

The 'Policies of Localisation' in Sino-Portuguese Negotiations during the 1988-1999 Transition Period

The Impact for Macao's Administration

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INTRODUCTION

The transfer of the Macao administration from Portugal to the People's Republic of China (PRC) was prepared during the so-called transition period, which started on 15 January 1988, when the 'Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao' came into force, and ended on 19 December 1999, the last day of the Portuguese administration in Macao. During this period, the Portuguese government remained solely responsible for the administration of Macao, and its powers remained unchanged, with the exception of some land issues. Although the Joint Declaration

clearly defined Portuguese responsibility for the administration of the territory until the handover, it also obliged the Chinese government to cooperate in the promotion of Macao's economic development and social stability. The agreement stipulated that the transfer of administration should be done within a framework of continuity, so the Portuguese and Chinese governments had to work in close cooperation to guarantee Macao's political, economic and social stability during the transition.

The transition was a very complex period for Macao and for Sino-Portuguese bilateral relations. It required the articulation of positions not only between the Portuguese and Chinese governments but also between Portugal's central authorities and the Portuguese administration in Macao. The Portuguese side feared that the process would not be conducted smoothly and without crisis. For Portugal it was essential to strive for consensus with China: it was the only guarantee that the measures adopted by the Macao administration would be respected in the long term.

The Joint Declaration defined the framework and institutional devices within which talks on the transition issues took place: the Sino-Portuguese Joint Liaison Group (JLG) and the Sino-Portuguese Land Group (LG). However, if these joint commissions failed to settle a particular issue it would be tackled directly by the Portuguese and the Chinese governments. As the

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JLG and the LG were the formal mechanisms chosen by the Joint Declaration for the implementation of the agreement, both the Portuguese and the Chinese sides respected the decisions of these joint commissions, and the proceedings of the meetings had legal force. Nevertheless, the two countries often held different interpretations of the power and functions of the two groups, leading to some conflicting views during the meetings.

The Sino-Portuguese Joint Liaison Group was established on 15 January 1988, when the Sino-Portuguese Joint Declaration entered into force, and continued its work until 1 January 2000. According to the Joint Declaration, it was 'an organ of liaison, consultation and exchange of information between the two governments' and had four functions:

1) to conduct consultations on the implementation of the Joint Declaration and its Annexes; 2) to exchange information and conduct consultations on matters relating to the transfer of government of Macao in 1999; 3) to conduct consultations on actions to be taken by the two governments to enable the Macao Special Administrative Region to maintain and develop external economic, cultural and other relations, and 4) to exchange information and conduct consultations on other subjects as may be agreed by the two sides.¹

The Chinese side tended to use the JLG to subject to her approval all the issues with a possible impact on the future Special Administrative Region (SAR), arguing that all the issues that would have an impact after 1999 should be subject to previous consultations, otherwise they would not be recognised by China. The Portuguese side did not accept this principle, arguing that, according to the Joint Declaration the JLG 'shall not interfere in the administration of Macao nor shall it have any supervisory role over that administration.'² Portugal was responsible for the Macao administration until 1999 and China had no right to interfere. The Portuguese side used the JLG for various purposes: to clarify specific issues; to inform the Chinese delegation of the progress achieved in different areas; and to reach agreement or find an acceptable solution for both sides regarding specific problems.

The Joint Liaison Group's meetings during the first year of the transition period took place alternatively in Lisbon, Beijing and Macao. Afterwards, the meetings in Lisbon and in Beijing were always

followed by a meeting in Macao. The rotating meetings opened doors for the use of bilateral diplomacy when negotiations stalled within the JLG: while in Beijing, the Portuguese side would try to resolve issues directly with representatives of the Chinese government, while the Chinese side used the meetings in Lisbon and Macao to put pressure on the Portuguese authorities. As mentioned above, although the Joint Declaration aimed at eliminating from the scope of Sino-Portuguese bilateral relations all the problems related to the administration and transfer of sovereignty of Macao, it stipulated that matters in which there was disagreement in the JLG or in the LG should be referred to the two governments for solution through consultations.³

The Portuguese and Chinese delegations of the JLG had five members each, the leader being of ambassadorial rank, and experts and supporting staff were designated when required. The Portuguese delegation had three diplomats: the head, the deputy head, and the counsellor of the Portuguese embassy in Beijing. The other two Portuguese members were personal choices of the President and the Prime Minister, although this was not officially stipulated. The head of the Portuguese delegation was based in Lisbon: the only Portuguese member of the JLG that resided in Macao was the deputy head, who was also the head of the Portuguese delegation in the Land Group and chief of the principal base in Macao. In contrast, all the members of the Chinese delegation were based in Macao, with the exception of the counsellor of the Chinese embassy in Lisbon. Although the Chinese side often insisted on a stronger Portuguese presence in the principal base in Macao to solve pending issues in between the JLG meetings, Portugal feared that this would lead the Chinese side to put even more pressure on the Macao administration.

This article analyses Sino-Portuguese negotiations on the three inter-related issues that were permanently discussed in the JLG until the end of the transition period: the localisation of the civil service, the localisation of the language and the localisation of the law. For their importance, the three localisations were called 'the three big issues' and were put on the agenda of every JLG meeting. The Chinese side tended to reduce these three issues into one because progress in one localisation implied and depended on progress on the other two.⁴ Despite the different points of view,

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Chinese President Li Xiannian during an official visit to Portugal (November 1984). All photos Gabinete de Comunicação Social do Governo da RAEM.

Portugal and China were both strongly committed to achieve progress on those questions. A joint working group was created and divided into three sub-groups to deal with the three questions.

