CONTINUITY AND AUTONOMY – LEADING PRINCIPLES SHAPING THE FUNDAMENTAL RIGHTS CONSTITUTIONAL SYSTEM IN THE MACAU SPECIAL ADMINISTRATIVE REGION*

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A significant number of procedural human rights protection instruments themselves have been created or improved and have been taken on in a very wide protective sphere, both nationally and internationally. However, this development of promoting and protecting an each person's human rights, though impressive, is insufficient, if said protection instruments are not truly efficient in attaining effective protection of the rights themselves, and if they do not remain, as sometimes happens, within the scope of theory, good intentions and unapplied legal rules.

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* This paper is dedicated to professor Héctor Fix-Zamudio, inescapable reference in constitutional law worldwide. The paper is an adaptation of ours "The Judicial Guarantees of Fundamental Rights in the Macau Legal System – a Parcours under the Focus of Continuity and of Autonomy", paper delivered at International Conference One Country, Two systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007 and, "The Constitutional Layer of Protection of Fundamental Rights in the Macau Special Administrative Region", paper prepared for the XXth biennial Lawasia conference, Hong Kong, 2007. The opinions expressed here are solely those of the author and do not reflect the views of any institution to which he is affiliated.

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1 "Effectiveness of Human Rights Protection Instruments", *Mexican Law Review*, 1, 2004.

SUMMARY: I. *Introducing and contextualizing the theme*. II. *The transition process – from territory under portuguese administration to SAR of the PRC*. III. *The continuity principle as a master guarantee*. IV. *Is comparative constitutional law faced with an anonymous new federalism?* V. *The basic law as the (major component of the) Macau SAR Constitution*. VI. *The fundamental rights judicial mechanisms of protection – between continuity and discontinuity*.

I. INTRODUCING AND CONTEXTUALIZING THE THEME

Macau is a Special Administrative Region of the People's Republic of China (PRC), since the 20th December 1999, thus ending several centuries of Portuguese official dominance[2] enjoying a high degree of autonomy, as eloquently announced both in the international arena *ex vi* the Joint Declaration of the Portuguese Republic and the People's Republic of China on the Question of Macau, signed in Beijing in 1987 and, domestically in the Basic Law of the Macau Special Administrative Region (SAR). It possesses, along with Hong Kong, a singular *status* in both the comparative constitutional law approach and in the dominions of international law posing new and demanding challenges in both perspectives.

We believe that it might prove useful to provide a brief explanation on the contents of this paper. In choosing the title we intended to identify the perspective of approach that we are going to bring to this exercise on one of the fundamental rights themes —the judicial protection machinery of the fundamental rights. In truth, following in the line of the title, it properly delimits the road that is going to follow, assuming that the stressed points of analysis reside (still)— in the perspective of the transition of the exercise of sovereign powers over Macau, and thus particularly with the emphasis in the principle of continuity on one side and, on the other, the principle of autonomy of Macau.

On the other hand, the opening reproduced sentence aims to stress that the effectiveness of the protection of fundamental rights goes beyond the normative discourse, as, in a fullness of meaning words, Héctor Fix-Zamudio warns us.

[2] No matter now under what juridical title neither its scope and theoretical justification.

We will address two main topics —autonomy and continuity— that in the rationale of this paper will shape the analysis of the main target of the paper —the fundamental rights system, including the judicial protection mechanisms— hence they will operate in the fashion of scouts of the road ahead.

In the fashion of an historical evolution of Macau in a very small nutshell, one should bring to mind that for the last half millennium, Macau, a tiny enclave in south China inhabited largely by Chinese people, has existed in a strange state of individuality and disconnection *vis-à-vis* greater China. China is its natural source of both *Imperia* and *Dominium*, although it was at the same time separated from China through its connection to a small far away country —Portugal. For several centuries until the last days of 1999, Macau has been effectively separated from China, and connected to Portugal, but as an autonomous entity. It has had many identities: a commercial outpost, a colony with special capacities, a territory artificially lumped together with other Portuguese possessions in Asia, a territory leased from China, a territory offered by China, and, ultimately, a "territory under (transitional) Portuguese Administration".

Some have referred to the history of Macau as a history of anomaly[3] and this anomalous history provides some clues as to why a miniscule piece of land has achieved such extensive autonomy within one of the giants of the world.

Three main periods may be identified in the evolution of Macau's political status. The first, from the establishment of the Portuguese in the territory until the end of the 18th century, was a "*system of mixed jurisdiction*", with both Portuguese and Chinese authorities exercising jurisdiction. The Portuguese had jurisdiction over the Portuguese community and certain aspects of the overall territory's administration, but no real sovereignty.

3 Wills, John and Van Dyke, Paul, "Strange shores: 442 Years of anomaly in Macau, and counting...", *Harvard Asia Pacific Review*, summer 2000, p. 1. Norman MacQueen speaks about a pragmatic anomaly in international relations in "Macao: end of a Special Case?", *The World Today,* vol. 41, 1985, p. 167. Eduardo Cabrita, goes further, speaking of "absurdity" in "International and constitutional limitations on the autonomy of the Macau Special Administrative Region", *Macau Law Journal*, special issue 2002, p. 154.

The second period began at the end of the 18th century and was a considerable change from the previous situation just mentioned. Macau's importance among Portuguese possessions was growing, Portuguese sovereignty over the territory was strengthened, and in a formal sense Macau became part of Portuguese territory,[4] as a Portuguese colony.[5]

And the third period followed the Portuguese democratic Revolution of 25 April 1974. This brought about a radical rejection of colonial policy and Portugal and China established diplomatic relations in 1979. Both countries expressed interest in finding a mutually-agreeable solution to Macau's status; negotiations began in 1985, a year after the signing of the Sino-U.K. Joint Declaration, and in 1987 the Sino-Portuguese Joint Declaration was signed agreeing that Macau would become a "Chinese territory under Portuguese administration".[6] This new state of affairs was reflected in the Portuguese Constitution.[7] Macau was *not* considered to be part of Portugal.

4 For instance, the 1822 Portuguese Constitution declared in Art. 20, IV, that the territory of the United Kingdom of Portugal included Macau.

5 In 1972, the PRC formally stated, in a memorandum dated of 8 of March, at the United Nations that it did not consider Macau and Hong Kong to be colonized territories, and thus they should not be covered by the declaration on the granting of independence and later, the UN General Assembly at its 27th session held on November 8 adopted a resolution containing a list of colonized territories which did not include either Macau or Hong Kong. On this, see, for example, Escarameia, Paula, *O direito internacional público nos princípios do século XXI*, Almedina, 2003, pp. 82-83.

6 The formal recognition of this status can be seen in: Law 1/76 dated 17 Feb 1976, Macau Organic Statute; the Portuguese Constitution of 1976; and the Joint Declaration on the Question of Macau signed in Beijing on 13 April 1987 and approved by the Portuguese Parliament.

7 This article 292 stated that "*While under Portuguese administration, the territory of Macau shall be subject to a statute that is appropriate to its special circumstances. Approval of such statute shall be within the competence of the Assembly of the Republic, with the President of the Republic carrying out the acts set out therein, the statute of the territory of Macau embodied in Law 1/76 , shall remain in force. Upon the proposal of either the Legislative Assembly of Macau or the Governor of Macau, who shall take the opinion of the Legislative Assembly of Macau, the Assembly of the Republic, which shall take the opinion of the Council of State, may amend or replace that statute. The President of the Republic shall not promulgate a decree of the Assembly of the Republic, where the proposal is approved with amendments, unless the Legislative Assembly of Macau or the Governor of Macau, as the case may be, gives a favourable opinion. And, the territory of Macau shall have its own judicial system that is autonomous and adapted to the particular circumstances of that territory, as provided by law, which shall give full effect to the principle of the independence of the judiciary*".

Macau is only referred to in Article 292[8] in relation to the transitional rule, so as to recognize the Joint Declaration.[9]

From a domestic law point of view,[10] only one thing seemed certain: Macau was no part of Portugal; it was *Ausland*,[11] some sort of appendix to Portuguese territory. As to what refers to the identification of Macau's constitution the mystery was still a key note. Most concluded that the Portuguese Constitution did not apply to Macau, at least *in toto*. Besides, Macau had an Organic Statute of constitutional origin and stand that performed most functions of a formal constitution.[12] So the constitutional order of Macau comprised part of the Portuguese Constitution that applied directly to Macau, a constitutional law called the Organic Statute of Macau and other parts of the Portuguese Constitution that were indirectly applicable to Macau—that is, through the Organic Statute and in the measure dictated by it.

Borrowing from Jorge Miranda, the constitutional and legal order of Macau constituted thus a juridical order *a se*.[13] The key norm in this atypi-

8 The formula used in Article 292 is ambiguous. We do believe that this is not due to a deficient *mens legislatori*, but reflects the lack of clarity about Macau's status which was often different from how it appeared on paper. Macau was thus something strange to the Portuguese territory and definitely not a part of it, an anomaly, as mentioned before.

9 However, even before the Joint Declaration, Macau was referred to in Article 5 not as being part of Portugal, but instead as being administered by Portugal. The 1989 revision moved the provision to the last chapter, Article 292, and reinforced the transitional character of the arrangements by adding the phrase "while under Portuguese administration". On this, see for example, Gomes Canotilho and Vital Moreira, *Constituição Anotada*, Coimbra, Coimbra Editora, 1993, p. 1076.

10 On an international law stance, Macau has been characterized by western scholars as a territory on a lease, a union community with Portugal enshrined in and by the Chief of State, condominium, a territory under an internationalized regime, a territory under a special situation, an autonomous territory without integration connected to a special international situation, a dependent community subjected to a dual distribution of sovereignty powers (in other words, China held the sovereignty right but Portugal was responsible for its exercise). Without doubt, it was an atypical situation. Since the Joint Declaration took effect, Macau was until 19 December 1999, an internationalized territory by international law standards, despite the absence of such a label in the treaty itself. For further information and references, see Cardinal, Paulo, Macau *The internationalization of an historical autonomy, forthcoming, Comparative national experiences of autonomy: Purpose, structures and institutions,* Yash Ghai (editor), UHK, Oxford University Press.

11 Rodrigues Queiró, Afonso, *Lições de Direito Administrativo,* Lisbon, 1976, p. 379.

12 With the exception of establishing and protecting fundamental rights, it should be noted.

13 *Funções, órgãos e actos do Estado*, Lisbon, 1990, p. 260.

cal juridical construction was Article 2 of the Organic Statute which stated that the territory of Macau constitutes a juridical person of public law and enjoys administrative, economic, financial, legislative, and judicial autonomy, provided the principles and the guarantees for rights and freedoms established in the Constitution of the Republic and the Organic Statute are observed.[14]

II. The transition process – from territory under Portuguese administration to SAR of the PRC

A first note is to clarify that by transition process we do not mean, nor it should be equivalent to the, resumption of full sovereignty by the PRC emanated in the transfer act proper.

On 20 December 1999, Macau went from being a territory under Portuguese administration to the resumption of full sovereignty by the People's Republic of China as a Special Administrative Region, in accordance with the Joint Declaration. This international treaty specifies that the SAR will enjoy a high degree of autonomy and will incorporate the basic policies stated in the Joint Declaration into a Basic Law.

The Joint Declaration describes the process leading the conclusion of the treaty[15] in its preamble and states, namely that the two countries agreed that a proper negotiated settlement by the two Governments of the question of Macau, which was left over from the past Thus Macau was a question left over from the past, both for Portugal and for China, an anomaly, then.[16] The Joint Declaration was thus concluded with the apex purpose of allowing China to resume the exercise of sovereignty over Macau in a peaceful and in *pacta* way, very in fashion in the late 20th century.[17] The Joint Decla-

14 Thus, as long as these principles and these fundamental rights were being respected, the autonomy enjoyed by Macau was virtually untouchable. Note that the Portuguese autonomous regions, however, did not have (nor has today) a separate constitutional order, as the Portuguese Constitution is fully applicable.

15 See, on the process leading to the JD, Gonçalves Pereira, Francisco, "O processo negocial da Declaração Conjunta-uma abordagem preliminar", *Boletim da Faculdade de Direito de Macau*, vol. 11, 2001, p. 63 and ff.

16 From the perspective of China, Macau had never ceased being part of China, but had been occupied by Portugal, Basic Law, Preamble.

17 Just before the Sino-Portuguese negotiations began, a similar process was unfolding, regarding Hong Kong. The Macau outcome was strongly influenced by that example. China employed the now-famous "One Country, Two Systems" formula coined by Deng

ration has been deposited at the United Nations by both contracting parties and is undoubtedly an international treaty proper[18] with all the legal consequences that implies.[19] It sets out the fundamentals of the process of transfer of sovereignty (with implications for the legal system, public administration, exercise of sovereignty powers, political structure, judiciary, and fundamental rights, among others) as well as a transition framework that works attached to the act of transfer of sovereignty itself.

The signing of the Joint Declaration initiated a transition period that served the process of the transfer. The first sub-period reached its end on 19 December 1999. Then a second phase of the transition started that will last for 50 years. During this latter period, the PRC has undertaken to uphold a set of binding principles, policies, and provisions that are included in the Joint Declaration and that impose limitations on China's sovereignty over Macau.[20]

This self-limitation on sovereignty is articulated in the 'One Country, Two Systems' strategy. Without question, the Joint Declaration constitutes a limitation on the exercise of sovereignty over the enclave. It is, however, a limitation freely created and desired by the two sovereign states in the normal exercise of their international legal powers,[21] or, in other words, "Un-

Xiaoping in order to achieve the reunification of China. Of course the principle was originally designed for Taiwan, not Macau and Hong Kong. The ultimate goal is still the reunification of Taiwan, but that task was postponed —in a very Chinese fashion— to wait for a better moment. And, in the meantime, the idea was that Macau and Hong Kong would serve as good examples for the compatriots of the other side of the Straits.

18 On this, Moura Ramos, Rui, "A Declaração Conjunta Luso-Chinesa na Perspectiva do Direito Internacional", *Boletim da Faculdade de Direito*, vol. 74, 1998; Zhi Zhong, Chen, "The Joint Declaration and the International Law", *Boletim da Faculdade de Direito de Macau*, No. 11, 2001, pp. 89 ff. For Hong Kong, Hannum, Hurst, *Autonomy, Sovereignty, and Self-Determination*, rev. edition, UPP, 1996, p. 136, Mushkat, Roda, *One Country, Two International Legal Personalities,* Hong Kong, Hong Kong University Press, 1997, pp. 140-1.

19 Frances Luke stresses this quality of the JD in "The imminent threat of China's intervention in Macau autonomy: Using Hong Kong's past to secure Macau's future", *American University International Law Review*, vol. 15, 2000, p. 3.

20 On these issues on the idea of transition periods, see Cardinal, Paulo, *Macau: The internationalization of an historical autonomy, cit, passim*, especially pp. 10-13.

21 The obligations created by the Joint Declaration vary according to whether they deal with Portugal or China. First and foremost is the obligation to transfer the exercise of sovereignty over Macau from Portugal to China. Other obligations arise as a result of this. These are provided for in the various sections of Point 2, in which the PRC government "declares" that China "will pursue the following basic policies regarding Macau". There follows a list

der the Joint Declarations (JDs), the PRC was reduced in its sovereign competences, these purporting only to external sovereignty: defence and foreign affairs".[22]

In conclusion, the Sino-Portuguese Joint Declaration envisages a transition period stretching from its implementation to the last day of the 50 years following China's resumption of sovereignty over Macau. One might well ask transition to what? The transition from Portuguese to Chinese exercise of sovereignty powers was accomplished in December 1999. But for a period of 50 years following the transfer, the Joint Declaration will remain in force, establishing a number of obligations on China.[23]

The Joint Declaration will remain a prominent source of law for the Macau SAR.[24] Its norms, characterised as "policies" embodying China's post-99 obligations, may genuinely constitute "material limits" on the legislative power responsible for drafting as well as amending the Macau Ba-

of eleven important "policies" which will define the future Macau SAR. The list closes with a twelfth, which, while reiterating the text of Article 2 of the JD stresses that "The above-mentioned basic policies… will be stipulated in a Basic Law… and they will remain unchanged for fifty years".

22 Isaac, Armando, "The constitutional framework for legal co-operation between the «Two Systems» of the «One Country»: the case of Macau", Conference on Mutual Legal Assistance under "One Country, Two Systems", Faculty of Law of the University of Hong Kong, 1999, p. 2.

23 After the 50 years, then, China will be free of any obligations stated in the Joint Declaration and could, theoretically, for example, abolish the SAR, change its nature, eradicate the high degree of autonomy, transform it into a municipality, revoke the Basic Law, eliminate the use of Portuguese language, restrict fundamental rights, demolish the current social-economic system, get rid of independent judicial power, including that of final adjudication, abolish the free port and separate customs status, alienate Macau, grant independence, etc. Godinho, Jorge, *Macau SAR Business Law and Legal System*, forthcoming, Lexisnexis, states, "*Macau is now in a period of Chinese Administration under the conditions agreed between Portugal and China (1999-2049), and from 2049 it will commence a period of unrestricted Chinese Administration*" and, later on, "*The Sino-Portuguese Joint Declaration will then cease to apply and therefore the Chinese Administration of Macau will no longer have to follow its requirements*", pp. 2 and 5.

