

**THE SYSTEM OF *NON DUAL DOMAINS* AND THE
PRINCIPLE OF EXCLUSIVITY ALLOCATED TO THE
SUBNATIONAL AUTONOMOUS UNITS IN THE
PROTECTION OF FUNDAMENTAL RIGHTS
- THE CASE OF THE SPECIAL ADMINISTRATIVE
REGIONS OF THE P.R. OF CHINA**

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**I
SOME INTRODUCTORY REMARKS AND PRECISIONS – *E.G.* CHINESE
CONSTITUTION, BASIC LAWS, BASIC QUESTIONS**

We do believe that we should bring forward right in the beginning of our route some brief basic elements that will underline this paper in order to better clarify both its intents and scope as well as to justify it vis-à-vis the subject matter under which it is included.

First of all one might well ask what is a paper on territorial autonomy issues doing in a panel branded «*Subnational Constitutions in federal constitutional states*». In truth, in a traditional and formalistic approach the Special Administrative Regions of China(SARs) – Macau and Hong Kong are neither federated states nor its Basic Laws are the result of its self exclusive constituent powers.

One can argue prima facie an evidence in itself that «*In reality the reasons brought forward to show a qualitative difference between the model of the regionalized state and the model of the federal state seems to be without base. (...) In general, it seems that the characteristics that distinguish the two models, federal and regionalist, are not as obvious as traditionally it is defended...*»¹. 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 line of borderline²

* The opinions expressed here are solely those of the author and do not reflect the views of any institution to which he is affiliated.

¹GIUSEPPE DE VERGOTTINI, *Derecho Constitucional Comparado*, UNAM/SEPS, Mexico, 2004, pp 326-7.

² FERNANDO DOMÍNGUEZ GARCÍA, *Autonomy experiences in Europe – a comparative approach: Portugal, Spain and Italy*, paper delivered at International Conference One Country, Two systems, Three Legal

especially from the perspective from the subnational units real scope of power. It is not uncommon to address both the Italian and the Spanish cases in this federalistic or proto federalistic manner even knowing that the constitutional-legal data provided by both suggests a, in this time frame, developed and energetic examples of territorial autonomy and not federations. One must underline, however, that none of the known classical examples has posed a more complex challenge to the theorization of the composite state forms as the SARs of the People's Republic of China³. In truth, it seems that is clear that one can, without significant effort, find elements of regionalism but also of federalism and even of statehood.

The Basic Law constitutes the formal domestic legal instrument that details the constitutional organization of the SAR, including 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 S.A.R. legal system, a (the) constitutional law. It is a material constitution if not even a formal one. In fact, if one looks at the legal order of the Macau SAR, the Basic Law is the highest source of the domestic legal system⁴. This role is clearly indicated in Article 11, 2, in a fashion rooted in Romano-Germanic legal systems: «No law, decree,

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.*»

³ As MARCO OLIVETTI eloquently putted it, «*Placing the two SARs in a comparative perspective is, as already said, 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*», *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.

⁴ «*The Basic Law has constitutional status and dominates all other Hong Kong laws. The Basic Law bears characteristics common to a constitution and allows the people of Hong Kong to administer their own affairs with the promised high degree of autonomy. It also bears authority as a national law of China. The Basic Law not only stipulates the sovereign ownership and legal status of Hong Kong, but also specifies the respective parties' permissible scope of authority and their interrelationship. Furthermore, it also provides for the territory's political system and economic development; it delineates the relationship of the executive, legislative and judicial powers and evolution of the electoral system; and it stipulates the rights and obligations of the Hong Kong inhabitants. The Basic Law dominates all local statutes of the territory, and enjoys constitutional status, namely, as a charter which cannot be defied and one that guarantees social stability and steady economic development. In light of this, all governmental institutions, organizations and individuals must strictly adhere to the Basic Law.*», RAO GEPING, *Two Views of Hong Kong's Basic Law: From Beijing*, "One Country" Must Dominate the Two Systems..., Hong Kong Journal, http://www.hkjournal.org/archive/2006_spring/rao.html.

*administrative regulations and normative acts of the Macau Special Administrative Region shall contravene this Law.»*⁵. 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.»*⁶.

It is important to note that the Basic Law must nonetheless follow the provisions of the Joint Declaration, although in some cases it has failed to do so.⁷ Hence, when analysing and interpreting the Basic Law, the first step must be to see how the subject in question is dealt with in the Joint Declaration⁸. Failing to do so would make the Joint Declaration meaningless and eliminate the source of all the distinctive features of the SARs. 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 with special links and cross-references such as the commands and nature of the JD, the *regulatory* function of the Basic Law vis-à-vis the Joint Declaration, *the pacta sunt servanda principle*, and the material limitation imposed on the revision procedures of the Basic Law, «*No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Macau*». A proviso that imposes itself to both the sovereign and the regional bodies – although to the latest ones in a mediate way since there is no power of amendment but only some power of proposing amendments.

On another key and in sort of an answer to one the questions posed how such constitutions differ from federal constitutions and each other one can state that while the two subnational constitutions share a significant array of similar contents, principles, ideology, intra document organization, textual paraphrasing even, the opposite is the answer concerning the center constitution. For known reasons, one embodies a political ideology and organizatory method consubstanciated in the Chinese communist - socialist way whilst the others embody a westernized market (albeit not only, in our view) superstructure and this is reinforced by the international treaties that modeled (imposed) the subnational constitutional texts.

⁵ As for the Hong Kong Basic Law, also article 11, 2, «*No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.*» perhaps with a less emphatic and apparently under scoped formulation.

⁶ *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.

⁷ See for example PAULO CARDINAL, *O sistema político de Macau na Lei Básica — separação e supremacia do executivo face ao legislativo*, Revista Administração, n.ºs 19/20, passim; for Hong Kong, YASH GHAI, *Hong Kong’s New Constitutional Order*, Hong Kong: HKU Press, 1999, p 146.

⁸ For instance a hypothetical revision of the Basic Law to eliminate the right to strike would not be possible since this right is directly protected by the umbrella guarantees established in the Joint Declaration. The same can be said, naturally, if in a revision of the Basic Law a proposal to abolish the high degree of autonomy were put forward.

As for one other question, how federal constitutions define the space allocated for subnational constitutions, one has to say that virtually nothing is established at this respect on the center Constitution besides a somehow enigmatic and fully empty norm, article 31 that states, «*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 discourse⁹. Why is this so? In the Preamble to its Constitution,¹⁰ 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. 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 SARs¹¹. Thus the existence of 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:¹² 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’.

⁹ 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.

¹⁰ Constitution of the PRC, 1982.

¹¹ 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 aspect, 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.