THE LOCALISATION OF THE CIVIL SERVICE

The localisation of the civil service was closely related to the two other 'big issues' of the transition period, and both Portugal and China agreed that it was the basis of the politics of localisation. For the Chinese side, the localisation of the civil service was the most important of all three localisations because once the Chinese occupied the higher ranks in the Macao administration the Chinese language would immediately be used, and the replacement of Portuguese for Chinese juridical staff would promote the localisation of the law.⁵ The Portuguese side aimed

at using the localisation of the civil service to reduce Chinese interference in post-1999 Macao.⁶

The localisation of the civil service included two main aspects: the increase of local civil servants in the Macao administration and the reintegration of the Portuguese expatriates in the Portuguese Republic. The increase of local civil servants was related to three issues: 1) the planning of the localisation of the civil service until 1999, namely of the chief and director ranks; 2) the nationality issue; and 3) the recognition of educational qualifications.

The localisation of the civil service was differently perceived by the Chinese and the Portuguese sides. The Chinese authorities (and Macao's Chinese population) tended to interpret localisation as 'Sinification': 'the promotion and recruitment of local Chinese residents to higher positions in the civil service,' arguing that the 'localisation should accurately reflect the ethnic composition of Macao's citizens.' Some Macanese,

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Portuguese-Chinese or Portuguese-Asian mixed-blood, wanted to be promoted after the withdrawal of Portuguese expatriates, and they identified localisation as ‘Macanisation’: ‘promotion priority should be given to bilingual Macanese.’⁷ Portugal was mainly concerned with the preservation of its cultural heritage in Macao after 1999 and was eager to integrate the Macanese, the best guardians of the Portuguese culture, in Macao’s civil service. Unlike the local Chinese, the Macanese could choose between Chinese and Portuguese nationality after 1999, but should they choose to remain Portuguese citizens they would be excluded from leadership posts in Macao.⁸ Nevertheless, the Portuguese administration tended to adopt a mixed interpretation of ‘Sinification’ and ‘Macanisation’: ‘recruitment and promotion of civil servants should be based on qualification and merit only, regardless of race and nationality.’⁹ Due to these different interpretations, the localisation of the Macao civil service became a diplomatic issue between the two sides.¹⁰

The Chinese side wanted a gradual increase in the number of Chinese functionaries in the middle and high posts of the Macao administration; Portugal did not want this ethnic discrimination of the other locals, namely the Macanese. This was related to the nationality question and to the issue of the Resident Identity Cards: the citizens who did not choose Chinese nationality had the status of permanent resident, being discriminated and banned access from principal public posts. China favoured a general plan of localisation, especially of the middle and high rank civil servants, and wanted the Portuguese to elaborate

Portuguese President General Ramalho Eanes with Deng Xiaoping, during his official visit to China (May 1985).



Portuguese President General Ramalho Eanes on his official visit to China (May 1985).

a list of the civil servants. The Chinese delegates in the JLG frequently asked for details of the civil servants of director and chief ranks—namely their distribution by service, place of birth, nationality, educational qualifications, posts, and knowledge of Portuguese and Chinese—and criticised Portugal for the slow pace of the localisation and for taking too long to promote local Chinese to higher ranks.¹¹ The Chinese delegation in the JLG insisted that the local inhabitants should correspond in the same percentage to the middle and high rank civil servants. They argued that, because 97 per cent of the Macao population was Chinese, they had necessarily to occupy an equal or similar percentage of middle and high positions in the future Macao administration.¹² This Chinese negotiating strategy aimed at obtaining at the very least a more representative bureaucracy and accelerating the pace of localisation in Macao.¹³

The Portuguese position was that the Chinese discrimination based on race or nationality to the public positions would lead not to a true localisation but to a pure ‘Sinification’ of three quarters of or all civil servants.¹⁴ The Sino-Portuguese Joint Declaration dismissed the Chinese theory of percentage and proportionality to nominate Chinese nationals to middle and high rank posts: After the establishment of the Macao Special Administrative Region, ‘public servants, (including police) of Chinese nationality and Portuguese and other foreign nationalities previously serving in Macao may all remain in employment ...’ ‘The Macao Special Administrative Region may appoint Portuguese and other foreign nationals previously serving in the public service in Macao or currently

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holding Permanent Identity Cards of the Macao Special Administrative Region to public posts (except certain principal official posts). ... The appointment and promotion of public servants shall be on the basis of qualifications, experience and ability.¹⁵

For the Portuguese delegates, the Chinese criterion of localisation was based on racial, ethnic, linguistic or nationality discrimination that had nothing to do with the experience and qualifications of Macao's civil service.¹⁶ They argued that the local Chinese usually had low educational levels and language proficiency¹⁷ and that promotion of local staff to chief and director ranks should follow the criteria of qualification.

As happened with the other leadership positions of the Macao administration, such as the governor and the under-secretaries, the upper ranks of Macao's civil service were usually filled through political appointments. The temporary and commissioned appointments favoured the Portuguese expatriates and led to few openings at the director level for the local Chinese or Macanese and to the absence of leadership training programmes for local civil servants. The recruitment for permanent staff set written examinations only in

Portuguese, excluding the majority of local Chinese. Besides, prior to 1989 the Portuguese administration did not recognise degrees from universities from non-Portuguese language regions, stopping much young local talent from entering the civil service.¹⁸

During the early years of the transition, the Chinese delegation in the JLG constantly criticised the increase in numbers of the civil servants in the administration, namely Portuguese expatriates, regardless of the needs of Macao's bureaucracy.¹⁹ According to them, this resulted in the creation of new positions to accommodate friends, to the overlapping of services and to the drastic inflation of governmental posts, which affected efficiency, increased the financial expenses of the administration and delayed localisation. The Portuguese delegates argued that the rapid increase of staff in the administration was rather a consequence of the integration of new local civil servants and would be compensated by the re-integration of some of the staff in Portugal's bureaucracy. The contracted local civil servants would progressively replace the vacant positions left by the Portuguese expatriates, reducing the number of temporary appointments.

The Sino-Portuguese Joint Declaration on the Question of Macao was signed in Beijing on 13 April 1987.



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Portuguese Prime Minister Cavaco Silva delivers a speech at the signing ceremony of the Sino-Portuguese Joint Declaration on the Question of Macao (13 April 1987).

