CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Subnational Constitutionalism in The Sars of the People's Republic Of China. An Exceptional Tailored Suit Model?•

by

Paulo Cardinal - Yihe Zhang

Perspectives on Federalism, Vol. 4, issue 2, 2012

Abstract

Macau and Hong Kong Special Administrative Regions of the People's Republic of China enjoy, via a complex web of constituent legal instruments (international treaties, norms of the PRC Constitution and, last but not the least, the Basic Laws), a remarkable high level of autonomy – namely in key areas such as fundamental rights, the continuation and evolution of a distinct legal system, including an almost universal range of legislative power stricto sensu, an independent judicial system, the economic and financial dimensions, including taxation, and also, at least to some extent, in the spheres of political organization based on elements of separation of powers doctrines and openness to pluralism, and an international law capacity - which provides the condition for the existence and ongoing evolution of subnational constitutionalism.

The extent, scope and nature of these two imaginative and pragmatic autonomy arrangements clearly show that they do not fit in any classical model, whether federal or of territorial autonomy. Its results, albeit imperfect, are deemed positive so far. Hence, can these exceptional cases present themselves as a model, even if tailored in origin, in the research and consecration of subnational constitutionalism in other geopolitical arenas?

The Basic Laws of Hong Kong and Macau serve basically as subnational constitutions, which lay down the foundation for continuing development of subnational constitutionalism. The sovereign constitutional norms are the same and the Basic Laws – such as the Joint Declarations - are essentially identical; that is, the normative superstructure has a high degree of similarity. However, the dynamics of constitutionalism show certain divergences that appeared in the two regions with a first decade of evolutionary praxis pointing to somehow different avenues that may, by the end of the day (2047 and 2049, respectively), result in different SARS profiles and different sedimentation of the autonomic traits of Macau and of Hong Kong

Key-words

Subnational constitutionalism, autonomy, comparative constitutional law, China, Macau and Hong Kong

1. Introductory Remarks on Subnational Constitutionalism

Multilevel constitutionalism denotes the constitutional *Ideas,* institutions, principles, norms and practices applied to settings beyond the State (Walker, 2009: 1). It indicates that constitutionalism does not require the framework of the State to be meaningful. Constitutionalism can been seen as both a symbolic frame and a normative frame of reference which registers substantive values such as democracy, accountability, equality, separation of powers, rule of law and fundamental rights, as well as procedural values of institutional specification, interpretation and balanced application of these values (Walker, 2003: 32-35).

In short, subnational constitutionalism means 'the application of constitutionalism at the subnational level' (Gardner, 2008: 327, Sigueira, 2010). The condition for the existence of subnational constitutionalism is 'a degree of autonomy sufficient to make them efficacious representatives and agents of subnational populations, and their constitutions meaningful documents of self-governance that provide to some significant degree for independence from processes of self-governance employed at national level; by the national polity' (Gardner, 2007: 4). Or, in other words, one can refer to political autonomy in which the capacity of decision, namely via legislative power, has a high degree of *margin of decision* (Garcia, 2005: 44). Therefore when we try to search for subnational constitutionalism, the first target is the scope of autonomy it has (Tarr, 2010).[I]

Other than this commonality, or starting point, what we can find is the diversity of subnational constitutionalism. This diversity appears in the form and content of the subnational constitutions. Regarding the form, some subnational constitutions are independent and formal constitutions made by subnational units themselves, as the national constitution only provides framework and allow the subnational units to make their own constitutions. The constitutional arrangements of some subnational units are an integral part of their national constitutions, especially in those federations resulted from devolution (Williams, 2004: 1). The cases of some territorial autonomies such as Spain, Italy and the SARS also pose natural differences in their form. Regarding the content, the differences can be the scope of autonomy the subnational units have, the model used to resolve competency disputes between national level and subnational unit level, the

amendment procedures, *etc.*[II] The main factor producing this wide diversity is the different conditions giving rise to different forms of subnational autonomy (Watts, 1999: 945). Some subnational units come into being after a devolutionary process, which means that a unitary state existed precedent and instituted the subnational units internally[III], while there are subnational units which precede the aggregated union or federation[IV]. It is also very possible that the constitutions of the subnational units of the same country are asymmetric, even if the primary juridical equality of the subnational units is a structural principle of the sovereign unit constitution; and even though this may beg the question of whether the asymmetric federal state is compatible at all with the classic concept of federal state (Pernthaler, 1999). Robert F. Williams has pointed out that the reasons behind this asymmetry might be the different time the constitutions were produced, the subsequent amendments, and the regional differences (Williams 2004: 12, Pernthaler, 1999: 35).[V]

As Neil Walker (Walker, 2003: 32) says, to defend the translation of constitutionalism, it shall be proved whether anything of value that can be achieved by developing a more general conception of constitutional translation from the state to other contexts. In other words, there must be a point of translation. It must be demonstrated that there is something of value in our statist constitutional heritage that is worth preserving and applying to the non-state context.

We can give a positive answer to this question, considering the functions of subnational constitutionalism. The functions can be generalized into three aspects. Firstly, in general as we said, subnational constitutions regulate the behavior of subnational governments. They establish the basic organs, specify their powers and responsibilities, and the relationship among these organs. They establish the mechanism to solve constitutional disputes and political disputes. Also, they can establish the rules governing the relationship between the governments at subnational level and the local governments inside subnational units. Subnational constitutions can be the primary tools to check the accountability and transparency of subnational organs. Secondly, subnational constitutions can provide a list of rights or a specific charter of rights of citizens and therefore realize the direct or indirect protection of liberty through the independent body of subnational power (Gardner, 2007: 14).[VI] In federal countries, the subnational constitutions are frequently celebrated as an alternative source of justiciable substantive rights. The rights prescribed in subnational constitutions often duplicate those in national constitutions, and sometimes constitutional

powers of the nation and the states are distributed to overlapping spheres. In both cases, subnational constitution can step in and provide protection when there is lack of efficient implementation of national constitution.[VII] Thirdly, in some cases, it can provide peoples with distinct identity and ethnicity and language minorities in various countries the opportunity for self-government and better protection of human rights. It usually offers more opportunity for the ethnic minorities to participate in the decision-making process.

Although the existence of subnational constitutions is not a new phenomenon, research on subnational constitutionalism is still at an early stage, and at this stage there are far more questions than conclusions. At the beginning, this subject mostly centred on the study of the constitutions of the states in United States, interlinked with American federalism.[VIII] Since then it has been challenged by Robert F. Williams and G. Alan Tarr who called to get away from the traditional approach of studying constitutional federalism from the top-down perspective, which focuses simply on the federal constitutional arrangements, instead adopting a perspective of the subnational units to focus on the subnational units' constitutional arrangements and their dynamics (Williams, 2004: 4). In addition, more questions are raised regarding the qualifications of a subnational constitution, the constitutional competency of subnational units, the relationship between the national constitutions and subnational constitutions (Saunders, 1999), the evolution of subnational constitutions, and more specifically, the function of subnational constitutions in enhancing protection of human rights[IX], etc.

However, as we observe, current research on subnational constitutionalism has been narrowly focusing on the subnational units of formal federate states. We think it can be broadened to include research on certain autonomous units under non-federal arrangements, since, for instance, there are cases where national states adopt highly pragmatic and inventive choices.[X]

It is now truly undeniable that, even when faced with classic federal or regional autonomies models, there is no crystal clear separation between them. It is a given fact that the multitude of solutions was put forward in composite states, whether federal or regionalist. In contemporary times the once clear-cut division between federations *versus* regionalized states has become a tenuous blurred and even intermixed borderline[XI]. It is not needed to point out significant differences at various levels among the federal legion, for example between Germany and Argentina[XII], nor between the regionalized states, as

between Portugal and Spain. And it is not necessary also to advise on the strong powers enjoyed by Italian and Spanish autonomous regions (irrespective of their designation, which also varies considerably) that make some authors place them in the federalism path. It is also well known that, for several reasons, both federal and regionalized forms are gaining much ground and becoming more topical than ever (Häberle, 1998)[XIII].

However, none of the above has posed a more complex challenge to the theorization of the composite state forms as the SARs of the People's Republic of China, and that is why a question is raised whether *an anonymous federalism* has been created (Cardinal, 2008a).

2. A panoramic characterization of the SARs: the Subnational Units of China with "Exceptional" Autonomy[XIV]

China is the birthplace of the One Country, Two Systems principle (Deng, 1993). Hong Kong and Macau were returned to China in 1997 and 1999 respectively, under the framework of Sino-British Joint Declaration and Sino-Portuguese Joint Declaration, and the Basic Law of each region, via the open gate created by article 31 of the PRC Constitution[XV] in order to accommodate diversity under unity. Thereafter, they have been special administrative regions of China, enjoying a high degree of autonomy, except in foreign affairs (this is however, with significant exceptions) and defence, besides a few delimited powers such as appointments of certain government officials as well as typified mechanisms of interaction such as the ones regarding (official) interpretation of some aspects of the Basic Law.

The Joint Declarations first stipulated that the government of the People's Republic of China would resume the exercise of sovereignty over Hong Kong and Macau with effect from 1 July 1997 and 20 December 1999 respectively thus allowing for the accomplishment of reunification with China, and consequently the establishment of the SARs enjoying high autonomy, integrated with, but separate from, the PRC.[XVI] The SARs are the juridical persons that embody the new autonomic reality within Chinese sovereignty. In this way, the Joint Declarations present a framework for SARs' internationally *plugged* autonomy[XVII], in the sense that the autonomy does not rely solely upon a domestic act and the sovereign power, but comes from an international treaty, which resulted from the free will of two sovereign states in each case of the SARs. The

Joint Declarations were and continue to be the genesis, the anchor and the guarantee of Hong Kong and Macau's autonomy. On the other hand, and in accordance with the JDs, it was necessary to further detail the contents of the policies/principles agreed, thus the necessity of a domestic legal act—the Basic Law.

The Basic Laws state that the SARs are *authorized* to exercise a high degree of autonomy. This is to be realized through the SARs' enjoyment of a range of powers: executive, legislative and independent judicial power, including that of final adjudication; the power independently to conduct, in accordance with the Basic Law, 'relevant external affairs', to use English (in the case of Hong Kong), and Portuguese (in Macau) as an official language of the SARs; and to maintain public order in the SARs. To this end, the socialist system will not be practiced in the SARs, and they are to keep their own system. The Basic Laws provide for the system to be used in the SARs: including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems. In addition, the PRC's national laws will not apply, apart from those listed in Annex III to the Basic Laws. In order to protect SARs' autonomy, the Basic Laws specify 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 Hong Kong SAR/MSAR administers.' These are just some of the items from an enormous list that is presented in the chapters on the economy, culture and social affairs, and on external affairs.

Concerning foreign affairs, one must point out that, in spite of the general exclusion clause, that exclusion is in fact qualified in the sense that it allows for considerable areas of exception. It provides an autonomy that is, in some ways, more extensive than other autonomies elsewhere. 'Perhaps the most distinctive feature of the agreement is the extensive authority granted to the (…) SAR in the area of foreign relations and participation in international organizations', says Hurst Hannum (Hannum, 1996: 140). A point to underline is that the Basic Law seems to contain the possibility of expanding the SARs´ autonomy. It states, that '(the SARs) may enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress or the Central People's Government.'[XVIII] Such powers, one would assume, would not be those dealing with the already existent autonomy, but ones that cross the boundaries of autonomy and deal with reserved subject matters like, for example, external relations.

As to the limitations of autonomy, one has to say that the autonomy envisaged by the Joint Declaration has certain natural limits, and the Basic Law also expressly provides for certain other limitations that were initially expressed in the treaty. First of all, the SARs are part of the Chinese territory, and 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, as exemplified by the power of the central government to take charge of defence of the SARs. 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[XIX]. Second, there is a temporal limitation: the principle of the internationalized autonomy (and of continuity) will remain in force for fifty years, and hence it is guaranteed only for that period of time. Finally, the appointment and removal of Chief Executive and the principle officials by the Central Government, the political nature of '*constitutional review*' by the National People's Congress, the restrictive rules on proposal for amendment of the Basic Laws from the side of SARs, the authoritative interpretation by the Standing Committee of the National People's Congress are the specific limitations on autonomy designed in Basic Laws.[XX]

After analysis of the scope and limitations of the autonomy of the SARs, we come to characterize its nature. It seems clear that one can, obviously, find elements of regionalism and of federalism (Rolla, 2009: 472-475) in the SARs of the People's Republic of China. Bearing in mind what is written *supra*, namely about the powers of the SARs, some characteristics can be deemed as almost federal or as incorporating a proto-federal phenomenon[XXI]. 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. In truth, it seems that the SARs are vested with characteristics that go beyond any substate entities and resemble a (*non integrated*) State in some circumstances.

This augmented set of powers makes us lean towards the idea that, in a sort of counter balancing exercise, it *rearranges* the whole picture and pushes up the framework of the SARs from a *mere* formal region lacking some characteristics connatural to federations to something else. And that is why we ask if the SARs' autonomy incorporates a sort of 'new' federalism, albeit anonymously. Faceless, just like a bottle of mineral water without a label but still filled with that liquid. Do we have here *an anonymous new federalism*? (Cardinal, 2009: 244 and ff)[XXII]

In short, and turning what was written elsewhere (Cardinal, 2009), one can propose the following melting pot on the characterization of the SARs' status:

- *Less* than (political) regionalist elements: The Chief Executive – as well as the principal officials of the government and the Procurator General- is appointed by the centre and shall be accountable to the Central People's Government.

- As for regionalist elements of the SARs: The formal labelling of both the SAR and the PRC – the first is stated to be a region and the latter proclaims that it is a unitary state. The lack of power of the SAR to decide on its constitutional law by itself, since the competence to enact and change the Basic Law is deposited outside the SAR – although as seen before, this is limited by reason of an international treaty and the impossibility of secession from the SARs. *Authentic* interpretation of the autonomy chart resides outside the SAR.

- Federal elements of the SARs: The existence of a political system[XXIII] and organizational framework with its own legislative, executive and judicial power. Both defence and, as a rule, foreign affairs remain with the centre. Existence of a constitution, at least in a material sense, named Basic Law.

- Statehood elements of the SARs: Among others, existence of judicial power including that of final adjudication, and hence the non possibility of any competence, be it *prima facie* or by way of appeal mechanisms of any courts of the Mainland. A self contained system of fundamental rights and the non application of the centre Constitution, a key feature even more when in comparison with traditional regional autonomies where the centre Constitution does apply including naturally the norms on fundamental rights. The non application of the Chinese Constitution to the *private sphere* in Macau, and residents of Macau are as such not under the scope of application of the Chinese Constitution, whether in the fundamental rights sphere or as tax payers, etc. The non application of the centre laws as a rule and the exceptions are subjected to the regime contained in the Basic Law. Hence, as in above, the basic rule is that Macau residents are in no way subject to Mainland laws thus meaning that the issue of supremacy of centre laws vis-à-vis regional ones is not even an issue.

