphasis on cooperation does not mean neglecting or relaxing oversight, but integrating the oversight into the cooperation. In fact, the two are of a unified dialectical relationship.

Macao Legislative Council and its Members supervise the Government's policies by way of

criticism, and checks and balances on government power are necessary to help with the government's legal and reasonable administration to ensure that Macao residents' legal rights are protected, and to get rid of public power abuse. In fact, the legislative restrictions on the government are also means of cooperation, to put pressure on the government, forcing its good governance within the framework of the law and the system through the checks and balances. In fact, cooperation and constraints are two sides of one coin, and to cooperate to facilitate the stability and prosperity of the Macao SAR, to restrain to prevent and limit the administrative *ultra vires*. The supervision on the work of the government itself is both constraint and cooperation. From a legal perspective, mutual supervision and mutual cooperation are complementary to each other and no unbridgeable gap exists between them, but it is an organic whole. Stress on cooperation is to avoid falling into unnecessary friction between the executive and legislative while emphasis on checks and balances is to prevent excessive expansion of the executive power. Constraints and cooperation have common interests and purpose: to improve the government's ability for governance and management with focus on improvement of people's livelihood, to promote economic development and social harmony. In other words, the constraints and cooperation between the executive and legislative are two sides of one coin, through the former to achieve the purpose of cooperating on a new, higher level.

Of course, the executive constraints on the legislature are mainly reflected in two aspects: First, the Chief Executive has rights to sign the bills, and promulgate laws, etc. Once the executive concepts of the SAR Government are inconsistent with the law, the Chief Executive has the power to refuse to sign a bill passed by the Legislative Council, and can submit a written justification for reconsideration; The Legislative Council can amend or improve the bill in accordance with the Chief Executive's justifications. Second, under certain conditions, the Chief Executive is entitled to dissolve the Legislative Council. In order to ensure the stability of the political system of the Macao SAR, the Chief Executive can exercise dissolution only once within one term of office and must consult the Executive Council and explain to the public in advance. To avoid the executive excessive power, the Council has the power to impeach the Chief Executive, embodying constraints on the Chief Executive.

### **1.2.2 Mutual restriction and cooperation relations of the executive and legislature in Hong Kong**

According to Hong Kong Basic Law, Hong Kong's political system is the executive-led system headed by the Chief Executive. In dealing with the relationship between the executive and the legislature, we must follow the principle of separate responsibility, co-restriction and co-operation for the executive and the legislature. The Hong Kong SAR Government under the leadership of the Chief Executive and the Legislative Council are two independent departments, both having and exercising different powers endowed by the Hong Kong Basic Law, in a relationship of constraints and cooperation. On the one hand, we emphasize mutual cooperation between the executive and the legislature, in order to improve the efficiency of the governance of the Hong Kong SAR Government; and on the other hand, we emphasize check and balance between them in order to restrict illegal, unreasonable, and non-procedural administration, therefore to integrate constraints into cooperation<sup>2</sup>.

In fact, this balance and coordination is a dialectical unity, "each inclusive of the other". Checks and balances between the executive and legislative can facilitate mutual supervision under the premise of separate responsibility and cooperation to prevent excessive executive power

domineering. Executive and legislative cooperation is to solve the problem of “more checks and less cooperation” of the Legislative Council on/with the SAR Government, in order to facilitate the executive and the legislature to exercise high degree of autonomy granted to the SARs by the Central Government so as to achieve long-term stability of the SARs.

Although Hong Kong law belongs to the common law system, and Macao law to the mainland law system, the principle of judicial independence is the same. From the perspective of the organizational system, the judicial organs of the SARs are not affiliated with the Legislative Council, neither with the Chief Executive, and they are not responsible to the legislature and the executive; nor affiliated with the mainland judiciary and so enjoy independent judicial power, and final adjudication. From the point of view of judicial activity, the SAR courts exercise judicial power independently, free from any interference. To protect the judicial officers, the Hong Kong Basic Law also stipulates that judicial officers perform judicial duties, immune from legal action.

