

MACAU: THE INTERNATIONALIZATION OF AN HISTORICAL AUTONOMY*

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RESUMEN: Este artículo comienza con una breve introducción para, posteriormente, proporcionarnos una perspectiva histórica que, según el autor, es un factor importante para entender la particularidad de un territorio minúsculo que tiene una posición jurídico-política tan preeminente dentro de la “Gigante China”. Después analiza y compara la autonomía de Macau como “territorio bajo la administración portuguesa” en contra de las regiones insulares autónomas portuguesas. El autor elige dos características de la autonomía de Macau: el sistema político y el sistema de los derechos fundamentales, y los analiza, antes y después de la transferencia de los poderes totales soberanos de Portugal con China, y concluye que aquellos juegan un papel importante que acentúa la autonomía de Macau como región especial de China.

Palabras clave: autonomía, autonomía internacionalizada, derechos fundamentales, federalismo, regiones administrativas especiales de China, continuidad, declaración conjunta.

ABSTRACT: *This article after a brief introduction moves to provide an historical account which, in the authors view is an important factor to understand the peculiarity of a tiny territory having such a preeminent jus-political position within giant China. It then analyses and compares the Macau autonomy as a “territory under Portuguese Administration” vis-à-vis the Portuguese islanded autonomous regions. The author elects two features of the Macau autonomy: the political system and the fundamental rights systems and analyses it both before and after the transfer of full sovereign powers from Portugal to China concluding that play a rather important role accentuating the Macau autonomy as a special region of China.*

Descriptors: *autonomy, internationalized autonomy, fundamental rights, federalism, Special Administrative Regions of China, continuity, Joint Declaration.*

* Artículo recibido el 2 de agosto de 2007 y aceptado el 22 de octubre de 2007.

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Boletín Mexicano de Derecho Comparado,
nueva serie, año XLI, núm. 122,
mayo-agosto de 2008, pp. 637-689

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I. INTRODUCTION

For the last half millennium, Macau, a tiny enclave in south China inhabited largely by Chinese people, has existed in a strange state of individuality and disconnection *vis-à-vis* greater China. China is its natural source of both *Imperia* and *Dominium*, although it is at the same time separated from China through its connection to a small far away country—Portugal.

For several centuries until the last days of 1999, Macau has been effectively separated from China, and connected to Portugal, but as an autonomous entity. It has had many identities: a commercial outpost, a colony with special capacities, a territory artificially lumped together with other Portuguese possessions in Asia, a territory leased from China, a territory offered by China, and, ultimately, a “territory under (transitional) Portuguese Administration”. Now Macau is a Special Administrative Region of the People’s Republic of China (PRC) enjoying a “high degree of autonomy”¹ as agreed in a bilateral international agreement and then detailed in a “para-constitution”, the Macau Basic Law.

In any autonomy there is a natural and immanent tension between the autonomous entity and the greater entity to which it belongs. This tension is apparent both in the words of autonomy—treaties, laws, and so on—and, perhaps to an even greater degree, in the people who carry it out. Within the words proclaiming autonomy and

¹ This principle of a high degree of autonomy is inherent in Macau’s present status. See for example, Canas, Vitalino, “A extensão da autonomia de Macau na comunidade e na Lei”, *Boletim da Faculdade de Direito*, vol. 12, 2001, p. 225.

setting its frontiers we find the people that have the competence to guide the autonomous entity and those that guide the larger entity. Ultimately the actual concretization of the autonomy —whether it leans more toward autonomy or more toward the central power— will be in their hands and depend on their will.

In the specific case of the SAR's, using the “One Country, Two Systems” formula, one can ask, will the practice of autonomy stress one country or two systems?²

II. BRIEF HISTORICAL ACCOUNT

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

In the official Portuguese version,⁴ a naval victory over the pirate fleets that had been disturbing trade on the southern coast of China was the reason why the Chinese emperor authorized the establishment of the Portuguese in Macau in 1557,⁵ as a reward. The Portu-

² This analytical framework is borrowed from Benny Tai, who uses it very successfully in several papers, for example in “One Country Two Systems: the Two Perspectives”, *Macau Law Journal*, special issue 2002.

³ Wills, John and Van Dyke, Paul, “Strange Shores: 442 Years of Anomaly in Macau, and Counting...”, *Harvard Asia Pacific Review*, summer 2000, p. 1. Norman MacQueen speaks about a pragmatic anomaly in international relations in “Macao: End of a Special Case?”, *The World Today*, vol. 41, 1985, p. 167. Eduardo Cabrita goes further, speaking of “absurdity” in “International and Constitutional Limitations on the Autonomy of the Macau Special Administrative Region”, *Macau Law Journal*, special issue 2002, p. 154.

⁴ See Oliveira, Jorge *et al.*, “An Outline of the Macau Legal System”, *Hong Kong Law Journal*, vol. 23, 1993, pp. 358-394. For a brief summary of other official versions and a critique of the Portuguese version see, “Arguments on the Portuguese Settlement in Macau”, in Blogmacau.info, <http://macau.blogharbor.com>.

⁵ See Jesus, Montalto de, *Macau Histórico*, Macau, Livros do Oriente, reprinted 1990, pp. 39 ff; Teixeira, Manuel, *Primórdios de Macau*, Macau, Instituto Cultural de Macau, 1990, pp. 11-13; Lessa, Almerindo, *A História e os Homens da Primeira República Democrática do Oriente*, Macau, Imprensa Nacional, 1974, p. 12; and Noronha e Silveira, Jorge, *Subsídios para a história do Direito Constitucional de Macau (1820-1974)*, Macau, Publicações O Direito, 1991, pp. 9-19. In English, Wills and Van Dyke, “Strange shores...”, note 3 CK; Chang, Jaw-ling Joanne, “Settlement of the Macao

guese had already been in the area for several decades,⁶ developing trade and looking for new footholds in this distant part of the world with such lucrative possibilities.

For more than two centuries after that, the Portuguese established in Macau administered their interests in an autonomous fashion. In Asia, the attentions of Portuguese imperial power were concentrated exclusively on India. Macau was too small, too far away, and too difficult to communicate with to care about. The administration of Portuguese interests was undertaken by the Senado, a body based on the local autonomous government tradition of medieval Portuguese, composed of three “councillors” elected for three year terms by the local Portuguese population, two judges, and one procurator. The Senado was vested with political, administrative, and judicial powers, but represented only the interests of the Portuguese population, not the Chinese. The local Portuguese were sometimes called to a “General Council” to resolve more delicate matters. The Senado thus reflected local priorities, with little influence from the global Portuguese empire. This curious political structure gave Macau the reputation of being “the first democratic republic of the Orient”.⁷

For many years Macau had no Governor, in other words, no official representative of the central power in Lisbon. Military support for the Portuguese in Macau was provided by the “Captain-Generals of the Voyage to Japan”. This fleet used Macau’s port as a trading post for China-Japan trade and as a staging point on the long voyage between Lisbon and Japan. When China banned direct trade with Japan in 1547, Macau-based Portuguese traders carried goods between China and Japan.

From the 17th century on, Macau was the target of several incursions by the Dutch. The defence of the city required the permanent presence of a military commander. For that purpose the Senado created, in 1615, the post of “War Governor”; in 1623, the title

issue: Distinctive features of Beijing’s negotiating behavior”, *Case Western Reserve Journal of International Law*, vol. 20, 1988, pp. 252 ff; Keeton, G. W., “The International Status of Macau before 1887”, in Keeton, *The Development of Extraterritoriality in China*, New York, H. Festing, 1969, vol. II; Oliveira *et al.*, “An outline of the Macau legal system”, note 4 CK.

⁶ See, for example, Wills and Van Dyke, “Strange Shores...”, *cit.*, note 3 CK.

⁷ An expression first used by Lessa, see note 5 CK.

changed to “Captain-General” or “Governor” and the holder of the post was appointed by the Viceroy of India, not by Lisbon.

Throughout the 17th and most of the 18th centuries, the Governor of Macau had purely military powers and could not question the ruling powers of the Senado. However, after that the Governor’s powers gradually increased, while there was a corresponding reduction in the powers of the Senado. By the time of the transfer of sovereignty, the Senado was no more than a simple municipality vested with no significant powers.

During this time, the Chinese continued to collect certain land and customs taxes, and the Portuguese continued to pay rent to China until 1849, when they abolished the Chinese customs house and declared Macau’s “independence” from China.⁸

On 26 March 1887, the Chinese government recognized the Portuguese right of “perpetual occupation” of Macau in an international agreement known as the Protocol of Lisbon.⁹ China agreed that Macau was the same as any other Portuguese possession, with the proviso that Portugal would never surrender Macau to a third party without China’s permission.¹⁰

Despite the existence of this treaty, the political status of Macau remains a subject of dispute.¹¹ The answer given depends on the per-

⁸ There was strong Chinese retaliation against this, culminating with the assassination of Gov. Ferreira do Amaral in circumstances that remain unclear, at least regarding the motivation for the assassination.

⁹ Formally titled the Treaty of Friendship and Commerce.

¹⁰ Articles 2 and 3. On these treaty clauses, Vasconcelos de Saldanha, António, “O estatuto jurídico internacional de Macau discutido à luz do Protocolo e do Tratado de 1887-Análise do Parecer solicitado pelo Ministério dos Negócios Estrangeiros da China a George Padoux em 1928”, *Boletim da Faculdade de Direito de Macau*, vol. 11, 2001, pp. 131 ff.

¹¹ For more on this, see the summary in Noronha e Silveira, note 5 CK, pp. 11-15; Gonçalves Pereira, Francisco, “Towards 1999: The Political Status of Macau in the Nineteenth and Twentieth Centuries”, in Cremer, R. D. (ed), *Macau: City of Commerce and Culture*, 2nd ed., Hong Kong, API Press Ltd, 1991, pp. 261-8; Morbey, Jorge (ed.), *Macau 1999—o desafio da transição*, Lisbon, CK publisher, 1990, pp. 38 ff; Gonçalves, Arnaldo, “Les implications juridico-constitutionnelles du transfert de la souveraineté de Macao a la République Populaire de Chine”, *Revue Internationale de Droit Comparé*, 1993, p. 4; Keeton, G. W., “The International...”, *cit.*, see note 5; Rodrigues Queiró, Afonso, *Lições de Direito Administrativo*, Lisbon, 1976, pp. 378 ff; Escarra, Jean, “Le Régime des concessions étrangères en Chine”, *Recueil des Cours de L’Académie de*

spective of the writer, with Portuguese and Chinese taking quite different approaches. The branding of this treaty as “unequal” seems to be more fashion than reality, considering the effective differences between Macau and Hong Kong and also the diminutive nature of Portuguese power at the time of its signature, both in comparison to the great Chinese empire and to the British empire and other western powers.¹²

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.

The second period began at the end of the 18th century and was a considerable change from the previous situation. Macau’s importance among Portuguese possessions was growing, Portuguese sovereignty over the territory was strengthened, and in a formal sense Macau became part of Portuguese territory,¹³ as a Portuguese colony.¹⁴

The third period followed the Portuguese Revolution of 25 April 1974. This brought about a radical rejection of colonial policy and Portugal and China established diplomatic relations in 1979. Both countries expressed interest in finding a mutually-agreeable solution to Macau’s status; negotiations began in 1985, a year after the signing of the Sino-U. K. Joint Declaration, and in 1987 the Sino-Portu-

Droit International, vol. 27, 1929, pp. 18 ff; and Conceição, Lourenço Maria da, *Macau entre dois tratados com a China—1862-1887*, Macau, Instituto Cultural de Macau, 1988.

¹² In the 1920s, the 1887 treaty was branded “unequal”, a characterization later adopted by the PRC. Up until the Joint Declaration its validity was disputed, even though Portugal had renounced its sovereignty over Macau and tried to give back Macau to China following the 1974 democratic revolution.

