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Macao's Return: Issues and Concerns

LIUTING WANG*

I. INTRODUCTION

On May 5, 1998, a board was unveiled in Beijing's Tiananmen Square¹ that counted "down the number of days and seconds before Macao's return."² After over 400 years of Portuguese control, Macao will be returned to China on December 20, 1999.³ Because of its small size and economy, Macao's return will not receive the media attention and international concern that Hong Kong's return received two years ago. Nonetheless, Macao's return is a significant historical event for China. Macao is the last Chinese territory occupied by foreign powers.⁴ Chinese

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The *Loyola of Los Angeles International & Comparative Law Review* was unable to obtain English translations for certain Chinese source material cited in this Article. Accordingly, the *Review* relies on the author's representations as to the accuracy of these sources.

1. *Committee Prepares for Macao's Return*, BEIJING REV., May 25-31, 1998, at 5.

2. *Id.* Macao is also spelled "Macau." The Chinese Government uses "Macao" to be consistent with the Mandarin pronunciation. The author uses "Macao" throughout this Article, but sometimes "Macau" may appear in the citations.

3. See Basic Law of Macao, Special Administrative Region of the People's Republic of China, reprinted in BEIJING REV., May 3-9, 1993, at I [hereinafter Basic Law of Macao]. The Basic Law of Macao was adopted at the First Session of the Eighth National People's Congress on March 31, 1993. See *id.* See also Teresa Poole Pecking, *China Focuses on Next Great Prize—Taiwan*, INDEP. (London), Mar. 24, 1997, at 12 (noting that December 20, 1999 "will mark an end to foreign government of claimed Chinese territory").

4. See Richard Halloran, *All Asia and the West Will Feel the Transfer's Reverberations*, INT'L HERALD TRIB. (Neuilly-sur-Seine, Fr.), June 30, 1997, at 10,

Government officials hope that Macao's return will demonstrate to the international community Macao's commitment to the "one country, two systems" theory,⁵ and open the possibility of the peaceful reunification of Taiwan with Mainland China.⁶

In contrast to the protracted animosity between China and Britain over Hong Kong, both China and Portugal characterize the Macao transition as smooth and cooperative.⁷ Indeed, few emotionally charged issues exist in the Macao transition that compare to the quarrels between Beijing and London over the governorship appointment and the legitimacy of the Hong Kong provisional legislature.⁸ Beijing and Lisbon, nonetheless, do dispute such issues as localizing law and civil services, designating an official language, controlling gang violence, and deploying troops.⁹ Potential disputes may also arise from the interpretation of the Basic Law of the Macao Special Administration Region of the People's Republic of China (Macao Basic Law), Macao autonomy, judicial independence, and protecting human rights. Democratic observers and human rights groups express concern that Macao may be more vulnerable to human rights abuses than was Hong Kong due to its small size, its anonymity within the international community, the deeply rooted Chinese influences, and the weak grass-roots democratic forces in Macao society.¹⁰

This Article discusses the current disputes between China and Portugal by analyzing the issues and concerns in the context of the Macao Basic Law and 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 (Joint Declaration).¹¹ The Macao transition ultimately involves two

available in LEXIS, World Library, Iht File.

5. See generally *Cooperation Vowed on Macao Handover*, BEIJING REV., May 11-17, 1998, at 5.

6. See *Qian: China to Deepen Reform, Widen Opening-Up*, XINHUA NEWS AGENCY (New York, N.Y.), Sept. 24, 1997, available in LEXIS, Asiapc Library, Arcnws File.

7. See *Cooperation Vowed on Macao Handover*, *supra* note 5, at 5.

8. See generally Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANSNAT'L L. 301, 321-324 (1996).

9. See *China Blasts Portugal over Macau's Handover*, AGENCE FRANCE PRESSE (Paris), Nov. 20, 1998, available in LEXIS, News Library, Allnws File.

10. See generally *Amnesty International Urges Macau Leaders to Ensure Human Rights*, AGENCE FRANCE PRESSE (Paris), July 2, 1997, available in LEXIS, Asiapc Library, Allnws File.

11. See generally *Joint Declaration of the Government of the People's Republic of*

issues: first, how the Macao Basic Law is interpreted and implemented; and second, whether the Chinese Government will honor its commitments, as embodied in the Macao Basic Law, to maintain the existing legal, political, and economic systems for fifty years. To maintain Macao's stability and prosperity, the Chinese Government must recognize Macao's unique history and culture, accept the differences between the Macanese and Chinese legal and social systems, and respect Macao's autonomy, judicial independence, and its people's human rights, in accordance with the Macao Basic Law.

Part II of this Article briefly discusses the history of Macao's separation from China. Part III provides an overview of the Macao Basic Law and the Joint Declaration, which are the two primary legal documents governing the transition process and Macao's future. Part IV discusses various issues and concerns arising from the Joint Declaration, including deploying Chinese troops in Macao, localizing law and civil services, maintaining social order and public security, appropriating the fiscal reserve, and designating an official language. Part V focuses on the interpretation of some of the Macao Basic Law's critical provisions and their potential impact on Macao. Part VI concludes that the Chinese Government must recognize the historical, legal, and cultural differences between China and Macao, respect Macao's culture and legal tradition, and resolve the differences in the spirit of the Basic Law.

II. MACAO'S SEPARATION

Macao is a free seaport, located outside of the Pearl River, west of Hong Kong. It includes the Macao Peninsula, Taipa Island and Coloane Island. Covering 20.96 square kilometers, Macao is but one sixty-third the size of Hong Kong.¹² Its current population of 450,000 consists of ninety-six percent ethnic Chinese, three

China and the Government of the Republic of Portugal on the Question of Macao, Apr. 13, 1987, P.R.C.-Port. [hereinafter Joint Declaration], reprinted in JAW-LING JOANNE CHANG, OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES NO. 4, SETTLEMENT OF THE MACAO ISSUE: DISTINCTIVE FEATURES OF BEIJING'S NEGOTIATING BEHAVIOR (WITH TEXT OF 1887 PROTOCOL AND 1987 DECLARATION) 29 (1988) [hereinafter CHANG, OCCASIONAL PAPERS].

12. See Macau Government Information Services, *Macau* (visited Nov. 3, 1999) <<http://www.macao.gov.mo>> [hereinafter Macau Government Homepage].

percent Portuguese, and one percent other ethnicities.¹³ Among Macao's population, about ninety-six percent speak Chinese as their first language.¹⁴

Unlike Hong Kong, the Chinese influence in Macao is evident through the Chinese version of its history and culture. According to Chinese scholars, in 1553, the Portuguese bribed corrupt Chinese officials to obtain permission to use Macao to dry their goods damaged in sea storms, and then refused to leave.¹⁵ From 1573 to 1849, the Portuguese paid rent to the Chinese Government and acknowledged Chinese sovereignty over Macao.¹⁶ Following the 1840 Opium War, Portugal and Britain conspired to force the corrupt Qing Government to sign the 1887 Lisbon Treaty¹⁷ that allowed the Portuguese to permanently manage and reside in Macao.¹⁸ The treaty prohibited Portugal from transferring Macao to another country without first obtaining China's approval.¹⁹ The Chinese knew that the British wanted to claim Macao.²⁰ Therefore, with respect to the treaty, China never technically relinquished Macao's sovereignty. In fact, from the Chinese perspective, Macao is within Chinese sovereignty and should not be considered a colony.²¹ Some Macao historians share similar views.²²

13. See *Chinese and Westerners Living Together in Macao*, WORLDSOURCES, INC., EMERGING MARKETS DATAFILE (Wash., D.C.), Oct. 18, 1999, available in LEXIS, Asiapc Library, Curnws File. See also Macau Government Homepage, *supra* note 12, Geography and Population Section.

14. See Macau Government Homepage, *supra* note 12, Geography and Population Section.

15. See HONGJIAN HUANG, MACAO HISTORY 49 (Hong Kong Commercial Publ'g 1987).

16. See *id.* at 65.

17. See Protocol Between Portugal and China Respecting the Relations Between the Two Countries, Mar. 26, 1887, P.R.C.-Port. [hereinafter Protocol Between Portugal and China], reprinted in CHANG, OCCASIONAL PAPERS, *supra* note 11, at 28.

18. See *id.*

19. See *id.* Article III states that "Portugal engages never to alienate Macau and dependencies without agreement with China." *Id.*

20. See generally Protocol Between Portugal and China art. III, reprinted in CHANG, OCCASIONAL PAPERS, *supra* note 11, at 28 (declaring that "Portugal engages never to alienate Macau and dependencies without agreement with China."). Possibly to prevent Great Britain from taking Macao, the Chinese Government stipulated, in the Protocol, that Portugal must obtain Chinese approval before alienating Macao.