24 See, Costa Oliveira, Jorge, "A continuidade do ordenamento jurídico de Macau na Lei Básica da futura Região Administrativa Especial", *Revista Administração*, No. 19/20, pp 24-5; Cardinal, Paulo, "O sistema político de Macau na Lei Básica — separação e supremacia do executivo face ao legislativo", *Revista Administração*, Nos. 19/20, p. 80; Isaac, Armando, "Substantive constitutional restrictions on the limits to the sphere of jurisdiction of the Macau Special Administrative Region's Courts", paper presented to the 4ª Comparative Constitutional Law Standing Committee Conference, Bangkok, 27-29 May 1999, Katchi, António, *Governo e Administração Pública de Macau*, IPM, 2005, pp. 14 and 93.

sic Law. The continuing validity and efficacy of the Joint Declaration is in fact assumed by the Basic Law itself.[25] In a sense, the Basic Law *does no more* than detail the policies stated in the Joint Declaration,[26] as foreseen in Point 12:

> The above stated basic policies and the elaboration of them in Annex I to this Joint Declaration will be stipulated in a Basic Law of the Macau Special Administrative Region of the People's Republic of China by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years.

Thus, Gomes Canotilho sees the Joint Declaration as playing a role in guaranteeing, directing, stimulating, and interpreting the future Macau SAR.[27]

In short, we can say that the Joint Declaration works as a *grundnorm* for the Basic Law and consequently for the Macau's autonomic constitutional, legal, political, social and economic system[28] until 2049.

All the obligations created by the international treaty emanate guarantees that are proclaimed in the Joint Declaration and, in accordance with the *pacta sunt servanda* principle; none of those guarantees might be violated within the timeline prescribed by the international treaty. Of course, the Joint Declaration contains no mechanism for its enforcement,[29] but respect for that

25 Preamble and in Art. 144 by stating that the basic policies of the People's Republic of China regarding Macau have been elaborated by the Chinese government in the Sino-Portuguese Joint Declaration and that no amendment to the Basic Law shall contravene the established basic policies of the PRC regarding Macau.

26 In *The Joint Declaration and the International Law*, Chen Zhi Zhong writes that the Basic Law codifies the 12 points in JD Art. 2, p. 92. In the decision on process 96/2002, the TSI (Court of Second Instance) a reference is brought to the densification of the Joint Declaration made by the Basic Law.

27 Gomes Canotilho, J. J., "As palavras e os homens—reflexões sobre a Declaração Conjunta Luso-Chinesa e a institucionalização do recurso de amparo de direitos e liberdades na ordem jurídica de Macau", *O Direito*, Oct. 1994, pp. 7-8.

28 See, for example, Isaac, Armando, *The constitutional framework for legal co-operation between the "Two Systems" of the "One Country": the case of Macau*. It is important to note again that the Basic Law must nonetheless follow the provisions of the Joint Declaration, although in some cases it has failed to do so; see for example Cardinal, Paulo, "O sistema político de Macau na Lei Básica — separação e supremacia do executivo face ao legislativo", *Revista Administração*, Nos. 19/20, *passim*; for Hong Kong, Ghai, Yash, *Hong Kong's New Constitutional Order*, Hong Kong, HKU Press, 1999, p. 146.

29 See, for example, Gonçalves, Arnaldo, "Les implications juridico-constitutionelles du transfert de la souveraineté de Macao a la République Populaire de Chine", *Revue*

jus cogens principle is a strong element and the international community in general and Portugal in particular should have a say in case of a breach.

III. The continuity principle as a master guarantee

A paramount principle in general, as well as in the fundamental rights area, is the principle of continuity.[30] "The current social and economic systems in Macau will remain unchanged, and so will the life style.[31]The laws currently in force in Macau will remain basically unchanged".[32] Continuity

Internationale de Droit Comparé, 1993, p. 838. Olivier, Marius, *Hong Kong: An exercise in autonomy?*, p. 88, states, for the similar Hong Kong situation, "The true sovereign and the final authority will be the PRC itself. It remains accountable to the United Kingdom, however, to the extent that it may be found to be in breach of the… provisions of the Joint Declaration". He notes, however, that a "major problem, however, is the fact that no provision is made for the independent settlement or adjudication of disputes arising from the terms of the JD, a problem which is complicated by the PRC's reluctance to accept the jurisdiction of the International Court of Justice", p. 62. One could add the fact that, contrary to general practice, the international treaty was not written in a third neutral official language. But none of these impair the validity of the JD up to 2049. As Chen Zhi Zhong writes in *The Joint Declaration and the International Law*, the obligations stipulated in the JD cannot be changed by either party unilaterally even by reason of its own national laws, *cit.*, p. 91.

30 On this principle, among others, Costa Oliveira, Jorge, "A continuidade do ordenamento jurídico de Macau na Lei Básica da futura Região Administrativa Especial", *Revista Administração*, Nos. 19/20, 1993, Cardinal, Paulo, *O Regime Jurídico da Advocacia no Contexto da Lei Básica*, AAM, Macau, 1992, pp. 71-77, *idem*, *The judicial guarantees of fundamental rights in the Macau legal system – a parcours under the focus of continuity and of autonomy*; Isaac, Armando, "Substantive constitutional restrictions on the limits to the sphere of jurisdiction of the Macau Special Administrative Region's Courts", paper delivered to the 4th Comparative Constitutional Law Standing Committee Conference, Bangkok, May, 1999, pp. 46 ff. For the Hong Kong case, Ghai, Yash, "The continuity of laws and legal rights and obligations in the SAR", *Hong Kong Law Journal*, vol. 27, 2, 1997, where the authoritative author clearly stated that "These issues need careful consideration when there is a change of sovereignty to ensure certainty and clarity in the new legal regime and that the vested rights are maintained… These considerations are particularly important in Hong Kong where the basic intention as reflected in the Sino-British Joint Declaration and the Basic Law is to maintain stability and prosperity by continuing most aspects of previous systems, particularly of the laws ", pp. 136-137.

31 The maintenance of the life -style was considered by Antunes Varela as being the most precious of the values that the PRC solemnly promised to respect in the future half century, both in the Joint Declaration and in the Basic Law, "O domínio público e o domínio privado sobre as terras e as águas do território de Macau", *Revista Jurídica de Macau*, special issue *A questão das terras em Macau – Doutrina*, 1997, p. 460.

32 Joint Declaration, Point 2 (4) and see also I and III of Annex I with some differences in the language of the late norms.

of the social system and of the economic one and also continuity of the normative acts basically unchanged, also referred to as the principle of the inalterability of the essential. One of the main pillars of the transition is thus clearly proclaimed in this normative discourse, the principle of continuity,[33] thus reinforcing the idea of it being based on the previous special identity of Macau. In other words, the contents of the autonomy should not be less than that enjoyed by the Territory of Macau under Portuguese administration.[34] The Joint Declaration points to this and in addition, effectively serves to extend the Macau autonomy, such as by mandating a self contained judicial system.

However this principle do not affirms itself as absolute, such meaning that the principle of the continuity does not have to be faced as meaning intangibility. It does not claim as synonymous of intangibility in as much as contracting parties they had intended to prevent an undesirable sclerosis of the legal system.[35] In the truth, this characteristic of elasticity, though limited one must point, of the principle of the continuity consists itself as an added guarantee to the effective survival of the legal system since it allows it, without abdicating however of its essential characteristics,[36] to adapt it to the natural and unexpected evolving of the social system where it is in-

33 Requejo Pagés, Juan Luis, *Las normas preconstitucionales y el mito del poder constituyente*, CEPC, 1998, elaborates on the continuity as a principle as well as on Constitution versus continuity and, among several other important reflections that may apply to the Macau *casu,* says that continuity does not suffer a bigger fracture with a new Constitution compared to the erosion that may happen due to the normal activity of the constituted powers.

34 Canas, Vitalino, "A extensão da autonomia de Macau na comunidade e na lei", *Boletim da Faculdade de Direito*, 12, 2001, p. 226.

35 Cardinal, Paulo, "Os direitos fundamentais em Macau no quadro da transição: algumas considerações", *Cuestiones Constitucionales*, 14, 2006, p. 32.

36 Wang, Liuting, "Macao's Return: Issues and Concerns", *Loyola of Los Angeles International and Comparative Law Review*, vol. 22, 1999, No.2, p. 180, tells us about the necessity of the new sovereign to acknowledge the existence of a differentiated legal system in Macau and of the local social custom's. It worth's mention some of the following ideas: the creation of new legislation imposes that it should be prudently taken in consideration the relationship between the Basic Law and the laws previously in force, but also the maintenance of the European continental legal system characteristic as a way of underlining the typical style of Macau, and, it should be mentioned that one of the messages contained in the One country, two systems is the admissibility of a regime left by a foreign State in the condition that it is not in violation of the Basic Law, Wanzhong, Sun, "A Lei Básica da RAEM e a construção do sistema jurídico de Macau", *Boletim da Faculdade de Direito*, Macau, no. 13, 2002, p. 54.

serted. If it is the *veritas* that the legal system will have to be maintained although not in absolute terms, however it is not less true than it could only be modified in the respect to the limits established for and in the Join Declaration.[37]

The limit to the fullness of the principle of the continuity could not be reduced only to the thesis of the maintenance of the laws saved in that to oppose the Basic Law or in that it will be subject to posterior alterations, otherwise that will simply mean carrying out the emptiness of that apex principle and consequent uselessness. To us, one has to admit the possibility of introduction of those alterations not being, however, permissible that these alterations consubstantiate basic changes.[38] With this we intend to mean that the general principles that characterize/shape the Macau legal system cannot be disregarded as well as diverse legal regimes —for example of the fundamental rights in general and of each right in itself— they cannot have its ratio deviated or overwhelmed. In other words, the essential content of a given juridical regimen will have to be respected and kept.[39]

Thus, the principle of continuity —of the present social and economic systems, and, in order to secure this, the laws currently in force will remain basically unchanged— constitutes itself as the master guarantee of the transition process as we envisage it. This principle is reinforced in Annex 1, III, of the Joint Declaration, which states that following the establishment of the Macau SAR the laws, decree-laws, administrative regulations, and other normative acts previously in force in Macau shall be maintained unless they contravene the Basic Law or are subject to any amendment by the Macau legislative body. The Macau Basic Law contains an identical provision. One has to assume and to print in these lines that we firmly disagree with those that wish to analyse the concept of laws previously in force inserted in the Joint Declaration as excluding the normative acts that were originated externally that is in Portugal. With effect, nothing in the in-

37 Cardinal, Paulo, "Os direitos fundamentais em Macau no quadro da transição: algumas considerações", *cit*., note 35, p. 32.

38 Lok Wai Kin seems to be purporting a somehow similar idea by proposing a difference between the *spirit* of the laws and its basic value as opposed to the specific writing of the normative rules. This later ones would be changeable. One can assume that those firstly mentioned would not, "Impacto da Lei Básica da RAEM na concepcção do Direito de Macau", *Boletim da Faculdade de Direito*, Macau, no. 13, 2002, p. 61.

39 Cardinal, Paulo, *O Regime Jurídico da Advocacia*..., *cit*., note 30, pp. 74-75.

ternational treaty, its wording or its spirit, allows to amputate in this way the principle of the continuity.[40] As one also does not accepts doctrine that it intends to still impose more fracture on the principle of the continuity by reverting this guarantee only to the legislation approved prior to the Joint Declaration.

Besides the general principle of continuity, the Joint Declaration, and the Basic Law, states that all fundamental rights and freedoms will be ensured thus ensuing an autonomic dimension of the principle of continuity thus reinforcing it in this field. The continuity principle is the guideline; hence, the idea of "permanent" fundamental rights in spite of the transition of the legal system.[41] We will return to the subject of continuity specifically referring to fundamental rights later on this paper.

An internationally plugged autonomy breaking the traditional boundaries of subnational units

To really understand the autonomy of the SAR one must resort again to the Joint Declaration. For the 50 years that started on 20 December 1999, the Joint Declaration will be the genesis, the anchor, and the guarantee of Macau's autonomy.[42] That is why we can affirm that the SAR autonomy is

40 See, for further elaboration and references, Cardinal, Paulo, "Os direitos fundamentais em Macau no quadro da transição: algumas considerações", *Cuestiones Constitucionales*, *cit*., note 35, pp. 33-34.

41 Our, *Permanent fundamental rights in a legal system in transition*, Lawasia, Seoul, 1999.This apparently paradoxical relationship —transition versus continuity— can be defined as a political and diplomatic formula created to ensure some balance between the resumption of sovereignty by a sovereign state and respect for the history, culture (including the legal culture), and specific identity of Macau. It also acts as a vote of confidence in the future by respecting the past. So, if it is true that we faced a change in the landlord in Macau, it is also true that the transition will not eliminate what existed before December 1999, but on the contrary it will maintain it, or continue it.

42 Making the same point, Almeida Ribeiro, Manuel de, "A Região Administrativa Especial de Macau e o Direito Internacional", *Boletim da Faculdade de Direito de Macau*, No. 13, 2002, p. 203. Although the SAR is founded on the basis of the One Country, Two Systems policy, Zhu Guobin asserts, "This political structure is, however, a result of the Joint Declaration even if an invention of the Chinese government", in *Redefining the Central-Local Relationship under the Basic Law,* paper given at One Country, Two Systems: Theory and Practice international conference, 1997. Arguing that the HKSAR is a creation of international law, Mushkat, Roda, "Hong Kong as an international legal person", *Emory International Law Review*, No. 114, p. 110; arguing against this view, among others,

a *plugged* one. Plugged to an international treaty, thus this autonomy, in contrast to the most known models, does not rely upon solely a domestic act, be it a Constitution be it a Basic Law. It does not rest freely and unlimitedly on the sovereign power the legitimacy of, and the disposal of, the Macau autonomy which are due to the Joint Declaration guarantees and from it, Macau *receives its superstructure conduit*. Referring to Hong Kong, it was written by Zhu Guobin that

> The power of autonomy enjoyed by the HKSAR does not derive from a delegation by the Central People's Government, but from an international arrangement based on the *realpolitik* and reasonable separation of power between the Central and SAR governments. We should not ignore the function of the "twelve items of policy" included in the article 3 of the Joint Declaration…[43]

The Joint Declaration is, thus, the genesis and anchor of Macau autonomy. That is, in our view, the appropriate conclusion. The assertion that Chinese institutions and the Chinese Constitution are the primary source of Hong Kong and Macau's autonomy[44] leads to the denial of any role post-transfer for the JD. The PRC Constitution opens the door in article 31, the NPC may even be the key to that door, but the creators and delivers of the autonomy institution, or the parents, are the signatory parties, Portugal and China, through a bilateral agreement. Both states are the parents even though the guardian and the parent that directly cares for the child —MSAR— is China. Thus the Joint Declarations present a framework for Macau's autonomy that has two main characteristics: the autonomy is internationalized and is temporary, and for the duration of the 50-year period covered by the Joint Declaration[45] it operates under the principle of continuity.[46]

Olivier, Marius, "Hong Kong: An Exercise in Autonomy?", *One country, two systems: Theory and Practice International Conference*, Hong Kong, 1997, p. 88.

43 "Redefining the Central-Local Relationship under the Basic Law", paper given at One Country, Two Systems: Theory and Practice International Conference, 1997, p. 6.

44 Among many others, see Huaqun, Zeng, "Hong Kong's Autonomy: Concept, Development and Characteristics", *China: An International Law Journal*, 1/2, 2003, pp. 320 ff.

45 If after those fifty years autonomy remains unchanged it will have a different legal foundation guaranteed in a different way.

46 The Joint Declaration first stipulates that the government of the People's Republic of China will resume the exercise of sovereignty over Macau with effect from 20 December

Something is written differently. Article 2 of the Basic Law states: "The National People's Congress authorizes the Macau Special Administrative Region to exercise a high degree of autonomy", with the inference being that the NPC is the source of the autonomy which is bestowed as a gift to Macau. As a proclamation of sovereignty to an audience that includes the Chinese diaspora and the Chinese inhabitants of the SAR this view have a certain appeal, but on juridical grounds alone, immune from any political influence, it is incorrect.[47]

In truth, this concrete autonomy *vis-à-vis* the PRC is possible only because Macau *fully* returned to the motherland, but this return happened due to the international agreement and, the reunification came with a package of prices, as described above. The establishment of a SAR and endowing it with a high degree of autonomy represented a bilateral will and not the single will of one of the parties. Moreover, the competences —and the duty— to establish these arrangements were set by the international treaty, not by China and even less by one of its political institutions.

Saying that "the NPC authorizes" is legally untrue and unrealistic since it does not have the power to do this. At the most one can concede that the NPC is mandated by the parties[48] to act in this fashion and acts, in a sense, in accordance and within that internationalized mandate. But the NPC could only act after the JD, since if the NPC already had the power to give such authorization one would have to conclude that the JD was not necessary at all. One can confirm this assertion with some Joint Declaration norms:

> The above-stated basic policies and the elaboration of them in Annex I will be stipulated in a Basic Law by the National People's Congress of the People's Republic of China, (2, 12, JD) [and] The National People's Congress of the People's Republic of China shall enact and promulgate a Basic Law of

1999 thus allowing for the accomplishment of reunification of Macau with China, and consequently the establishment of an entity integrated with, but separate from, the PRC: The SAR is the juridical person that embodies the new autonomic reality within Chinese sovereignty.

47 Where the Joint Declaration is silent but the Basic Law grant powers to the SARs it should be considered a situation of delegation, especially if they are not derived from general principles stated in the Joint Declaration.

48 Luke, Frances, "In order to Implement the Declaration, China and Portugal selected China's National People's Congress to legislate a Basic Law for Macau", *The Imminent threat of China's Intervention, cit.*, p. 4.

> the Macau Special Administrative Region of the People's Republic of China, stipulating that… (I, Annex I).

One can see that it was decided in the international treaty that the domestic competent body would be the NPC and, more, that its competence would be predetermined in the sense that it would have to enact a law (no choice either to enact or not) and the contents of that law would have to, at least to a certain extent, respect previous and superior basic rules and principles set forth bilaterally.