The international law personality. The existence of total separateness of finance and tax systems. The issuing of its own currency. A separate customs. The separateness of its own social system.

- *Uncategorized/unique* elements: The measurement of the international law capacity of the SARs goes far beyond what is present in autonomous regions, in 'regions' with *shared* sovereignty, such as New Caledonia (Dormoy, 2000, Bihan, 2006), and even in federated states (Nabais, 2001, Henders, 2000)[XXIV]. However, it has less capacity than an independent State and has a domestically drawn line of what is and what is not in its sphere. The accession of Hong Kong and Macau to the centre is bilateralized as in federations; however, it was in a horizontal fashion (Nabais, 2001: 31) rather than a vertical fashion (no matter in ascending or descending move). Besides, it was the result of an international treaty in which it took no part; so instead, it was not the subject of it, but its object. The autonomy frame is internationally *plugged*/guaranteed as in some known cases of regional autonomies, but this is done in a more detailed manner on the one hand, and with a limited timeline on the other hand.

3. The autonomy of the SARs Versus that of Ethnic Autonomous Regions in China

To better understand the SAR's 'exceptional' autonomy, it is relevant to compare them with another form of autonomy arranged in China's political system — the ethnic autonomies. The policy of ethnic autonomies is implemented in areas where people of ethnic minorities live in compact communities. The purpose of establishing those autonomous areas is to solve the ethnic problem and to provide the minorities with the right to govern themselves.[XXV] Ethnic autonomous areas are established at different levels, including autonomous regions, autonomous prefectures and autonomous counties, depending on how large are the populations of the ethnic groups and how much territory they occupy. Currently, there are five provincial-level ethnic autonomous regions[XXVI].

The rules applied to ethnic autonomous areas in general are provided in articles 112 to 122 of the Constitution of China and the Law of the People's Republic of China on Regional Ethnic Autonomy. The organs of self-government of ethnic autonomous areas shall apply the principle of democratic centralism[XXVII], must guarantee that the Constitution and other laws are observed and implemented in these areas[XXVIII], shall lead the people of the various nationalities in a concentrated effort to promote socialist modernization, shall

place the interests of the State as a whole above anything else and make positive efforts to fulfil the tasks assigned by State organs at higher levels[XXIX], shall rationally readjust the relations of production and the economic structure and work hard to develop the socialist market economy, under the condition of adhering to the principles of socialism.[XXX]

It is immediately very clear that the economic and political system applied in the ethnic autonomous areas is the same as the one applied in China, all pertaining to socialism, democratic centralism and socialist market economy. It is different from the Hong Kong and Macau SARs which are implementing the second system, different from the general one applied in China.

The self-government organs of autonomous areas exercise the functions and powers of local organs of state and at the same time exercise the right of autonomy within the limits of their authority as prescribed by the Constitution, the law of regional national autonomy and other laws, as well as implement the laws and policies of the state in the light of the existing local situation.[XXXI] The self-government organs have the power to enact autonomous regulations and separate regulations, administer local finance and taxes, use the revenues accruing to the national autonomous areas, manage local economy and education and culture affairs, use their own ethnic language, etc. To avoid repetition, it only needs to be emphasized that the Hong Kong and Macau SARs have their own currencies, separate fiscal and economic policies, own official languages, and the right to conduct certain external affairs on its own in accordance with Basic Laws.

It should be noted that the legislative power held by the autonomous areas is very limited. The people's congresses of national autonomous areas have the power to enact regulations on the exercise of autonomy and separate regulations, in the light of the political, economic and cultural characteristics of the nationality or nationalities in the areas concerned. These two kinds of regulations are subject to the approval of the Standing Committee of the National People's Congress. The regulations on the exercise of autonomy and separate regulations of autonomous prefectures and autonomous counties shall be submitted to the standing committees of the people's congresses of provinces, autonomous regions or municipalities directly under the Central Government for approval before they go into effect, and reported to the Standing Committee of the National People's Congress and the State Council for the record.[XXXII] The requirement of approval largely compromises the legislative power of the ethnic autonomous areas, which directly

leads to the underdeveloped situation of legislation by self-governing organs of autonomous areas (Chen Shaofan, 2005; Dai, 2002). It is widely commented that the legislative power is not authentic or it is only semi-legislative power. The autonomous areas often take a passive standing in legislation because of the rigid requirements on its approval. It must be said that the review by the superior organs is not only limited to the legitimacy of the regulations, in other words, its compliance with superior laws, but also includes the appropriateness of substantial content, to see whether they are adapted to the concrete situation and practical needs of the areas. In addition, there are no rules on the time limit of the review of Standing Committee of the NPC and the standing committees of the people's congresses at provincial level: in practice, there is a serious problem of delay of approval. In this aspect, the legislative power of ethnic autonomous areas are even less independent than the ordinary administrative units of PRC, since the latter's local regulations only need to be reported to the Standing Committee of the National People's Congress for the record.[XXXIII]

It is important to note that national laws and regulations by the superior administrative governments are applied in ethnic autonomous areas. If a resolution, decision, order, or instruction of a state agency at a higher level does not suit the actual conditions in an ethnic autonomous area, the local organs can either implement it with certain alterations or cease implementing it altogether, only after acquiring the approval of that higher level state agency.[XXXIV] However, even the use of this flexibility is rather limited.[XXXV] In contrast, the national laws applied in Hong Kong and Macau SARs are specified in a rather restricted list in Annex III of the Basic Laws, and enter into force in the SARs by way of promulgation or legislation by the Region.

Regarding the judicial system, the ethnic autonomous areas don't have independent judicial power. The local courts are constituents of the unitary court system of China and shall be supervised by the Supreme People's Court and by People's Courts at higher levels.[XXXVI] Needless to say, the ethnic autonomous areas have the socialist legal system, while the Hong Kong and Macau can preserve their own distinct legal systems.

Regarding the relationship between central government and the autonomous regions and the SARs, the difference lies in the scope and nature of the central power in these two types of regions. The Basic Laws provide high autonomy for the SARs, and stipulate that the central government is responsible for the foreign affairs relating to the SARs and the

defence of the SARs. On the other side, the division between central government (or superior government) and ethnic autonomous areas is not clear in the Law of the People's Republic of China on Regional Ethnic Autonomy. The provision that organs of ethnic autonomous areas shall make positive efforts to fulfil the tasks assigned by State organs at higher levels, and the chapter on the responsibility of state organs at higher levels to help ethnic autonomous areas develop, further emphasize the authority of central or higher administrative organs and their right to intervene in local affairs, and diminish the autonomy the ethnic autonomous areas have.

In brief, the comparison reveals that the SARs enjoy a much higher autonomy than that of ethnic autonomous regions at provincial level as well as a different nature and foundation. The ethnic autonomous regions have to implement national policies, albeit with the power to make certain changes in some cases. Their own autonomy is restricted because of the limitations on their legislative power[XXXVII] and the wide-ranging and intrusive central power. Therefore one does not find a case of subnational constitutionalism. In short, these two autonomy systems are based on different rationales, one is to let the ethnic minorities govern themselves, under the same system, and the other is to allow and assure the prosperity of the other system with its values and principles, especially the open market (Ghai, 2000a).

4. The Constitutional Order of the SARs

Since China is not a formal federal state, the question arises whether it makes any sense at all to refer to a principle of having a Constitution for the SARs. One should not refer to a constitutional autonomy in its full sense in a federalist manner, namely the power to produce its own constitutional texts[XXXVIII]. One could imagine that the Macau and Hong Kong solution be just enough to apply the Chinese Constitution in its entirety and, on a lower level, ordinary legislation, whether centralized or local. This choice however was put aside as we all well know and international law, via the Joint Declarations, intermediated and shaped a completely different avenue. China's attitude towards the questions of Macau and Hong Kong *legated by the past* was extremely pragmatic (and innovative) thus imposing a similarly infused analysis. It was said that 'Constitutional autonomy is also the possibility of an autonomous territorial being – state, region – granting itself a "constitution" ("statute", "basic law") in order to stabilise its own organization and define its identity. In the case of

Macau there was no real constitutional autonomy in this sense (and, wherever it exists, it is always limited), but the Joint Declaration and the Basic Law aim at finding the essential dimensions of organizational stability and the political, historical, economic and social identity of the territory.' (Canotilho, 2009: 748-749).

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

As a very brief summary one can say that we envisage the composition of the SARs constitutional order as built in aggregation by several different juridical texts: firstly—not necessarily above all, quite the opposite—the most comprehensive, structure, detailed, and in-depth one, the Basic Laws, plus, as seen, the Joint Declarations—as the hetero foundation and demanding 12 commandments, among other roles—and naturally the PRC constitution, in part, such as article 31[XXXIX]. We have thus a multilevel and *multicomposite* constitutional order.

The Basic Laws constitute the formal domestic legal instrument that details the constitutional organization of the SARs, including political system, autonomy, as well as the non-organisational constitutional frameworks such as in the fields of fundamental rights, economy, and social issues. These two legal documents have the appearance and the structure of a formal constitution and have been called a 'mini-constitution' or a 'para-constitution'. To us, the main point to stress, with or without 'mini' or 'para' or other similar qualification expressions, is that the Basic Laws are, in the SARs legal systems, a constitutional law thus naturally part of the SARs constitutional order. They are material constitutions if not even formal ones (Raz, 1998)[XL]. In fact, if one looks at the legal order of the SARs, the Basic Law is the highest source of the domestic legal system. This role is clearly indicated in the Basic Laws[XLI]. Besides, as Giancarlo Rolla put it, 'Further evidence

of the constitutional nature of Basic Law is provided by the fact that its revision may be carried out only by way of a special procedure, a "reinforced" procedure, (…) which cannot be amended by the National People's Congress except following specific procedures. (Rolla, 2009: 475)'. In short, we call it a *lato sensu* constitution.[XLII]

An interesting query might be the amendment and interpretation of subnational constitutions. As we pointed out above, the Joint Declarations constrains the power to amend these two subnational constitutions. This leads to the relatively immutable character of the Basic Laws in the period prescribed in the Joint Declarations. And also, the Joint Declarations serve as an authoritative reference for their interpretation.

Another characteristic is the role of national government, as the constituent power, and the subnational units in the amendment and interpretation of the subnational constitution. As the Basic Laws by nature are national laws made by the national legislature, its amendment is in the hands of the national power. Both central and subnational have the power to initiate amendments, but with different conditions. When the amendment is from the Standing Committee of the National People's Congress (NPCSC) and the State Council, there is no requirement for it to be referred to any institutions of the SARs for comment. When the proposal is from the delegation of the Regions to the National People's Congress, it has to obtain the consent of two-thirds of the deputies of the Regions to the National People's Congress, two-thirds of all the members of the legislative organ of the Regions, and the Chief Executives.[XLIII] It means that it is possible for the central government to amend the Basic Laws without any formal consultation, not to mention the consent of, the SARs, but the strict requirement on raising the amendment proposal from the side of SARs make it very difficult for them to change the arrangement .

The power of authoritative interpretation of the Basic Laws is with the Standing Committee of the NPCSC. The courts within SARs have also the power to interpret, as they are authorized to interpret on their own, in adjudicating cases, the provisions of the Basic Laws which are within the limits of the autonomy. The courts of the SARs may also interpret other provisions in adjudicating cases. However, the courts shall seek an interpretation from NPCSC if, when adjudicating cases, they need to interpret the provisions 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 on the cases, through the Court

of Final Appeal. Further, the courts of the SARs, in applying those provisions having being interpreted by the NPCSC, shall follow its interpretation.[XLIV] The power to authoritatively interpret Basic Laws in practical set an upper *political jurisdiction* for the SAR's constitutional interpretation and review, which may incites the risk of infringing the juridical autonomy of the SARs.

It can be seen that through this design, the central authority has been introduced to the level of subnational units and acquires an important role, if not say dominative, in the evolution of subnational constitutions. The national force becomes an integrated part of the subnational constitutional politics.

5. The Entrenched Constitutional Principles

As was stated at the beginning, this tentative glance of the constitutional principles will be done from the perspective of the periphery or, if one prefers, from the standpoint of the subnational unit and not from the centre[XLV]. This explains, for example, why we elected the 'two systems' segment and not the 'One country' counterpart. We are not in any way diminishing the paramount importance of either the 'one country' or the 'two systems', or questioning the idea of Chinese sovereignty.

One should also point out that there is a complex interrelation of the principles, and thus making it sometimes not so easy to draw a division between them – when one ceases to give room to another. Sometimes, a given principle is *no more* than a corollary of another more ample one, making it, at times, somewhat difficult to grant it independent status; for example, the principle of having a constitution should presuppose the constitutionality principle at the risk of the former not being true or merely a paper constitution, which is not the case.

In general, these are what one can mention in relation to the constitutional system: the principle of obedience to the Joint Declaration's basic policies; the principle of a constitution; the principle of continuity; the principle of the second system within the one country, two systems; the principle of autonomy; the principle of democratization; the principle of an own and distinct legal system; the principle of constitutionality; the principle of legality; the principle of separation of powers; and the principle of independent judiciary. We will not address all of the above. On the other hand, by virtue of simplifying the

written discourse we will have Macau has a departing point of reference; however, unless stated otherwise, the following paragraphs do apply to Hong Kong.

5.1. The principle of obedience to the Joint Declaration basic policies

The Joint Declarations established a group of basic policies that will shape the Hong Kong and Macau SARs for fifty years. The *twelve commandments* are mandatory and cover several main features. Hence, when analysing and interpreting the Basic Laws, the first step must be to see how the subject in question is dealt with in the Joint Declarations[XLVI]. Failing to do so would make the Joint Declarations meaningless and eliminate the source of all the distinctive features of the SARs. We are faced with a relationship between these two preeminent sources of law of an exceptional nature, which together may be considered as forming the constitutional block of the SARs (along with article 31 of the PRC Constitution), with special links and cross-references to the commands and nature of the Joint Declarations*;* the *regulatory* function of the Basic Laws vis-à-vis the Joint Declarations; *the pacta sunt servanda principle*; and the material limitation imposed on the revision procedures of the Basic Law: *no amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong/Macau*. This is a proviso that imposes itself on both the sovereign and the regional bodies – although on the latter in a moderate way since there is no power of amendment but only some power of proposing amendments.