¹² LIU GAOLONG, *O estabelecimento das Regiões Administrativas 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.

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.

Contrary to what to a certain extent is common, the legal order of the center applies, or so tends to, unlimitedly and unrestricted to the subnational entities at least in the subject matters reserved to the center as well as in other areas. For instance, central taxes, central system of justice, monetary matters, and several more, thus forming a strong component of the subnational legal system formation process. Although varying immensely in shape and scope, one fact seems certain, there is competitiveness between national and subnational units in forming the latter's legal system. Two domains of competence contributing both to one single legal system. However, with the SARs one does not find such schemes except for the Basic law itself (and in here with constraints applicable to the sovereign power) and a few *sovereignty* legislation but that must be identified and, in a sense incorporated, by the Basic Law itself and with a special procedure of application. In this sense there is an extremely low grade, and a limited one, of intervention in the subnational legal systems¹³, hence a *non dual* domains system as a rule.

Besides what has just been stated one must stress that in what concerns specifically with the protection of fundamental rights the scenario is even more complex and unique. 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 one¹⁴. A particularly true assertion in formal federations but also in some regionalized states even if the techniques used vary in a great manner¹⁵. When, however, one is faced with a monolithic source, that role rests upon the

¹³ «It is a strict consequence of the principle “one country, two systems” that the Chinese legal order does not find application in the territory of the two SARs», states MARCO OLIVETTI, addressing an «immunity from Chinese Law», and thus adding an element of confederacy, *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.

¹⁴ «Hence a double security arises to the rights of the people», JAMES MADISON, *Federalist, No 51*, The Federalist Papers, Hamilton /Madison / Jay, Signet Classic edition, 2003, p 320.

¹⁵ 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, JORGE CARMONA TINOCO, *La incorporación de los derechos humanos en las Constituciones locales mexicanas*, , *Derecho y seguridad internacional*, in Memoria del Congreso Internacional de Culturas y Sistemas Jurídicos Comparados; Ricardo Méndez Silva, (Coord); 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, DOROTHY TOTH BEASLEY, *Federalism and the protection of individual rights: the american state constitutional perspective*, in Ellis Katz / G. Allan Tarr, *Federalism and Rights*, (Ed), Rowman & Littlefield, 1996, pp 102 ff.

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

We do believe that knowledge of the juridical-political historical evolution of Macau, and to perhaps a lesser extent of Hong Kong¹⁶, will come in hand when trying to perceive, or better understand, some of the unique and imaginative solutions one finds today. In addition to this effort of fully understanding those solutions one must bear in mind that the light at the end of this original tunnel is Taiwan and the strong will of *reunification* (formal and material) of the entire homeland under Beijing leadership.

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 China¹⁷. 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, ultimately, a «*territory under (transitional) Portuguese Administration*» until 19 December 1999. Now, Macau – as Hong Kong in a similar fashion - is a Special Administrative Region of the People's Republic of China 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 deposited by both parties at the UN, and, domestically, in the Basic Law of the Macau Special Administrative Region¹⁸. From 1987 Macau entered a transition period that established the transfer of sovereignty along with a set

¹⁶ One has not the needed time to address even if in short the complexity of both Macau and Hong Kong historical juridical-political process. For a brief introduction see, for Macau, PAULO CARDINAL, *The judicial guarantees of fundamental rights in the Macau legal system – a parcours under the focus of continuity and of autonomy*, section two, paper delivered at International Conference One Country, Two systems, Three Legal Orders - Perspectives of Evolution, Macau, 5-7 February, 2007, as for Hong Kong, YASH GHAI, *Hong Kong's New Constitutional Order*, HKU Press, 1999, pp 2 ff.

¹⁷ 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. For further details, PAULO CARDINAL, *ob. ult. cit* and bibliography in there identified.

¹⁸ As for Hong Kong, one has the following mirrored documents: The Sino-British Joint Declaration, 1984, and the Basic Law of the Hong Kong Special Administrative Region, this unit becoming into existence in the first of July, 1997.

of rules and principles that still shape the present day status of the subnational entity known as SAR with a guaranteed life span of 50 years.

A paramount principle on the subject of the transition in general as well as the transition in the fundamental rights area is the principle of continuity.¹⁹ «*The current social and economic systems in Macau will remain unchanged, and so will the life style. The laws currently in force in Macau will remain basically unchanged.*»²⁰. Continuity 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. This principle constitutes itself as a true cushion on the fundamental rights²¹ all the above allowing to introduce the continuity principle as the transition process master guarantee.

II THE JOINT DECLARATION AND THE SAR'S STATUS - AN INTERNATIONALLY PLUGGED AUTONOMY ²²

The Joint Declarations describe the process leading the conclusion of the treaty in its preamble and states, namely that the two countries agreed that a proper negotiated settlement by the two Governments of the question which was left over from the past – Macau in one case, Hong Kong in the other. Thus Macau and Hong Kong were a question left over from the past, both for Portugal and for China, and the late and United Kingdom. The Joint

¹⁹ On this principle, among others, JORGE COSTA OLIVEIRA, *A continuidade do ordenamento jurídico de Macau na Lei Básica da futura Região Administrativa Especial*, Revista Administração, nºs 19/20, 1993, PAULO CARDINAL, *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* ARMANDO ISAAC, *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, YASH GHAI, *The continuity of laws and legal rights and obligations in the SAR*, Hong Kong Law Journal, Vol. 27, 2, 1997, where it is clearly stated that «*These issues (the continuity of laws and rights and obligations) 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.

²⁰ Sino-Portuguese Joint Declaration, Point 2 (4) and see also I and III of Annex I with some differences in the language of the late norms. For the Hong Kong situation, namely point 2 (5) and II, Annex I.

²¹ 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.*», *Direitos e Deveres Fundamentais dos Residentes em Macau*, s/d, FDUM.

²² Parts of this section and of the next ones draw heavily from excerpts of my *The judicial guarantees of fundamental rights in the Macau legal system – a parcours under the focus of continuity and of autonomy*.

Declarations were thus concluded to allow China to resume the exercise of sovereignty over the two territories in a peaceful and in *pacta* way.

The Joint Declaration(s) has been deposited at the United Nations by both contracting parties and is undoubtedly an international treaty no matter the unusual branding it received²³ with all the legal consequences that implies.²⁴ 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 international treaty initiated a transition period that served the process of the transfer. The first sub-period reached its end on 19 December 1999 – or 30 of June in Hong Kong. Then a second phase of the transition started that will last for 50 years²⁵.. 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 and Hong Kong This self-limitation on sovereignty is articulated in the 'One Country, Two Systems' strategic principle. Without question, the Joint Declaration constitutes a limitation on the exercise of sovereignty over the peripheral territories. It is, however, a limitation freely created and desired by the contracting sovereign states in the normal exercise of their international legal powers or, in other words, «*Under the Joint Declarations (JDs), the PRC was reduced in its sovereign competences, these purporting only to external sovereignty: defence and foreign affairs.*»²⁶.