The Chinese delegates wanted a clear definition of the civil servants who would remain in the Macao administration: only after the Portuguese expatriates left could the local Chinese and Macanese aspire to fill vacant positions in the upper administrative ranks.²⁰ Willing to accelerate the pace of localisation, the Chinese side pressed for the recognition of academic qualifications of local people who did not have a Portuguese education and the reduction of educational requirements for the local bureaucrats, namely the proficiency in Portuguese language.²¹ Agreeing with the importance of training local civil servants, in 1988 the Macao administration transformed the University of Macau (previously called University of East Asia) into a public university and implemented reforms to avoid the brain drain of local talent.²² In 1993, the Macao administration established a new regime of recognition of educational qualifications obtained outside Macao and in the unofficial education systems existing in

Macao.²³ Despite these efforts, the Portuguese side implemented Macao's localisation policies at a much slower rhythm than Hong Kong, and by the end of the transition period Macao was left with a young and inexperienced team of civil servants and a mediocre bureaucracy.²⁴

Portugal wanted to guarantee a place in the Republic's civil service to those Portuguese functionaries who opted to stay in Macao after 1999 in case they decided to be reintegrated in Portugal. However, the Chinese delegates in the Joint Liaison Group did not accept the double-binding system: civil servants could under no circumstance have a double juridical statute and could not be responsible to two different governments. The civil servants could choose between retirement, continuing to exercise functions in Macao as predicted in the Joint Declaration, or returning to Portugal. The Chinese position on this issue was that the Portuguese civil servants who opted to stay in Macao

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after the handover could not remain civil servants of the Portuguese Republic; the civil servants integrated in Portugal's civil service would be dismissed by the government of the future Special Administrative Region in 1999. The government of the future SAR would not accept that Portugal attributed a dual status.

The integration of Macao civil servants in the Portuguese Republic was related to the issue of the pension fund for Macao's civil servants. The Portuguese side wanted the Macao Special Administrative Region to pay the pensions of all Macao civil servants, except for those who were reintegrated in Lisbon before 1999. The issue was a cause of great dissension in the Joint Liaison Group. There were three types of situations: 1) the civil servants who stayed in Macao after the handover; 2) the civil servants who were integrated into Portugal's bureaucracy before the handover; and 3) the civil servants who retired before the end of the Portuguese administration. Consensus was reached in the first two situations. The future Macao Special Administrative Region was responsible to pay the pensions to the civil servants that stayed in Macao, while the pensions of the civil servants reintegrated in Portugal were transferred to Portugal's Retirement Fund (*Caixa Geral de Aposentações—CGA*).

The dissensions referred to the civil servants who retired before the handover: according to one member of the Portuguese delegation of the JLG, Portugal argued that these pensions should be paid by the Macao Special Administrative Region, but China did not accept this. The Chinese position was that the pensions of the functionaries who retired before the



Meeting of the Sino-Portuguese Joint Liaison Group.

end of the Portuguese administration were Portugal's responsibility. The Portuguese position was that, because they were Macao's civil servants, their pensions should be paid by Macao. Portugal did not manage to push the Chinese delegation to accept the total payment of the pensions for Macao, as said another Portuguese delegate. The responsibilities of the pension fund of the Macao SAR were divided, and Portugal was bound to contribute. The Portuguese government agreed with the transfer to Portugal's CGA of the responsibility for the payment of the pensions of the civil servants who retired before 19 December 1999.²⁵

In February 1994, the Macao Government issued a decree authorising civil servants to take early retirement or to leave the civil service with financial compensation, with the transfer of responsibilities to the CGA. Macao civil servants could opt before 24 May 1994 between: joining Portugal's civil service after 1999; retiring, with the transfer of responsibilities to the CGA; leaving the civil service under pecuniary compensation; or remaining in Macao's civil service.²⁶ This was a huge burden for Portugal's pension fund, and the Portuguese negotiators could have negotiated the issue more carefully: Portugal should have created a fund with the money of Macao to pay those civil servants.

THE LOCALISATION OF THE LANGUAGE

The global plan for the localisation of the civil service was directly related to the generalisation of bilingualism within the Macao administration. The Chinese side expected that the official status of the

Portuguese Prime Minister Cavaco Silva with Deng Xiaoping during an official visit to China (April 1987).



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Chinese language would increase the number of Chinese in Macao's bureaucracy and that the translation of Portuguese laws would put an end to the Portuguese and Macanese control of Macao's judiciary.²⁷ In Macao there coexisted a language spoken by the majority of the population and a language of reference used in the civil service, in the legislative process and in the courts. This was typical of colonial situations in which the lawmakers and law enforcers did not know the language used by the majority of the addressees of the norms. During more than four centuries of occupation, Portugal had not succeeded in generalising the use of the Portuguese language in Macao.

The Chinese side claimed that the Chinese language should be of equal status to Portuguese during the transition period. After long delaying the issue, the Portuguese side realised that the officialisation of the Chinese language during the transition period was the best way to safeguard and valorise the Portuguese language and culture in Macao after 1999. Portugal saw the attribution of official status to the Portuguese language as an assurance of the stability of Macao's juridical system beyond 1999. It also safeguarded the possibility of Portugal-Macao juridical cooperation and allowed the Macao courts and administration to appeal to Portuguese jurisprudence and doctrine. The Portuguese side even expected that the structures and methodologies for juridical translation developed to

translate into Chinese the Portuguese law would be the base for a system of bilingual juridical production, or at least for the translation into Portuguese of normative acts originally produced in Chinese.²⁸

By April 1991, Portugal and China finally reached agreement and signed a memorandum of talks on the statute of the Portuguese and Chinese languages in Macao. The Portuguese side agreed to publish, before the end of 1991, legislation conferring on the Chinese language an official status identical to and with the same legal force as the Portuguese language. That legislation should include information on the conditions to implement the Chinese language in the Macao administrative, legislative and judicial sectors as rapidly and gradually as possible. In exchange, the Portuguese side obtained the guarantee in Macao Basic Law that the Portuguese language would remain official after 1999: 'Besides the Chinese language, the Portuguese language can be used in the administrative, legislative and judicial bodies of the Macao Special Administrative Region. The Portuguese language is also an official language.'²⁹