¹³ For instance, the 1822 Portuguese Constitution declared in Article 20, IV, that the territory of the United Kingdom of Portugal included Macau.

¹⁴ In 1972, the PRC formally stated, in a memorandum dated of 8 of March, at the United Nations that it did not consider Macau and Hong Kong to be colonized territories, and thus they should not be covered by the declaration on the granting of independence and later, the UN General Assembly at its 27th session held on November 8 adopted a resolution containing a list of colonized territories which did not include either Macau or Hong Kong.

guese Joint Declaration was signed agreeing that Macau would become a “Chinese territory under Portuguese administration”.¹⁵ This new state of affairs was reflected in the Portuguese Constitution, which stated:

1. While under Portuguese administration, the territory of Macau shall be subject to a statute that is appropriate to its special circumstances. Approval of such statute shall be within the competence of the Assembly of the Republic, with the President of the Republic carrying out the acts set out therein.

2. The statute of the territory of Macau embodied in Law 1/76 of 17 February, with the amendments made by Law 53/76 of 14 September, by Law 13/90 of 10 May and by Law 23-A/96 of 29 July, shall remain in force.

3. Upon the proposal of either the Legislative Assembly of Macau or the Governor of Macau, who shall take the opinion of the Legislative Assembly of Macau, the Assembly of the Republic, which shall take the opinion of the Council of State, may amend or replace that statute.

4. The President of the Republic shall not promulgate a decree of the Assembly of the Republic, where the proposal is approved with amendments, unless the Legislative Assembly of Macau or the Governor of Macau, as the case may be, gives a favourable opinion.

5. The territory of Macau shall have its own judicial system that is autonomous and adapted to the particular circumstances of that territory, as provided by law, which shall give full effect to the principle of the independence of the judiciary.¹⁶

This transitory status laid the basis for a new era for Macau and provided for the opening of the negotiations between Portugal and China concerning the future of Macau and the resumption by China of full sovereignty over the territory. From these negotiations a formal international agreement emerged called the Sino-Portuguese Joint

¹⁵ The formal recognition of this status can be seen in: Law 1/76 dated 17 Feb 1976, Macau Organic Statute; the Portuguese Constitution of 1976; and the Joint Declaration on the Question of Macau signed in Beijing on 13 April 1987 and approved by the Portuguese Parliament.

¹⁶ Article 292, Status of Macau.

Declaration on the Question of Macau, which was deposited at the United Nations.

III. THE POLITICAL SYSTEM ON THE EVE OF THE SAR'S ESTABLISHMENT

A brief description of the political system of Macau is necessary in order to understand the extent of autonomy enjoyed by Macau in the last decade of Portuguese administration.¹⁷

An initial examination of the relevant institutions reveals that the system was fairly complex, particularly as it related to the production of legal norms for the Territory. In fact, five bodies had powers to carry out political functions (legislative or other similar duties): the Assembly of the Portuguese Republic, the Portuguese government, the Legislative Assembly of Macau, the Governor of Macau, and, heading the system, the President of the Portuguese Republic.

The extent of the respective roles of the Portuguese government and parliament was to order the application of (some) Portuguese legislation to the territory of Macau, and in the case of the latter, to review the Organic Statute. However the initiative for revising the Organic Statute had to come from the local bodies.

The President of the Republic was, in some respects, the enclave's head of State. He had significant powers such as appointing and dismissing the Governor and Under-Secretaries and representing Macau in international relations.

According to the Organic Statute, the Governor was the representative in Macau of the Organs of State of the Portuguese Republic, with the obvious exception of the courts. He was appointed and dismissed by the President of the Portuguese Republic, following consultations with the local population, through the Legislative Assembly

¹⁷ This account is based on Cardinal, Paulo, "Macau's political system during the transition: continuity or convergence", *Macau Law Journal*, special issue, 2002, pp. 287-303. For more information on the subject, see Morbey, Jorge, *op. cit.*, see note 11; Canas, Vitalino, "Preliminares do estudo da Ciência Política", *O Direito*, Macau, 1992, pp. 209 ff; Oliveira Rocha, Sistema Político de Macau (photostated lectures), Macau Law Faculty. For an historical background, see Noronha e Silveira, *Subsídios para a história do direito constitucional de Macau*, see note 5 CK.

and bodies representing the social interests of the territory. He was also responsible to the President of the Portuguese Republic for all government actions.

A second examination reveals a simpler, more “local” system. Effectively, the bodies of Macau’s own government were almost the only players in the system, even in the case of lawmaking. In fact, only in a very few cases was legislation made in Portugal and later extended to Macau. Besides, it is important to underline that there was no need to demonstrate the existence of any specific condition or interest¹⁸ to enable the local bodies to enact legislation.

The Governor held both executive and legislative power and also represented Portugal’s sovereign bodies as described above. He was assisted in his duties by a partially-elected Consultative Council. The post of Governor was the only executive body given that, formally, there was no government. He could delegate his executive powers (as was done in practice) to the Under-Secretaries, and was responsible for conducting the general policies of the territory. He had exclusive, authorized (by the Legislative Assembly), and concurrent legislative powers. He could not make laws on matters that had been reserved to Portugal’s sovereign bodies or to the Legislative Assembly, unless, in the case of the latter, they concerned matters of relative reserve and a law had been passed authorising this.

The Legislative Assembly was the body with the most democratic features. The majority of its members were elected by the population of Macau in free, direct, and increasingly universal elections, as well as through indirect suffrage. Its function was primarily as a legislative body. It also had some powers of political control. It had at its disposal a considerable set of reservations on legislative power, divided into those of absolute reservation (of which there were only a few) and relative reservation, the majority. Naturally, it has cumulative legislative powers in all matters not reserved to Portugal’s sovereign bodies or to the Governor.

In conclusion, the system outlined in the Organic Statute was marked by a balance between the Governor and the Legislative As-

¹⁸ As is required for the Portuguese autonomous regions, described below.

sembly,¹⁹ although the Governor had slightly greater powers, and also by the potential for arbitration, in the case of conflict, by the Portuguese President.

A third, “realpolitik” examination reveals that another player had entered into the system: the Sino-Portuguese Joint Liaison Group (JLG). This was the forum for making the arrangements to ensure the effective application of the Joint Declaration and to establish appropriate conditions for the full resumption of sovereignty by China.

The JLG was not supposed to interfere in any way with the “Portuguese Administration of Macau” in during the transitional period, since the Joint Declaration stipulates that, until December 19, 1999, the Portuguese government would be fully responsible for the administration of Macau. However, it is very difficult to separate out those areas that the JLG was “allowed” to include on its agenda. In practice, the JLG became one of the most effective controls on executive action and discussed many issues that were within the sphere of competence of the Portuguese Administration of Macau. But Macau institutions were not represented in the JLG, with only the representatives of the governments of Portugal and China at the table.

This body thus gradually penetrated the political system of the Territory of Macau, upsetting the system to a certain degree.²⁰ In ef-

¹⁹ The relationship may be summarized as follows: Powers of the Legislative Assembly over the Governor: to approve the Finance Act, in other words, to authorise the collection of revenue and public spending; to pass a vote of no confidence in government action; to submit legal documents issued by the Governor to the Constitutional Court to evaluate their constitutionality and legality; to ratify, refuse, rectify, or demand amendment of Decree-Laws of the Governor; to authorise the Governor to contract and offer loans and to furnish guarantees; and to issue opinions on all matters concerning the Territory. Members of the Legislative Assembly may also submit questions on any activities of the Governor or the Administration./ Powers of the Governor over the Legislative Assembly: to submit legal documents issued by the Legislative Assembly to the Constitutional Court to evaluate their constitutionality; to promulgate laws; to exercise the power of political veto; to exercise the power of veto due to unconstitutionality; to propose to the President of the Portuguese Republic the dissolution of the Legislative Assembly; and to appoint seven members.

²⁰ For a critique, see Godinho, Paulo, “Infracção ao Código”, *Ponto Final* weekly, 4 November 1994, p. 17; and “As Garantias do GLC”, *op. cit.*, in the same note, 11 November 1994, p. 17. The broader context is presented in Horta e Costa, Pedro and Almeida Correia, Sérgio de, “Por uma política de tradução jurídica e produção legislativa bilingue no actual contexto do período de transição”, *Revista Administração*,

fect, a triangular system was adopted with the Joint Liaison Group in one corner, and the Legislative Assembly and Governor in the other two corners of this local triangle. This amounted to a *de facto* undermining of Macau's real autonomy.

IV. COMPARISON WITH AUTONOMOUS REGIONS IN PORTUGAL

The system for Portuguese autonomous regions that existed at the time Macau was administered by Portugal provides an interesting comparison with the Macau autonomy.²¹

The Portuguese Constitution states clearly that Portugal is a unitary state and not a federation of any kind, but provides for self-government for certain areas, autonomy of local authorities, and autonomous regions in the archipelagos of the Azores and Madeira.²² Thus Portugal is a partially regionalized state, in the sense that only some parts of its territory are granted an autonomous status.²³

The Constitution states that there shall be special political and administrative arrangements for the archipelagos of the Azores and Madeira based on their geographical, economic, social, and cultural characteristics and on the historical aspirations of the peoples of those islands for autonomy. The purposes of regional autonomy shall be democratic participation by the citizens of the regions, their economic and social development, the promotion and protection of regional interests, and the strengthening of national unity, as well as of the bonds of solidarity among all Portuguese. However, autonomy is

No. 7, p. 134 (note 5). Concerning this increase of powers, see Costa Oliveira, Jorge, "Checks on the executive action in Macao: the powers and functions of executive government", *Centre for Comparative and Constitutional Studies* 1994, pp. 125-6.

²¹ This account covers the rules that existed at the time Macau was still under Portuguese Administration, and not the rules that are in force at present time. In fact, the 6th constitutional review, approved in 2004, extended the political and administrative autonomy of the autonomous regions of the Azores and Madeira, augmenting the powers of their respective legislative assemblies, abolishing the post of Minister of the Republic, replaced by that of Representative of the Republic and, most notably, eradicating the concept of *specific interest*.

²² Article 6.

²³ On this issue, Gomes Canotilho and Vital Moreira, *Constituição Anotada*, Coimbra, Coimbra Editora, 1993, 74 ff and 843 ff.; Miranda, Jorge, *Manual de Direito Constitucional*, Coimbra, Coimbra Editora, 1994, t. III, *passim*.

not without limits: it is stipulated that regional political and administrative autonomy shall in no way derogate from the complete sovereignty of the state and shall be exercised within the framework of the Constitution.²⁴

Legislation governing the autonomous regions originates within them. Drafts of their political and administrative statutes shall be prepared by the regional legislative assemblies and tabled before the Assembly of the Republic for debate and approval. If the Assembly of the Republic rejects or amends the draft, it shall return the draft to the regional legislative assembly in question for its consideration and opinion. On receipt of the opinion, the Assembly of the Republic shall debate the draft and reach a final decision on it.²⁵

In terms of their powers, the autonomous regions are territorial corporate entities,²⁶ and have, besides many others, the following powers, which may be further provided for in their statutes:

To legislate, in compliance with the fundamental principles of the general laws of the Republic, on such matters of specific interest to the regions²⁷ as are not within the exclusive powers of the organs with supreme authority and, when the power is delegated to them by the Assembly of the Republic, on such matters of specific interest to the regions that are within the exclusive powers of the organs with supreme authority; to implement these laws; to make regulations for implementing regional legislation and certain general laws; to exercise the right of legislative initiative with respect to their statutes and in certain other circumstances, by tabling bills and proposals for amendments before the Assembly of the Republic; to exercise certain executive powers; to administer and dispose of their assets and to enter into transactions and contracts; to exercise powers of taxation, in

²⁴ Article 225.