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

²³ On this, RUI MOURA RAMOS, *A Declaração Conjunta Luso-Chinesa na Perspectiva do Direito Internacional*, Boletim da Faculdade de Direito, Vol. 74, 1998; CHEN ZHI ZHONG, *The Joint Declaration and the International Law*, Boletim da Faculdade de Direito de Macau, No. 11, 2001, p 89 ff. For Hong Kong, RODA MUSHKAT, *One Country, Two International Legal Personalities* (Hong Kong: Hong Kong University Press, 1997), pp 140-1, HURST HANNUM, *Autonomy, sovereignty, and self-determination*, rev. edition, UPP, 1996, p136.

²⁴ FRANCES LUKE stresses this quality of the Joint Declaration 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.

²⁵ After the 50 years guaranteed period, 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, eliminate 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. etc.. Underscoring this, JORGE GODINHO, *Macau SAR Business Law and Legal System*, forthcoming, 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 emphasizing that «*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

²⁶ ARMANDO ISAAC, *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.

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. All these obligations emanate from 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, but respect for that *jus cogens* principle is a strong element and Portugal and the international community should have something to say in case of a breach.

The Joint Declaration will remain a prominent source of law for the Macau SAR.²⁷ 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 Basic Law. The continuing validity and efficacy of the Joint Declaration is in fact assumed by the Basic Law itself.²⁸ In a sense, the Basic Law ‘does no more’ than detail the policies stated in the Joint Declaration,²⁹ 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.³⁰

As to the contents of the autonomy, the Joint Declaration in articulating the continuity principle means that the autonomy should not be less than that enjoyed by the Territory of Macau under Portuguese administration.³¹ The treaty effectively points to this and in addition, effectively serves to extend the Macau autonomy, such as by mandating a self-contained judicial system.

²⁷ See JORGE COSTA OLIVEIRA, *A continuidade do ordenamento jurídico de Macau na Lei Básica da futura Região Administrativa Especial*, Revista Administração, No. 19/20, pp 24-5; PAULO CARDINAL, *O sistema político de Macau na Lei Básica...* cit., p 80; ARMANDO ISAAC, *Substantive constitutional restrictions on the limits to the sphere of jurisdiction of the Macau Special Administrative Region's Courts*, paper presented to the 4th Comparative Constitutional Law Standing Committee Conference, Bangkok, May 1999, ANTÓNIO KATCHI, *Governo e Administração Pública de Macau*, IPM, 2005, p 14, 93.

²⁸ 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. For Hong Kong, article 159.

²⁹ In *The Joint Declaration and the International Law*, CHEN ZHI ZHONG, Boletim da Faculdade de Direito de Macau, No. 11, 2001, writes that the Basic Law codifies the 12 points in JD Art. 2, p 92. In the decision on process 96/2002, the TSI (Macau Court of Second Instance) a reference is brought to the densification of the Joint Declaration made by the Basic Law.

³⁰ GOMES CANOTILHO, *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, October, 1994, pp 7-8.

³¹ VITALINO CANAS, *A extensão da autonomia de Macau na comunidade e na Lei*, Boletim da Faculdade de Direito, 12, 2001, p 226. The same idea is extensive to Hong Kong.

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.

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* 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, before the opposite, it was assumed this past, respected this legacy and is intended, inside some coordinates, to keep it³².

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.³³ That is why we can affirm that the S.A.R. autonomy is 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 (and Hong Kong) autonomy which are due to the Joint Declaration guarantees³⁴ and from it, Macau *receives its superstructure conduit*. Referring to Hong Kong it was written 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*

³² JORGE MIRANDA, *Manual de Direito Constitucional, Tomo IV*, 2nd ., p 191

³³ Making the same point, MANUEL DE ALMEIDA RIBEIRO, *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, RODA MUSHKAT, *Hong Kong as an international legal person*, Emory International Law Review, No. 114, page 110; arguing against this view, among others, MARIUS OLIVIER, *Hong Kong: An exercise in autonomy?* One country, two systems: Theory and practice international conference, Hong Kong, 1997 p 88.

³⁴ There are two additional unwritten guarantees for the Macau autonomy that also apply in Hong Kong. One is international monitoring, either institutionalized or by the media in general, and the other is the Taiwan question. While the latter remains unresolved, it operates as a guarantee, in the sense that the success of both Macau and Hong Kong is a card to be played in the game of reunification, an important measure of China's willingness to accommodate different systems in its attempt to attract the compatriots on the other side of the Taiwan Straits. The success will have to be not only economic but also the safeguarding of extensive autonomy in areas such as the political system and fundamental rights. At this light some add the question of whether other countries are willing or not to recognize the SARs status, ZENG HUAQUN, *Hong Kong's autonomy: Concept, development and characteristics*, China: An international law journal, 1 / 2, 2003, p. 322.

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... »³⁵.

Again one wishes to stress that the Joint Declaration is the genesis and anchor of Macau and Hong Kong autonomy. That is, in my view, the appropriate conclusion. The assertion that Chinese institutions and the Chinese Constitution are the primary source of Hong Kong and Macau's autonomy³⁶ leads to the denial of any role post-transfer for the JD. The PRC Constitution opens the door in Art. 31, the NPC may even be the key to that door, but the creators and deliverers 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.

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 has a certain appeal, but on juridical grounds alone, immune from any political influence, it is incorrect.³⁷ 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.

Hence, stating 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 parties³⁸ 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*

³⁵ ZHU GUOBIN, *Redefining the Central-Local Relationship under the Basic Law*, paper given at One Country, Two Systems: Theory and Practice international conference, 1997, p. 6.

³⁶ Among many others, see ZENG HUAQUN, *Hong Kong's autonomy: Concept, development and characteristics*, China: An international law journal, 1 / 2, 2003, pp 320 ff.

³⁷ 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.

³⁸ FRANCES LUKE, says «*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.

promulgate a Basic Law of the Macau Special Administrative Region of the People's Republic of China, stipulating that ..., I, Annex I.

It can be seen 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.

Thus the Joint Declarations present a framework for Macau's and Hong Kong's autonomy that has two main characteristics: the autonomy is internationalized³⁹ and temporary, and for the duration of the 50-year period covered by the Joint Declaration⁴⁰ it operates under the principle of continuity or unchangeability.⁴¹ 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 SAR is the juridical person that embodies the new autonomic reality within Chinese sovereignty.

