

Reflections on Several Issues Relating to the Law Reform

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Since 2004 when the Government of the Macao Special Administrative Region (hereinafter as “the Macao SAR”) set up the Law Reform Office and Law Consultant Committee, law reform in Macao has experienced 6 years rough road. The efforts that the government has taken for law reform and its performance cannot be negated, but the criticism of common people in Macao on the law reform never stops. It is quite normal to have critical opinion, which just shows the high expectations of Macao on law reform. Now an important issue is that: on the occasion of the 2nd ten-year after Macao returning to the motherland, it is necessary for the new government of the Macao SAR to take self-reflection on the law reform work, especially to have clear thinking on the orientation and development of law reform and other seated issues.

I. Carry out reform based on the existing law system

1.1 Interpretation of “laws previously in force basically remain unchanged”

Take perspective on the law reform of Macao, the first thing is to keep faith in law reform. It is considered that, the principle of “laws previously in force shall basically remain unchanged” is stipulated in 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 (hereinafter as “the Joint Declaration”) and the Basic Law of the Macao Special Administrative Region of the People’s Republic of China (hereinafter as “the Basic Law”); according to this principle, laws previously in force that have been maintained after Macao’s returning to the motherland shall “basically remain unchanged”, or at least the basic principles in laws previously in force shall remain unchanged, otherwise, it contravenes the principle of “laws previously in force shall basically remain unchanged” stipulated in the Basic Law.

It is prescribed in Item 3, Appendix I of the Joint Declaration that, “after the establishment of Macao Special Administrative Region, the laws, decrees, administrative regulations and other normative acts previously in force in Macao shall be maintained, except for any that contravenes the Basic Law, or subject to any amendment by the legislature of the Macao Special Administrative Region.” Article 8 of the Basic Law restates this provision. Obviously, except for the differences on certain immaterial content, the basic nature and spirit of these two provisions are in full accord. The provision stipulated in Article 8 of the Basic Law is merely more precise and scientific. In my

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opinion, in order to understand the provision stipulated in Article 8 of the Basic Law correctly, the following two aspects shall be focused:

First, it shall be interpreted from the political meaning. Undoubtedly, the purpose that it is stipulated in the Article 8 of the Basic Law that any laws previously in force that do not contravene the Basic Law can be maintained, which has distinct political overtones, is to achieve smooth transition in the law field upon the returning of Macao to the motherland. At that point, in order to achieve this goal, among the three major problems Macao was facing during the transition, Chinese party put forward the issue of localization of laws, and through cooperation and negotiation between China and Portugal, laws-related problems concerning the transfer of government, such as the "transfer" of Portuguese local laws as well as the translation and clearing of laws previously in force, were solved, thus it laid foundation for the smooth transition in law field. From this point, it has strong time target for the principle that "laws previously in force shall basically remain unchanged". It is a political transition principle that can ensure the smooth transition of Macao.

Second, it shall be interpreted from its own development law of laws. If the purpose of interpreting the Article 8 of the Basic Law from the perspective that whether laws previously in force contravene the Basic Law, or from the political meaning, is to clarify that whether laws previously in force shall be repealed or maintained upon the returning of Macao; thus interpreting the Article 8 of the Basic Law from its own development law of laws aims to clarify that whether laws previously in force shall be repealed or maintained after the returning of Macao. On the aspect of its own development law of laws, no laws can remain unchanged, which means that laws shall develop and change with the development and changes of the society, and shall serve for the society; this is an incontrovertible and immutable rule. Therefore, concerning the problem that whether to repeal or maintain laws previously in force after the returning of Macao, a principle has been set up in the Article 8 of the Basic Law that "any laws previously in force without amendment by the legislature or other relevant organs of the Macao Special Administrative Region can be maintained". That is to say, laws previously in force maintained upon the returning of Macao, as long as they are not amended by the legislature or other relevant organs of the Macao SAR, can continue to be maintained; otherwise, if the legislature or other relevant organs of the Macao SAR thinks it is necessary, they have right to amend and repeal the laws previously in force in accordance with the changes and requirement of the society. From this point, it misinterprets the Article 8 of the Basic Law by interpreting "laws previously in force shall basically remain unchanged" into keeping laws previously in force unchanged within 50 years after the returning of Macao, and violates the development law of laws.