17 years has passed since the reunification of Hong Kong, and in the overall sense, the relationship between the executive and the legislature went smoothly: the executive can get the support of the Legislative Council, and the vast majority of the bills and the budgets presented by the executive authorities have been approved by the Legislative Council. However, discordances between the Hong Kong Legislative Council and the administration persist, and the Chief Executive is facing serious challenges. How to defuse social political opposition, promote Hong Kong’s political democracy, and formulate a political democracy are mainstream public opinions, an important topic facing the SAR Government.

## **II. Review and Analysis of the Dissimilarities between the Executive and the Legislature, and the Judiciary in the two Executive-Led SARs**

Formulated later than the Hong Kong Basic Law, the Macao Basic Law made references to the Hong Kong Basic Law, but also paid attention to the specific circumstances of Macao. The drafting of the Macao Basic Law began more than three years after the drafting of the Hong Kong Basic Law, and therefore was able to fully draw on the drafting experiences of the Hong Kong Basic Law, adding a lot of adjustments and changes in content and in wording. This leads to some differences in the executive-led governance and operation, reflecting from one aspect different characteristics of the two special administrative regions.

### **2.1 Differences in the scope of power of the Chief Executive in formulating administrative regulations**

Paragraph 5 of Article 50 of the Macao Basic Law stipulates that the Chief Executive of the Macao SAR has the power to “develop, promulgate and implement administrative regulations”. The Hong Kong Basic Law also has a similar provision, namely Paragraph 5 of Article 62: the Hong Kong SAR Government is entitled to “draft and introduce bills, motions and subordinate legislations”. Although the two Basic Laws endower the Chief Executives with authority to develop administrative regulations in Macao and subordinate legislations in Hong Kong, they have one thing in common: the legal value of the regulations is often less than the legal laws enacted by the Council. The difference is that the spatial extent for the Macao SAR Government to develop administrative regulations is larger than that of Hong Kong. In addition to the development of

administrative regulations matching with the rules enacted by the Macao Legislative Council, the Macao SAR Government can also develop administrative regulations alone to make up for legal gaps in this regard in order to have laws and rules to follow.

In contrast, subordinate legislations of the Hong Kong SAR is to support the implementation of the laws the Hong Kong Legislative Council enacted, often in forms of rules, regulations, bylaws, etc. Although different in name, they have the same legal nature and legal status, with some subordinate feature.

## **2.2 Differences between the “three power” configuration under the executive-led Macao and Hong Kong administration, and the “three power” separation system of the western countries**

The so-called executive-led is actually the Chief Executive dominant. This is the point of view of the Basic Law scholar Xiao Weiyun, which is quite reasonable and scientific. Two Basic Laws give dual status (dual identity) to Chief Executives of the Hong Kong SAR and the Macao SAR. The Hong Kong Basic Law and the Macao Basic Law stipulate that the Chief Executive is the head of the Hong Kong SAR and the Macao SAR, on behalf of the SARs. They also are also heads of the two SAR authorities (i.e. the Governments), with a dual identity. Externally, Chief Executives make contacts and communication with the Central Government on behalf of Hong Kong and Macao SARs; and internally, as heads of the Administrations, they take leadership of Hong Kong and Macao SAR Governments. As can be seen, they enjoy special and important position in the SARs, especially the important privilege in terms of important personnel, including the right of appointment proposal for the principal officials, the right to dissolve the Legislative Council, the right of appointment and removal of the judges. In addition, in the Macao SAR, the Chief Executive also enjoys the right to appoint and dismiss prosecutors and the right to give appointment and dismissal suggestions for the Attorney General.

We need to specially point out that, both the Hong Kong SAR “three powers” configuration and the Macao SAR “three powers” configuration come from the Hong Kong Basic Law and the Macao Basic Law, and from the central authority, all belonging to the autonomy of the SARs. In distinguishing the minute differences in their power configuration, we cannot equate “three powers” configuration of Hong Kong and the executive-led Macao administration under “three powers” configuration with the Western separation of powers or the executive-led phenomenon under the Parliament-dominant system. They belong to new democratic systems fitting the characteristics of the special administrative regions.