The Joint Declaration states that «*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*». ⁴² This paragraph vests the SAR with the traditional trinity of normal statehood functions, while, at the same stance, establishing the limits of its autonomy.

³⁹ 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 United Nations; 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 OSKAR PETERLINI, *The South-Tyrol autonomy in Italy: Historical, political and legal aspects*, PETER HIPOLD, *Aspetti internazionali dell'autonomia de ll Alto Adige*, pp89 ff, in *L'ordinamento speciale della provincial autonoma di Bolzano* (cura, J. Marko, S. Ortino, F. Palermo), Cedam, 2001. On the internationalised origins of Aland autonomy, see MARKKU SUKSI, *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 YORAM DINSTEIN, *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.

⁴⁰ If after those fifty years autonomy remains unchanged it will have a different legal foundation guaranteed in a different way.

⁴¹ FRANCISCO GONÇALVES PEREIRA, *Accommodating diversity: Macau under China's Constitution*, in *Macau on the threshold of the third millennium*, Macau, Instituto Ricci, 2001, p 107.

⁴² Point 2 (2) and I of Annex I.

While the Joint Declaration works as a *grundnorm* for the Basic Law and consequently for the Macau's autonomic legal system⁴³, there is at times 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 absolute⁴⁴.

III THE (BROAD) SCOPE OF THE SARs POWERS – BREAKING THE BOUNDARIES OF SUBNATIONAL UNITS

Macau and Hong Kong 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.*»⁴⁵.

The package of powers allocated to the SARs is huge and in a general view cannot be found even in formal and dynamic federated states⁴⁶. 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.

⁴³ «*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*», ARMANDO ISAAC, *The constitutional framework for legal co-operation between the "Two Systems" of the "One Country": the case of Macau*, cit., P 3.

⁴⁴ 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.

⁴⁵ FERNANDO DOMÍNGUEZ GARCÍA, *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.

⁴⁶ For an analysis of the SARs autonomy and comparative study, see MARCO OLIVETTI, *The Special Administrative Regions of the PRC in comparison with autonomous regions models*, GIANCARLO ROLLA, *The development of asymmetric regionalism and the principle of autonomy in the new constitutional systems – a comparative approach*, FERNANDO DOMÍNGUEZ GARCÍA, *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

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.⁴⁷ It is expressly provided with an international legal capacity either to conclude international treaties or to join international organizations.⁴⁸ Thus the limitations on autonomy concerning foreign affairs are, in fact, qualified, making the autonomy in some ways more extensive than others elsewhere.⁴⁹ *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*⁵⁰. 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. Further features of the autonomy include, among many other areas, the provision that after the establishment of the Macau SAR the socialist system and socialist policies shall not be practised in Macau.

Thus 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 Laws states that Macau and Hong Kong are *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 participate in international organizations and

⁴⁷ WANG SHUWEN, *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.

⁴⁸ Annex 1, VIII.

⁴⁹, XIAOBING XU / GEORGE D WILSON, *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.

⁵⁰ *Autonomy, sovereignty, and self-determination*, rev. edition, UPP, 1996, p 140.

conferences not limited to states, and to develop international relations and conclude related agreements; to use the Portuguese language (or the English one, for Hong Kong) 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 Basic Law provides for the system to be used in Macau: including the social and economic systems, the system for safeguarding 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 stipulations 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.

Another important feature of the scheme to mention is that in the MSAR context, Chinese nationality is generally less important than residence in the territory.⁵¹ This contributes to the effective autonomy of Macau since people of various nationalities can belong on (almost) equal terms.

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.*⁵² 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 and Hong Kong are 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,⁵³ 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 delimited by the JD).

⁵¹ ANTÓNIO KATCHI describes this as a *population* separation feature, which is one among several aspects of separation, such as territorial, linguistic, patrimonial, monetary, and political structure separation. *Governo e administração pública de Macau* (Macau: Instituto Politécnico de Macau, 2004), pp 13-16.

⁵² Art. 20. VITALINO CANAS, *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.

⁵³ On this point, MARIUS OLIVIER, *Hong Kong: An exercise in autonomy?*, *passim*.

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, 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 Law⁵⁴. 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 Law⁵⁵ aimed at ensuring that the previous capitalist system and way of life shall remain unchanged for 50 years?⁵⁶

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,

⁵⁴ For further elements, PAULO CARDINAL, *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.

⁵⁵ VITALINO CANAS, *A extensão da autonomia de Macau...*, pp 242-3. For a different perspective, see among others, YASH GHAI, *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 powers on the SARs and, it is important to note once more, sovereignty is limited in pacts by the JD for the period of fifty years, thus the relevance of this argument is softened.

⁵⁶ These questions were already put forward in ours *Macau: The internationalization cit.*

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 either⁵⁷ ..

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.⁵⁸ 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 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 policies⁵⁹ .

Finally, Article 143 could potentially serve either as a threat to autonomy or create possibilities for its expansion.⁶⁰ 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

⁵⁷ 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.

⁵⁸ 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 FRANCISCO GONÇALVES PEREIRA, *Portugal, a China e a Questão de Macau*, Macau, IPOR, 1995, p 140.

⁵⁹ 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, pp101 ff.

⁶⁰ 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*», FERNANDO DOMÍNGUEZ GARCÍA, *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*», FU HUALING and RICHARD CULLEN, *Two Views of Hong Kong's Basic Law: But Hong Kong Should Seek A Better Way...*, Hong Kong Journal, 2006, II, http://www.hkjjournal.org/archive/2006_spring/rao.html.

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.⁶¹ 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 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 provision for judicial review, of course the power of interpretation vested in the Macau courts is potentially important in protecting fundamental rights.⁶²

The courts of the MSAR are also *authorized to interpret* other provisions of the Basic Law in adjudicating cases. However, if they need to interpret the provisions of Basic Law 'concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments in the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the NPC. While this mechanism begins by extending the scope of the courts' interpretation power, it ends with more limitations.⁶³ Before it makes an interpretation, the NPC Standing Committee is required to consult the Macau Basic Law Committee. Since this Committee has members who include representatives of the Macau SAR,⁶⁴ this procedure may limit the harmful effects of such political and external interpretation.

IV

(STILL) THE S.A.R. AUTONOMY: - AN ANONYMOUS NEW FEDERALISM?

As announced earlier it is a given fact the multitude of specific solutions in existence in composite states, be it federal or regionalist ones and in contemporary times the once clear cut division between federations versus regionalized states has become a tenuous blurred even intermixed line of borderline⁶⁵. It is not needed to point out significant differences at

⁶¹ Ibid. Also, EDUARDO CABRITA, *International and constitutional limitations on the autonomy of the Macau Special Administrative Region*, Macau Law Journal, special issue, 2002 p 184.