From the above two aspects, it is not difficult to draw such a conclusion that, law reform not only accords with the provision stipulated in the Article 8 of the Basic Law, but also reflects the requirement of laws on its own development. For the legislature of the Macao SAR, it can and should timely amend laws previously in force, if it is necessary for the society, including amending the basic principles of laws previously in force.

1.2 Interpretation of "law lagging"

It is no doubt that the correct interpretation of Article 8 of the Basic Law will do good to further strengthening the faith in law reform. However, it still confuses most people that how to carry out law reform in Macao, whether to take large reform or little reform, more exactly, whether to thoroughly reform or partially reform. For instance, some may think that the existing laws of

Macao lag, thus they need to be changed thoroughly; and some may think that not all the existing laws of Macao lag. The major problem is law enforcement problem. The existing laws of Macao mainly consist of laws previously in force that are maintained, therefore, concerning whether the existing laws of Macao lag, actually the problem is that whether the laws previously in force that are maintained lag. I think that this problem cannot be treated with the same standard, and it shall be investigated at both macroscopic level and microscopic level:

First, by investigating at the macroscopic level, generally speaking, laws previously in force do not lag. Before the returning of Macao, laws previously in force that are maintained has gone through long-term adjustment with the social system and life-style of Macao, thus they are basically consistent with each other. Generally speaking, it did not lag.¹ After the returning of Macao, the social system and life-style are still the same without essential changes on the whole; and the laws previously in force that are maintained are basically consistent with the existing social system and life-style on the whole, thus no lag problem exist on the whole. To say the laws previously in force generally lag behind the existing social system and life-style does not accord with the provision of the Basis Law that the previous social system and life-style remain unchanged for 50 years; unless it is believed that laws previously in force generally lag before the returning of Macao. But this statement obviously does not accord with the fact.

Second, by investigating at the microscopic level, lag phenomenon in laws previously in force do exist. As a specific slip law, when the society changes, the relevant amendment of laws shall go through a legislative process on problems finding, researching and solving. This process can last for at least several months or one year, and even several years or decades. Therefore, at this point, it is absolute for law lagging phenomenon to exist. It is inevitable that law lagging phenomenon exist in any countries or regions. Macao certainly cannot be exceptional.

It should be pointed out that in Macao, investigated at the microscopic level lagging phenomenon of laws previously in force not only exists but also is quite severe. Of course, there are a lot of reasons resulting in the severe lagging of laws previously in force behind the society of Macao. For instance, by analyzing on legislation aspect, the reason is that the legislative ideas both come from Portugal; by analyzing on social aspect, although the previous social system and life-style generally unchanged after the returning of Macao, the specific social system does really change a lot. In a word, no matter what reasons resulted in the lagging, it will objectively obstruct the function of laws serving for the society; thus attentions shall be paid to it.

From the above, since the laws previously in force generally do not lag, it should not be “changed thoroughly” or totally repudiated. In other words, the law reform in Macao shall be partially little reform instead of integrally large reform. The idea to overturn laws previously in force and establish new legislation does not accord with the practical situation, and it cannot be achieved objectively. On the contrary, the idea of “total repudiation” that thinks laws previously in force cannot be changed or largely changed is also inadvisable.

II. Carry out reform upon the social need

Laws serve for the society. Certainly law reform is closely related with the social need. While carrying out law reform upon the social need, I believe that attentions shall be paid to the following issues:

2.1 Treat different situations differently

While investigating the lagging phenomena of laws previously in force, we should make a distinction between different lagging situations, so as to carry out reform more target-oriented. The lagging situations of laws previously in force can be divided into three categories:

The first lagging situation is that the content of laws previously in force cannot catch up with the development and changes of the society in Macao, thus it can be called as "Lag in Time". "Lag in Time" refers to the lag in narrowed sense. This lag situation is quite common in laws previously in force in Macao. The primary cause is that some of the laws previously in force were drew up in the 1980's, since then over 20 years have passed and it was "out of date"; quite a few laws previously in force were drew up in the 1990's, and over 10 years have passed since then. For such laws with operating period of more than 10 years, it is necessary to take overall review and discussion on them. For the laws that are obviously not adapted to the development of modern society, amendment shall be taken in time. This review, discussion and amendment work is the major content of law reform in Macao.