21. See HONGJIAN HUANG, *supra* note 15, at 198.

22. See WINKUAN HUANG, PONDERING ON MACAO HISTORY 36 (Macao Star Press 1987).

In contrast, the western version of Macao's history is different. French Chinese expert Paul Pelliot believes the Portuguese first discovered and colonized Macao.²³ The Portuguese view, on the other hand, proffers that the Chinese Government gave Macao to Portugal as a reward for its efforts in fighting pirates.²⁴ In 1564 the Portuguese received a year tax-free and a "golden chop" for assisting the Chinese in crushing a mutiny in Guangdong Province—a fact that supports the Portuguese view.²⁵ Chinese scholars believe Portugal used this event to justify its occupation of Macao.²⁶ The Macao Government now agrees that "it was never a colony in the strictest sense of the word."²⁷

The Portuguese Government formally renounced all of its overseas colonies and territories after the 1974 Portuguese Revolution.²⁸ In 1979, Portugal restored diplomatic relations with China and explicitly recognized Macao as a Chinese territory.²⁹ In 1987, the two countries signed the Joint Declaration, stating that China will take over Macao on December 20, 1999.³⁰ In 1993, the Chinese National People's Congress promulgated the Macao Basic Law and established the Macao Special Administrative Region (MSAR) under the theory of "one country, two systems."³¹ According to the Macao Basic Law, Macao will maintain its current capitalist system for fifty years and enjoy a high level of autonomy.³²

The Chinese Government believes that Macao's return should be handled differently than was Hong Kong's return.³³

23. See HONGJIAN HUANG, *supra* note 15, at 27–28.

24. See C.K. Lau, *History Simmers in the Last Colony*, S. CHINA MORNING POST (Quarry Bay, H.K.), Dec. 20, 1997, at 17, available in LEXIS, Asiapc Library, Allnws File.

25. See HONGJIAN HUANG, *supra* note 15, at 55–56.

26. See *id.*

27. Macao Government Homepage, *supra* note 12, More than Four Centuries of History Section.

28. See *Xinhua Begins Question and Answer Series 'ABC's' of Macao SAR Basic Law*, BRIT. BROADCASTING CORP. SUMMARY OF WORLD BROADCASTS (Reading, Eng.), Apr. 1, 1999, available in LEXIS, Asiapc Library, Curnws File.

29. See *id.*

30. See HONGJIAN HUANG, *supra* note 15, at 198–199.

31. Joint Declaration para. 2, reprinted in CHANG, OCCASIONAL PAPERS, *supra* note 11, at 29.

32. See Basic Law of Macao ch. I, art. 5, reprinted in BEIJING REV., May 3–9, 1993, *supra* note 3, at I. See also Macao Government Homepage, *supra* note 12, More than Four Centuries of History Section.

33. See generally *Macao Plans Easy Transition from Portugal to China*, NIKKEI WEEKLY (New York, N.Y.), Jan. 27, 1997, at 25.

Because of Macao's unique history, however, the differences in handling the return may not be significant. Macao differs from Hong Kong in size, economy, demography, and history, giving its return certain distinctive characteristics. For example, Chinese presence may have reduced Portuguese influence in Macao.³⁴ The Chinese Government, however, must recognize the distinctive legal system and social customs that have evolved in Macao.³⁵ Furthermore, the international community accepts Macao as a separate legal entity, rather than merely a part of China or Portugal.³⁶ Therefore, to maintain Macao's stability after the transition, China must handle the transition in the same manner it handled the Hong Kong transition.

III. THE JOINT DECLARATION AND MACAO BASIC LAW

To understand the process of Macao's return, two important legal documents must be examined: the Sino-Portugal Joint Declaration and the Basic Law. These two documents share key provisions. First, pursuant to the principle of "one country, two systems," both documents state that the Central Government of China will assume sovereignty over Macao and establish the MSAR on December 20, 1999, in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China.³⁷ Second, both documents define the basic political

34. See generally Rone Tempest, *Macao Hand-over Complicated by Deadly Turf War*, L.A. TIMES, Jan. 1, 1999, at A5 (discussing the Chinese triads' influence in Macao). See also CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK 1999, available at (visited Nov. 10, 1999) <<http://www.odci.gov/cia/publications>> (noting that Macao "depends on China for most of its food, fresh water, and energy imports."); Barbara Basler, *Tiny Piece of Empire, Cringing in Giant Shadow*, N.Y. TIMES, Aug. 2, 1989, at A4 (characterizing Macao's economy as one that is dominated by Chinese investment companies). Cf. Christine Courtney & David Holley, *As '97 Nears, China Invests in Hong Kong*, L.A. TIMES, Aug. 10, 1993, at D1 (discussing China's extensive investments in Hong Kong).

35. See Macau Government Homepage, *supra* note 12, Macau in Transition Section.

36. See, e.g., *id.* International Agreements Rights and Status Protected Section (noting that the Sino-Portuguese Joint Liaison Group agreed on the continued application of many international agreements after the 1999 hand over—Macao's participation in such agreements evidences that the international community views Macao as separate legal entity from the People's Republic of China for purposes of applying international law).

37. See Joint Declaration para. 2(1), reprinted in CHANG, OCCASIONAL PAPERS, *supra* note 11, at 29; Basic Law of Macao preamble, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at I. Article 31 of the Constitution of the People's Republic of China provides: "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of the specific conditions." P.R.C.

structure determining Macao's future, including the relationship between the Central Government and the MSAR and the procedures for electing the region's chief executive and legislative representatives and providing basic human rights.³⁸

The difference between the two documents is that each governs a separate aspect of the transition process. The provisions of the Joint Declaration serve as a general guide for the transition. Under the Joint Declaration, a Sino-Portuguese Joint Liaison Group will be formed to facilitate the information exchange between China and Portugal during the transition's planning stages.³⁹ The Macao Basic Law codifies the Joint Declaration's key provisions in a more detailed and comprehensive fashion.⁴⁰ The Macao Basic Law, which becomes effective on December 20, 1999, will serve as the "mini-constitution" of Macao.⁴¹ The Chinese National People's Congress promulgated the Macao Basic Law,⁴² and the Standing Committee of the National People's Congress (Standing Committee) has exclusive authority over the Basic Law's final interpretation.⁴³ In other words, contrary to the Joint Declaration, the Chinese are not legally obligated to consult with the Portuguese as to whether the Chinese interpretation of the Basic Law is consistent with the Joint Declaration. Although the Joint Declaration defines the Macao Basic Law's framework,

CONST. art. 31 (1982).

38. See Joint Declaration Annex I, *reprinted in* CHANG, OCCASIONAL PAPERS, *supra* note 11, at 31; Basic Law of Macao chs. II-III, *reprinted in* BEIJING REV., May 3-9, 1993, *supra* note 3, at II-IV.

39. See Joint Declaration para. 4, *reprinted in* CHANG, OCCASIONAL PAPERS, *supra* note 11, at 30. See also *id.* Annex II, § I, para. 1, *reprinted in* CHANG, OCCASIONAL PAPERS, *supra* note 11, at 36.

40. For example, the Joint Declaration simply states the MSAR is subject to the authority of the Central Government of China. See Joint Declaration para. 2(2), *reprinted in* CHANG, OCCASIONAL PAPERS, *supra* note 11, at 29. The Macao Basic Law further defines the relationship between the MSAR and the Central Government and stipulates that the Central Government has the authority to determine, among other things, whether any existing Macao laws conflict with the Macao Basic Law, the scope of the Central Government's defense obligations, and the extent of the MSAR's responsibility to maintain public order. See Basic Law of Macao ch. II, arts. 14, 17, 19, *reprinted in* BEIJING REV., May 3-9, 1993, *supra* note 3, at II-III.

41. Cf. *infra* note 241 (discussing the notion of a "mini-constitution" as applied to Hong Kong).

42. See Basic Law of Macao preamble, *reprinted in* BEIJING REV., May 3-9, 1993, *supra* note 3, at I.

43. See *id.* ch. VIII, art. 143, *reprinted in* BEIJING REV., May 3-9, 1993, *supra* note 3, at XIII.

its influence will disappear when the law takes effect. Because the major provisions of the two documents are substantively similar, this discussion focuses on seven key provisions of the Macao Basic Law.