The Joint Declaration presents a framework for Macau's autonomy that has two main characteristics: the autonomy is internationalized[49] and temporary, and for the duration of the 50-year period covered by the Joint Declaration[50] it operates under the principle of continuity or unchangeability.[51] It first stipulates that the government of the People's Republic of China will resume the exercise of sovereignty over Macau with effect from 20 December 1999 thus allowing for the accomplishment of reunification of Macau with China, and consequently the establishment of an entity integrated with, but separate from, the PRC: "The People's Republic of China

49 The case of South-Tyrol is a point of reference and comparison for the autonomies of Macau and Hong Kong. Surprising as it may seem, that case shares more of the "uniqueness" of the Macau and Hong Kong autonomies. In fact, they have in common a transfer of sovereignty —at least to a certain degree— from one sovereign state to another sovereign state; that transfer was agreed and laid down in an international legal agreement; those agreements were deposited at the UN; thus, the foundation of the autonomy is primarily internationally based; the level of autonomy enjoyed is of a greater range than other autonomous regions that exist only by means of domestic law; in these cases one finds that there are at least two official languages within the juridical boundaries of the autonomies, the language of the "new" sovereign as well as the language of the previous one. On this, see Peterlini, Oskar, *The South-Tyrol autonomy in Italy: Historical, political and legal aspects,* Hipold, Peter, "Aspetti internazionali dell'autonomia de'll Alto Adige", pp. 89 ff, in *L´ordinamento speciale della provincial autonoma di Bolzano*, (cura, J. Marko, S. Ortino, F. Palermo), Cedam, 2001. On the internationalised origins of autonomy, see also Suksi, Markku, *The self-government of the Aland islands in Finland: Purpose, structures and institutions.* In general and providing several examples and nuances, both historical (such as Memel) and contemporary (such as South-Tyrol), see Dinstein, Yoram, Autonomy (International guarantees of autonomy), pp. 243 ff, in *Beyond a One-Dimensional State: An emerging right to autonomy?* (ed Zelim A. Skurbaty), Martinus Nijhof, 2005.

50 If after those fifty years autonomy remains unchanged it will have a different legal foundation guaranteed in a different way

51 Gonçalves Pereira, Francisco, "Accommodating diversity: Macau under China's Constitution", *Macau on the threshold of the third millennium*, Macau, Instituto Ricci, 2001, p. 107.

will establish a Macau Special Administrative Region of the People's Republic of China upon resuming the exercise of sovereignty over Macau".[52] The SAR is the juridical person that embodies the new autonomic reality within Chinese sovereignty,

> The Macau SAR will be directly under the authority of the Central People's Government of the PRC, and will enjoy a high degree of autonomy, except in foreign and defence affairs, which are the responsibilities of the Central People's Government. The MSAR will be vested with executive, legislative and independent judicial power, including that of final adjudication.[53]

This paragraph vests the SAR with the traditional trinity of normal statehood functions, while at the same time establishing the limits of its autonomy.

While the Joint Declaration works as a *grundnorm* for the Basic Law and consequently for the Macau's autonomic legal system,[54] there is sometimes a significant discrepancy between them, as one can see later. In that sense, the so called constituent power of the Chinese body concerning the SAR has limitations and it is not absolute.[55]

Macau enjoy a high degree of autonomy, except in foreign affairs (with however significant exceptions) and defence. And "despite the use of the adjective 'administrative', its autonomy is political given that the scope is not merely administrative, but it also holds powers of a state nature, in what interests us here, legislative powers".[56]

52 Point 2 (1) and reafirmed on point I of Annex I.

53 Point 2 (2) and I of Annex I.

54 *Macau's legal system will have a new constitutional Grundnorm: the JD itself, which is the body of principles and rules defining its autonomy as an SAR and limiting Chinese sovereignty*, Isaac, Armando, *The constitutional framework for legal co-operation between the "Two Systems" of the "One Country": the case of Macau*, *cit*., p. 3.

55 Juan Luis Requejo Pagés warns that even though the constituent power can shape the contents of the constitutional law as freely as it wishes however this absolute power in terms of defining the scope of applicability is restrained externally —international law— up to the existence of limits that reduce the absolute to impotence, *Las normas preconstitucionales y el mito del poder constituyente*, CEPC, 1998, p. 54.

56 Domínguez García, Fernando, "Autonomy Experiences in Europe – a Comparative Approach: Portugal, Spain and Italy", paper delivered at International Conference One Country, Two Systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007.

The package of powers allocated to the SARs is huge and in a general view cannot be found even in formal and dynamic federated states[57]. For example, in the area of foreign relations they can conduct or by having formal borders and customs controls inside the same country. But also in many other areas such as in the enjoyment of a range of powers: executive, legislative and independent judicial power, including that of final adjudication. Or, in a most unique fashion, a virtual total formal exclusivity on the area of fundamental rights. There are some limits imposed on the subnational entities scope of autonomy and mechanisms envisaged for or that can operate as limitation clauses such as, for example, via the interpretation complex procedures and, ultimately, by the fact that the power to revise the Basic Laws rests with the center not with the periphery entities, albeit with some —relevant— constraints upon the center.

Let us start by the external affairs sphere. Using the name "Macau, China", (or Hong Kong) the Macau SAR may on its own maintain and develop economic and cultural relations, and in this context, conclude agreements with states, regions, and relevant international organizations. It may issue its own travel documents. The establishments of these guarantees are of a particular significance if comparisons are made between the SAR and other examples of autonomy around the world. In fact, even states in federations are not granted such a degree of independent interaction in the international legal order as the SAR.[58] It is expressly provided with an international legal capacity either to conclude international treaties or to join international organizations.[59] Thus the limitations on autonomy concerning foreign affairs are, in fact, qualified, making the autonomy in some

57 For an analysis of the SARs autonomy and comparative study, see Olivetti, Marco, "The Special Administrative Regions of the PRC in Comparison with Autonomous Regions Models", Rolla, Giancarlo, "The Development of Asymmetric Regionalism and the Principle of Autonomy in the New Constitutional Systems – a Comparative Approach", Domínguez García, Fernando, "Autonomy Experiences in Europe – a Comparative Approach: Portugal, Spain and Italy", papers delivered at International Conference One Country, Two systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007.

58 Shuwen, "Wang As características da Lei Básica da Região Administrativa Especial de Macau", *Boletim da Faculdade de Direito de Macau*, No. 1, 1997, p. 46, concludes that some of the powers enjoyed by the SARs cannot be seen in federal systems.

59 Annex 1, VIII.

ways more extensive than others elsewhere.[60] "Perhaps the most distinctive feature of the agreement is the extensive authority granted to the… SAR in the area of foreign relations and participation in international organizations, says Hurst Hannum".[61] Where else are there formal borders and customs controls inside the same country as there are between the MSAR and the rest of China?

The principle of autonomy is extended not only to the rules but also to the people of the autonomy; the Joint Declaration states that both the government and the legislature of the Macau SAR will be composed of local inhabitants. Another principle is autonomy of decision-making. Macau will, "on its own", decide policies in the fields of culture, education, science and technology, and protection of cultural relics. This is among several areas on which the SAR is given the power to decide by itself.

The international treaty granted an unprecedented autonomy and incorporated a wide range of detailed guarantees. It resulted from the free will of two sovereign states that converged and were legally formalized in the Joint Declaration —not as a result of any unilateral will, either of China or Portugal. On the other hand, and again in accordance with the JD, it was necessary to further detail the contents of those policies/principles, thus the necessity of a domestic legal act — the Basic Law.

The Basic Law states that Macau is *authorized* to exercise a high degree of autonomy. As in the Joint Declaration, this is to be realized through the MSAR's enjoyment of a range of powers: executive, legislative and independent judicial power, including that of final adjudication; the power independently to conduct, in accordance with the Basic Law, "relevant external affairs", to use the Portuguese language as an official language of the SAR ; to exercise immigration controls over the entry, stay, and exit of foreign nationals; and to maintain public order in the SAR. To this end, the socialist system will not be practiced in Macau, and the SAR is to keep its own system. The fundamental Law provides for the system to be used in Macau: including the social and economic systems, the system for safe-

60 Xu, Xiaobing / Wilson, George D, "The Hong Kong Special Administrative Region as a Model of regional External Autonomy", *Case Western Reserve Journal of International Law*, Winter, 2000, pp. 2-5, stress that Hong Kong (and Macau) arguably enjoys, in real terms, more far-reaching external autonomy than any other region in the world, historical or current.

61 *Autonomy, sovereignty, and self-determination*, rev. edition, UPP, 1996, p. 140.

guarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems. In addition, the PRC's national laws will not apply, apart from those listed in Annex III to the Basic Law. In order to protect Macau's autonomy, the Law specifies that "No department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the MSAR administers". These are just some of the items from an enormous list that is presented in the chapters on the economy, culture and social affairs, and on external affairs.

A point to underline is that the Basic Law seems to contain the possibility of expanding the SAR's autonomy. It states, that "the MSAR may enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress or the Central People's Government".[62] Such powers, one would assume, would not be those dealing with the already existent autonomy, but ones that cross the boundaries of autonomy and deal with reserved subject matters like, for example, external relations.

As to the limits of autonomy one has to say that the autonomy envisaged by the Joint Declaration has certain natural limits, and the Basic Law also expressly provides for certain other limitations that were initially expressed the treaty.

First of all, Macau is Chinese territory, and the government of the People's Republic of China has resumed the exercise of sovereignty over it. Sovereignty now resides solely in the Chinese state, both in its title and in its exercise,[63] and the form of the autonomous entity is that of a special administrative region while the legal domestic document is a basic law enacted by the central authorities and not by the autonomous entity (although as seen, the external *pacta* source must be complied with meaning that sovereignty resides solely in China and in no other but it is delimitated by the JD). Second, there is a temporal limitation: the principle of the internationalized autonomy (and of continuity) will remain in force for fifty years, hence it is guaranteed only for that period of time. Finally, the SAR will enjoy a high degree of autonomy, except in foreign affairs and defence,

62 Article 20. Canas, Vitalino, "A extensão da autonomia de Macau na comunidade e na Lei", *Boletim da Faculdade de Direito*, vol. 12, 2001, p. 244, makes this point despite considering the article an enigma.

63 On this point, Olivier, Marius, *Hong Kong: An exercise in autonomy?*, *passim.*

which are the responsibilities of the CPG. However, as mentioned above, there are exceptions that allow for the SAR to exercise extensive autonomy in external affairs.

The first and third of these limitations can be considered as inherent in any phenomenon of autonomy, while the second is directly connected to the internationalized nature of the granting process. Several further limitations on Macau's autonomy that are specific to this instance are laid out in the Joint Declaration and in the Basic Law.

One should bring a couple of examples of some limits of autonomy established by the Basic Law.[64] Article 18 states that the NPC Standing Committee may add to or delete from the list of national laws applying to Macau in Annex III, it can do so only after consulting the Committee for the Basic Law of the MSAR and the SAR government. This process attempts a certain balance between the centre and the autonomous unit. Furthermore, laws listed in Annex III are confined to those relating to defence and foreign affairs, as well as other matters outside the limits of Macau's autonomy, "as specified by this Law". Especially when read in conjunction with point 2, second paragraph of the JD stating that Macau will enjoy a high degree of autonomy, except in foreign and defence affairs, this restriction appears to presuppose that the residual powers not expressly allocated to Macau or the PRC should be considered to be vested in the SAR, as the promised "high degree of autonomy" will be only limited in foreign affairs and defence matters, leaving the rest, all the rest, in the hands of the SAR. That is to say, regarding limitations on subject matters, the mechanism is one of a closed list composed of only two areas, and notably the list is one of exceptions and not one of devolved matters as is the case in so many autonomies. Besides, if this is not so, we can ask how could one expect the SAR fully to explore the guarantees in the Basic Law[65] aimed at ensuring

64 For further elements, Cardinal, Paulo, "Macau: The internationalization of an historical autonomy, Macau – the internationalization of an historical autonomy", forthcoming in *Comparative National Experiences of Autonomy: Purpose, Structures and Institutions,* Yash Ghai (editor), UHK, Oxford University Press.

65 Canas, Vitalino, *A extensão da autonomia de Macau...*, pp. 242 and 243. For a different perspective, see among others, Ghai, Yash, *Hong Kong's New Constitutional Order*, 1997 edition, pp. 146 ff, with detailed analysis, examples and references to official Chinese doctrine against the allocation of residual powers to the SARs. The issue of sovereignty is a powerful one indeed but it cannot, alone and by itself, stand against the vesting of residual

that the previous capitalist system and way of life shall remain unchanged for 50 years?[66]

Certainly that way of life and its maintenance over its several fields presupposes that action can be taken in all the areas specified in the Basic Law, but not only those. If there is no provision in the Basic Law concerning the protection of endangered wild life, or agriculture, fisheries, urban planning, weights and measurements standards, should that mean that the SAR cannot act, for instance by means of legislation, in those areas? Would the PRC have to take care of such matters? We do not think so and believe that the spirit and extent of a high degree of autonomy does not point that way either.[67]

Article 144 establishes that the power of amendment of the Basic Law shall be vested in the NPC. This is the corollary of the above-mentioned limitation on the form and the source of the domestic legal instrument which is to detail the autonomy structure of Macau. The NPC Standing Committee, the State Council, and the Macau SAR have the power to propose bills amending the Basic Law. Although the fact that the MSAR may propose amendments does reflect some degree of autonomy, in this specific aspect Macau enjoys less autonomy than before.[68] Before a bill can be put on the NPC's agenda, the Macau Committee for the Basic Law must study it and submit its views to the NPC. No amendment may contravene the "established basic policies" of the PRC regarding Macau. This last

powers on the SARs and, it is important to note once more, sovereignty is limited in pacta by the JD for the period of fifty years, thus the relevance of this argument is softened.

66 These questions were already put forward in ours, "Macau: The internationalization..." *cit*., note 64.

67 Even if the common rule in autonomous regions points in the opposite direction, one must remember that the SAR autonomies do not fit into any classical autonomy model. This SAR autonomy is different and goes beyond traditional boundaries in many ways, even exceeding the level of autonomy of local units in federated states (for example in having its own currency, establishing formal frontiers and customs control with the rest of the country, issuing autonomous passports, as seen above), thus challenging the claims of those who would put a restrictive gloss on the powers of the SARs by citing the fact that formally they are not states in a Chinese federation. Article 20 of the Basic Law should also be interpreted in this light.

68 Although the revision of the OS was vested in the Portuguese parliament, it depended exclusively on the impulse of the local autonomy bodies as mentioned above. See Gonçalves Pereira, Francisco, *Portugal, a China e a Questão de Macau*, Macau, IPOR, 1995, p. 140.

statement is of critical importance in the maintenance of autonomy, since these policies are those that were the object of agreement and were thus detailed in the Joint Declaration, hence we find here a clear assumption of the necessity of respecting the JD, at the very least to what is part of the said basic policies.[69]

Finally, Article 143 could potentially serve either as a threat to autonomy or create possibilities for its expansion.[70] We will come back to the issue in correlation with fundamental rights.

IV. Is comparative constitutional law faced with an anonymous new federalism?

To be aware of this singular constitutional concrete status constitutes a necessary condition a full understanding of an attempt to apply a branding. In truth, without grasping it, we believe any analysis would be incomplete and inadequate. For instance, the *blind* application of federal models or regional autonomy ones to the SARs would prove inconsistent, with a deficit and probably incorrect in finding an answer. Not that we are refusing the importance and use of the constitutional comparative law; on the contrary. What we advocate is a *modern* "*open mind*" and comprehensive approach in which one we will find that, in some areas, *traditional* autonomy solu-

69 This circumstance is not new in constitutional law, as Juan Luis, Requejo Pagés, states that the constituent revision power is radically limited, in its existence and in its definition and scope of its capacity, *Las normas preconstitucionales y el mito del poder constituyente*, CEPC, 1998, pp.101 ff.

70 That is if there were a trend in interpretation friendlier to the autonomy and its expansion than one that favours the centre. This may not be likely but, in theory, the potential for broadening is there or as said, "This power can be used to limit Macao's autonomy or as a simple safeguard of Peking's competences. Time will tell which tendency has more weight", Domínguez García, Fernando, "Autonomy experiences in Europe – a Comparative Approach: Portugal, Spain and Italy", paper delivered at International Conference One Country, Two Systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007. As for Hong Kong, "Unfortunately, the constitutional problems have not been resolved by this modus vivendi. The Basic Law is not self-contained – it has not established a complete constitutional 'firewall' around the HKSAR. There remain several means by which China's laws – and legal mores - may cross the border and mingle adversely with Hong Kong's common law regime. The most detrimental conduit has been and remains Article 158 of the Basic Law, which allows the Standing Committee of the NPC to interpret the Basic Law", Hualing Fu and Cullen Richard, "Two Views of Hong Kong's Basic Law: But Hong Kong Should Seek A Better Way…", *Hong Kong Journal*, 2006, II, *http://www.hkjournal.org/archive/2006_spring/rao.html*.

tions are identified in Macau whereas, in other areas, federal ones are clearly in place and, in some other spheres, perhaps other territorial organizatory models will come to hand. As emphasized by Marco Olivetti, "Placing the two SARs in a comparative perspective is… highly problematic. This model of autonomy includes elements typical of the regional, the federal, the unitary and the confederal arrangements but it does not correspond to anyone of these".[71]

Besides the above particular local circumstance, in a general plane, it is now truly undeniable that even when faced with classic federal or regional autonomies models, there is not a crystal clear separation between them. It is a given fact the multitude of specific solutions in existence in composite states, be it federal or regionalist ones. In contemporary times the once clear cut division between federations versus regionalized states has become a tenuous blurred even intermixed borderline.[72] It is not needed to point out significant differences at various levels among the federal legion, for example between Germany and Argentina,[73] nor between the regionalized states, as between Portugal and Spain. And it is not necessary also to advice

71 "The Special Administrative Regions of the PRC in Comparison With Autonomous Regions Models", paper given at the International Conference One Country, Two systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007. Chen, Albert, for example, states that "This Autonomy is quite Innovative, O conceito de um país, dois sistemas e a sua aplicação a Hong Kong, Taiwan e Macau", *Revista Jurídica de Macau*, special issue, 1999, p. 253

72 Domínguez García, Fernando, "Autonomy experiences in Europe – a Comparative Approach: Portugal, Spain and Italy", paper delivered at International Conference One Country, Two systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007, says, that "In recent decades, doctrine has shown a confluence between the concepts of federal state and regional state due to the centralisation processes undergone in the first, and the qualitative and quantitative increase in the powers of the second", and, "Many of the criteria defined as essentials of the federal state are also present in the states classified as regional (power of self-organisation, exercising of state powers), others have been 'demystified' (originating nature of the federated communities as well as their state and/or sovereign nature) or have been relativised (existence of their own legal power, participation in a second chamber of the national parliament and participation in the reform of the common constitution) . The majority of criteria that theoretically separate the federal state from the regional state are elements with a historic connection that explain how the federal state was formed…, Transferring historical determinants to legal reasoning entails the inoperancy of the notion of federal state beyond its simple nominalism in certain countries."; see also, for example, Vergottini, Giuseppe De, *Derecho constitucional comparado*, Mexico, UNAM/SEPS, 2004, pp. 326 ff .