The second lagging situation is that although certain content or certain system stipulated in laws previously in force can catch up the social development and changes, it is a question whether It is rational. Thus this situation can be called "lagging lack of rationality". The major reason resulting in "lagging lack of rationality" is that from a world-wide view certain content or system stipulated in the laws previously in force differs both in theory and in legislation. However, the Portuguese scholars only refer to one of the theories or legislative patterns from a personal point of view, so that today it is worth studying whether this provision is rational or not. For instance, in the field of criminal proceedings, although it is stipulated in the Basic Law that the system of criminal pre-trial court shall be maintained, upon the situation that there is no pre-trial system in many countries and regions even including Portugal, it is necessary to study whether this system is rational, whether it is suitable for Macao, and whether it shall be amended. For another example, in the field of criminal law, it is worth studying whether it is rational and scientific for the provisions about corporate crime and continuing offence. It is part of the law reform in Macao to make amendment for the phenomenon of "lagging lack of rationality".

The third lagging situation is that certain content or certain system stipulated in laws previously in force were completely copied from Portugal upon legislation, so it does not accord with the practical situation of Macao, then it can be called "lagging alienated from reality". This situation seldom occurs, but once it is found out, it shall be amended in time.

2.2 Treat differently according to the order of priority

The above three types of lagging are formed by analyzing the lagging state of laws previously in force from the connotation and reason of the lagging view. However, in the process of law reform, we should start from the actual situation instead of "taking things all of a lump without any discrimination". Specifically, when the government set up the target of law reform, they should make concrete analysis for different legal systems instead of only pursuing for greatness and perfection. Especially when they set up the short-term (1-2 years) target of law reform, they should start form the actual situation down-to-earth, and set the order of priority.

The first priority refers to laws previously in force that are directly related with the people's livelihood. Special attention shall be paid to laws directly related with the people's livelihood, and it shall be put in the first place of reform. If there are lagging phenomena in these laws, no matter

“lagging in time”, “lagging lack of rationality” or “lagging alienated from reality”, they should be solved with priority. For instance, the legal system concerning social welfare and security of citizens in Macao is the law directly related with the people’s livelihood.² Besides, laws in the fields of administrative organs operation, medical treatment and public health, housing, insurance, etc. all belong to the laws directly related with the people’s livelihood. The law reform shall focus on these laws previously in force. The government shall lose no time to eliminate the lagging phenomena existing in these laws previously in force, so as to ease social conflicts and achieve social harmony.

The situation with less priority refers to the provisions in laws previously in force that lag but have little effect on the people’s livelihood, or have no direct effect on the society. These provisions can be put on the back burner, especially those with “lagging lack of rationality” and “lagging alienated from reality”. For instance, concerning the reform on the Five Codes, the government should not pursue for integral reform for these big Codes during the law reform, instead, they should practically and realistically review whether there are lagging phenomena with high priority; if the answer is yes, amendment shall be made partially in time; if the answer is no, these laws can be put on the back burner. Because from the current situation, these big Codes are still typical codes with Civil Law System, which are not so much behind; integral reform for these big Codes is unnecessary at present, and we don’t have the basis for theoretical research and relevant talents for reform.

2.3 Enhance communication between administration and legislation to improve legislative efficiency

There is a famous saying in the judicial field goes like this: “The late justice is not justice.” Actually, this famous saying is also applicable to legislation. When the society needs, especially the people’s livelihood needs, laws shall catch up with the needs in time; otherwise, the social justice cannot be achieved. To achieve this goal, besides that we should find out problems in a short time, we shall strive for legislative efficiency. Therefore, we cannot speed up the law reform without high efficient and decisive legislative efficiency.

From the legislation practice of Macao for nearly 10 years, in order to improve the efficiency of legislation, attentions shall be paid to the following two links:

The first link is consultation. It is a laudable way for legislation that should be insisted on to consult public opinions on the laws draft drew up by the government, and it also reflects the basic requirement for democratic and legalistic society. But it should be pointed out that the legislation should be democratic and also reflect centralization and the consultation cannot be in long term or termless. Objectively, it is normal that people have different opinions on certain items of the law draft because of their different position and role. Therefore, for legislative democracy, it is quite difficult and even impossible to obtain total agreement or basic agreement. On this occasion, long-term or termless waiting is unnecessary. Especially for the law draft related with the people’s livelihood, the legislators shall pay attention to the legislative efficiency, and be bold instead of irresolute; if necessary, even there are different opinions, they can start legislation first on the basis of most people’s agreement, and then sum up experience through applicable laws, because laws can be amended after all. If they pursue for perfection in every aspect on purpose upon legislation, It is unrealistic, also it will affect the legislative efficiency and block the realization of social justice.