The Joint Declarations are undoubtedly international treaties, despite the unusual branding it receives[XLVII], with all the legal consequences that they imply. They set out the fundamentals of the process of the transfer of sovereignty (with implications for the legal system; public administration; exercise of sovereignty powers; political structure; judiciary; and fundamental rights, among others). Without question, the Joint Declarations constitute a limitation on the exercise of sovereignty over the peripheral reunited territories. These international treaties are echoing a certain spirit of a *Kantian perpetual peace*[XLVIII]*,* a limitation freely created and desired by the contracting sovereign states in the normal exercise of their international legal powers, or, in other words, 'Under the Joint Declarations (JDs), the PRC was reduced in its sovereign competences, these purporting only to external sovereignty: defence and foreign affairs.' (Isaac, 1999).

The Joint Declarations remain as a prominent source of law for the SARs (Oliveira, 1993: 24-25, Cardinal, 1993: 80, Katchi, 2005: 14, 93). The norms prescribed in the Joint Declarations, characterised as 'policies' embodying China's obligations, may genuinely constitute *material limits* on the legislative power responsible for drafting as well as amending the Basic Laws. The continuing validity and efficacy of the Joint Declaration is in fact, as seen, assumed by the Basic Law itself.[XLIX] In a sense, the Basic Laws *do no more* than detail the policies stated in the Joint Declarations[L].

In short, we can say that the Joint Declaration works as a *grundnorm* for the Basic Laws and consequently for SARs' autonomous constitutional, legal, political, social and economic system[LI] until 2047 and 2049, respectively. All the obligations created by the international treaty emanate guarantees that are proclaimed in the Joint Declarations and, in accordance with the *pacta sunt servanda* principle, none of these guarantees may be violated within the timeframe prescribed by the international treaty. Of course, the Joint Declarations contain no mechanism for its enforcement, but respect for that *jus cogens* principle is a strong element and the international community in general, and United Kingdom or Portugal in particular, should have a say in case of a breach of either Joint Declaration.

5.2. The principle of continuity

A paramount principle in general as well as in the fundamental rights area is the principle of continuity. '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. '[LII]. This means the continuity of the social system, of the economic system and also of the normative acts basically unchanged[LIII]. Or, as one author put it, it was envisaged a '*high degree of continuity*' (Crawford, 2005: 29).

However, this principle does not affirm itself as absolute, meaning that the principle of continuity does not have to be read as meaning intangibility. It does not claim to be synonymous with intangibility inasmuch as the contracting parties had intended to prevent an undesirable sclerosis of the legal system (Cardinal, 2006: 32). In truth, this characteristic of elasticity, though limited one must say, and of the principle of continuity, consists as an added guarantee to the effective survival of the legal system since it allows it, without abdicating its essential characteristics[LIV], to adapt to the natural and unexpected

evolution of the social system where it is inserted.[LV] If it is the *veritas* that the legal system will have to be maintained, although not in absolute terms, it is equally true that it could only be modified in respect to the limits established in the Joint Declaration (Cardinal, 2006). Besides, as another author points out, if Macau fails to keep and develop its own legal system the One country, two systems principle would be lacking its sense and purpose (Mai Man Ieng, 2001: 2).

The limit to the fullness of the principle of continuity cannot be reduced to only the thesis of the maintenance of the laws, save for opposing the Basic Law or that it will be subject to posterior alterations; otherwise, that will simply mean carrying out the emptiness of that apex principle and consequently be rendered useless. To us, one has to admit the possibility of the introduction of those alterations, even though it is not permissible for these alterations to consubstantiate basic changes[LVI]. With this we mean that the general principles that characterize/shape the Macau legal system cannot be disregarded, and neither can the diverse legal regimes be disregarded - for example, of the fundamental rights in general and of each right in itself - they cannot have their ratio deviated or overwhelmed.

5.3. The principle of the second system (within the one country, two systems global one)

Article 5 of the Basic Law announces that 'The socialist system and policies shall not be practised in the Macau Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.' Furthermore, article 11, 1, reassures that 'the systems and policies practised 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 executives legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law'.

In these two norms, the separation line between the sovereign and the subnational unit is clearly drawn. This means that in the sphere of the above mentioned *systems,* its design, enforcement, application and development must be made in accordance with the values and aims of the granted and tolerated values in the second system and not by way of importation of the correlative ones in force in the Mainland. For an assertive position, 'Given the contradictions between them, then to what extent is the Constitution applicable

in Hong Kong? The argument that it applies as a whole to Hong Kong must be rejected because the Constitution allows only one system. A more popular argument is that it applies only partially, but this theory is difficult to apply. A convenient, but not principled, argument is that the Basic Law is a national law passed by the congress, when decided, pursuant to an international treaty, to exercise its supreme power only through the framework of that de facto constitution. It is now settled that, as far as Hong Kong courts are concerned, the Basic Law forms the only valid constitutional cord connecting Hong Kong's laws to the national constitution. There is no other official means by which Chinese laws (including the Constitution) may be applied in Hong Kong.'(Fu and Cullen, 2006)[LVII].

In these fields, the core of Macau's autonomy, the second segment of the one country, two systems principle, is in command in the political system, in the legal system and its sources, in the judicial system and in the fundamental rights – one is not allowed to implement a socialist system or policies to downgrade the value of fundamental rights of an instrumental status and unceremoniously and unrestrictedly subordinate it to a given *societal* value that is propagated by the government without any real balancing of the potentially conflicting interests at stake.

5.4. The principle of an own and distinct legal system

Contrary to what, to a certain extent, is common, the legal order of the centre applies, or so tends to, unlimitedly and unrestrictedly to the subnational entities, at least in the subject matters reserved to the centre, as well as in other areas. For instance, the legal order of the centre applies in issues such as central taxes, central system of justice, monetary matters, and several others, and thus forming a strong component of the subnational legal system formation process. Although varying immensely in shape and scope, one fact seems certain: there is competitiveness between national and subnational units in forming the latter's legal system. We are faced with two domains of competence that contribute to one single legal system.

However, with the SARs example, we do not find such schemes except for some limited PRC constitutional norms, the Basic Law (and in here with constraints applicable to the sovereign power) and a few *sovereignty* legislations that must be identified and, in a sense, incorporated by the Basic Law itself and with a special procedure of application.

The Basic Law provides for the system to be used in Macau and it includes: the social and economic systems; the system for safeguarding the fundamental rights and freedoms of its residents; and the executive, legislative and judicial systems. In this sense, there is an extremely limited and low grade intervention in the subnational legal systems, and hence a *non dual* domains system of sources of law as a rule. Marco Olivetti stated that 'It is a strict consequence of the principle "one country, two systems" that the Chinese legal order does not find application in the territory of the two SARs', and thus addressing an 'immunity from Chinese Law' (Olivetti, 2009: 793). Or, in other words, 'The Macau legal system is normatively self-closed and self-referential due to the immanence of those Basic Policies' (Isaac, 2007) (enshrined in the Joint Declaration).

5.5 The principle of constitutionality

The most aprioristic and immediate role of the constitutionality principle is clearly indicated in Article 11, 2, of the Macau Basic Law, 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.'[LVIII] Article 8 reinforces the principle vis-à-vis the previous normative acts: 'The laws, decrees, administrative regulations and other normative acts previously in force in Macau shall be maintained, except for any that contravenes this Law.' Within Macau's own domestic legal system, a hierarchy is established and the apex role of its constitution is safeguarded, namely with the mechanism envisaged in article 17, 3[LIX]. This makes the Basic Law function as the norm parameter and the domestic constitutional platform.

This plane, along with other dimensions of the principle, is established in the Basic Law in many other articles. All those dimensions mean that the SAR is not above or outside the Basic Law; it is, instead, subjugated to it as in the fashion of any modern constitutional states. This submission embodies the idea of Constitution proper (Canotilho and Moreira, 2007: 216.)[LX].

5.6. The principle of Protection of Fundamental Rights[LXI]

The Basic Laws establish a wide catalogue of fundamental rights and several principles imbued with a *westernalized* approach and thus contribute to one more ground of differentiation vis-à-vis the sovereign besides the usually more adulated group of economic differentiations.[LXII] Besides, as noted before, one must underline the fact that, contrary to traditional regional autonomies and federated states, the fundamental rights system of the SARs – norms, principles, guarantees, limitations, courts, etc. – rest solely on the Basic Law and local legislation as well as applicable international instruments and does not allow room for the application of the national Constitution.

As seen, Article 4 of the Basic Laws solemnly states that the Special Administrative Regions *shall* safeguard the rights and freedoms of the residents and of other persons in the Region. This normative principle is in line with provisions of the Joint Declaration as well as other norms of the Basic Law, such as article 11[LXIII]. It definitely commands an *idea* of safeguarding the rights and freedoms, especially the fundamental ones, and thus not allowing for policies that will undoubtedly position themselves as anti fundamental rights. The safeguarding of fundamental rights is a mandatory general principle of conduct. Its connection with the continuity principle is self-evident and together they form a structural rector principle (and philosophy) of respect of fundamental rights, which is in line with the legate transferred to the new juridical person – the SAR – in the new constitutional order. This principle of safeguarding does not distinguish, nor should it, the origin of the fundamental rights or its christening. It extends its protective command to any fundamental right whether established in domestic law or in international law, whether vested with the robes of fundamental rights or with the cosmopolitan robes of human rights.

We tentatively identify several principles underlying the fundamental rights constitutional subsystem or component[LXIV]. They are[LXV]: the principle of safeguarding, the principle of self containment and of exclusivity[LXVI]; the principle of a charter of rights; the principle of continuity of fundamental rights; the principle of equality[LXVII], the principle of non discrimination[LXVIII]; the principle of safeguarding human dignity[LXIX]; the principle of legality of fundamental rights in general and on restrictions in particular; the principle of reception of at least minimum international standards; the principle of self-executing constitutional norms; the principle of *local* philosophy interpretation and integrative methods; the principle of effective judicial protection; the principle of proportionality; the

principle of overture to other rights in the Basic Law; the principle of overture to other rights outside the Basic Law; and the principle of extension to collective persons.[LXX]

Together with the constitutional principles that we have elaborated which have or may potentially have a contributory role in establishing and guaranteeing the fundamental rights system, they constitute the protective web of the fundamental rights system, shaping it into a potential and formal *pro libertate* one, from the perspective of the periphery or, if one prefers, from the standpoint of the subnational unit.

5.7. The principle of separation of powers

One can very briefly say, and we quote, that 'Under the Basic Law, there is a clear and sharp separation between the executive and the legislature' (Ghai, 1999: 263), and subsequently, there are some mechanisms, albeit not perfect, of checks and balances. Articles 2, 16 and 17, among other articles, reflect the separation of powers in Macau. Even if there is a dominance of the executive over the legislature as it is the case[LXXI], one knows that the event of absolute power does not fit in the Basic Law schematics. Absolute power negates true fundamental rights, whereas separated and controlled powers lay the carpet for the possibility of real fundamental rights. What varies is the scope and quality of those rights.

On the other hand, one must bring to the subject the fact that Macau and Hong Kong are constitutionally guaranteed with an independent judiciary. The principle of independent judiciary is present in the Basic Law, which is in line with the Joint Declaration, and it emphatically states that Macau (and Hong Kong) enjoys independent judicial power, including that of final adjudication. Immediately, one can see two dimensions at stake: the judicial power is independent from other *intrasistemic* powers and it is also independent from the central sovereign powers, and thus the final adjudication. Needless to stress, having an independent judiciary in the safeguarding of the constitutional system and of the fundamental rights system[LXXII] is paramount.

6. Comparing the core of the Chinese SARs: Homogeneity of Norms

The constitutional space that is allotted to Hong Kong and Macau is fundamentally the same, as they are created by similar Joint Declarations and the same Chinese

Constitution. The Basic Laws of the two regions are essentially identical, regarding the general structure, major principles, and wording. They were drafted in 1985-1990 and 1988-1993 respectively. Most of the drafters of the Hong Kong Basic Law from the mainland have been absorbed by the Drafting Committee for the Macau Basic Law and brought along same method and approach.[LXXIII]

Notwithstanding the similarity, there are some differences appearing in the content. It is also natural when the Basic Law of Macau, which was drafted later, tended to avoid some uncertainties from a technical point of view. The drafters also tried to make the Basic Law adapt to the society of Macau and reflects its own characteristics. For example, there is a provision regarding the policies on tourism and recreation which, in *the real world,* means casino industry, the sector giving most revenue to the government.

However, there are some differences that are more remarkable. Macau has a more complete list of fundamental rights than Hong Kong[LXXIV]. Whereas in Hong Kong the Basic Law states in article 25 that all Hong Kong residents shall be equal before the law, the corresponding article in Macau states the same principle, densifies and expands on it to cover the non-discrimination clause[LXXV], stating that all Macau residents shall be equal before the law, and shall be free from discrimination, irrespective of their nationality descent, race, sex, language, religion, political persuasion or ideological belief, educational level, economic status or social conditions. Macau Basic Law also adds the principle of human dignity to the chapter of fundamental rights. This principle constitutes a standard of universal protection and operates as an interpretation clause and a criterion of balancing fundamental rights and other relevant constitutional values (Canotilho and Moreira, 2007: 198; Rolla, 2002: passim; Cardinal, 2010a).

Another difference is put in the evolution of method of selecting the Chief Executive and formatting the legislature. For Hong Kong, the ultimate aim is to achieve universal suffrage for selecting the Chief Executive and electing all members of legislature, for Macau these provisions are absent. That only a majority of legislators are to be elected directly was put into the Macau Basic Law. It shall be borne in mind that this different treatment was put earlier in the Joint Declarations; the Basic Law was just to implement the policies enshrined in Joint Declarations. The differences might reflect different bargaining power of the British and the Portuguese governments, and different degrees of domestic

desire for democracy (Ghai, 2000b: 192). This difference leads to a different democratization pace as appeared in the SARs which would be elaborated later.

7. The dynamics and divergences in the constitutionalism of the twin regions: some items

7.1 Constitutional Review

The Basic Laws established a complicated dual system of constitutional review. One is the review conducted by the NPCSC, the other is the judicial review by the courts. The NPCSC can invalidate the laws enacted by the legislatures of the SARs which it considers are not in conformity with the provisions of Basic Laws regarding affairs on the relationship between the central authorities and the region, by returning them.[LXXVI] This power to review constitutionality has two restrictions. The first is it can only review and invalidate the laws that fall into the scope as provided and the second is the laws are only limited to the laws enacted by the legislatures of the SARs, excluding the administrative regulations enacted by the Chief Executive.[LXXVII]

But the courts' power of constitutional review is not without restrictions. One restriction is it has to be subject, within the limits and scope prescribed by the Basic Laws, to the authoritative interpretation of the NPCSC and it might be overruled by the interpretation from the NPCSC which, as we will see later, happened in Hong Kong SAR.

