

Probe into the Issue of Interpretation of the Basic Laws

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Since the handover, the Central Authorities and the Governments of the Hong Kong and Macao Special Administrative Regions (SARs) have earnestly implemented the policy of “One Country, Two Systems” acted in strict accordance with 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”) and obtained remarkable achievements. Meanwhile, issues such as the understanding and implementation of the Basic Laws disrupting the newly established legal order immediately after the establishment of the Hong Kong SAR in 1997 have also occurred, due to the reality in which Hong Kong, Macao and the Mainland are independent jurisdictions with inherent differences existing in their respective legal traditions, systems and cultures. Besides Hong Kong, disputes have also emerged over some of the provisions of the Macao Basic Law during its 15 years of practice and thus aroused public concern. Since correct interpretation and implementation of the Basic Laws is crucial to the SARs’ prosperity, stability and development, this article aims to conduct a probe into the issue of interpretation of the Basic Laws.

I. A Few Typical Precedents on Interpretation of the Basic Laws

On the issue of interpretation, there is a chapter in the Hong Kong Basic Law and the Macao Basic Law with relevant provisions that clearly stipulate that the power of interpretation of the Basic Law is vested in the Standing Committee of the National People’s Congress (NPC). In order to embody a high degree of autonomy in the SARs, the NPC Standing Committee has authorized the courts of the SARs to interpret on their own, in adjudicating cases, the provisions of the Basic Laws which are within the limits of the autonomy of the SARs. The courts of the SARs may also interpret other provisions of the Basic Laws when adjudicating cases. Nevertheless, if the courts of the SARs, in adjudicating cases, need to interpret the provisions of the Basic Laws concerning affairs which are the responsibility of the Central Government, or concerning the relationship between the Central Authorities and the SARs, and if such interpretation will affect the judgments in the cases, the courts of the SARs shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the NPC Standing Committee through the Courts of Final Appeal of the SARs. If the NPC Standing Committee makes an

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interpretation of the provisions concerned, the courts of the SARs, in applying those provisions, shall follow the interpretation of the NPC Standing Committee.

Since the Basic Laws have not clearly defined issues concerning the provisions which are within the limits of the autonomy of the SARs as well as the subjects to seek interpretation, a spate of disputes, frictions and conflicts have occurred during the practice of the Basic Laws.

1.1 The issue concerning the right of abode in Hong Kong

1.1.1 The case of undocumented children

The case of undocumented children refers to a series of disputes and cases concerning the right of abode triggered by Paragraph 2 of Article 24 of the Hong Kong Basic Law. The point of contention focuses on the legal status of the children of Chinese nationality born in the Mainland to Hong Kong residents after the implementation of the Hong Kong Basic Law as well as on whether the children born in Hong Kong to Chinese citizens who are non-Hong Kong residents after the reunification could acquire Hong Kong permanent resident status. The more well-known cases to the public include those of Ng Ka Ling and Chong Fung Yuen.

The point of contention in the case of Ng Ka Ling focuses on whether the rule of the Immigration (Amendment) (No. 2) Ordinance – which came into effect from 1st July 1997 and stipulates that in order for Hong Kong residents' child of Chinese nationality born outside Hong Kong to qualify for the right of abode in Hong Kong, one of the parents must be Hong Kong permanent resident with the right of abode in Hong Kong at the time of the child's birth – contravenes Item 3 of Paragraph 2 of Article 24 of the Hong Kong Basic Law, thus further challenging the constitutionality of the rule. The case of Chong Fung Yuen, on the other hand, partially represents the children born in Hong Kong to parents of Chinese nationality who are non-Hong Kong residents (commonly known as "double-nos," "double illegitimacy," "double illegitimate infants" or "anchor babies"). The two types of legal disputes mentioned above involve claimants whose parents have applied for judicial review by declaring their eligibility for the right of abode in accordance with Article 24 of the Hong Kong Basic Law.

On 29th January 1999, the Court of Final Appeal of the Hong Kong SAR ruled in the case of Ng Ka Ling that all children born to Hong Kong residents are entitled to the right of abode in Hong Kong, including those born in the Mainland. Given the ruling's potential of attracting an influx of more than 1.6 million eligible persons into Hong Kong and causing a tremendous impact¹ on the society of Hong Kong, the Hong Kong SAR Government on 20th May 1999 sought the assistance of the Central Government to resolve the issue encountered during the implementation of the relevant provisions of the Hong Kong Basic Law. On 26th June 1999, the 10th Session of the 9th NPC Standing Committee deliberated over the State Council's Motion on Proposing the Request for an Interpretation of Article 22.4 and Article 24.2.(3) of the Basic Law of the Hong Kong SAR of the People's Republic of China. The NPC Standing Committee's final interpretation clarified that persons are eligible for the right of abode only if, at the time of their birth, at least one of their parents has the status of permanent resident in Hong Kong.²

On 20th July 2001, the Court of Final Appeal ruled in the case of Chong Fung Yuen that "Chinese citizens born in Hong Kong have the right of abode according to Article 24 of the Basic Law regardless of the status of their parents."³ The Court ruled in favor of Chong Fung Yuen, believing that the meaning of the provision was not ambiguous. As a result, all Chinese citizens born in Hong Kong are eligible for the right of abode.