The second link is the communication between the government and the legislature. From the

practice of legislation in Macao we can see that most of the law drafts were drawn up by the government and then submitted to the legislative council for reviewing. Therefore, upon legislation it is important to improve legislative efficiency by enhancing the interworking between administration and legislation. At this point, communications made by the government before the law draft submitted to the legislative council shall be particularly emphasized. If this communication is well done, there is no doubt that the reviewing speed of legislative council can be improved. For instance, when the legislative council was discussing the draft amendment of the Voter Registration Law, some councilors did not understand the provision stipulated in the draft concerning that "the attempted crime can be penalized referring to the accomplished crime"³, and raised an objection, so that the draft was returned to the government for further revision. In the process of drawing up the draft, if the government communicated with the legal adviser of the legislative council in advance about this legislative idea, and managed to achieve consensus, the legislative efficiency could be improved.

III. Carry out reform relying on local legal talents

It is matter-of-course that law reform needs legal talents. While for the law reform in Macao, it is a long-term and intricate task that will take several years, ten years or even longer to be completed, so we should set up firm faith to rely on local legal talents. To do this, I believe from a long view we should pay attention to the following two issues:

3.1 Legal language issues

It is known to all that before returning, the legal language of Macao is mainly Portuguese, and Chinese only plays second fiddle. Certainly it is related to the direct governance of Portugal. The problem is that: after the returning of Macao, in the legal field, no essential changes have taken place on this language phenomenon. I think, it is a historical fact that cannot be denied that the law of Macao originates from Portugal. Even though after the returning of Macao, we should also respect the fact rather than reject the positive effect of Portuguese on the laws of Macao. However, this does not mean the laws of Macao cannot exist without Portuguese. These are two different concepts. To this point, it is necessary for us to clarify the following two points:

First, how to understand the provision stipulated in the Basic Law concerning "Portuguese is also an official language". It is stipulated in the Article 9 of the Basic Law that "in addition to the Chinese language, Portuguese may also be used as an official language by the executive authorities, legislature and judiciary of the Macao Special Administrative Region." I think this provision mainly includes three items: (1) compared with Portuguese, Chinese is the first official language, which is determined by the political status of Macao. (2) "Portuguese is also an official language" stipulated in the Basic Law reflects the scientific attitude of Chinese government to respect the history, especially their concerns on the lawful rights and interests of the Portuguese descendants living in Macao. (3) "Portuguese can be used" only refers to that both Chinese and Portuguese shall be used in the formal executive, legislative and judiciary documents, such as forms provided by the executive authorities for the public to fill in, laws drawn up by the legislative council and the judicial opinions made by the court of final appeal; but on some occasions Portuguese may not be used, for instance, the occasion that the executive authorities hold meeting with members of the Chinese

citizens, the occasion that the executive authorities receive Chinese citizens, and the occasion that the court tries a case with judges, lawyers and parties all Chinese citizens.

The second is how to historically view the concept of “Sino-Portuguese bilingual legal talents”. This concept was generated under certain historical background. Before the returning of Macao, the legal fields including the legislative and judiciary fields were all controlled by the Portuguese, therefore, in order to cultivate local legal talents, it is impossible to do without Portuguese. The concept of “Sino-Portuguese bilingual legal talents” was put forward under the political and practical conditions at that time. Without “bilingual”, the local legal talents cannot be cultivated, and the needs for smooth transition in legal field cannot be met.

However, ten years have passed since the returning of Macao, so Chinese is certainly the official language. This means that the particular historical background under which “Sino-Portuguese bilingual legal talents” was put forward no longer exists; if it does exist, it is the historical fact that laws previously in force that are maintained were drew up in Portuguese. But it is obvious that this fact cannot become the reason of strengthening “Sino-Portuguese bilingual legal talents” again, because these laws previously in force that were drew up in Portuguese already have Chinese translated version.⁴

Next, from the position of Macao, the former Chief Executive Edmund Ho Hau Wah has reiterated on many occasions that Macao shall develop toward an international tourism city. This shows that the development orientation of Macao is to be world-wide and become an international city. In that case, the orientation of law reform in Macao shall accord with it to be world-wide, that is to say, on the basis of combining the local reality to absorb the essence of law reform in other countries, and finally form a complete legal system with the regional characteristics of Macao and gathering advanced legal systems of other countries. Obviously, in order to achieve such a target for law reform, diversified legal talents are needed. Knowing Portuguese and understanding Portuguese laws are far from enough. It is significant to cultivate large quantities of local legal talents who have profound legal theory foundation, have a good command of legal systems in countries using the Civil Law System, and are familiar with the Common Law System. Thus I believe that it does not accord with the target of law reform by strengthening “Sino-Portuguese legal talents”, and it might even block the effect of law reform so that the idea of law reform will be restrained within the idea of Portuguese legal culture, and reject the advanced legal theories and legal system of the other countries.