(1) Under the principle of "one country, two systems," the Macao Basic Law declares that China will resume its sovereignty over Macao on December 20, 1999 and establish the MSAR according to Article 31 of the Chinese Constitution.⁴⁴ Unlike China's provincial governments, the MSAR will have a high degree of autonomy and will be subject to the Central Government's direct authority.⁴⁵ Potential issues arising under this provision include a conflict of laws and a possible power struggle between the Chinese Central Government and the Macao Government.⁴⁶

(2) The MSAR will enjoy a high degree of autonomy and have executive, legislative, and independent judicial power, including that of final adjudication.⁴⁷ The MSAR will not practice the socialist system and the current system will remain unchanged for fifty years.⁴⁸ This provision raises two issues. First, if Macao has a high degree of autonomy, will it be subject to intervention by the Central Government? If so, to what extent? Second, if the final interpretation of the Macao Basic Law rests with the Standing Committee, are Macao courts authorized to adjudicate cases concerning state actions that are inconsistent with the Basic Law?⁴⁹

(3) Chinese will be the official language.⁵⁰ Portuguese may be used as an alternate official language.⁵¹

(4) The Central Government will be responsible for Macao's foreign affairs and defense.⁵² It is the MSAR's obligation to

44. See *id.* preamble, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at I.

45. See Joint Declaration para. 2(2), reprinted in CHANG, OCCASIONAL PAPERS, *supra* note 11, at 29.

46. For a detailed discussion of these issues, see *infra* Part V.

47. See Joint Declaration para. 2(2), reprinted in CHANG, OCCASIONAL PAPERS, *supra* note 11, at 29.

48. See Basic Law of Macao ch. I, art. 5, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at I.

49. For a detailed discussion of these issues, see *infra* Part V.

50. See Basic Law of Macao ch. I, art. 9, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at II.

51. See *id.*

52. See Macau Government Homepage, *supra* note 12, Political Transition Section.

maintain public order and conduct its internal affairs without outside interference.⁵³ Here, the issue is whether China has the right to deploy troops in Macao after the hand over. The Joint Declaration is silent on this point. Ultimately, the answer will depend on interpretation of these provisions.

(5) The MSAR will enact its own laws, and keep or repeal its current laws as necessary.⁵⁴ Chinese national law will not apply to the MSAR except in a state of emergency.⁵⁵ The Standing Committee may invalidate all laws the MSAR legislature enacts regarding the relationship between the MSAR and the Central Government if these laws contradict the Macao Basic Law.⁵⁶ The Basic Law requires that the MSAR enact laws prohibiting any act of treason, secession, sedition or subversion against the Central Government, including theft of state secrets.⁵⁷ These provisions are quite ambiguous and are replete with potential for abusive interpretation in terms of human rights issues. The Standing Committee has the exclusive and final authority in interpreting the Macao Basic Law.⁵⁸ It also has the final word as to what constitutes "a state of emergency" for purposes of determining whether Chinese national law should apply to Macao.⁵⁹ The interpretative flexibility of these provisions poses dangers. For example, if Macao students and civilians stage a Tiananmen-Square-type demonstration, will this be a state of emergency warranting the Central Government to declare martial law in Macao? In response to western media's criticisms of the Chinese Government for jailing journalists who disclosed state secrets,⁶⁰ will the Macao Government similarly restrain reporters' freedom to report politically sensitive news?

53. See Basic Law of Macao ch. II, arts. 13–14, *reprinted in* BEIJING REV., May 3–9, 1993, *supra* note 3, at II.

54. See *id.* ch. II, arts. 17, 23, *reprinted in* BEIJING REV., May 3–9, 1993, *supra* note 3, at II.

55. See *id.* ch. II, art. 18, *reprinted in* BEIJING REV., May 3–9, 1993, *supra* note 3, at II.

56. See *id.* ch. II, art. 17, *reprinted in* BEIJING REV., May 3–9, 1993, *supra* note 3, at II; see also *id.* ch. VIII, art. 143, *reprinted in* BEIJING REV., May 3–9, 1993, *supra* note 3, at XIII.

57. See *id.* ch. II, art. 23, *reprinted in* BEIJING REV., May 3–9, 1993, *supra* note 3, at III.

58. See *id.* ch. VIII, art. 143, *reprinted in* BEIJING REV., May 3–9, 1993, *supra* note 3, at XIII.

59. See *id.* ch. II, art. 18, *reprinted in* BEIJING REV., May 3–9, 1993, *supra* note 3, at II.

60. See *Amnesty Highlights Reporters Jailed in China*, AGENCE FRANCE PRESSE (Paris), May 1, 1996, available in LEXIS, News Library, Afg File.

(6) Chapter IV of the Macao Basic Law describes the MSAR's political structure.⁶¹ An elected chief executive accountable to the MSAR and the Central Government will govern the MSAR.⁶² The Legislative Council will enact the laws of the MSAR.⁶³ An independent judiciary will be responsible for adjudicating and interpreting the law, but will be limited to adjudicating only those cases that do not involve foreign or defense affairs.⁶⁴ The extent of the judiciary's power and authority of final adjudication, as well as the localization of law and civil service, are discussed below in more detail.

(7) Articles 25 through 44 represent the MSAR's "Bill of Rights." The Articles protect Macao residents' freedom of speech, religion, and association, right of privacy, freedom from any discrimination, and presumption of innocence.⁶⁵ Article 40 provides that "The rights and freedoms enjoyed by Macao residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the first paragraph of this Article."⁶⁶ Because the Chinese and English languages may interpret certain concepts differently, a potential problem arises concerning the definition of these guarantees.⁶⁷

An overview of the relevant provisions of the Macao Basic Law demonstrates that potential issues may arise between China, Portugal, the Central Government, and the MSAR. For example, because of cultural divergence and the differences between the Mainland China and MSAR legal systems,⁶⁸ China's past

61. See generally Basic Law of Macao ch. IV, arts. 45–102, reprinted in BEIJING REV., May 3–9, 1993, *supra* note 3, at V–IX.

62. See *id.* ch. IV, arts. 45, 47, reprinted in BEIJING REV., May 3–9, 1993, *supra* note 3, at V.

63. See *id.* ch. IV, arts. 67, 71(1), reprinted in BEIJING REV., May 3–9, 1993, *supra* note 3, at VII.

64. See *id.* ch. VIII, art. 143, reprinted in BEIJING REV., May 3–9, 1993, *supra* note 3, at XIII; *id.* ch. IV, art. 82, reprinted in BEIJING REV., May 3–9, 1993, *supra* note 3, at VIII.

65. See generally *id.* ch. III, arts. 24–44, reprinted in BEIJING REV., May 3–9, 1993, *supra* note 3, at III–IV.

66. *Id.* ch. III, art. 40, reprinted in BEIJING REV., May 3–9, 1993, *supra* note 3, at IV. The first paragraph of Article 40 states, "The provisions of International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Macao shall remain in force and shall be implemented through the laws of the Macao Special Administrative Region." *Id.*

67. See Frances H. Foster, *The Illusory Promise: Freedom of the Press in Hong Kong, China*, 73 IND. L.J. 765, 773–775 (1998).

68. See Jin Huang & Andrew Qian, "One Country, Two Systems," *Three Law Families and Four Legal Regions: The Emerging Inter-Regional Conflicts of Law in China*,

experience in operating the Special Economic Zones offers little practical guidance.⁶⁹ Additionally, because Macao is part of China, the principle of international conflict of law may not apply.⁷⁰ The recent Hong Kong hand over experience may provide some positive perspectives for Macao, but it is too early to draw any meaningful conclusions as to how well the "one country, two systems" works. There are no clear answers to these issues at this stage. For China and Macao, learning will occur through trial and error.

IV. CURRENT ISSUES AND DISPUTES

The Hong Kong hand over was a difficult event for both the Chinese and British Governments.⁷¹ In comparison, the Chinese and Portuguese Governments anticipate that Macao's transition will be friendly.⁷² When Chinese Premier Zhu Rongji met Portugal's Prime Minister Antonio Guterres on April 21, 1998, he promised that China would strictly abide by the Joint Declaration and resolve all related issues "in a spirit of cooperation."⁷³

Several disputes, however, have escalated to a point where each nation blames the other for acting in bad faith. The Chinese Government is concerned with three major issues: (1) localizing civil servants; (2) localizing laws; and (3) establishing the official status of the Chinese language.⁷⁴ Recently, issues such as controlling gang violence, deploying troops, and appropriating the fiscal reserve have also received attention.⁷⁵ Because these disputes relate to the interpretation of the relevant provisions of the Joint Declaration, this Article discusses them in that context.

5 DUKE J. COMP. & INT'L L. 289, 300 (1995). For a discussion of the Special Economic Zones, see *infra* Part V.

69. See *Special Economic Zone and the Open Coastal Belt* (visited Oct. 27, 1999) <<http://www.nyconsulate.prchina.org/news/AboutChina.html>> [hereinafter *Special Economic Zone*].

70. See Huang & Qian, *supra* note 68, at 310-311.

71. See *Macao Plans Easy Transition from Portugal to China*, *supra* note 35, at 25. See also Davis, *supra* note 8, at 304.

72. See Joint Declaration Annex II, *reprinted in* CHANG, OCCASIONAL PAPERS, *supra* note 11, at 36.

73. *Cooperation Vowed on Macao Handover*, *supra* note 5, at 5.

74. See *Committee Prepares for Macao's Return*, *supra* note 1, at 5.

75. See generally *Macao, China Agree on More Cooperation to Beat Triads*, AGENCE FRANCE PRESSE (Paris), Oct. 15, 1998, available in LEXIS, News Library, Allnws File. See also *China Calls for Macao Civil Service to be Localized Soon*, AGENCE FRANCE PRESSE (Paris), Nov. 6, 1998, available in LEXIS, News Library, Allnws File.

