

CROSSROADS OF THE WORLD, CROSSROADS OF THE LAW:  
HONG KONG AND MACAU LEGAL SYSTEMS  
APPROACHING 20 YEARS POST-TRANSITION

*Hong Kong has created one of the most successful societies on Earth.*

Prince Charles

*Macau has been steady. The shocking, unexpected government is the one in Washington.*

Steve Wynn

MIROSLAW MICHAŁ SADOWSKI

*2017 and 2019 will be the years of the 20<sup>th</sup> anniversaries of the, respectively, Hong Kong and Macau's transitions. As these commemorations are coming closer, the author of this article analyses the legal systems of the two China's Special Administrative Regions. He looks at them from the viewpoint of what are sometimes called 'the last great acts of History in the 20<sup>th</sup> century' (the transitions), and in the perspective of collective memory of the times of colonialism, and first post-transition years. In the introductory part of the article, M. M. Sadowski investigates the fascinating history behind the unique legal systems of the two Europe's entrepôts in Asia, describing how the power over the two cities was granted to Portugal and Great Britain, how the local laws had gradually been eradicated, and laws of colonial empires implemented instead. The second part of this essay is devoted to the current shape of Hong Kong and Macau's legal systems, which are, interestingly, at the same time different — Macau's belongs to the civil, and Hong Kong's to the common law family — and similar — at their cores lie two alike Joint Declarations. The author first analyses, then compares these two systems, remarking upon their exceptional form (the unique scope of independence granted to the two cities), noting at the same time how their laws were never shaped by the will of citizens, but first by colonial powers, and ultimately during the Sino-British and Sino-Portuguese negotiations. He also reflects on the changes that have been introduced in law since the transition of power over Hong Kong and Macau, and tries to predict what the future will bring to their legal frameworks, and what will be left from their colonial past in terms of law.*

*In the third part of the article, M. M. Sadowski looks into the politics, society, and collective memories in Hong Kong and Macau, showing how they are interconnected, together ultimately shaping the two cities' present.*

## INTRODUCTION

“It is only in Paris where one finds cafés so Oriental” lamented French poet Gérard de Nerval while travelling in Cairo in the 19<sup>th</sup> century.<sup>1</sup> Today, one may hear some of the tourists visiting to Hong Kong or Macau say “it is only in the Pearl River Delta where one finds cities so Occidental”. So they might seem, at least at first glance. Hong Kong’s architecture resembles that of London’s City or of Manhattan, while Macau’s is a unique cross between styles of Mediterranean towns and Las Vegas. Their urban problems are also quite similar to those of their Western counterparts: soaring housing prices, efficient, but overcrowded public transportation system, and surprisingly large influx of immigrants. The successes of the two cities are also beyond the reach of many of their neighbouring states: Hong Kong’s stock exchange is currently the 6<sup>th</sup> largest in the world by market capitalization,<sup>2</sup> Macau’s revenues from gambling overtook those of Las Vegas in 2007,<sup>3</sup> the city’s public debt is non-existent, and its budget surplus is the highest in the world,<sup>4</sup> which makes such contentious issues as cash-handout policy possible.<sup>5</sup> And even the geography seems amazingly European; as Tristram Hunt put it, Hong Kong is “a curious mix of the exotic and the familiar: a meteorology and geology like that of the Highlands or the Alps, but set above the South China Sea”.<sup>6</sup> One could say: all the faces of the Western world in two nutshells.

Of course, in reality, neither Hong Kong nor Macau is a European city; they both lie on the crossroads between the East and the West, and their success in the modern world is the result of drawing extensively on both equally rich cultures. And because of

<sup>1</sup> Gérard de Nerval cited in J. Porter ‘*The Past is the Present: The Construction of Macau’s Historical Legacy* [2009] *History and Memory* vol. 21, no. 1 90.

<sup>2</sup> <[world-exchanges.org/home/index.php/statistics/monthly-reports](http://world-exchanges.org/home/index.php/statistics/monthly-reports)> accessed 29 January 2016.

<sup>3</sup> L. Sonny, ‘Casino Capitalism and Its Legitimacy Impact on the Politico-administrative State in Macau’ *Journal of Current Chinese Affairs* vol. 38, 1, [2009], 24.

<sup>4</sup> <[cia.gov/library/publications/the-world-factbook/geos/mc.html](http://cia.gov/library/publications/the-world-factbook/geos/mc.html)> accessed 29 January 2016.

<sup>5</sup> B. K. K. Kwong, ‘A Comparative Analysis of the Cash Handout Policy in Hong Kong and Macau’ *Journal of Current Chinese Affairs* 42/3 [2013], 87-100.

<sup>6</sup> T. Hunt, “Ten Cities that made an Empire”, Allen Lane, 2014, 241.

these crossroads, and because of ‘the last great acts of History in the 20<sup>th</sup> century’ (as their transition to China is sometimes described), Macau and Hong Kong are not only curious examples of legal hybridity, but also *mnemotopoi* and *lieux de mémoire* par excellence: they are both full of collective memories deposited there. In this paper, I would first like to analyse and compare the legal frameworks of the two SARs (Special Administrative Regions), and then show how memory of the colonial times is still present in many aspects of everyday life and how it influences the politics and societies of the two China’s SARs.

## I. HONG KONG AND MACAU’S TORTUOUS WAYS TO BECOME SARs

First of all, however, I feel we need to answer the question: ‘How were the two SARs born?’. The Portuguese sovereignty over Macau dates back to the middle of 16<sup>th</sup> century, when they started paying annual rent to China in 1557. The rent was paid until 1863, when the Portuguese, emboldened by the acquisition of Hong Kong by the British, attempted to renegotiate the basis for their occupation.<sup>7</sup> It has to be noted that until the 19<sup>th</sup> century the question of sovereignty of Macau was rather ambiguous with both the Chinese (who collected custom duties and executed criminal justice) and Portuguese (who were too weak to change the *status quo*) claiming it, which resulted in — as Alfonso and Pereira put it — “Since Macao’s origin as a Portuguese settlement, a dualism has been shown, sometimes strikingly, in all aspects of life: in the exercise of political power, the administration of justice, religious structures, trade affairs, even the urban administration. [...] thus was shaped a system of administration in which mediation played an important role.”<sup>8</sup>

The situation changed in Portuguese favour with the abatement of China at the end of 18<sup>th</sup> century. Hence, the Constitution of Portugal of 1822 stated that Macau was an integral part of the country, in 1845 Portugal declared Macau a free port, and in 1887 the Chinese agreed to sign the Sino-Portuguese treaty of Peking (after previously holding negotiations in Lisbon, which concluded with the Lisbon Protocol). In the treaty of

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<sup>7</sup> Y. Ghai, ‘The Basic Law of Special Administrative Region of Macau: Some Reflections’ in *International and Comparative Legal Quarterly*, vol. 49, [2000], 183, 185.