Portugal assumed a two-level engagement: 1) one regarding the political principle, related to the exercise of sovereignty; 2) and the other regarding the implementation in the field. At the political level, the Portuguese government decreed that: 'In Macao the Chinese language has official status and has the

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Portuguese President Jorge Sampaio met Chinese President Jiang Zemin during his official visit to China (February 1997).

same legal force as the Portuguese language.³⁰ At the implementation level, it was up to Macao's governmental bodies to assure that, 'in conformity with the local reality, the official status of the Chinese language was gradually and progressively implemented in the administrative, legislative and judicial domains.'³¹

The Macao administration wanted to show the Chinese side 'the political will to create all the necessary conditions for the effective implementation of the agreement on the official statute of the Chinese language,' and gradually adopted measures to extend the official use of the Chinese language.³² These measures were intended to improve the quality of the training of interpreters and translators by creating courses of a higher academic level, to intensify the diffusion of the Chinese language through the existence of more modular courses of different levels and lengths, and to support Sino-Portuguese education. The administration also adopted specific measures to train local bilingual staff in order to achieve a wider use of both languages: the creation of a team to assess the plans for the generalisation of bilingualism and linguistic training in the administration;³³

Portuguese President Jorge Sampaio with Chinese Premier Li Peng (February 1997).



the assessment of the linguistic situation of the civil service and the presentation of linguistic training plans according to the needs of every civil service; the creation of special scholarships for training and professional improvement of the civil servants.³⁴

From 1987 to 1995 the number of Macao's civil servants that had a good or fair command of written Portuguese decreased 4.6 per cent, as a result of the departure of several hundred Macanese who chose early retirement or to leave the civil service as part of the integration plan, and of the Chinese lack of interest in learning Portuguese. On the other hand, those who had a good or fair command of Mandarin increased 15.5 per cent, and the bilingual civil servants (those who had a good or fair command of written Portuguese and Chinese) increased 5.8 per cent.³⁵

Despite all these measures, the official recognition of the Chinese language had little practical influence on the status of Portuguese as the working language of the Macao administration for two reasons. First, all official and legal documents were in Portuguese and, due to the shortage of translators, only important policy announcements and decrees were translated into Chinese. Second, the Portuguese and the Macanese, who could not read nor write Chinese, occupied the chief positions in the administration.³⁶

Although the official recognition of the Chinese language had repercussions over all the Macao

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administration, the more delicate issues centred on the legislative and judicial levels. The achievement of a situation of legislative bilingualism was a complex process in Macao due to some adverse starting points. First, the lack of bilingual jurists: the majority of the judicial community did not command written Chinese; only a minority commanded spoken Chinese (Cantonese); and just a few technical staff of Chinese origin commanded Portuguese. The population also had a very poor command of the juridical organisation in force. Second, the need to attribute official value to the translation of legal texts made imperative the clarification of the translator's competence; the number of interpreters and translators was insufficient, and they usually had a deficient training base and lack of specialised training. Third, the translations were made by different entities with no guarantee of terminological and stylistic uniformity in technical-judicial terms and were usually made without juridical support. Fourth, legislative bilingualism required the establishment of criteria for the solution of possible divergences of sense or interpretation between the Portuguese and Chinese versions of the texts.

The process of legislative bilingualism in Macao evolved through three different phases. Before the Organic Statute of Macao entered into force, the majority of Macao legislation was produced in Portugal, and only the laws that directly affected the Chinese community were translated. From 1976 to 1989, the legislation produced in Portugal decreased and the legislation produced in Macao increased, but there were still a limited number of legislative translations. With the signing of the Sino-Portuguese Joint Declaration in 1987, predicting an autonomous judicial system for Macao that was characterised by legislative and judicial bilingualism, the translation of the laws became one of the priority tasks of the transition period.

In 1989 a decree declared obligatory the publishing of a Chinese translation of all legislative or legal diplomas, but 'in case of doubt, the text in the Portuguese language prevails upon the translation of the text in the Chinese language.'³⁷ The Chinese version had thus a merely informative character. The lack of centralisation in the elaboration of the Chinese version of the laws facilitated the increase in the number of translated texts but impeded the Portuguese and Chinese versions from having equal value. Due to the

diversity of editing styles of the texts in Chinese and the lack of uniformity in the translation of technical terms, the versions in the Chinese language could not be invoked with identical authenticity to the Portuguese versions.

The implementation of the official statute of the Chinese language involved the attribution of identical legal value to the Portuguese and the Chinese versions of the diplomas edited by the Macao administration. The authenticity of both versions required the settlement of a fixed Chinese version for the technical-judicial terms of the Portuguese law, a Chinese linguistic and stylistic pattern to give coherence to the legislative texts, and the provision of rules in case of divergence between the interpretations of the sense of law resulting from the two versions. The Office for Juridical Translation (*Gabinete para a Tradução Jurídica—GTJ*) aimed at 'creating conditions for the existence of official versions in the Chinese language of the normative acts in force invoked with the same rigour and juridical security of the versions in Portuguese language.' In 1991 the GTJ had seven translation teams, each composed of a jurist of Portuguese training, a jurist of Chinese training, an interpreter-translator and a scholar.

Although the localisation of the Chinese language in Macao's legislation was a rather consensual issue in the Joint Liaison Group meetings, it consisted of a slow process that demanded much Sino-Portuguese cooperation. The slowest and more complex dimension of the implementation of the official status of the Chinese language was at the judicial level. Priority was given to the training of bilingual jurists, to the translation of the laws and to the gradual use of Chinese in the courts, both orally and in documents. Macao had to be governed by its own people also in the legal sector, so the magistrates were gradually localised to work in synchrony with the community that they served.³⁸ The legislative and judicial autonomy of the territory depended on the existence of professionals of law and of a local juridical culture. The strategy of the GTJ was to train translators who held a great knowledge of the law in force in Macao. Priority was thus given to the recruitment of local personnel with university training or attending law courses.

