

Macau's autonomy – looking for a fresh awakening?

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Macau has enjoyed as a special administrative region of the People's Republic of China a lively and weary frame of autonomy that permits to tackle its challenges and position itself concerning the future. Although eight years may be considered a short lack of time to monitor the track ran through, the balance of its transition under China's responsibility is, under any perspective, positive and helpful¹.

China has refrained from interfering in the day-by-day of Macao governance although, here and there, has made clear to Macau authorities that wants the development of the region to be achieved, through political stability, sense of national unity and political accountancy of Macau elite. On its part, Macao government has used its extensive powers invested by Macau Basic Law [MBL], the mini-constitution of the territory, with steadiness and sense of proportion, even though the scale of its handling has been, remarkably, conservative and modest. The Legislative Assembly has consolidated its role as the competent political forum for Macau polity allowing all the alternative judgments to be uttered and confronted. Even though its record as Macau's primary legislator has not been completely consistent with its constitutional obligations². The judicial system has used its competences without any interference from any of the other two branches of government what is a confirmation of its independence.

The defies that Macau autonomy is face to, in the years to come, are more of sustainability of Macau model of development, the capacity to resist the iron economic hug of Guandong province, and keep the political model open for enhancements set ajar by the Basic Law. But in this respect [as in others] the conditionings seem more external than internal. They are related to China's political and constitutional agenda.

The first generation of Macau elite to benefit from the responsibilities of government will wait for its successors to come which may have, most probably, the same

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¹ For a review of the conditionings that framed Macau transition see my article "A Paradigm of Autonomy: The Hong Kong and Macau SARs", *Contemporary Southeast Asia*, Vol 18 (1), June 1996, Singapore, pp. 36-60, Francisco Gonçalves Pereira, "Accommodating Diversity: Macau under China's Constitution", *Macau on the Threshold of the Third Millennium*, Macau Ricci Institute, December 2001, pp. 101-125, Vitalino Canas, "A Lei Básica e a evolução política de Macau" [The Basic Law and the Political Evolution of Macau], *Política Internacional*, Vol. 1, N.o 15/16, Autumn-Winter 1997, pp. 147-174, Yash Ghai, "The Basic Law of the Special Administrative Region of Macau: Some Reflections", *International Comparative Quarterly*, 49 (1), January 2000, pp. 183-198; Susan J. Henders, "So what if it's not a gamble? Post-Westphalian politics in Macao", York University, Toronto [Canada], July 2001, paper acceded via www.findarticles.com, and Paulo Cardinal "The system of *non dual domains* and the principle of exclusivity allocated to the subnational autonomous units in the protection of fundamental rights - the case of the Special Administrative Regions of the P.R. of China", VIIth World Congress of the International Association of Constitutional Law, Athens, Greece, 2007, accessible at <http://www.enelsyn.gr>

² According to the statistics available at the site of *Imprensa Oficial* – <http://pt.io.gov.mo> - during the period 1999-2006 the Macau Legislative Assembly [MLA] has approved 101 laws compared with 253 *regulamentos administrativos* [administrative regulations] and 629 *ordens executivas* [executive ordinances], the last two comprising the laws approved by the executive. It matches, broadly, 11% of the legislative production of the government. If we take into account the type of laws approved, considering the data obtainable via site of MLA [www.al.gov.mo/lei/leis] the major part of these 101 laws result from a proposal of the executive.

sociological background, the business elite. But history seldom repeats itself and the expectations that Macau community have are substantially different from those emerging in 1999. These changes are related to the sociological composition of Macau population³ and the presumably impact of Hong Kong anticipated constitutional bargaining into Macau political environment. An additional element of uncertainty is posed by the outcome of the 17th National Congress of the Communist Party of China, the monopolistic force in China's system.

1. Macau's as a Chinese subject

Macau has maintained under Chinese rule, the characteristics of a continental-based and judicial system, the relevant organizational principles regarding the development of Macau's political structure and some of the most pertinent factors of differentiation that an author foreseen as the *model of symmetry* enshrined in the Basic Law⁴.

Macau [but also Hong Kong] Basic Laws have been preserved by China's Central Government as proper constitutional law, even though according with another view⁵ "they are presumed to have a unique status within China's constitutional system and in the hierarchy of Chinese law". Allowing the Special Administrative Regions to act as vivid and engaged *autonomous territories*, China has validated the international legal personality adjudicated to them by the Basic Laws, and has done it without visible second thoughts⁶. The argument that the margin of autonomy entitled by the BLs was just possible because of the bilateral covenants concerted a decade before between China and Great Britain and China and Portugal⁷, has loose, in the interim, most of its accuracy as the willpower of the Chinese sovereign coincide with the constitutional law.