1.1.2 Disputes over the right of abode of foreign domestic helpers

In 2011, the judicial review case concerning the right of abode of foreign domestic helpers in Hong Kong also aroused widespread attention in the society of Hong Kong. The point of contention of the issue is whether seven years of continuous work in Hong Kong (with the assumption that the need to leave Hong Kong for a short period of time after the termination of each contract is not considered) gives the foreign domestic helpers the eligibility to apply to become permanent residents of Hong Kong according to Article 24 of the Hong Kong Basic Law.⁴

On 25th March 2013, the five judges of the Court of Final Appeal of the Hong Kong SAR, during the major litigation concerning foreign domestic helpers' lawsuits seeking the right of abode in Hong Kong, unanimously rejected the foreign domestic helpers' appeal in the case of *Vallejos v. Commissioner of Registration* and ruled against the foreign domestic helpers' claims for the right of abode in Hong Kong. The judges of the Court of Final Appeal in the verdict pointed out the highly restrictive nature of residence of foreign domestic helpers in Hong Kong as their contracts only allowed them to serve specifically designated employers and banned them from engaging in other work. Moreover, prior to their arrival in Hong Kong, foreign domestic helpers had already been aware of their purpose, which was not to settle in Hong Kong. Therefore, the Court deemed that their appeal did not comply with the interpretation of the definition of "ordinary residence" in Article 24.2.(4) of the Hong Kong Basic Law and considered the Immigration Ordinance of the Hong Kong SAR not "unconstitutional." Meanwhile, the Court's ruling also rejected the Governments' proposal to seek the NPC Standing Committee's legislative interpretation. The Court's verdict pointed out that the courts, in adjudicating cases, may interpret on their own the provisions which are within the limits of the autonomy of the SAR according to the provisions of Paragraph 2 and 3 of Article 158 of the Hong Kong Basic Law. The courts may also interpret other provisions of the Hong Kong Basic Law under the circumstance that does not violate legal reasons. Therefore, it was not necessary to seek an interpretation from the NPC Standing Committee.

1.2 On the issue of amending the methods for selecting the Chief Executive and forming the Legislative Council

According to Article 45 of the Hong Kong Basic Law, the method for selecting the Chief Executive of the Hong Kong SAR will ultimately be conducted through universal suffrage. However, no specific programs and schedules have been clearly established and Article 7 of Annex I of the Hong Kong Basic Law only states that the selection method can be amended in or after 2007.

On 6th April 2004, the 8th Session of the 10th NPC Standing Committee adopted the interpretation⁵ of Annexes I and II of the Hong Kong Basic Law, which involves the amendment of the methods for selecting "the Chief Executive and forming the Legislative Council as well as the regulation governing the voting procedures of bills and motions." The most important provision stipulates that the commencement of three legal procedures required in the original provisions for all the proposed amendments – "passage by a two-thirds majority of all the members of the Legislative Council, the consent of the Chief Executive and report to the NPC Standing Committee for approval or record" – also requires two other procedures, namely: a) the Chief Executive's submission of a report to the NPC Standing Committee on whether the amendment is necessary; b) The NPC Standing Committee's affirmation according to the provisions of Articles 45 and 68 of the Hong Kong Basic Law, in light of the actual situation in Hong Kong and in accordance with the

principle of gradual and orderly progress. In other words, there are two procedural prerequisites for the amendment procedures besides the three aforementioned steps of necessary legal procedures.

On 17th November 2011, Fernando Chui Sai On, the Chief Executive of the Macao SAR, wrote to Wu Bangguo, the then Chairman of the NPC Standing Committee, seeking the NPC Standing Committee's interpretation of Article 7 of Annex I and Article 3 of Annex II of the Macao Basic Law. On 31st December 2011, the NPC Standing Committee adopted The Interpretation Regarding Article 7 of Annex I and Articles 3 of Annex II of the Macao Basic Law⁶, which clearly defined the need to follow the five-step procedure for verifying the necessity of amendments when amending the methods for selecting the Chief Executive of the Macao SAR and forming the Legislative Council of the Macao SAR. Similar to the situation in Hong Kong, in addition to the three procedures according to Article 7 of Annex I and Article 3 of Annex 2 of the Macao Basic Law, there are two procedural prerequisites, which are: a) the Chief Executive of the Macao SAR's submission of a report to the NPC Standing Committee; b) The NPC Standing Committee's affirmation on whether such an amendment is necessary in accordance with Articles 47 and 68 of the Macao Basic Law and in light of the actual situation of the Macao SAR.

1.3 The term of office of the Chief Executive

The term of office of the Chief Executive succeeding Tung Chee-hwa, Hong Kong's first Chief Executive, became a contentious issue after Tung's resignation on 10th March 2005. There was one view believing that the new Chief Executive should serve the five-year term of office. Another view held that the succeeding Chief Executive should only serve the residue of the former Chief Executive's term of office. On 6th April 2005, Donald Tsang Yam-kuen, the then acting Chief Executive, submitted a report on the relevant issues to the State Council, proposing the State Council make a request to the NPC Standing Committee for its legislative interpretation. On 27th April 2005, the NPC Standing Committee adopted the interpretation, pointing out that the succeeding Chief Executive should only serve the residue of the previous Chief Executive's term of office if the resignation took place before 2007.⁷