<sup>8</sup> R. Afonso and F. G. Pereira ‘The political status and government institutions of Macao’ in *Hong Kong Law Journal* 16:1 28, 30-31.

Peking, the Chinese agreed on “perpetual occupation and government of Macau by Portugal”, and Portugal promised “never to alienate Macau without previous agreement with China”. The Peking treaty cemented the status of Macau as an integral part of Portugal until 1971, when ‘some autonomy’ was granted to the city.<sup>9</sup>

Compared to Macau, Hong Kong was a late acquisition. At first, the British were not that much interested in the city (or rather, back in the day, the settlement) itself, but in selling opium and “‘opening up’ China to the wonders of modern, capitalist markets.”<sup>10</sup> The question of Hong Kong first came up in the Chuan-pi Convention of 1841, which was an initial (and unsuccessful) attempt to end the First Opium War (1839-1842).<sup>11</sup> However, it was in the treaty of Nanking of 1842, that the embattled China agreed to pay 21 million silver dollars for the costs of war and the destroyed opium, open up five ports (among them Shanghai) to British diplomats and traders, and ultimately to transfer Hong Kong island and its harbour to Britain ‘in perpetuity’.<sup>12</sup> Subsequently, Britain granted Hong Kong the status of a ‘crown colony’ in 1843.

While the colony grew into a busy trading hub, the Second Opium War (1856-1860) broke out. As the British and French troops entered the Forbidden City in Beijing, the once more defeated Chinese agreed to sign the First Convention of Peking in 1860, which *inter alia*, formally ceded the Kowloon Peninsula and Hong Kong ‘in perpetuity’ to Britain. Nevertheless, the question of the ‘Fragrant Harbour’ returned once more, after China’s defeat in the First Sino-Japanese War (1894-1895). Britain then urged the Chinese government to sign the Second Convention of Peking of 1898, which leased the rest of the Kowloon peninsula and the so-called New Territories rent-free to Britain for 99 years, expiring on 30<sup>th</sup> June 1997. It is worth noting that, while “all subsequent Chinese governments denounced pacts that ceded territory to Britain as ‘unequal treaties,’” refusing to treat them as legally-binding, they generally honoured them in practice.<sup>13</sup>

The second half of the 20<sup>th</sup> century proved to be a time of hefty growth for Hong Kong and Macau, thanks to globalisation and rapid modernisation of their economies

<sup>9</sup> Y. Ghai, *supra*, note 7, 186.

<sup>10</sup> T. Hunt, *supra*, note 6 229.

<sup>11</sup> T. Hunt, *supra*, note 6 236.

<sup>12</sup> T. Hunt, *supra*, note 6 237.

<sup>13</sup> ‘Timeline’ [2006] Hong Kong Law Journal  
<http://web.archive.org/web/20080217231155/http://www.hkjournal.org/timeline/timeline1800s.html> accessed 29 January 2016.

(Hong Kong's since 1950 and Macau's since 1970).<sup>14</sup> However, while the cities were emerging as some of the wealthiest players in the Far East, when the 1980s came, both the Hong Kong and Macau's communities started to fear about their future. In June 1982 Deng Xiaoping declared that it is Chinese wish to regain sovereignty over Hong Kong and Macau in a process of re-integration of these territories into China within a few years "under the banner of one country, two systems".<sup>15</sup>

The British were the first to start the talks — during her September 1982 visit to China, Margaret Thatcher declared that "for the common purpose of maintaining Hong Kong's prosperity and stability, the two sides agreed to continue the negotiations through diplomatic channels." Ultimately, the two sides held 22 rounds of talks between July 1983 and September 1984, which focused mostly on the '12 Principles' proposed by the PRC's government and on putting the 'One Country Two Systems' rule into practice. Tellingly, the questions of military garrison, social security, and the formation of the legislature proved to be the most difficult to reach a consensus.<sup>16</sup> In the end, the Sino-British Joint Declaration has been signed on 19 December 1984.

Interestingly, despite the British government hailing it as a success back in the day, Margaret Thatcher said in a 2007 interview (lending some insight into the process): "What I wanted was a continuation of British administration. But when this proved impossible, I saw the opportunity to preserve most of what was unique to Hong Kong through applying Mr Deng's [one country, two systems] idea to our circumstances", admitting that she felt "sad" during the handover ceremony in 1997, realising however, that "the Brits should not hang around and must let the Chinese get on with it."<sup>17</sup> Similar feelings has been expressed by the PM at the time of handover, Tony Blair, who in his autobiography said: "Occasionally the British fail to see the fact that although we are often regarded by the indigenous people as having been good colonialists, those people no longer want us as colonialists. In the end, however benign we are, they prefer to run

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<sup>14</sup> P. C. Forêt, 'Le paysage en décolonisation de la métropole Hong Kong-Macao' in P. Claval and A.-L. Sanguin (eds) "Métropolisation et politique", L'Harmattan, 1997.

<sup>15</sup> C. Amado Mendes, "Portugal, China and the Macau Negotiations, 1986-1999", Hong Kong University Press, 2013, 37.

<sup>16</sup> T. Wai-Chu Maria (ed.), 'The Basic Law and Hong Kong - The 15th Anniversary of Reunification with the Motherland' <[basiclaw.gov.hk/en/publications/15anniversary\\_reunification/index.html](http://basiclaw.gov.hk/en/publications/15anniversary_reunification/index.html)> accessed 24 February 2016.

<sup>17</sup> M. Goslet, 'My regrets over Hong Kong by Lady Thatcher' in *The Telegraph*, 10 June 2007. <[telegraph.co.uk/news/uknews/1554095/My-regrets-over-Hong-Kong-by-Lady-Thatcher.html](http://telegraph.co.uk/news/uknews/1554095/My-regrets-over-Hong-Kong-by-Lady-Thatcher.html)> accessed 24 February 2016.

themselves and make their own mistakes. But at the handover ceremony I still felt a tug, not of regret but of nostalgia for the old British Empire.”<sup>18</sup>