73 An example among others, Antonio Hernandez tells us of a deep process of centralization in Argentina contrary to the federal model envisaged in its Constitution, "El federalismo a diez años de la reforma constitucional de 1994", *Cuadernos de Federalismo*, 2005, pp. 65 ff.

on the strong powers enjoyed by Italian and Spanish autonomous regions (irrespective of their designation, which also varies considerably) that make some author placing them in the federalism path. It is also well know that for several reasons that both federal and regionalized forms are gaining much ground and becoming more topical than ever.[74]

However, none of the above has posed a more complex challenge to the theorization of the composite state forms as the SARs of the People's Republic of China. In truth, it seems that is clear that one can, obviously, find elements of regionalism but also of federalism,[75] "No federal state of which I am aware would tolerate a similar degree of separateness or autonomy on the part of any one region within the same country".[76] Bearing in mind what was written supra, namely on the powers of the SAR, some characteristics can be deemed as almost federalistic or as incorporating a proto-federalistic phenomenon[77] but that does not seem to worry the PRC as long as it is still labeled as a normal unitary state and the formula works.

It has been proposed that Macau should be named an *Exceptional Administrative Region*, rather merely a "special" one, since "special" is insufficient to describe the nature of the SAR's status and the dimension of the

74 Haberle, Peter, "Current Problems of German Federalism", *Federalism and Regionalism in Europe*, ed. A. D'Atena, Napoli, 1998, pp. 119 ff. In this work one is given several reasons for this advance of the composite state, such as the "Europe of the Regions" factor.

75 For example, Rolla, Giancarlo, *The development of asymmetric regionalism and the principle of autonomy in the new constitutional systems – a comparative approach.*

76 Fung, Daniel, "Foundation for the survival of the Rule of Law in Hong Kong: The Resumption of Chinese Sovereignty", *UCLA Journal of International Law and Foreign Affairs*, 1, 1996-7, p. 292.

77 José Casalta Nabais describes a high degree of complexity and originality that does not fit any previous models, "Região Administrativa Especial de Macau, federalismo ou regionalismo?", *Boletim da Faculdade de Direito de Macau,* vol. 12, 2001, pp. 33-34. Or, as Marco Olivetti puts it, "In the case of the SARs, the lack of homogeneity not only is allowed or tolerated, but it is directly imposed to the Regions be their Basic Laws, up to the point that they couldn't even reduce or remove it (e. g. adopting a socialist system). Here lies in my opinion the core problem of every attempt to classify the SARs using the models created in the literature over territorial distribution of powers. None of these models and none of existing experience allows such a difference of political structure, of socio-economic model and of fundamental rights regulation between the centre and the autonomous entities like the one foreseen by the Hong Kong and Macao Basic Laws", "The Special Administrative Regions of the PRC in Comparison with Autonomous Regions Models", paper given at the International Conference One Country, Two Systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007.

powers that it enjoys.[78] This argument seems persuasive, given the nature of the autonomy outlined above, which does not fit into any category of existing autonomous entities or even states within federations —in truth, it seems that the SARs are vested with characteristics that go beyond any substate entity[79] and resemble a (non integrated) State in some circumstances.[80]

And that is why we ask if the SAR autonomy incorporates a sort of "new" federalism although anonymously. Do we have here *an anonymous federalism*? One does not forget the inexistence of some classical features of federalism, such as the *Kompetenz-Kompetenz.* As someone said, the regime of the SAR under the one country, two systems framework brings to the centralized state system some federalist characteristics, concluding that China now has a combined system of federalism and unitary state.[81] One will try to elaborate a listing, non exhaustive, of characteristics that point to the different forms. Due to lack of time and due to what is written elsewhere in this paper one will not present extensive explanations on most of the listed elements – therefore one asks to bear in mind the other parts of the paper.

Macau enjoys a high degree of autonomy, except in foreign affairs (with however significant exceptions) and defence. And "despite the use of the adjective 'administrative', its autonomy is political given that the scope is not merely administrative, but it also holds powers of a state nature, in what interests us here, legislative powers".[82] The package of powers allocated to

78 Bacelar Gouveia, Jorge, "A Lei Básica da Região Administrativa Especial de Macau – Contributo para uma Compreensão de Direito Constitucional", *Boletim da Faculdade de Direito*, No. 13, 2002, p. 195, asserts this position, on the basis of a schematic analysis that divides the juridical norms into general, special, and exceptional ones. "Of course, I am not seriously proposing changing the designation, since such a change would also call into question the use of 'administrative' in 'administrative region". As explained by Xu and Wilson, the problem was that he term 'autonomous region' had already been allocated in the Chinese system", *The Hong Kong Special Administrative Region*…, p. 7.

79 Casalta Nabais, José, *Região Administrativa Especial de Macau, federalismo ou regionalismo*?, p. 32.

80 Canas, Vitalino, *A extensão da autonomia, cit*, p. 240.

81 Wan Cheong, Ieong, *One China, Two Systems and the Macao SAR,* Macau, University of Macau, 2004, pp. 233-4.

82 Domínguez García, Fernando, "Autonomy Experiences in Europe – a Comparative Approach: Portugal, Spain and Italy", paper delivered at International Conference One Country, Two Systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007.

the SARs is huge and in a general view cannot be found even in formal and dynamic federated states.

The center Constitution has little to say besides a somehow enigmatic and empty norm, article 31 that declares, "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 specific conditions". Truly little can be retained from this legal narrative.[83] Why is this so? In the Preamble to its Constitution, the People's Republic of China proclaims itself to be a unitary multi-national state, thus not allowing —at least from a formal point of view— any kind of federalism.[84] It also prescribes socialism as the system practiced by the PRC. The scheme of administrative divisions it establishes also does not accommodate the idea of the SARs.[85] Thus the existence of

83 Marco Olivetti says, "there is no constitutional foundation of the autonomy of the SARs at the central level. Art. 31 of the Chinese Constitution is of course the constitutional base for the formation of Special administrative Regions, but in this article there is neither a list of these kind of Regions, nor is the objective situation in which a SAR must be created (these Regions can be created 'when necessary') described in a way that can limit the discretionary power of the NPC", "The Special Administrative Regions of the PRC in Comparison with Autonomous Regions Models", paper given at the International Conference One Country, Two systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007.

84 As Albert Chen warns, "The People's Republic of China (PRC) has always insisted that it is a unitary state and cannot accept a federal structure. The concept of a special administrative region (SAR) within the PRC with a high degree of autonomy, and the related concept of 'one country, two systems', represent a substantial modification of the original model of a highly centralised unitary state", "The theory, Constitution and Practice of Autonomy: the Case of Hong Kong", paper delivered at International Conference One Country, Two systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007.

85 The PRC Constitution incorporates significantly different approaches to regional autonomy, and even establishes different constitutional norms for the "domestic" autonomies and for the SARs in articles 30 and 31 respectively. Article 30 lists the administrative divisions of the state, including the autonomous regions, but not the special administrative regions which are provided for, as seen, in article 31. The PRC Constitution further develops the essentials of the domestic autonomy regimes in articles 112 to 122, whereas the framework for the SARs is established in their respective Joint Declarations and Basic Laws. One of the legal consequences of this formal differentiation is that the rules regarding domestic autonomies may be amended in any way the constitutional *legislatori* see fit, thus the legal status of those autonomies is basically dependent on the constitutional rules and does not derive from other norms such as, for instance, laws governing each autonomous entity. A simple *quantity test* comparison between the SARs and the other autonomy model in China reveals that the SARs enjoy a much wider scope of autonomy. Besides this quantitative as-

the Special Administrative Regions, and the wide scope of autonomy that they enjoy, do not fit into the scheme the Chinese Constitution establishes so, in order to accommodate their creation, Article 31 was created and somehow artificially implanted being surrounded by a context that does really not match so well and virtually isolated hence not to be surprised on the absence of a set of center constitutional rules establishing methods of policing boundaries.

The PRC took a highly pragmatic approach towards the questions of Macau and of Hong Kong:[86] the point was to resolve these issues and allow reunification, even if that meant actually *forgetting* the stipulations of the PRC Constitution to a certain extent. In formal terms, it created Article 31 as a sufficiently vague device to allow the incorporation of the SARs into the Chinese state as a "second system" enjoying a "high degree of autonomy". Article 31 was the necessary step to accommodate the constitutional framework to the international binding obligations that were to come. On the other hand, the center-subnational relationship machinery is, again with a flavor of originality, mostly laid in the Basic Laws rather than in the national constitution.

This augmented set of powers makes us learn to the idea that in a sort of counter balance exercise one *rearranges* the whole picture and push up the framework of the SARs from a formal *mere* region lacking some characteristics connatural to federations to something else. And that is why we ask if the SAR autonomy incorporates a sort of "new" federalism although anonymously. Do we have here *an anonymous federalism*?[87] As already said, the regime of the SAR under the one country, two systems framework brings to the centralized state system some federalist characteristics, con-

pect, other important differences shape the nature of the SARs: their foundation in an international agreement, the limited timeframe, and the set of 12 policies agreed bilaterally. Thus the difference between the autonomous power enjoyed by the SARs and the autonomous areas is not only one of degree, but most importantly of their nature.

86 Gaolong, Liu, "O estabelecimento das Regiões Adminsistrativas Especiais traduz-se num grande desenvolvimento estadual", *Boletim da Faculdade de Direito de Macau* , vol. 12, 2001, writes that in a unitary country the position of the SARs enjoying such a high degree of autonomy is unique, thus it constitutes a new departure in the organization of the state, p. 93.

87 Our, *The judicial guarantees of fundamental rights in the Macau legal system – a parcours under the focus of continuity and of autonomy*, *cit*.

cluding that China now has a combined system of federalism and unitary state.[88]

In brief one can propose the following melting pot on the characterization of the SARs status:

— *Less than (political) regionalist elements:* The Chief Executive —as well as the principal officials of the government and the Procurator General— is appointed by the centre and shall be accountable to the Central People's Government.
— As for the *regionalist elements of the SAR*: The formal label of both the SAR and of the PRC, the first stating to be a region, this proclaiming it is a unitary state. The lack of power of the SAR to decide on its own on its constitutional law, as the competence to enact and change the Basic Law is deposited outside the SAR – although, as seen, in a limited way by reason of an international treaty and the impossibility of secession from the SARs. *Authentic* interpretation of the autonomy chart residing outside the SAR.
— *Federal elements of the SAR:* The existence of a political system and organizational framework with its own legislative, executive and judicial power.[89] Both defense and, as rule, foreign affairs resting in the centre. Existence of a Constitution, at least in a material sense, named Basic Law.
— *Statehood elements of the SAR*: Among others, existence of judicial power including that of final adjudication, hence non possibility of any competence, be it *prima facie* be it by way of appeal mechanisms

88 Wan Cheong, Ieong, *One China, Two Systems and the Macao SAR,* Macau, University of Macau, 2004, pp. 233 and 234. Underdown, Michael, uses the interesting expression "federalism Chinese style", "Legal Issues in a Federal State: Protecting the Interests of Macau", *Boletim da Faculdade de Direito de Macau,* vol. 12, 2001, p. 55. Davis, Michael C., "The Case for Chinese Federalism", *Journal of Democracy*, vol. 10, 2, April 1999, poses the question of federalism in China and of confederacy and proposes a concept of economic federalism already in force but unaccompanied by a formal constitutional one, pp. 128 ff.

89 See, for example, Olivetti, Marco, "Federalismo e regionalismo in Europa", in Groppi, T. *et al*. (a cura de), *Nuevos rasgos de la administración local en Europa*, Queretaro, Fundap, 2005. However, as the author states, even in some federations, as in Austria and Belgium, the judicial power rests only in the federation and is not shared with the federated units.

of any court of the mainland.[90] A self contained system of fundamental rights and non application of the centre Constitution. The non application of the Chinese Constitution to the *private sphere* in Macau, residents of Macau as such are not under the scope of application of the Chinese Constitution be it in the fundamental rights sphere, or as tax payers, etc. The non application of the centre laws as a rule and the exceptions are subjected to the regime contained in the Basic Law. Hence, as in above, the basic rule is that the Macau residents are in no way subjected to mainland laws thus meaning that the issue of supremacy of centre laws *vis-à-vis* regional ones is not even an issue.[91] The international law personality.[92] The existence of total separateness of finance and tax systems.[93] The issuing of its own currency. As well as of a separate customs. The separateness of its own social system.

What we call, in the lack of a better expression*, uncategorized/unique elements:* The measurement of international law capacity of the SARs that goes far beyond those present in autonomous regions, even more than "regions" with *shared* sovereignty such as New Caledonia,[94] and even more far than federated states.[95] However, it has less capacity than an independ-

90 For example, in Germany, the Federation courts have a degree of competence by appeal to rule on decisions of the federated courts, see Benda *et al*., *Manual de derecho constitucional*, Marcial Pons, p. 661. Note, however, in the case of the SARs the political mechanism of interpretation.

91 See, Olivetti, Marco, "Federalismo e regionalismo in Europa", *cit*., note 89.

92 See, for example, Bacelar Gouveia, Jorge, *Manual de Direito Internacional Público*, 2nd Almedina, 2004, pp. 456-457, Cardinal, Paulo*, International Law Notes*, Universidade de Macau, 2006, *passim*.

93 Articles 104 and 106 expressly use the word "independent" to characterize these systems.

94 See, among others, Dormoy, Daniel, "Les Relations Extérieures", *La souverainité partagée en Nouvelle-Calédonie et en droit compare* (dir. Jean-Yves Faberon/Guy Agniel), La documentation Française, 2000, pp. 350 ff., Goeesel-Le Bihan, Valérie, *La participation des departments et regions d´outre-mer à la conclusion des accords internationaux: essai d´analise générale*, RFDC, 65, 2006, pp. 3 ff.

95 See, for example, Casalta Nabais, José, "Região Administrativa Especial de Macau, federalismo ou regionalismo?", Henders, Susan J., "Region-States and the World: China Pushes the Envelop", *Policy Options*, January-February, 2000, pp. 87 ff, namely the data provided compiling the nonstate actors activity in international law and both Macau and Hong Kong are high in the rankings and in the case of Hong Kong it is surpassed only by a will be State —Palestine— and an associated one.

ent State and has a domestically drawn line of what is it and what is not in its sphere. The accession of Macau to the centre is bilateralized, as in federations; however it was in a horizontal fashion,[96] rather than vertical (no matter in ascending move or descending). Besides, it was the result of an international treaty in which it took no part; instead it was not the subject of it but its object. The autonomy frame is internationally plugged/guaranteed, as in some known cases of regional autonomies, but in a more detailed manner on one hand however with a limited timeline on the other hand. [97]

All seen it is certainly possible one conclusion without *fear* of being contradicted: the SARs incorporate traditional characteristics of several models. After the easy conclusion one can try to reach another one far more difficult to attain: balancing all the elements, all the contradictory simultaneous characteristics one may ask if, in truth, we are looking at a new kind of federalism albeit imperfect (either for having less or having more than federated states), faceless. Anonymous.

As for the dynamics of the SAR autonomy, as in *opposition* to the previous legalistic fashion, the focus of our attention has been on the words of autonomy, that is to say the norms that create and regulate it, both in the Joint Declaration and in the Basic Law. But, as said elsewhere,[98] a norm is not a proper norm solely as words; a juridical norm only becomes so when interpreted and applied. For these operations people are necessary. It is necessary to look at the dynamics of the system, to the way it is applied, to the way it is operated in the day-by-day breathing of the Hong Kong and Macau's autonomy, in other words the way that the factual dimension shapes in concrete the Macau's SAR autonomy sphere.

It seems undeniable that the actual destiny of the SARs's autonomy rests in the hands of the people who govern it. Given the regulatory construction, how it functions is then up to those who operate it, elaborate it, and shape it. In this exercise the scope of autonomy will be constructed. The dialectic tension inherent in autonomy phenomena —the central entity and

96 Casalta Nabais, José, "Região Administrativa Especial de Macau, federalismo ou regionalismo?", *cit*., note 95, p. 31.

97 Others add to this melting pot some characteristics of confederations. Olivetti, Marco, "The Special Administrative Regions of the PRC in Comparison with Autonomous Regions Models", paper given at the International Conference One Country, Two Systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007.

98 Cardinal, Paulo, *Macau: the internationalization*, *cit*.

its leaders will tend to push back the boundaries of autonomy, while the autonomous entity and its leaders will tend to enlarge its boundaries — will inevitably come into play. Borrowing a curious formulation, one could see this as "one countryers on one side and "two systemers"[99] on the other — the proponents of sovereignty versus the proponents of autonomy.