1.4 Disputes over legislative power

Paragraph 1 of Article 17 of the Macao Basic Law stipulates that the Macao SAR shall be vested with legislative power. Item (5) of Article 50 of the Macao Basic Law stipulates that the Chief Executive of the Macao SAR shall exercise the powers to formulate the administrative regulations and promulgate them for implementation. In practice, the Chief Executive, the Legislature, and the courts of the SAR hold different views on the provisions of the Macao Basic Law regarding the Chief Executive's power to formulate the administrative regulations. Since reunification, the relationship between the administrative regulations formulated by the Chief Executive and the laws enacted by the Legislative Council has triggered a series of judicial litigation, becoming the focus of attention in the society of Macao. In practice, the Intermediate Courts of the Macao SAR and the Court of Final Appeal of the Macao SAR have understood and ruled differently on the same issues. Of these, the representative examples are Decision No. 280/2005⁸ and Decision No. 28/2006⁹ respectively made by the Intermediate Courts of the Macao SAR and the Court of Final Appeal of the Macao SAR, with the society and the academic community also sharing different views on these issues.¹⁰

Decision No. 280/2005 made by the Intermediate Courts of the Macao SAR supported the

application of a joint-venture company's workers for exceptional extension of Authorization to Stay in Macao and revoked the administrative decision that rejected the application while declaring the invalidity of the Government's Administrative Regulation No. 17/2004 applicable in the case. The Administrative Regulation was deemed illegal since the Intermediate Courts held the view that the formulation of administrative regulations must be specifically authorized by the law, thus precluding the existence of independent administrative regulations. The Government refused to accept in this regard and appealed to the Court of Final Appeal. One of the core claims of the litigation was to request the confirmation of the Chief Executive's power granted by the Basic Law to formulate independent administrative regulations that can regulate the externally binding code of conduct while affirming the validity of Administrative Regulation No. 17/2004 and upholding the administrative decision. Decision No. 28/2006 made by the Court of Final Appeal accepted the argument of the Administrative Authorities and affirmed the validity of Administrative Regulation No. 17/2004. The Court believed that "the Chief Executive's power 'to formulate the administrative regulations' refers to the original regulation-formulating power directly derived from the Basic Law (which is not secondary and does not refer to only formulation of administrative regulations that can be implemented)."¹¹ As a result, the Court of Final Appeal overruled the decision of the judges of the Intermediate Courts, arguing that the requirement of prior legal authorization for the administrative regulations has no legal basis.

1.5 The case of Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC

The case of Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC (hereinafter as "the Congo case") in 2011 was the arbitration case that appealed to the courts of the Hong Kong SAR to recognize and enforce a foreign state as the defendant. In the case, the Democratic Republic of the Congo (DRC) granted mining rights to the China Railway Group, expecting in exchange to receive the Group's investment in the DRC's infrastructure. As the creditor, a US fund company filed an injunction seeking to freeze the Group's USD102 million investment as debt repayment. The DRC advocated that the courts of the Hong Kong SAR have no jurisdiction over the country given its "entitlement to state immunity" and demanded the revocation of the ruling, which was overruled by the Court of Appeal of the High Court of the Hong Kong SAR. The DRC then appealed the decision to the Court of Final Appeal to seek the NPC Standing Committee's legislative interpretation on diplomatic immunity. The Court of Final Appeal finally accepted its appeal for interpretation. On 8th June 2011, the Court of Final Appeal, by a majority of 3 to 2, ruled in an interim judgment to seek the NPC Standing Committee's interpretation of Articles 13 and 19 of the Hong Kong Basic Law on the issues involved in this case. On 26th August 2011, the 22nd Session of the 11th NPC Standing Committee adopted the interpretation, specifying that Hong Kong's external affairs are the responsibility of the Central Government. Therefore, the courts of the Hong Kong SAR, in adjudicating cases involving foreign states and the jurisdictional immunity and enforcement immunity over their property, shall apply and implement the state immunity rules or policies applicable to the Hong Kong SAR decided by the Central Government. The courts also must not deviate from the aforementioned rules or policies and adopt rules different from the aforementioned rules or policies.¹²

II. Analysis of the Specific Channels of Interpreting the Basic Laws

The understanding and interpretation of the provisions of the Basic Laws has undergone a series of disputes, frictions, conflicts and even collisions during the ten-plus years of the implementation of the Basic Laws in both SARs. As a result, a series of procedures and channels for resolving disputes have evolved after a period of adjustment, adaptation and exploration. So far, the NPC Standing Committee has made four interpretations involving the provisions of the Hong Kong Basic Law. Of these, only one has been initiated by the NPC Standing Committee. Two have been carried out through the Chief Executive's submission of reports on relevant issues to the State Council, proposing the State Council make a request to the NPC Standing Committee for its interpretations, which were ultimately conducted. One has been made through the Court of Final Appeal that sought the NPC Standing Committee's interpretation. As for the Macao Basic Law, the NPC Standing Committee has made one interpretation, which was carried out through the Chief Executive who directly wrote to the Chairman of the NPC Standing Committee to seek the NPC Standing Committee's interpretation. Other disputes have mostly been resolved through the courts' judicial interpretations during litigation. To more directly examine the disputed provisions, the point of contention, types of disputes, institutions to interpret the Basic Laws and channels of interpreting the Basic Laws involved in the aforementioned cases, Table 1 is given below for further clarification.