The Portuguese, negotiating the transition of power in Macau, followed the same pattern. During the talks, held between 1986 and 1987, despite having a weaker position than the British three years earlier, the Portuguese government stressed that Macau “should be drawing on the experience of Hong Kong.” The two most difficult issues were the date of the transition (contrary to the British, the Portuguese were not bound by a date, i.e. the end of the lease) and the question of nationality of Macau’s residents.<sup>19</sup> The negotiations have proved to be intense, with some of the Portuguese politicians even threatening to veto the outcome.<sup>20</sup> Ultimately, in the Sino-Portuguese Joint Declaration signed on 13 April 1987, the handover has been scheduled for 19 December 1999, and the issue of nationality postponed until after the signing of the agreement.<sup>21</sup> It has also been assured that Macau will continue to be a hub for Portuguese activity in East Asia.<sup>22</sup> Surprisingly, despite this provision, Portugal generally “expunged Macau from its political agenda” after the handover, contrary to the UK, which continues to retain a strong position in Hong Kong.<sup>23</sup>

## II. HONG KONG AND MACAU’S LEGAL SYSTEMS

Just before the transition, in 1997 and 1999, respectively, the world’s press behaved somewhat hysterically writing about Hong Kong’s and Macau’s future. July 1<sup>st</sup>, 1997 and December 20<sup>th</sup>, 1999 seemed equal to doomsday to many journalists, with the *New York Times* going as far as to proclaim in August 1995 “the death of Hong Kong.”<sup>24</sup> 19 years later we can see how groundless their predictions were.

And why did they not turn out to be true? The answer is simple, though some may find it surprising: thanks to the rule of law in both cities. As many researchers point out, after it became clear at the beginning of the 1980s that the British will have to return

<sup>18</sup> T. Blair, “A Journey. My Political Life”, Knopf, 1<sup>st</sup> ed, 2010, 128.

<sup>19</sup> C. Amado Mendes, *supra*, note 15, 39.

<sup>20</sup> C. Amado Mendes, *supra*, note 15, 53.

<sup>21</sup> C. Amado Mendes, *supra*, note 15, 39.

<sup>22</sup> C. Amado Mendes, *supra*, note 15, 59.

<sup>23</sup> C. Amado Mendes, *supra*, note 15, 5.

<sup>24</sup> R. Fung Daniel ‘Hong Kong-China Legal Synergy in the Run-Up to and Beyond 1997’, in 18 *Journal of International Law* [1997] 41, 43.

Hong Kong to China, they had two options to ensure the city's future after the handover. They could democratise the political system (which could have been risky, as China allergically reacted to such ideas), or they could ensure that the rule of law would remain in place after 1997. They chose the second option.

The last governor of Hong Kong, Christopher Patten, said it *expressis verbis* in 1994: "The rule of law is essential to Hong Kong's future. [...] It protects the freedom of individuals to manage their affairs without fear of arbitrary interference by the Government or the improper influence of the rich and powerful. Its starting point is the individual but it encompasses the whole of society. [...] Without it, there is no protection against corruption, nepotism or expropriation. Only under the rule of law are businessman guaranteed the level playing field and the competitive environment which they need."<sup>25</sup>

This 'rule of law' has been guaranteed in both cities during the Sino-British and Sino-Portuguese negotiations, which culminated in the signing of Sino-British Joint Declaration in 1984 and of Sino-Portuguese Joint Declaration in 1987. And today, in 2016, we can say it turned out both governments were right to believe that the Chinese would respect the rule of law more than the rule of democracy. The unique legal system created during the Sino-British and Sino-Portuguese negotiations is working rather well, although it has to be admitted that its inherent flaws are quite noticeable.

There are three bases of the functioning of the Hong Kong Special Administrative Region (HKSAR) and Macau Special Administrative Region (MSAR). The first one is the Article 31 of PRC Constitution, which states that "the state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of specific conditions." This article introduces the famous "One Country Two Systems" rule, which enables the communist/socialist system of the mainland to coexist with the capitalist system in Hong Kong and Macau, and therefore suspends application of the rest of PRC Constitution from HKSAR and MSAR. (*Nota*

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<sup>25</sup> Governor C. Patten, '1994 Policy Address' in "Looking Far Beyond the Final Thousand Days of British Rule" in *South China Morning Post* (6 October 1994) 6.

*bene*, this article of PRC Constitution was originally formulated with reunification of Taiwan, not Hong Kong and Macau, in mind).<sup>26</sup>

The second and third foundations of the SAR's are the two joint declarations — Sino-British signed in 1984 and Sino-Portuguese signed in 1987 — and two Basic Laws (mini- constitutions of HKSAR and MSAR) drafted by committees composed of members from the mainland, and, respectively, from Hong Kong and Macau.

What is particularly interesting, the two basic laws are one of the few statutes in the world which, although created at the end of the 20<sup>th</sup> century, were not actually consulted with the people whom they concern, and are still deeply immersed in the colonial past, keeping its memory alive. The greatest difference between them and the mainland law is that they stem from basically three different concepts. While mainland China uses a socialist legal system with Chinese characteristics, Macau's system originates directly from the Portuguese legal system belonging to the Continental European family, and Hong Kong's system belongs to the common law family, with courts referring on a regular basis to decisions of the U.S. Supreme Court, the High Court of Australia, or the South African Constitutional Court.<sup>27</sup> Such contrasts between legal frameworks within just one country, have led to the creation of an expression, which, in my opinion, best describes this complex situation: 'One Country, Two Systems, Three Legal Orders.'<sup>28</sup>

The end of British governance in Hong Kong on 1<sup>st</sup> July 1997, and of Portuguese governance in Macau on 19<sup>th</sup> December 1999, meant not only the beginning of the Chinese rule, but also of the rule of Hong Kong's and Macau's Basic Laws. Promulgated in 1990 and 1993 respectively, they are statutory laws, which establish legal frameworks for the functioning of the Hong Kong and Macau Special Administrative Regions. What makes the two Basic Laws so particular, apart from their origins, is their temporary character (after 50 years — in 2047/2049 — they will be open to renegotiation) and the fact that at the same time they are ordinary laws (passed by PRC's People's National Congress) and local laws (as they only apply to HKSAR and MSAR).<sup>29</sup> Also, it has to be

<sup>26</sup> J. de Lisle, 'Political Alchemy, the long Transition, and Law's Promised Empire: How July 1, 1997 Matters — and Doesn't Matter — In Hong Kong's Return to China' [1997] 18 *Journal of International Law* 69, 72, *supra* note 7.

<sup>27</sup> R. Fung Daniel, *supra*, note 24, 8.

<sup>28</sup> J. Oliveira and P. Cardinal (eds) "One Country, Two Systems, Three Legal Orders — Perspectives of Evolution", Springer-Verlag, 2009.