V. The basic law as the (major component of the) Macau SAR Constitution

One must ask that not being China a formal federal state it makes any sense at all to refer to a principle of having a Constitution for the Macau region. One should not refer to a constitutional autonomy in its full sense, namely the power to produce its own constitutional text.[100] It should be enough to apply the Chinese Constitution in its entirety and, on a lower level ordinary legislation, be it centralized one or local one. This choice however was putted aside as we all well know. China's attitude towards the questions of Macau and Hong Kong *legated by the past* was extremely pragmatic (and innovative) thus imposing a similarly impregnated analysis. It was said that

> Constitutional autonomy is also the possibility of an autonomous territorial being —state, region— granting itself a "constitution" ("statute", "basic law") in order to stabilise its own organization and define its identity. In the case of Macau there was no real constitutional autonomy in this sense (and, wherever it exists, it is always limited), but the Joint Declaration and the Basic Law aim at finding the essential dimensions of organizational stability and the political, historical, economic and social identity of the territory.[101]

99 Benny Tai, "One Country Two Systems: the two perspectives", *Macau Law Journal*, special issue, 2002, pp. 150 ff.

100 One does not forget the inexistence of some classical features of federalism, such as the *Kompetenz-Kompetenz.* Jorge Bacelar Gouveia warns that, in spite of the extraordinary scope of autonomy and the existence of powers that not even federated states have, the Macau SAR cannot be deemed as something similar to a state in a federation since it lacks an essential power, that is the power to enact its own constitution, "A Lei Básica da Região Administrativa Especial de Macau – Contributo para uma compreensão de direito constitucional", *Boletim da Faculdade de Direito*, No. 13, 2002, p. 197.

101 Gomes Canotilho, "The Autonomy of the Macau Special Administrative Region – Between Centripetism and Good Governance", paper delivered at International Conference One Country, Two Systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007.

On the other hand, the Joint Declaration stated that the above-stated basic policies and the elaboration of them in Annex I to this declaration will be stipulated in a Basic Law of the Macau SAR. One more emanation of the above mentioned principle of obedience to the Joint Declaration basic policies. Along with this, one must underline that the constituent power of the sovereign was not unlimited and unrestricted but, on the contrary, owes allegiance to the international treaty it signed with a counterpart sovereign state. In this sense, the so called constituent power of the Chinese body competent to enact the SAR Basic Law has limitations and it is not absolute. This is one of the several imaginative operative schemes envisaged to the SARs being functionalized, we believe, to contribute to the success of the formula even if meaning a contained rupture of the domestic absolute domain of the Chinese Constitution.

The above potential point of critique clarified, we hope, it must be said that the Basic Law constitutes the formal domestic legal instrument that details the constitutional organization of the SAR, including its political system, its autonomy, as well as the non-organisational constitutional frameworks such as in the fields of fundamental rights, economy, and social issues. This legal document has the appearance and the structure of a formal Constitution and has been called a "mini-constitution" or a "para-constitution". To us, the main point to stress, with or without "mini" or "para" or other similar qualification expressions, is that the Basic Law is, in the SAR legal system, a (the) constitutional law. It is a material constitution if not even a formal one.[102] In fact, if one looks at the legal order of the Macau SAR, the Basic Law is the highest source of the domestic legal system Besides, as Giancarlo Rolla putted it,

> Further evidence of the constitutional nature of Basic Law is provided by the fact that its revision may be carried out only by way of a special procedure, a "reinforced" procedure… which cannot be amended by the national People's Congress except following specific procedures.[103]

102 Bacelar Gouveia, Jorge, "The Fundamental Rights in Macau", paper given at the International Conference One Country, Two Systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007. "The constitutional nature of the Basic Law derives also from its content. Many of the topics it covers are materially constitutional".

103 "The development of asymmetric regionalism and the principle of autonomy in the new constitutional systems – a comparative approach", paper given at the International Conference One Country, Two Systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007.

One must refer again to the Joint Declaration and its *twelve commandments* that are mandatory and must be lay down in the Basic Law and cover several main features as known. We are faced with a relationship between these two preeminent sources of law of an exceptional nature, that might together be considered as forming the constitutional block of the SAR (along with article 31 of the PRC Constitution and some other norms on competence), sewing special links and cross-references.

In a general view functionalized to the densification and guarantee of the constitutional system of fundamental rights, as to what relates to the constitutional order of Macau one can bring in here a tentative list of principles at work in the SAR:

> At the above light, we can address the following, the principle of obedience to the Joint Declaration basic policies, the principle of a constitution, the principle of continuity, the principle of the second system within the one country, two systems one, the principle of autonomy, the principle of democratization, the principle of a own and distinct legal system, the principle of constitutionality, the principle of legality, the principle of separation of powers, the principle of independent judiciary. In other words, the principles that add to the protective web of the fundamental rights system and that, along with the ones of the fundamental rights system proper, shape it into a *pro libertate* one. Listing that is done from the perspective of the periphery or, if one prefers, from the stand of the subnational unit, not from a center point.[104]

An overview of the constitutional fundamental rights system principles – *reinforcing the other side of the Great Wall*

We will deal with *benign* principles rather than malignant ones in the perspective of a *good,* reinforced, *pro libertate* system.[105] This means nec-

104 This explains, for example, why we elected the "two systems" segment and not the "One country" counterpart. We are not in any way diminishing the paramount importance neither of this one nor questioning the idea of Chinese sovereignty.

105 On the Macau system of fundamental rights, our "Os direitos fundamentais em Macau no quadro da transição: algumas considerações", *Cuestiones Constitucionales*, *cit*., note 35; Canas, Vitalino, "The General Regime of Fundamental Rights in the Basic Law and in the International Instruments", paper presented at the Conference One Country, Two Systems, Three Legal Orders – Perspectives of Evolution, Macau, 2007, Bacelar Gouveia, Jorge, "Fundamental Rights in the Macau legal system", paper presented at the above conference. For Hong Kong, for example, Ghai, Yash, Hong Kong's New, *cit*., Young, Simon, "Restricting Basic Law Rights in Hong Kong", *Hong Kong Law Journal*, vol. 34, part 1,

essarily that the list to be presented is an incomplete one. At this light we will not address, for example, the principle of minimum content in the constitutional normative text. In fact, the text of the Basic Law concerning fundamental rights is extremely economical not opting for an immediate densification of the given right –much in contrary to the previous constitutional order. On the other hand we will address the principle of effective judicial protection in the next section.

In general we can say that, as demanded by the Joint Declaration, commanding that all rights and freedoms of the inhabitants and other persons will be ensured in the Macau SAR, the local Constitution established a wide catalogue of fundamental rights and several principles of guarantee impregnated with a *westernalized* approach thus contributing to one more ground of differentiation *vis-à-vis* the sovereign besides the usually more adulated group of economy differentiations. The maintenance of capitalism was undoubtedly one of the driving forces of the new constitutional order of the SARs[106] but also the democratic principle (the question remains only as to its extent and scope,[107] not its existence) and the continuity of the fundamental rights *guarantistic* and pre existent system in its general delineation such as wide listing, enforcement, guarantees, high value of, no

2004, and "The Basic Laws and the fundamental rights in the SARs", paper presented at the above mentioned Conference.

106 For a critique see, Gomes Canotilho, "the basic idea of 'one country, two systems' does not have to be interpreted in a strictly functional sense. The autonomy of the Macau Special Administrative Region is not an organizational skeleton exclusively directed at the maintenance of a capitalist system. It is an organizational autonomy (regarding the horizontal distribution of power) structural-internal (regarding the division of power among the different levels of government) and structural-external (regarding the competence in external affairs) that allows for a legal and political support to the substantive constitution of Macau (and not just the capitalist system)", "The Autonomy of the Macau Special Administrative Region – Between Centripetism and Good Governance", paper delivered at International Conference One Country, Two Systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007.

107 Referring to Hong Kong, Chen, Albert, says "Here it must be pointed out that the domestic political system of the HKSAR falls short of international standards of democracy", and "I would characterize the present political system of Hong Kong as one with constitutionalism but only partial democracy", thus meaning that although without a very high degree the fact remains that democracy is present, "The theory, constitution and practice of autonomy: the case of Hong Kong", paper delivered at International Conference One Country, Two Systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007. The author further states that "On the other hand, the Basic Law does provide for the possibility of further democratization of the SAR". Noting that there are however still legal and political limitations to a full democracy.

unconditional submission to the collective, *local* rather than center methods and ideology of interpretation and application as to be seen.

One can easily read in article 11, 1 of the Basic Law, the preeminent values that, following in the steps of the Joint Declaration, were the driving force in shaping Macau's Constitution once the resumption of sovereignty was effected under the one country, two systems principle: the systems and policies practised in the Macau SAR, including the *social and economic systems*, the *system for safeguarding the fundamental rights and freedoms* of its residents, the *executives legislative and judicial systems*, *and the relevant policies*, shall be based on the provisions of this Law (emphasis added). Those comprise the contents of the constituent decision for the Basic Law for the Macau SAR.

1. *The principle of safeguarding*

Article 4 of the Basic Law solemnly states that "The Macau Special Administrative Region shall safeguard the rights and freedoms of the residents of the Macau Special Administrative Region and of other persons in the Region in accordance with law". This normative principle is in line with provisions of the Joint Declaration as well as other norms of the Basic Law such as article 11.[108] It is definitely commanded an *idea* of safeguarding the rights and freedoms, most especially the fundamental ones thus not allowing policies that will undoubtedly position itself as anti fundamental rights ones. The safeguarding of fundamental rights is a mandatory general principle of conduct.

Its connection with the continuity principle is self-evident and together they form a structural rector principle (and philosophy) of respect of fundamental rights, in line with the legate transferred to the new juridical person —the SAR— in the new constitutional order.

Some corollaries of this principle of safeguarding can be for example the *popularization* of fundamental rights as well as some legislative provisions for example, in non procedural guarantees norms as well as in adjudicative ones such as in the Civil Procedure Code and in the Adminis-

108 It is emblematic, and some substance must arise from it, that in the Chapter I of the Basic Law on general principles two of them expressly address the fundamental rights issues in general. There is one more on a specific fundamental right of private property, article 6. Ieong, Wan Chong, says that this circumstance means that the Basic Law wished to underline the important status of the rights at stake in a democratic policy, *Anotações à Lei Básica da RAEM*, Macau, 2005, p. 39.

trative Procedure one. There is an evident intimate relation between this principle and the one of effective judicial protection.

2. *The principle of continuity of fundamental rights*

Besides the general principle of continuity, the Joint Declaration, and the Basic Law, states that all fundamental rights and freedoms will be ensured thus ensuing an autonomic dimension of the principle of continuity thus reinforcing it in this field. The continuity principle is the guideline; hence, the idea of "permanent" fundamental rights in spite of the transition of the legal system.[109] This principle constitutes itself as a true cushion on the fundamental rights and as Vieira de Andrade states

> the imperative of maintaining the laws previously in force basically unchanged is an imperative of the maintenance of the system (that is, of its essential norms, those that constitute its characteristic core including, for example, a norm that forbids the death penalty) and subsequent prohibition of an unjustified downgrading via legislative act.[110]

Glancing in general the principle of the continuity of the legal system and advancing to what refers concretely to the fundamental rights, we borrow words from the Joint Declaration on the question of Macau, *passim*, The laws currently in force in Macao will remain basically unchanged, all rights and freedoms of the inhabitants and other persons in Macau, including those of the person, of speech, of the press, of assembly, of association, of travel and movement, of strike, of choice of occupation, of academic research, of religion and belief, of communication and the ownership of property will be ensured by law in, the MSAR shall, according to law, ensure the rights and freedoms of the inhabitants and other persons in Macau as provided for by the laws previously in force in Macau.

109 Our, *Permanent Fundamental Rights in a Legal System in Transition*, Lawasia, Seoul, 1999. This apparently paradoxical relationship —transition versus continuity— can be defined as a political and diplomatic formula created to ensure some balance between the resumption of sovereignty by a sovereign state and respect for the history, culture (including the legal culture), and specific identity of Macau. It also acts as a vote of confidence in the future by respecting the past. So, if it is true that we faced a change in the landlord in Macau, it is also true that the transition will not eliminate what existed before December 1999, but on the contrary it will maintain it, or continue it.

110 *Direitos e Deveres Fundamentais dos Residentes em Macau*, FDUM, s/d.

It seems, in this way, legitimate to conclude for the existence of a will of the two signatory sovereigns of the Joint Declaration in keeping, in obedience to the continuity, a certain *status quo*[111] and, thus, irradiate a reliable capital in the people of Macau, after all, the main addressees of these fundamental rights. Being true that there was a transfer of sovereignty powers, it also is true to affirm that with the consumption of this transference, it was not proceeded to the elimination of the past but, rather the opposite, it was assumed this past, respected this legacy and is intended, inside some coordinates, to keep it.[112]

At this light of continuity, it matters to survey if the current situation mirrors integrally what would be the ideal picture and find out if there are issues of discontinuity. The reply to give it is that the current situation does not mirror the previous one in a total satisfactory form.[113] With effect, and without forgetting the general director principle[114] decreed in the article 4 of the Basic Laws establishing that the SAR assures, in the terms of the law, the rights and freedoms of the residents of Special the Administrative Region and other people in the Region, and article 11, in which, beyond the cited general rule it finds consecrate, the internal constitutional platform of the Basic Law as norm parameter of all other, there are some issues that the Basic Law did not address, like the right to life and some rights and guarantees *vis-à-vis* the administrative bodies, among others, or it delineated solutions substantially divergent of those that were in force in the territory of Macau as in the measure of densification borrowed immediately in the constitutional norm to a given fundamental right.

Focusing on the wording of the Macau Basic Law and of the Joint Declaration, the Basic Law reproduces almost integrally, the list that pre-existed but whilst before 1999 the constitutional rules developed and detailed

111 Vitalino, Canas, say, "we can support the existence of a Macau unwritten law acquis, comprising a set of rules on the restriction of the fundamental rights that go beyond the ones expressed in the Basic Law and the ones withdrawn from the exegesis of the own ICCPR by their authors. Nowadays, in Macau, those rules have not any written expression. Certainly, it would be safer if they had it", *The general regime cit*.. As for the later need we concur, see our "Os direitos fundamentais em Macau no quadro da transição: algumas considerações", *Cuestiones Constitucionales*, *cit*., note 35, p. 56

112 Miranda, Jorge, *Manual de Direito Constitucional*, 2nd., t. IV, p. 191.

113 Torres, Pinheiro, *Interesses públicos e interesses privados – A perspectiva da transição,* BFDM, 11, 2001, p. 206. Some tell us *of provisions that are problematic*, Hurst Hannum, *Autonomy, sovereignty, and self-determination*, rev. edition, UPP, 1996, p. 147.

114 Ghai, Yash, *Hong Kong´s New Constitutional Order,* 2nd., HKU Press, 1999, p. 423.

the fundamental rights,[115] thus construing a protective web of constitutional standing around each right. Differently, the Basic Law seldom goes beyond the simple establishment of the rights.[116]

Very importantly, one of the most outstanding gaps refers to the regimen of exercise of fundamental rights[117] that is, how and with design can be introduced restrictions to the rights and freedoms guaranteed for the Basic Law?[118] And, what principles discipline these restrictions? Which are

115 Rolla, Giancarlo, *Garantía de los derechos fundamentales y justicia constitucional*, Mexico, Porrúa-IMDPC, 2006, pp. 65 ff. Proves us exactly that the trend is going on the way of creating extensive and detailed catalogues of fundamental rights in the new constitutional texts, pp. 2-3.

116 To illustrate this thesis, we reproduce some of the constitutional norms. Basic Law, Article 27 "Macau residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike". The equivalent rights are, in the Portuguese Constitution settled by, and in, articles 37, 38, 46, 45, 55, 56, 57, among others, that are connected to or develop aspects of those fundamental rights. It would be inadequate to reproduce all those constitutional norms. Anyway, these examples seem to be enough to substantiate our conclusion on the different density levels of both constitutional laws. Simon Young says "the statement of rights in terse, vague and non-descriptive language is another commonality", "The Basic Laws and the Fundamental Rights in the S.A.R.s", paper presented at the Conference One Country, Two Systems, Three Legal Orders – Perspectives of Evolution, Macau, 2007.

117 As Simon Young say, "the Basic Laws are silent on many significant issues that relate to the actual enjoyment of the rights provided", "The Basic Laws and the fundamental rights in the S.A.R.s", paper presented at the Conference One Country, Two Systems, Three Legal Orders – Perspectives of Evolution, Macau, 2007. Echoing similar worries and pointing out, namely, issues of interpretation and application, Liuting Wang, *Macao´s return cit.,* p. 203.

118 On this Bacelar Gouveia, Jorge, *Lei Básica, cit.,* pp. 187-188, where he points out the existence of a single mention to the regimen of fundamental rights, precisely on the restrictions —article 40 second paragraph— stating that , "in its simplicity that is a rule rather limited since being necessary in some cases, the fundamental rights restrictions naturally presupposes material intrinsic limits, that may guide the restrictions normative power and place it under parameters superiorly defined such as the principles of protection of the essential nucleus or of the proportionality". The scope of the article 40 is however, in our view, a bit vaster in the sense that those restrictions cannot go beyond what is established in the covenants. On this, also Weijian, Luo, "A Lei Básica – garantia importante dos direitos e liberdades dos residentes de Macau, Administração", n. 19/20, p. 113. As for the counterpart norm in Hong Kong, Ghai, Yash *op. cit*., p. 445, Young, Simon, "Restricting Basic Law Rights in Hong Kong", *Hong Kong Law Journal*, vol. 34, part 1, 2004, stating at p. 111, "the only sensible and coherent approach is to treat all Basic Law rights as autonomous ones having the potential to bloom beyond the minimum standards of the ICCPR" e " it is noteworthy that these two restriction clauses are framed in the negative, rather than in the

the restrictions to the restrictions? Which rights and freedoms will not ever be able to be suspended?[119] Let's proceed by listing some of the *vexata quaestio* not constitutionally decided currently in the Basic Law:[120] are there in the Basic Law, other fundamental rights besides those not enrolled in Chapter III? In other words, does the system admit the existence of analogous fundamental rights in constitutional *headquarters*? Does it admitted equally for analogous fundamental rights with international law rules source? And, how about with legislative act *headquarter*s? As one can verify the simple enunciating of questions allows perceiving that, in this issue, many uncertainties still hang, or in other words, many grey zones subsist.