## **2.3 Differences in appointment/removal procedures and purview of the Hong Kong and Macao SAR Chief Executives for the judges of the Court of Final Appeal**

Article 89 and 90 of the Hong Kong Basic Law and Articles 87 and 88 of the Macao Basic Laws provide that the Chief Executives appoint and dismiss judges at all levels of the courts of the SARs in accordance with the recommendation by the Independent Commission of local judges, lawyers and eminent persons. In case of inability of judges to perform their duties or conduct incompatible activities with his or her post, the Chief Executive may remove them from office in accordance with legal procedures. The Hong Kong Basic Law also provides, for the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of higher level courts, the Chief Executive must consult the Legislative Council besides in accordance with the above

procedure (Article 90 of the Hong Kong Basic Law)<sup>3</sup>. This suggests that for either appointment or dismissal, the consent of the Legislative Council of Hong Kong is a necessary legal procedure; while in Macao, the removal of the judges of the Court of Final Appeal is decided in accordance with the suggestion of the Review Committee composed of the Macao SAR Legislative Council Members (Paragraph 3 or Article 87 of the Macao Basic Law). It only covers the right of removal, not covering the right to appoint judges, which is relatively small. However, this puts certain degree of emphasis on decision-making right of the Macao Chief Executive on this issue.

#### **2.4 Differences in appointment qualifications and conditions for the President and other judges of the Court of Final Appeal**

In accordance with Macao Basic Law, for the selection of judges, their professional qualifications are used as the criteria, and professionally qualified foreign judges may also be employed (Article 87). However, only permanent residents of the Macao SAR with Chinese citizenship can act as the President of the Court of Final Appeal (Article 88), regardless of his/her right of abode in any foreign country. According to statistics, as of October 2013, there were a total of 46 Macao judges at three levels of courts, in which there are 38 local judges in Macao, accounting for 83% of the number of judges; eight judges of Portuguese nationals, representing 17% of the total number. Specifically, the judges of Portuguese nationality are distributed as follows: there are 5 out of 34 in the Primary Courts; 2 out of 9 in the Intermediate Courts; and 1 out of 3 (including the President of the Final Court) in the Court of Final Appeal. Foreign judges adopt the way of a two-year employment contract, which can be renewed and the number of reappointment is unlimited.<sup>4</sup>

There are two restrictive conditions for the judges of the Court of Final Appeal and the Chief Judge of higher courts in the Hong Kong Basic Law: permanent residents of Chinese citizenship and no right of abode in any foreign country (Article 90). This means that the Court of Final Appeal President and President of the Higher Court of Hong Kong have relatively stricter qualifications, and they must meet the above two conditions at the same time. Whether the Court of Final Appeal judges, judges of the Higher Court of Hong Kong, judges of district courts, magistrate courts and other special courts can be held by foreign judges, the Hong Kong Basic Law has no restriction, requiring only that selection of the Hong Kong SAR judges and other judicial officers should be based on their own judicial and professional qualities and may be recruited from other common law jurisdictions (Article 92).

#### **2.5 Differences in the sources and channels of judge employment and promotion**

Currently, except a small number of Portuguese national judges, Macao newly-recruited judges and judicial support staff are mainly recruited for training from law school undergraduate and graduate students. In practice, senior judges are usually selected and promoted from the judge and prosecutor contingent. Its sources are relatively simple. Article 92 of the Hong Kong Basic Law provides that selection of the Hong Kong SAR judges and other judicial officers should be based on their own judicial and professional qualities and may be recruited from other common law jurisdictions (Article 92). In practice, the judges must have professional legal qualifications and relevant experience gained in Hong Kong or in other common law jurisdictions. Senior judges are generally recruited from Hong Kong distinguished barristers or promoted from senior officers within the judiciary or the Department of Justice.<sup>5</sup> For example, the former Hong Kong SAR Chief