<sup>29</sup> J. B. Gouveia, 'The Fundamental Rights in Macao' in Jorge Oliveira and Paulo Cardinal (eds), *supra*, note 28, 695, 697.



noted that “the Basic Law is a more intense normative reality than an ordinary normative text in that it contains obvious constitutional implications.”<sup>30</sup>

There are significant similarities between the two Basic Laws, which is not surprising, as MBL was modelled on the HKBL.<sup>31</sup> Both first Chapters of the Basic Laws state the General Principles, which, *inter alia*, provide for the high degree of autonomy in the SARs and the continuation of the “previous systems”, especially the “capitalist system and way of life.”<sup>32</sup> The few differences between the two Basic Laws in the two first Chapters concern the question of vesting of the land. While both Articles 7 state that “The land and natural resources [...] shall be State property” and its management “invested” to the local governments, which makes sense in Hong Kong, where land was leased, and less sense in Macau, where significant plots of land were alienated. Thus MBL makes a general exception for “the private land recognized as such according to the laws in force before the establishment of the Macao Special Administrative Region.”<sup>33</sup> In Hong Kong the only such exception made, concerns the land on which the Anglican Church is standing.<sup>34</sup>

Chapters II and VII deal with the question of the SARs autonomy, their relationship with China, and the powers of conduction of their external affairs. Chapters III guarantee the rights and duties of the citizens of Hong Kong and Macau, and Chapters IV regulate the political and governmental issues. I will analyse these questions more profoundly later on.

Chapters V, which contain provisions for economy, in some parts differ from one another. While the monetary, fiscal, and trade provisions (including the obligation to maintain the free *entrepôts*) are identical, MBL has no prescriptions regarding the international financial centre (as Macau was not one). Also the question of aviation is not elaborated upon (as it was not developed in Macau back in the day).<sup>35</sup> However, contrary to Hong Kong, Macau is authorised *expressis verbis* to make policies regarding “tourism and recreation,”<sup>36</sup> and carrying out “the protection of environment in accordance with law.”<sup>37</sup> Chapters VI regulate the questions of culture and social affairs, recognising the

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<sup>30</sup> Jorge B. Gouveia, *supra*, note 28, 698.

<sup>31</sup> Y. Ghai, *supra*, note 7, 187.

<sup>32</sup> Article 5 of HKBL and MBL.

<sup>33</sup> Article 7 of MBL.

<sup>34</sup> Y. Ghai, *supra*, note 7, 188.

<sup>35</sup> Y. Ghai, *supra*, note 7, 189-190.

<sup>36</sup> Article 118 of MBL.

<sup>37</sup> Article 119 of MBL.

rights of NGOs, and containing guarantees of educational and religious rights (with MBL obliging the local government to “gradually institute a compulsory education system”).<sup>38</sup>

Apart from the minor differences between the two Basic Laws listed above, there are also two serious ones: the first significant, the second more symbolic. First of all, as most of the legal framework on Macau was in the form of Portuguese legislation, and, moreover, only in Portuguese, the laws in force before the handover were to be preserved until being translated to Chinese and re-enacted in a form of local legislation. Contrarily, in Hong Kong the Acts of the British Parliament and Orders in Council were excluded, requiring localisation in Hong Kong in every case.<sup>39</sup>

Secondly, while in Hong Kong according to the NPC’s Standing Committee’s decision on Article 160 of the Basic Law “Any provisions granting privileges to Britain or other nations or regions of the British Commonwealth shall not be maintained”, the article 24 of MBL symbolically gives the Portuguese special rights in Macau, stating (3) that “The Portuguese who were born in Macao and have taken Macao as their place of permanent residence before or after the establishment of the Macao Special Administrative Region” are a specific category of permanent residents. Also, the Article 42 of MBL says that “The interests of the residents of Portuguese descent in Macao shall be protected by the Macao Special Administrative Region in accordance with law, and their customs and cultural traditions shall be respected”, thus linking the present-day Macau with its colonial past.<sup>40</sup>

Another particular, post-colonial trait of the legal systems in Hong Kong and Macau, is their bilinguality. The official languages in Hong Kong and Macau are, respectively, Chinese and English, and Chinese and Portuguese. This has a significant impact on the judiciary, as, according to Article 9 of HKBL (MBL follows the same pattern), “In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region”. However, it has to be noted that, as the majority of the population in both cities speak Cantonese (89.5% in HKSAR and 83.3% in MSAR),<sup>41</sup>

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<sup>38</sup> Article 121 of MBL.

<sup>39</sup> Y. Ghai, *supra*, note 7, 193.

<sup>40</sup> Y. Ghai, *supra*, note 7, 195.

<sup>41</sup> <[cia.gov/library/publications/the-world-factbook/geos/hk.html](http://cia.gov/library/publications/the-world-factbook/geos/hk.html)> accessed 29 January 2016; <[cia.gov/library/publications/the-world-factbook/geos/mc.html](http://cia.gov/library/publications/the-world-factbook/geos/mc.html)> accessed 29 January 2016.

most of the trials (over 82% in HK)<sup>42</sup> are conducted in Cantonese. This has not always been the case — in 1998 only 7% of the trials were conducted in Chinese.<sup>43</sup>

Nevertheless, while the introduction of a bilingual legal system has had many benefits — it increased public interest in legal questions, allowed a larger number of Hong Kongers to sit in a jury, and generally brought law nearer to the people<sup>44</sup> — it has also created some problems. The translation of laws to Cantonese proved to be particularly challenging, especially in Macau where before 1988 less than 10% of legal acts had a Chinese version.<sup>45</sup> Also, whilst in present-day Hong Kong “it is a ‘rare situation’ that requests to conduct court proceedings in Chinese are turned down due to unavailability of bilingual judges or other reasons,”<sup>46</sup> the small number of Portuguese-speaking Chinese lawyers, and the requirement for the lawyers, who do not hold a degree issued or recognised by University of Macau, to attend a one year adaptation course and to take an exam before the Macau’s Lawyers’ Association,<sup>47</sup> results in large numbers of judiciary still coming from Portugal.<sup>48</sup> Unsurprisingly, the pressure to diminish the use of Portuguese in Macau in favour of English, is withstood by the Macanese bar, which is still dominated by Portuguese/Portuguese-trained lawyers.<sup>49</sup> (Nota bene, numerous studies conducted in Hong Kong have intriguingly observed that the two linguistic environments, the English and the Cantonese, coexist rather separately in Hong Kong. Whilst Chinese is treated as an ‘auxiliary language’ in such domains as law, politics, business, or education, and associated mostly with ‘inner values’ — tradition, home and solidarity — English is “the language of power and success”, related with ‘outer values’

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<sup>42</sup> K. Ka Yin Mong, ‘Impacts of the Bilingual Policy on the Delivery of Justice in Hong Kong - Increased Perceived Justice and Community Representativeness’ <academia.edu/3708390/Impacts\_of\_the\_Bilingual\_Policy\_on\_the\_Delivery\_of\_Justice\_in\_Hong\_Kong\_Increased\_Perceived\_Justice\_and\_Community\_Representativeness> accessed 24 March 2016.