3. *The principle of self containment and of exclusivity*

This principle of a self contained system of fundamental rights and of exclusivity constitutes one of the key characteristics of both the Macau constitutional system and of the fundamental rights one.[121] It is intimately connected with others, such as the principle of autonomy, to which is one of the master components, and with the one country, two systems one, exis-

positive or permissive form … the two restrictive clauses should be seen as constitutional safeguards providing a safety net for, rather than a ban on, human rights standards".

119 We are making reference to the regimen, established namely in articles 18 and 19 of the Portuguese Constitution. Just as a memory exercise we will briefly remind the regimen set out in these articles by the time they were fully enforceable in Macau. Article 18 states that the constitutional provisions relating to rights, freedoms and guarantees are directly applicable to, and binding on, both public and private bodies; those rights may be restricted by law (hence not by an administrative regulation) only in those cases expressly provided for in the Constitution and restrictions shall be limited to the extent necessary to safeguard other rights and constitutionally protected interests and laws restricting these rights shall be general and abstract in character, cannot have retroactive effect nor limit, in extent or scope the essential content of the constitutional provisions. Article 19 provides, namely, that it's not possible to suspend the exercise of those rights, except where a state of siege or a state of emergency has been properly declared; the proportionality principle must be applied and, in any case should not be possible to suspend the exercise of, among others, the rights to life, personal integrity, defence of accused persons, freedom of conscience and religion.

120 For a more extensive list, Cardinal, Paulo, "Os direitos fundamentais em Macau no quadro da transição: algumas considerações", *Cuestiones Constitucionales*, *cit*., note 35, pp. 57-58.

121 As we stated, for example in, *Macau: the internationalization cit*.. See also, "A first approach reveals the nuclear character of the positive legal sources of the fundamental rights, as a result of their recognition being totally autonomous with regard to the constitutional law of the People's Republic of China", Bacelar Gouveia, Jorge, *The fundamental rights in Macau*, *cit*.

tence of a constitution and of a charter of rights, etcetera. On the other hand, it presents to the fields of comparative constitutional law a challenging and unique case study. Thus, we should first pose the issue in context, which is to say with the federal and regional autonomy models.

In composite states the system delineated for the fundamental rights establishment and guarantee is in normalcy anchored in two different complementary domains: the center constitution on one hand and, on the other, the subnational one:[122] a particularly true assertion in formal federations but also in some regionalized states even if the techniques used vary in a great manner.[123] When, however, one is faced with a monolithic source, that role rests upon the center and never on the subnational units thus being the center the superstructure source of fundamental rights in an exclusive manner and not the other way around. That is, with the remarkable exception of the SARs of the PRC, at least to a very great extent, hence the idea-principle we tried to convey immediately in the title of this paper: non duality of domains (composite plus component) and exclusivity principle benefiting not the center but instead the subnational units. Exclusivity both in the sense that the national constitution does not apply —but, instead, a basic law that even if approved by the center cannot be shaped freely and

122 "Hence a double security arises to the rights of the people", Madison, James, *Federalist, No. 51*, The Federalist Papers, Hamilton /Madison / Jay, Signet Classic edition, 2003, p. 320.

123 Even within the same federal composite entity, as for instance the case of Mexico, in which three methods of subnational fundamental rights system cohabit, a) a general clause of incorporation stated in the local constitution establishing that the inhabitants of that state enjoy the rights enshrined in the federal constitution, b) with or without the general clause of incorporation the local constitutions reproduce the federal catalogue or part of it, c) the arid way by which one does not found the general clause of incorporation, neither a comprehensive catalogue but sparse references to given fundamental rights. On this and for further development, Carmona Tinoco, Jorge, "La incorporación de los derechos humanos en las Constituciones locales mexicanas. Derecho y seguridad internacional", in Méndez Silva, Ricardo (coord.), *Memoria del Congreso Internacional de Culturas y Sistemas Jurídicos Comparados*, México, UNAM, 2005, pp. 366 ff. Or even in terms of timing as in the case of the United States where some local units preceded the federal one in establishing fundamental rights as, among others, Pennsylvania, Vermont and Maryland; on this, see, for example, Toth Beasley, Dorothy, "Federalism and the protection of individual rights: the american state constitutional perspective", in Katz, Ellis / Tarr, Allan, *Federalism and Rights* (ed.), Rowman & Littlefield, 1996, pp. 102 ff. For a concise view of the historical evolution in the United States until the so-called new judicial federalism, Barceló Rojas, Daniel, *Introducción al derecho constitucional estatal estadounidense*, México, UNAM, 2005, pp. 75 ff.

has to obey an international treaty— and in the sense that only the regional courts are competent to intervene even in final adjudication.

As specifically dealing with autonomous regions bills of rights, Marc Carrillo stated on the controversial issue of creating an autonomous region bill of rights in Catalonia[124]

> the contributions of comparative law, in which the decentralization of the political autonomy have allowed declarations of (fundamental) rights and freedoms of sub state entities, incorporate at its constitutional or statutory legal texts bills of rights as a form of expressing their own political identity. Thus, and assuming the superior guarantee provided by the Federal Constitution or the State Constitution to the fundamental rights, the institutional norm of the sub state entity (Lander, State, Province, Autonomous Community or Region) specifies and develops the scope of the fundamental rights preexistent…[125]

We know that even in sub state entities such as autonomous regions, it is possible to find a detailed chapter on fundamental rights incorporated in the autonomy act. But, it also shows us that those *regional* rights are connected to, and owe obedience to, the fundamental rights inserted in the sovereign Constitution. They share a scope of application and they do not preclude one another. In federal states one find similar situations whereby a given citizen is the recipient of a double origin set of fundamental rights – the state Constitution and the federal one. In some cases, the state Constitution does little more than to declare that the *federal* fundamental rights are received by the *subfederal* Constitution,[126] in other cases the local Con-

124 See a critique in, for example, Ferreres Comella, Víctor, "Derechos, deberes y principios en el nuevo Estatuto de Autonomía de Cataluna", in *Derechos, deberes y principios en el nuevo Estatuto de Autonomía de Cataluña*, Foro, CEPC, Madrid, 2006, pp. 9 ff.

125 "La declaración de derechos en el Nuevo Estatuto de Autonomia de Cataluña: expresión de autogobierno y límite a los poderes públicos", in *Derechos, deberes y principios en el nuevo Estatuto de Autonomía de Cataluña*, *cit*., note 124, p. 70.

126 For example, in federal Mexico the Constitution of Coahuila in which is stated in its article 17 that "*the residents of the State have, besides the rights conferred in the general Constitution of the Republic, the following*:" … On the Mexican federated constitutions new tendency in establishing mechanisms of protection, see, for example, Fix-Zamudio, Héctor / Valencia Carmona, Salvador, *Derecho constitucional mexicano y comparado*, 4th ed., Porrúa, 2005, pp. 924 ff. In varying degrees these state Constitutions establish some fundamental rights and with an important ratio being occupied by *local-cultural-language based* rights. In Germany, some states do not establish a fundamental rights catalogue at all, for example Hamburg, see on this Hartwig, Matthias, "Los derechos fundamentals en la

stitutions provide for a rich catalogue of fundamental rights but still open the door for the application of the federal based fundamental rights. Naturally, in regionalist states the absence of fundamental rights in the local basic law is more widespread and evidently the rule of the application of the fundamental rights established in the (centre) Constitution is intangible. In view of all this one can thus talk about a domestic multilevel protection in fundamental rights.[127]

Very differently is the situation of the Chinese SARs as already mentioned. The center constitution simply does not have a say in establishing fundamental rights in the regional level. Again, we resort to article 11, 1 of Basic Law the systems and policies practised in the Macau SAR including the system for safeguarding the fundamental rights and freedoms of its residents, shall be based on the provisions of this Law. This principle proves, beyond doubt that at least in the referred areas of article 11, in the case at stake concerning the system of fundamental rights, there is no place at all for the Chinese Constitution in the Macau or the legal system. In this sense, the SAR example is unique and embodies quite the opposite stance to known examples of composite states, and its fundamental rights system mirrors more a sort of *fundamental rights declaration of independence* rather than of a declaration of autonomy, when compared to the above mentioned situations, both in federal and non federal states, where the rule is the applicability of the Constitution of the sovereign State, in spite of the existence of substate charters of fundamental rights nor of its contents and extension. In short, there is not in the SARs a domestic multilevel system of fundamental rights —in sharp opposition to any known model of composite States.

Specifically concerning the issue of fundamental rights Macau enjoys statehood like fashion situation or status, be it in its establishment in constitutional terms as seen before because the Basic Laws are not the product

República Federal de Alemania y sus Lander", *Derechos y libertades en los Estados compuestos*, Aparicio, Miguel (ed.), Atelier, 2005, p. 149, for the USA, see, for example, Tarr, Allan, "Federalismo y la protección de los derechos en los Estados Unidos", in *ibidem*, telling us of the role of both sources, federal Constitution plus state Constitutions, pp. 42 ff. In Belgium, the federated units do not have a charter of fundamental rights, on this and the explanations for it, Verdrussen, Marc, "La protección de los derechos fundamentales en el Estado Federal Belga", in *ibidem*., pp. 170 ff.

127 Castellá Andreu, Josep, "El reconocimiento y garantía de los derechos y libertades en los Estados compuestos. Una aproximación comparada", in *Derechos y libertades en los Estados compuestos*, *cit*., note 126, p. 13.

of an exclusive an unrestricted will of the sovereign, its detailing in legislative fashion, its application, both in administrative and judicial terms, its popularization, its changes, its ideology.

This self-contained system constitutes one of the most important and distinctive features of the Macau subnational entity in which, contrary to known examples, in federated states —such as, for example in Germany, Mexico, or the USA – and in autonomous regions —namely the Portuguese, Spanish and Italian ones—, there is no available place for the application of the central Constitution nor for the central courts machinery. And this is not even due, as in Quebec for example, trough a fashion like derogation temporal specific clause, the override clause.[128] The fundamental rights articulated in the Chinese Constitution do not extend into Macau's *new* legal order.

Some Chinese constitutional norms are *applicable* to Macau, namely those dealing directly with the SAR (organizational-competence norms) but the subjects towards those rules are Chinese bodies rather than SAR ones.[129] However, that is not the case in relation to fundamental rights[130] due precisely to the autonomous character of the SAR, therefore neither Chinese constitutional norms nor the nature and spirit of their interpretation in the PRC system may be used to reduce or to enlarge the scope and content of the rights system or of any given right in Macau.

Thus on these matters the Basic Law shields Macau from the correlative norms of the PRC Constitution. At least in the field of fundamental rights one has crystal clear water divisions in excluding the applicability of the Chinese Constitution. In other words, the system of fundamental rights is self-sufficient and concedes to outside norms only to the extent properly allowed, such as regarding the international covenants and also to ensure concurrence with the stipulations in the Joint Declaration, namely by es-

128 On this, for example, Rolla, Giancarlo, *The development of asymmetric regionalism and the principle of autonomy in the new constitutional systems – a comparative approach, cit.* a method expressly sanctioned by Article 33 of the Canadian Charter of Rights and Liberties.

129 And also with sovereignty and its limits but in a way of reception operated by the Basic Law and in accordance with the scope of that reception.

130 As in many other areas. See, among others, Xingping, Wu, "O sistema jurídico da Região Administrativa Especial de Macau", *Boletim da Faculdade de Direito*, 13, 2002, p. 74; Qing, Xu, *A Natureza e o estatuto da Lei Básic*, *– uma tentativa de abordagem, paper given at the Seminário intitulado Linhas de Evolução do Direito da RPC – Reflexos em Macau,* 1994*,* pp. 22 and 23.

tablishing a mandatory catalogue of fundamental rights and establishing several general principles. The establishment of these is to be part of the norm-building of the Macau SAR.

There can be, however, a couple of possible exceptions thus a window that can, in a certain way, be opened to the reception of the Chinese legal order including laws. One is the mechanism of interpretation of article 143, the other, the proviso inserted in article 18 on state of war and of emergency.[131]

The mechanism of interpretation may, indeed, have the potential to *export* to Macau namely certain postures of the centre *vis-à-vis* the fundamental rights. The issue is extremely complex. Article 143 could potentially serve either as a threat to autonomy and its contents or create possibilities for its expansion.[132]

This provision established that the power of interpretation of the Basic Law is vested in an external body, the NPC Standing Committee. This is a political institution, not a judicial one, and thus this means the imposition of a method that is foreign to Macau. The new system goes against the idea of autonomy proclaimed for Macau.[133] Regarding provisions of the Basic Law that relate to issues within Macau's autonomy, the NPC Standing Committee "shall authorize the courts of the Macau SAR" when adjudicating cases "to interpret [them] on their own". However, if the cases involved are within the scope of the autonomy as in the case of fundamental rights, the question arises why it is necessary for an external body to authorize the local courts to interpret these provisions. Since there is no express provi-

131 Making this point concerning article 18, Davis, Michael, "The Basic Law and Democratization in Hong Kong", *Loyola University Chicago International Law Review*, vol. 3, issue 2, 2006, p. 180, says that this article (and 23) elevate concerns over mainland intervention.

132 That is if there was a trend in interpretation friendlier to the autonomy and its expansion than one that favours the centre. This may not be likely but, in theory, the potential for broadening is there. As for Hong Kong, "Unfortunately, the constitutional problems have not been resolved by this modus vivendi. The Basic Law is not self-contained – it has not established a complete constitutional 'firewall' around the HKSAR. There remain several means by which China's laws —and legal mores— may cross the border and mingle adversely with Hong Kong's common law regime. The most detrimental conduit has been and remains Article 158 of the Basic Law, which allows the Standing Committee of the NPC to interpret the Basic Law", Hualing Fu and Cullen Richard, "Two Views of Hong Kong's Basic Law: But Hong Kong Should Seek A Better Way…", *Hong Kong Journal*, 2006, II, *http://www.hkjournal.org/archive/2006_spring/rao.html*.

133 For example, Cabrita, Eduardo, *International and Constitutional*..., p. 184.

sion for judicial review, of course the power of interpretation vested in the Macau courts is potentially important in protecting fundamental rights.[134]

As for article 18, 4, it states that in the event that the Standing Committee of the NPC decides to declare a state of war or, by reason of turmoil within the Macau SAR which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region. One has to note the absence of a listing of rights that may not be suspended and in what terms[135] as well as the absence of any set of rules prescribed by the Basic Law.[136]

In that norm it is allowed the implementation, in our view temporarily only, of centre laws directly affecting fundamental rights thus making an exception on the self contained system and the principle of exclusivity. One must point the necessity of an extraordinary situation arising[137] thus in normalcy it would be illegitimate to apply the national laws and, on the other hand, that procedure must be made with extreme caution in order to safeguard the international and constitutional guaranteed autonomy and, as said, the effects can only be temporary which leads us to say that we are

134 Alves Correia, Fernando, "A Fiscalização da Constitucionalidade das Normas do Ordenamento Jurídico de Macau à Luz da Recente Jurisprudência do Tribunal Constitucional", *Revista Jurídica de Macau*, vol. 4, No. 3, 1997, p. 26. The negative impacts of the use of this procedure in Hong Kong are already well known. In the case of Macau, the mechanism has so far not been activated.

135 See Canas, Vitalino, *The general regime*, *cit*.

136 Although in a somehow different presupposition, Bacelar Gouveia, Jorge, defends the "drafting of balanced rules for the suspension, in view of the BLM's silence in that respect. The rules could flow directly from the constitutional principles or from existing norms enshrined in the International Covenant on Civil and Political Rights and in the Inner Security Law of Macau.", *The fundamental rights*, *cit*. We have voiced doubts on the procedure contents *maxime* its non normativization in the Basic Law, *Os direitos fundamentais*, *cit*., p. 58

137 Héctor Fix-Zamudio, in "States of emergency and defending the Constitution", *Mexican Law Review,* 7, 2007, provides a historical account and warns of excesses that were practiced in several latitudes thus mandating comprehensive constitutional regimes about states of emergency saying, for example, "the Constitutions promulgated in the late 19th century included guidelines on the states of emergency. These guidelines required mandatory intervention from the Legislative branch to authorize and supervise the declarations of exception or of emergency to be exercised by the Executive" and that a tendency that " has become stronger in recent years is characterized by the fact that situations of emergency or of exception are instituted according to the procedures established by constitutional provisions, precisely for the purpose of upholding democratic constitutional provisions".

faced with an exception to the principle of exclusivity that is, redundantly saying, exceptional and temporary.

4. *The principle of a charter of rights*

Being self contained then the fundamental rights system primarily must have a charter of fundamental rights to begin with.[138] In this light, one must point that the Basic Laws contain a substantive catalogue of fundamental rights (or an inventory of) which is quite satisfactory given the type of instrument,[139] particularly when compared with provisions made in other legal orders in the region.

On the other this inclusion of a charter of fundamental rights in the Basic Law adds to its consideration as a constitution. Besides, from the formal point of view the self-contained system of fundamental rights embodied primarily in its own charter of rights represents an augmentation of the autonomy of Macau as compared with the situation prior to 1999, since before the transfer of sovereignty, the system relied mostly on the importation of norms and principles from the Portuguese Constitution.