²⁵ Article 226.

²⁶ Article 227.

²⁷ The concept of specific interest is not very clearly defined, but is one of the key boundary markers of autonomy. On this concept, see Canotilho and Moreira, *Constituição Anotada*, see note 23, pp. 851 ff, Blanco de Morais, Carlos, *A autonomia legislativa regional*, Lisbon, Associação Académica da Faculdade de Direito de Lisboa, 1993.

accordance with the law, and to adapt the national tax system to regional circumstances.²⁸

The scope of matters in the “specific interest” of the autonomous regions²⁹ is as follows:

a. Improvement of human resources and quality of life; *b.* Heritage and cultural creation; *c.* Defence of the environment and ecological balance; *d.* Protection of nature and natural resources, as well as the health of the public, animals and vegetation; *e.* Agricultural and fisheries development; *f.* Water, mineral and thermal resources and locally produced energy; *g.* Use of land, accommodation, urbanism and regional planning; *h.* Roads, traffic and land transport; *i.* Infra-structure and sea and air transport between the islands; *j.* Commercial and industrial development; *l.* Tourism, folklore and crafts; *m.* Sports; *n.* Organisation of regional administration and related services; and *o.* Other matters relating exclusively to the respective region or which have a particular significance to them.

The organs of self-government of the regions are the Regional Legislative Assembly and the Regional Government.³⁰ Specific methods of cooperation are envisaged between the organs with supreme authority – that is the President, the Government, the Assembly of the Republic and the courts – and regional organs.³¹ The Minister for the Republic represents the state in the autonomous region and ensures that the boundaries established for the autonomy in the constitution are maintained.³² To this end, the Minister has certain signature and veto powers over acts of the autonomous region.³³

Another important restraint on the capacities of the autonomous regions is that their organs of self-government may be dissolved by the President of the Republic for serious actions contrary to this Constitution, provided the opinion of the Assembly of the Republic and the Council of State has been considered.³⁴ And, if the regional or-

²⁸ Article 227.

²⁹ Article 228.

³⁰ Article 231.

³¹ Article 229.

³² Article 230.

³³ Article 233.

³⁴ Article 234.

gans are dissolved, the Minister for the Republic shall assume responsibility for the government of the region.

Comparing Macau's system to this one, it should first be noted that Macau was *not* considered to be part of Portugal. In fact, the Constitution stated that the territory of Portugal comprises the territory in the Continent of Europe as is historically defined and the archipelagos of the Azores and Madeira.³⁵ Macau is only referred to in the above-mentioned Article 292 in relation to the transitional rule, so as to recognize the Joint Declaration.³⁶

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

On an international level, Macau has been characterized by western scholars as a territory on a lease,³⁷ a union community with Portugal enshrined in and by the Chief of State,³⁸ a condominium,³⁹ a territory under an internationalized regime,⁴⁰ a territory under a special situation,⁴¹ an autonomous territory without integration connected to a special international situation,⁴² a dependent community

³⁵ Article 5. Based on the Constitution as revised in 1989.

³⁶ However, even before the Joint Declaration, Macau was referred to in Article 5 not as being part of Portugal, but as being administered by Portugal. The 1989 revision moved the provision to the last chapter, Article 292, and reinforced the transitional character of the arrangements by adding the phrase "while under Portuguese administration". On this, see for example, Canotilho and Moreira, *Constituição Anotada*, see note 23, p. 1076.

³⁷ For example Quoc Dinh, Nguyen *et al.*, *Droit International Public*, Paris, LGDJ, 1987, 434. With a note of curiosity one can point out that this is the position generally taken by the French international law *school* like, among others, Dupuy, Pierre-Marie, *Droit International Public*, Paris, Précis Dalloz, 1992, p. 46 or Focsaneanu, Lazar, "La Declaration Conjointe du Gouvernement de la République Populaire de Chine et du Gouvernement de la République du Portugal sur la Question de Macao", *Revue Générale de Droit International Public*, t. 91, núm. 4, 1987, p. 1279.

³⁸ Bessa Lopes, Nuno, *A Constituição e o direito internacional*, Codeco, 1979, 27.

³⁹ Nogueira, Franco, "Um político confessa-se", *Civilização*, 1987, p. 217.

⁴⁰ Miranda, Jorge, *Direito Internacional Publico I*, Lisbon, 1991, pp. 289-290.

⁴¹ Moreira, Adriano, *Direito Internacional Publico*, ISCSP, Lisboa, 1983, p. 195.

⁴² Miranda, Jorge, "A teoria das formas de Estado e a Região Administrativa Especial de Macau", *Boletim da Faculdade de Direito de Macau*, vol. 14, 2002, p. 30.

subjected to a dual distribution of sovereignty powers (in other words, China held the sovereignty right but Portugal was responsible for its exercise).⁴³ Without doubt, it was an atypical situation.

Since the Joint Declaration Macau has been an internationalized territory by international law standards, despite the absence of such a label in the treaty itself.

From a domestic law point of view, only one thing seemed certain: Macau was no part of Portugal, it was “Ausland”,⁴⁴ some sort of appendix to Portuguese territory. So, it was not Portugal but what was it? And what was its constitution?

These questions provoked much discussion, and the courts—especially the Constitutional Court—had to deal with the lack of any definite answers. By contrast, the situation regarding the Azores and Madeira was crystal clear. Both in the domestic order and the international one there were no doubts at all as to their legal status.

Most concluded that the Portuguese Constitution did not apply to Macau, at least *in toto*. Besides, Macau had an Organic Statute of constitutional origin that performed most functions of a formal constitution.⁴⁵ So the constitutional order of Macau comprised part of the Portuguese Constitution that applied directly to Macau, a constitutional law called the Organic Statute of Macau and other parts of the Portuguese Constitution that are indirectly applicable to Macau—that is, through the Organic Statute and in the measure dictated by it—. Thus, the constitutional and legal order of Macau constitute a juridical order *a se*.⁴⁶ As a corollary, the system of judicial control of constitutionality was also special and not the “normal” one that exists in Portugal.

The key norm in this atypical juridical construction was Article 2 of the Organic Statute which stated that the territory of Macau constitutes a juridical person of public law and enjoys administrative, economic, financial, legislative, and judicial autonomy, provided the

⁴³ Blanco de Moraes, *A organização do poder político-legislativo no território de Macau*, Coimbra, Estudos em Homenagem ao Prof. Doutor Rogerio Soares, 1999, pp. 134 and 135.

⁴⁴ Rodrigues Queiró, Afonso, *Lições de Direito Administrativo*, Lisbon, 1976, note 11, p. 379.

⁴⁵ With the exception of protecting fundamental rights, it should be noted.

⁴⁶ Miranda, Jorge, *Funções, órgãos e actos do Estado*, Lisbon, 1990, p. 260.

principles and the guarantees for rights and freedoms established in the Constitution of the Republic and the present Statute are observed. Thus, as long as these principles and these fundamental rights were being respected, the autonomy enjoyed by Macau was virtually untouchable. The Portuguese autonomous regions, however, did not have a separate constitutional order, as the Portuguese Constitution is fully applicable.

One other area of difference is the participation of Macau in the international legal order as it had an international capacity, though limited, and it could accede to international instruments and join organizations on its own. For example it was an original member of the WTO. It was an international law subject. But the autonomous regions cannot be considered international law subjects.

In terms of legislative powers, the local bodies of Macau had the capacity to legislate in any area that was not reserved to the Portuguese sovereign bodies. However, Article 31 of the Organic Statute broadened the scope of Macau's legislative powers even further, by allowing the territory to enact legislation in specific areas that should have been reserved to the Portuguese state were the Constitution to have been strictly applied.⁴⁷ That is, the rule was the competence to legislate in every field, with the exception of the matters reserved to Portugal but this exception was in its turn subjected to the exception of Article 31. A complicated construction, but very effective in broadening the powers of Macau in legislating.⁴⁸ This meant, for example, that in most matters a law from Macau could revoke a Portuguese law that was applicable in Macau. By contrast, Portuguese autonomous regions also enjoy wide powers to legislate, but under the restrictions of the "specific interest" concept.

In short, there are many differences between Macau and the Portuguese autonomous regions, and certainly, from a quantitative point

⁴⁷ Article 31 provided a huge range of legislative competences in fields such as fundamental rights, crimes and criminal procedure, taxes, monetary system, some of which were otherwise reserved to the Portuguese sovereign bodies. This signifies that Macau bodies had powers to legislate even in many subjects that within the Portuguese constitutional order *stricto sensu* were allocated to the sovereign bodies alone.

⁴⁸ For further analysis see, for example, Blanco de Moraes, *A organização do poder político-legislativo no território de Macau*, see note 43 CK.

of view, one can conclude that Macau enjoyed by far greater autonomy than the archipelagos.

V. THE JOINT DECLARATION AND THE TRANSITION

On 20 December 1999, Macau went from being a territory under Portuguese administration to the resumption of full sovereignty by the People's Republic of China as a Special Administrative Region (SAR), in accordance with the "Joint Declaration of the Portuguese Republic and the People's Republic of China on the Question of Macau", signed in Beijing in 1987.⁴⁹ This specifies that the SAR will enjoy a high degree of autonomy and will incorporate the basic policies stated in the Joint Declaration into a Basic Law.

The Joint Declaration describes the process leading the conclusion of the treaty⁵⁰ in its preamble:

The Government of the People's Republic of China and the Government of the Republic of Portugal have reviewed with satisfaction the development of the friendly relations between the two Governments and peoples since the establishment of diplomatic relations between the two countries and agreed that a proper negotiated settlement by the two Governments of the question of Macau, which is left over from the past, is conducive to the economic growth and social stability of Macau.

Thus Macau was a question left over from the past, both for Portugal and for China, an anomaly, then. It was a question that could be solved only after the establishment of diplomatic relations between the two states. From the perspective of China, Macau had never ceased being part of China, but had been occupied by Portugal.⁵¹ The Joint Declaration was thus concluded to allow China to resume

⁴⁹ This section is partly based on Cardinal, Paulo, *Permanent Fundamental Rights in a Legal System in Transition— The Case of Macau*, Seoul, Lawasia, 1999.

⁵⁰ See, on the process leading to the JD, Gonçalves Pereira, Francisco, "O processo negocial da Declaração Conjunta-uma abordagem preliminar", *Boletim da Faculdade de Direito de Macau*, vol. 11, 2001, pp. 63 and ff; Chang, "Settlement of the Macao issue...", note 5 CK, *passim*.

⁵¹ Basic Law, Preamble.

the exercise of sovereignty over Macau in a peaceful and in *pacta* way, very in fashion in the late 20th century.

Just before the Sino-Portuguese negotiations began, a similar process was unfolding, regarding Hong Kong. The Macau outcome was strongly influenced by that example. China employed the now-famous “One Country, Two Systems” formula coined by Deng Xiaoping in order to achieve the reunification of China. Of course the principle was originally designed for Taiwan, not Macau and Hong Kong. The ultimate goal is still the reunification of Taiwan, but that task was postponed—in a very Chinese fashion—to wait for a better moment. And, in the meantime, the idea was that Macau and Hong Kong would serve as good examples for the compatriots of the other side of the Straits.

The Joint Declaration, this strangely-named international treaty⁵² has been deposited at the United Nations and is undoubtedly a “real” international treaty⁵³ with all the legal consequences that implies.⁵⁴ It sets out the fundamentals of the process of transfer (with implications for the legal system, public administration, exercise of sovereignty powers, political structure, judiciary, and fundamental rights, among others).