The political, economic and social autonomy of Macao presumed that its population knew the diplomas that were the base of the juridical system in

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force. The translation of the laws into Chinese had to follow criteria of technical and juridical quality and of terminological uniformity to assure the invocation of the Portuguese and Chinese versions of the legal texts with the same juridical security. Priority was given to the translation of the structural norms and diplomas of the Macao juridical system: the Constitution of the Portuguese Republic, the Organic Statute of Macao, the Law of the Bases of the Judicial Organisation of Macao, and the five 'major codes'.

THE LOCALISATION OF THE LAW

The localisation of the law was a complex process that included different aspects such as: 1) the transformation of laws of Portuguese origin into local laws; 2) the classification of the laws in force by subjects (penal law, commercial law, civil law, procedural penal law, procedural civil law and administrative law) and by types of diplomas; and 3) the law reform, which consisted in revising, updating and adapting the Macao legislation to the local situation. Other aspects of the localisation of the law, analysed in the previous section, were the translation into Chinese of all the existing laws and the training of bilingual jurists.

The need to update the Macao judicial system during the transition period was a consequence of the demands of the Joint Declaration and of the inertia that had characterised the life of the Territory. In 1988 the Macao judicial organisation was mainly the original one from Portugal and only accessible in Portuguese: Macao had a District Court with appeal to the High Court of Justice in Lisbon; there was an insignificant number of local people working in the civil service; Portuguese was the only official language, and few laws had Chinese versions.³⁹ There were two major sources of Macao's laws: Portuguese laws and local laws. The Portuguese laws emanated from the Portuguese Republic (Parliament and Government) and were either laws specifically made for Macao or national laws extended to Macao through publication in the Official Bulletin of Macao. The local laws were the ones created by Macao's bodies with legislative competence, i.e., the legislature and the Governor.⁴⁰ After 1976, with the entrance into force of the Macao Organic Statute, the production of local legislation increased, balancing the amount of laws created by the Republic. The interrelated use of both the Portuguese

and the local laws made it difficult to determine the origins of the laws in force in Macao.

As the Sino-Portuguese Joint Declaration stated that 'the laws currently in force in Macao will remain basically unchanged,'⁴¹ the Portuguese authorities in Macao were of the opinion that those laws would remain 'basically unchanged' during the fifty years after the transition, regardless of their origin. But by 1989-1990 the Chinese authorities made clear to the Macao government that only the local laws would be respected. Members of the juridical department of Xinhua News Agency privately repeated to the coordinator of the Macao Legislative Office that the Chinese interpretation of 'laws in force in Macao' only referred to the legal laws which emanated from the bodies of the territory. In the JLG the Chinese side also insisted on the need to localise the laws, suggesting that all the 'colonial' legislation would become void after 1999. If the Portuguese side wanted the Macao Special Administrative Region to adopt those laws, they had to pass through a process of localisation to become Macao laws. Initially, the Portuguese side interpreted the Chinese version as a mere negotiating strategy or as a tactic to accelerate Macao's legal reforms and to intervene in the legislative process. But the perseverance of the Chinese authorities led the Macao administration to consider the possible existence of similar procedures regarding Hong Kong.

The administration concluded that China had a similar approach to Hong Kong and that the British and Hong Kong authorities had created a negative precedent. Both the Sino-Portuguese Joint Declaration on Macao and the Sino-British Joint Declaration on Hong Kong stipulated the permanence of the laws in force in the enclaves after the handover, but the two agreements used different techniques to define the nature and origin of the laws that would remain in force. The Sino-British Joint Declaration limited the acts to remain in force and the non-localised laws would not be automatically maintained. In the Sino-Portuguese Joint Declaration there was not a restrictive enumeration of the normative acts—all the normative acts were generically considered—thus the norms to remain in force did not need localisation. According to the Sino-British Joint Declaration:

'After the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong (i.e., the common law, rules

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Handover ceremony (19 December 1999).

of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region legislature.⁴²

There was no reference to the British Acts of Parliament extended to Hong Kong, such as the Letters Patent, Royal Instructions and the Orders in Council, and there was not a residual category for non-localised normative acts. Thus, the laws originated in the United Kingdom would not remain in force in Hong Kong. In the Sino-British Joint Declaration Britain accepted the principle of the localisation of the laws emanating from British legislative bodies. The British side was thus obliged to localise several laws, leading to a vast programme of localisation, for which Britain engaged with China in informal talks. On the other hand, the Sino-Portuguese Joint Declaration stipulated that:

‘After the establishment of the Macao Special Administrative Region, the laws, decrees,

administrative regulations and other normative acts previously in force in Macao shall be maintained save for whatever therein may contravene the Basic Law or subject to any amendment by the Macao Special Administrative Region legislature.’⁴³

The Portuguese interpretation of this statement was that all normative acts existing in Macao before the transfer of the Administration would remain in force, including both the acts originating in Macao and the acts emanating from the Portuguese Republic and extended to Macao. As an international treaty, the Sino-Portuguese Joint Declaration did not stipulate the obligation of localising the laws in Macao’s legal structure. In juridical terms, the Portuguese side could thus claim that the Joint Declaration was clear enough on the needlessness of localising the laws and that there was no ground for further discussion. However, the risk of prevalence of the Chinese version could result in the loss of the most significant part of

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Macao's legal structure, damaging the interests and rights of Macao's citizens, the security of the legal traffic, and ending any possibilities of preserving a legal structure of Portuguese origin in the Far East. And for the Portuguese authorities and the Portuguese administration in Macao this was an objective of 'the highest priority.'