The Basic Laws of the SARs stipulate that no law enacted by the legislatures shall contravene Basic Law, which can be regarded as a foundation for constitutionality review. However, the Basic Laws didn't establish a unitary system for judicial review and a constitutional court, or some such equivalent which is charged specifically with the responsibility of adjudicating on constitutional challenges, in the SARs.

In Hong Kong, the Court of Final Appeal has readily and consciously assumed a role of the implementer of the Basic Law and the guardian of fundamental rights. The Court of Final Appeal (CFA) has taken a robust approach to constitutional review. From the very first case, it has declared in no uncertain terms that:

'in exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of an

obligation, not of discretion, so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency'.[LXXVIII]

At the beginning, there were some conflicts between the CFA and the NPCSC on understanding the power of the CFA to constitutionally review the acts of NPC and NPCSC, and the interpretation of Basic Law itself (Tai, 2002). As rightly commented by some authors (Clarke, 1999), the Court tried to delineate the scope of the HKSAR's judicial autonomy from the central government. The Court was concerned to establish its constitutional jurisdiction as widely as possible and to assert the independence of its judicial power as forcefully and expansively. It asserted itself as the guardian of the Basic Law and a champion of the legal autonomy of HKSAR and the rights of its residents. It tried to erect a 'firewall' around Hong Kong's judicial autonomy by placing the interpretation and enforcement of the Basic Law primarily under its own control and limiting the requirement to seek an authoritative interpretation from NPCSC in article 158 of the Basic Law.

There were a handful of constitutional adjudications, which compounded the constitutional jurisprudence. The courts employed a wide range of remedies, including the traditional ones like declaration of unconstitutionality, reading in and reading down, as well as the innovative ones, such as temporary suspension of a declaration of unconstitutionality (Zervos, 2010). And the courts are willing to give access to applications of constitutional review by carefully interpreting the procedural rules. In one case, the Court of Appeal established exceptional rules to entertain the application for judicial review by an applicant who had not been charged with any offence and was not affected by any executive decision, which would be normally regarded as lack of *locus standi*.[LXXIX] The Court stated that 'where the constitutionality of laws is involved, the court should be more eager to deal with the matter. Put bluntly, if a law is unconstitutional, the sooner this is discovered, the better.'[LXXX]

In interpreting Basic Law, the CFA has carefully taken a distance from the Chinese approach and insisted on its common law approach. In the case of *Chong Fong Yuen v Director of Immigration*[LXXXI], the CFA attempted to define the relations between the Hong Kong courts and the NPCSC in interpreting the Basic Law. It concluded that, according to Chinese law, the interpretation by the NPCSC is legislative in nature, as NPCSC is a

legislative body. Since a common law court would generally not consider how the Legislature will respond to the courts' interpretation of a particular statutory provision, which is considered as the exclusive power of the court, when Hong Kong courts interpret the Basic Law, they will not take into account how the NPCSC would interpret the Basic Law under Chinese law, or how it would respond to their interpretation. In this way, the CFA tried to insist the primacy of common law principles in interpreting Basic Law (Chan, 2007: 412).

Regarding to the role of guardian of human rights[LXXXII], one commentator has generalized two major themes evolved from the judgments of the CFA.

'The first theme is its eagerness to position itself as a liberal constitutional court protecting fundamental rights. In a line of decisions, the Court gradually established firm jurisprudence on the approach to fundamental rights that is in line with contemporary liberal thinking on human rights. The second theme is to maintain continuity with the previous system. The establishment of the SAR is not the creation of a new regime as such, but a continuation of the previous regime, and the court should be slow to disturb such continuity.' (Chan, 2007: 415)

Hong Kong courts have considerably used international treaties and international and comparative jurisprudence to ensure that domestic laws and policies comply with international human rights norms (Cardinal, 2010d and forthcoming). This has constituted an important element for internationalizing Hong Kong's constitutional law or, in other words, internalizing international human rights law in Hong Kong (Chen Albert, 2009a). Since the enactment of the Bill of Rights in 1991, the human rights norms in International Covenant on Civil and Political Rights have constitutional force in Hong Kong and are used as yardsticks for constitutional judicial review. This system was maintained after 1997 when ICCPR was incorporated in article 39 of the Basic Law to bring the ICCPR into the Basic Law's framework for the protection of human rights. To construe and apply the ICCPR, the use of international norms in general and of the case law on the European Convention on Human Rights (ECHR) has proved to be the single most important source of reference for the Hong Kong courts (Chen Albert, 2009a: 247), even though the ECHR is not part of the law of the land. Apart from the jurisprudence of the ECHR, Hong Kong courts have also sometimes referred to and relied on a wide range of other international decisions namely from the Inter-American Court of Human Rights, the Human Rights Committee, the International Court of Justice in deciding human rights cases, as well as

referring to the general comments and concluding observations of treaty-monitoring bodies.[LXXXIII]. And, to some, perhaps even more remarkably, 'Indeed, compared to the record of the Hong Kong courts before 1997, Hong Kong courts in the post-1997 era have been even more open, active and receptive than before in the use of international and comparative materials in the domain of human rights law.' (Chen Albert, 2009: 248)

Compared with their counterparts of Hong Kong judiciary, the Macau judiciary, especially the Court of Final Appeal (TUI), demonstrated earlier a timid role in protecting fundamental rights and in constitutional review, notably in its first years of operation.[LXXXIV] However, Articles 11 and 145 of the Basic Law on the supremacy of the Basic Law over any ordinary norm and the principles of justice and of the effective protection proclaimed in Article 36 of the Basic Law demanded a different attitude — one that could easily be reached in Hong Kong — even in the absence of a branded and expressly established judicial procedure. Besides, as stated in Article 83 of the Basic Law, the courts shall be subordinate to nothing but law, and the first law is the Basic Law of Macau. Therefore, the absence of a specific set of procedural rules on constitutionality issues[LXXXV] cannot be seen as impairing the competence of the court to implement the constitutionality principle and safeguard the Basic Law. The political mechanisms can coexist with normal judicial ones, as is the case in Hong Kong which has to follow, in this aspect, the same type of rules in its Basic Law, and the CFA has been active in these crucial fields. On the other hand, in Macau, the TUI suffers a problem of invisibility.

As was said, there were initial oppositions to the assumption of constitutional review, however, a ruling by the TUI promisingly and clearly affirms that it has the competence to scrutinize the conformity of any rule vis-à-vis the Basic Law, further stating that, in the cases adjudicated, the courts cannot apply norms inserted either in laws or administrative regulations that are in violation of the Basic Law or its settled principles. This is, from several angles, an apex decision that should merit further study and may indicate a certain shy deviation from a previously *conservative stance* by the court.[LXXXVI] Time will tell.

In the field of fundamental rights, in which there are relatively few cases, the tentative conclusion is that the Court usually opts for a moderate or shy approach, with little densification of the fundamental rights enshrined in the Basic Law, in the Joint Declaration such as the principle of effective judicial protection or the continuity principle,

and in international law[LXXXVII]. There is a lack of deepening of important general principles and concepts, such as proportionality, usually simply acknowledging it in an administrative law context. In short, the Court does not engage an in-depth, proactive and liberal stance, although it does not present itself as being anti human rights.

An example of a rigid and detached approach, perhaps even an insensitive one, is the case in which the internationally established family reunification right was dismissed, and the Court serenely advocated that if a parent wish to be reunited with its sibling so instead of bringing the child to Macau the parent — legal immigrant worker — could instead simply cease to work in Macau and move back to his Southeast Asian homeland[LXXXVIII]. Finally one more example would be the Ao Man Long case and the dismissal of his right of appeal, also internationally guaranteed[LXXXIX].

In some cases, however, most notably in habeas corpus ones, the TUI clearly assumed a guarantor role. More recently, in several cases related to freedom of demonstration, TUI has demonstrated a more suitable approach as guarantor and *densifier* of fundamental rights.

Whereas one can see a clear active and widely respected *pro libertate* judicial activity in Hong Kong, one fails to see such enthusiasm in Macau[XC], at least in the same dimension that can be seen on the other side of the estuary of the Pearl River. However, as said, there might be a new tendency encompassing a *friendlier* approach to fundamental rights issues.

7.2. The democratization process

The issue of democratization of the SARs has to be put into a wider historical context to be discussed. In Macau, the democratization took place shortly after the Portuguese revolution in 1974, but it became stagnant during the 1980s and the 1990s. The Organic Statute passed in 1976 established a 17-member legislature with six directly elected members, six elected by occupational groups and five appointed by the Governor. There was a division of legislative power between the Legislative Assembly and the Governor. In Hong Kong, only until 1985, the Legislative Council introduced members elected by functional constituencies. Before that all members were appointed by the Governor. The common characteristic of the political system of Macau and Hong Kong is the overarching powers of the governor and the relatively little accountability to the legislature.

The Joint Declarations, based on compromises between two parties, stipulated that the government and the legislature shall be composed of local inhabitants and the chief executive will be appointed by the central government on the basis of the results of elections or consultations to be held locally. The legislature shall be constituted by direct elections in the case of Hong Kong, and for Macau majority members of the legislature shall be directly elected. In both cases, the executive shall be accountable to the legislature.

The Basic Law gives the Chief Executive an important role in the legislative process. The Chief Executive can also prevent the submission of legislative bills relating to government policies by not giving his or her consent. The Government has a reserved right to initiate legislative proceedings dealing with public expenditure, political system and the operation of the government.[XCI] The Chief Executive can veto the bill approved by the legislature and ask them to reconsider it.[XCII] If the same bill gets approved with qualified majority, the Chief Executive can dissolve the legislature.[XCIII] Other than power regarding legislative issues, the legislature has the power to examine and approve budgets introduced by the government; to receive and debate the policy addresses of the Chief Executive; to raise questions on the work of the government; to debate any issue concerning public interests; to receive and handle complaints from residents; and to summon, as required when exercising the powers and functions, persons to testify or give evidence.[XCIV] The legislature may pass a motion of impeachment of the Chief Executive by a two-thirds majority of all its members, although it has to be reported to the central government for the final decision.[XCV]

It can be concluded that the Chief Executive does have wide-ranging powers, but a system of checks and balances exists. The legislature can play a role of monitoring and balancing the power of the executive based on rules provided in Basic Law, although a lack of substantial powers turn the pre-eminence to the executive side, without however deleting the separation of powers principle .

The post-handover democratization of Hong Kong SAR has been mainly centred on the reform of electoral rules of Chief Executive and the Legislative Council[XCVI]. The progress achieved until this moment is that the election of the Chief Executive in 2017 may be implemented by the method of universal suffrage and, after the Chief Executive is selected by universal suffrage, all the members of the Legislative Council may be elected by universal suffrage. It depends on the internal players to create conditions and materialize

these objectives.[XCVII] Macau's case is different from Hong Kong because the universal election of the Chief Executive and all the members of the Legislative Assembly was not put into the Basic Law.[XCVIII] Also Macau lacks political parties *stricto sensu* and a strong civil society, as well as a certain lack of primary social identification with Macau proper due to strong and recent immigration from mainland China, which might be reasons influencing its democratization process.

7.3. Exercise of External Autonomy

Hong Kong and Macau SARs enjoy a high degree of international legal capacity based on their autonomy, internal and external (Chan and Lim, 2011: 77-81). The Basic Laws accord the SARs the power to conduct relevant external affairs on their own, while the central government is responsible for the foreign relations relating to the SARs.[XCIX] To conduct relevant external affairs, the SARs can maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.[C] SARs may, as members of delegations of the People's Republic of China, participate in international organizations or conferences in appropriate fields limited to states and affecting the Region, or may attend in such other capacity as may be permitted by the Central People's Government and the international organization or conference concerned, and may express their views, using the name 'Hong Kong, China' or 'Macau, China'. This gives the SARs the opportunity to promote their interests through key international organizations. The SARs can also participate in their own capacity under the name 'Hong Kong, China' or 'Macau, China' in international organizations and conferences not limited to states.[CI]

It all left the SARs governments the chance to make full use of their wide external affairs powers, which concerns their international recognition. It can be generally observed that Hong Kong has more vigorously taken an active role and is a visible player in the international arena compared to Macau, especially in the fields of commerce and trade, by

participating in more intergovernmental organizations and non-intergovernmental organizations and establishing more overseas Economic and Trade Offices.

Hong Kong participates in 26 international organizations which are only open to sovereign states, sending representatives as members of delegations of China. These organizations include important ones such as Food and Agriculture Organization, Group of Twenty, International Atomic Energy Agency, International Civil Aviation Organization, International Labour Organization, International Monetary Fund, The World Bank Group, World Health Organization, World Intellectual Property Organization, etc. Hong Kong participates in 39 intergovernmental organizations not limited to states, such as Asia - Pacific Economic Cooperation, Asian Development Bank, International Maritime Organization, Organization for Economic Co-operation and Development - Trade Committee, World Meteorological Organization), World Customs Union, World Trade Organization, etc. It also participates in more than 170 non-intergovernmental organizations. Hong Kong has been an active participant in international and regional economic and trade forums, such as World Trade Organization and Asia - Pacific Economic Cooperation. Some important international organizations maintain offices in Hong Kong, such as the Commission of the European Communities, the Bank for International Settlements, the International Monetary Fund, the International Bank for Reconstruction and Development and the International Finance Corporation. All these external relations and activities help it to construct and maintain its prominent position as a leading commercial, communications, financial, logistics and transportation centre.

Macau's *de facto* participation in international organizations is more limited. Macau has used the channel of having representatives as members of delegations of China to mainly participate in UN meetings. Macau is a member of 13 intergovernmental organizations not limited to states, such as World Trade Organization, World Tourist Organization, World Health Organization, etc[CII]. And participates in more than 29 non-intergovernmental organizations. It should be emphasized that, due to its unique historical and linguistic advantages, Macau is selected as the base for the Permanent Secretary of Forum Economic and Trade Co-operation Between China and Portuguese-Speaking Countries, and participates in the activities through members in the delegation of China.