Executive Donald Tsang appointed three experienced and eminent lawyers as Court of Final Appeal non-permanent Hong Kong judges on 8<sup>th</sup> April 2010, increasing non-permanent Hong Kong judges from three to six. To this point, there are six non-permanent Hong Kong judges in the Court of Final Appeal of the Hong Kong SAR (Bokhary served as non-permanent judge of the Court of Final Appeal in Hong Kong after retirement on 25<sup>th</sup> October 2012), and 11 non-permanent judges of other common law jurisdictions (including Lord Lishen Fan, the United Kingdom Supreme Court president as Court of Final Appeal other common law jurisdiction judge)<sup>6</sup>, totaling 17. According to actual needs, the number of non-permanent judges can increase by 13 (up to a maximum of 30). In accordance with the requirements of Full Court and the Court of Final Appeal, Full Court is composed of five judges, including the Chief Justice, three permanent judges and one non-permanent Hong Kong judge or one non-permanent judge of other common law jurisdictions. Increase in non-permanent Hong Kong judges facilitates more flexible deployment of staff at the hearings, or when ruling appeals and dealing with the cases.<sup>7</sup>

### **2.6 Differences in staffing ratio of judicial support and administrative personnel**

It is an indisputable fact that the number of judges in the Macao SAR is small and concise. There are 46 judges at three-level courts. The Intermediate Courts and Court of Final Appeal quota is full, and the judges in the lower courts can increase by 8 on the basis of the original 34. In a few years, the number of judges at the grass-root level in Macao is expected to reach 42, reaching the total of 54 judges plus 12 intermediate and Court of Final Appeal judges. Nevertheless, the number of judicial support staff at all levels of the courts in Macao is large, reaching 240 in total, and plus 220 administrative staff, each judge has an average of five judicial support staff and five administrative staff.

In contrast, although the Hong Kong Basic Law provides selection and hiring requirements for other judicial personnel (Article 92), the actual number of judges is more than that of Macao, and there is not long waiting and backlog of cases. Despite personnel limit, staffing a small number of judicial officers to assist Hong Kong judges in their daily work can meet the actual needs. Even when retirements of permanent judges or other reasons cause insufficient staff problem, the retired judges may also be employed as non-permanent judges. Hong Kong judge configuration includes both permanent judges and non-permanent judges, which is a fairly reasonable and scientific practice. In this way, we can both maintain the stability of the judge staff by employing experienced barristers and retired judges as non-permanent judges to further apply their talents for the prosperity and stability of Hong Kong, and enable the senior judges to play an important role in passing their experiences and in helping the young judges.

In this respect, it is worth for Macao to learn from Hong Kong. According to the existing population of Macao (58.2 million)<sup>8</sup> and configuration limit, the number of permanent judges cannot increase substantially, only by single digits. It is not wise to make a substantial increase in judicial support and administrative staff to solve the problem of lack of judges.

## **III. Thoughts on the Problems and Solutions in the Executive-led Administration of the Hong Kong SAR and the Macao SAR**

Since the handovers of Hong Kong and Macao, the executive-led model has made remarkable

and obvious achievements in the framework of the Basic Laws, but in the actual operations, problems are also an objective existence, which cannot be ignored.

### **3.1 Improvements in relations of the executive to the legislature and to the judiciary in Macao**

In contrast, the Macao executive-led political system operates well and co-ordinates smoothly, and the executive and legislative, and judicial relations have achieved an organic integration of cooperation and constraints. However, this does not mean that their relationship is perfect and not defective in their interactions. If we carefully examine the problems in practice, there is still room for improvement in addition to the lessons learned. They are summed up as follows:

#### **3.1.1 Change from passive to active legislation**

Developing medium and long term planning for the Macao SAR is an important legislative aspect of the SAR Government, and a key factor to measure the effects of the executive-led governance. To build a world tourism and leisure center and establish an economic and trade cooperation service platform between China and Portugal, Macao must realize the rule of law in advance, size the situation properly and actively guide the economy.