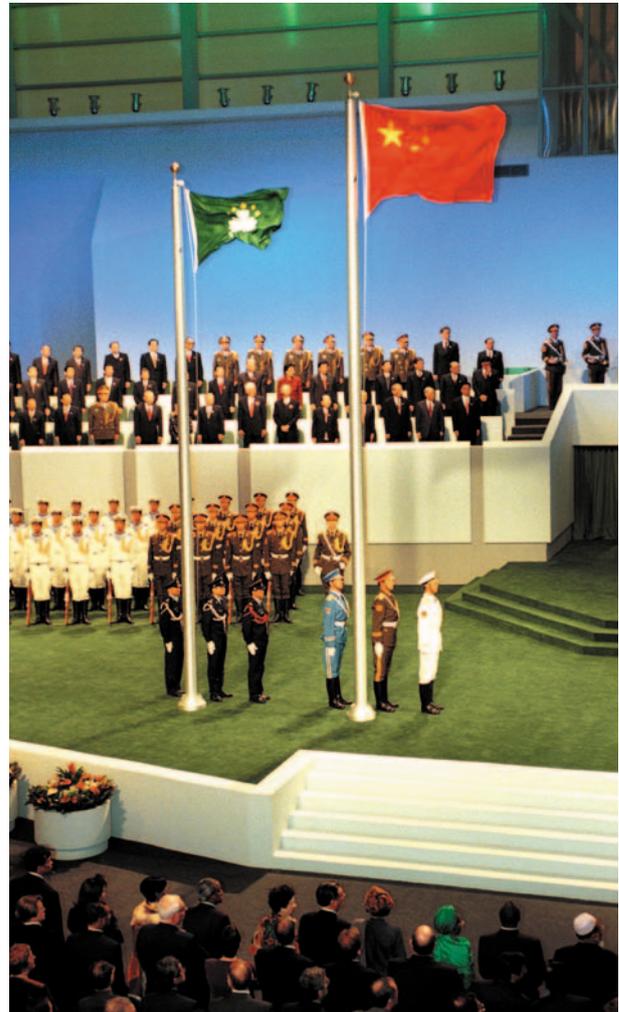
Portugal wanted to keep the juridical system of Portuguese origin as an effective social system in the Chinese language, confirming Macao's autonomy, namely towards Zhuhai and Hong Kong. The Portuguese side perceived the localisation of the law as the main legacy that Portugal could leave in Macao. Macao's market economy and social stability were meaningless if not translated into local laws that safeguarded the rights, liberties and guarantees of the residents after 1999.⁴⁴ It was absolutely necessary to translate into local laws the rights, liberties and guarantees recognised in the Organic Statute of Macao.⁴⁵ Thus, for political reasons the Portuguese side opted to establish with the Chinese side the terms in which Macao's legal structure would effectively be preserved, through the localisation of the most relevant laws of the enclave. The Portuguese position was that although the Joint Declaration did not require the localisation of Macao laws of Portuguese origin, this would benefit Macao's legal modernisation and adaptation, and therefore Portugal was willing to hold private talks with China on the plans of localisation and adaptation of the laws in force. According to this position, the talks should always include experts from the Macao government and follow the Hong Kong model.

The Chinese side expected to be consulted in advance or at least informed by the Portuguese side on the elaboration of new laws affecting the long-term interests of Macao citizens, to avoid the compulsory revision in case they contravene the Basic Law, and wanted the Portuguese side to submit drafts on the localisation of the laws and reach consensus within the JLG before publishing them in the Macao government bulletin.⁴⁶ The Chinese side insisted on the principle of previous consultation: Portugal should submit to the Joint Liaison Group all the legislation for approval, so that it remained binding after the handover; but the Portuguese side did not accept this principle.

The Portuguese laws that were in force in Macao and that did not contravene the Basic Law

could be legally transformed into local laws through a process of localisation, thus constituting the legal system of the Macao Special Administrative Region, ensuring a smooth and stable transition. The urge for discarding the laws with colonial features forced the Portuguese side to rapidly alter less acceptable codes and laws.⁴⁷ The law reform consisted of re-approving the obsolete legal codes and adapting them to local needs. The most relevant legislation was inserted into specific legal codes, namely the 'major codes'. Priority was given to the major codes that regulated the main aspects of the lives of Macao's inhabitants: the criminal code, the civil code, and the commercial code. Some of these codes were made in the late 19th century or early 20th century. They were obsolete in content, did not reflect Macao's social reality, and had lost validity

Handover ceremony.



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with the revision of the Organic Statute of Macao.⁴⁸ For example, while in Portugal the criminal code of 1982 had already been revised several times, in Macao the criminal code in force dated from 1886, and its limitations had been surpassed by the production of detached legislation since the 1970s.⁴⁹ Another priority was to revise the code of criminal procedure and the code of civil procedure in order to guarantee the good functioning of the courts. This would leave Macao with an autonomous judicial organisation and an efficient justice.

The Portuguese strategy for updating Macao's legal system was to keep untouched the Portuguese source of the Macao law while adapting it to the local and regional realities. There was permanent collaboration with the Chinese side, namely within the JLG, to guarantee that the judicial structure would remain unchanged in the following fifty years.⁵⁰ According to a member of the Portuguese delegation, the Chinese delegates were also very interested in this collaboration and rushed Portugal to finish the codes so that they had time to make suggestions. Before producing a new law, the Portuguese side showed the Chinese translation to their counterpart and negotiated the points of disagreement. A previous member of the Portuguese Administration in Macao revealed that the aim of the Portuguese negotiators was that the laws would remain in force after the handover, contrary to what happened in Hong Kong.