⁶² FERNANDO ALVES CORREIA, *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.

⁶³ On this important issue, YASH GHAI, *Hong Kong's New Constitutional Order*, 1997 edition, p 185 ff. 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.

⁶⁴ Stressing this point CABRITA, *International and Constitutional...*, p 184.

⁶⁵ For example, MARCO OLIVETTI says that the regionalist cases of Spain and Italy are similar to those federal unitary systems present in Europe, *Federalismo e regionalismo in Europa*, in T. Groppi, L. Ammannati, M. Olivetti (a cura di), *Nuevos rasgos de la administracion local en Europa*, Fundap. Queretaro, 2005

various levels among the federal legion, for example between Germany and Argentina⁶⁶, nor between the regionalized states, as between Portugal and Spain. And it is not necessary also to advice 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 ever⁶⁷.

However, as said in the opening remarks, 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 federalism⁶⁸, «*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.*»⁶⁹ 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 phenomenon⁷⁰ 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

⁶⁶ 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.

⁶⁷ PETER HABERLE, *Current problems of German federalism*, in *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.

⁶⁸ For example, GIANCARLO ROLLA, *The development of asymmetric regionalism and the principle of autonomy in the new constitutional systems – a comparative approach*.

⁶⁹ DANIEL FUNG, *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.

⁷⁰ 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 by 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. .MICHAEL UNDERDOWN 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. MICHAEL C: DAVIS, *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..

SAR's status and the dimension of the powers that it enjoys.⁷¹ 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 entity⁷² and resemble a (non integrated) State in some circumstances⁷³. This last augmented set of powers makes us lean to the idea that in a sort of counter balance exercise *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 S.A.R. 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.⁷⁴ 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.

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.

Regionalist elements of the SARs:

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

⁷¹ JORGE BACELAR GOUVEIA, '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 the term 'autonomous region' had already been allocated in the Chinese system. 'The Hong Kong Special Administrative Region...', p 7.

⁷² JOSÉ CASALTA NABAIS, 'Região Administrativa Especial de Macau, federalismo ou regionalismo?', p 32.

⁷³ VITALINO CANAS, *A extensão da autonomia* cit, p 240.

⁷⁴ IEONG WAN CHEONG, *One China, Two Systems and the Macao SAR*, Macau, University of Macau, 2004) pp 233-4.

seen, in a limited way by reason of an international treaty and the impossibility of secession from the SARs⁷⁵.

Authentic interpretation of the autonomy chart residing outside the SAR.

Federal elements of the SARs:

The existence of a political system and organizational framework with its own legislative, executive and judicial power⁷⁶.

Both defense and foreign affairs resting in the centre, albeit with exceptions concerning the last one.

Existence of a constitution, at least in a material sense, named Basic Law.

Statehood elements of the SARs:

Judicial power including that of final adjudication, hence non possibility of any competence, be it *prima facie* be it by way of appeal mechanisms of any court of the mainland⁷⁷. Note, however, the political mechanism of interpretation.

A self contained system of fundamental rights and non application of the centre Constitution, as seen *infra*.

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 issue⁷⁸.

⁷⁵ 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 and because the MSAR is of a temporary nature and does not even have any right of secession, *A Lei Básica da Região Administrativa Especial de Macau...*, p 197.

⁷⁶ See, for example, MARCO OLIVETTI, *Federalismo e regionalismo in Europa*, in T. Groppi, L. Ammannati, M. Olivetti (a cura di), *Nuevos rasgos de la administracion local en Europa*, Fundap. Queretaro, 2005. However, as the author states, even in some federations, as in Austria and in Belgium, the judicial power rests only in the federation and is not shared with the federated units.

⁷⁷ For example, in Germany, the Federation courts have a degree of competence by appeal to rule on decisions of the federated courts, see BENDA, MAIHOFER, VOGEL, HESSE, HEYDE, *Manual de Derecho Constitucional*, Marcial Pons, p 661

⁷⁸ See, MARCO OLIVETTI, *Federalismo e regionalismo in Europa* in T. Groppi, L. Ammannati, M. Olivetti (a cura di), *Nuevos rasgos de la administracion local en Europa*, Fundap. Queretaro, 2005

The international law personality.

The existence of total separateness of finance and tax systems⁷⁹. The issuing of its own currency.

As well as of a separate customs.

The separateness of its own social system.

The maintenance of frontiers with the rest of China and the issuing of its own passports.

Uncategorized/Unique elements:

The measurement of international law capacity of the SARs that goes far beyond those present in autonomous regions⁸⁰, more than «regions» with *shared* sovereignty⁸¹, and even more far than federated states⁸². However, it has less capacity than an independent 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 fashion⁸³, 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.

Others add to this melting pot some characteristics of confederations⁸⁴.

⁷⁹ Articles 104 and 106 expressly use the word «independent» to characterize these systems.

⁸⁰ See, for example, MARCO OLIVETTI, *El "poder exterior" de las regiones italianas, en perspectiva comparada*, Boletín Mexicano de Derecho Comparado, Número 115 Enero-Abril 2006, pp 193 ff.

⁸¹ VALÉRIE GOESEL-LE BIHAN, *La participation des départements et régions d'outre-mer à la conclusion des accords internationaux: essai d'analyse générale*, RFDC, 65, 2006, pp3 ff.

⁸² See, for example, JOSÉ CASALTA NABAIS, *Região Administrativa Especial de Macau, federalismo ou regionalismo*. SUSAN J. HENDERS, *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.

⁸³ JOSÉ CASALTA NABAIS, *Região Administrativa Especial de Macau, federalismo ou regionalismo?*, p 31.

⁸⁴ MARCO OLIVETTI, *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.

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 elsewhere⁸⁵, 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 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'⁸⁶ on the other—the proponents of sovereignty versus the proponents of autonomy.

V

THE PRINCIPLE OF EXCLUSIVITY OF THE FUNDAMENTAL RIGHTS SYSTEM IN «*MERE*» AUTONOMOUS REGIONS TAILORED IN A STATEHOOD FASHION

As MARC CARRILLO stated on the (controversial) issue of creating an autonomous region bill of rights in Catalonia « *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*

⁸⁵ PAULO CARDINAL, *Macau: the internationalization* cit.

⁸⁶ BENNY TAI, 'One Country Two Systems: the two perspectives,' *Macau Law Journal*, special issue, 2002, p 150 ff.

rights preexistent»⁸⁷, 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 finds 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* constitution⁸⁸, in other cases the local constitutions 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 rights⁸⁹.