Table 1: An Overview of the Typical Precedents of Interpretation of the Basic Laws

Disputed provisions	Point of contention	Types of disputes	Institutions to interpret the Basic Laws	Channels of interpreting the Basic Laws
Articles 22 and 24 of the Hong Kong Basic Law	On the provisions regarding whether the children of Chinese nationality born in the Mainland to Hong Kong residents are eligible for the right of abode in Hong Kong as well as the Mainland residents' eligibility for residence in Hong Kong.	Social disputes involving judicial litigation (representative case – the Ng Ka Ling case)	The Court of Final Appeal of the Hong Kong SAR	First, the Court of Final Appeal of the Hong Kong SAR made an interpretation. Later, the Chief Executive submitted a report on the relevant issues to the State Council, proposing the State Council make a request to the NPC Standing Committee for its legislative interpretation. The NPC Standing Committee's final interpretation should prevail.
			The NPC Standing Committee	
	On whether infants born in Hong Kong to parents who are both non-Hong Kong residents are eligible for the right of abode in Hong Kong.	Social disputes involving judicial litigation (representative case – the Chong Fung Yuen case)	The Court of Final Appeal of the Hong Kong SAR	The Court of Final Appeal of the Hong Kong SAR made the judicial interpretation.
On whether the foreign domestic helpers are eligible for the right of abode after seven years of continuous employment in Hong Kong.	Social disputes involving judicial litigation (representative case – the case of <i>Vallejos v. Commissioner of Registration</i>)	The Court of Final Appeal of the Hong Kong SAR	The Court of Final Appeal of the Hong Kong SAR made the judicial interpretation.	

Table 1: An Overview of the Typical Precedents of Interpretation of the Basic Laws (Cont’)

Article 7 of Annex I and Article 3 of Annex II of the Hong Kong Basic Law	On the understanding of the procedures of amending the methods for selecting the Chief Executive and forming the Legislative Council of the SAR.	Social disputes	The NPC Standing Committee	The NPC Standing Committee made the legislative interpretation on its own initiative.
Article 7 of Annex I and Article 3 of Annex II of the Macao Basic Law				The Chief Executive of the Macao SAR wrote to the Chairman of the NPC Standing Committee to seek the NPC Standing Committee’s legislative interpretation.
Article 46 and Annex I of the Hong Kong Basic Law	On whether the succeeding Chief Executive should serve a five-year term of office or the residue of the former Chief Executive’s term of office.	Social disputes	The NPC Standing Committee	The then acting Chief Executive of the Hong Kong SAR submitted a report on the relevant issues to the State Council, proposing the State Council make a request to the NPC Standing Committee for its legislative interpretation.
Item (5) of Article 50 of the Macao Basic Law	On whether the Chief Executive can formulate independent administrative regulations to regulate the externally binding code of conduct	Social disputes involving judicial litigation (representative cases – Decision No. 280/2005 made by the Intermediate Courts of the Macao SAR and Decision No. 28/2006 made by the Court of Final Appeal of the Macao SAR)	The Intermediate Courts of the Macao SAR and the Court of Final Appeal of the Macao SAR	First, the Intermediate Courts of the Macao SAR made an interpretation. After the appeal, the Court of Final Appeal of the Macao SAR made a different interpretation.
Articles 8, 13, 19 and 160 of the Hong Kong Basic Law	On the issue of whether state immunity rules or policies the Central Government has decided to adopt should be applicable to the Hong Kong SAR.	Social disputes involving judicial litigation (representative case – the Congo case)	The NPC Standing Committee	The Court of Final Appeal of the Hong Kong SAR sought the NPC Standing Committee’s legislative interpretation.

The precedents mentioned above and the analysis of Table 1 both demonstrate that if disputes in the society have occurred due to interpretation of the relevant provisions of the Basic Law, and if such disputes involve judicial litigation, the provisions concerning the case which are within the limits of the autonomy of the SARs, or the provisions that will not affect the outcome of the judgments, under normal circumstances, the courts can interpret on their own during the process of adjudicating cases. In practice, instances include the cases involving the foreign domestic helpers’ right of abode in Hong Kong and disputes over legislative power of the Macao SAR, which have been resolved through judicial channels. If the disputed provisions concerning the cases involve the provisions of the Basic Laws concerning the affairs which are the responsibility of the Central Government, or concerning the relationship between the Central Authorities and the SARs, and if

an interpretation of the provisions concerned will affect the judgments in the cases, the Court of the Final Appeal shall seek the NPC Standing Committee's interpretation and make judgments in accordance with the NPC Standing Committee's interpretation, such as the Congo case in Hong Kong.

If the disputed provisions concerning the case involve the provisions of the Basic Laws concerning the affairs which are the responsibility of the Central Government, or concerning the relationship between the Central Authorities and the SARs, but the Court of Final Appeal does not follow the procedures to seek the NPC Standing Committee's legislative interpretation but interpret on their own, then when the NPC Standing Committee makes a subsequent interpretation of the provisions concerned, the courts of the SARs, in applying those provisions, shall follow the interpretation of the NPC Standing Committee. However, judgments previously rendered shall not be affected. The more typical cases in practice should be the case of Ng Ka Ling in Hong Kong.