5. *The principle of legality of fundamental rights in general and on restrictions in particular*

Concerning the question to survey if there is a reservation of law (meaning that only laws from the Legislative Assembly are adequate and proper to address this issues), the reply is positive, *maxime* in what respects to the reserve of restrictive law[140] – the rules that are envisage to impose restrictions on fundamental rights.

138 As Vitalino, Canas, recalls, the Basic Law enunciated itself a charter of rights, *The general regime of fundamental rights*, *cit.*

139 Davis, Michael, "The Basic Law and Democratization in Hong Kong", *Loyola University Chicago International Law Review*, vol. 3, issue 2, 2006, p. 180; Bacelar Gouveia, Jorge, *A Lei Básica da Região Administrativa Especial de Macau*…, p. 187; Luke, Frances, *The imminent threat of China's intervention*…, p. 2.

140 On this relevant problem and its dimensions and upholding the principle of reservation of law, Andrade, Vieira De, *op. e loc. cit.*; Xingping, Wu, *O sistema*, *cit.* p. 84., Cardinal, Paulo, *Os direitos fundamentais*, *cit*., p. 59; Albuquerque, João, *Ensino no Curso de Produção Legislativa*, 2003, Also affirming this reservation see for example, Parecer 3/II/2005, 3ª Comissão Permanente, Legislative Assembly.

This is correct in spite of the absence of a general clause rule allocating an express reservation of law to the Legislative Assembly. Firstly, it is a general principle transferred to the new constitutional order by the continuity principle, secondly, various norms of the Basic Law on fundamental rights expressly affirm so, for example, article 32, "in accordance with the provisions of the law", article 33, "unless restrained by law", among several others. Last but not least, in accordance with article 40, 2, "The rights and freedoms enjoyed by Macau residents shall not be restricted unless as prescribed by law".[141]

One point should be made clear, the regime sustained by article 40, 2 cannot be reduced to be applied only to the rights contained in the mentioned international instruments and not to any other fundamental right constitutionally established but out of the international treaties. With Vitalino Canas,

> As for the others, that is, those rights of freedom tat expressly are consecrated by the Basic Law, there are arguments that lead to an identical application of ICCPR regime. The main argument is the one of the congruence and balance of the system. It would be a bit nonsense if the rights directly consecrated by the Basic Law, those which this para-constitutional law wanted to recognize as having a superior systematic importance, giving them a plain consecration, would benefit from a regime of restrictions less secure than the rights only enunciated in ICCPR and in force in MSAR. Thus, the better orientation is that both the freedom rights incorporated in MSAR legal order, by reception of ICCPR rules, made by the Basic Law and the freedom rights specifically enunciated in the Basic Law, benefit from the limitative regime of restrictions deriving from ICCPR.[142]

The meaning of law in the above mentioned norms cannot be other than, in accordance with the constitutional order of Macau, law in the sense of a true legislative act emanated by the legislative body of the SAR[143] or formal laws previous to the transfer of sovereignty. At this light, one must

141 As said by Vitalino, Canas, "it consecrates the principle of the reserve of the law in the field of the restrictions of rights", *The general regime, cit.*

142 *The general regime*, *cit*.

143 Referring to laws of the Legislative Assembly, see for example, Wan Cheong, Ieong, *Anotações*, *cit.*, p. 93.

conclude that, for example, any restriction imposed on a given fundamental right by way of an administrative regulation is illegitimate.[144]

6. *The principle of* local philosophy *in the interpretation and integrative methods*

This principle is intimately connected to several others such as the autonomy one and the exclusivity one. In fact, having its constitution and having a mandate to address the issue of fundamental rights in an exclusive matter must signify also that the system is impregnated with its own set of values and philosophy[145] that must came in hand when interpreting and implement fundamental rights as well as when integrating lacunae —filling gaps.

An intense debate has arose in several composite jurisdictions on whether the interpretation of a given fundamental right inserted in a local constitution should be made in *obedience* to the centre —*e. g*. federation— or instead in line with the *local* reality and set of values. In the United States, for example, there is a tendency to resort to a localized interpretation of the subnational constitution since, even when faced with the similar normative texts, federal and state, the local rule has its own history and singularity.[146] Thus even in a situation of a dual system of protection one can

144 In this sense, see, for example, the decision of the Second Instance Court, 223/2005.

145 Canas, Vitalino, *The general regime of fundamental rights, cit*., says "it is important to mention the essential aspects of the conception that was in force in Macau until 19th December 1999, which is subjacent to the ICCPR and to the CFREU, and that in principle ought to be the one of BLM. This is about the democratic and liberal conception of fundamental rights. The acknowledgement of the fundamental rights lies on the dignity of the human person, which is the beginning and the end of the organization in society; on the individualistic and humanistic idea of free development of the human beings personality; on the creation of conditions for a full citizenship and on the definition of the respective collective destiny by the communities in which they are integrated. The contents and the exercise of these rights benefit from a general principle of favor libertatis and their delimitation, suspension or restriction is subject to strict rules of grounding, controllability, plainness, specification, temperance and proportionality".

146 See, for example, Tarr, Allan, "Federalismo y la protección de los derechos en los Estados Unidos", *Derechos y libertades en los Estados compuestos*, Aparicio, Miguel (ed.), Atelier, 2005, telling us of the role of both sources, federal Constitution plus state Constitutions, p. 59. On the Mexico case and the emergence of the *judicial federalism*, Fix-Zamudio, Héctor, "Relaciones entre los tribunales locales y federales", in Gámiz Parral, Máximo N. (coord.), *Las entidades federativas y el derecho constitucional*, UNAM, Instituto de Investigaciones Jurídicas, 2003, pp. 126 ff. See also, Fix-Zamudio, Héctor &

find a tendency for a periphery rather than central interpretation so, with much more justification one can do the local interpretation in a system of exclusivity as seen.

Warn us Jorge Menezes Oliveira that,

> resorting to the interpretation of protection of rights' provisions according to Chinese principles and tradition would very likely turn out to be a self-defeating undertaking. Bearing in mind the three main purposes of the Basic Law, I believe that one can find reasonably safe grounds in the Basic Law itself to claim that it is to be interpreted according to the techniques and principles characteristic of Macao's autonomous legal system.[147]

Thus in order to comply with this autonomic fundamental rights system, there is to be no importation of rules, methods of interpretation, methods and theories of fundamental rights that are observed in the PRC, on the contrary the matrix must be the western idea of fundamental rights fully embodied in the Macau legal order before 1999. This is particularly important as these embody an extremely different general approach to the subject matter when compared to that of the SARs.

7. *The principle of proportionality*

The principle of proportionality presents itself as a triple patterned one, adequacy, necessary and proportionality *stricto sensu,* of the restrictions that are to be imposed in a fundamental right. We already noted that, contrary to the situation in force before 1999, there is no general clause on restrictions thus no general clause imposing the principle of proportionality as a limitation to the restriction process.

Valencia Carmona, Salvador, *Derecho constitucional mexicano y comparado*, 4th ed., Porrúa, 2005, pp. 920 ff.

147 "Interpretation of the Basic Law", paper given at the International Conference One Country, Two Systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007. Jorge Bacelar Gouveia says "We should bear in mind, when analysing these issue, that the system of fundamental rights in Macao is rooted in a concept that derogates from the socialist system of the Constitution of the People's Republic of China... With regard to the BLM, the picture is quite different. It is not, as the reading of various indices proves, a case of incorporation of a socialist-inspired notion of the fundamental rights. Here, the dominant concept is a western, liberal and social idea of the fundamental rights", *The fundamental rights in Macau*, *cit*.

On this, the decision of the Macau Court of Second Instance, process 1284, 2002, in which, promisingly, it is mentioned the principle of proportionality as a necessary tool of analysis of admissible restrictions to fundamental rights.[148]

On this rector principle and its survival in the present constitutional order it was said that "the proportionality principle was not received by the Basic Law on the same categorical way, however that omission does not mean that the Basic Law is totally indifferent to it."[149] In fact, see, for example, mentions in articles 28 by forbidding *arbitrary* arrest, 129 tell us about *impartiality and rationality*.[150] From these, along with again the continuity, one can extract the maintenance of the proportionality principle regarding restrictions to the fundamental rights.

8. *The principle of* overture *to other rights in the Basic Law*

In what respects to know if it exists, in the text of the Basic Law, other fundamental rights that are not established in Chapter III, that is to say, if this constitutional law admits other dispersed or not branded fundamental rights the reply is affirmative;[151] immediately by calling for an interpretative criterion (integrator) rooted in the Joint Declaration, such as Gomes Canotilho considers.

When the Joint Declaration presents an exemplifying catalogue of fundamental rights[152] is forcible to conclude that these rights addressed by the treaty still subsist as fundamental even in the event that they have not de-

148 From the same second instance court references to the proportionality principle in varying degrees of assessment with acceptance, 166/2003, 22/2002. In legislation one finds references to proportionality and its dimensions on a (general) norm on restrictions, article 8, Law of internal security, 9/2002, a positive aspect underlined by Katchi, António, *Governo e Administração Pública de Macau*, IPM, 2005, p. 111.

149 Ribeiro, Lino, *Lições de Direito Administrativo*, unpublished, p. 125. One can add that, for example in the Portuguese case, the existence of the proportionality principle was already considered even before it managed to find an express space in the constitutional text.

150 See Ribeiro, Lino, "A Lei Básica e os princípios conformadores da acção administrativa", *Boletim da Faculdade de Direito*, 14, 2002, pp. 71-72.

151 Canas, Vitalino, *The general regime, cit*., Andrade, Vieira De, *Direitos cit*., Bacelar Gouveia, Jorge, *The fundamental rights*, *cit*.

152 Hannum Hurst, *Autonomy, sovereignty, and self-determination*, rev. edition, UPP, 1996, p. 142 in *reference to the Hong Kong Joint Declaration citing explanatory notes to the international treaty*.

served such label in the Basic Law (or are absent from it). For example, the rights of the praised religious confessions in article 128, which in the Joint Declaration finds shed in it finishes paragraph of point V of the Annex I of that international treaty. The same goes to the property right,[153] article 6 of the Basic Law and its guarantees, article 103. Equally the International covenants serve as a mandatory reference for this. Other rights not only have to be qualified as fundamental because foreseen in the Joint Declaration —even if in other paragraphs— and by its own nature. And some more others dispersed throughout chapters V and VI of the Basic Law.[154]

9. *The principle of* overture *to other rights outside the Basic Law*

Given that the Macau Basic Law already provides for a charter of fundamental rights and that, undoubtedly, establishes other fundamental rights outside chapter III we may ask if it allows for other rights, fundamental ones that are established in international norms and in ordinary legislation.

At this light, what is the *opening* scope of article 41 stating that Macau residents shall enjoy the other rights and freedoms safeguarded by the laws of the SAR. Does this only mean that other rights are recognized albeit not with a fundamental nature, meaning they are merely *ordinary*? Or, considering that is formally inserted in the fundamental rights chapter of a constitutional law and uses a terminology akin of fundamental rights, such as "freedoms", pretends to open the door to the existence of other fundamental rights besides those already established in the Basic Law?[155] We believe that the second answer —in spite of a not so crystal wording— should be the correct one considering what was just said plus the anchor of the conti-

153 In this same sense, for example, Weyun, Xiao, "Conferência sobre a Lei Básica de Macau", APLBM, pp. 126 and 127.

154 Weyun, Xiao, *Conferencia sobre a Lei Básica de Macau*, APLBM, *op*. and *loc cit*. Also in this sense the Court of Final Appeal of Macau, at decision 22/2005 clarifies that there are more fundamental rights in the Basic Law, for example in article 98, even if they are not expressly branded as fundamental.

155 The case at stake is not, evidently, to promote to the fundamental category all and every right established in infra-constitutional sources but only those that have an intrinsic fundamentality, Miranda, Jorge & Medeiros, Rui, *Constituição Portuguesa Anotada*, Coimbra Editora, 2005, I, p. 138.

nuity principle; in a manner somehow similar to the pre-existing technique applicable in Macau constitutional order before the handover.[156]

As to fundamental rights with an international law origin we do believe that not only those created by the international instruments alluded to in article 40 of the Macau Basic Law, are to be called into the inner circle of the fundamental being constituionalized ones,[157] but also many more namely embodied in the classical human rights conventions[158] even in the absence of the integrative bridge process established in article 40 of the Basic Law.[159]

Concerning rights established in legislation, one asks is the right to life – expressly guaranteed in ordinary legislation in Macau —*e. g*. Civil Code— a fundamental right or not?[160] We believe that some rights established in ordinary legislation are fundamental rights,[161] such as the referred right to life.

As to the importance of these overture clauses one must clarify and concur with crystal words that

> The purpose of this clause open to the incorporation of atypical fundamental rights cannot be —as was also the case with the clause referring to "extradocumentary" fundamental rights— solely to identify materially the

156 Article 16, 1 of the Portuguese Constitution, "The fundamental rights enshrined in this Constitution shall not exclude such other rights as may be laid down by law and in the applicable rules of international law". This type of clause is gaining the favors of many constitutions. For this Portuguese (before also a Macanese one) constitutional norm, see, among others, Gomes Canotilho & Vital Moreira, *Constituição Anotada*, 4th ed., Coimbra Editora, 2007, pp. 364 ff (this is followed by another pillar of the fundamental rights system, article 17, stating, that "the set of rules governing rights, freedoms and guarantees shall apply to those set out in Title II and to fundamental rights of a analogous nature").

157 Young, Simon, *Fundamental rights, cit*.

158 For example, Convention on the Elimination of All forms of Discrimination Against Women, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of the Child, just to mention some that are applicable in Macau and, as easily seen, norms of these conventions embody far more reach and importance than some norms of the ILO conventions from the stand of fundamental rights. Katchi António, *Governo e Administração Pública de Macau*, IPM, 2005, considers that the fundamental rights in a formal sense are those established, namely, in the Basic Law, in the Joint Declaration, in International Covenants and in the ILO conventions, p. 94.

159 In this sense, Bacelar Gouveia, Jorge, *The fundamental rights, cit.*, via the so-called open clause for atypical fundamental rights.

160 The past of Macau, along with the apex nature of life, should provide us the answer.

161 Bacelar Gouveia, Jorge, *The fundamental rights, cit*., concurs and considers the principle enshrined in article 41 one of the most significant in the matter of fundamental right but also warns that the rule is not entirely unambiguous.

> mentioned rights, viewing them as mere fundamental rights in a material sense and leaving them to their status as international rights or legal rights, but not as constitutionalised rights incorporated into the BLM. Its purpose is quite different since, should the constitutionalisation of said rights not take effect by virtue of that provision, then the provision would purely and simply be useless. It would only serve the purpose of putting a label on the fundamental rights thus incorporated. And that is certainly not what is expected of it: on the contrary, it is expected that the BLM, in case it has eventually failed to declare other equally relevant fundamental rights, takes this opportunity to reach towards those other rights, engendered under different circumstances. In this manner, under the mentioned provision, such other rights can acquire the constitutional value of the rights formally enshrined in the BLM.[162]

In discussing the principle of non discrimination and the *principle of safeguarding human dignity* we will claim attention to differences between the Macau Basic Law and the Hong Kong counterpart. This does not mean that the above principles cannot be extracted at all from the constitutional text in Hong Kong much less it presupposes a negative judgment to Hong Kong practice *vis-à-vis* Macau. One thing is certain though, compared to Hong Kong one can find some relevant differences in the Basic law that add to the level of Macau display.[163] Macau has a more comprehensive list of fundamental rights than Hong Kong. In some cases the words of the Macau Basic Law reflect the particular characteristics of Macau. The reinforcement of fundamental rights listing is one such example.[164]

162 Bacelar Gouveia, Jorge, *The fundamental rights in Macau*, *cit*.

163 James, Cotton, for example, tell us about a "greater precision" on the norms concerning the fundamental rights, in the Macau Basic Law, *The retrocession of Macau and the limitations of the Hong Kong Model*, Pacific Focus, vol. XV, 2, 2000, p. 50. It seems possible to assert that one good reason that allows to explain the enrichment of the Macau Basic Law vis-à-vis the Hong Kong one is, besides a better constitutional background provided by the Portuguese constitutional norms, the fact that the Macau Basic Law was drafted and enacted after the its Hong Kong sister thus allowing to learn with the mistakes of this one and permitting an evolution in the constitutional construction of the normative texts as well as providing an added level of trust in the way of legislating *westernalized* style. See also, Ghai, Yash, *The Basic Law of the Special Administrative Region of Macau: Some Reflections* 2000, 49 ICLJ 183-184.

164 The MSAR "shall protect, according to law, the interests of residents of Portuguese descent in Macau and shall respect their customs and cultural traditions", or, "shall establish consultative co-ordination organisations composed of representatives from the government, the employers' organizations and the employees' organizations", are only two exam-

A rather emblematic and significant difference moves within the sphere of a transversal principle —of equality and non-discrimination. In truth, whereas in Hong Kong the Basic Law states in article 25 that *All Hong Kong residents shall be equal before the law*, the correspondent one of Macau states the same principle, *densifies* it and enlarge it to cover the non-discrimination clause stating that *all Macau residents shall be equal before the law, and shall be free from discrimination, irrespective of their nationality descent, race, sex, language, religion, political persuasion or ideological belief, educational level, economic status or social conditions*.

Another cornerstone of unquestionable importance in defining, interpreting, applying and limiting restrictions to the fundamental rights is the following principle, *the human dignity of Macau residents shall be inviolable*,[165] article 30 continues by saying, *humiliation, slander and false accusation against residents in any form shall be prohibited. Macau residents shall enjoy the right to personal reputation and the privacy of their private and family life.*

This principle constitutes a standard of universal protection, a *pre-condition* and basis of the *Republic* and the basis of consecration of many fundamental rights endowing them with an inherent *personcentricity*, among other functions.[166] In an extremely brief and simplified way one can resort to Giancarlo Rolla when he affirms that the normative value of the principle of human dignity operates as an interpretation clause, a *qualificative* value of the constitutional system in a whole, as a criterion of balancing fundamental rights and other relevant constitutional values.[167]

ples, articles 42 and 115 or the rights to *habeas corpus*, and of privacy. For an extensive listing Young, Simon, *Fundamental rights*, *cit*. The author also provides a list of fundamental rights that are addressed in the Hong Kong Basic law but not in the Macau Basic Law. A comparison proves, anyway, that the Macau case is far more complete than the Hong Kong one.