A catch of pragmatism should be seen in this stance, as China still looks to resolve the Taiwan issue according with the ideological foundations of the principle <one country, two systems> and doing it without conceding any defeat to its unitary and nationalistic convictions⁸. Macau and Hong Kong are, in this concern, examples to show to the world as China's emerges as a *responsible stakeholder* of the international community⁹.

Additional sense of reality should be opposed to the views that figure in Macau and Hong Kong pragmatic integration in the PRC's an invitation for a multi-faceted pluralism

³ According to the information released by the Statistics and Census Macau Service, the resident population of Macao was estimated at 520,000 people at 31 March 2007, an increase of about 29,000 persons compared with the same period of 2006. Macau population was estimated at July 2000 in 445,594 inhabitants, less 17% than the 2007 figure. See *Encyclopedia of the Nations* in <http://www.nationsencyclopedia.com> and SCSM site.

⁴ See Francisco Gonçalves Pereira, *ibidem*, p. 101.

⁵ See Wang Chenguang, "Introduction: an Emerging Legal System" in Wang & Zhang editors, *Introduction to Chinese Law*, Hong Kong-Singapore, Sweet & Maxwell Asia, 1997, pp. 21-2.

⁶ A full autonomous territory could be perceived according with the classification of Hurst Hannum and Richard B. Lillitch in "The Concept of autonomy in International Law and the Practice of the UN", *Israel Law Review*, n.o 15 (2), 1980, pp. 180-190.

⁷ What Vitalino Canas, *ibidem*, sees as "a formal and informal consensus between China and Portugal over the diverse status of Macau".

⁸ In a visit to Hong Kong in 1998, the Chinese President, Jiang Zemin, remarked that "the adherence to the policies of "one country, two systems, Hong Kong people administering Hong Kong" and a high degree of autonomy and strict compliance with the Basic Law of the HKSAR constitute the fundamental guarantee for long-term prosperity and stability in Hong Kong [...]. There are reasons to believe that the successful implementation of the policy of "one country two systems" will serve as an example for Macau's smooth return to the motherland and for the final settlement of the Taiwan question". Check it in <http://www.infor.gov.hk/info/sar1/jiang-e.htm>

⁹ See Zbigniew Brzezinski, "Living with China", *The National Interest*, Spring 2000, via www.findarticles.com and Robert Sutter, "Why Does China Matter?", *The Washington Quarterly*, 27(1), Winter 2003-4, pp. 75-89.

in the remaking of the Chinese state¹⁰. The integration of both territories has been, under a Chinese political view, a retaken of Chinese sovereignty over parts of its territory, parts that were for historical reasons taken illegitimately from the mainland.

The acceptance of an ideological diverse political system in both special administrative regions is precarious and no reason [as many western commentators, normally, advance] allows anyone to conclude that the capitalist system and the rule of law existing in both regions are considered superior to the socialist system in Mainland China. China is not in a way to become capitalist, at least the atomistic capitalism we know.

The terms used by president Hu Jintao in its official visit to Macau SAR, in December 2004, are scarcely equivocal:

As long as Macau's overall and long-term interests and China's national interests truly cherished, Macau can achieve a broad-based unity in its society and make concrete efforts to usher in an ever-brighter future for the Macao people. It is necessary to promote greater unity on the basis of loving the country and loving Macau among all social strata sectors and communities and maintain and consolidate general harmony in society¹¹.

China looks, then, to Macau has part of its political structure and any change in its status quo would be carefully monitored by the Central Government which conserves, as we know, a final say in the constitutional balances allowed to the SARs. The mechanism of article 144.o of the Basic Law is unequivocal, requiring a qualified majority of the Legislative Assembly and the accord of the Chief Executive for any proposal of revision of the normative to be submitted to the National People's Congress. Macau doesn't pose, for reasons coming from the past, a threat to the survival of China's political elite¹². Macau community was never a <people> in sociological terms and never had aspiration to political self-determination¹³. In recent years the proportion of its inhabitants coming from China for economic reasons has boost tremendously and consequently increase its mobile population, with the consequent loss of Macau four-centenary identity.

How has Macau lived with the sort of constitutional autonomy permitted by the Basic Law?

It should be recognized that MSAR enjoyed smoothly the type of consensus-building structured by the Basic Law, that may be defined as a model of organic separation of powers and an institutional equilibrium between the executive and legislative powers of government¹⁴. Although in general this consensus has been achieved without significant disturbances, a specific issue has swelled its importance and raised questions about the accuracy of division of powers settle by the Basic Law.

¹⁰ Under this view Francisco Gonçalves Pereira, *ibidem*, and Lo Shiu Hing, "Constitutional Conventions and Political Development in Macau" in *Macau on the Threshold of the Third Millennium*, Macau Ricci Institute, December 2001, pp. 93-100.