<sup>43</sup> K. Ka Yin Mong, *supra*, note 42.

<sup>44</sup> K. Ka Yin Mong, *supra*, note 42.

<sup>45</sup> E. Cabrita, ‘A tradução jurídica em Macau- uma lei bilingue para dar voz aos direitos’ <dsaj.gov.mo/macaulaw/pt/data/perspectiva/issued2/pg3p.htm#\*> accessed 24 March 2016.

<sup>46</sup> K. Ka Yin Mong, *supra*, note 42.

<sup>47</sup> I. Castellucci, ‘Legal Hybridity in Hong Kong And Macau’ in *McGill Law Journal* 57:4, [2011], 702.

<sup>48</sup> B. Chou, ‘Local Autonomy in Action: Beijing’s Hong Kong and Macau Policies’ [2013] *Journal of Current Chinese Affairs* vol. 42, 3 38.

<sup>49</sup> I. Castellucci, *supra*, note 47, 703-704.

— success, stylishness, academic achievement,<sup>50</sup> which confirms that the SAR's society is still predominantly post-colonial.)

The legal bilinguality is one of the reasons why Hong Kong and Macau are thought to be 'extraordinary' (at least in the eyes of comparative legal scholars).<sup>51</sup> However, what is particularly striking in the two SARs, is the level of local autonomy granted to them in the Basic Laws. Despite the fact that a "third-world country" with an authoritarian system took over two "first-world cities,"<sup>52</sup> both SAR's governments are able to freely make decisions on a wide range of policies, except for defence and military matters, and partially foreign relations. Looked at from the perspective of Clark's Modified Theory of Local Autonomy, Hong Kong and Macau are classified as Type 2, as "the power of initiation of both SARs is broader than all other local authorities in China, but instrumentally restricted to a certain extent."<sup>53</sup> They dictate (in theory) their own economic, cultural and social policies, they have their own currency, and they keep all their tax and non-tax revenue; they may participate in "international organizations or conferences in appropriate fields limited to states and affecting the Region"<sup>54</sup> (as WTO for example, of which they are both founding members); they are authorized to develop economic and cultural relations with foreign countries<sup>55</sup>; issue their own passports<sup>56</sup>; and establish official and semi-official trade and economic missions in foreign countries.<sup>57</sup> And, in minor details, the flights from Hong Kong and Macau to mainland China (and *vice versa*) are still considered to be international.

However, in reality the two SARs are not as autonomic as it would seem at a first glance. From the economic perspective, they have become increasingly integrated into China's markets, especially Macau, as PRC supplies it with 100% of its fresh water, livestock, poultry, and 70% of its electricity.<sup>58</sup> Correspondingly, Macau's power of initiation in internal affairs, is heavily affected by Beijing, which, for example had

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<sup>50</sup> K. Hang Ng, 'If I lie, I tell you, may heaven and earth destroy me. Language and Legal Consciousness in Hong Kong Bilingual Common Law' *Law & Society Review* Vol. 43, 2 [2009], 369, 374-375.

<sup>51</sup> E. Örüçü, 'Comparatists and Extraordinary Places' in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, 2003, 467, 481.

<sup>52</sup> J. deLisle, *supra*, note 26, 79.

<sup>53</sup> B. Chou, *supra*, note 48, 32.

<sup>54</sup> Hong Kong Basic Law Article 152 and Macau Basic Law Article 137.

<sup>55</sup> Hong Kong Basic Law Article 151 and Macau Basic Law Article 136.

<sup>56</sup> Hong Kong Basic Law Article 154 and Macau Basic Law Article 139.

<sup>57</sup> Hong Kong Basic Law Article 156 and Macau Basic Law Article 140.

<sup>58</sup> Z. Jiang, 'Mutual Cooperation for Prosperous Future' cited in B. Chou, *supra*, note 48, 33.

repeatedly called for ‘appropriate economic diversification’ of the SAR. It led to the formulation of diversification plans by Macau’s government, despite the fact the city did not have the need of them back in the day.<sup>59</sup> Similarly, the PRC influences the theoretically autonomous question of immigration control, which, for example, resulted in Hong Kong’s rejection of the visa application made by Wang Dan, an exiled student leader, who wanted to attend the funeral of Szeto Wah (a Hong Kong democrat) in 2010, despite his assurances of not wishing to make any public statements.<sup>60</sup>

On the other hand, it has to be noted that Hong Kong and Macau enjoy a free use of the local ways in public administration and cultural expression, as evidenced by the use of Cantonese, English, and Portuguese, but not Mandarin, on an everyday basis, and the adherence to the rule whereby only SAR’s permanent residents are eligible to serve as principal public officers, in contrast with the rest of China, where anti-localism policy is preferred. Also, both SAR’s have a high degree of religious freedoms, with some of the top officials (including former Hong Kong chief executive and Macau’s secretary for administration and justice) being Catholic, while in PRC “the mere display of religious symbols and preaching amongst teenagers may lead to prosecution.”<sup>61</sup> Similarly, despite the fact that dual nationalities are prohibited in China, in Hong Kong people may have a right to abode in another country (but not if they want to occupy senior public posts). In Macau, where the Portuguese administration granted the Portuguese passports to about one fourth of citizens (among them many politicians, judges and businessmen), the law is even more lenient, as only the chief executive may not have a dual nationality.<sup>62</sup> The examples above demonstrate, in my opinion, that the ‘One Country, Two Systems’ systems, although “deficient”, does work in Hong Kong and Macau, thus representing “a significant breakthrough for the Chinese political and legal systems.”<sup>63</sup>

One of the remaining particularly interesting legal issues I would like to remark on in this article, is the question of fundamental rights and basic laws in the two Special Administrative Regions. While in the media we may hear about the cases of their violation, I feel not enough is said about the framework behind them. In Hong Kong,

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<sup>59</sup> S. Shiu-hing Lo, ‘The Politics of Cross-Border Crime in Greater China: Case Studies of Mainland China, Hong Kong, and Macao’ cited in Bill Chou, *supra*, note 48, 35.

<sup>60</sup> B. Chou, *supra*, note 48, 34.

<sup>61</sup> B. Chou, *supra*, note 48, 37.

<sup>62</sup> B. Chou, *supra*, note 48, 38.