The signing of the Joint Declaration initiated a transition period that served the process of the transfer. The first sub-period reached

⁵² “It is sometimes suggested... that the JD is not binding, at least on the government of China, because as a mere “declaration” of intended policies by a sovereign power in regard to its own territory it cannot restrict the sovereignty it confirms”, writes Wesley-Smith, Peter, concluding, “This is not so”, *Constitutional and Administrative Law in Hong Kong*, Hong Kong, China and Hong Kong Law Studies, 1993, p. 57. On the Joint Declaration as a document with legal force, see Qing, Xu, *A Natureza e o estatuto da Lei Básica da RAEM – uma tentativa de abordagem*, unpublished, 1994, p. 9.

⁵³ On this, Moura Ramos, Rui, “A Declaração Conjunta Luso-Chinesa Na Perspectiva do Direito Internacional”, *Boletim da Faculdade de Direito*, vol. 74, 1998; Carapinha, José, “The Political and Legislative Transition of Macau”, in *Macau and its Neighbours in Transition*, Macaul, FSSH-Fundação, 1996, p. 18; Zhi Zhong, Chen, “The Joint Declaration and the International Law”, *Boletim da Faculdade de Direito de Macau*, No. 11, 2001, pp. 89 ff. For Hong Kong, Mushkat, Roda, *One Country, Two International Legal Personalities*, Hong Kong, Hong Kong University Press, 1997, pp. 140-141.

⁵⁴ Frances Luke stresses this quality of the JD in “The imminent threat of China’s intervention in Macau autonomy: Using Hong Kong’s past to secure Macau’s future”, *American University International Law Review*, vol. 15, 2000, p. 3.

its end on 19 December 1999. Then a second phase of the transition started that will last for 50 years. During this latter period, the PRC has undertaken to uphold a set of binding principles, policies, and provisions that are included in the Joint Declaration and that impose limitations on China's sovereignty over Macau. This self-limitation on sovereignty is articulated in the "One Country, Two Systems" strategy.

There has not always been a single, clear, interpretation of the concept of transition or transition period, and thus this concept merits some examination. Under the simplest reading, it has been suggested that the transition period began when the Sino-Portuguese Joint Declaration came into effect in January 1988 and ended on 19 December 1999. In other words, the transition period was the time taken for the transfer of sovereignty over Macau from Portugal to the PRC.⁵⁵ The corollary of this view is that the Joint Declaration ceases to be effective after 19 December 1999. On the following day, as the transition period will have concluded, it will no longer make sense to invoke the international legal document which created and regulated that transition period. If this is accepted, the Joint Declaration will no longer have any purpose after the transition is over.

But this view is based on an isolated, hermetic interpretation of Point 3 of the Joint Declaration, which does not take into account the remaining text of the treaty and does not respect the letter and the spirit of the document. In fact, the transition period must be understood as meaning the entire time for which the contracting parties, Portugal and China, will be bound by the international treaty they decided to sign. Without question, the Joint Declaration constitutes a limitation on the exercise of sovereignty over the enclave. It is, however, a limitation freely created and desired by the two sovereign states in the normal exercise of their international legal powers.

There are two reasons why the existence of this limitation on China's full exercise of sovereignty cannot be used as a basis for arguing that the Joint Declaration will cease to be effective. Firstly, this is a limitation which has already affected the Portuguese Republic,

⁵⁵ Joint Declaration, Point 3.

and secondly it was freely agreed by both contracting parties. They are thus self-imposed limitations translated into convention.

The framework of the Joint Declaration varies; it fluctuates in rigour depending on the situation in which it is applied and to whom it is being addressed. In other words, the ways in which it can be applied are variable.

Effectively, then, the obligations created by the Joint Declaration vary according to whether they deal with Portugal or China. First and foremost is the obligation to transfer the exercise of sovereignty over Macau from Portugal to China. Other obligations arise as a result of this. These are provided for in the various sections of Point 2, in which the PRC government “declares” that China “will pursue the following basic policies regarding Macau”. There follows a list of eleven important “policies” which will define the future Macau SAR. The list closes with a twelfth, which, while reiterating the text of Article 2 of the JD stresses that “The above-mentioned basic policies... will be stipulated in a Basic Law... and they will remain unchanged for fifty years”.

In addition to the obligations binding the PRC and those binding Portugal, there are still other obligations which are directed simultaneously towards both parties, such as the creation of a Joint Liaison Group.⁵⁶ One of Portugal’s obligations consists of promoting economic development and preserving Macau’s social stability.⁵⁷

Now that the obligations enshrined in the Sino-Portuguese Joint Declaration have been identified —albeit not exhaustively— it is apparent that they are not directed uniformly to both parties, whether in terms of subject matter or time. In fact, the obligations of the PRC, and, indirectly, those of the Macau SAR, last throughout the 50

⁵⁶ Article 4 and Annex II, point 1.

⁵⁷ For more on this package of obligations, see Costa, Alberto, “Continuidade e mudança no desenvolvimento jurídico de Macau à luz da Declaração Conjunta Luso-Chinesa”, *Revista Jurídica*, No. 1, p. 54. For Hong Kong, Olivier, Marius, “Hong Kong: An exercise in autonomy?”, conference paper delivered at One Country, Two Systems: Theory and Practice international conference, Hong Kong, 1997, pp. 71-2.

years following the resumption of sovereignty.⁵⁸ This is thus a second transition period, or sub-period.⁵⁹

In conclusion, the Sino-Portuguese Joint Declaration envisages a transition period stretching from its implementation to the last day of the 50 years following China's resumption of sovereignty over Macau. This period can be divided into a further two periods, the first lasting until 19 December 1999 and the second beginning on 20 December of the same year and lasting for 50 years.

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. After the 50 years, then, China will be free of any obligations stated in the Joint Declaration and could, theoretically, for example, abolish the SAR, change its nature, eradicate the high degree of autonomy, transform it into a municipality, revoke the Basic Law, eliminate the use of Portuguese language, restrict fundamental rights, demolish the current social-economic system, get rid of independent judicial power, including that of final adjudication, abolish the free port and separate customs status, alienate Macau, grant independence, etc.⁶⁰

All these guarantees are in the Joint Declaration and, in accordance with the *pacta sunt servanda* principle, none of that will be possible within the timeline prescribed by the international treaty. Of course, the JD contains no mechanism for its enforcement, but re-

⁵⁸ For example, Cardinal, Paulo, "O sistema político de Macau na Lei Básica—separação e supremacia do executivo face ao legislativo", *Revista Administração*, No. 19/20, passim; Cabrita, "International and Constitutional...", see note 3 CK, p. 159.

⁵⁹ See Escovar Trigo, Manuel, "A Transição na Declaração Conjunta", *População e Desenvolvimento em Macau*, UM-FM, 1994, pp. 368 ff; Gonçalves Pereira, Francisco, "Declaração Conjunta, modelo de transição e reforma da Administração", *Revista Administração*, No. 11, pp. 78 ff.

⁶⁰ Godinho, Jorge, *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 "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.

spect 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. Besides, the PRC has everything to gain in preserving the Macau format in order to solidify its status in the international arena.⁶¹

The Joint Declaration will remain a prominent source of law for the Macau SAR.⁶² 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.⁶³

In a sense, the Basic Law “does no more” than detail the policies stated in the Joint Declaration,⁶⁴ as foreseen in Point 12: “The above stated basic policies and the elaboration of them in Annex I to

⁶¹ See, for example, Gonçalves, Arnaldo, *op. cit.*, see note 11, p. 838. Olivier, “Hong Kong: An exercise in autonomy?”, see note 57 CK, p. 88, states, “The true sovereign and the final authority will be the PRC itself. It remains accountable to the United Kingdom, however, to the extent that it may be found to be in breach of the... provisions of the Joint Declaration”. He notes, however, that a “major problem, however, is the fact that no provision is made for the independent settlement or adjudication of disputes arising from the terms of the JD, a problem which is complicated by the PRC’s reluctance to accept the jurisdiction of the International Court of Justice”, p. 62. One could add the fact that, contrary to general practice, the international treaty was not written in a third neutral official language. But none of these impair the validity of the JD up to 2049. As Chen writes in “The Joint Declaration and the International Law”, the obligations stipulated in the JD cannot be changed by either party unilaterally even by reason of its own national laws, see note 53 CK, p. 91.

⁶² See Costa, Alberto, “Continuidade e mudança no desenvolvimento jurídico de Macau”, see note 57 CK, p. 64, note 7; Costa Oliveira, Jorge, “A continuidade do ordenamento jurídico de Macau na Lei Básica da futura Região Administrativa Especial”, *Revista Administração*, No. 19/20, pp. 24-5; Cardinal, “O sistema político de Macau na Lei Básica...”, see note 58 CK, p. 80; Isaac, Armando, “Substantive constitutional restrictions on the limits to the sphere of jurisdiction of the Macau Special Administrative Region’s Courts”, paper presented to the 4a. Comparative Constitutional Law Standing Committee Conference, Bangkok, 27-29 May 1999.

⁶³ Preamble and in Article 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.

⁶⁴ In Zhong, Zhi, “The Joint Declaration and the International Law”, Chen writes that the Basic Law codifies the 12 points in JD Article 2, see note 53 CK, p. 92.

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.⁶⁵

VI. THE GENESIS AND THE GUARANTEE OF AUTONOMY: THE JOINT DECLARATION

For the 50 years that started on 20 December 1999, the Joint Declaration will be the genesis, the anchor, and the guarantee of Macau's autonomy.⁶⁶ It presents a framework for Macau's autonomy that has two main characteristics: the autonomy is, internationalized⁶⁷

⁶⁵ Gomes Canotilho, J. J., "As palavras e os homens—reflexões sobre a Declaração Conjunta Luso-Chinesa e a institucionalização do recurso de amparo de direitos e liberdades na ordem jurídica de Macau", *O Direito*, October 1994, pp. 7-8.

⁶⁶ That is, in my view, the appropriate conclusion. The assertion that Chinese institutions and the Chinese Constitution are the primary source of Macau's autonomy leads to the denial of any role post-transfer for the JD. The PRC Constitution opens the door in Article 31, the NPC may even be the key to that door, but the creators and delivers of the autonomy institution, or the parents, are the signatory parties, Portugal and China, through a bilateral agreement. Both states are the parents even though the guardian and the parent that directly cares for the child—MSAR—is China. Making the same point, Almeida Ribeiro, Manuel de, "A Região Administrativa Especial de Macau e o Direito Internacional", *Boletim da Faculdade de Direito de Macau*, No. 13, 2002, p. 203. Although the SAR is founded on the basis of the One Country, Two Systems policy, Zhu Guobin asserts, "This political structure is, however, a result of the Joint Declaration" even if an invention of the Chinese government, in "Redefining the Central-Local Relationship under the Basic Law", paper given at One Country, Two Systems: Theory and Practice international conference, 1997. Arguing that the HKSAR is a creation of international law, Mushkat, Roda, "Hong Kong as an international legal person", *Emory International Law Review*, No. 114, p. 110; arguing against this view, among others, Olivier, "Hong Kong: An exercise in autonomy?", see note 57 CK, p. 88.

⁶⁷ 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 is shares more of the "uniqueness" of the Macau and Hong Kong autonomies. In fact, they have in common a transfer of sovereignty—at least to a certain degree—from one sovereign state to another sovereign state; that transfer was agreed and laid down in an international legal agreement; those agreements were deposited at the UN; thus, the foundation of the autonomy is primarily internationally based; the level of autonomy en-

and temporary, and for the duration of the 50-year period covered by the Joint Declaration,⁶⁸ it operates under the principle of unchangeability.⁶⁹ If after those fifty years autonomy remains unchanged—as I believe it will—it will have a different legal foundation guaranteed in a different way.