Although Article 67 of the Macao Basic Law provides that the Legislative Council is the legislature of the Macao SAR, Paragraph 1 of Article 71 also made it clear that the Legislative Council has duties to enact, amend, suspend or repeal laws in accordance with the provisions of the Macao Basic Law and legal procedures. However, the majority of the Legislative Council members are not legal experts, not necessarily experts of complex social and economic affairs. Thus, in Macao, the Legislative Council is often in a passive state in legislation, which is somewhat related to the composition of the Legislative Council. To build a world tourism and leisure center and an economic and trade cooperation service platform between China and Portuguese-speaking countries, in order to promote appropriate economic diversification, Macao faces very heavy legislative tasks, which requires the Government to co-ordinate the overall planning, introduce relevant laws according to priorities, and establish coordinative legislative departments and improve the procedures and rules in legislation projects in order to make legislative work go well, and to ensure proper governance through legislation and implementation of the law.

#### **3.1.2 Further improve the executive-led mechanism through appropriate legislative restriction**

The Macao Basic Law gives the Chief Executive power to develop, promulgate and implement administrative regulations without approval of the Legislative Council. The reality shows it is an indisputable fact that administrative regulations are too many and diverse. Only in gaming industry, there are nearly 30 administrative regulations, which is a bit random. As more administrative regulations are developed and put into practice, administrative actions of administrative organs accordingly are directly related to the equitable development of society and the vital interests and rights of the public. Over-expansion of executive power, and the introduction of a large number of administrative regulations are somewhat related. Therefore, it is imperative to make appropriate restrictions for the Chief Executive to develop administrative regulations.

#### **3.1.3 Support role of judicial functions needs to be improved.**

The role of the judicial work in the Macao SAR executive-led political system should not be overlooked. As the implementation and further development of the “One Country, Two Systems” policy, as an important part of the regime, courts at all levels have never stopped improvements and

reforms in the system itself and mode of operation. Establishment of specialized courts, changes in the past criminal-civil mixed judicial system, and specialization of judges and judicial officers significantly improved trial efficiency for criminal, civil and minor civil cases, and the trial schedule has been shortened to less than six months. The Intermediate Courts established two chambers, with a separate chamber for civil and administrative cases, substantially increasing clearance rate by 33% in 2011-2012 than 2009-2010, unsettled cases decreasing by 28%.<sup>9</sup> The number of judges increased from 29 at the end of 2007 to 46 by October 2013, the problem of judge shortage eased. Currently, each year, the three judges of the Intermediate Court Criminal Chamber has to cope with about 500 new appeals, overloaded with work, physically and mentally stressed, which is not optimistic. Therefore, it is necessary and imminent to break through the limitation of the original nine judge configuration, to appropriately expand or to increase the number of judges in the Intermediate Courts.

In addition, the degree of bilingualism in instruments needs further acceleration, which is greatly related to the Macao personnel training and inadequate reserves. From the condition of courts at three levels, Chinese referee instruments for minor civil cases at the lower courts has the highest proportion, reaching 97.50%; Chinese judgment instruments for juvenile jurisdiction cases reached 87.08%; For criminal cases, bilingual instruments in Chinese and Portuguese account for 76.13%. In contrast, for civil cases, there is a lower proportion of bilingual instruments in Chinese and Portuguese, only 55.43%, but increased by 10.85% from 44.58% of 2009-2010. The proportion of Chinese used at criminal courts remained at about 90%<sup>10</sup>. It is the Intermediate Courts that need improvement. In the 2011-2012 judicial year, the Intermediate Courts produced and approved 1,122 pieces of Full Court judgments, among which the Portuguese referee instruments are 874, accounting for 77.90%; Chinese instruments are 248, accounting for 22.10%. Of the 413 Full Court referee instruments of the Criminal Chamber, Portuguese instruments are 281, accounting for 68.04%; Chinese 132, accounting for 31.96%. The admissible civil and labor litigation cases are 529, among which the Full Court Portuguese referee documents are 457, accounting for 86.39%; with just 132 copies of Chinese referee instruments, accounting for 13.61%. This shows that the proportion of Portuguese referee documents in the Intermediate Courts remain high

The situation of Macao Court of Final Appeal is encouraging in ensuring that all referees and decisions are made with the familiar language of the parties through persistent efforts of all sides, without affecting the operation of the Court, trial period and quality. Among 93 cases settled, the Full Court bilingual documents in Chinese and Portuguese are 65, accounting for 87.84% of Full Court referees, and accounting for 86.02% of the total number of completed cases; while only 13 referees or decisions were made in Portuguese because the parties are not familiar or unable to use Chinese.<sup>11</sup> All this achieved good results, and the use of Chinese is basically solved in the Court of Final Appeal.