<sup>63</sup> A. H.Y. Chen, ‘The Theory, Constitution and Practice of Autonomy: The Case of Hong Kong’ in Jorge Oliveira and Paulo Cardinal (eds), “One Country, Two Systems, Three Legal Orders – Perspectives of Evolution”, *supra*, note 28 751, 766.

the primary legal instruments for protecting principal rights and freedoms are the Hong Kong Basic Law and the Hong Kong Bill of Rights Ordinance, or BORO, which since 1991 has implemented the International Covenant on Civil and Political Rights. Apart from BORO (whose remaining in force is ensured by Article 39 of the Basic Law), the level of implementation of other human rights treaties varies. However, protection against discrimination is guaranteed in a number of different ordinances, and some of the freedoms which are not clearly secured in the Basic Law (*inter alia*, the right to silence of a suspect when questioned by the police), are protected by ordinary legislation and the common law.<sup>64</sup>

Likewise, in MSAR the basis for the protection of freedoms and rights is the Macau Basic Law, supplemented by various regulations, administrative orders and international treaties, among them ICCPR and ICESCR, which, unlike in Hong Kong, have direct implementation in Macau, play the key roles. Interestingly, the Portuguese constitution, which, evidently, does not apply to Macau since 1999, continues to have an influence “on a macro level” in relation to the rights which were protected in it, and are not included in the Macau Basic Law. It has also been noted that certain laws which appear in HKBL, and not in MBL (like the right to a fair trial), are nevertheless respected in Macau.<sup>65</sup>

Other interesting issues concerning fundamental laws and basic laws in Hong Kong and Macau arise in the context of contentious litigation, as the Basic Laws have left many questions regarding the application of the guaranteed rights unanswered. These include:

- the question of application of ‘the Basic Law rights’ in litigation;
- the problem of who can invoke ‘the Basic Law rights’ before the court (the question of standing);
- the problem regarding the possibility of possible justification of an infringement of a right (the question of restrictions);
- the question of the availability of remedies where a right has been infringed.<sup>66</sup>

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<sup>64</sup> S. NM Young, ‘Fundamental Rights and the Basic Laws of the Hong Kong and Macau Special Administrative Region’ in Jorge Oliveira and Paulo Cardinal (eds) *supra*, note 28 681, 682.

<sup>65</sup> S. NM Young, *ibidem* 683.

<sup>66</sup> S. NM Young, *ibidem* 683.

While Macau has yet to address these problems, the Hong Kong courts have already tackled these issues a number of times in recent years. Although the length of this article does not allow me to analyse these cases in depth, it is worth noting that, *inter alia*:

- both the vertical, and horizontal application of the ‘Basic Law Rights’ and, in some cases, of the BORO, has been allowed;<sup>67</sup>
- the courts have adopted a broad interpretation of ‘sufficient interest’, which the applicant has to demonstrate when trying to challenge the constitutionality of a law, reviewing the petitions even in cases where no specific state action has been taken against the applicants;<sup>68</sup>
- any restrictions to the ‘Basic Law Rights’ have to pass three-stage validity test: firstly, the legality stage — they must be prescribed by law; secondly, the rationality stage — the derogation has to be rationally connected with the pursuit of a legitimate societal aim; thirdly, the proportionality test — the means can be employed only in cases where it is necessary to achieve the legitimate aim;<sup>69</sup>
- in the question of constitutional remedies, the Court of Final Appeal held that within the power to declare laws unconstitutional, there is “a concomitant power to suspend the declaration where it was necessary in the circumstances and only for such fixed periods as was necessary”;<sup>70</sup> furthermore, the CFA<sup>71</sup> has also held that “the courts have the power to give a ‘remedial interpretation’ to the impugned provision so as to bring it in line with the dictates of the Basic Law”, which “could involve the technique of ‘reading down’, so as to give the words a narrower meaning, or “reading in”, so as to add new words to the legislation”.<sup>72</sup>

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<sup>67</sup> See *Cheng & Another v Tse Wai Chun* [2000] 3 HKLRD 418 (CFA); *A Solicitor v The Law Society of Hong Kong* [2004] HKEC 219 at paras 107 and 174 (CA); *A Solicitor v The Law Society of Hong Kong* [2004] HKEC 219 at paras 107 and 174 (CA).

<sup>68</sup> See *Leung TC William Roy v Secretary for Justice* [2005] HKEC 998 (CFI), *aff’d* [2006] 4 HKLRD 211 (CA); *Leung Kwok Hung v Chief Executive* [2006] HKEC 239 (CFI), *aff’d* [2006] HKEC 879 (CA).

<sup>69</sup> See *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229; *Solicitor v Law Society of Hong Kong* [2006] 2 HKLRD 116 (CFA); *Official Receivers and Trustees in Bankruptcy of Chan Wing Hing & Another v Chan Wing Hing & Another & Secretary for Justice (Intervener)* [2006] HKEC 1352 (CFA); *HKSAR v Lam Kwong Wai & Another* [2006] 3 HKLRD 808 (CFA); *HKSAR v Lam Kwong Wai & Another* [2006] 3 HKLRD 808 (CFA), para 40.

<sup>70</sup> *Koo Sze Yiu & Leung Kwok Hung v Chief Executive* [2006] 3 HKLRD 455 (CFA).

<sup>71</sup> See *HKSAR v Hung Chan Wa & Another* [2006] 3 HKLRD 841 (CFA); *HKSAR v Lam Kwong Wai & Another & Another* [2006] 3 HKLRD 808 (CFA).

<sup>72</sup> S. NM Young, *supra*, note 28, 688-693.

It has to be remembered, however, that the jurisprudence regarding the fundamental rights and freedoms in Hong Kong is still young and growing, and its development (and influence on Macau) will no doubt prove worthy of further investigation.

At the end of this chapter I would like to remark on the level of independence of judiciary in Hong Kong and Macau. While technically, as I mentioned before, both SAR's have independent judiciary systems, with their own courts of final appeal, it has to be noted that in China "the existing doctrine of Congressional supremacy"<sup>73</sup> gives the National People's Congress unlimited power "to make or unmake any law whatsoever on any matter whatsoever."<sup>74</sup> Although introducing any fundamental changes in the two Basic Laws before, respectively, 2047 and 2049, would be undoubtedly controversial, breaching China's international treaty obligations under Joint Declarations, it would not necessarily be unlawful under Chinese public law, as some researchers point out.<sup>75</sup>

However, it is worth noting that 'the Mainland' authorities may influence the legal framework of Hong Kong and Macau even without taking such drastic measures. It is plainly visible on the example of Hong Kong. Under Article 158 (1) of the Basic Law, the NPCSC (Standing Committee of the National People's Congress) holds the power of final interpretation of the national law, including the Basic Law, even though national laws which are not explicitly listed in Annex III of the Basic Law are not operative in Hong Kong, and Article 158 of HK Basic Law delegates such power to the courts of Hong Kong for interpretation while handling court cases.<sup>76</sup> Despite this ambiguity, the High Court of Hong Kong itself confirmed the "general and unqualified" nature of the NPCSC's competence.<sup>77</sup>

Since the Hong Kong's handover, this Standing Committee's power has been exercised four times, resulting in, *inter alia*: reversing the effects of a court judgement (in 1999 the NPCSC's interpretation of the Articles 22(4) and 24(2)(3) of the Basic Law meant reversing large parts of controversial *Ng Ka Ling* judgment, also known as 'the right of abode' issue); giving the Beijing the power of determining the changes in the

<sup>73</sup> D. Gittings, 'What Will Happen to Hong Kong after 2047' *California Western International Law Journal* vol. 42 [2011], 37, 57.