The Joint Declaration first stipulates that the government of the People's Republic of China will resume the exercise of sovereignty over Macau with effect from 20 December 1999 thus allowing for the accomplishment of reunification of Macau with China, and consequently the establishment of an entity integrated with, but separate from, the PRC: "The People's Republic of China will establish a Macau Special Administrative Region of the People's Republic of China upon resuming the exercise of sovereignty over Macau".⁷⁰ The SAR is the juridical person that embodies the new autonomic reality within Chinese sovereignty.

The Macau Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China, 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 Macau Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication.⁷¹

joyed is of a greater range than other autonomous regions that exist only by means of domestic law; in these cases one finds that there are at least two official languages within the juridical boundaries of the autonomies, the language of the "new" sovereign as well as the language of the previous one. On this, see Peterlini, Oskar, *The South-Tyrol autonomy in Italy: Historical, political and legal aspects*, in this volume. On the internationalised origins of autonomy, see also Suksi, Markku, *The self-government of the Aland islands in Finland: Purpose, structures and institutions*, in this volume.

⁶⁸ In other words, "is not open-ended", Xu, Xiaobing, and Wilson, George D., "The Hong Kong Special Administrative Region as a model of regional external autonomy", *Case Western Reserve Journal of International Law*, Winter, 2000, p. 11.

⁶⁹ Gonçalves Pereira, Francisco, "Accommodating diversity: Macau under China's Constitution", in *Macau on the threshold of the third millennium*, Macau, Instituto Ricci, 2001, p. 107.

⁷⁰ Point 2 (1) and reaffirmed on point I of Annex ICK.

⁷¹ Point 2 (2) and I of Annex ICK.

The qualification of the degree of autonomy is essentially symbolic, rather than some sort of measurement, except insofar as it contrasts the special situation of the SAR as compared with other forms of autonomy in China. This paragraph also vests the SAR with the traditional trinity of normal statehood functions, while at the same time establishing the limits of its autonomy.

While the Joint Declaration works as a *grundnorm* for the Basic Law, there is a significant discrepancy between them, one that appears on several occasions. 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.⁷²

In truth, this concrete autonomy vis-à-vis the PRC is possible only because Macau returned to the motherland, but this return happened due to the international agreement and, the reunification came with a package of prices, as described above. The establishment of a SAR and endowing it with a high degree of autonomy represented a bilateral will and not the single will of one of the parties. Moreover, the competences—and the duty—to establish these arrangements were set by the international treaty, not by China and even less by one of its political institutions. Saying that “the NPC authorizes” is legally untrue and unrealistic since it does not have the power to do this. At the most one can concede that the NPC is mandated by the parties to act in this fashion and acts, in a sense, in accordance and within that internationalized mandate. Why the NPC? Because in the Chinese domestic order, it is the institution that is considered to be the most appropriate and the JD did not need to interfere in such do-

⁷² As Zhu Guobin puts it, “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*...”, “Redefining the Central-Local Relationship...”, note 66 CK, p. 6. Where the Joint Declaration is silent but the Basic Law grant powers to the SAR’s it should be considered a situation of delegation, especially if they are not derived from general principles stated in the Joint Declaration.

mestic legal matters. 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.⁷³

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.

“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”.⁷⁴ All the rights and freedoms of the inhabitants and other persons are to be guaranteed by law in the Macau SAR. One of the main pillars of the transition is clearly proclaimed in this normative discourse, the principle of continuity, thus reinforcing the idea of it being based on the previous special identity of Macau. In other words, the contents of the autonomy should not be less than that enjoyed by the Territory of Macau under Portuguese administration.⁷⁵ The JD points to this and in addition, effectively serves to extend the Macau autonomy, such as by mandating a self contained judicial system.

Thus a paramount principle is the continuity/maintenance of the present social and economic systems. In order to secure this, the laws currently in force will remain basically unchanged.⁷⁶ This principle is reinforced in Annex 1, III, of the Joint Declaration, which states that following the establishment of the Macau SAR the laws, decree-laws,

⁷³ It is virtually impossible to find any reference to the Joint Declaration in the relevant Chinese literature on the subject. Clearly there is an effort to due to downgrade, if not entirely erase, the Joint Declaration. Reading some published works, one may not be aware there ever was such a thing as the Joint Declaration.

⁷⁴ Point 2 (4) and check also I and III of Annex I with some differences in the language of the late norms.CK.

⁷⁵ Canas, “A extensão da autonomia...”, see note 1 CK, p. 226.

⁷⁶ On this, Oliveira, “A continuidade do ordenamento jurídico...”, see note 62 CK, *passim*; Cardinal, Paulo, “O Regime Jurídico da Advocacia no Contexto da Lei Básica”, Macau, Associação dos Advogados de Macau, 1992, pp. 71-7; Costa, Alberto, “Continuidade e mudança no desenvolvimento jurídico de Macau”, see note 57 CK, *passim*; Gonçalves Pereira, “Declaração Conjunta...”, see note 59 CK, pp. 77 ff; Assunção, Leonor, “Princípios de Direito Penal e Direitos e Garantias Processuais Penais dos Residentes de Macau”, *Administração*, pp. 129 ff; and Isaac, “Substantive constitutional restrictions...”, see note 62 CK, pp. 46 ff.

administrative regulations, and other normative acts previously in force in Macau shall be maintained unless they contravene the Basic Law or are subject to any amendment by the Macau legislative body. The Macau Basic Law contains an identical provision.

The Joint Declaration states that all fundamental rights and freedoms will be ensured. Again, the continuity principle is the guideline; hence, the idea of “permanent” fundamental rights in spite of the transition of the legal system.

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

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.

Using the name “Macau, China”, 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 establishment 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.⁷⁷ It is expressly provided with an international legal capacity either to conclude international treaties or to join international organizations.⁷⁸

⁷⁷ Shuwen, Wang, “As características da Lei Básica da Região Administrativa Especial de Macau”, *Boletim da Faculdade de Direito de Macau*, No. 1, 1997, p. 46, concludes that some of the powers enjoyed by the SAR’s cannot be seen in federal systems.

⁷⁸ Annex 1, VIII.

Thus the limitations on autonomy concerning foreign affairs are, in fact, qualified, making the autonomy in some ways more extensive than others elsewhere.⁷⁹ Where else are there formal borders and customs controls inside the same country as there are between the MSAR and the rest of China?

Moving to the economic and finance areas, the contracting parties to the JD established complete autonomy, including the power to retain Macau's own currency. Macau will remain a free port and a separate customs territory in order to develop its economic activities and there will be free flow of capital. The Macau Pataca remains the legal tender of the MSAR and will continue to circulate and be freely convertible. Again, such a power is now not seen even in some important sovereign states, such as those of the European Union. In addition, the Macau SAR continues to have independent finances and the Central People's Government (CPG) does not levy taxes on it.

Even the maintenance of public order in the Macau SAR is the responsibility of its government, despite the sensitivity of this issue of China.

Further features of the autonomy include the provision that after the establishment of the Macau SAR the socialist system and socialist policies shall not be practised in Macau. Also, judicial power in the Macau SAR is vested in its own courts, with the power of final adjudication exercised by its own court of final appeal.

It has been proposed that Macau should be named an *Exceptional Administrative Region*, rather merely a "special" one, since "special" is insufficient to describe the nature of the SAR's status and the dimension of the powers that it enjoys.⁸⁰ This argument seems persua-

⁷⁹ Xu and Wilson, "The Hong Kong Special Administrative Region as a model of regional external autonomy", see note 68, 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.

⁸⁰ Bacelar Gouveia, Jorge, "A Lei Básica da Região Administrativa Especial de Macau—Contributo para uma compreensão de direito constitucional", *Boletim da Faculdade de Direito*, No. 13, 2002, p. 195, asserts this position, on the basis of a schematic analysis that divides the juridical norms into general, special, and exceptional ones. Of course, I am not seriously proposing changing the designation, since such a change would also call into question the use of "administrative" in "administrative region". As explained by Xu and Wilson, the problem was that he term "autonomous

sive, given the nature of the autonomy outlined above, which does not fit into any category of existing autonomous entities or even states within federations.

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.

VII. MACAU'S AUTONOMY AND THE PRC CONSTITUTION

In the Preamble to its Constitution,⁸¹ 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 establishes⁸² also does not accommodate the idea of the SAR's.

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.⁸³ In order to accommodate their creation, Article 31 was created, stating: "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".

As mentioned above, autonomous areas in China were created in order to accommodate national diversity. Therefore the autonomous

region" had already been allocated in the Chinese system. "The Hong Kong Special Administrative Region...", see note 68 CK, p. 7.

⁸¹ Constitution of the PRC, 1982.

⁸² Article 30.

⁸³ For a brief account of the history of the Chinese autonomy model, Gonçalves, Arnaldo, "A paradigm of autonomy: the Hong Kong and Macau SAR's", *Contemporary Southeast Asia*, vol. 18, No. 1, 1996, pp. 39 ff.

areas are connected to a certain minority, as the Constitution states that nationalities regional autonomy is practiced in areas where people of minority nationalities live in concentrated communities.⁸⁴ In these areas, organs of self-government are established to exercise the power of autonomy. Unlike for the SAR's, there are no international agreements to regulate this process.

The Chinese Constitution incorporates different approaches to regional autonomy, and even establishes different constitutional norms for the "domestic" autonomies and for the SAR's in articles 30 and 31 respectively.⁸⁵ Article 30 lists the administrative divisions of the state, including the autonomous regions, but not the special administrative regions which are provided for 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 SAR's is established in their respective Joint Declarations and Basic Laws.⁸⁶ 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 comparison between the SAR's and

⁸⁴ Article 4.

⁸⁵ Further emphasizing the different constitutional origins of the two types of autonomy, in article 62 on the functions and powers of the National People's Congress, approving the establishment of autonomous regions is clause 12 while deciding on the establishment of special administrative regions and the systems to be instituted within them is covered by clause 13.

⁸⁶ Other references to the SAR's in the PRC Constitution are found in articles 59(12) and 62(13), one being a norm of competence and the other one a norm of representation. For the autonomous regions there are several more norms, for example in articles 62(12), 67(8), 67(12) and 67(20) and 89(4) and 89(15), to mention a few. Some of these are of great importance in the configuration of the nature and level of the autonomy, such as those that allow the NPCSC to annul regulations of the autonomous regions, article 68(8), and stipulate that the State Council exercises unified leadership over the work of local organs of state administration at different levels throughout the country, and to lay down the detailed division of functions and powers between the central government and the organs of state administration of autonomous regions, article 89(4).

the other autonomy model in China reveals that the SAR's enjoy a much wider scope of autonomy.⁸⁷

Besides this quantitative aspect, other important differences shape the nature of the SAR's: 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 SAR's and the autonomous areas is not only one of degree, but of their nature.⁸⁸

China took a highly pragmatic approach towards the questions of Macau and of Hong Kong:⁸⁹ 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 SAR's into the Chinese state⁹⁰ as a "second system" enjoying a "high degree of autonomy". Article 31 was the necessary step to accommodate the constitutional framework to the international binding obligations that were to come. In a somewhat similar fashion, Article 292 of the Portuguese Constitution was construed to accommodate Portugal's legally-binding obligations toward Macau. Article 292 alone could not serve the purpose of returning Macau to China with all the necessary guarantees, just as Article 31 alone could not realize the return of Macau and establish the terms for its incorporation.⁹¹

⁸⁷ See for example, Gaolong, Liu, "Definição do regime de 'Um país, dois sistemas' na Lei Básica de Macau", *Boletim da Faculdade de Direito de Macau*, vol. 13, 2002, pp. 141 ff.; Zhu, "Redefining the Central-Local relationship...", see note 66 CK, *passim*, Wang, "As características da Lei Básica...", see note 77 CK, p. 46.