A. Localizing Civil Servants

Paragraph 2(3) and Annex I, section I, of the Joint Declaration state that the Macao Government will be composed of "local inhabitants."⁷⁶ Although ethnic Chinese make up ninety-five percent of the Macao population, only seven out of fifty senior civil servants in Macao are of Chinese descent.⁷⁷ Traditionally, the Portuguese occupied most of these positions.⁷⁸ The Portuguese, however, will presumably leave Macao after December 20, 1999.⁷⁹ In order to successfully transfer Macao to China, it is critical, therefore, that public services are localized before the hand over.

The localization process, unfortunately, is very slow. The Portuguese Government runs Macao like a colony; Portuguese expatriates hold the top seven civil service jobs.⁸⁰ The fact that Macao is considered a place for Portuguese ex-officers to "get rich quick,"⁸¹ probably causes the Chinese to doubt whether the ex-officers will leave. Before 1984, the civil service positions the Chinese held were either those of ordinary workers or junior policemen⁸²—the Portuguese controlled all major senior management positions.⁸³ The Chinese worry that the Portuguese may create a "Mozambique syndrome,"⁸⁴ in that the Portuguese officers may maintain their well-paying jobs until the hand over and then leave the whole city to the unqualified Macao Chinese who are unable to supervise the new MSAR's functioning.⁸⁵

76. Joint Declaration para. 2(3), reprinted in CHANG, OCCASIONAL PAPERS, *supra* note 11, at 29; *id.* Annex I, § III, reprinted in CHANG, OCCASIONAL PAPERS, *supra* note 11, at 31.

77. See John Gittings, *Macau Countdown Begins with Killing*, GUARDIAN (London), Dec. 21, 1998, at 11, available in LEXIS, Asiapc Library, Allnws File.

78. See generally *China Calls for Macau Civil Service to be Localized Soon*, *supra* note 75 (noting that "Beijing has called for the speedy transfer of senior civil service positions to the local Chinese in the Portuguese enclave of Macau . . .").

79. See Joint Declaration para. 1, reprinted in CHANG, OCCASIONAL PAPERS, *supra* note 11, at 29.

80. See Todd Crowell & Law Siu-Lan, *Troubled Transition*, ASIaweek (Causeway Bay, H.K.), Apr. 24, 1998, at 24, available in LEXIS, Asiapc Library, Allnws File.

81. Gittings, *supra* note 77, at 11.

82. See Lau, *supra* note 24, at 17.

83. See *id.*

84. Crowell & Siu-Lan, *supra* note 80, at 24 (explaining that the term, "Mozambique Syndrome," refers to "civil servants clinging to their well-paid jobs to the last moment then tossing the administration over to the unqualified locals.").

85. See *id.*

In comparison, the British localized the Hong Kong Government, except for the attorney general and the governor, long before the Hong Kong hand over.⁸⁶ This early localization contributed to the success of Hong Kong's transition.⁸⁷ The Portuguese Government promises to localize Macao civil services before the hand over,⁸⁸ but this promise has yet to be realized.

B. Localizing Laws

In addition to localizing civil servants, the Chinese Government is also concerned about localizing laws, which is a vague concept that is not clearly defined in the Joint Declaration.⁸⁹ Localizing laws in Macao involves three potential problems: all Macao legal documents are in Portuguese; few Chinese nationals qualify for the judiciary; and Macao's current laws may contradict the Joint Declaration or Basic Law.

These issues are internally related to each other. Annex I, section IV of the Joint Declaration requires that Macao establish a final court of appeal.⁹⁰ For several reasons, few Chinese nationals qualify for positions on the bench. First, Portuguese continues to be the official legal language of Macao—all Macao's legal documents are written in Portuguese.⁹¹ Therefore, a Macao judge must understand both Chinese and Portuguese to properly adjudicate cases. After December 20, 1999, however, Chinese will be the official language.⁹² Second, few Chinese nationals have served in the Macao judiciary under Portuguese rule and therefore, do not have both the necessary legal experience and bilingual capabilities to serve on the bench.⁹³ After the hand over, the primary undertakings for the Chinese Government will be to

86. See *Tale of Two Cities*, ASIaweek (Causeway Bay, H.K.), Apr. 24, 1998, at 25, available in LEXIS, Asiapc Library, Allnws File (noting that "all top positions [in the civil service were] filled by ethnic Chinese, except for governor and attorney general.").

87. See *id.*

88. See *Chinese Official Urges Quicker Localization in Macao*, XINHUA NEWS AGENCY (New York, N.Y.), Oct. 14, 1997, available in LEXIS, Asiapc Library, Allnws File.

89. See *Chinese Official Urges Quicker Localization in Macao*, *supra* note 88.

90. See Joint Declaration Annex I, § IV, reprinted in CHANG, OCCASIONAL PAPERS, *supra* note 11, at 32.

91. See *Chinese Official Urges Quicker Localization in Macao*, *supra* note 88.

92. See Joint Declaration para. 2(5), reprinted in CHANG, OCCASIONAL PAPERS, *supra* note 11, at 30 (providing that in addition to the Chinese language, Portuguese may also be used in "organs of government.").

93. See Crowell & Siu-Lan, *supra* note 80, at 24.

train and appoint qualified Chinese nationals to the judiciary and translate the law into Chinese. Compared to the Portuguese, the British did a superior job in appointing ethnic Chinese to the Hong Kong bench.⁹⁴

The third aspect of localizing laws is keeping Macao's current law in force unless it contradicts the Joint Declaration or the Macao Basic Law.⁹⁵ The MSAR may make its own law, amend, or repeal the current law,⁹⁶ but it must report any such activity to the Standing Committee for the record.⁹⁷ A problem may arise as to whether a Macao law should be kept, amended, or repealed. For example, China utilizes the death penalty;⁹⁸ Macao has banned capital punishment since the mid-19th century.⁹⁹ Chinese officials indicate that the Chinese Government will respect Macao's judicial heritage.¹⁰⁰ Because China and Macao have different political ideologies and legal traditions, however, the Standing Committee, which possesses authority to invalidate Macao laws it deems unfit,¹⁰¹ will thus inevitably clash with the authority of Macao's legislature.

C. Chinese as the Official Language

Paragraph 2(5) of the Joint Declaration states that Portuguese, in addition to Chinese, *may* be used by the MSAR Government.¹⁰² The Chinese Government wants to ensure that Chinese will be the official language after the Macao transition.¹⁰³ The Portuguese Government fears that Portuguese may lose its

94. *See id.*

95. *See* Joint Declaration Annex I, § III, *reprinted in* CHANG, OCCASIONAL PAPERS, *supra* note 11, at 31.

96. *See id.* *See also* Basic Law of Macao ch. IV, art. 71(1), *reprinted in* BEIJING REV., May 3-9, 1993, *supra* note 3, at VII.

97. *See* Joint Declaration Annex I, § III, *reprinted in* CHANG, OCCASIONAL PAPERS, *supra* note 11, at 31-32.

98. *See generally* *Macao Death Penalty Ban "to Stay,"* H.K. STANDARD (Kowloon Bay, Kowloon), Feb. 18, 1997, *available in* LEXIS, News Library, Allnws File.

99. *See id.*

100. *See id.*

101. *See* Basic Law of Macao ch. I, art. 17, *reprinted in* BEIJING REV., May 3-9, 1993, *supra* note 3, at II.

102. *See* Joint Declaration para. 2(5), *reprinted in* CHANG, OCCASIONAL PAPERS, *supra* note 11, at 30.

103. *See* Basic Law of Macao ch. I, art. 9, *reprinted in* BEIJING REV., May 3-9, 1993, *supra* note 3, at II.

language status after December 20, 1999,¹⁰⁴ because ninety-five percent of Macao's population is Chinese¹⁰⁵ and Chinese is the primary language spoken. Because the Chinese Government's view will likely prevail in the Macao legislation, the Chinese Government may leave this decision to future Macao governments.¹⁰⁶ Although the Macao Basic Law, like the Joint Declaration, states that Portuguese may be an additional official language,¹⁰⁷ it is optional. Despite the fact that the Portuguese influence will be a dominant one at the time of the transition, it is foreseeable that this influence may slowly fade away in time.

D. Social Order and Security

Paragraph 2(10) of the Joint Declaration states that the Macao Government is responsible for maintaining public order in Macao.¹⁰⁸ In the past two years, public security in Macao deteriorated dramatically because of gang violence.¹⁰⁹ Because Macao's economy largely depends on casino-related tourism,¹¹⁰ the gangs, known in Macao as "triads," fight each other to gain control of the casino operations.¹¹¹ The triads retaliate against Macao police and public officials for attempting to regulate and investigate the triads' role in illegal casino operations.¹¹² The triads have bombed, kidnapped, and shot governmental officials and innocent people in casinos and on the streets.¹¹³ As a result of this ongoing violence, the Macao tourism economy has declined.¹¹⁴

104. See generally *id.*

105. See *Tempest*, *supra* note 34, at A5.

106. See *China Blasts Portugal over Macau's Handover*, *supra* note 9.

107. See Joint Declaration para. 2(5), *reprinted in* CHANG, OCCASIONAL PAPERS, *supra* note 11, at 30; Basic Law of Macao ch. I, art. 9, *reprinted in* BEIJING REV., May 3-9, 1993, *supra* note 3, at II.