Regarding the application of international treaties, the differences between the two SARs are more mitigated. In fact, 243 multilateral treaties are applicable to the HKSAR,

while 190 multilateral treaties to the Macau SAR, and a quantity of those multilateral treaties applied in the SARs, do not apply to mainland China. HKSAR is also party to more than 140 bilateral agreements with 60 countries, including Air Services Agreements, Investment Promotion & Protection Agreements, Mutual Legal Assistance Agreements, Surrender of Fugitive Offenders Agreements, Transfer of Sentenced Persons Agreements and Double Taxation Avoidance Agreements.[CIII] Macau SAR is also party to more than 141 bilateral agreements, the majority of which concern diplomatic and consular relations, air transport service, and visa abolition.[CIV] Up to October 2011, there are 59 Consulates-General, 62 Consulates and 5 Officially Recognised Bodies in Hong Kong[CV], and most of these representations extend service to Macau. Hong Kong also has established its Economic and Trade Offices in its major trading partners, namely, Australia, Belgium (the EU), Canada, Germany, Japan, Singapore, Switzerland, the UK and the US.[CVI] Macau only established three overseas Economic and Trade Offices in Portugal, Brussels (European Union), and Geneva (World Trade Organization).

8. Some final remarks

As Robert F. Williams and G. Alan Tarr (2004: 12) pointed out, 'documenting how subnational constitutions within a particular country are similar to, or different from, each other is a crucial first step. However, the really interesting question is explaining the reasons for the differences among subnational constitutions.' Hong Kong and Macau's Basic Laws, as their subnational constitutions, are created under similar historical background and based on similar international treaties, namely, the Sino-British Joint Declaration and the Sino-Portuguese Joint Declaration, which therefore entrenched similar principles for them and ensured the constitutional values such as rule of law, protection of human rights to continue survive and develop on these two lands consecrating a *Rechtsregion*. But constitutionalism is living and evolving; and it is more a matter of a constitutionalising process. A variety of reasons result in different degrees of constitutionalism present in societies having similar constitutions.

As seen, the extent, scope and nature of these two imaginative and pragmatic autonomy arrangements clearly show that they do not fit in any classical model, either

federal or of territorial autonomy. Its results, albeit imperfect, are deemed positive so far. Hence, can these exceptional cases present themselves as a model in the research and consecration of subnational constitutionalism in other geopolitical arenas? Answering the question of considering Macau (and Hong Kong) autonomy as a model (Goncalves, 1996), Giancarlo Rolla (2009: 472) considers that, 'from the viewpoint of the comparative law theory, it is incorrect to refer to Macau as a model' since, 'In summary, two elements concurring to the establishment of a model are: on the one hand, an experience that becomes obvious on account of its efficiency, and on the other, the experience's aptitude to circulate in other countries and legal systems. Regarding Macau, I believe we can confirm the presence of the first prerequisite element but not the second. Therefore, it may be more appropriate to speak of Macau as a "tailored suit": that is, a constitutional measure that is suitable for solving a specific situation but is one that can hardly be generalized.' (Rolla, 2009: 472 and 473).

Even if the Macau – and Hong Kong – autonomy solution only complies with the first element, efficiency[CVII], one could already accept that solution envisaged in the One Country, Two systems maxim, as mission (basically) accomplished. We do believe however that the internationalized autonomy arrangements of the SARs do have the potential to be exported, that is to circulate in other legal systems, other countries thus allowing to, in a *pacta* and Kantian *perpetual peace* stance, accommodate diversity in unity. In peace. In mutual respect. Safeguarding the fundamental rights of the citizens of the subnational unit.

• The opinions expressed here are solely those of the authors and do not reflect the views of any institution to which they are affiliated. Thanks are due to Luís Pessanha, who offered many suggestions. The usual disclaimers do apply. Paulo Cardinal, LicLaw (Lisbon), PostGrad (Macau), PhD candidate (Coimbra), Invited Lecturer, Faculty of Law, University of Macau; Coordinator Legal Adviser of Macau Legislative Assembly, paulocardinal@yahoo.com. Yihe Zhang, LLM (University of Macau), LLB(ECUPL PRC), Legal Adviser of Macau Legislative Assembly, janezhangyihe@yahoo.com.

I Tarr (2010) has given an approach in the analysis of subnational constitutionalism: firstly, there should be an essentially legal assessment of the amount of subnational constitutional space, competency, or autonomy that the component units are allotted, and then the question is how a federal system polices the outer limits of subnational constitutional-making space allotted to component units.

II On studies on subnational constitutionalism in different countries and collective works encompassing comparative law approaches, see *e.g.,* Gunlicks, 2000; Brand, 2000; Delledonne, 2011; Marshfield, 2008; Williams, 1999; Murray and Maywald, 2006; Moreno, 'Subnational Constitutionalism in Spain'; Häberle, 2006;

Valadés and Serna de la Garza, 2005; Aparicio, 1999.

[III] See particularly the case of South Africa and also of Kenya.

[IV] See the cases of the United States and Switzerland.

[V] Also see reasons put forward by Pernthaler (1999: 35 and ff.), such as the autonomy of the subnational units as justification.

[VI] On subnational constitutions and protection of rights, see William, 1977; Pollock, 1983; Tarr, 1997; Tinoco and Sosa, 2008; Galligan, 2007, in which the author discussed the rights protection by subnational governments under three models of federalism: traditional constitutional federalism, multinational federalism and asymmetric federalism. For a case study of Mexico subnational constitutions and rights protection, see for example, Tinoco, 2010; Rojas, 2008.

[VII] In explaining the supplementary function of protecting human rights by state constitutions of United States, Pollock (1983: 709) pointed out, 'the Bill of Rights in the United States Constitution establishes a floor for basic human liberty. To carry forward that metaphor, the state constitution establishes a ceiling. A state may supplement federally granted rights, it may not diminish them through a more restrictive analysis of the state or federal constitution.' For more about this function, see Brennan, 1977.

[VIII] See Ginsburg and Posner, 2010, Tarr and Williams, 1999. Elazar (1982: 3) explains: 'The United States does have a living and active tradition of taking state constitutions seriously, if not always seriously enough. That tradition is reinforced by the continuing processes of constitutional design: regular referenda on state constitutional amendments in most states, periodic constitutional conventions to achieve major constitutional revisions or comprehensive constitutional change, and state supreme court decisions which shape state constitutional law.'

[IX] See Fercot, 2008, Castellá Andreu, 2007. For the Macau, and Hong Kong, cases, Cardinal, 2009 and 2010d.

[X] An inspiring research on subnationalism in Italy and Spain autonomies can be found in Delledonne and Martinico, 2011. Regarding the Chinese SARs, for example, see Cardinal, 2007.

[XI] García (2009: 412), says, that 'In recent decades, doctrine has shown a confluence between the concepts of federal state and regional state due to the centralisation processes undergone in the first, and the qualitative and quantitative increase in the powers of the second.' See also, for example, Vergottini, 2004.

[XII] An example among others, Hernandez (2005) tells us of a deep process of centralization in Argentina contrary to the federal model envisaged in its Constitution.

[XIII] In this work one is given several reasons for this advance of the composite state, such as the 'Europe of the Regions' factor.

[XIV] Parts of this section are drawn from Cardinal, 2009.

[XV] That reads, '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 the light of the specific conditions.'

[XVI] Sino-British Joint Declaration Point 3(1) and reaffirmed on Point I of Annex I; Sino-Portuguese Joint Declaration Point 2 (1) and reaffirmed on point I of Annex I.

[XVII] The case of South-Tyrol is a point of reference and comparison for the autonomies of Macau and Hong Kong. Surprising as it may seem, that case shares more of the 'uniqueness' of the Macau and Hong Kong autonomies. In fact, they have in common a transfer of sovereignty—at least to a certain degree—from one sovereign state to another sovereign state; that transfer was agreed and laid down in an international legal agreement; those agreements were deposited at the UN; thus, the foundation of the autonomy is primarily internationally based; 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, 2009. In general and providing several examples and nuances, both historical (such as Memel) and contemporary (such as South-Tyrol), see Dinstein, 2005.

[XVIII] Art. 20 of Hong Kong Basic Law and Macau Basic Law. Canas (2001: 244) makes this point despite considering the article an enigma.

[XIX] Although as seen, the external *pacta* source must be complied with meaning that sovereignty resides solely in China and in no other, but it is delimitated by the Joint Declaration.

[XX] For detailed discussion on the limitations of autonomy, see, Cardinal, 2008b: 671-681. It shall also be noted that the absence of a conflict resolution mechanism has been seen as a limitation, or an impediment, to the autonomy. To be clearer, there is no independent judicial forum for the determination of jurisdictional disputes between the central government and the SARs, while the Standing Committee of National People's Congress, a political organ, undertakes '*constitutional review*', and interprets the Basic Laws. See, Chen Albert,

2009: 760-762.

[xxi] Nabais (2001: 33-34) describes a high degree of complexity and originality that does not fit any previous models. Olivetti (2009: 783) puts it 'In the case of the SARs, the lack of homogeneity not only is allowed or tolerated, but it is directly imposed to the Regions by their Basic Laws, up to the point that they couldn't even reduce or remove it (e.g. adopting a socialist system). Here lies in my opinion the core problem of every attempt to classify the SARs using the models created in the literature over territorial distribution of powers. None of these models and none of existing experience allows such a difference of political structure, of socio-economic model and of fundamental rights regulation between the centre and the autonomous entities like the one foreseen by the Hong Kong and Macao Basic Laws.'

[xxii] Ieong (2004: 233-234) says that the regime of the SARs under the one country, two systems framework brings to the centralized state system some federalist characteristics, and concludes that China now has a combined system of federalism and unitary state. Underdown (2001) uses the interesting expression '*federalism Chinese style*'. Davis (1999) poses the question of federalism in China and of confederacy and proposes a concept of economic federalism already in force but unaccompanied by a formal constitutional one. Zheng (2007: 213) referred to China as a 'de facto federalism' or a 'behavioral federalism'. 'China does not have a federalist system of government (…) Constitutionally, the country is a unitary state. Nevertheless, within China's cultural context, a formal institutional perspective can hardly help us understand the country's central-local relations properly. A better understanding of China's central-local relations should begin with a behavioral perspective. Such a perspective will enable us to see China's de facto federal structure.' See also, Cheung, 2007.

[xxiii] Again, an item embodying the 'second system', even if this new system marks disruptions in several issues with the previous 'colonial' political system, which is less marked in the case of Hong Kong. The main reason is that the Macau model was copied from Hong Kong. See, for example, Cardinal, 2002, and 2008b: 678-681. For Hong Kong's case, see Ghai, 1999.

[xxiv] Henders compiled the data related to the nonstate actors activity in international law and both Macau and Hong Kong are high in the rankings and in the case of Hong Kong it is surpassed only by a will be State - Palestine - and an associated one.

[xxv] China has since imperial times adopted the notion of ethnic autonomy. For a historical analysis and the origin of current ethnic autonomy, see Phan, 1996.

[xxvi] They are the Inner Mongolia Autonomous Region, the Xinjiang Uygur Autonomous Region, Guangxi Zhuang Autonomous Region, Ningxia Hui Autonomous Region and Tibet Autonomous Region.

[xxvii] Article 3 of the Law of the People's Republic of China on Regional Ethnic Autonomy.

[xxviii] Article 5 of the Law of the People's Republic of China on Regional Ethnic Autonomy.

[xxix] Article 7 of the Law of the People's Republic of China on Regional Ethnic Autonomy.

[xxx] Article 26 of the Law of the People's Republic of China on Regional Ethnic Autonomy.

[xxxi] Article 115 of the Constitution of PRC.

[xxxii] Article 116 of the Constitution of PRC.

[xxxiii] Article 3 of the Constitution of PRC.

[xxxiv] Article 20 of the Law of the People's Republic of China on Regional Ethnic Autonomy.

[xxxv] Up to 2002, there are 13 laws which authorized the ethnic autonomous areas the right to alter implementation, but the alterations have been practically done only to 4 laws (Marriage Law, Election Law, Inheritance Law, and Forest Law) by some ethnic autonomous areas.

[xxxvi] Article 46 of the Law of the People's Republic of China on Regional Ethnic Autonomy.

[xxxvii] For analysis of the limited role the autonomous legislative powers can play in solving central-local conflicts of interests distribution and in extending autonomous power, see Xia Chunli, 2008.

[xxxviii] One does not forget the inexistence of some classical features of federalism, such as the *Kompetenz-Kompetenz,* see, Cardinal, 2009. Gouveia (2002: 1997) 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. It is important to note though that historically not all constitutions were the result of a self constituent power but rather *granted* by a superior entity, be it a monarch or the international community, e.g., the Constitution of Bosnia and Herzegovina has come into being as Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina of the Dayton Agreements, see Yee, 1996, on legitimacy and undemocratic questions.

[xxxix] We could question if other normative documents integrate the constitutional order of the SARs such as

the ICCPR, by virtue of article 40 of the Macau Basic Law and 39 of the Hong Kong one stating: 'The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article. '

[XL] Raz (1998: 153-154) presents a seven characteristic criterion in order to ascertain the existence of a constitution in a thick sense: it contains the definition of powers of the main organs of government; is meant to be of long duration, that is it is stable or aspire so; it is written; it is a superior law; there are judicial procedures to implement that superiority; it is entrenched; and, finally, it purports principles of government that usually express common values of the community, such has human rights, democracy, *etc.*. The Basic Laws conform to all of the above with some deficiency regarding one, the judicial mechanisms of implementation. For further see Cardinal, 2010a.

[XLI] Article 11 of Hong Kong Basic Law: No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law. Article 11 of Macau Basic Law: No law, decree, administrative regulations and normative acts of the Macau Special Administrative Region shall contravene this Law.

[XLII] In truth, as explained and detailed in the text**,** we view the Basic Law as the Macau Constitution, see Cardinal, 2010a and b. However, we do know that actually in mainland doctrine this view is not shared, see e.g. Liu and Han, 'The Basic Laws of HK and Macao SARs aren't Subnational Constitutions in China'. Apparently an approach is favored filled with traditional and old-fashioned concept of absolute, or unlimited, and indivisible sovereignty, basically in the footsteps of the way paved by Jean Bodin in the XVI century. Further, for a good summary of the division between Hong Kong scholars and mainland scholars on the nature of the Basic Law, see Chen Albert, 2002: 381, footnote 25. 'Mainland scholars think the Basic Law is one of the basic laws enacted by the National People's Congress according to the Chinese Constitution, and don't regard it as constitutional instrument or constitutional law. (…) Hong Kong scholars generally think the Basic Law is the constitutional law or constitutional instrument. The Judiciary also shares this opinion, and adopts general principles of interpreting constitution to interpret the Basic Law, and general principles of constitutional review to review the compliance of laws enacted by Legislature with the Basic Law.' For relevant jurisprudence relating to the nature of Basic Law as the constitution of Hong Kong SAR, see Lo, 2011: 14-15.

[XLIII] Basic Law of Hong Kong: Article 159; Basic Law of Macau: Article 144.