As dictated by the mechanism of interpreting the Basic Laws, the premise that allows the Court of Final Appeal to seek the NPC Standing Committee's legislative interpretation must be the existence of specific cases. Therefore, if no specific cases are involved, – for example, disputes over the procedures of amending the methods for selecting the Chief Executive of the SAR and forming the Legislative Council of the SAR as well as those over the provisions concerning the term of office of the succeeding Chief Executive of the Hong Kong SAR – then the NPC Standing Committee's legislative interpretation cannot be sought through the Court of Final Appeal. In light of this, channels of resolution include the NPC Standing Committee's initiation to make the legislative interpretation, the Chief Executive's submission of a report on relevant issues to the State Council, proposing the State Council make a request to the NPC Standing Committee for its legislative interpretation or the Chief Executive's letter on relevant issues to the Chairman of the NPC Standing Committee to seek legislative interpretation.

III. The Perfection of the Interpretation System of the Basic Laws

3.1 Interpretation by the NPC Standing Committee

According to the provisions of the Basic Laws, the power to interpret the Basic Laws is vested in the NPC Standing Committee. The NPC Standing Committee's power to interpret the Basic Laws is determined by the nature of the Basic Laws and the legal status of the SARs. It is worth mentioning that, even so, the NPC Standing Committee's legislative interpretation should also follow the established legal procedures and consult its Committee for the Basic Law before giving an interpretation. The NPC Standing Committee owns the comprehensive power to interpret the Basic Law. Once the NPC Standing Committee makes an interpretation, it shall be the ultimately authoritative interpretation. In practice, it can be further categorized into the following four situations according to the different subjects seeking the NPC Standing Committee's interpretation.

3.1.1 The NPC Standing Committee's interpretation of the Basic Laws on its own initiative

According to China's legal interpretation system, the NPC Standing Committee can interpret all the laws on its own initiative, including interpretation of the Basic Laws, of course. However, under the policy of "One Country, Two Systems" and the high degree of autonomy, the NPC Standing Committee must exercise its power to interpret the Basic Laws very carefully by

complying with the provisions of the Legislation Law. It must never make an interpretation arbitrarily.

Judging from the key elements of proposal for legislative interpretation, there are several important conditions required in order for the NPC Standing Committee to interpret the Basic Laws on its own initiative, namely: a) major disputes that have occurred in the society over the provisions of the Basic Laws when encountering major practical issues; b) the need to further clarify the characteristics of the provisions of the Basic Laws or newly-emerged circumstances that require clarification of the applicable legal basis; c) involvement of relevant provisions concerning the affairs which are the responsibility of the Central Government, or concerning the relationship between the Central Authorities and the SARs; d) relevant disputes that cannot be resolved in the SARs and, if not promptly handled, will inevitably have a significant impact on the prosperity and stability of the SARs, even affecting the vital interests of the residents of the SARs. Only under such circumstances will the NPC Standing Committee interpret the Basic Laws on its own initiative.¹³

Judging from the interpretation procedure, the NPC Standing Committee has strict procedural requirements for legislative interpretation. In order for the NPC Standing Committee to interpret the Basic Laws on its own initiative, a motion must be proposed during the meeting of the Chairman of NPC Standing Committee, which will then decide whether to recommend the inclusion of the proposal for interpretation in the NPC Standing Committee's agenda after seeking opinions from all sides by following the legal procedures. If the proposal's inclusion in the agenda of the NPC Standing Committee is permitted, it will be necessary to seek further consultation from its Committee for the Basic Law. In addition, the plenary session of the NPC Standing Committee must also conduct a hearing on the briefing of the draft of the legislative interpretation and deliberate over it in group discussions. The NPC Standing Committee's Law Committee will then conduct a unified deliberation based on the comments of group discussions and propose the revised draft for voting. The meeting of the Chairman of the NPC Standing Committee will finally determine the voting and announcement of the draft.

Judging from the interpretation method, legal interpretation does not create new rules, but clarifies the meaning of the original provisions. The key is to remain faithful to the original intent of the legislation when determining the meaning of the provisions. When determining the specific meaning of the law and regulations, one must not only look at the literal meaning of the provisions of the law, but also the relationship between the gist and context of the legislation. It is necessary to conduct a comprehensive analysis of the system stipulated by the law as a whole in order to search for the meaning that best embodies the original intent of the legislation.

Since the establishment of the SARs, the NPC Standing Committee has interpreted the Basic Laws on its own initiative only once, i.e. the interpretation made on 6th April 2004 for Article 7 of Annex I and Article 3 of Annex II of the Hong Kong Basic Law concerning the provisions on the procedures for amending the methods for selecting the Chief Executive and forming the Legislative Council. This paper's author believes that Article 7 of Annex I and Article 3 of Annex II of the Hong Kong Basic Law involve the affairs which are the responsibility of the Central Government and concerning the relationship between the Central Authorities and the SARs. Both had also sparked major disputes in the society that would affect the prosperity and stability of the SAR if not promptly handled with the meaning clearly and swiftly defined. Therefore, the NPC Standing Committee's interpretation on its own initiative was well-timed and necessary.