165 On this apex principle structuring a fundamental rights system (and the organizatory one) it is not possible to provide a comprehensive list of bibliography namely in the continental legal systems. Peter Haberle tells us that the human dignity is a *anthropological-cultural premise* of the Constitutional State, *El Estado constitucional*, UNAM, 2003, p. 169, "The constitutional democracy is not considered viable id it does not adopt as permanent criteria of guidance the dignity of the human person…", Diez-Picazo, Luis, *Sistema de derechos fundamentales*, 2nd ,Thomson, 2005, p. 68.

166 Gomes Canotilho & Vital Moreira, *Constituição Anotada*, 4th ed., Coimbra Editora, 2007, pp. 198 ff.

167 *El valor normativo del principio de la dignidad humana*, *passim*.

VI. The fundamental rights judicial mechanisms of protection – between continuity and discontinuity

In general, one can say that speaking about fundamental rights guarantees one should be able to identified all mechanisms devised to protection, be it judicial or non judicial, but also as to regimen general substantive rules, such as rules on restrictions, suspension, to the depth of the constitutionally drawn norms of each and every right, to the international law avenues of connection, to the popularization of the rights,[168] a system of free and independent lawyers, a *de jure* and *de facto* independence of the judicial system and of the judges, among many other *facts*, juridical or political.

One should mention before in a very briefly manner the non judicial mechanisms. The following lines describe a couple of the existing means for reacting in the event of any breach of rights by administrative bodies.

If subjective rights or legally protected interests are damaged by an administrative act, a complaint against it can be filed to those responsible by the interested person, requesting its revocation or modification. An administrative appeal can be made against any administrative act engaged in by organs subject to the hierarchical powers of another organ. Note that appeals can be made on the basis of illegality, failure to observe the principles of equality, proportionality, justice, impartiality or inconvenience of the act, according to the Code of Administrative Procedure. The petition right, a fundamental right in itself recognized by the Basic Law (article 50, 18 and 71, 6), serves to defend rights by petitioning, in several modalities, to any political body or public authority, in accordance with Law 5/94/M. A complaint lodged with the Committee Against Corruption. Given its investigative powers in protecting the rights, freedoms, guarantees and the legitimate interests of the residents, the CAC Commissioner acts as Macau's "Ombudsman" to promote the protection of rights of individuals assuring, through informal means, justice, legality and the efficiency of the public administration.

168 In Macau, this issue has been putted in the political agenda and has been practiced, for example, Ho Hau Wah, Ce, stated *the juridical publicizing is intimately connected with the formation of the spirit of Justice. That is why that the public departments have been promoting it* Speech to the Legislative Assembly of 2001. Chou, Susana, Forward *to Colectânea de Leis Regulamentadoras de Direitos Fundamentais*, Assembleia Legislativa, said in publicizing the Law, the legislator, *in casu*, the Legislative Assembly, promotes not only its knowledge but as well as the concretization of one of the sides of a fundamental right enshrined in the supreme law of Macau, the access to Law, article 36.

In designing the judicial machinery for fundamental rights application, the principle of effective judicial protection — and its corollaries—[169] is of utmost importance in this field, and it was well dictated before the transfer of sovereignty and it seems to have survived relatively well, at least as for example, to what concerns the opinion of the Second Instance Court, in ruling 166/2003, where it is stated, namely that it is not difficult to see in article 36 of the Basic Law the establishment of the principle of plenitude on the judicial guarantee, and, it is established a general principle of effective judicial protection to safeguard all subjective juridical positions as well as a special principle that guarantees all the access to the administrative justice. It proceeds, by stating that it is expressly guaranteed the access to Law, the access to courts and the access to juridical information.[170]

One can conclude for the existence of a general principle of effective judicial protection in paragraph 1 of 36 whilst the second paragraph points to a specific effective judicial protection in the field of administrative justice,[171] a field, needless to say, very prone to litigation on fundamental rights. One should point that by effective judicial protection we do not refer merely to the guarantee proclaimed to allow the access to the courts, it must be an (potential) effective protection provided by the courts thus involving, namely an intrinsic connection between substantive rights and procedural, instrumental ones.[172]

As stated before, our *parcours* is to be done under the focus of continuity and of autonomy and it is at that light that most of the following should be understood. In the principle of autonomy one must bear in mind, for instance, the non applicability of Chinese rules, of Chinese techniques and

169 See a listing in, Fix-Zamudio, Héctor, "Effectiveness of Human Rights Protection Instruments", *Mexican Law Review*, 1, 2004, in which is presented several principles or sub principles that cooperate in the aim of an effective protection of fundamental rights such as, access to Justice, the right to procedural action, due process of law, competent, independent and impartial Judge or Court, simple and brief procedure, reasonable term and undue delays, compliance and enforcement of International decisions about rights protection and fundamental freedoms.

170 It is true, however, that the Basic Law does not provide express indications on fundamental rights remedies. "While both the HKBL (Article 35) and the MBL (Article 36) protect the residents' right to judicial remedies, it is rather odd that both documents are silent as to remedies available where there has been a breach of a fundamental right", Young, Simon, *Fundamental rights*, *cit*.

171 Ribeiro, Lino, "A justiça administrativa no contexto da Lei Básica da RAEM", *Boletim da faculdade de Direito*, 13, 2002, p. 225.

172 *Cfr*. Namely, Gomes Canotilho & Vital Moreira, *Constituição*, *cit*., p. 416.

ideology in the fundamental rights fields namely in adjudicating cases, as seen before. The continuity lighthouse implies that one has to resort to the analysis of what was previously in force, its scope, its idiosyncrasy, its correlation within the system —procedural versus substantive.

It is deposited however in the courts the ultimate and perhaps the noblest function of defending the fundamental rights especially when other mechanisms failed or are simply insufficient. A fundamental right is after all a right and it will have no less protection than those normal ordinary rights such as, for example, the normal machinery established in a Civil Procedure Code.

With the continuity light one can find a rupture with the previous system concerning the judicial mechanisms protecting fundamental rights.[173]

Among that small army of procedural institutes one had the amparo and, operating indirectly but effectively, the constitutionality appeal. However, the year 2000 revealed itself, as the *annus horribilus* for and from the courts competences on both fields. In fact, with a few and short rulings,[174] the Court of Final Appeal in the aftermath of the transfer drew a deadly blow to both institutions. It was the understanding of the court that neither the amparo nor the compatibility of norms with the constitutional order could be exercised —in this last situation one even had the case in which a given norm was allegedly both in violation of the previous constitution and the present one, as in the 1/2000!

One must consider that the Court of Final Appeal drew a blow to its mandatory role of safeguarding the constitutionality principle —and to the effective judicial protection as well. It was the understanding of the court that the compatibility of norms with the constitutional order could not be adjudicated. The commands exposed before, namely in articles 11 and 145 of the Basic Law on the supremacy of the Basic Law over any ordinary norm surely plus the principles of justice and of the effective protection proclaimed in article 36 of the Basic Law demanded a different attitude —one that could easily be reached in Hong Kong— even in the absence of a branded and expressly established judicial procedure.[175] Besides, as

173 See, for the system before the transfer of sovereignty, Cardinal, Paulo, *Os direitos fundamentais em Macau*, *cit*., pp. 38 ff.

174 Basically, 8/2000, 4/2000, for the constitutionally review and 1/2000, 2/2000, for the amparo.

175 Vitalino Canas states, "On the contrary, in the context of the Basic Law, there is no possibility of judicial review of the constitutionality by a Constitutional Court. But we may

stated in article 83 of the Basic Law the courts shall be subordinated to nothing but law, well the first law is the Basic one. On the other hand, one should bear in mind a crucial principle applicable in the Macau legal system and enshrined in article 7 of the Civil Procedure Code stating that, in the absence of adequate procedural machinery the judge shall determine the practice of the necessary acts that are more adequate to the goal of the process.

On the amparo appeal one need not to underline its reputation worldwide as well as its expansive move to new legal systems.[176] "We can declare, without any exaggeration, that the amparo in its several modalities and designations… presents itself as a contribute to the human rights procedural law… of the same magnitude as the *habeas corpus*, the constitutional courts and the ombudsman".[177]

On adjudicating the amparo appeals, the Court demonstrated it lends more weight to formalistic aspects —the revocation of the Law where the amparo was inserted— than to constitutional principles such as the continuity one, the prohibition of recession, and of the effective protection, as well as other elements as the functional nature of the amparo norm, the nature of fundamental right of the amparo, and the existence of specific scope amparo appeals in Macau. On the other hand, it seems, from the subtext that the court mistakenly took the amparo as a mechanism of judicial review, in the sense of a procedure envisaged to attack norms. It is clear that that's not the amparo philosophy, particularly in Macau. As Jorge Miranda clearly affirms, "on the light of the Joint Declaration the institution subsists in the Macau legal system".[178]

consider whether MSAR ordinary courts can, under BLM, Article 143 and 11, 2nd paragraph, refuse the application of rules in conflict with that same BLM. It is relevant to underline that in Hong Kong, in spite of the English tradition of the Parliament sovereignty, and the law sovereignty, and of the impossibility of the courts to review the constitutionality of laws, there is a doctrinal and jurisprudential opening to the possibility for the courts not to apply rules in the grounds of 'breach of the Basic Law', very much in line with north American tradition of Marbury vs. Madison", *The general regime*, *cit.* Also our *Os direitos fundamentais*, *cit.*, pp. 62 and 63.

176 See, for all, Fix-Zamudio, Héctor & Ferrer Mac-Gregor, Eduardo (eds.), *El derecho de amparo en el mundo*, Porruá-UNAM, 2006.

177 Fix-Zamudio, Héctor, "Amparo y tutela", in *Ensayos sobre el derecho de amparo*, 3a. ed., México, Porrúa-UNAM, 2003, p. 696.

178 *Manual de Direito Constitucional*, Coimbra Editora, 2001, VI, p. 56. We also affirmed the survival of the amparo as technically sustainable, in spite of a in memorian facto

One of the most significant component of the Macau's legal system individuality, in other words, a component of the "second system" was thus in a very simple manner putted overboard, at least in the eyes of some courts.

In this sense we affirm the rupture, both in the amparo —although not totally as to be seen— and in the constitutionality appeal.

It seems relevant to bring in here some general considerations on the amparo and its impact on constitutionality and on fundamental rights.

> The constitutional complaint (Article 93 Section 1 Subsection 4 of the Basic Law): it turns the Federal Constitutional Court into a "citizens' court". The access granted by the Federal Constitutional Court to everyone… has profoundly increased the awareness of the citizens of the role of the Court *vis-à-vis* public authority...[179]

Or, in the Latin American model of constitutional justice it takes preeminence the amparo as a privileged mechanism of judicial guarantee of constitutional rights.[180] In South Korea, it is well underlined the importance of the constitutional petition (an amparo model) in strengthening the fundamental rights, curving abuses of public powers and fulfilling the effective implementation of the fundamental rights.[181]

situation, "La institución del recurso de amparo de los derechos fundamentales y la juslusofonía – los casos de Macau y Cabo Verde", *El derecho de amparo en el mundo*, pp. 891 ff., and "O amparo macaense de direitos fundamentais *vis-a-vis* as decisões judiciais", in *O Direito de Amparo em Macau e em Direito Comparado*, *Macau Law Journal*, special issue, 1999, pp. 353 ff. As did Armando Isaac, in, for example, *Do amparo da continuidade (constitucional) à continuidade do recurso de amparo em Macau*.

179 Häberle, Peter, "El recurso de amparo en el sistema germano-federal de jurisdicción constitucional", *Macau Law Journal*, special issue on Amparo, p. 182.

180 See, for example, Fix-Zamudio, Héctor, "El juicio de amparo mexicano. Su proyección en Latinoamérica y en los instrumentos internacionales", in *Ensayos sobre el derecho de amparo*, 3a. ed., Mexico, Porrúa-UNAM, 2003, pp. 847 ff., Carmona Tinoco, Jorge Ulises, "Domestic and International Judicial Protection of Fundamental Rights: a Latin American Comparative Perspective", paper delivered at International Conference One Country, Two Systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007.

181 Kyong-Whan, Ahn, "The Constitutional Court and Legal Changes in Korea: Post 1987 Development", *Derecho comparado Asia-México. Culturas y Sistemas Jurídicos Comparados*, Serna de la Garza, José María (ed.), UNAM, 2007, pp. 59 ff.

One is not unaware of the movements to revise the amparo but, in no place known, the aim is its eradication of the legal system, solely its adjustment namely to the demands due to its extreme popularity.[182]

The principle of effective protection is of utmost importance in this field, and it was well dictated before the transfer of sovereignty and it seems to have survived relatively well, at least as for example, what concerns the opinion of the Second Instance Court, in ruling 166/2003, where it is stated, namely that it is not difficult to see in article 36 of the Basic Law the establishment of the principle of plenitude on the judicial guarantee, and, it is established a general principle of effective judicial protection to safeguard all subjective juridical positions as well as a special principle that guarantees all the access to the administrative justice. It proceeds, by stating that it is expressly guaranteed the access to Law, the access to courts and the access to juridical information. This is what one can label as a *friendly* fundamental rights ruling in the well known sense used by, for example, Gomes Canotilho.

1. *The continuity*

The *habeas corpus*, Article 28 (2) of the Basic Law guarantees that no one shall be subjected to arbitrary or unlawful arrest, detention or imprisonment and assures, in the event of arbitrary or unlawful arrest, detention or imprisonment, the right to apply to the court for the issuance of a writ of *habeas corpus*.

In the field of administrative law one finds continuity also, for instance, article 100, 1, a) of the Administrative Process Code, whereby any person that has a fundamental right that was violated or fear that his right will be violated can address the court to order the public authorities to adopt a given action or stop adopting a given action in order to assure the exercise of the right at stake.

Significantly there are in force unlabelled/clandestine amparo appeals. In the laws regulating the fundamental rights of assembly and demonstration (Law 2/93) and that on data protection (Law 8/2005), establish reinforced judicial mechanisms of protection of those fundamental rights that are shaped in the amparo model as easily seen both from its normative text

182 For example, for the spanish case, Pérez Tremps, Pablo (coord.), *La reforma del recurso de amparo*, Tirant lo Blanch, 2004.

and from the preparatory works.[183] In this last case for example, the competence is given to the Court of Final Appeal, its restricted to the issue of violation of a fundamental right, urgent and *per saltum* and the above mentioned doctrine of article 7 of the Civil Procedure Code is applicable.[184]

The Civil Code *invisible* mechanism. It is known that the Civil Code of Macau contains a para chart of fundamental rights.[185] In it many rights are established, beyond the normal boundaries of classical personality rights thus being simultaneously fundamental and personality rights. Article 67 prescribes that everyone has the right to be protected and to demand for the necessary adequate measures to be taken in order to stop the menace on his rights as well as preventive measures. Since, as seen, at least several of those rights of the para chart are fundamental ones consequently this judicial process is also a fundamental rights one.[186]

2. *The deficit*

In a conclusion fashion, one may after this already long *voyage*, affirm that there is a deficit to the continuity principle with the eradication of the amparo and of the constitutional review. Not a total discontinuity however.

There is also a deficit to the rich catalogue of fundamental rights in the sense that the broad scope of enunciation of fundamental rights is not corresponded in the same measure to the judicial mechanisms available. However, the judicial mechanisms in force are more and better than a *prima facie* analysis could presuppose, namely by the existence of the *clandestine* amparo appeals and the obligation of courts to not allow normative violations of the Basic Law.

One wonders also if we can ask for borrowing to the Macau SAR of the PRC reality, and bearing in consideration namely the idea of transition,

183 Respectively, Parecer no. 1/93, CACDLG, and Parecer 3/II/2005, 3 Committee, stating that the committee feels that in fundamental rights should be created rules that provide reinforced protection. For further elaboration see our *Os direitos fundamentais*, *cit*.

184 On this see also Ferreira, Cristina, "The Europeanization of Law", placing the inominated amparo in the context of an institute created in that law "to guarantee effective judicial protection", paper delivered at International Conference One Country, Two systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007.

185 See, Mota Pinto, Paulo, *Os direitos de personalidade do Código Civil de Macau*, BFD, 8, 1999, and our *Os direitos fundamentais cit*, pp. 42 ff.

186 On this, Cardinal, Paulo, *O amparao macaense*, *cit.*, pp.388-389, Mota Pinto, Paulo, *Os direitos de personalidade do Código Civil de Macau*, BFD, 8, 1999.

principle of continuity, the broad autonomy, the formal timeline and guarantees of the Joint Declaration, "the second system" in the "one country, two systems" principle, the topical idea of Peter Häberle[187] of *Time and constitutional culture — a dimension of the generation sequence of citizens in the constitutional state.* We could introduce here a (small) *challenge*: why not (re)create the general amparo appeal —thus consolidating the access to justice and the right to a procedural action—[188] and initiate a *friendlier,* and with openness, *constitutional* review thus contributing to the consolidation of a *Rechtsregion*, in a similar sense of a *Rechtsstaat.*

187 Chet Tremmel, Joerg (ed.), "A constitutional law for future generations – the 'other' form of social contract: the generation contract", in *Handbook of Intergenerational Justice EE*, 2006, p. 223.

188 Dimensions of extreme relevance as pointed by Fix-Zamudio, Héctor, "Effectiveness of Human Rights Protection Instruments", *Mexican Law Review*, 2004, p. 1.