Finally, from the social equity, strengthening “Sino-Portuguese bilingual legal talents” will objectively produce inequity. The ways of training local legal talents of Macao is diversified, including the training of legal talents in Macao and the training of legal talents outside Macao. If we only lay stress on “Sino-Portuguese legal talents”, it will be unfair for the local citizens who accept legal education outside Macao. Especially by taking whether to know Portuguese as the eligibility of applicants when recruit legal talents, such as judges, this kind of unfair will be more obvious. Therefore, legal quality is the basic standard to measure legal talents, and it has nothing to do with language. Whether to know Portuguese can only be taken as reference rather than a rigid condition.

If the existing laws in Macao were established and developed on the basis of Portuguese, in the process of law reform today, we should get rid of the bondage of language, and untie the crux of language, so as to make the law reform of Macao can step into a free way combined with practical society and international law systems. No matter which languages they know, as long as they are

the local legal talents in Macao with certain legal quality and legal theories, they shall be treated and recruited equally without discrimination.

3.2 Speed up the training of theory type legal talents

According to the occupation, legal talents can be divided into two categories: one is legal talents enforcing the law, such as judges, procurators, lawyers, legal advisers, etc., which can also be called operation type legal talents; The other one is legal talents doing research work, such as scholars, this kind of legal talents also can be called theory type legal talents. Certainly, division of these two categories is not absolute. Operation type legal talents can also take part in the research of legal theory, while the theory type legal talents can also take part in actual operation of laws. I think that from the long-term demand of law reform, more attention shall be paid to the training of theory type legal talents in Macao.

Before the returning of Macao, in consideration of the demand of smooth transition, from the long-term view on training local legal talents, it should lay stress on the training of operation type legal talents such as judges, lawyers, governmental legal advisers. However, just because of this, the structure of local legal talents in Macao is deformed, i.e. operation type legal talents continuously increase, while the theory type legal talents are quite few, so that it fundamentally affects the development of legal theory in Macao, and it is hard to form the atmosphere for studying the legal theory. It is said that there is only laws in Macao without legal theory. This reflects the weak situation of legal theory research in Macao from a certain point. From the current situation, the deficiency of legal theory research has seriously affected the smooth processing of law reform. For instance, in the recent years, the Macao government does have resolution for the law reform, but the problem is "the spirit is willing, but the flesh is weak". What's the "flesh"? That is the legal theory. If you want to revise or draw up a law, you should know which part needs to be revised and why, or why should this law be drew up; what's the theoretical basis of revising or drawing up the law, and what position we should stand on by comparing and studying the theories or legislative patterns of other countries. For all of these, if no research or discussion is done, any law reform is a meaningless term. Even the law reform is carried out, only little will be changed. Especially for the amendment of big Codes, provided that the theoretical research is not enough, it will be hard to carry out the law reform. Thus, in order to carry out the law reform in Macao, and fundamentally solve the problem of adaptability between the laws and the society in Macao, it should have its own theory type legal talents.

Notes:

- ¹ Although the laws previously in force originated from Portuguese laws, it should be pointed out that there is no boundary among laws. We cannot say the laws lag behind the Macao society only because the laws previously in force in Macao originated from Portugal. For instance, as the basic framework of Macao's legal system, the five big Codes all originated from Portuguese scholars, but they are not laggard laws on the whole, thus we cannot say the five big Codes generally lag behind Macao society.
- ² The second-term Government of the Macao SAR had amended the previous social security laws concerning the social welfare and security issues of the citizens.

- ³ According to the provisions stipulated in the Article 22.2 of Penal Code of Macao, the penalty for attempted crime by obstacles shall be reduced compared with accomplished crime.
- ⁴ Certainly, for these laws previously in force, in case of discrepancy between the Chinese translated version and the Portuguese version, the Portuguese version shall prevail. But this situation seldom occurs, thus it cannot be the reason that people must understand Portuguese.