⁸⁸ Zhu, "Redefining the Central-Local relationship...", see note 66 CK, p. 6.

⁸⁹ Gaolong, Liu, "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 SAR's enjoying such a high degree of autonomy is unique, thus it constitutes a new departure in the organization of the state, p. 93.

⁹⁰ Jorge Miranda uses the expression a status of autonomy with integration as opposed to the previous autonomy without integration with Portugal, "A teoria das formas de Estado...", see note 42 CK, p. 30.

⁹¹ The provisions of the two constitutions thus work in a similar inverted fashion, and were bridged by the Joint Declaration. Article 292 allowed the special status of Macau as a non-Portuguese territory, thus permitting it to be alienated, while Article 31 allowed the return of Macau with a special status. Then it is up to the Chinese

The above characteristics can be deemed as almost federalistic⁹² or as incorporating a proto-federalistic phenomenon but that does not seem to worry the PRC as long as it is still labelled as a normal unitary state and the formula works. And if there were doubts, the NPC stated: “The Basic Law of the Macau Special Administrative Region is constitutional as it is enacted in accordance with the Constitution of the People’s Republic of China in the light of the specific conditions of Macau”.⁹³ Thus, from a solely domestic stance, the SAR’s are integrated into the constitutional framework of the PRC, although in a very special way.

VIII. AUTONOMY AND THE BASIC LAW

The Basic Law constitutes the formal domestic legal instrument that details the constitutional organization of the SAR, including its autonomy. This legal document has the appearance and the structure of a formal constitution and can be called a “mini-constitution” or a “para-constitution”.

domestic legal order to decide, under the framework dictated by the JD, the method by which the Macau reunification is to be effected, as it was up to the Portuguese domestic legal order to decide how to proceed with the disposal of powers over Macau.

⁹² Ieong Wan Cheong considers that 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, *One China, Two Systems and the Macao SAR*, Macau, University of Macau, 2004, pp. 233-4. 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. 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. 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, the *Kompetenz-Kompetenz*, 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...”, see note 80 CK, p. 197.

⁹³ Decision of the National People’s Congress on the Basic Law of the Macau Special Administrative Region of the People’s Republic of China, adopted by the Eighth National People’s Congress at its First Session on 31 March 1993. A similar decision was passed for Hong Kong on 4 April 1990.

In fact, if one looks at the legal order of the Macau SAR, the Basic Law is the highest source of the domestic legal system. This role is clearly indicated in Article 11, in a fashion rooted in Romano-Germanic legal systems: “No law, decree, administrative regulations and normative acts of the Macau Special Administrative Region shall contravene this Law”.

It is important to reiterate that the Basic Law must follow the provisions of the Joint Declaration, although in some cases it has failed to do so.⁹⁴ 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 Declaration.⁹⁵ Failing to do so would make the Joint Declaration meaningless and eliminate the source of all the distinctive features of the SAR’s.

1. *The Features of Autonomy*

The Basic Law states that Macau is authorized to exercise a high degree of autonomy.⁹⁶ 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;⁹⁷ the power independently to conduct, in accordance with the Basic Law, “relevant external affairs”,⁹⁸ to participate in international organizations and conferences not limited to states only under the name Macau, China,⁹⁹ and to develop international relations and conclude related agreements;¹⁰⁰ to use the Portuguese language as an

⁹⁴ See for example Cardinal, “O sistema político de Macau na Lei Básica...”, see note 58 CK, *passim*; for Hong Kong, Ghai, *Hong Kong’s New Constitutional Order*, Hong Kong, HKU Press, 1999, p. 146.

⁹⁵ 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 JD. 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.

⁹⁶ Articles 2 and 12.

⁹⁷ Article 2, CK?

⁹⁸ Article 13, CK?

⁹⁹ Article 137, second paragraph, CK?

¹⁰⁰ Article 136, CK?

official language of the SAR;¹⁰¹ to exercise immigration controls over the entry, stay, and exit of foreign nationals;¹⁰² and to maintain public order in the SAR.¹⁰³

To this end, the socialist system will not be practiced in Macau,¹⁰⁴ and the SAR is to keep its own system: “The laws, decrees, administrative regulations and other normative acts previously in force in Macau shall be maintained, except for any that contravenes this Law, or subject to any amendment by the legislature or other relevant organs of the Macau Special Administrative Region in accordance with legal procedures”.¹⁰⁵ The Basic Law provides for the system to be used in Macau: “The systems and policies practiced in the Macau SAR, 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”.¹⁰⁶ In addition, the PRC’s national laws will not apply, apart from those listed in Annex III to the Basic Law.¹⁰⁷ 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”.¹⁰⁸

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. Since most of the substance has been discussed above in relation to the contents of the Joint Declaration, here I will focus primarily on the limitations the Basic Law imposed on Macau’s autonomy.

The Basic Law also contains the possibility of expanding Macau’s autonomy. It states, “The MSAR may enjoy other powers granted to it by the National People’s Congress, the Standing Committee of the

¹⁰¹ Article 9, CK?

¹⁰² Article 139, CK?

¹⁰³ Article 14, second paragraph, CK?

¹⁰⁴ Article 5, CK?

¹⁰⁵ Article 8, CK?

¹⁰⁶ Article 11, first paragraph, CK?

¹⁰⁷ Article 18, second paragraph, CK?

¹⁰⁸ Article 22, CK?

National People's Congress or the Central People's Government".¹⁰⁹ 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.

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.¹¹⁰ This contributes to the effective autonomy of Macau since people of various nationalities can belong on (almost) equal terms.

2. *The Limits of Autonomy*

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 in the treaty.

First of all, Macau is Chinese territory, and the government of the People's Republic of China has resumed the exercise of sovereignty over it. Sovereignty now resides solely in the Chinese state, both in its title and in its exercise,¹¹¹ 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. Under such a framework, it is not possible for Macau to achieve formal federated status, even less for it to win independence.

Second, there is a temporal limitation: the principle of the internationalized autonomy will remain in force for fifty years, hence it is guaranteed only for that period of time.

¹⁰⁹ Article 20. Canas, Vitalino, "A extensão da autonomia...", *cit.*, note 1, p. 244, makes this point despite considering the article an enigma.

¹¹⁰ 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.

¹¹¹ On this point, Olivier, Hong Kong: An exercise in autonomy? See note 57 CK, *passim*.

Finally, Macau 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.

The Chief Executive will be appointed by the CPG, although the selection will be based on the results of elections or consultations in Macau. Officials holding principal posts will be nominated by the Chief Executive of the Macau SAR but appointed by the CPG. The limits are stated in point 3 of the JD and are further developed in Annex I.

The relationship between religious organizations in the Macau SAR and those in other parts of the PRC shall be based on the principles of non-subordination, non-interference, and mutual respect. This arrangement of mutual restraint relates to the sensitive issue of relations between the PRC and the Vatican, and while it might be considered a limitation on autonomy, it also acts as a guarantee for the autonomy of religious organizations in Macau.

Additional limitations are imposed through the Basic Law. It is notable that the language used in the Basic Law—since the centre “authorizes”, Macau “may” do certain things and “shall” do others—implies that autonomy is a favour granted from on high. The following list of specific provisions is not exhaustive, but rather highlights the most prominent limitations on autonomy.

Chapter I of the Basic Law, “General Principles”, essentially reproduces what has already been stated in the JD. The most notable exception is that the concept of “local inhabitant” is changed to that of “permanent resident”.¹¹²

Article 15 states that not only the appointment, but also the removal, of the Chief Executive, the principal officials of the govern-

¹¹² On this change and its implications, Cardinal, “O sistema político de Macau na Lei Básica...”, see note 58 CK, pp. 95-100.

ment, and the Procurator General are the prerogative of the CPG. No mention of the procedure for removal was made in the JD, thus the Basic Law is broadening the scope of the correspondent norm of the international treaty by adding the removal power.

Article 17 sets out a complex procedure for a political variety of constitutional review:

[T]he laws enacted by the legislature of the Macau Special Administrative Region must be reported to the Standing Committee of the National People's Congress for the record. The reporting for record shall not affect the entry into force of such laws. If the Standing Committee of the National People's Congress, after consulting the Committee for the Basic Law of the Macau Special Administrative Region under it, considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, the Standing Committee may return the law in question but shall not amend it. Any law returned by the Standing Committee of the National People's Congress shall immediately be invalidated.

This imposes a clear limit on the capacity to enact laws in the name of defining the boundaries of autonomy. Although the effect is the invalidation of the law, we do not know if the result is the invalidation of the law in *toto* or solely of a specific norm that is in violation of the above parameters. However, there is still some self-restraint since it is not within the powers of the central bodies to change or amend the law.

Although 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 presup-

pose 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, how could one expect the SAR fully to explore the guarantees in the Basic Law¹¹³ aimed at ensuring that the previous capitalist system and way of life shall remain unchanged for 50 years? Certainly that way of life and its maintenance over its several fields presupposes that action can be taken in all the areas specified in the Basic Law, but not only those. If there is no provision in the Basic Law concerning the protection of endangered wild life, or agriculture, fisheries, urban planning, weights and measurements standards, should that mean that the SAR cannot act, for instance by means of legislation, in those areas? Would the PRC have to take care of such matters? I do not think so and I believe that the spirit and extent of a high degree of autonomy does not point that way either. 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 pow-

¹¹³ Article 5. Canas, “A extensão da autonomia de Macau...”, see note 1 CK, pp. 242-3. For a different perspective, see among others, 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.

ers of the SAR's by citing the fact that formally they are not states in a Chinese federation.¹¹⁴

Article 19 brings in a serious limitation on Macau autonomy:

The courts of the Macau Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

This procedure has the potential for allowing further erosion of the scope of autonomy in practice.

Article 23 requires that MSAR:

Shall enact laws, on its own, to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

Although the power to enact the laws is vested in the local bodies, the central authorities have given a direct command to enact certain legislation thus not allowing the possibility for the autonomous bodies to decide otherwise.

Throughout Chapter IV, "Political Structure", there are statements making Chinese nationality a requirement for top political posts. In correspondent JD norms Chinese nationality was not a requirement. This constitutes another example of a certain reinterpretation phenomenon evident in the Basic Law as compared with the JD.

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.

¹¹⁴ Article 20 of the Basic Law should also be interpreted in this light.

The NPC Standing Committee, the State Council, and the Macau SAR have the power to propose bills amending the Basic Law. Amendment bills from the Macau SAR shall be submitted to the NPC by the Macau delegation to the NPC after obtaining the consent of two-thirds of their number, two-thirds of all the members of the Macau Legislative Council, and the Chief Executive. 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.¹¹⁵

Before a bill amending the Basic Law 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.

Finally, Article 143 could potentially serve either as a threat to autonomy or create possibilities for its expansion.¹¹⁶ This provision established that the power of interpretation of the Basic Law is vested in an external body, the NPC Standing Committee. This is a political institution, not a judicial one, and thus this means the imposition of a method that is foreign to Macau. The new system goes against the idea of autonomy proclaimed for Macau.¹¹⁷ 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

¹¹⁵ Although the revision of the OS was vested in the Portuguese parliament, it depended exclusively on the impulse of the local autonomy bodies as mentioned above. See Gonçalves Pereira, Francisco, *Portugal, a China e a Questão de Macau*, Macau, IPOR, 1995, p. 140.

¹¹⁶ 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. For example the Portuguese Constitutional Court in Lisbon played an acknowledged role in strengthening and broadening in some areas the scope of autonomy enjoyed by the Archipelagos of Azores and Madeira, through some constitutional judgments and *creative* interpretations.

¹¹⁷ *Idem.* Also, Cabrita, "International and Constitutional...", see note 3 CK, p. 184.

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.¹¹⁸

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 through the Court of Final Appeal of Macau.