Very differently is the situation of the Chinese SARs as already mentioned before. The center constitution simply does not have a say in establishing fundamental rights in the regional level. «*Under the principle ‘One country, two systems’, the socialist principles and policies established in the Constitution are not applicable in the Regions (SAR). In accordance with article 11 of the Basic Law, the systems and policies practiced in the MSAR, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, are based on the provisions of the Basic Law. This means that the Constitution is*

⁸⁷, *La declaración de derechos en el Nuevo Estatuto de Autonomía de Cataluña: expresión de autogobierno y límite a los poderes públicos*, in *Derechos, Deberes Y Principio en el nuevo Estatuto de Autonomía de Cataluña*, Foro, CEPC, Madrid, 2006, p70.

⁸⁸ For example, in federal Mexico the Political Constitution of Veracruz, article 4, of Chihuahua, article 4, or 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: ...* or, in Chiapas State, Everyone will have the individual and social guarantees established by the Constitution of the United States of Mexico and that the present Constitution reaffirms; guarantees that cannot be restricted nor suspended except in the conditions settled by the federal constitution, article 4. As earlier seen, In varying degrees these state constitutions establish some fundamental rights and with an important ratio being occupied by *local-cultural based* rights. In Germany, some states do not establish a fundamental rights catalogue at all, for example Hamburg, see on this MATTHIAS HARTWIG, *Los derechos fundamentales en la República Federal de Alemania y sus Lander*, in *Derechos y libertades en los Estados compuestos*, Miguel Aparicio (ed), Atelier, 2005, p 149. In Belgium, the federated units do not have a charter of fundamental rights, on this and the explanations for it, MARC VERDRUSSEN, *La protección de los derechos fundamentales en el Estado Federal Belga*, in *idem*, pp 170 ff. For the United States of America case, and its evolutionary path on irradiating the federal bill of rights to the federated states, ERWIN CHEMERINSKY, *Constitutional law - principles and policies*, 2nd ed, Aspen Law and Business, New York, 2002, pp470 ff..

⁸⁹ JOSEP CASTELLÀ ANDREU, *El reconocimiento y garantía de los derechos y libertades en los Estados compuestos. Una aproximación comparada*, in *Derechos y libertades en los Estados compuestos*, Miguel Aparicio (ed), Atelier, 2005, p 13. The author mentions also the external sources and systems of protection of fundamental rights, such as at the European level, as components of this multilevel idea.

applicable in the MSAR, except for those rules that are related to the socialist principles and policies and the ones referred in article 11 of the Basic Law.»⁹⁰.

This sentence proves, beyond doubt, that at least in the referred areas there is no place at all for the Chinese Constitution in the Macau or the Hong Kong legal system, namely in the subject matter that we are dealing now: the fundamental rights as we will show in further detail. In this sense, the SAR example is unique and embodies quite the opposite stance, 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 – as further developed next.

Specifically concerning the issue of fundamental rights both Hong Kong and Macau enjoy 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 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 and Hong Kong subnational entities 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, through a fashion like derogation temporal specific clause, the override clause⁹¹.

The general directive principle is stated in Art. 4: *‘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.’* Such provisions are given force by means of Art. 11, which states that no law, decree-law, administrative regulations and normative acts of the Macau SAR shall contravene it. This makes the Basic Law function as the norm parameter, the domestic constitutional platform.⁹² As well as the second part of this same article as to be seen.

⁹⁰ WU XINGPING *O sistema jurídico da Região Administrativa Especial de Macau*, Boletim da Faculdade de Direito de Macau, 13, 2002, p 74.

⁹¹ On this, for example, GIANCARLO ROLLA, *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.

⁹² On the Basic Law as internal *grundnorm*, WU XINGPING, *O sistema jurídico da Região Administrativa Especial de Macau*, Boletim da Faculdade de Direito, Macau, No. 13, pp 75-7; JORGE BACELAR GOUVEIA, *A Lei Básica da Região Administrativa Especial de Macau...*, p 183-4; XU QING, *A Natureza e o estatuto da Lei Básica...*, p 24. Considering the Basic Law as a parametric norm in the Macau legal system does not invalidate the position of the Joint Declaration as highest source of law in Macau. On this, see ALBERTO COSTA, *Continuidade e mudança no desenvolvimento jurídico de Macau*, p 64; JORGE COSTA OLIVEIRA, *A continuidade do ordenamento jurídico de Macau...*, pp 24-5; PAULO CARDINAL, *O sistema político de*

It is important to point out that 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. 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 reception⁹³. For an assertive position, «*Given the contradictions between them, then to what extent is the Constitution applicable in Hong Kong? The argument that it applies as a whole to Hong Kong must be rejected because the Constitution allows only one system. A more popular argument is that it applies only partially, but this theory is difficult to apply. A convenient, but not principled, argument is that the Basic Law is a national law passed by the congress, when decided, pursuant to an international treaty, to exercise its supreme power only through the framework of that de facto constitution. It is now settled that, as far as Hong Kong courts are concerned, the Basic Law forms the only valid constitutional cord connecting Hong Kong's laws to the national constitution. There is no other official means by which Chinese laws (including the Constitution) may be applied in Hong Kong. As the Hong Kong Court of Final Appeal has authoritatively stated: "the Court accepts that it cannot question the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein"».*

However, that is not the case in relation to fundamental rights⁹⁴ 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.

This understanding is grounded both in the Joint Declaration and in the Basic Law. As stated in Art. 11, «*The systems and policies practiced in the Macau Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law.*»

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. Thus in order to comply with this autonomic fundamental rights system, there is to be no importation of rules, methods of

Macau na Lei Básica... p 80; ARMANDO ISAAC, *Substantive constitutional restrictions...*, passim; and *The constitutional framework*, cit., GOMES CANOTILHO, *As palavras e os homens...*, p 341-2. In effect, the Joint Declaration is a superior class of *grundnorm*—inclusive *vis-à-vis* the Basic Law—and an externalized one. As mentioned above, amendment of the Basic Law cannot eliminate a specific fundamental right that is guaranteed in the Joint Declaration.

⁹³ FU HUALING and RICHARD CULLEN, *Two Views of Hong Kong's Basic Law: But Hong Kong Should Seek A Better Way...*, Hong Kong Journal, 2006, II, cit.

⁹⁴ As in many other areas. See, among others, WU XINGPING, *O sistema jurídico...*, p 74; XU QING, *A Natureza e o estatuto da Lei Básica...*, p 22 and 23.

interpretation⁹⁵, 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 and in Hong Kong before 1997. This is particularly important as these embody an extremely different general approach to the subject matter when compared to that of the SARs.