3.1.2 The Chief Executive's submission of a report to the State Council, proposing the State Council make a request to the NPC Standing Committee for its legislative interpretation

According to the provisions of Article 43 of the *Legislation Law of the People's Republic of China*, the State Council has the authority to propose a request to the NPC Standing Committee for legislative interpretation. Since the SAR Governments are directly under the Central Government, the SAR Chief Executives's submission of a report on major disputes encountered during the process of implementing the Basic Laws to the State Council, proposing the State Council make a request to the NPC Standing Committee for its interpretation of relevant provisions of the Basic Laws to resolve the issues concerned is in accordance with the Basic Laws and the legal interpretation procedure stipulated by the laws of the Mainland. Nevertheless, it depends on the discretion of the State Council to determine whether to accept the SAR Chief Executives' proposal of seeking the interpretation of the relevant provisions of the Basic Laws from the NPC Standing Committee. It should be noted that the State Council's motion of seeking interpretation of the Basic Laws from the NPC Standing Committee should also comply with the same strict statutory procedures that govern the NPC Standing Committee's initiation of interpretation.

In practice, the ruling of the Court of Final Appeal of the Hong Kong SAR on 29th January 1999 on the Ng Ka Ling case was considered to have a tremendous impact on the society of Hong Kong with the potential to cause the "unbearable burden" on the newly established SAR. On 20th May 1999, Tung Chee-hwa, the then Chief Executive of the Hong Kong SAR, submitted *The Report on Seeking the Assistance of the Central People's Government to Resolve Issues Encountered when Implementing the Relevant Provisions of the Basic Law of the Hong Kong SAR* to the State Council for assistance, proposing the State Council seek the interpretation of the original legislative intent of Article 22.4 and Article 24.2.(3) of the Hong Kong Basic Law from the NPC Standing Committee in accordance with the relevant provisions of the *Constitution of the People's Republic of China* (hereinafter as "the Constitution") and the Hong Kong Basic Law. On 10th June 1999, the State Council notified the Hong Kong SAR Government of the acceptance of Tung's report on the issue regarding the right of abode, and would seek the NPC Standing Committee's interpretation of the relevant provisions of the Hong Kong Basic Law. On 26th June 1999, the NPC Standing Committee deliberated over the State Council's *The Motion on Request for an Interpretation of Article 22.4 and Article 24.2.(3) of the Basic Law of the Hong Kong SAR of the People's Republic of China* and made an interpretation of Article 22.4 and Article 24.2.(3) of the Hong Kong Basic Law through the legal procedures and consultation with the NPC Standing Committee's Committee for the Hong Kong Basic Law. The disputes in 2005 over the term of office of the succeeding Hong Kong SAR Chief Executive were also resolved through Donald Tsang Yam-kuen, the then acting Chief Executive of the Hong Kong SAR, who submitted a report on relevant issues to the State Council, proposing the Stated Council make a request to the NPC Standing Committee for its interpretation. According to the Constitution, its laws and regulations, as well as the practice since Hong Kong's handover, proposing an interpretation from the NPC Standing Committee through the State Council is a more smooth method, which neither intervenes the judicial system nor undermines judicial independence in Hong Kong.

3.1.3 The Chief Executive of the SAR's writing to the Chairman of the NPC Standing Committee to seek the NPC Standing Committee's interpretation

Accordance to the provisions of the Basic Laws, the Chief Executive is obligated to implement the Basic Laws. If an issue is encountered during the course of implementing the Basic

Laws without specific cases involved and the possibility of obtaining an interpretation through the courts, under such circumstances, the Chief Executives' direct proposal for interpretation from the NPC Standing Committee is consistent with the legislative spirit of the Basic Law and the principle that the power to interpret the Basic Laws is vested in the NPC Standing Committee, especially when concerning the affairs which are the responsibility of the Central Government, or concerning the relationship between the Central Authorities and the SARs.

What needs to be clarified is the distinction between the Chief Executives' direct proposals to the NPC Standing Committee for interpretation and that through the State Council for an interpretation from the NPC Standing Committee. The State Council has the authority to make a "request" to the NPC Standing Committee for its interpretation. In contrast, the Chief Executives can only make a "proposal" for an interpretation from the NPC Standing Committee rather than a direct "request" based on his obligation of implementing the Basic Laws and required constitutional responsibilities. The meeting of the Chairman of the NPC Standing Committee will decide whether to accept the "proposal," which can be included in the meeting agenda of the NPC Standing Committee only after the deliberation and adoption by the meeting of the Chairman of the NPC Standing Committee with an interpretation subsequently made through the legal procedures. Thus, the power to decide whether to accept the Chief Executives' proposals for an interpretation is vested in the NPC Standing Committee.

On 17th November 2011, the Macao SAR Chief Executive Fernando Chui Sai On wrote to Chairman Wu Bangguo to raise the issue of interpretation of Article 7 of Annex I and Article 3 of Annex II of the Macao Basic Law. During a forum with members from all sectors of the society of Macao, Qiao Xiaoyang, Deputy Secretary-General of the NPC Standing Committee, pointed out¹⁴ Fernando Chui Sai On's "considerably keen grasp of an important issue during the enforcement of the law" in his initiation to write to Wu Bangguo to propose an interpretation on the issue of whether to amend the methods for selecting the Chief Executive and forming the Legislative Council stipulated by the provisions of Annexes I and II of the Macao Basic Law. Qiao further affirmed that "the Chief Executive's hope for the NPC Standing Committee's clarification of issues encountered when implementing the Basic Law is very appropriate since it not only fulfills the constitutional responsibilities of the Chief Executive, but also fully embodies the spirit of the society of Macao and the Government of the Macao SAR acting in strict accordance with the Basic Law."