While this mechanism begins by extending the scope of the courts' interpretation power, it ends with more limitations.¹¹⁹ The negative impacts of the use of this procedure in Hong Kong are already well known, and are described in this volume. In the case of Macau, the mechanism has so far not been activated.

The courts are required to follow any interpretation made by the Standing Committee, but "judgments previously rendered shall not be affected". 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,¹²⁰ this procedure may limit the harmful effects of such political and external interpretation.

¹¹⁸ Alves Correia, Fernando, "A Fiscalização da Constitucionalidade das Normas do Ordenamento Jurídico de Macau à Luz da Recente Jurisprudência do Tribunal Constitucional", *Revista Jurídica de Macau*, vol. 4, No. 3, 1997, p. 26.

¹¹⁹ On this important issue, Ghai, *Hong Kong's New...*, *cit.*, 1997 edition, note 113, pp. 185 ff.

¹²⁰ Stressing this point Cabrita, "International and Constitutional...", see note 3 CK, p. 184.

IX. A FEATURE OF AUTONOMY: THE POLITICAL SYSTEM

The fact that there is a separate MSAR political system is in itself a rather important indicator of the existence of institutional autonomy. Another question is the scope and the extent of the powers allocated to the various bodies comprising it, as well as their *internal* interaction. The relative amount of power given to the body that acts as the representative of the central entity is another important measure of autonomy.

In terms of titles of posts, requirements for holders of political office, powers, and the relationship between the executive and the legislature the current political system of the Macau SAR is different from the previous arrangements in a number of respects. This is despite the fact that the system briefly described in the Sino-Portuguese Joint Declaration¹²¹ was supposed to be allowed to continue to operate. The Basic Law did not actually follow several of the solutions outlined in the JD.¹²²

The system is based on two principal institutions: the legislature and the executive, the latter consisting of the Chief Executive, the government and the Executive Council. This structure is basically similar to that which existed before. However, the division appears to be based on a balance which does not in fact exist. A heavier emphasis is placed on the Chief Executive (who heads the government and the Executive Council) than on the Legislative Assembly.¹²³ Since the

¹²¹ Xiao Weiyun states that the provisions of the JD concerning these matters are very vague instead of detailed and concrete, “A estrutura política da Lei Básica da Região Administrativa Especial de Macau”, *Administração*, No. 19/20, p. 61. As for the Hong Kong, JD see, along the same line, Cheng, Joseph, “Preliminary suggestions on the Political System of the Hong Kong Special Administrative Region”, in *id.* (ed), *Hong Kong in Transition*, Hong Kong, Oxford University Press, 1986, pp. 55-6. Ghai, Yash and Wesley Smith, Peter, “Constitutional and legal system”, in Smart, Philip and Halkyard, Andrew (eds.), *Trade and Investment Law in Hong Kong*, Hong Kong, Butterworths Asia, 1993, note the minimalism of the JD on this topic in contrast to the developed and detailed provisions on economic and social policies, pp. 9-10.

¹²² Changes were made, for example, in titles: Chief Executive and Executive Council are used instead of Governor and Consultative Council. Also, Chinese nationality was made a requirement for holding certain public offices; and the executive became a plural body.

¹²³ Cardinal, “O sistema político de Macau na Lei Básica...”, see note 58 CK, pp. 93-4; Gonçalves Pereira, “Da Declaração Conjunta à Lei Básica”, *Revista Macau*, 2nd series, No. 1, p. 48.

Chief Executive is designed to be the institution more connected to the central power, whereas the Legislative Assembly is more closely connected to the MSAR population, and thus more representative of the autonomy principle, in effect this means that in terms of the operation of the political system, autonomy is diminished by the strengthening of the powers Chief Executive and the consequent downgrading of the role of the Legislative Assembly.¹²⁴ Some authors suggest that a different kind of balancing mechanism has been created by granting exclusive legislative power to the Legislative Assembly.¹²⁵ Although the meaning of the Basic Law on this matter is in dispute,¹²⁶ according to the interpretation of jurists who were members of the Basic Law Drafting Committee, the removal of legislative powers from the Chief Executive was indeed a major change. However, once the SAR came into being the administrative regulations have been revealed as a strong source of law (they have even been used to repeal legislative acts enacted by the Governor), undermining the supposed impact of this new “balance”. Besides this, it is important to consider the current system of legislative procedure. The Basic Law introduces a mechanism of allocation of powers

¹²⁴ Gonçalves Pereira, *op. cit.*, previous note, p. 48; Cardinal, “O sistema político de Macau na Lei Básica...”, see note 58 CK, pp. 93-94; and Malheiro Magalhães, António, “O princípio da separação dos poderes na Lei Básica da Região Administrativa de Macau”, *Administração*, No. 41, pp. 730-731. On the impact of the diminution of the power of the legislature in Hong Kong on its autonomy, see Yu-sek, Tseng, “La peau de chagrin du haut degree d’autonomie”, *Bulletin de Sinologie*, No. 45, p. 10. It is indeed curious to note that, before reunification, Chinese scholars argued the opposite, concluding that the MSAR system would represent balance of powers. See Fan, Leong, *Guia da Lei Básica de Macau*, Macau, Associação das Ciências Económicas de Macau, 1995, pp. 89 ff; Xiao, “A estrutura política da Lei Básica...”, see note 121 CK, p. 63. However, at present the Chinese political legal literature often acknowledges that the system is tilted in favour of the Executive.

¹²⁵ Canas, Vitalino, “A Lei Básica e a evolução política de Macau”, *Política Internacional*, Nos. 15-16, 1997.

¹²⁶ Cardinal, “O sistema político de Macau na Lei Básica...”, see note 58 CK, pp. 89 ff. Fifoot, Paul, “One Country, Two Systems—Mark II: from Hong Kong to Macao”, *International Relations*, 1994, p. 4 argues that although the provision is not clear, legislative power would remain shared. However, several authors, including the majority of Chinese scholars, do not find this such a clear issue: Magalhães, “O princípio da separação dos poderes...”, see note 124 CK, p. 730; Leong, *Guia da Lei Básica de Macau*, see note 124 CK, pp. 207-8. In practice, from a strictly formal point of view, only the Legislative Assembly can enact laws, although the Executive often exercises a de facto legislative power by enacting administrative regulations.

that requires the Chief Executive's written consent for the introduction of bills relating to government policies.¹²⁷ Furthermore, without the CE's approval, members may not introduce bills relating to the following subjects: revenue and public expenditure; the political structure and operation of the government;¹²⁸ and the method for electing members of the Legislative Assembly.¹²⁹ Thus by imposing an absolute or a relative reservation of legislative initiative, the legislative power of the Legislative Assembly is diminished.¹³⁰

The Chief Executive also has other powers over the legislative process. These are the powers:

- To return bills to the Legislative Assembly for reconsideration they are “not compatible with the overall interests of the Region”;¹³¹
- To dissolve the Legislative Assembly if:
 - (i) it insists on passing a bill that has been returned by the CE;
 - (ii) it refuses to pass a budget; or
 - (iii) it refuses to pass any bill;¹³²
- To refuse authorisation to members of the government, amongst others, to testify or give evidence when requested to do so by the Legislative Assembly;¹³³ and
- To decide on the priority of the issues to be submitted to the Legislative Assembly.¹³⁴

There are few mechanisms that provide more balance to the system and, in any case, these are ineffectual and difficult to put into operation. For example, the statement that the government is accountable to the Legislative Assembly is not accompanied by any sanctions for failure to

¹²⁷ Article 75. This could include an amalgamation of virtually all the activities and policies of the MSAR not controlled by other similar clauses, Article 103 ff.

¹²⁸ Article 75.

¹²⁹ Annex II, Article 2.

¹³⁰ Cardinal, “O sistema político de Macau na Lei Básica...”, see note 58 CK, p. 94; Katchi, *Governo e administração pública de Macau*, see note 110 CK, p. 38. Magalhães, “O princípio da separação dos poderes...”, see note 124 CK, p. 730, considers this mechanism an assault on the separation of powers principle.

¹³¹ Article 51.

¹³² Article 52.

¹³³ Article 50(15).

¹³⁴ Article 74 (2).

do so;¹³⁵ and the special procedure for investigating the Chief Executive does not give the Legislative Assembly any real powers, given that the power to make this decision is held by the CPG. In addition, it is an extremely complicated process.¹³⁶ The procedures for forcing the resignation of the CE due to irreconcilable differences with the Legislative Assembly may only be used in extreme situations.¹³⁷

Given the former praxis less centred on a single body, the system as envisaged might allow the emergence of a system comparable to other “strong-arm democracies” in the region where such power arrangements accompany economies with a strong capitalist bent.¹³⁸

X. AN AUTONOMOUS SYSTEM TO PROTECT FUNDAMENTAL RIGHTS¹³⁹

Fundamental rights are a recognized aspect of the autonomy idea. The Basic Law contains a substantive catalogue of fundamental rights which is quite satisfactory given the type of instrument,¹⁴⁰ particularly when compared with provisions made in other legal orders in the re-

¹³⁵ Article 66.

¹³⁶ Article 71(7).

¹³⁷ Article 54.

¹³⁸ It is interesting to note that in Hong Kong’s case, the Basic Law system was less disruptive of the pre-existing order and even includes some mechanisms for remedying any imbalances which might occur, but these were not adopted for Macau where the initial system was already more balanced and democratic. Chen, Albert, “From Colony to Special Administrative Region: Hong Kong’s Constitutional Journey”, in Wacks, Raymond (ed.), *The Future of the Law in Hong Kong*, Hong Kong, Oxford University Press, 1989, pp. 112 ff; Ngai, Gary, “Macau em transição—a preservação da sua identidade no próximo século”, *Revista Administração*, No. 24-25, pp. 229-301. For information on the democratic features of Macau’s political system, see Rich, William, “Hong Kong: Revolution Without Change”, *Hong Kong Law Journal*, vol. 20, No. 3, p. 209; Mushkat, Roda, “Can Macao legitimately claim a Hong Kong style international legal status?”, paper given in Macau at the International and Comparative Law Institute of Macau, 1994.

¹³⁹ This is an adaptation of Cardinal, Paulo, “Os direitos fundamentais em Macau no quadro da transição: algumas considerações”, *Cuestiones Constitucionales*, Mexico, UNAM, IJ, No. 14, January-July, 2006, pp. 21-70.

¹⁴⁰ Gouveia, “A Lei Básica da Região Administrativa Especial de Macau...”, see note 80 CK, p. 187; Luke, “The imminent threat of China’s intervention...”, see note 54 CK, p. 2.

gion, such as that of Hong Kong.¹⁴¹ As a general rule, external reports on human rights in Macau are rather positive on the legal provisions for fundamental rights in Macau, as well as regarding, its general approach to respect for rights.¹⁴²

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, administrative regulations and normative acts of the Macau Special Administrative Region shall contravene this Law”. This makes the Basic Law function as the norm parameter, the domestic constitutional platform.¹⁴³

¹⁴¹ See, for example, Fifoot, “One Country, Two Systems—Mark II...”, see note 126 CK, pp. 51-2; Cotton, James, “The retrocession of Macau and the limitations of the Hong Kong Model”, *Pacific Focus*, vol. 15, No. 2, 2000, p. 50. Wang, “As características da Lei Básica...”, see note 77 CK, p. 49, identifies fundamental rights enshrined in the Macau Basic Law that are absent in the Hong Kong one.

¹⁴² For example, the US State Department Report on human rights in Macau 2001, states “The government generally respects the human rights of its citizens”. Also European Commission Communication to the European Council and the European Parliament, “The EU and Macao: Beyond 2000”, 1999. Specifically on freedom of religion, the US International Religious Freedom Report on China (with a chapter dedicated to Macau) in 2002 states, “There was no change in the status of respect for religious freedom... and government policy continued to contribute to the generally free practice of religion”. This assertion does not mean that there are no breaches of fundamental rights in Macau, but overall the situation is indeed a positive one especially if compared to other jurisdictions in Asia.