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 establishing 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.

This self-contained system constitutes one of the most important and distinctive features of the Macau autonomy and of Hong Kong even if to a different extent. In truth, from the formal point of view this self-contained system of fundamental 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 principles⁹⁶ from the Portuguese Constitution.⁹⁷

If it is self contained then the system primarily must have a charter of fundamental rights to begin with. In this light, one must point that the Basic Laws contain a substantive catalogue of fundamental rights⁹⁸ (or an inventory of) which is quite satisfactory given the type of

⁹⁵ 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*», *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.

⁹⁶ PINHEIRO TORRES, *Interesses públicos e interesses privados – A perspectiva da transição*, BFDPM, 11, 2001, p 204 stresses this point by comparison with the previous system.

⁹⁷ The system of fundamental rights in the Portuguese Constitution is widely recognized as very liberal, extensive, and comprehensive in its coverage. One describes it as one of the most *perfected* in the world, JORGE BACELAR GOUVEIA, 'A Declaração Universal dos Direitos do Homem e a Constituição Portuguesa', in *Ab Uno ad Omnes – 75 anos da Coimbra Editora*, (Coimbra: Coimbra Editora, 1998), p 958.

⁹⁸ On the Macau system of fundamental rights, Os direitos fundamentais em Macau no quadro da transição: algumas considerações, *Cuestiones Constitucionales*, UNAM, Mexico, 14, 2006, VITALINO CANAS, 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, JORGE BACELAR GOUVEIA, Fundamental Rights in the Macau legal system, paper presented at the above conference. For Hong Kong, for example, YASH GHAI, *Hong Kong's New*, cit., SIMON YOUNG, *Restricting Basic Law Rights in Hong Kong*, *Hong Kong Law Journal*, Vol. 34, Part 1, 2004, and *The Basic Laws and the fundamental rights in the S.A.R.s*, paper presented at the above Conference.

instrument,⁹⁹ particularly when compared with provisions made in other legal orders in the region.¹⁰⁰

One should attempt to an overview of the SARs fundamental rights constitutional system, both on what it contains and on what it seems to be lacking.

In this sense, it matters to survey if the current situation mirrors integrally what, in our opinion, would be the ideal picture. The reply to give it is still not in a total satisfactory form¹⁰¹. With effect, and without forgetting the general director principle¹⁰² decreed in the article 4 of both Basic Laws establishing that the SARs assure, 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 that 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 for the moment specifically on the Macau situation, the wording of the Macau Basic Law and of the Joint Declaration reproduces, almost integrally, the list that pre-existed but whilst before the constitutional rules developed and detailed the fundamental rights¹⁰³, thus construing a protective web of constitutional standing around each right., The Basic Law seldom goes beyond the simple establishment of the rights¹⁰⁴.

⁹⁹ JORGE BACELAR GOUVEIA, *A Lei Básica da Região Administrativa Especial de Macau...*, p 187; LUKE, 'The imminent threat of China's intervention...', p 2.

¹⁰⁰ See, for example, PAUL FIFOOT, *One Country, Two Systems—Mark II...*, p 51-2; JAMES COTTON, *The retrocession of Macau and the limitations of the Hong Kong Model*, Pacific Focus, Vol. 15, No. 2, 2000, p 50. WANG SHUWEN, *As características da Lei Básica...*, p 49, identifies fundamental rights enshrined in the Macau Basic Law that are absent in the Hong Kong one. A different question results of the counterpoint to make between the Macau Basic Law and the Portuguese Constitution, this via importation of the Macau Organic Statute, as a necessary way to test the continuity in this field. It is crystalline that the level of development and densification of the constitutional rules is presented, in today's constitutional order with accentuated simplicity.

¹⁰¹ PINHEIRO TORRES, *Interesses públicos e interesses privados – A perspectiva da transição*, BFD, 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.

¹⁰² YASH GHAI, *Hong Kong's New Constitutional Order*, 2nd HKU Press, 1999, p 423.

¹⁰³ GIANCARLO ROLLA, *Técnicas de garantía y cláusulas de interpretación de los derechos fundamentales - Consideraciones sobre las Constituciones de América Latina y de la Unión Europea.*, http://www.costituzionale.unige.it/crdc/centre/centre_publications.htm_2006., 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.

¹⁰⁴ 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

On the other hand, one of the gaps most outstanding refers to the regimen of exercise of fundamental rights¹⁰⁵ that is, how and with design can be introduced restrictions to the rights and freedoms guaranteed for the Basic Law¹⁰⁶? And, what principles discipline these restrictions¹⁰⁷? Which are the restrictions to the restrictions? Which rights and freedoms will not ever be able to be suspended? We are making reference to the regimen, established namely in articles 18 and 19 of the Portuguese Constitution.

Let's proceed by listing some of the *vexata quaestio* not constitutionally decided currently in the Basic Laws¹⁰⁸:

Are there in the Basic Law, other fundamental rights besides those not enrolled in Chapter III - for example, article 6? 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 *headquarters*? The juristic persons can be the bearer of fundamental rights? In case of an affirmative answer, which rights? All? To what regimen are subjected the restrictions of

all those constitutional norms. Anyway, these examples seem to be enough to substantiate our conclusion on the different density levels of both constitutional laws.

¹⁰⁵ Echoing similar worries and pointing out, namely, issues of interpretation and application, LIUTING WANG, *Macao's return cit.*, p 203.

¹⁰⁶ On this JORGE BACELAR GOUVEIA, *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 more vast in the sense that those restrictions cannot go beyond what is established in the covenants.* On this, also LUO WEIJIAN, *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, YASH GHAI, ob. cit., p 445, SIMON YOUNG, *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 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.*».

¹⁰⁷ On this, the decision of the Macau Tribunal de Segunda Instância, process 1284, 2002, in which, promisingly, it is mentioned the principle of proportionality as a triple pattern (adequate, necessary and proportionality *stricto sensu*) of analysis of admissible restrictions to fundamental rights. 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 ANTÓNIO KATCHI, *Governo e Administração Pública de Macau*, IPM, 2005, p 111. 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.*», LINO RIBEIRO, *Lições de Direito Administrativo*, unpublished, p. 125. In any event, as said by YASH GHAI, «*it is not always easy to determine the (...) scope of restrictions.*», ob. cit. p 443.

¹⁰⁸ For a more extensive list, PAULO CARDINAL, *Os direitos fundamentais em Macau no quadro da transição: algumas considerações*, Cuestiones Constitucionales, UNAM, pp 57-58

fundamental rights? Is there a reservation to law in this matter? The Basic Law norms have or not direct applicability in this area¹⁰⁹? Can the bearers of fundamental rights, in the lack of law detailing/delineating a given fundamental right, exert this right, and to invoke it, namely before the courts if necessary will be?