The Portuguese side also aimed at leaving Macao with an autonomous judicial system. They considered that only with an independent judicial power and autonomous institutions could Macao maintain its lifestyle, as predicted in the Joint Declaration. Portugal wanted to leave in Macao an independent judicial power that guaranteed the primacy of the law, and so it created conditions for the effective independence of the magistrates, who should enjoy a status of total independence and should not be susceptible to any illegitimate interference.⁵¹

In 1990 the Portuguese parliament, by proposal of Macao's Legislature, consigned in the Organic Statute of Macao the judicial autonomy of the territory, and the Law of Bases of the Macao Judicial Organisation ensured Macao's singularity and established the contents and limits of that autonomy.⁵² The majority of the Macao legislative powers that still remained in the Portuguese Parliament were transferred to the local

government bodies—the Governor and the Legislative Assembly—which were given the authority to legislate in terms of judicial order and to establish the regime of the courts.⁵³ The High Court of Justice was established, and the local instances were given specific functioning rules and exclusive jurisdiction in the majority of the matters on trial, granting Macao a high degree of judicial autonomy.⁵⁴

CONCLUSION

The localisation of the civil service, the localisation of the language and the localisation of the law were a direct consequence of the transfer of the Macao administration from Portugal to the People's Republic of China. As the good functioning of the administration after the handover depended on the solutions found for these localisations, they were known as 'the three big issues'. Thus, they dominated the agenda of Sino-Portuguese consultations during the so-called transition period, until the transfer of the Macao administration in 1999. The problems resulting from the localisation process were discussed in all Joint Liaison Group plenary meetings, and the Chinese side clearly wanted the process to evolve at a faster pace.

Some failures in the Macao Joint Declaration would have repercussions in the negotiations during the transition period—the Portuguese side tried to compensate for the omissions in the agreement during the JLG talks.⁵⁵ For example, while the Hong Kong Joint Declaration states that the Hong Kong SAR is responsible for paying the pensions of its inhabitants, regardless of whether the retirement took place before or after the handover, the Macao Declaration merely mentions that the pensions paid to the civil servants who retire after 1999 cannot be lower than the amount paid before. The Portuguese delegation in the JLG then had to negotiate the issue of the pension fund, which was quite contentious.⁵⁶ In fact, the localisation of the civil service was the most controversial issue, as Portugal strongly rejected China's ethnic criterion for the high posts of the administration. The Chinese side constantly claimed the need for a plan of the localisation of Macao's civil service during the transition period, and that the localisation should be representative: the majority of the population was Chinese and should be represented in the right proportion in the middle

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and high ranks of the civil service. For the Portuguese side, the official objectives of the localisation were the continued promotion of Macao's economic and social development, stability and security, and 'the existence in 19 December 1999 of one administration that would work fully and without disruption on 20 December 1999.'

Another issue that was overlooked during the Sino-Portuguese negotiations of the Joint Declaration was the official status of the Portuguese language after 1999, which was also negotiated in the JLG and included in Macao's Basic Law. While negotiating the localisation of the Chinese language, Portugal secured the official status of the Portuguese language after 1999, which arguably should have been negotiated before the signature of the Joint Declaration; it was a tactical mistake to overlook the issue and accept the vague Chinese declaration: 'In addition to Chinese, Portuguese may also be used in organs of government and in the legislature and the courts in the Macao Special Administrative Region.'⁵⁷ The status of the Portuguese language was one of the major Portuguese objectives for the transition period as Portugal was mostly interested in the visibility of the Portuguese presence and culture in Macao after the transfer of the administration to China.⁵⁸

This paper also argued that the outdated situation of Macao's juridical system in the beginning of the transition led the localisation of the law to absorb much of the efforts of the Portuguese delegation in the JLG, which resulted in neglecting other areas that could safeguard Portugal's presence in Macao after 1999. The Portuguese side aimed at establishing an autonomous judicial order defined by the local government bodies, to give Macao competence in terms of judicial organisation.⁵⁹ Portugal considered the law to be the best guarantee for the maintenance of Macao's identity and aimed to consolidate Macao's politico-administrative autonomy and judicial system. Fearing that China would discard after 1999 the legislation that she did not approve, Portugal consulted the Chinese delegation in the JLG while editing, in Portuguese and Chinese, Macao's disciplinary codes. Although not formally accepting the principle of preliminary consultation of the Chinese side, the Portuguese side was subordinated to the diplomatic consensus: 'one went as far as the consensus allowed. To go beyond it, in a unilateral way, would be of no use.'⁶⁰

The Macao administration was aware that the transition period was too short to cover the inactivity that had characterised the Portuguese rule for the previous twenty years. There was no social structure on which to build the transition policies. It was hard to get short-term results from the investment in higher education and in the training of local functionaries. Besides, the last years of the transitional period were considered 'lost' in psychological terms: after 1997 the evolution of the Hong Kong transition would have a bigger impact on Macao than any policies of the Portuguese administration. Moreover, the Macao administration faced strong pressure made through the Chinese press in the Territory, persistently criticising the Portuguese administration and reiterating the positions of the Chinese delegation in the JLG. China also used intermediaries to influence the Governor. In the JLG, the Chinese side constantly pushed the negotiations of the 'three big issues' to a more radical and accelerated rhythm, and forced the introduction of new points in the agenda, insisting on their treatment during the talks.⁶¹

In conclusion, from 1999 to 2049 the success of this model of 'negotiated transition' is being tested in the Macao Special Administrative Region.⁶² Portugal aimed at leaving Macao with consolidated institutions, a modern administration and a consistent juridical framework. As predicted in the Joint Declaration, the rights, liberties and guarantees of the Macao people were codified in internal laws and by the application to Macao of the main international covenants of rights, confirmed in the Joint Liaison Group meetings.⁶³ However, the Portuguese strategy of remaining a strong presence in the territory until the handover delayed the localisation of Chinese civil servants and the use of the Chinese language in Macao's bureaucracy. As a result, by 1999, Macao was arguably left with a mediocre bureaucracy, vulnerable to China's influence and unlikely to maintain the Portuguese cultural presence after the handover.⁶⁴ The bureaucracy was left with few qualified people related to the Portuguese system, and the places were filled with civil servants trained by Beijing; the Macanese should have been more supported and should have been attributed high posts in the administration; very few Portuguese chose to stay in the territory after 1999; the Portuguese school was a weak solution; the Portuguese language was a lost cause. **RC**