¹¹ Speech of Hu Jintao in Macao acceded via www.chinadaily.com

¹² In a certain sense this situation aggravated as the sensitivity about Macao political system prevailing in the Legislative Assembly is more than ever close to Beijing will. A system framed on consensus, in consultation and in the informality of its mechanisms is used by Chinese elite to reach its decisions. Any attempt to implement unannounced changes is destined to failure. See Vitalino Canas, *ibidem*, p. 151.

¹³ See in detail about this point my article "A Paradigm of Autonomy" *ibidem*.

¹⁴ That is basically different from the one set in Macau Organic Statute. See Vitalino Canas, *ibidem*, p. 157 and the author in "A Paradigm of Autonomy" footnote 1.

The Basic Law has created a specific organ – the Chief Executive –heading an administrative complex - the government – which is the organ of government that reunites powers of a singular organ of representation¹⁵ and member of the administration. The Chief Executive, differently that was envisioned under the Macau Organic Statute to the Governor, doesn't have formal legislative powers.

The government may present “proposals of law” to the Legislative Assembly – the true legislative power in Macau political system. The Chief Executive may implement its competences listed in article 50.o of MBL through the promulgation of *regulamentos administrativos* <administrative regulations>. But the copious use of this legal ability during these eight years has raised doubts in Macau jurisdictional system about its constitutional conformity.

According with press¹⁶ following a non-favorable adjudication by the Court of Final Appeal, the government intents to present a proposal of law do define the legislative competence of MSAR, proposal that plans to submit, in two steps, first to the Executive Council¹⁷ and secondly to the Legislative Assembly, for approval. Is to early to guess what will be the reaction of Macau legislators to this initiative.

There are different explanations for this controversial situation but firstly the drafters of Macau Basic Law have chased Hong Kong solutions and carried them, mechanically, to MBL. As Yash Ghai remarks there is a different “constitutional tradition under Portuguese constitutional law from that in Britain, whereby the executive has certain law making powers”¹⁸. And he clarifies is argument:

The influence of the Hong Kong model was manifest both in the negotiations over and the terms of the Sino-Portuguese Joint Declaration and in the drafting of the Basic Law. All the Mainland lawyers who served on the Hong Kong Basic Law Drafting Committee were also on the Macau Drafting Committee, as were several other Mainland members of the Hong Kong Drafting Committee. Not surprising, they were influenced by the approach and method adopted for Hong Kong

So a reliable explanation is that the drafters of Macau Basic Law didn't take into consideration that a pure legislative system of government concentrated in the Legislative Assembly wont work, basically because it is against Macau [and Portuguese] tradition.

A second reason for this situation is that Macau Legislative Assembly [MLA] has been unable to function as a legislative branch of government. Members of MLA see their participation in the affairs of the assembly as a matter of prestige and use it as pulpit for expressing the views of the corporate interests of the groups, entrepreneurial and professional associations they represent. Not the place where Macau laws should be proposed, negotiated and finalized. A minority of the actual MPs has legal training, being the majority entrepreneurs and members of Macau associations.

This case entitle us to consider that two systems of government coexist in the case of Macau: one formal that is defined in the Basic Law and catch its momentum for

¹⁵ An organ that represents Macau internationally and represents the Chinese sovereignty at Macau Special Administrative Region.

¹⁶ João Costeira Varela in *Macau Hoje*, “Regulamentos-Reacções diferentes sobre acordão do TUI que dá razão a Governo”, 20.07.2007.

¹⁷ The Executive Council is a consultative body of the Chief Executive whose composition and functioning is defined by articles 57.o and 58.o of Macao Basic Law.

¹⁸ See Yash Ghai, “The Basic Law...”, *ibidem*, p. 196

innovation in the Legislative Assembly; an informal system of government that respond to the necessities of governance and takes its legitimacy from 440 years of executive predominance.

2. The need for a democratic awakening

The effectiveness of Macau Basic Law has revealed, eight years passed by, the need for improvement in order to adapt it to the needs of Macau modernization and to respond to the type of mindset that Hu Jintao alluded in its 2004 visit to Macao¹⁹:

A democratic and scientific decision-making mechanism should be established and gradually perfected. Administrative and legal reforms should be carried and steadily to make administration more law-based, standardized and effective. A diligent, clean and efficient government is needed to provide quality services to the public.