### **3.2 Improvements in the executive, legislative, and judicial relations in the Hong Kong SAR**

Many functioning problems are exposed in the Hong Kong executive-led executive and the legislative relationship, needing more improvement in the relationship between the executive, the legislature and the judiciary.

#### **3.2.1 Further strengthen co-ordination between the executive and the legislature**

As for the political system, the Hong Kong Basic Law implements a relationship between the

executive and the legislature under the executive-led system in system design, that is, a relationship of “mutual constraints and mutual cooperation”. Since the implementation of the Hong Kong Basic Law 17 years ago, the overall situation is acceptable, but the legislative provisions themselves increasingly show apparent shortcomings and deficiencies, especially the provisions about mutual constraints are not clear, and provisions about mutual cooperation do not put stress on cooperation, with intrinsic deficiencies and unclear in terms of cooperation. As Scholar Shiu Sin-por said that the executive and legislative “mutual cooperation is only a desire,” that “the system does not encourage cooperative mechanism, and if there is cooperation between the two sides, in most cases they are just based on common interests, or under the pressure of public opinion, but not due to certain effective institutional mechanism.”<sup>12</sup> It is imperative to improve legal mechanisms for executive and legislative cooperation, and it is necessary to modify, enrich and improve the co-ordination provisions for the executive and legislature when the time is ripe, or conditions are met, adding provisions about the executive and legislative coordination and highlighting mutual restriction while focusing on cooperation, in order to ensure the effective realization of the cooperation-focused mechanism in the legal system.

In addition, Paragraph 5 of Article 73 of the Hong Kong Basic Law provides that the Legislative Council has the right to question the government. From the positive point of view, legislators tend to question the contents about current issues related to people’s livelihood. Questioning the government is not to challenge or undermine the authority and credibility of the government, but to enable the government to hear from different voices through communication, and know about public sentiment, so as to be more cautious when formulating reasonable and scientific policies. The Legislative Council should make full use of effective channels of communication as convenient means of legislative oversight on the government, to make the government more deliberate in the implementation of the policies, more effective in taking into account the interests of all parties, thereby improving public identification with the government. But the reality shows that in Hong Kong, this questioning right has changed to a abused means of by opposition lawmakers, making the Hong Kong SAR Chief Executive overwhelmed with work, struggling to cope, which is not only distracting, but also affecting the efficiency of the SAR Government.

### **3.2.2 Constantly strengthen the executive capabilities and promote the government’s prestige among the public**

First of all, the Chief Executive has a dual role in the Hong Kong SAR, taking great responsibility and exerting great influence in fully implementing the “One Country, Two Systems” principle and developing appropriate policies, and in management of Hong Kong affairs. Currently, the Legislative Council has “more checks and balances on, but less cooperation” with the Hong Kong SAR Government for various reasons. Firstly, the electoral system itself has deficiencies, and the Chief Executive is elected indirectly by the Electoral Committee consisting of 1,200 people. There is no doubt that the Chief Executive elected this way is a fully qualified, high-quality elitist. But that does not mean that he enjoys high recognition among the public, and that his ruling foundation is strong. It is unavoidable for him to be questioned, obstructed or resisted by the opposition in the Legislative Council when reviewing the government’s motions and bills. To solve this problem, the Chief Executive should have strong political skills, the courage to bear responsibility and to brave the difficulties, in order to make quick and accurate judgments and responses in the complicated situation. Secondly, he should not only give full play to the role and

the ruling power of the executive team, each performing his respective duties, but also and exercise strict "accountability". Heads of the executive departments must be strict with themselves in full display of their talents on the job, and actively assist and cooperate with the work of the Chief Executive, and be accountable to him.