¹⁴³ On the Basic Law as internal *grundnorm*, Xingping, Wu, “O sistema jurídico da Região Administrativa Especial de Macau”, *Boletim da Faculdade de Direito*, Macau, No. 13, pp. 75-7; Gouveia, “A Lei Básica da Região Administrativa Especial de Macau...”, see note 80 CK, pp. 183-4; Qing, Xu, *A Natureza e o estatuto da Lei Básica...*, see note 52 CK, 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 Costa, Alberto, “Continuidade e mudança no desenvolvimento jurídico de Macau”, see note 57 CK, p. 64; Costa Oliveira, Jorge, “A continuidade do ordenamento jurídico de Macau...”, see note 62 CK, pp. 24-5; Cardinal, “O sistema político de Macau na Lei Básica...”, see note 58 CK, p. 80; Isaac, “Substantive constitutional restrictions...”, see note 62 CK, *passim*; Carapinha, “The Political and Legislative Transition of Macau”, see note 53 CK, p. 19; Gomes Canotilho, “As palavras e os homens...”, note 65, pp. 341-2. In effect, the JD is a superior class of *grundnorm* —inclusive *vis-à-vis* the Basic Law— and an

It is important to point out that the fundamental rights articulated in the Chinese Constitution do not extend into Macau's new legal order. Certainly some Chinese constitutional norms are applicable in Macau, namely those dealing with sovereignty and its limits. However, that is not the case in relation to fundamental rights¹⁴⁴ 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 enlarge or to reduce the scope and content of the rights system or of any given right in Macau.

This understanding is grounded in the Joint Declaration and in the Basic Law. As stated in Art. 11, "[T]he 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*".¹⁴⁵

Thus on these matters the Basic Law shields Macau from the correlative norms of the PRC Constitution. As one author puts it, "under Article 11 of the Basic Law, the systems and the policies in the Macau SAR, are based on the stipulations of the Basic Law. This means to say that the Constitution is applicable in the MSAR, except for the stipulations that refer to the socialist system as well as those matters identified in Article 11".¹⁴⁶ Thus in order to comply with this autonomic fundamental rights system, there is to be no importation of rules, methods and theories of fundamental rights that are observed in the PRC. This is particularly important as these embody an extremely different general approach to the subject matter when compared to that of the SAR's.

In other words, the system of fundamental rights is self-sufficient and concedes to outside norms only to the extent properly allowed,

externalized one. As mentioned above, amendment of the Basic Law cannot eliminate a specific fundamental right that is guaranteed in the Joint Declaration.

¹⁴⁴ As in many other areas. See, among others, Wu, "O sistema jurídico...", see note 143 CK, p. 74; Qing, Xu, *A Natureza e o estatuto da Lei Básica...*, see note 52 CK, pp. 22 and 23.

¹⁴⁵ Emphasis added.

¹⁴⁶ Wu, "O sistema jurídico...", see note 143 CK, pp. 74 and 76.

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. 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 principles from the Portuguese Constitution.¹⁴⁷

This is an area that reveals some of the differences between the two sisters in autonomy, Macau and Hong Kong. Macau has a more comprehensive list of fundamental rights than Hong Kong; those rights not provided for in the Hong Kong Basic Law will be identified in the next chapter.

XI. THE WORDS OF AUTONOMY... AND THEIR IMPLEMENTERS

The focus so far 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 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.

I believe that the actual destiny of Macau'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

¹⁴⁷ 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, Bacelar Gouveia, Jorge, "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.

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”¹⁴⁸ on the other —the proponents of sovereignty versus the proponents of autonomy—.

However, judging from the Hong Kong example, it appears that sometimes it is the leaders of the autonomous entity—in both in the judiciary and in the executive—who have promoted the interests of the centre in this dialectic. A curious situation indeed and not a reassuring one for Macau.

However, the above analysis should have made clear that despite a degree of elasticity, the words set certain limits. The words of autonomy are the first step to identifying the scope of autonomy but also the last step in setting its outer parameters.

Based on the model of the autonomy as written, the SAR cannot be considered either a traditional autonomous region or as a division of a federated state.¹⁴⁹ There have already been attempts to apply the format to other realities.¹⁵⁰ Even simply using quantitative analysis or measurement does not make it possible to place the SAR in either of these two categories, since it incorporates elements of both and then goes beyond them.¹⁵¹ For example, it has elements that usually are found only in sovereign states such as its own currency, a degree of international legal capacity, its own economic system, an independent taxation system, and its own legal system.¹⁵²

¹⁴⁸ Tai, Benny, “One Country Two Systems: the two perspectives”, *Macau Law Journal*, special issue, 2002, see note 2, pp. 150 ff.

¹⁴⁹ Canas, “A extensão da autonomia...”, see note 1 CK, p. 240; Tang, James T. H., “Hong Kong’s International Status”, *Pacific Review*, No. 6, 1993, uses the term “quasi-state”, p. 205.

¹⁵⁰ For example UN officials proposed “One Country, Two Systems” as a solution to the East Timor issue at the time when its inhabitants were suffering the brutality of the Indonesian military and political apparatus. It was also taken into consideration to address problems in the Balkans. Deng Xiaoping foresaw the potential of the format, asserting that it might be useful for the resolution of international disputes, *On the Question of Hong Kong*, Hong Kong, New Horizon Press, 1993, *passim*. See also Gonçalves, “A paradigm of autonomy...”, see note 83 CK, p. 54.

¹⁵¹ See, for example, Canas, “A extensão da autonomia...”, see note 1 CK, p. 24; Wang, “As características da Lei Básica...”, see note 77 CK, p. 43.

¹⁵² For some examples, Canas, “A extensão da autonomia...”, see note 1 CK, p. 240.

Another aspect of the model is the fact that it seems almost blindly copied from the legal framework designed for Hong Kong. In some areas, this has caused difficulties, particularly related to the legal system since Macau's system is a continental one whereas Hong Kong uses the common law. For example, Article 40 of the Macau Basic Law on the International Covenants has created doubts about whether Macau continues to be a monist system in which the treaties are directly applicable, or has changed to a dualist one, as in Hong Kong, in which the treaties must be transformed into municipal law to become effective. Another example is the creation of the executive order, an act completely unknown before 1999 and one which could result in disruption in the process of production of legal norms. However, in some other respects copying the Hong Kong SAR legal framework worked to strengthen autonomy, while other rules could have been imported but were not thus diminishing the scope of Macau's autonomy. A good example is Art. 68 of the Hong Kong Basic Law which states that the ultimate aim is the election of all the members of the Legislative Council by universal suffrage.¹⁵³

By contrast, 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 mentioned above is one such example. Others are that 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, and that policies on tourism and recreation should be made "in the light of its overall interests", reflecting Macau's reliance on the casino industry.¹⁵⁴ An administrative court is established in the MSAR which has jurisdiction over administrative and tax cases. Land and natural resources within the Macau Special Administrative Region are state property, except for the private land

¹⁵³ Yash Ghai writes, "This conservatism is somewhat surprising, for Macau achieved a measure of direct elections in 1976 under the Organic Statute, well ahead of Hong Kong...", "The Basic Law of the Special Administrative Region of Macau: Some Reflections", *International and Comparative Law Quarterly*, vol. 49, 2000, p. 192.

¹⁵⁴ Articles 42, 115, 118.

recognized as such according to the laws in force before the establishment of the MSAR.¹⁵⁵ Unlike in Hong Kong, theoretically there are no limits on the number of members of the Legislative Assembly who are not Chinese nationals,¹⁵⁶ while there is no prohibition on the President of the Legislative Assembly or members of the Executive Council, among others, having right of abode in any foreign country, as is the case in Hong Kong.¹⁵⁷

In terms of the world of leaders and politics, for the centre formally the key role will be played by the NPC Standing Committee through its power to interpret the Basic Law. Of course, the top leaders of the PRC will inevitably have the final say on such matters in practice. On the side of the autonomy, the members of Macau's government, its Legislative Assembly, and the judges in its courts will be the decision-makers. Civil society will certainly have a role to play as well.

A special mention should be made of the Chief Executive, since the holder of this post has a dual role,¹⁵⁸ acting both as representative of the centre and as protector of the autonomy. Thus, the Chief Executive: *a)* acts as the head of the MSAR government, the executive organ of the autonomy,¹⁵⁹ and *b)* is accountable to the CPG as the head of the MSAR and its representative.¹⁶⁰ This means that although the CE is the top leader of the autonomous region, the post holder also has primary and direct responsibility to the centre, including accountability for the autonomy.

¹⁵⁵ The land and natural resources in the Hong Kong SAR are state property without exception.

¹⁵⁶ Hong Kong Basic Law Article 67 reads: "However, permanent residents of the Region who are not of Chinese nationality or who have the right of abode in foreign countries may also be elected members of the Legislative Council of the Region, provided that the proportion of such members does not exceed 20 percent of the total membership of the Council".

¹⁵⁷ For more examples, Ghai, "The Basic Law of the Special Administrative Region of Macau...", see note 153 CK, pp. 192-195; Wang, "As características da Lei Básica...", see note 77 CK, pp. 46 ff.

¹⁵⁸ On this dual role and some of its implications, Cardinal, "O sistema político de Macau na Lei Básica...", see note 58 CK, *passim*.

¹⁵⁹ Article 62.

¹⁶⁰ Article 45.

The Chief Executive has the responsibility and the capacity to determine the scope of autonomy vis-à-vis the centre. In no other person is this dialectical tension so clear and so onerous. Then within the SAR political system the actions of the Chief Executive have enormous potential to reinforce autonomy or to damage it. Also, this person has the responsibility to accommodate the SAR's policies within the PRC, both in acting scrupulously according to the law and in *selling* these policies in Beijing. An act which advances autonomy will undoubtedly need to be explained well to central leaders, otherwise it could very well lead to misunderstanding and conflict.

This discussion leads inevitably to the comparison between the autonomy praxis of Macau and Hong Kong. There has been much criticism of Hong Kong's leaders who have been charged with downgrading the SAR's autonomy. By contrast, assessment of Macau's performance in this regard has been quite positive. Given that the legal framework is almost identical, the reasons for this difference may be found in the people implementing autonomy, rather than in the legal framework for it.

The fact that Hong Kong is much bigger in so many aspects than Macau certainly is one explanation for why China would pay more attention. But this factor can only explain some of the differences. Another issue to be considered is that in Hong Kong civil society—and its outspoken calls for democracy—is clearly stronger than in Macau, despite the fact that Macau enjoyed democratic representation much earlier than Hong Kong. This factor may make the PRC leadership more nervous about Hong Kong. But to fully explain this situation I believe it is necessary to analyze the implementation of policy and the people who implement it. It is commonly agreed that Macau's top leadership has been competent and effective, in contrast to that in Hong Kong.

This does not mean that Macau should not try to become a more important player or that democratization should not advance there. In this respect, Macau has much to learn from Hong Kong. It is the responsibility of the leaders of the autonomy to solidify the autonomy, and democratization is evidently important to this process. The impetus for democratization must come from Macau, as otherwise the current peaceful relations with the centre could, over time, mean

a de facto erosion of autonomy.¹⁶¹ Provided Macau continues to manage to combine the written framework for autonomy with effective leadership, it is possible it can avoid the erosion of autonomy seen in Hong Kong as a result of poor governance.

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.

¹⁶¹ Ghai, "The Basic Law of the Special Administrative Region of Macau...", see note 153 CK, for a pessimistic assessment, pp. 195 ff.