108. See Joint Declaration para. 2(10), *reprinted in* CHANG, OCCASIONAL PAPERS, *supra* note 11, at 30.

109. See generally Gittings, *supra* note 77, at 11. See also generally Mark Landler, *Macao Astir over Troops in Handover to Beijing*, N.Y. TIMES, Sept. 27, 1998, at 4 (noting that "Macao's residents are exhausted by [the] gang war . . . [and] are very concerned about security." (internal quotation marks omitted)).

110. See generally Macau Government Homepage, *supra* note 12, Unique Appeal of Macau Section (explaining that "[a]most half of Macau's visitors come for leisure and to gamble.").

111. See generally John Ridding, *Macau Prepares to Crack Down on Triads*, FIN. TIMES (London), Apr. 19, 1997, at 3, available in LEXIS, World Library, Fintime File.

112. See generally Gittings, *supra* note 77, at 11.

113. See *id.*

114. See Harold Bruning, *Macao's Triad Tentacles Scare off Potential Investors*, FIN.

The Macao Government's ability to maintain public order, particularly its ability to provide security to Chinese leaders on the day of the transition ceremony, is questionable.¹¹⁵ Many speculate whether Mainland China is the source of the violence and hope that the Chinese Government will cooperate. The Chinese Government, on the other hand, criticized the Macao Government's inability to control and aggressively reduce the violence. Nevertheless, the Chinese Government agreed to deploy troops around Macao to assist the Macao police in controlling the spread of violence.¹¹⁶ Cooperation between the two sides has been successful thus far.¹¹⁷ The implications of triad violence, however, extend far beyond public security issues. The Portuguese Government's inability to effectively control the violence disappointed Macao residents, who are now eager to see the Chinese Government take over Macao.¹¹⁸ The triad violence not only created a foundation of public support for the Chinese takeover, but also provided the Chinese Government with an excuse to deploy troops in Macao thereafter.

E. Deploying Troops

Although the triad violence gives the Chinese Government a reason to deploy troops in Macao, the Joint Declaration does not clearly address whether the Chinese Government may do so after the hand over. The Joint Declaration merely states that the Central Government is responsible for Macao's defense and that the Macao Government must maintain the public order.¹¹⁹ Early in the transition, both the Chinese and the Portuguese agreed it was not necessary to station troops in Macao.¹²⁰ In 1975, the

POST (Toronto), May 16, 1997, at 57, available in LEXIS, World Library, Natpst File (noting that "some hotels have complained of a fall in business.").

115. See generally *id.* (discussing recent killings and attempted assassinations in Macao by Chinese contract killers).

116. See *Macao, China Agree on More Cooperation to Beat Triads*, *supra* note 75. Although Macao Government officials believe the overall crime rate dropped, they admit that incidences of arson, kidnapping, and other serious offenses increased. See Gittings, *supra* note 77, at 11.

117. See generally *Macao, China Agree on More Cooperation to Beat Triads*, *supra* note 75.

118. See *id.*

119. See Joint Declaration para. 2(10), reprinted in CHANG, OCCASIONAL PAPERS, *supra* note 11, at 30.

120. See *Portugal to Hold Talks with China on Stationing in Macau*, AGENCE FRANCE PRESSE (Paris), Sept. 23, 1998, available in LEXIS, Asiapc Library, Allnws File.

Portuguese Government pulled out the troops it deployed in Macao.¹²¹ Lu Ping, Director of China's Hong Kong and Macao Affairs Office, stated that Macao was too small to warrant a garrison.¹²²

The Chinese Government later changed its position, however, and decided to deploy troops in Macao because the triad violence was out of control.¹²³ The Portuguese Government immediately criticized China for deviating from the spirit of the Joint Declaration¹²⁴ and for placing a "new interpretation" on the terms of the hand over.¹²⁵ In response, the Chinese Government defended its decision by stating that it evinced China's recommencement of sovereignty.¹²⁶

Portugal acted similarly when it deployed and stationed troops in Macao upon its takeover.¹²⁷ The Portuguese Government withdrew its troops during the Portuguese Revolution because it decided to renounce its overseas colonies¹²⁸—it did not remove the troops because Macao no longer required their presence.¹²⁹ Therefore, the Portuguese Government's argument, that the Chinese Government should not station troops in Macao for defense purposes, is a weak one. Although the Chinese may prevail in stationing troops despite Portuguese protest, China may lose its credibility in the international community because the Chinese Government clearly stated that it would strictly abide by the Joint Declaration and give Macao a high degree of autonomy.¹³⁰

F. Other Issues

Two other issues souring the Sino-Portuguese relationship, include the depletion of Macao's fiscal reserves and the protected

121. *See id.*

122. *See China Has No Plans to Station PLA in Macau*, REUTER WORLD SERVICE, Apr. 27, 1997.

123. *See Portugal to Hold Talks with China on Stationing Troops in Macau*, *supra* note 120.

124. *See id.*

125. *See Landler*, *supra* note 109, at 4.

126. *See China to Send Troops to Macau After Next Year's Handover*, AGENCE FRANCE PRESSE (Paris), Sept. 18, 1998, available in LEXIS, Asiapc Library, Allnws File.

127. *See Landler*, *supra* note 109, at 4.

128. *See id.*

129. *See id.*

130. *See id.*

status of Macao residents holding Portuguese passports. In the past, the Macao Government accumulated fiscal reserves.¹³¹ Recently, however, the Government decided to incorporate all the accumulated past savings into the 1999 budget.¹³² This move may have raised suspicions that Portuguese officials were intentionally depleting the reserves before leaving Macao. The Chinese Government argued that the savings should be turned over to the new MSAR Government after December 20, 1999, because it belongs to the people of Macao.¹³³

The Chinese Government is also upset with the Portuguese Government's excessive issuance of Portuguese passports to Macao residents.¹³⁴ The Portuguese issued Macao residents far more passports, permitting migration to any European Union country, than the British issued in Hong Kong.¹³⁵ Because China does not recognize dual citizenship, Macao residents may only use their Portuguese passports as "travel documents,"¹³⁶ and not to invoke consular protection, despite the fact that the Portuguese Government maintains that the Macao people "can opt to retain their Portuguese nationality, which grants them consular protection."¹³⁷

The above disputes demonstrate that the Macao transition is not running smoothly and that the Sino-Portuguese relationship is not as friendly as the two countries claim. It is certainly better, however, than the Sino-British relationship during the Hong Kong hand over.¹³⁸ In contrast to British Governor Chris Patton, who strongly defended British interests in Hong Kong and the future of Hong Kong democracy, the Portuguese Governor is not concerned about Macao's future with respect to issues such as localizing civil services and deploying troops.¹³⁹ What Portuguese officials truly care about, however, is using their last days in Macao to make as

131. See generally *China Attacks Portugal over Macau Budget Ahead of Handover*, AGENCE FRANCE PRESSE (Paris), Dec. 4, 1998, available in LEXIS, Asiapc Library, Allnws File.

132. See *id.*

133. See *id.*

134. See *China, Portugal at Odds over Passports in Macau*, REUTERS NEWS SERVICE, Mar. 23, 1997.

135. See Crowell & Siu-Lan, *supra* note 80, at 24.

136. *China, Portugal at Odds over Passports in Macau*, *supra* note 134.

137. *Id.*

138. See Davis, *supra* note 8, at 304.

139. See generally *id.*

much money as possible.¹⁴⁰ The Chinese Government may therefore triumph on most of the issues, especially given its refusal to grant consular protection to Macao residents holding Portuguese passports. Because Portuguese officials are primarily concerned with monetary issues, the Sino-Portuguese problems will likely be resolved in China's favor. This imbalance increases human rights groups' concerns about whether China will keep its pledge under the Basic Law to give Macao autonomy and judicial independence and guarantee human rights to Macao's people.¹⁴¹

V. INTERPRETING THE BASIC LAW: AUTONOMY, JUDICIAL INDEPENDENCE, AND HUMAN RIGHTS

Macao's future stability and prosperity largely depend on how the Macao Basic Law is implemented. The fundamental principle underlying the Basic Law is the theory of "one country, two systems."¹⁴² Under this theory, the Chinese will establish a Special Administrative Region in Macao similar to the Hong Kong model.¹⁴³ China has experimented with the "one country, two systems" theory in the southeast coastal cities for over a decade.¹⁴⁴ These cities, designated as the Special Economic Zones, enjoy a high degree of autonomy, including the right to practice free market economies.¹⁴⁵ The experiment, which is thus far successful, demonstrates that China can maintain co-existing socialist and market systems.¹⁴⁶

The Hong Kong Special Administrative Region was established using the same philosophy as was employed to establish the Special Economic Zones. There is a major difference, however, between the Special Economic Zones and the Special Administrative Region. The Special Economic Zones practice free market systems and have decentralized policy-making

140. See generally Crowell & Siu-Lan, *supra* note 80, at 24.

141. See generally Amnesty International Urges Macau Leaders to Ensure Human Rights, *supra* note 10.

142. See generally Guigio Wang & Priscilla M.F. Leung, *One Country, Two Systems: Theory Into Practice*, 7 PAC. RIM. L. & POL'Y J. 279 (1998) (discussing the "one country, two systems" theory as applied to Hong Kong, not to Macao).