Next, the Chief Executive should be good at dealing with different political parties, political groups and all walks of life, including the opposition, to form a broad political alliance. Given that the Hong Kong's Chief Executive lacks strong political allies in the Legislative Council, motions proposed by the SAR Government were repeatedly resisted by the Opposition in the Legislative Council for lack of effective support. This is because the Chief Executive of Hong Kong cannot have political affiliations, and has not obtained support from more political alliances. The Chief Executive must establish a broad political alliance in order to expand his power base and strive for more strength and support of social organizations and the public. Only in this way can he gradually change the passive situation in the review process of the Legislative Council.

### **3.2.3 Expansion of the Hong Kong jurisdiction should draw enough attention and appropriate restriction.**

The Hong Kong Basic Law stipulates that the Court of Final Appeal is entitled to interpret the provisions about high degree of autonomy in the Hong Kong Basic Law. The Court of Final Appeal takes a dynamic understanding of this and actively intervenes with the administration, and has gradually formed a similar "constitutional review" model.<sup>13</sup> In the 1999 case of Ng Ka Ling appealing Immigration Department, the Court of Final Appeal ruled the SAR legislature violating the Hong Kong Basic Law, and claimed that the SAR judiciary could review the legislation of the National People's Congress. After this, the SAR Government reported to the Central Government, and then the State Council asked the NPC Standing Committee to for interpretation requirements. Interpretation by the NPC Standing Committee clarified the relationship between the NPC Standing Committee and the SAR judiciary, thus avoiding excessive expansion of the SAR Judiciary<sup>14</sup>. Although the decision of the Court of Final Appeal has not been overthrown by the NPC Standing Committee, yet in the future its trial and judgment must be based on the interpretation of Hong Kong Basic Law by the country's highest judicial authority.

The latest is the 2008 case of Congo (DRC). The Hong Kong Court of First Instance made the judgment of no jurisdiction over the case. The plaintiff refused to accept the verdict, and appealed to the Court of Appeal in Hong Kong. In 2010, the Court of Appeal quashed the judgment of the Court of First Instance by 2:1 majority. Two judges of the Court of Appeal believed that before its handover, Hong Kong pursued Britain's restrictive immunity system, because State Immunity Act enacted by Britain in 1978 extended to Hong Kong. After the handover, because was no national state immunity law applicable in Hong Kong, and restrictive immunity system has become an international practice and part of common law, this common law restored its potency in Hong Kong after SIA ceased to apply, so restrictive immunity system continues to apply in Hong Kong. Congo (DRC) and the Railway Company of China appealed to the Court of Final Appeal in Hong Kong SAR. On 8<sup>th</sup> June 2011, the Hong Kong Court made a temporary 3:2 majority judgment<sup>15</sup>, applying for interpretation by the NPC Standing Committee whether rules or policies on state immunity are "diplomacy affairs" and, ruling that the courts of the Hong Kong SAR had no jurisdiction over the Congo (DRC) case if it is not inconsistent with the interpretation of the NPC Standing Committee. Hong Kong Court of Final Appeal held that before making a final judgment, it is necessary ask the NPC Standing Committee to make interpretations on four issues relating to "Foreign Affairs" in

Hong Kong Basic Law Article 13-1, and Article 19-3, in accordance with Article 158-13. This is the first time since the handover that the Court of Final Appeal submitted application for the NPC Standing Committee interpretation in accordance with Article 158 of the Hong Kong Basic Law (the past three interpretations are requested by the executive branch).

By 26<sup>th</sup> August 2011, the long-time debated “state immunity” is defined finally by the most authoritative interpretation. The 22<sup>nd</sup> Plenary Meeting of the Eleventh NPC Standing Committee unanimously voted for “NPC Standing Committee’s Interpretation of Paragraph 1 of Article 13, and Article 19 of the Hong Kong Basic Law”. The interpretation mainly gives four explanations about the problem raised by the Hong Kong SAR Court of Final Appeal, the core content of which is that the Hong Kong SAR must implement the state exemption rules or policies decided by the Central Government. This is the fourth time after the reunification of Hong Kong that the NPC Standing Committee gave interpretation, which is the result of the Hong Kong courts’ first application for interpretation, establishing the most authoritative legal basis for the final decision on Congo (DRC) case.