3.1.4 Interpretation of the Basic Laws from the NPC Standing Committee sought by the Court of Final Appeal

If the courts of the SARs, in adjudicating cases, need to interpret the provisions of the Basic Laws concerning affairs which are the responsibility of the Central Government, or concerning the relationship between the Central Authorities and the SARs, and if such interpretation will affect the judgments in the cases, the courts of the SARs shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the NPC Standing Committee through the Court of Final Appeal of the SARs. When the NPC Standing Committee makes an interpretation of the provisions concerned, the courts of the SARs, in applying those provisions, shall follow the interpretation of the NPC Standing Committee. However, judgments previously rendered shall not be affected.

In terms of the Congo case in 2011, the Court of the Final Appeal of the Hong Kong SAR agreed to seek the NPC Standing Committee's legislative interpretation on the issue of whether the

Hong Kong SAR is obligated to invoke or implement the state immunity rules or policies that the Central Government has adopted in accordance with Paragraph 1 of Article 13 of the Hong Kong Basic Law. On 26th August 2011, the 22nd Session of the 11th NPC Standing Committee adopted a resolution, stating that since the external affairs of Hong Kong are the responsibility of the Central Government, the courts of the Hong Kong SAR should apply and implement the state immunity rules and policies applicable to the Hong Kong SAR that the Central Government has decided and shall not deviate from these rules or policies.

After a series of legal disputes concerning the interpretation of the Basic Law, such as Ng Ka Ling case in 1999, the Congo case in 2011 was both the first case and attempt of the Court of Final Appeal of the Hong Kong SAR since Hong Kong's handover to seek the NPC Standing Committee's legislative interpretation in accordance with the provisions and procedures stipulated by Article 158 of the Hong Kong Basic Law. The action embodied the respect for correct understanding of the Hong Kong Basic Law demonstrated by the judiciary organs of the Hong Kong SAR. It was also the result of mutual adjustment and adaptation between the Central Authorities and the Hong Kong SAR since the application of the Hong Kong Basic Law in Hong Kong. Judging from the multiple interpretation experiences, if the Court of the Final Appeal of the SARs adheres to the procedure of the mechanism of interpreting the Basic Laws and takes the initiative to seek the NPC Standing Committee's interpretation, it will cause relatively smaller social impact on the society of the SARs as well.

3.2 Interpretation of the Basic Laws by the courts of the SARs

In accordance with the Basic Laws, the NPC Standing Committee has authorized the courts of the SARs to interpret on their own, in adjudicating cases, the provisions which are within the limits of the autonomy of the SARs as well as other provisions of the Basic Laws that do not involve legal reasons.

However, there have also been some instances in which the courts of the SARs, in adjudicating cases, have not followed the NPC Standing Committee's interpretation of the provisions as a basis for judgment due to differing legal interpretation methods and traditions between Hong Kong and the Mainland, thus causing negative social effects, such as the case of Chong Fung Yuen. On 20th July 2001, the Court of Final Appeal of the Hong Kong SAR, when adjudicating the case of Chong Fung Yuen and making an interpretation of the disputed Paragraph 2 of Article 24 of the Hong Kong Basic Law concerning the case, did not adopt the Preparatory Committee for the Hong Kong SAR's opinion on the interpretation of the provisions made on 10th August 1996, but follow the legal interpretation rules of Hong Kong. According to the literal interpretation, the Court ruled in favor of Chong Fung Yuen, entitling all Chinese citizens born in Hong Kong to the right of abode regardless of whether their parents are Hong Kong residents. On 21st July 2001, the spokesman of the NPC Standing Committee's Legal Work committee stated publicly that the Court of Final Appeal of the Hong Kong SAR's ruling in the case of Chong Fung Yuen "was not entirely consistent with the NPC Standing Committee's legislative interpretation," resulting in the issue of Chinese mothers giving birth in Hong Kong that has derived from the case as well as the legal consequences that have continued until the present.

Of course, in adjudicating cases, the courts' interpretation of the Basic Laws is still the more frequently exercised channel of legal remedies in practice. Since 1997, the number and scope of the interpretation carried out by the courts of the Hong Kong SAR has increased and expanded

considerably. Elsie Leung Oi-sie, former Secretary for Justice of the Hong Kong SAR, once said that more than one-thirds of the provisions of the Basic Law had undergone the interpretation by the courts in Hong Kong since reunification. If these one-thirds involved the principal Articles of the Basic Law, that would be 53 Articles (as of May 2005). The NPC Standing Committee has conducted only four interpretations of the provisions of the Hong Kong Basic Law since reunification in 1997. Since its handover, the Macao SAR has undergone only one interpretation concerning the Macao Basic Law made by the NPC Standing Committee while the rest have been carried out and resolved through judicial litigation. On account of this, a lot of interpretations related to the provisions of the Basic Laws have been made by the courts of the SARs during adjudication of cases.