143. See Joint Declaration para. 2(1), *reprinted in* CHANG, OCCASIONAL PAPERS, *supra* note 11, at 29.

144. See *Special Economic Zone*, *supra* note 69 (explaining China's five Special Economic Zones and their favorable trade and investment policies).

145. See *id.*

146. See *id.*

systems.¹⁴⁷ The Special Administrative Region, in contrast, will have a very different legal and political system. Macao and Hong Kong are experimenting with a new version of the "one country, two systems" theory.¹⁴⁸ The Special Economic Zones are subject to the direct control of China, and the Chinese Government is free to make, repeal, or amend any applicable law without arousing the international community's interest.¹⁴⁹ The international community, however, maintains an interest in the stability and prosperity of Macao and Hong Kong because of their respective histories.¹⁵⁰ Therefore, any wisdom gained from the Special Economic Zones experience may not help Macao. Naturally, questions arise as to whether the two legal systems, socialist China and capitalist Macao, will conflict in the future. Resolution of any potential conflict is determinable only upon interpretation of the Basic Law.

Macao is a Chinese territory and is therefore subject to the Central Government's will.¹⁵¹ China need not utilize international conflict of law principles to resolve future disputes with Macao. The Standing Committee, not an independent judiciary, has the exclusive authority regarding the final interpretation of the Macao Basic Law.¹⁵² Although the Macao Basic Law is virtually a mirror image of the Hong Kong Basic Law,¹⁵³ the limited Hong Kong experience will not serve as a useful guide in executing the Macao hand over.

To a certain extent, however, Hong Kong's experiences may help predict Macao's fate. For example, a recent controversy between Hong Kong and China concerning an immigration law decision the Hong Kong Court of Final Appeal rendered¹⁵⁴ reveals that a similar conflict may arise between a Macao court and the Central Government. The following discussion covers three

147. See generally *id.*

148. See Wang & Leung, *supra* note 142, at 290.

149. See *id.*

150. See *id.* at 289-290.

151. See Joint Declaration para. 2(2), reprinted in CHANG, OCCASIONAL PAPERS, *supra* note 11, at 29.

152. See Wang & Leung, *supra* note 142, at 301.

153. See Lau, *supra* note 24, at 17.

154. See Mark Landler, *Hong Kong Ruling on Children May Open a Door from China*, N.Y. TIMES, Jan. 31, 1999, at 5 (referring to *Ng Ka Ling v. Director of Immigration*, 38 I.L.M. 551, May 1999 (Hong Kong Special Administrative Region Court of Final Appeal, Jan. 29, 1999)).

critical conflicts of law issues likely to arise from implementation of the Basic Law: autonomy, judicial independence, and human rights.

A. Autonomy

Article 2 of the Macao Basic Law states that “[t]he National People’s Congress authorizes the Macao Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.”¹⁵⁵ Article 5 guarantees that the “previous capitalist system and way of life shall remain unchanged for 50 years.”¹⁵⁶

The troubling language in Article 2 is its use of the phrase, “a high degree of autonomy,”¹⁵⁷ which, although could easily be interpreted as equivalent to independence, has never been interpreted as such. One of the reasons the Chinese Government granted the MSAR such a high degree of autonomy was to maintain Macao’s current economic and political systems for fifty years after the hand over.¹⁵⁸ The purpose of having two systems is to unite China; one country, not independence, is the ultimate objective.¹⁵⁹ The MSAR may enjoy the privilege of autonomy in its independent policy decision-making, but because autonomy is a matter of degree, the privilege is relative to the ordinary autonomy other provincial or autonomous governments possess. Therefore, the MSAR’s autonomy is subject to Central Government intervention, if necessary.¹⁶⁰ Bearing this in mind, it is clear that Macao’s “high degree of autonomy” is actually subject to greater limitations than the Basic Law’s drafter’s envisioned.

Although the Basic Law gives the future Macao legislature power to promulgate necessary laws,¹⁶¹ this grant of legislative

155. Basic Law of Macao ch. I, art. 2, *reprinted in* BEIJING REV., May 3–9, 1993, *supra* note 3, at I.

156. *Id.* art. 5, *reprinted in* BEIJING REV., May 3–9, 1993, *supra* note 3, at I.

157. *Id.* art. 2, *reprinted in* BEIJING REV., May 3–9, 1993, *supra* note 3, at I.

158. *Cf.* Wang & Leung, *supra* note 142, at 289 (discussing, for example, the Chinese Government’s grant of autonomy to Hong Kong and preservation of Hong Kong’s economic structure). According to the Basic Law of Macao, the country’s current “capitalist system and the way of life shall remain unchanged for [fifty] years.” Basic Law of Macao ch. I, art. 5, *reprinted in* BEIJING REV., May 3–9, 1993, *supra* note 3, at I.

159. *See generally* Wang & Leung, *supra* note 142, at 283–285.

160. *See id.* at 286.

161. *See* Basic Law of Macao ch. I, art. 11, *reprinted in* BEIJING REV., May 3–9, 1993,

autonomy is limited. The MSAR must submit all laws it enacts to the Standing Committee for the Committee's approval.¹⁶² If the Standing Committee finds that a law does not conform to the Macao Basic Law, it will return the law to the MSAR to be invalidated.¹⁶³ Because the Standing Committee has authority to make the final interpretations of the Basic Law,¹⁶⁴ it has the exclusive discretion to return any Macao law in question.¹⁶⁵

Article 18 of the Macao Basic Law may further curtail Macao's legislative autonomy. Pursuant to Article 18, the Standing Committee may add or delete national laws listed in Annex III of the Macao Basic Law.¹⁶⁶ Although the applicable national laws represent a very narrow category of laws (e.g., laws governing the national flag and national day), there are no provisions preventing the Standing Committee from expanding Article 18's application into other areas. The Central Government may also order that the relevant national law apply to the MSAR during a state of emergency;¹⁶⁷ the Standing Committee decides what constitutes a state of emergency. Clearly, the Macao Basic Law provides the Central Government with a great degree of flexibility in allowing it to interpret the law to serve its policy purposes. The Central Government may further limit Macao autonomy by amending the Basic Law, if necessary.¹⁶⁸

B. Judicial Independence

The MSAR's judicial system will consist of primary courts, intermediate courts, and the Court of Final Appeal.¹⁶⁹ Additionally, administrative courts will oversee administrative and taxation procedures.¹⁷⁰ The Macao courts will have jurisdiction

supra note 3, at II.

162. *See id.* ch. II, art. 17, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at II.

163. *See id.*

164. *See id.* ch. VIII, art. 143, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at XIII.

165. *See id.* ch. II, art. 17, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at II.

166. *See id.* ch. II, art. 18, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at II.

167. *See id.*

168. *See id.* ch. VIII, art. 144, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at XIII.

169. *See id.* ch. IV, art. 84, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at VIII.

170. *See id.* ch. IV, arts. 86, 88, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at VIII.

over all cases except those related to national defense and foreign affairs.¹⁷¹ "The courts of the Macao Special Administrative Region shall *exercise judicial power independently*. They shall be . . . nothing but law . . ." ¹⁷² The Court of Final Appeal will be the court of last resort.¹⁷³ A careful analysis, however, reveals that the MSAR judiciary's independence is somewhat limited.¹⁷⁴

The Court of Final Appeal's adjudication is subject to three primary restraints.¹⁷⁵ First, where a case concerns questions of certain state actions, including defense or foreign affairs, the Court must obtain a certificate from the Chief Executive, who, in turn, must obtain a certifying document from the Central Government.¹⁷⁶ Second, the Court may only interpret the Macao Basic Law for purposes of adjudicating cases, and its interpretation is subject to the authority of the Standing Committee's interpretation.¹⁷⁷ In other words, if the Court's interpretation has broad policy implications extending beyond the case itself, the Standing Committee may intervene if it finds the decision affects the Central Government's policy. This is precisely what happened in *Ng Ka Ling v. Director of Immigration*, as discussed below.

Lastly, the Court must suspend its judgement in cases concerning interpretation of the relationship between the Central Government and the MSAR if such decisions would have an unappealable effect.¹⁷⁸ The Court of Final Appeal must obtain an interpretation from the Standing Committee before rendering such decisions.¹⁷⁹ The Macao Basic Law, however, does not elaborate such a standard for the Court to follow.¹⁸⁰ Can the Court correctly identify such issues and seek timely interpretation from the Standing Committee? Can the Court decide cases within the limits

171. See *id.* ch. II, art. 19, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at III.

172. *Id.* ch. IV, art. 83, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at VIII (emphasis added).