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NOTES

- 1 'Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau,' Beijing, 13 April 1987, Annex II, Section I.
- 2 Ibid.
- 3 Ibid., Sections I and II.
- 4 Herbert Yee, *Macau in Transition: From Colony to Autonomous Region*. London: Palgrave, 2001, p. 41.
- 5 Ibid.
- 6 Lo Shiu Hing, *Political Development in Macau*. Hong Kong: The Chinese University Press, 1995, p. 166.
- 7 Herbert Yee, *Macau in Transition*, p. 42.
- 8 Ibid., pp. 55 and 49.
- 9 Ibid., p. 42.
- 10 Lo Shiu Hing, *Political Development in Macau*, p. 166.
- 11 Herbert Yee, *Macau in Transition*, p. 42.
- 12 *Tribuna de Macau*, 14 December 1991.
- 13 Lo Shiu Hing, *Political Development in Macau*, p. 156.
- 14 *Tribuna de Macau*, 14 December 1991.
- 15 'Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau,' Beijing, 13 April 1987, Annex I, paragraphs V and VI.
- 16 *Tribuna de Macau*, 14 December 1991.
- 17 Herbert Yee, *Macau in Transition*, p. 42.
- 18 Ibid., pp. 42-6 and 52 for the all paragraph.
- 19 Lo Shiu Hing, *Political Development in Macau*, p. 164.
- 20 Herbert Yee, *Macau in Transition*, p. 47.
- 21 Lo Shiu Hing, *Political Development in Macau*, pp. 156 and 158.
- 22 Herbert Yee, *Macau in Transition*, p. 52.
- 23 Decree no. 39/93/M, *Diário da República*, Lisbon, 26 July 1993.
- 24 Lo Shiu Hing, *Political Development in Macau*, p. 161; Richard L. Edmonds, and Herbert S. Yee, 'Macau: From Portuguese Autonomous Territory to Chinese Special Administrative Region.' *The China Quarterly*, no. 160, December 1999, p. 813.
- 25 Decree no. 357/93, *Diário da República*. Lisbon, 14 October 1993.
- 26 Decree no. 14/94/M, *Diário da República*. Lisbon, 23 February 1994.
- 27 Lo Shiu Hing, *Political Development in Macau*, p. 156.
- 28 The difference between the juridical translation and the bilingual juridical production is that the bilingual production consists in a dynamic process aiming at making impossible the distinction between the original text and the translation.
- 29 In July 1991 the draft of the Macau Basic Law included this paragraph in chapter I, article 9.
- 30 Decree no. 455/91, *Diário da República*, I Série A, n.º 301, 2.º suplemento. Lisbon, 31 December 1991.
- 31 Ibid.
- 32 In February 1992, the Governor created a Linguistics Commission (*Comissão de Acompanhamento da Situação Linguística de Macau*), an organ of direct support to the Governor, presided by the Governor and composed by other twenty-three elements from within and outside the Administration, to monitor the official use of the Chinese language and to discuss the problems resulting of the linguistic situation of Macao. Despatch no. 16/GM/92, *Boletim Oficial de Macau*, no. 8, 24 February 1992. The Governor also asked the department of Chinese affairs (*Direcção dos Serviços de Assuntos Chineses*) to propose measures to the enlargement of the use of the Chinese language in the public services of the administration, facilitating the access of the majority of the population to the administrative system. Despatch no. 106/GM/91, *Boletim Oficial de Macau*, 27 May 1991.
- 33 Despatch 30/GM/94, *Boletim Oficial de Macau – Série I*, 30 May 1994.
- 34 Despatches no. 46/GM/94 and 47/GM/94, *Boletim Oficial de Macau – Série I*, 25 July 1994, and Decree no. 174/94/M, *Boletim Oficial de Macau – Série I*, 8 August 1994.
- 35 Herbert Yee, *Macau in Transition*, p. 58.
- 36 Ibid., p. 57.
- 37 Decree no. 11/89/M, *Diário da República*. Lisbon, 20 February 1989.
- 38 Jorge Sampaio, *Portugueses*, vol. I. Lisbon: Imprensa Nacional Casa da Moeda, 1997, pp. 359-62.
- 39 Jorge Sampaio, *Portugueses*, vol. IV. Lisbon: Imprensa Nacional Casa da Moeda, 2000, p. 404.
- 40 Herbert Yee, *Macau in Transition*, p. 59.
- 41 'Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau,' Beijing, 13 April 1987, no. 2 (4).
- 42 'Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong,' Beijing, 19 December 1984, Annex I, Paragraph II.
- 43 'Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau' Beijing, 13 April 1987, Annex I, Paragraph III.
- 44 Jorge Sampaio, *Portugueses*, vol. I, pp. 352-3.
- 45 Ibid., pp. 359-62.
- 46 *China Daily*, 28 December 1994.
- 47 *O Comércio de Macau*, 31 August 1991.
- 48 *Ou Mun*, 30 September 1991.
- 49 *O Comércio de Macau*, 31 August 1991.
- 50 Jorge Sampaio, *Portugueses*, vol. IV, pp. 405 and 427-8.
- 51 Jorge Sampaio, *Portugueses*, vol. I, pp. 359-62.
- 52 Law no. 112/91, Lisbon, 29 August 1991.
- 53 Jorge Sampaio, *Portugueses*, vol. I, pp. 359-62.
- 54 Ibid., p. 351.
- 55 António Santana Carlos, 'Macau: O Modelo da Transição.' In *A Presença Portuguesa no Pacífico—Forum Macau*. Lisbon: ISCSRP, 1999, p. 171.
- 56 Ibid., p. 165.
- 57 'Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau,' Beijing, 13 April 1987, paragraph 2 (5).
- 58 Jorge Sampaio, *Portugueses*, vol. IV..., p. 435.
- 59 Ibid., vol. I, p. 351.
- 60 Ibid., vol. IV, pp. 443, 405 and 427-8.
- 61 Ibid.
- 62 António Santana Carlos, 'Macau: O Modelo da Transição,' p. 174.
- 63 Jorge Sampaio, *Portugueses*, vol. IV, p. 434.
- 64 L. Edmonds, and Herbert S. Yee, 'Macau: From Portuguese Autonomous Territory to Chinese Special Administrative Region', p. 813.