<sup>74</sup> A. H. Y. Chen, 'The Court of Final Appeal's Ruling in the *Illegal Migrant Children* Case: Congressional Supremacy and Judicial Review' in H. L. Fu and Y. P. Ghai (eds) *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, (Hong Kong University Press 2000) 80, *supra* note 79.

<sup>75</sup> D. Gittings, *supra*, note 73, 57.

<sup>76</sup> F. Lin, "The Constitutional Crisis in Hong Kong- is It Over?", in *Pacific Rim Law & Policy Journal Association* [2000], 281-315.

<sup>77</sup> *Lau Kong Yung v The Director Of Immigration* [1999] 2 HKCFAR 300, 323.



electoral system in Hong Kong (the 2004 interpretation of Clause 7 of Annex I and Clause 3 of Annex II of the Basic Law established NPCSC's approval as a prerequisite when making any amendments to the Annexes I and II of the Basic Law); and even rewriting the literal meaning of Paragraph 2, Article 53 of the Basic Law in 2005 (which ran counter to the Article 46 of the Basic Law).<sup>78</sup>

Of all the above situations, the case of the *Ng Ka Ling* proved to have the most far-reaching consequences. Firstly it caused a constitutional crisis,<sup>79</sup> ultimately proving “that the Mainland was not prepared to give the HKSAR's courts an alternative locus of power.”<sup>80</sup> It has to be noted that NPCSC has also on one occasion interpreted Macau's Basic Law, even without considering the opinions of the Court of Final Appeal. When asked in 2011 by Macau's chief executive Chui Sai On, who (Macau or Beijing) holds the power of initiating political reform, the Standing Committee ruled that it is the sole prerogative of PRC's authorities.<sup>81</sup>

However, as some researchers point out, it needs to be observed that since 1997 China has mostly been reluctant not only to make amendments in the Basic Law, but also to interpret it, as its powers to do so were used sporadically, only on four occasions until 2011.<sup>82</sup> This means that, political issues (such as deeper dependence on China) aside, and despite the elements of legal ‘hybridity’ between Hong Kong, Macau and the Mainland, there's high probability that no fundamental changes will be introduced in the Basic Law in the near future, which means the two SARs seem set to remain separate legal districts until 2047 and 2049,<sup>83</sup> and maybe even later on.

Besides, as some authors note, “the two SARs provide [...] a very useful laboratory for Beijing to [...] conduct socio-political, institutional, and legal experiments”, being “sources of ideas and economic, legal models, and legal vocabulary that are usefully imported into China's socialist society for its market-economy-related reforms, like the introduction of legislation on trusts or that on securities, modelled on

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<sup>78</sup> D. Gittings, *supra*, note 73, 58.

<sup>79</sup> F. Lin, *ibidem*, 76.

<sup>80</sup> C. Jones, ‘Lost in China? Mainlandisation and Resistance in post-1997 Hong Kong’, in *Taiwan in Comparative Perspective*, Vol. 5, [2014], 21, 34.

<sup>81</sup> Bill Chou, *supra*, note 48, 36.

<sup>82</sup> D. Gittings, *supra*, note 73, 59.

<sup>83</sup> H. Jin, ‘Interaction and Integration Between the Legal Systems of Hong Kong, Macao and Mainland China 50 Years After Their Return to China’ in Jorge Oliveira and Paulo Cardinal (eds) *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution*, *supra*, note 28, 769, 774.

the Hong Kong ones, or other developments of all sorts,”<sup>84</sup> which, in my opinion, seems to be another guarantee of maintaining the prevailing legal systems in Hong Kong and Macau.

### III. POLITICS, SOCIETY AND COLLECTIVE MEMORY IN HONG KONG AND MACAU

On paper, both Hong Kong and Macau have two independent political systems, whereby governments, members of legislatures, and chief executives (the heads of the governments) are chosen through elections. It is worth noting, however, that these elections are not as democratic as what we are used to in the 21<sup>st</sup> century. The chief executives are elected every five years by an election committee of, respectively, 1,200 members in Hong Kong and 400 members in Macau. They may serve a maximum of two terms. Election committee members are chosen from four occupational and professional sectors, representing the interests of societal associations, professional bodies, political circles, and business classes.

It is not surprising that this process, which seems bizarre by modern standards, is highly influenced by Beijing, which, contrary to Article 45 of HK Basic Law (“the ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures”) and to the will of the citizens (of whom between 64 and 83% support universal suffrage),<sup>85</sup> insists the chief Executive is elected by said 1,200 members committee.<sup>86</sup> Somewhat surprisingly, MSAR’s Basic Law doesn’t even have such an aim.

Although the elections to HK’s Legislative Council (or LegCo) and Macau’s Legislative Assembly (or AL) are more democratic than those of the chief executives, they are not entirely free. In Hong Kong, LegCo consists of 70 members in which 35 returned from geographical constituencies and 5 from a District Council functional constituency are elected by direct elections; and 30 returned from other functional constituencies by indirect elections. Macau’s AL is a 33-member body comprising 14

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<sup>84</sup> I. Castellucci, *supra*, note 674.

<sup>85</sup> M. Sing, *Hong Kong's Tortuous Democratization: A Comparative Analysis* (1<sup>st</sup> edn, Psychology Press 2004) 204-205.

<sup>86</sup> B. Chou, *supra*, note 48, 33.

directly elected members, 12 indirectly elected members representing functional constituencies and 7 members appointed by the chief executive. As a result, despite the fact that the pan-democratic camps received 56,27% of votes in Hong Kong's 2012 elections, and around 30% of votes in Macau, they hold, respectively, only 27 and 4 seats.