173. See *id.* ch. IV, art. 84, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at VIII.

174. See Wang & Leung, *supra* note 142, at 305.

175. See *infra* text accompanying notes 176-179.

176. See Basic Law of Macao ch. II, art. 19, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at III.

177. See *id.* ch. VIII, art. 143, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at XIII.

178. See *id.*

179. See *id.*

180. See *Hong Kong Court 'Clarifies' Ruling*, NAT'L L.J., Mar. 8, 1999, at A12.

of Macao autonomy that directly or indirectly affect Central Government policies? The Hong Kong *Ng Ka Ling* case sheds light on future potential limitations on the Macao judiciary's autonomy and independence.¹⁸¹

The Hong Kong Basic Law contains a provision giving Hong Kong courts independent judicial power, including the power of final adjudication.¹⁸² This independence was recently tested on January 29, 1999, when the Hong Kong Court of Final Appeal, in a landmark decision, overturned a lower court ruling and allowed four Mainland-born children to stay in Hong Kong.¹⁸³ Because the Chinese Government worries that people will flood into Hong Kong if it does not maintain tight border control, all immigration into Hong Kong must be government approved.¹⁸⁴ After the hand over, the Hong Kong legislature tightened immigration laws accordingly.¹⁸⁵ The *Ng Ka Ling* plaintiffs challenged the legitimacy of the new immigration laws under the Hong Kong Basic Law.¹⁸⁶ The Hong Kong Court of Final Appeal, following local laws, ruled in the plaintiffs' favor.¹⁸⁷ The ruling's broad policy implications extend beyond the case's main issues—it allowed children born to Hong Kong parents who live in China to directly apply to the Hong Kong Court for permission to migrate.¹⁸⁸ In other words, these immigrants no longer needed the Chinese Government's approval.

The immediate consequence of the decision, which encouraged immigrants to circumvent the Chinese immigration policy, put the Hong Kong judiciary directly in conflict with the Chinese Central Government.¹⁸⁹ If the ruling was not overturned, thousands of Chinese may have tried to enter Hong Kong. Chinese legal scholars criticized the ruling for giving more weight

181. See *Ng Ka Ling v. Director of Immigration*, 38 I.L.M. 551, May 1999 (Hong Kong Special Administrative Region Court of Final Appeal, Jan. 29, 1999).

182. See Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China art. 19, Apr. 4, 1990, reprinted in 29 I.L.M. 1520, 1523 (1990) [hereinafter Basic Law of Hong Kong].

183. See *Ng Ka Ling*, 38 I.L.M. at 552.

184. See *id.* at 553.

185. See Landler, *supra* note 154, at 5.

186. See *Ng Ka Ling*, 38 I.L.M. at 559-560.

187. See *id.* at 577-578.

188. See Landler, *supra* note 154, at 5.

189. See Mark Landler, *China Tells Hong Kong It Wants Immigration Ruling 'Rectified'*, N.Y. TIMES, Feb. 14, 1999, at 13.

to the Hong Kong Court's interests than to the policy of the National People's Congress, and argued that the ruling "should be rectified."¹⁹⁰ Zhao Qizheng, Head of the Information Office of China's State Council, commented that the decision was a "'mistake' and 'should be changed.'"¹⁹¹ Although the Hong Kong Basic Law requires the Chinese Government approve all immigrants to Hong Kong,¹⁹² the ambiguity of the language does not necessarily deprive the Hong Kong Court of jurisdiction over immigration cases.¹⁹³ The real question was whether the Central Government's interpretation of this provision controls, or whether control lies with the Hong Kong Court.

According to the Hong Kong Basic Law, the Hong Kong Court has jurisdiction to adjudicate the case, and its interpretation of the Hong Kong Basic Law should prevail if a case has no bearing on defense, foreign affairs, or the relationship between the Central Government and the Hong Kong region.¹⁹⁴ Under high pressure from the Chinese Government and in light of the danger of jeopardizing the relationship between the Standing Committee and Hong Kong, the High Court of Hong Kong, on February 26, 1999, issued a clarification,¹⁹⁵ which stated that the Court did not intend to question the Standing Committee's authority.¹⁹⁶ The High Court avoided the more fundamental question of whether the Court could challenge an act of the Central Government under the Hong Kong Basic Law.¹⁹⁷ This episode ended in the Standing Committee's decision to overturn the Hong Kong High Court's

190. *Id.*

191. Mark Clifford, *Will Beijing Keep Its Word?*, BUS. WEEK (New York, N.Y.), Feb. 22, 1999, at 58.

192. See Basic Law of Hong Kong art. 22, reprinted in 29 I.L.M. 1520, *supra* note 182, at 1524 ("For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval.").

193. See *id.* art. 158, reprinted in 29 I.L.M. 1520, *supra* note 182, at 1545 (explaining that the Hong Kong courts may interpret other provisions of the Hong Kong Basic Law in adjudicating cases; if in doing so, the need arises to interpret provisions of the Hong Kong Basic Law concerning affairs that are the Central Government's specific responsibility, then courts should seek interpretation of the relevant provisions from the Standing Committee through the Court of Final Appeal of the Region).

194. See Basic Law of Hong Kong art. 19, reprinted in 29 I.L.M. 1520, *supra* note 182, at 1523-1524.

195. See *Hong Kong Court 'Clarifies' Ruling*, *supra* note 180, at A12.

196. See *id.*

197. See *id.*

ruling, reasoning that the Court's interpretation of the Hong Kong Basic Law was erroneous.¹⁹⁸

This incident established a precedent for Central Government intervention in the Special Administrative Region's judicial independence, and marked the beginning of the conflict between the two entities. In the absence of a neutral judiciary to interpret the Hong Kong Basic Law,¹⁹⁹ clashes between the two are inevitable because the competing authorities will interpret the law differently. In *Ng Ka Ling*, the Hong Kong High Court was concerned with legal standing principles, while the Standing Committee was concerned with the ruling's practical consequences.²⁰⁰ It is foreseeable that similar clashes between China and the Macao judiciary could occur because Macao also faces potential Mainland Chinese migration.²⁰¹ Accordingly, this case sends a message to Macao courts that their judicial independence may be limited.

This clash involves both a conflict between two different legal systems and a conflict between two different legal traditions. China is a civil law country.²⁰² The Chinese courts have no experience with interpreting the Constitution,²⁰³ in fact, they have never so done.²⁰⁴ The Standing Committee interprets the Chinese Constitution only for decision-making purposes.²⁰⁵ Therefore, the Committee has little experience in interpreting constitutional provisions like the Macao Basic Law.²⁰⁶

198. See Erik Guyot, *Hong Kong's New Order is Expediency*, WALL ST. J., July 2, 1999, at A10.

199. Although the Supreme People's Court is the highest court of the land, it does not have the independent interpretative power equivalent to that of the United States Supreme Court. See Foster, *supra* note 67, at 791-793.

200. See Guyot, *supra* note 198, at A10. If the Hong Kong High Court's ruling was not overruled, it would have permitted about 1.67 million Mainland Chinese to immigrate to Hong Kong. See *id.* This represents approximately one-quarter of the already existing Hong Kong population. See Halloran, *supra* note 4, at 10. A Hong Kong Government survey and strong public sentiment influenced the Standing Committee's decision to overrule the High Court—implying that the Court's decision was not necessarily founded on legal reasoning. See Guyot, *supra* note 198, at A10.

201. See *Macau Plans Easy Transition from Portugal to China*, *supra* note 33, at 25.

202. See Wang & Leung, *supra* note 142, at 301.

203. See *id.*

204. See *id.* at 308.

205. See *id.*

206. See *id.*

In contrast, courts often interpret constitutions during adjudication in common law jurisdictions.²⁰⁷ Apparently, the Chinese are not ready to accept the possibility that the Macao Basic Law can be challenged in lower courts. The Chinese must learn from their experience, and from other countries' experiences, and recognize and accept the possibility that lower courts might challenge the Macao Basic Law.

C. Human Rights

From the international community's perspective, one of the most sensitive issues involved in Macao's return concerns Macanese human rights. Articles 24 through 45 of the Macao Basic Law state that the MSAR respects and protects all aspects of fundamental human rights, from religious freedoms to privacy rights.²⁰⁸ Although the plain language of the Articles enumerates the protected rights, human rights watchers worry that Macao is more vulnerable to human rights abuses than was Hong Kong because Macao's society is not as strong as is Hong Kong's, which embraces a democratic spirit.²⁰⁹ Because the Chinese human rights tradition under communist rule does not conform to western standards, the Chinese Government may interpret human rights concepts, as defined in the Macao Basic Law, differently than would a western society.