After the courts' interpretation of the provisions of the Macao Basic Law, the Government and the Legislative Council of the Macao SAR will, under normal circumstances, comply as well. Like the aforementioned, after the Court of Final Appeal's ruling on the disputes over Macao's legislative power, the Court focused on another point of contention – "the ultimate differentiation between the subject matters of the law and those of administrative regulations." On 27th July 2009, the Legislative Council of the Macao SAR formulated Statute No. 3/1999 *Regime Jurídico de Enquadramento das Fontes Normativas Internas* (Regulation on the Formulation of Internal Norms) to clearly determine the applicable matters regulated by the law, independent administrative rules and regulations, and supplemental administrative rules and regulations of the Macao SAR as well as their respective classes.

IV. Conclusion

The disputes over the interpretation of the provisions of the Basic Law in practice are mostly resolved through judicial channels. In light of this, the courts of the SARs, especially the Court of Final Appeal, have played an important role under the entire interpretation system of the Basic Law. At the same time, judicial practices since reunification have shown that, under normal circumstances, the entire course of interpreting the Basic Laws will be smoother with smaller social impact on the SARs if the courts of the SARs can strictly adhere to the designed mechanism of interpreting the Basic Law and only interpret the relevant provisions concerned that are within the limits of the autonomy of the SARs or will not affect the outcome of the ruling during the course of adjudicating cases. Similarly, the interpretation process will proceed more smoothly if the courts seek an interpretation of the relevant provisions from the NPC Standing Committee through the Court of Final Appeal of the SAR when the disputed provisions concerned involve the affairs which are the responsibility the Central Government, or concerning the relationship between the Central Authorities and the SARs as specified by the Basic Laws, and if such interpretation will affect the judgments in the cases, the NPC Standing Committee shall make an interpretation and the courts of the SARs must make ruling based on the NPC Standing Committee's interpretation in adjudicating cases.

Of course, the Court of Final Appeal's proposal for an interpretation from the NPC Standing Committee must be based on the precondition of existing specific cases due to the designed mechanism of interpreting the Basic Laws. Therefore, if specific cases are not involved, then the courts cannot seek the NPC Standing Committee's interpretation through the Court of Final Appeal

of the SARs. In practice, under the circumstances in compliance with the laws, regulations and legal procedures, the NPC Standing Committee can make interpretation on its own initiative; the SAR Chief Executives can submit a report on relevant issue to the State Council, proposing the State Council make a request to the NPC Standing Committee for an interpretation; or the Chief Executives can write on relevant issues to the Chairman of the NPC Standing Committee to seek interpretation. These resolution channels are both legal and viable. The practice of these channels of interpreting the Basic Laws also further enriches and improves enables the interpretation system of the Basic Laws.

Notes:

- ¹ Tung Chee-hwa (1999). Report on Seeking Assistance from the Central People's Government in Solving Problems Encountered in the Implementation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. In the website of The Basic Law of the Hong Kong SAR: http://www.basiclaw.gov.hk/en/materials/doc/1999_05_20_e.pdf.
- ² The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. In the website of The Basic Law of the Hong Kong SAR: http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc17.pdf.
- ³ The judgment of the Court of Final Appeal of the Hong Kong SAR (civil): FACV No. 26/2000 (original case number: Court of Appeal Civil Appeal No. 61 of 2000)
- ⁴ Vallejos v. Commissioner of Registration. In the website of Wikipedia: http://en.wikipedia.org/wiki/Vallejos_v._Commissioner_of_Registration.
- ⁵ The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. In the website of The Basic Law of the Hong Kong SAR: http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc18.pdf.
- ⁶ The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article 3 of Annex II to the Basic Law of the Macao Special Administrative Region of the People's Republic of China. In the website of The National People's Congress of the People's Republic of China: http://www.npc.gov.cn/npc/xinwen/2012-01/01/content_1685014.htm. 1 January 2012.
- ⁷ Interpretation of Paragraph 2, Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress. In the website of The Basic Law of the Hong Kong SAR: http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc20.pdf.
- ⁸ The Judgment of the Intermediate Courts of the Macao SAR: Decision No. 280/2005. In the website of Tribunais da RAEM: <http://www.court.gov.mo/c/cdefault.htm>.
- ⁹ The Judgment of the Court of Final Appeal of the Macao SAR: Decision No. 28/2006. In the website of Tribunais da RAEM: <http://www.court.gov.mo/c/cdefault.htm>.
- ¹⁰ Lok Wai Kin (2009). *"One Country, Two Systems" and the Implementation of the Basic Law of the Macao Special Administrative Region*. Guangzhou: Guangdong People's Publishing House. 299.
- ¹¹ Decision No. 28/2006 of the Chinese Judgment of the Court of Final Appeal of the Macao SAR. 6, 107.
- ¹² The Judgments of the Court of Final Appeal of the Hong Kong SAR (civil): FACV Nos. 5, 6, 7/2010 (original case

number: On Appeal from CACV Nos. 373 of 2008 and No. 43 of 2009). In the website of Legal Reference System: http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=76745. See also Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress. In the website of The Basic Law of the Hong Kong SAR: http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc22.pdf.

- ¹³ The Institute of Hong Kong and Macao Affairs of the Development Research Center of the State Council (2009). *The Introduction to the Hong Kong Basic Law*. Beijing: The Commercial Press. 254
- ¹⁴ Qiao Xiaoyang's Speech at a Forum with Members from all Walks in the Macao Society. In the website of Associação de Divulgação da Lei Básica de Macao: http://www.basiclaw.org.mo/index.php?p=25_1&art_id=1133.