Within Macau system of government a more feasible balance between the powers of the legislative and the executive is urgent. In my view this outcome can only be achieved by the amendment of Macau Basic Law and came from the creation of a consensus between MLA and the government on the direction Macau political system should have. A system composed of a strong executive and a weak legislature. A system that is underdeveloped, that has no parties merely political associations organized, periodically, to elect their mandatories to the MLA, a system that doesn't stimulate activism and sense of citizen responsibility, a system that cherishes a cozy relationship between the business community and the government and motivates cronyism, nepotism and corruption.

As the *Comissariado contra a Corrupção*, the local counter-corruption agency, refers in a report send to the government "Estudo sobre o aperfeiçoamento do regime eleitoral para a AL" [Report on the improvement of the electoral regime to the Legislative Assembly] and quoted abundantly by the press²⁰, the present electoral regime based on appointments or elections through constituencies facilitates the connections between the appointed [or elected] and the big corporations²¹ and multiply the trading-off of the votes. The document refers that the current electoral system doesn't submit the associations to any type of legal supervision, and as the associations have a fundamental role in the system they become instruments for the purchase of votes or mobilization of certain people to MLA.

The document emphasizes as well that the MPs are not organized by their ideologies or by their public policy alternative views but by the "connections" they have to the so-said "associations". This entitles the public to distinguish the members of MLA by the circle of social interests they represent and the arrangement is seen as a device to drive the government to endorse public policies that are in convergence with the MP's interests or their circle. The big corporations complete this scenario by their employers statute and by the large number of their employees, what offer "chief conveniences for the persuasion and canvass of voters".

¹⁹ Speech of Hu Jintao in Macao, *Hi envisions better future for Macao SAR*, in www.chinadaily.com.cn/english/doc/2004-12/20/content_401756.htm

²⁰ *Jornal Tribuna de Macau* "CCAC acusa associações e empresas de propiciarem a corrupção eleitoral" [CCAC accuses associations of promoting electoral corruption], 31.07.2007.

²¹ The system anchors in Macau history and was designed to provide a privileged status and influence for the business community, who is basically distrustful of direct elections that would diminish its power.

Behind this stage curtain *the electoral suffrage takes place under the gloominess of electoral corruption which damages the image of integrity of the MSAR*²² remarks the CCAC. The CCAC proposes the “redefinition of the organizations that are crucial for political participation, namely the regime of political association”.

Macau doesn't have a trustful regime of representative government nor it was suggested in the Sino-Portuguese Joint Declaration. The Portuguese administration never felt compelled to create a system of political representation organized in the base of political parties as it prevails in the West or exists in the case of Hong Kong. It looked enough to allow the expression of pluralism through the informal channels of the associations or the participation of the most relevant figures of the community in the Legislative Assembly, in the Consultative Council or in the myriad of councils existing by areas of policy-making.

After 1999 this was never an issue because Macau elite was now at the helm of the ship. The pressure for democratic accountancy was never significant and the celestial order that seemed to enchant the circle of power till the Ao Man Long crisis, at late 2006, asked to be kept, harmoniously. The incident unveiled the closing ties between a senior official of the government and some local construction companies involving accusations of bribery, bribe taking and money laundering. But the case made also clear that the Legislative Assembly has not performed properly its mission as counter-power of the Executive. It kept the silence when its voice was much needed.

In a system of representation structured in political parties and organized under ideological lines this case would be not impossible but it would be rather implausible [in its scale]. The competition between political parties would turn the opposition vigilant to the slipping of the executive and that add to reliability to the system. As we see in many parts of the world the independence of the judiciary is toughened in a system that has other channels for political accountability of those who hold the power.

3. The road ahead

Macau SAR has an encounter with its destiny in two-years time when a second Chief Executive is to be elected and the necessary steps will be taken for a brand-new legislature, the IV in the MSAR short history. It would be decisive that Macau may count with a new Legislative Assembly elected through universal and direct suffrage where a larger and more inclusive representation takes place.

But the reforms envisioned to Macau political system need to combine the approval of a qualified majority of members of the present Legislative Assembly, the assent of the Chief Executive and the agreement of its final receiver, the National People's Congress of the PRC. This *coalition of will* is hardly to anticipate, because so many conflicting interests are in question. But that encounter may be favored if the changes announced by Donald Tsang to the sister system of Hong Kong SAR catch a positive outcome, as much from Hong Kong political forces as China large parliament.

For its faith Macau may be compelled to rely, as it did before, in the favors of the gods of the Olympus and the good luck of its neighbor.

²² In 2006, the CCAC denounced to the *Ministério Pùblico* [procurate] four cases of electoral corruption concerning the direct elections to MLA occurred in 2005 and one occurred in 2001 and involving some associations related to the gambling industry and Fujian province interests in Macao. One of the accused is a member of the Legislative Assembly and although accused by the courts has invoked immunity against these accusations. The Legislative Assembly has not considered voting the suspension of its immunity.