The Chinese translation of the notion of a "fundamental right" or "freedom" is subtly different than the English translation.²¹⁰ Because of different contexts and cultures, the Chinese and westerners may understand and interpret the same words differently.²¹¹ For example, under traditional Chinese teachings, the state's interest always outranks the individual's interest.²¹² The state's interest is not merely limited to state security interest, but is a much broader interest, encompassing everything concerning state authority.²¹³ This traditional Chinese

207. See *id.* at 309.

208. See generally Basic Law of Macao ch. III, arts. 21–45, reprinted in BEIJING REV., May 3–9, 1993, *supra* note 3, at III–IV.

209. See Amnesty International Urges Macau Leaders to Ensure Human Rights, *supra* note 10.

210. See Foster, *supra* note 67, at 773.

211. See generally *id.*

212. See Davis, *supra* note 8, at 318.

213. See *id.*

view will likely affect the interpretation of the Macao Basic Law's human rights provisions.

Another example of these language differences is the application of the phrase "freedom of the press," which is more narrow in Chinese than in English.²¹⁴ "Freedom," or "ziyou," in Chinese, traditionally carries some negative meaning suggesting "[l]icense to [b]e [b]ad."²¹⁵ "The press" means "publication" in Chinese and does not include other means of expression or communication such as the mass media.²¹⁶ "Freedom of the press," under the communist rule in China, is always a politically sensitive concept.²¹⁷ Any direct and harsh criticism of the Chinese Government or its policies is unacceptable because it extends beyond the "freedom of the press."²¹⁸ There is no tolerance in China for freedom of expression if it challenges the authority of the state.²¹⁹ In Macao, the term "freedom of the press" may have a broader application due to Macao's century of western cultural influences.

Furthermore, the Chinese human rights tradition is different from the western tradition.²²⁰ In balancing competing interests of the state and the individual, the Chinese emphasize "sovereignty, subsistence, and the preeminence of collective over individual rights in the interest of economic development."²²¹ The most rudimentary official teaching in Chinese schools emphasizes that the "individual does not exist without the [s]tate."²²² This notion is also reflected in Chapter III of the Macao Basic Law, which is titled the "Fundamental Rights and Duties of the Residents."²²³ The Macao Basic Law does not separate the fundamental rights of a citizen from his or her duties or obligations, but emphasizes a balance of rights and inalienable duties.²²⁴

214. See Foster, *supra* note 67, at 773.

215. *Id.*

216. See *id.*

217. See generally *id.*

218. See *id.* at 768.

219. See *id.*

220. See Davis, *supra* note 8, at 318.

221. *Id.*

222. *Id.*

223. Basic Law of Macao ch. III, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at III.

224. See generally *id.* ch. II, arts. 24-45, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at III.

Chapter III generally defines basic human rights and subjects these rights to certain restrictions, such as the necessity of maintaining social order.²²⁵ Article 23 requires that the Macao legislature enact laws prohibiting any act of treason, secession, sedition, subversion against the Central Government, or theft of state secrets.²²⁶ These abstract concepts may invite abusive interpretations that serve specific political purposes. China jailed political dissidents for charges similar to those Article 23 prohibits.²²⁷ Will this also happen in Macao?

Macao, long under Portuguese influence, embraces the western concepts of individual rights and personal freedom from unreasonable governmental interference. It is foreseeable that Macao courts and the Chinese Government will apply different standards derived from their respective cultural traditions when interpreting fundamental rights, and that the cultural clash may lead to social discontent and instability. Neither side may know where the boundary between providing fundamental rights and maintaining social order lies.

Macao lacks strong grassroots democratic forces and an appealing opposing political party to balance against the potential Chinese abuse of human rights.²²⁸ Unlike the British, the Portuguese will not leave behind a Hong Kong-type, well-developed democratic political system in Macao. According to Rory Mungoven, Director of Amnesty International's Asia-Pacific Program, little international interest and a weak and fragile civil society make Macao very vulnerable to human rights abuses.²²⁹

For example, not long ago, the Macao Government blocked production of a play because its subject matter was too political, despite its success in Hong Kong, Portugal, Britain, and Kenya.²³⁰

225. See generally *id.* ch. II, art. 23, reprinted in BEIJING REV., May 3-9, 1993, *supra* note 3, at III.

226. See *id.*

227. See *China Uses 'State Secret' Laws Against Dissidents*, AGENCE FRANCE PRESSE (Paris), June 23, 1995, available in LEXIS, Asiapc Library, Allnws File.

228. See generally *Amnesty International Urges Macau Leaders to Ensure Human Rights*, *supra* note 10.

229. See generally *id.* Mungoven believes that "concerns for human rights in the tiny Portuguese enclave have been overshadowed by worries over Hong Kong's hand over to China." *Id.* Fearing that Macao may become vulnerable to human rights abuses, Mungoven urges that "Portuguese authorities must move quickly to secure human rights here (Macau) and leave a legacy of human rights protection in law." *Id.*

230. See *Drama and Politics in Macau*, ASIaweek (Causeway Bay, H.K.), Sept. 4, 1998, at 8.

The play portrayed the brutality with which the Portuguese Government handled a Chinese demonstration during the 1960s.²³¹

There is also concern for the rights and future status of the Macanese,²³² a minority group comprised of 10,000 to 16,000 people.²³³ Some Macanese have Portuguese passports and may leave Macao if necessary.²³⁴ Others plan to stay but are afraid that the Chinese majority will discriminate against them.²³⁵ The Macanese minority does not have a strong political voice in Macao because it is internally divided on issues and has no strong leader.²³⁶ The Macanese worry that the strong Chinese presence and influence will eventually shadow their existence, making them second-class citizens.²³⁷ These worries are well founded because official statistics do not even list them as Macanese;²³⁸ the Joint Liaison Group is considering classifying them as either Chinese or Portuguese.²³⁹ Although the Macao Basic Law purportedly prohibits discrimination based on a person's "descent" or "language,"²⁴⁰ the Macanese are nevertheless uncertain about their future.

Macao's future stability depends on how the Macao Basic Law is interpreted and implemented. Autonomy, judicial independence, and the human rights of Macao residents will likely be the three issues dominating future dealings between the Chinese and Macao Governments. To resolve these issues, both sides first must recognize the differences in their respective legal systems, political ideologies, and cultural traditions, and make a good faith effort to abide by the spirit of the Macao Basic Law and act in Macao's best interest.

231. *See id.*

232. The Macanese were among the earliest natives to occupy Macao. *See* Annabel Jackson, *Countdown for Culture in Crisis*, S. CHINA MORNING POST (Quarry Bay, H.K.), Feb. 8, 1998, at 2, available in LEXIS, Asiapc Library, Allnws File.

233. *See id.*

234. *See id.*

235. *See id.*

236. *See id.*

237. *See id.*

238. *See id.*

239. *See id.*

240. Basic Law of Macao ch. III, art. 25, *reprinted in* BEIJING REV., May 3-9, 1993, *supra* note 3, at IV.

VI. CONCLUSION

The Macao transition deserves more attention from the international community than it currently receives. Although Macao is relatively small in size and economy, the legal and political significance of the Macao hand over is great—it is another test of the “one country, two systems” theory. The Macao transition may reveal whether China is truly committed to political democracy and human rights. Macao’s unique history and social culture make it more vulnerable to Chinese abuse and oppression of human rights than was Hong Kong during the Hong Kong hand over. The issues of designating an official language, localizing laws and civil service systems, and controlling triad violence must be resolved on grounds mutually beneficial to Macao and China.

Potential conflicts between the Central Government and the MSAR concerning deploying troops, administrative and legislative autonomy, judicial independence, and human rights protections have just begun. At the center of the controversy is how the Macao Basic Law will be interpreted and whether the Central Government or the MSAR has the authority to interpret the law. The final interpretation of the Macao Basic Law will determine the future relationship between MSAR and the Central Government.

This conflict gives rise to a new breed of conflict of laws issues, namely, those arising when two competing government entities with completely different respective legal systems occupy one country simultaneously. Like the Hong Kong Basic Law, Macao and the west may view the Macao Basic Law as Macao’s “mini-constitution.”²⁴¹ The Standing Committee’s overruling of the Hong Kong immigration decision, however, clearly sends a message to Macao that this may not necessarily be the case.²⁴² The Chinese Government never intended the Basic Law to function as the MSAR’s “mini-constitution.” Ultimately, if the Basic Law is subject to the Standing Committee’s discretionary interpretation, the promises of autonomy, judicial independence,

241. Charlotte Ku, Introductory Note, Basic Law of Hong Kong, *reprinted in* 29 I.L.M. 1520, *supra* note 182, at 1511 (stating that the Hong Kong Basic Law will serve as a “mini-constitution” governing the relationship between Hong Kong and China).

242. See Landler, *supra* note 189, at 13 (“the Chinese [G]overnment told Hong Kong’s top legal official . . . that a landmark ruling on immigration by the high court here violated the territory’s constitution . . .”).

and protection of fundamental rights under the Macao Basic Law may not be kept. The Chinese Government should acknowledge the historical, legal, and cultural differences between China and Macao, respect Macao's cultural and legal traditions, and resolve the differences in accordance with the spirit of the Macao Basic Law.