The independence of the judiciary should be stressed, that is, the judicial, the executive, and the legislative separation of powers, should be free from any interference. The basic spirit lies in the pursuit of the rule of law, freedom and equality. This is an important cornerstone of Hong Kong social development. But it cannot be ignored that the characteristic of the executive-led system is that the executive power is over the legislative and judicial powers. But the role of the judiciary in Hong Kong intervened to a certain extent in the operations of the executive-led system. The SAR courts reached beyond the scope of autonomy in the exercise of judicial review on some cases, which obviously belongs to the scope of the central administration. In order to avoid or reduce these conflicts, correct understanding of judicial independence is crucial. The SAR Governments and the Court of Final Appeal should ask for instructions and communicate with the Central Government, having mutual respect and establishing mutual trust mechanism between the Central Government and the SARs, especially in matters involving the definition the Central Authorities and the SAR Government powers. Meanwhile, the Hong Kong judiciary should strictly comply with the Hong Kong Basic Law, neither exercising ultra vires nor overriding the executive and legislative powers. For judicial ultra vires, some necessary institutional restrictions should be made in order to keep a balance between the judicial and executive powers.

## Notes:

- <sup>1</sup> Jeong Wan Chong, Huang Laiji and Li Zhiqiang (2012). *A Study of SAR System and Basic Political System in China*. Beijing: China Democracy and Legal Press. 389.
- <sup>2</sup> Song Sio Chong and Ho Man Ieng (2011). *On the Relationship between the Executive and Legislative Branches of the MSAR under the “One Country, Two Systems” Policy*. In *Academic Journal of One Country Two Systems (Chinese version)*, Volume 7. 73-74.
- <sup>3</sup> Jeong Wan Chong, Huang Laiji and Li Zhiqiang (2012). *A Study of SAR System and Basic Political System in China*. Beijing: China Democracy and Legal Press. 388-389.
- <sup>4</sup> This is material obtained in the research made in the Court of Final Appeal of the Macao SAR with 6 other fellows from Shanghai Academy of Social Sciences on 24<sup>th</sup> October 2013.

- <sup>5</sup> On Courts and Judges in Hong Kong Judicial System. In the website of the Legal Network: <http://www.docin.com/p-433595010.html>.
- <sup>6</sup> Author (2012). Donald Tsang Appointed Tang as Permanent Judge of the Hong Kong CFA. In the website of *China Daily*: [http://www.chinadaily.com.cn/hqgj/jryw/2012-03-29/content\\_5558681.html](http://www.chinadaily.com.cn/hqgj/jryw/2012-03-29/content_5558681.html).
- <sup>7</sup> Author (2012). Donald Tsang Appointed Three Non-Permanent Judges for Hong Kong CFA. In the website of NetEase: <http://news.163.com/10/0409/09/63QN5KOM000146BC.html>.
- <sup>8</sup> The number of judges is allocated according to the proportion of the population in Macao. By the end of 2012, the total population of Macao was about 58.2 million. See Author (2013). Macao's Population is over 58 Million. In the website of Xinmin: <http://news.xinmin.cn/domestic/2013/03/05/19024270.html>.
- <sup>9</sup> The Annual Report of the Macao SAR Courts (2011-2012). 12.
- <sup>10</sup> *Ibid.*, 40.
- <sup>11</sup> *Ibid.*, 23.
- <sup>12</sup> Shiu Sin-por (2007). Administration vs. Legislature under the Basic Law. *Hong Kong and Macau Studies*, 2007 Spring. 105.
- <sup>13</sup> Jeong Wan Chong, Huang Laiji and Li Zhiqiang (2012). *A Study of SAR System and Basic Political System in China*. Beijing: China Democracy and Legal Press. 315.
- <sup>14</sup> Cheng Jie. Hong Kong's Political and Executive-led System. In Rao Geping and Wang Zhenmin (Eds.). *Hong Kong and Macao Basic Law Review*. First Series. 95.
- <sup>15</sup> Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC, FACV 5, 6 & 7/2010.