[XLIV] Basic Law of Hong Kong: Article 158; Basic Law of Macau: Article 143.

[XLV] For further see Cardinal, 2009 and 2010c, papers that have parts that are closely followed in this section.

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

[XLVII] Sharing the same opinion, Ramos, 1998; Chen Zhizhong*,* 2001. For Hong Kong, Mushkat, 1997: 140-1; Crawford, 2005: 3 – 4, says 'It is true that it is termed a Joint Declaration and much of it is in declaratory mode. But the name given to a treaty is a matter of indifference. (…) There is no difficulty from the point of view of international law in seeing the Joint Declaration as a treaty. Moreover the declaratory mode does not mean that the Joint Declaration is a mere declaration or recital without legal force. Much that is in the Joint Declaration is actually being constituted, or at least being agreed to be constituted. '.

[XLVIII] Kant purported an idea of universal hospitality and this resulted in strong disagreement towards colonialism. The Joint Declarations ended colonialism and the inhabitants of Macau and of Hong Kong of Portuguese or British background are seen as permanent residents of the SARs in (almost) total parity with Chinese nationals. See, Cardinal, 'A Tale of Two Cities - The Judicial Protection of Fundamental Rights in the Exceptional Autonomous Regions of Macau and Hong Kong of The PR of China and the Role and Influence of International Law Instruments on Human Rights', forthcoming; Cardinal, 2010a: 741 - 748.

[XLIX] Preamble and in Art. 144 stating that the basic policies of the People's Republic of China regarding Macau have been elaborated by the Chinese government in the Sino-Portuguese Joint Declaration and that no amendment to the Basic Law shall contravene the established basic policies of the PRC regarding Macau. For Hong Kong, article 159.

[L] Chen Zhi Zhong (2001: 92) writes that the Basic Law codifies the 12 points in JD Art. 2. In the decision on

process 96/2002, the TSI (Macau Court of Second Instance) a reference is brought to the densification of the Joint Declaration made by the Basic Law.

[LI] 'Macau's legal system will have a new constitutional Grundnorm: the JD itself, which is the body of principles and rules defining its autonomy as an SAR and limiting Chinese sovereignty', Armando Isaac (1999, 3). It is important to note again that the Basic Law must nonetheless follow the provisions of the Joint Declaration, although in some cases it has failed to do so; see for example Cardinal, 1993; for Hong Kong, Ghai, 1999: 146.

[LII] Joint Declaration, Point 2 (4) and see also I and III of Annex I with some differences in the language of the late norms. Alves (2001: 207) asserts that 'As for the concept of "laws in force" we understand it in a broad meaning, encompassing not only the formal aspect – written laws – but also the spirit of the legal system, its internal logic, its own dogmatic concepts and all the rest that provides life and sense to the legal order previously existent at the date of transfer of the exercise of sovereignty.'

[LIII] One should note that, contrary to what might be perceived, the whole idea of continuity of a given legal system is far more common – and adequate if not necessary in many cases – than the sole cases within Chinese context. These phenomena can be witnessed in a multitude of situations by which some shift of sovereignty occurs. Be it by transfer of sovereignty over a given territory, access to independence or other situations historically existent.

[LIV] Wang (1999: 180) tells us about the necessity of the new sovereign to acknowledge the existence of a differentiated legal system in Macau and of the local social customs. Its worth mentioning some of the following ideas: the creation of new legislation imposes that it should be prudently taken in consideration the relationship between the Basic Law and the laws previously in force, but also the maintenance of the European continental legal system characteristic as a way of underlining the typical style of Macau, and, it should be mentioned that one of the messages contained in the One county, two systems is the admissibility of a regime left by a foreign State in the condition that it is not in violation of the Basic Law, Sun, 2002.

[LV] It should be pointed out that from the perspective of legal transplant and legal culture, some legal scholars made a analogy between 'the theory of possession' - a concept in civil law - and preserving the transplanted legal regime and rules, and asserted 'for a jurisdiction built upon legal transplant, existing legal rules and legal theories should be preserved unless they are proven to be not suitable for the society or not corresponding to the common norms of the human society.' See Tong and Wu, 2010: 670, who consider this *continuity* a result or phenomenon rather than a principle. We think that, by the end of the day, it actually concurs with what we advocated here about continuity and elasticity.

[LVI] Lok (2002: 61) seems to be purporting a somehow similar idea by proposing a difference between the *spirit* of the laws and its basic value as opposed to the specific writing of the normative rules. This later ones would be changeable. One can assume that those would not.

[LVII] Or in the words of Wu (2002: 74) 'Under the principle "One country, two systems", the socialist principles and policies established in the Constitution are not applicable in the Regions (SAR). This means that the Constitution is applicable in the MSAR, except for those rules that are related to the socialist principles and policies and the ones referred in article 11 of the Basic Law'.

[LVIII] Rao, 2006, states that 'The Basic Law has constitutional status and dominates all other Hong Kong laws. (…) The Basic Law dominates all local statutes of the territory, and enjoys constitutional status, namely, as a charter which cannot be defied and one that guarantees social stability and steady economic development. In light of this, all governmental institutions, organizations and individuals must strictly adhere to the Basic Law.'

[LIX] Note, however that such constitutionality mechanism of control does not extend to administrative regulations enacted by the Government. On this subject see also, article 145 'Upon the establishment of the Macau Special Administrative Region, the laws previously in force in Macau shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the provisions of this Law and legal procedure.'

[LX] As Ribeiro (2002: 57) points, the principle of *Rechtsstaat* - or of a *Rechtsregion,* in a similar sense of a *Rechtsstaat* as P. Cardinal has been long referring to*,* - is present in the Basic Law, albeit maybe not so immediately, namely in an indirect way via the separation of powers, the administrative legality, the guarantee of the judiciary remedies, *etc.*.

[LXI] At this stage we are not caring about properly differentiating the concepts of fundamental rights and of human rights. One is aware of various possible distinctions between human rights and fundamental rights but

for the current purpose we use both expressions as synonyms and as interchangeably unless otherwise stated. Anyway, some are already questioning the distinction today, based namely on the growing fact that legal systems are plural having to coexist domestic and international orders in a given jurisdiction, and pointing out possible negative effects of it, see, for example, Cavallo, 2010: 15 and ff.

[LXII] Note, as Crawford (2005: 3) states that 'that autonomous economic system implies the rule of law […] together with an immediate guarantee of individual rights'.

[LXIII] It is emblematic, and some substance must arise from it, that in Chapter I of the Basic Law on general principles, two of them expressly address the fundamental rights issues in general. Cristina Ferreira (2010: 423, 424) reads article 4 as a *lato sensu* safeguard by encompassing the responsibility of guaranteeing the effective enjoyment of the fundamental rights, e.g. by juridically establishing those rights, promoting them, and establishing judicial and quasi-judicial mechanisms of guarantee.

[LXIV] On the history, continuity of fundamental rights and maintenance of its western, liberal, *pro homine* legacy of the fundamental rights system in Macau, see Cardinal, 2010b.

[LXV] On detailed elaboration of these principles, see Cardinal, 2010c.

[LXVI] Meaning that no norms from the Chinese Constitution are to be imported in the field of fundamental rights. This key element is a crucial difference from other subnational constitutionalisms, be it in federal or regional examples. We know that even in sub state entities such as autonomous regions, it is possible to find a detailed chapter on fundamental rights incorporated in the autonomy act. But it also shows us that those regional rights are connected to, and owe obedience to, the fundamental rights inserted in the sovereign constitution. They share a scope of application and they do not preclude one another. In federal states, one finds similar situations whereby a given citizen is the recipient of a double origin set of fundamental rights – the state constitution and the federal constitution. In some cases, the state constitution does little more than to declare that the federal fundamental rights are received by the subfederal constitution ; in other cases, the local constitutions provide for a rich catalogue of fundamental rights but still open the door for the application of the federal based fundamental rights. Naturally, in regionalist states, the absence of fundamental rights in the local basic law is more widespread, and evidently, the rule of the application of fundamental rights established in the (centre) Constitution is intangible. In view of all this, one can thus talk about a domestic multilevel protection in fundamental rights, as, for example, Castellá Andreu (2007) advocated for Spanish case. The situation of the Chinese SARs, as already mentioned, is very different. The centre constitution simply does not have a say in establishing fundamental rights in the regional level. For further see Cardinal, 2010c: 244 and ff.

[LXVII] For Macau see, e.g. Ac. TUI pr. º 5/2010, and Reports of the Permanent Commissions of the Legislative Assembly of Macau: 1.ª Comissão Permanente - Parecer N.º 2/IV/2010 and 3.ª Comissão Permanente - Parecer N.º 4/IV/2010. Regarding Hong Kong, for example, Secretary for Justice v Yau Yuk Lung, [2007] 3 HKLRD 903 (Court of Final Appeal).

[LXVIII] In the Basic Law of Hong Kong the principle of non discrimination is not textually established in contrast to what occurs in the Macau Basic Law. On the latter see, for example, Sena, 2010: 154 and ff.

[LXIX] Note that the principle of human dignity is constitutionalized expressly only in Macau, and not in Hong Kong, *ex vi* article 30 of the Basic Law, inserted in the Fundamental Rights and Duties of the Residents chapter that states 'The human dignity of Macau residents shall be inviolable'.

[LXX] For further developments see Cardinal, 2010c, Ghai, 1999.

[LXXI] And if there is dominance, primacy or lead of one over another than one must have a separation established. One does not dominate, prevail or lead over oneself. Hence, it is not understood how can possibly be argued that due to a primacy of the Executive over the Legislative the separation of powers does not exist in the Basic Law design.

[LXXII] Gouveia (2005: 1091-1092) states, 'Simply said, without the implantation of mechanisms of practical order destined to its defence, never this concretization could pass out of the paper and penetrate in the constitutional reality of the day-by-day of the citizens that would have been disturbed in the title and exercise of these rights. It is therefore that the protection of the fundamental rights cannot be enough with its mere existence, for more numerous and rich that is its constitutional list. (…) It became indispensable to count on the contribution of two instances of the public power that can play an undeniable role (…) in the fundamental rights guardianship: the non judicial guardianship and the judicial guardianship.'

[LXXIII] However, the rigid copy of Hong Kong model did cause some confusions as Hong Kong and Macau operate under different legal system. One under common law, and the other civil law system. See, Cardinal, 2008: 686.

[LXXIV] For detailed discussion, see Cardinal, 2010c. Cotton (2000) also tells us about a 'greater precision' on the norms concerning the fundamental rights.
[LXXV] In itself an open and evolving clause thus opening the way to new items of non discrimination.
[LXXVI] Laws enacted by the legislatures of the SARs must be reported to the Standing Committee of the National People's Congress for the record, but the reporting for record shall not affect the entry into force of such laws. Article 17 of Hong Kong Basic Law and Macau Basic Law.
[LXXVII] The NPCSC can also invalidate the laws previously in force in Hong Kong by declaring them in contravention of the Basic Laws. However, this is a power to be executed only at the time of the establishment of the SARs. If any laws are later discovered to be in contravention of the Basic Laws, they shall be amended or cease to have force in accordance with the procedure as prescribed by the Basic Laws.
[LXXVIII] Ng Ka Ling v Director of Immigration, [1999] 1 HKLRD 315, para 61.
[LXXIX] Leung T C William Roy v. Secretary for Justice, [2006] 4 HKLRD 211. The judged based his argument carefully to prove that the court can determine on a case by case basis whether sufficiently exceptional circumstances exist to enable it to exercise the discretion to hear cases notwithstanding that future conduct or a hypothetical situation is involved. And in this particular case, the court held that the applicant has sufficient interests involved to challenge the law.
[LXXX] Leung T C William Roy v. Secretary for Justice, [2006] 4 HKLRD 211, para 30.
[LXXXI] Director of Immigration v Master Chong Fung Yuen, [2001] 2 HKLRD 533.
[LXXXII] For an examination of the constitutional rights cases of the first decade in the CFA, see Young, 2008. For an updated version, see Young, 2009.
[LXXXIII] We are following closely Chan, 2007 and Chen, 2009.
[LXXXIV] In this part we closely follow Godinho and Cardinal, 2010.
[LXXXV] It is not necessary here to recall the enormous inconveniences that the situation of lack of such procedure entails.
[LXXXVI] It is of relevance to take a further look to recent judicial decisions from TUI on this subject as well as to its nuances. For example, in Ac. TUI, proc. 8/2007, it is said that 'When courts adjudicate cases, they are subject to law only. In consequence, if the court deems the law applied is against a law of higher hierarchy, the court shall apply the law of superior hierarchy or other legal norms, not the illegal norm of lower hierarchy. Unless the law provides otherwise, no matter what type of the case, which instance and which procedural phase, the court applying the law can review its validity on its own initiative or upon request of a party, particularly if there is a violation of a higher law, provided the case is within its jurisdiction. If it confirms this breach of law, the court cannot apply the rule which should be applied otherwise but was deemed illegal, and shall apply other legal rules in order to pass a ruling within the scope of the plaintiff's petition. However, it shall be emphasized that the conclusion that a norm is in violation of law of superior hierarchy is merely an integral part of the courts' reasoning, or one step on the logical process leading to the final decision, and it does not constitute the content of the ruling. The court cannot pass a ruling that a norm is illegal with a general binding force. The sentence is only valid in the case itself, and does not produce any effect toward other cases and other courts. The norm considered illegal does not become invalid because of this particular ruling. It shall be noticed that a preliminary issue is one question, and the issue of unconstitutionality (at another level) is another question. Unconstitutionality is not an incidental issue or issue of procedural law, but a preliminary issue or issue of substantive constitutional law. But it is brought incidentally in proceeding which has other different issues as object.' See also, Ac TUI, pr. 9/2006, 'In the legal system of Macau SAR, the courts in hearing cases can consider the conformity of laws with the Basic Law. And in compliance with Article 11 of the Basic Law, the courts cannot apply norms which infringe the Basic Law or principles it establishes, without prejudice to Article 143 of the Basic law. In the legal system of Macau SAR, there is no specific procedure to review the conformity of laws with the Basic Law, therefore courts can consider this issue only in the proceedings of specific cases.' The tendency is positive and is consolidating, although with justifiable doubts and cautions in the absence of legislation. It is still, however, insufficient and short reached, namely by refusal of assuming a power to declare *erga onmes* the unconstitutionality of norms.
[LXXXVII] When it does so, in some cases, is to reduce the scope of a right, such as in the right of appeal regarding criminal cases, in the Ao Mao Long case, a former member of the Government that was accused of several serious white collar crimes.
[LXXXVIII] Ac. TUI, pr. 36/2007, regarding article 9 of the UN Convention on the Rights of the Child 'The Macau SAR does not impose the separation of the appellant from his son. This (the child) solely does not

have the right to reside in Macau. The appellant can keep living with his son. It can simply stop working in Macau and return to his country of origin'. This sort of icy consideration is to be avoided in such formal acts as a judicial decision of a supreme court and one fails to see the technical enlightenment that may have been intended to bring.