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.

We only intend to present some brief notes on a pair of questions before enunciated. Thus, in that it 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 affirmative¹¹⁰; immediately by calling for an interpretative criterion (integrator) rooted in the Joint Declaration, such as GOMES CANOTILHO considers. When the JD presents an exemplifying catalogue of fundamental rights¹¹¹ is forcible to conclude that these rights addressed by the Joint Declaration still subsist as fundamental even in the event that they have not deserved 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 right¹¹², 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 Law¹¹³.

We may ask what is the *opening* scope of article 41 stating that Macau (and Hong Kong, respectively) 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 Law¹¹⁴? We believe that the

¹⁰⁹ Defending this direct aplicability, PINHEIRO TORRES, *Interesses públicos e interesses privados – A perspectiva da transição*, BFD, 11, 2001, p 205. See also, example provided in ANTÓNIO KATCHI, *Governo e Administração Pública de Macau*, IPM, 2005, pp103-104.

¹¹⁰ VIEIRA DE ANDRADE, *Direitos* Cit..

¹¹¹ HURST HANNUM, *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.

¹¹² In this same sense, for example, XIAO WEYUN, *Conferência sobre a Lei Básica de Macau*, APLBM, pp 126-127; SIMON YOUNG, ob. cit., p 110.

¹¹³ XIAO WEYUN, *Conferência sobre a Lei Básica de Macau*, APLBM, ob 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.

¹¹⁴ 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, JORGE MIRANDA and RUI MEDEIROS, *Constituição Portuguesa Anotada*, I, Coimbra Editora, 2005, p138.

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 continuity principle; in a manner somehow similar to the pre-existing technique applicable in Macau constitutional order before the handover¹¹⁵.

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 and 39 of the Hong Kong one, are to be called into the inner circle of the fundamental ones but also many more namely embodied in the classical human rights conventions¹¹⁶ even in the absence of the integrative bridge process established in article 40 of the Basic Law. 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 not¹¹⁷?

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 equally positive, *maxime* in what respects to the reserve of restrictive law¹¹⁸ – the rules that are envisage to impose restrictions on fundamental rights.

¹¹⁵ 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 and 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*). On that type of overture clause, GIANCARLO ROLLA, *Técnicas de garantia y cláusulas de interpretación de los derechos fundamentales - Consideraciones sobre las Constituciones de América Latina y de la Unión Europea.*, http://www.costituzionale.unige.it/crdc/centre/centre_publications.htm, 2006, pp 13 ff, especially concerning opening to international instruments..

¹¹⁶ 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, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention Against Discrimination in Education, 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. ANTÓNIO KATCHI, *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 the ILO conventions, p 94.

¹¹⁷ The past of Macau, along with the apex nature of life, should provide us the answer

¹¹⁸ On this relevant problem and its dimensions and upholding the principle of reservation of law, VIEIRA DE ANDRADE, ob. e loc. cit.; WU XINGPING, *O sistema*, cit. página 84., PAULO CARDINAL, *Os direitos fundamentais* cit. p 59, JOÃO ALBUQUERQUE, *Ensino no Curso de Produção Legislativa*, 2003, WU XINGPING, *O sistema*, cit. página 84. Also affirming this reservation see for example, Parecer 3/II/2005, 3^a Comissão Permanente, Legislative Assembly. In general, for a comprehensive survey of the problems of fundamental rights restrictions, JORGE REIS NOVAIS, *As restrições aos direitos fundamentais não expressamente autorizadas pela Constituição*, Coimbra Editora, 2003, addressing several issues that can be posed in the Macau SAR system.

As to the problem to know if the juristic persons can be bearer of fundamental rights, even in the absence of generic express reference in the text of the Basic Law, also the reply is affirmative, like the example of the rights attributed to the religious confessions¹¹⁹.

In the fashion of a tentative summary, one has to conclude for a diminishing of the previous high level of the substantive fundamental rights system, namely in its protective dimension on one hand and, on the other for an augmenting of the autonomic traces of it. In general, as said, the normative dimensions of the substantive side of the fundamental rights system of Macau and of Hong Kong still shines in a high position among its Asian counterparts.

VI

A BRIEF COMPARISON BETWEEN THE TWO SARS CONSTITUTIONAL TEXTS – THE LATTER THE BETTER?

The present section intends to do no more than a comparative constitutional textual analysis between both Basic Laws thus not going beyond the legal approach. This does not mean that we do not know or that we disregard the importance of the dynamics of the fundamental rights, its application, at various levels, its encroachment in the society, its popularization. It is known that in some known examples a weaker text does not necessarily equals to a weaker factual level of protection. That analysis can be tried in another instance.

With an evident claiming, compared to Hong Kong one can find some relevant differences that add to the level of Macau display¹²⁰.

This is an area that reveals some of the differences between the two sisters in autonomy, Macau and Hong Kong, as earlier mentioned. 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, thus enhancing its autonomy. The reinforcement of fundamental rights is one such example, the MSAR ‘shall protect, according to law, the interests of residents of Portuguese descent in Macau and shall respect their customs and cultural traditions’, that it ‘shall establish consultative co-ordination organisations composed of representatives from the government, the employers’ organizations and the employees’ organizations.

Another rather emblematic and significant difference moves within the sphere of a transversal principle – of equality and non-discrimination. In truth, whereas in Hong Kong

¹¹⁹ VIEIRA DE ANDRADE, op. and loc. cit., PAULO CARDINAL, *Os direitos fundamentais* cit. p 59. The Macau Court of Final Appeal also points in this same direction by considering by example the existence of fundamental rights on the religious organizations set forth in article 128, 22/2005.

¹²⁰ 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.

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*¹²¹, article 30¹²². And some other examples augmenting the Macau chart by contrast with Hong Kong can be found. Other examples are, article 37, *The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law*, and the Macau Basic law, article 38, *The freedom of marriage of Macau residents and their right to form and raise a family freely shall be protected by law. The legitimate rights and interests of women shall be protected by the Macau Special Administrative Region. The minors, the aged and the disabled shall be taken care of and protected by the Macau SAR*.

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 *westernized* style.

¹²¹ 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, p169, GOMES CANOTILHO and VITAL MOREIRA say that 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, *Constituição Anotada*, 4th ed., Coimbra Editora, 2007, pp 198 ff. «*The constitutional democracy is not considered viable id it does not adopt as permanent criteria of guidance the dignity of the human person...*», LUIS DIEZ-PICAZO, *Sistema de derechos fundamentales*, 2nd, Thomson, 2005, p 68.

¹²² That 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*.