[LXXXIX] By the ICCPR, article 14(5), in force in Macau and not subjected to any reservation or similar act and constantly reaffirmed in formal reports of competent international institutions, see, for example, Molinero, 2003, and documents in it referred.

[XC] See, for example, Torres (2009: 318) states 'there is a particular need for a permanent rethinking for judicial decisions, especially (but not only) when human rights are involved and this should start at the highest level.'

[XCI] Basic Law of Hong Kong: Article 74; Basic Law of Macau: Article 75.

[XCII] Basic Law of Hong Kong: Article 49; Basic Law of Macau: Article 51.

[XCIII] Basic Law of Hong Kong: Article 50; Basic Law of Macau: Article 52.

[XCIV] This list summarized the powers that the legislature of Hong Kong SAR and Macau SAR both have, which is prescribed in Basic Law of Hong Kong: Article 73; Basic Law of Macau: Article 71. But according to the same articles, the Legislature of Hong Kong SAR also has the power to endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court, and the Legislature of Macau SAR doesn't have the power to approve public expenditure.

[XCV] Basic Law of Hong Kong: Article 73.9; Basic Law of Macau: Article 71.7.

[XCVI] For an account of the constitutional reform of Hong Kong, see Chan and Harris, 2005; Tai, 2002 and 2009; Chen Albert, 2010, 2009, 2008 2007, 2006.

[XCVII] In 2010 the Legislative Council has passed a law proposal to expand the size of the Election Committee for the Chief Executive and increase the number of seats in the Legislative Council. It is regarded as one of the preparatory steps for the universal suffrage of the Chief Executive and all members of the Legislative Council.

[XCVIII] For a discussion on Macau's political system and electoral reform, see, Godinho, 'Political Representation in Macau', forthcoming.

[XCIX] Article 13 of Hong Kong Basic Law and Macau Basic Law.

[C] Hong Kong Basic Law: Article 151; Macau Basic Law: Article 136 (This article added the "technology field" upon the above list.)

[CI] Hong Kong Basic Law: Article 152; Macau Basic Law: Article 137.

[CII] For the list of intergovernmental organization in which Macao SAR enjoys independent Status, see web page of Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the Macao SAR: http://www.fmcoprc.gov.mo/eng/gjzzhy/t189359.htm

[CIII] For the lists of multilateral treaties and bilateral agreements in force, see the Hong Kong SAR Department of Justice's Bilingual Laws Information System" (BLIS) web page at http://www.legislation.gov.hk/choice.htm#bf

[CIV] For the lists of multilateral treaties and bilateral agreements in force in Macau SAR, see the web page of Law Reform and International Law Bureau: http://www.dsrjdi.ccrj.gov.mo/cn/tratadoscn.asp

[CV] For information about consular posts and officially recognized representatives, see the webpage of Hong Kong Protocol Division Government Secretariat at http://www.protocol.gov.hk/eng/consular/index.html

[CVI] http://www.gov.hk/en/about/govdirectory/oohk.htm

[CVII] Dual, that is to say efficiency for the sovereign and efficiency for the subnational unit.

References

- Alves Leonel, 2001, 'A Região Administrativa Especial de Macau e os trabalhos da Comissão Preparatória' in *Boletim da Faculdade de Direito da Universidade de Macau (BFDM)*, 12: 205-218.
- Alessandro Truini, 2003, *Federalismo e Regionalismo in Italia e in Europa*, I, CEDAM, Padova.
- Aparicio Miguel A., 1999, *La descentralización y el federalismo, Nuevos modelos de autonomía política*, CEDECS, Barcelona.
- Bihan Valérie Goeesel-Le, 2006, 'La participation des departments et regions d´outre-mer à la conclusion des accords internationaux: essai d´analise générale' in *Revue Française de Droit Constitutionnel*, 65: 3-11.
- Brand Dirk, 2000, 'The Western Cape Constitution' in *Rutgers Law Journal*, 31: 961-970.

- Brennan William J., 1977, 'State Constitutions and the Protection of Individual Rights' in *Harvard Law Review*, 90: 489-504.
- Canas Vitalino, 2001, 'A Extensão da Autonomia de Macau na Comunidade e na Lei' in *BFDM*, 12: 225-245.
- Canotilho Gomes, 2009, 'The autonomy of the Macau Special Administrative Region – Between centripetism and good governance', in Paulo Cardinal/Jorge Costa Oliveira (eds), *One Country, Two Systems, Three Legal Orders*, *cit.*, 745-750.
- Canotilho Gomes and Moreira Vital, 2007, *Constituição da República Portuguesa Anotada*, vol. I, Coimbra Editora, Coimbra.
- Cardinal Paulo, 1993, 'O sistema político de Macau na Lei Básica — separação e supremacia do executivo face ao legislativo' in *Revista da Administração Pública de Macau*, 19/20: 79-101.
- Cardinal Paulo, 2002, 'Macao's political system during the transition: continuity or convergence?' in *Macau Law Journal*, Special Issue: The Basic Laws: Problems and Perspectives: 287-303.
- Cardinal Paulo, 2006, 'Os direitos fundamentais em Macau no quadro da transição: algumas considerações' in *Cuestiones Constitucionales*, 14: 32.
- Cardinal Paulo, 2007, 'The system of non dual domains and the principle of exclusivity allocated to the subnational autonomous units in the protection of fundamental rights - the case of the special administrative regions of the P.R. of China', Paper delivered at VII World Congress of the International Association of Constitutional Law, http://www.enelsyn.gr/en/workshops/workshop11(en).htm.
- Cardinal Paulo, 2008a, 'Continuity and Autonomy—Leading Principles for the Fundamental Constitutional System in the Macau Special Administrative Region', in Ferrer Mac-Gregor, Eduardo/Zaldívar Lelo de Larrea, Arturo, (coord.), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho*, T. IV, UNAM, Marcial Pons, 169 - 231.
- Cardinal Paulo, 2008b, 'The Internationalization of an Historical Autonomy' in *Boletín Mexicano de Derecho Comparado*, 122: 637-689.
- Cardinal Paulo and Oliveira Jorge Costa (eds), 2009, *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution –: Essays on Macau's Autonomy after the Resumption of Sovereignty by China*, Springer-Verlag, Berlin Heidelberg.
- Cardinal Paulo, 2009, 'The judicial guarantees of fundamental rights in the Macau legal system – a parcours under the focus of continuity and of autonomy', in Paulo Cardinal/Jorge Costa Oliveira (eds), *One Country, Two Systems, Three Legal Orders*, *cit.*, 221 – 269.
- Cardinal Paulo, 2010a, 'Fragmentos em torno da constituição processual penal de Macau – do princípio da continuidade ao princípio da dignidade humana', in Manuel Da Costa Andrade etc. (Organizadores), *Estudos em Homenagem ao Prof. Doutor Jorge de Figueiredo Dias*, Volume III, Coimbra Editora, Coimbra, 741 – 778.
- Cardinal Paulo, 2010b, 'Fundamental Rights in Macau: From Territory under Portuguese Administration to Special Administrative Region of PRC', in Jorge AF Godinho (ed), *Studies on Macau Civil, Commercial, Constitutitonal and Criminal Law*, LexisNexis, Hong Kong, 1-37.
- Cardinal Paulo, 2010c, 'The Constitutional Layer of Protection of Fundamental Rights in the Macau Special Administrative Region' in *Revista de Direito Público*, 3: 211 – 262.
- Cardinal Paulo, 2010d, 'La protezione giurisdizionale dei diritti fondamentali nelle Regioni autonome di Hong Kong e di Macao e l'influenza delle carte internazionali in materia di diritti', in Giancarlo Rolla (cur), *Il sistema europeo di protezione dei diritti fondamentali e i rapporti tra le giurisdizioni.*, Giuffrè, 99 - 137.
- Cardinal Paulo, 'A Tale of Two Cities - The Judicial Protection of Fundamental Rights in the Exceptional Autonomous Regions of Macau and Hong Kong of The PR of China and the Role and Influence of International Law Instruments on Human Rights', forthcoming in *Estudos em Homenagem ao Doutor J.J.Gomes Canotilho,* vol. 4, Coimbra Editora.
- Castellá Andreu Josep María, 2007, 'Hacia Una Protección "Multinivel" de Los Derechos en España. El reconocimiento de derechos en los estatutos de autonomía de las comunidades autónomas' (Moving Towards "Multi-Level" Protection of Rights in Spain: Recognizing Rights in the Statutes of Autonomy of Autonomous Regions) in *Boletín Mexicano de Derecho Comparado*, 120: 723-741.
- Cavallo Aguilar, 2010, 'Derechos fundamentals - derechos humanos. Una distinción válida en el siglo XXI? ' in *Boletín Mexicano de Derecho Comparado*, 127, 15-71.
- Chan SC Johannes and Harris Lison, 2005, 'The Constitutional Journey: The Way Forward', in Chan SC Johannes and Harris Lison (eds.), *Hong Kong Constitutional Debate*, Hong Kong Law Journal Limited, Hong Kong, 143-169.

- Chan SC Johannes, 2007, 'Basic Law and Constitutional Review: The First Decade' in *Hong Kong Law Journal*, 37: 407-436.
- Chan SC Johannes and Lim C.L. (eds), 2011, *Law of the Hong Kong Constitution*, The Hong Kong Law Library, Hong Kong.
- Chen Albert, 2002, 'The Concept, Implementation and Interpretation of the Basic Law of Hong Kong SAR' in Li Jianliang and Jian Zixiu (eds), *Interpretation of the Constitution in Theory and Practice (XIAN FA JIE SHI ZHI LI LUN YU SHI WU)* III, Sun Yat-sen Institute for Social Sciences and Philosophy, Taipei, 371-426,
- Chen Albert, 2006, 'The Fate of the Constitutional Reform Proposal of October 2005' in *Hong Kong Law Journal*, 35: 537-542.
- Chen Albert, 2007, 'The Basic Law and the Development of the Political System in Hong Kong' in *Asia Pacific Law Review*, 15: 19-40.
- Chen Albert, 2008, 'A New Era in Hong Kong's Constitutional History' in *Hong Kong Law Journal*, 38: 1-13.
- Chen Albert, 2009a, 'International Human Rights Law and Domestic Constitutional Law: Internationalisation of Constitutional Law in Hong Kong' in *National Taiwan University Law Review*, 4(3): 237-333.
- Chen Albert, 2009b, 'Constitutional Developments in Autumn 2009' in *Hong Kong Law Journal* 39: 751-766.
- Chen Albert, 2009c, 'The Theory, Constitution and Practice of Autonomy: The Case of Hong Kong', in Paulo Cardinal and Jorge Oliveira (eds), *One Country, Two Systems, Three Legal Orders*, cit., 751-767.
- Chen Albert, 2010, 'An Unexpected Breakthrough in Hong Kong's Constitutional Reform' in *Hong Kong Law Journal* 40: 259-270.
- Chen Shaofan, 2005, 'New Enquiries on Several Problems of the Legislation by Ethnic Autonomous Areas in our Country' in *Research on Ethnics (MIN ZU YAN JIU)*, 1: 10-16.
- Chen Zhi Zhong, 2001, 'The Joint Declaration and the International Law' in *BFDM*, 11: 89-92.
- Cheung Peter T.Y., 2007, 'Toward federalism in China? The Experience of the Hong Kong Special Administrative Region', in Baogang He, Brian Galligan and Takashi Inoguchi (eds.), *Federalism in Asia*, Edward Elgar, Cheltenham UK, 242-265.
- Clarke Tom, 1999, 'Case Note: Ng Ka Ling v Director of Immigration; Tsui Kuen Nang v Director of Immigration; Director of Immigration v Cheung Lai Wah' in *Melbourne University Law Review,* 23: 773-794.
- Cotton James, 2000, 'The Retrocession of Macau and the Limitations of the Hong Kong Model', *Pacific Focus*, 15(2): 49-63.
- Crawford James, 2005, *Rights in One Country: Hong Kong and China*, Hochelaga Lectures 2004, Faculty of Law, University of Hong Kong, Hong Kong.
- Dai Xiaoming and Huang Mu, 2002, 'On the Legislation of Ethnic Autonomous Areas' in *Journal of Southwest University of Nationalities. Philosophy and Social Sciencies (XI NAN MIN ZU XUE YUAN XUE BAO)*, 7: 70-81.
- Davis Michael C., 1999, 'The case for Chinese Federalism' in *Journal of Democracy*, 10(2): 134-177.
- Delledonne Giacomo, 2011, 'Speaking in Name of the Constituent Power: the Spanish Constitutional Court and the New Catalan Estatut' in *Perspectives on Federalism*, 3 (1): 1-14.
- Delledonne Giacomo and Martinico Giuseppe, 2011, 'Legal Conflicts and Subnational Constitutionalism', EUI Working Paper Law 2011/03, http://cadmus.eui.eu/handle/1814/16214.
- Deng Xiaoping, 1993, *On the Question of Hong Kong*, New Horizon Press, Hong Kong.
- Dinstein Yoram, 2005, 'Autonomy (International guarantees of autonomy)', in Zelim A. Skurbaty(ed), *Beyond a One-Dimensional State: An emerging right to autonomy?* , Martinus Nijhof, Leiden, 243-254.
- Dormoy Daniel, 2000, 'Les relations extérieures', in Faberon Jean-Yves and Agniel Guy (dir.), *La souveraineté partagée en Nouvelle-Calédonie et en droit compare*', La documentation Française, Paris, 350.
- Elazar Daniel J., 1982, 'State Constitutional Design in the United States and other Federal Systems', *Publius J. Federalism*, 12: 1-10.
- Fercot Céline, 2008, 'Diversity of Constitutional Rights in Federal Systems. A Comparative Analysis of German, American and Swiss Law' in *European Constitutional Law Review*, 4: 302-324.
- Ferreira Cristina, 2010, 'Em prol dos direitos fundamentais em Macau — a Provedoria de Justiça do CCAC e as demais instituições que promovem os direitos humanos' in *Revista da Administração Pública de Macau*, 88: 397-433.

- Fu Hualing and Cullen Richard, 2006, 'Two Views of Hong Kong's Basic Law: But Hong Kong Should Seek A Better Way…', in *Hong Kong Journal*, II, 6, http://www.hkjournal.org/archive/2006_spring/fu.html.
- Galligan Brian, 2007, 'Federalism, Subnational Government and Rights Protection', Paper presented at 2007 APSA Conference. http://arts.monash.edu.au/psi/news-and-events/apsa/refereed-papers/au-nz-politics/galligan.doc.
- Garcia Fernando Dominguez, 2005, *Las regiones con competencias legislativas*, Tirant Lo Blanch, Valencia.
- Gardner James A., 2008, 'In Search of Subnational Constitutionalism' in *European Constitutional Law Review*, 4 (2): 325-343.
- Gardner James A., 2007, 'In Search of Sub-National Constitutionalism', paper prepared for Seventh World Congress, International Association of Constitutional Law, Athens, Greece, June 11-15, http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Gardner.pdf.
- Ghai Yash, 1999, *Hong Kong's New Constitutional Order*, Hong Kong University Press, Hong Kong.
- Ghai Yash, 2000a, 'Autonomy Regimes in China: Coping with Ethnic and Economic Diversity', in Ghai Yash (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States*, Cambridge University Press, Cambridge, 77-88.
- Ghai Yash, 2000b, 'The Basic Law of the Special Administrative Region of Macau: Some Reflections' in *International and Comparative Law Quarterly*, 49: 183-198.
- Ginsburg Tom and Posner Eric A., 2010, 'Subconstitutionalism' in *Stanford Law Review*, 62: 1583-1628.
- Godinho Jorge and Cardinal Paulo, 2010, 'The Macau Court of Final Appeal—the First Decade', paper presented at the Hong Kong's Court of Final Appeal: The Andrew Li Court 1997-2010 conference, Hong Kong.
- Godinho Jorge, 'Political Representation in Macau', in Yu Eilo W. Y. and Chan Ming K. (eds), *China's Macao Transformed: Challenge and Development in the 21st Century*, Forthcoming.
- Goncalves Arnaldo, 1996, 'A Paradigm of Autonomy: The Hong Kong and Macau SARs', in *Contemporary Southeast Asia*, 18: 36-60.
- Gouveia Jorge Bacelar, 2002, 'A Lei Básica da Região Administrativa Especial de Macau—Contributo para uma compreensão de direito constitucional' in *BFDM*, 13: 173-198.
- Gouveia Jorge Bacelar, 2005, *Manual de Direito Constitucional*, vol. II, Almedina, Coimbra.
- Gunlicks Arthur B., 2000, 'State (Land) Constitutions in Germany' in *Rutgers Law Journal* 31: 971-991.
- Häberle Peter, 1998, 'Current problems of German federalism', in A.D´Atena (ed), *Federalism and Regionalism in Europe*, Editoriale Scientifica, Napoli.
- Häberle Peter, 2006, *El federalismo y el regionalismo como forma structural del Estado constitucional*, UNAM, Mexico.
- Henders Susan J., 2000, 'Region-States and the world: China Pushes the Envelope' in *Policy Options*, January-February: 88-89.
- Hernandez Antonio, 2005, 'El federalismo a diez anos de la reforma constitucional de 1994' in *Cuadernos de federalismo*, XVIII: 65-84.
- Hurst Hannum, 1996, *Autonomy, sovereignty, and self-determination*, rev. edition, University of Pennsylvania Press, Philadelphia.
- Ieong Wan Cheong, 2004, *One China, Two Systems and the Macao SAR,* University of Macau, Macau.
- Isaac Armando, 1999, '*The constitutional framework for legal co-operation between the "Two Systems" of the "One Country": the case of Macau'*, Conference on Mutual Legal Assistance under 'One Country, Two Systems', Faculty of Law of the University of Hong Kong.
- Isaac Armando, 2007, 'Autonomy and the Basic Law: Grundnorm, System and Autopoiesis', paper delivered at International Conference on One Country, Two systems, Three Legal Orders - Perspectives of Evolution, Macau.
- Katchi António, 2005, *Governo e Administração Pública de Macau*, Macau Polytechnic Institute (IPM), Macau.
- Liu Xiaomei and Han Bin, 'The Basic Laws of HK and Macao SARs aren't Subnational Constitutions in China', available at the website of Institute of Law of Chinese Academy of Social Sciences: http://www.iolaw.org.cn/global/EN/showNews.asp?id=27717.
- Lo P Y, 2011, *The Hong Kong Basic Law*, LexisNexis, Hong Kong.
- Lok Wai Kin, 2002, 'Impacto da Lei Básica da RAEM na concepcção do Direito de Macau' in *BFDM*, 13:57-66.
- Mai Man Ieng, 2001, 'Diploma legal administrativo e acto legislativo por autorização', in *Revista do*

Ministério Público de Macau, 2.

- Marshfield Jonathan L., 2008, 'Authorizing Subnational Constitutions in Transitional Federal States: South Africa, Democracy, and the KwaZulu-Natal Constitution' in *Vanderbilt Journal of Transnational Law*, 41: 585-638.
- Molinero Natalia Alvarez, 2003, 'Implementation of the Views of the UN Human Rights Committee in Spain: new challenges', http://web.abo.fi/instut/imr/research/seminars/ILA/Alvarez.doc.
- Moreno Luis, 'Subnational Constitutionalism in Spain', available at http://camlaw.rutgers.edu/statecon/subpapers/moreno.pdf.
- Murray Christina and Maywald Catherine, 2006, 'Subnational Constitution-Making in Southern Sudan' in *Rutgers Law Journal* 37: 1203-1234.
- Mushkat Roda, 1997, *One Country, Two International Legal Personalities*, Hong Kong University Press, Hong Kong.
- Nabais J. Casalta, 2001, 'Região Administrativa Especial de Macau, federalismo ou regionalismo?' in *BFDM,* 12: 23-35.
- Oliveira Jorge Costa, 1993, 'A continuidade do ordenamento jurídico de Macau na Lei Básica da futura Região Administrativa Especial' in *Revista da Administração Pública de Macau*, 19/20: 21-60.
- Olivetti Marco, 2009, 'The Special Administrative Regions of the PRC in comparison with autonomous regions models', in Paulo Cardinal/Jorge Costa Oliveira (eds), *One Country, Two Systems, Three Legal Orders*, *cit.*, 777-798.
- Pernthaler Peter, 1999, *El estado federal asimétrico*, Instituto Vasco de Administración Pública, Oñati.
- Pollock Stewart G., 1983, 'State Constitutions as Separate Sources of Fundamental Rights' in *Rutgers Law Review*, 35: 707-722.
- Peterlini Oskar, 2009, 'The South-Tyrol autonomy in Italy: Historical, political and legal aspects', in Paulo Cardinal/Jorge Costa Oliveira (eds), *One Country, Two Systems, Three Legal Orders, cit.,* 143-170.
- Phan Bihn G., 1996, 'How Autonomous Are the National Autonomous Areas of the PRC? An Analysis of Documents and Cases' in *Issues & Studies* 32: 83-108.
- Ramos Rui Moura, 1998, 'A Declaração Conjunta Luso-Chinesa na Perspectiva do Direito Internacional' in *BFUM*, 14.
- Rao Geping, 2006, 'Two Views of Hong Kong's Basic Law: From Beijing, "One Country" Must Dominate the Two Systems…' in *Hong Kong Journal*, II, http://www.hkjournal.org/archive/2006_spring/rao.html.
- Raz Joseph, 1998, 'On the authority and interpretation of Constitutions: some preliminaries', in L. Alexander (ed.), *Constitutionalism: Philosophical foundations*, CUP, Cambridge, 152-193.
- Ribeiro Lino, 2002, 'A Lei Básica e os princípios jurídicos conformadores da acção administrativa', in *BFUM*, 14.
- Rolla Giancarlo, 2009, 'The development of asymmetric regionalism and the principle of autonomy in the new constitutional systems: a comparative approach', in Paulo Cardinal/Jorge Costa Oliveira (eds), *One Country, Two Systems, Three Legal Orders, cit.,* 461-481.
- Rolla Giancarlo, 2002, '*El valor normativo del principio de la dignidad humana*' in *Anuario Iberoamericano de Justicia Constitucional*, 6: 463-489.
- Rojas Daniel A. Barceló, 2008, 'La función de los derechos fundamentales de las Constituciones estatales mexicanas. Contribución a la teoría de la Constitución estatal', in Mac-Gregor Eduardo Ferrer and Lelo de Larrea Arturo Zaldlvar (coordinadores), *La Ciencia del Derecho Procesal Constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho, t. IV, Derechos fundamentales y tutela constitucional*, Universidad Nacional Autónoma de México, etc., México, 111-151.
- Saunders Cheryl, 1999, 'The Relationship Between National and Subnational Constitutions', in *Seminar Report: Subnational Constitutional Governance*, Konrad- Adenauer Foundation, Johannesburg, 23-35.
- Sena Pedro, 2010, 'Identidade e diferença: Expressão juslaboral do princípio da igualdade na ordem jurídica de Macau', in *Revista do Ministério Público*, 123: 141-179.
- Sigueira Julio Pinheiro f. H., 2010, 'What is Subnational Constitutionalism', STALS Research Paper, N. 7/2010, http://www.stals.sssup.it/files/stals_Pinheiro.pdf.
- Sun Wanzhong, 2002, 'A Lei Básica da RAEM e a construção do sistema jurídico de Macau' in *BFDM*, 13: 45-55.
- Tai Benny Y.T., 2002, 'Chapter 1 of Hong Kong's New Constitution: Constitutional Positioning and Repositioning', in Ming K. Chan and Alvin Y. So (eds.), *Crisis and Transformation in China's Hong Kong*, M.E.

Sharpe, Inc, New York, 189-219.

- Tai Benny Y.T., 2009, 'An Unexpected Chapter Two of Hong Kong's Constitution: New Players and New Strategies', in Ming Sing (ed), *Politics and Government in Hong Kong—Crisis under Chinese Sovereignty*, 220-245.
- Tarr G. Alan, 1997, 'The New Judicial Federalism in Perspective' in *Notre Dame Law Review*, 72: 1097-1118.
- Tarr G. Alan, Williams Robert F., 1999, '*United States of America—Subnational Constitutional Law*', Kluwer Law International, Hague.
- Tarr G. Alan, 2010, 'Explaining Sub-national Constitutional Space', Paper prepared for VIIIth World Congress, International Association of Constitutional Law, Mexico City, Mexico, December 6-10, 1-14, http://www.juridicas.unam.mx/wccl/ponencias/5/351.pdf.
- Tinoco Jorge Carmona and Sosa Edgar Corzo, 2008, 'Entidades federativas y derechos humanos' in *Cuestiones Constitucionales*, 19: 385-396.
- Tinoco Jorge Carmona, 2010, 'La situación actual de la incorporación de los derechos humanos en las Constituciones locales mexicanas', in Astudillo César and Leon Manlio (coord.), *Derecho Constitucional Estatal* , Universidad Nacional Autónoma de México, México, 83-144.
- Tong Io Cheng and Wu Yanni, 2010, 'Legal Transplant and the On-going Formation of Macau Legal Culture', *ISAIDAT Law Review* 1.
- Torres Pinheiro, 2009, 'Comments' of in Paulo Cardinal/Jorge Costa Oliveira (eds), *One Country, Two Systems, Three Legal Orders*, *cit.,* 315-318.
- Underdown Michael, 2001, 'Legal Issues in a Federal State: Protecting the Interests of Macau' in *BFDM,* 12: 55-68.
- Valadés Diego and Serna de la Garza J.M., 2005, *Federalismo y regionalismo*, UNAM, Mexico.
- Vergottini Giuseppe de, 2004, *Derecho Constitucional Comparado*, UNAM/SEPS, Mexico.
- Walker Neil, 2003, 'Postnational Constitutionalism and the Problem of Translation', in Weiler J.H.H. and Wind M. (eds), *European Constitutionalism Beyond the State*, Cambridge University Press, Cambridge, 27-54.
- Walker Neil, 2009, 'Multilevel Constitutionalism: Looking Beyond the German Debate', LSE 'Europe in Question' Discussion Paper Series, http://www2.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper8Walker.pdf.
- Wang Liuting, 1999, *Macao´s return: Issues and concerns*, in *Loyola of Los Angeles International and Comparative Law Review*, 22(2): 175-206.
- Watts Ronald L., 1999, 'Foreword: States, Provinces, Lander, and Cantons: International Variety Among Subnational Constituions' in *Rutgers Law Journal*, 31: 941-959.
- Williams Robert F., 1999, 'Comparative Subnational Constitutional Law: South Africa's Provincial Constitutional Experiments', *South Texas Law Review* 40: 625-660.
- Williams Robert F. and Tarr G. Alan, 2004, 'Subnational Constitutional Space: A View from the States, Provinces, Regions, Lander, and Cantons', in G. Alan Tarr, Robert F. Williams and Josef Marko (eds.), *Federalism, Subnational Constitutions and Minority Rights*, Praeger Publishers, London, 3-24.
- Wu Xingping, 2002, 'O sistema jurídico da Região Administrativa Especial de Macau' in *BFDM*, 13: 67-86.
- Xia Chunli, 2008, 'Autonomy and China's Ethnic Minorities: An Observation of Autonomous Legislatures' in *Asia-Pacific Journal on Human Rights and the Law*, 9 (2): 11-46.
- Yee Sienho, 1996, 'The New Constitution of Bosnia and Herzegovina' in *EJIL*, 7(2): 176-192.
- Young Simon, 2008, *Developing Constitutional Rights Jurisprudence in the Hong Kong Court of Final Appeal*, paper delivered at the Second Conference on Law and Citizenship, Legislative Assembly of Macau.
- Young Simon, 2009, 'Constitutional Rights in Hong Kong's Court of Final Appeal' in *Chinese (Taiwan) Yearbook of International Law and Affairs,* 27: 67-96.
- Zervos Kevin, 2010, 'Constitutional Remedies Under the Basic Law' in *Hong Kong Law Journal*, 40: 687-710.
- Zheng Yongnian, 2007, 'China's de facto Federalism', in He Baogang, Galligan Brian and Inoguchi Takashi (eds.), *Federalism in Asia*, 213-241.

Cases

- TUI, pr. º 9/2006.
- TUI, pr. º 8/2007.

- TUI, pr. º 36/2007.
- TUI, pr. º 5/2010.
- Ng Ka Ling v Director of Immigration, [1999] 1 HKLRD 315.
- Director of Immigration v Master Chong Fung Yuen, [2001] 2 HKLRD 533.
- Leung T C William Roy v. Secretary for Justice, [2006] 4 HKLRD 211.
- Secretary for Justice v Yau Yuk Lung, [2007] 3 HKLRD 903.