While political systems of the two SARs are still far from being democratic, their liberal economic systems, inherited from Britain and Portugal, seem well and good. Hong Kong is still an international finance centre (last year its stock exchange broke yet another record, closing with HK\$30.55 trillion, or \$3.94 trillion, on 13<sup>th</sup> of April; it also became world's largest exchange operator),<sup>87</sup> its harbour, and that of Macau, are one of the last free *entrepôts* in the world, and, thanks to the expiration of the monopoly on casinos in Macau in 2002, it is considered to be the Monte Carlo of the Orient, with gaming-related taxes accounting for more than 83% of total government revenue.<sup>88</sup>

It is worth noting, however, that some recent decisions of both governments, such as the introduction of the minimum wage in Hong Kong in 2011<sup>89</sup> and the cash handout policy in the two cities,<sup>90</sup> have done a lot to deconstruct the post-colonial myth of the SARs as *laissez-faire* bastions. The impact of the post-2008 recession is also visible, particularly in Macau, where gaming revenues fell both in 2014 and 2015,<sup>91</sup> making the authorities realise that the need to diversify the city's economy is becoming a burning issue, while the attempt to reinvent Macau as *Centro Mundial do Turismo e Lazer* (Global Centre of Tourism and Leisure) remains rather unsuccessful.<sup>92</sup>

Law, politics, economy... When researching collective memory, one notes how they are all interlinked, and that society is what lies at the very core of their existence. And society is the basis of collective memory. As Maurice Halbwachs put it, "I usually recall because others induce me to do it; their memory is trying to help my memory, and my memory finds support in theirs; [...] the groups I belong to at any moment give me

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<sup>87</sup> H. Singh, 'Tuesday Papers: Hong Kong exchange becomes world's largest' <[citywire.co.uk/money/tuesday-papers-hong-kong-exchange-becomes-world-s-largest/a809108](http://citywire.co.uk/money/tuesday-papers-hong-kong-exchange-becomes-world-s-largest/a809108)>

<sup>88</sup> <[cia.gov/library/publications/the-world-factbook/geos/hk.html](http://cia.gov/library/publications/the-world-factbook/geos/hk.html)> accessed 29 February 2016.

<sup>89</sup> P. Siu, 'No one happy as Hong Kong minimum wage raised to HK\$32.5 today' <[scmp.com/news/hong-kong/economy/article/1782670/no-one-happy-hong-kong-minimum-wage-raised-hk325-today](http://scmp.com/news/hong-kong/economy/article/1782670/no-one-happy-hong-kong-minimum-wage-raised-hk325-today)> accessed 30 January 2016.

<sup>90</sup> B. Kwong Kam Kwan, *op.cit.*

<sup>91</sup> DICJ, 'Information / Monthly Gross Revenue from Games of Fortune' <[dicj.gov.mo/web/en/information/DadosEstat\\_mensal/](http://dicj.gov.mo/web/en/information/DadosEstat_mensal/)> accessed 17 February 2016

<sup>92</sup> A. Gonçalves, 'Macau 2015-2019: as LAG a economia' *Hoje Macau* (Macau, 26th March 2015) 19.

the means to their [memories] reconstruction, on condition that I turn to them and embrace their way of thinking for at least one moment”.<sup>93</sup> And there are no better communities to explore collective memory than Hong Kong’s and Macau’s ever-changing societies.

What is particularly striking in analysing both communities is that although they’re similar in terms of ethnicity (Hong Kong: Chinese 93.1%, Indonesian 1.9%, Filipino 1.9%, other 3%; Macau: Chinese 92.4%, Portuguese 0.6%, mixed 1.1%, other 5.9%, including Macanese — mixed Portuguese and Asian ancestry), and, as I’ve noted before, in terms of the languages spoken (Hong Kong: Cantonese 89.5%, English 3.5%, Mandarin 1.4%, other Chinese dialects 4%, other 1.6%; Macau: Cantonese 83.3%, Mandarin 5%, Hokkien 3.7%, English 2.3%, other Chinese dialects 2%, Tagalog 1.7%, Portuguese 0.7%, other 1.3%),<sup>94</sup> they have very different attitudes towards their identity. While over 46% of Hong Kongers identify themselves as HK citizens, and only 18% as Chinese citizens, more people in Macau (77.4%) identify themselves as Chinese than Macanese (60.7%).<sup>95</sup> Also, people of Hong Kong have high levels of civic duties — since July 1, 1997 there have been about 1,000 demonstrations per year, or three a day, the biggest ones gathering as much as 500,000 people. The number of protests, and the recent birth of the Umbrella Movement are perhaps unsurprising, given that in 2012 as many as 37% of Hong Kong citizens said they mistrusted the central government in Beijing.<sup>96</sup> Besides, it has to be remembered that Hong Kong is the only city in China where the Tiananmen Massacre remembrance rallies take place every year.<sup>97</sup> On the other hand, many people in Macau do not discuss politics even with their friends and relatives, or have a strong reaction to government wrongdoings!<sup>98</sup>

What is the reason of such differences between so similar societies living in cities only 66 km apart? The answer is simple: significantly different History (and, thus, collective memories). While the United Kingdom has a very long tradition of democracy,

<sup>93</sup> M. Halbwahs, ‘Społeczne ramy pamięci’ (M.M. Sadowski tr., 1st edn, PWN2008) 4-5.

<sup>94</sup> <[cia.gov/library/publications/the-world-factbook/geos/mc.html](http://cia.gov/library/publications/the-world-factbook/geos/mc.html)> accessed 29 February 2016. <[cia.gov/library/publications/the-world-factbook/geos/hk.html](http://cia.gov/library/publications/the-world-factbook/geos/hk.html)> accessed 29 February 2016.

<sup>95</sup> B. Chou, *supra*, note 48, 42-46.

<sup>96</sup> K. Drew, ‘In Hong Kong, Frustration 15 Years After Return to Chinese Rule’ <[nytimes.com/2012/06/30/world/asia/in-hong-kong-frustration-after-return-to-chinese-rule.html?\\_r=0](http://nytimes.com/2012/06/30/world/asia/in-hong-kong-frustration-after-return-to-chinese-rule.html?_r=0)> accessed 21 February 2016.

<sup>97</sup> J.-P. Bèja, ‘Is Hong Kong Developing a Democratic Political Culture?’ in *China Perspectives. Hong Kong Special Feature*, no. 2, 2007, 4-12.

<sup>98</sup> H. S. Yee, ‘Mass Political Culture and Political Development in Post-1999 Macau’ in *China Perspectives. Macau Special* n. 44, [2002], 29-40.

Portugal has been a dictatorship for a large part of the 20<sup>th</sup> century, until 1974. Secondly, while the British favoured the policy of localisation in its colonies after the WWII, the Portuguese preferred governing mostly by people coming from the metropolis. It changed only at the turn of the 1980s and 1990s. The effects of the two different policies are still visible today.

It is worth noting, however, that despite their differences, there are some similarities between the two cities, which stem from a strong local identity. As a result, Hong Kongers are wary of ‘Mainlandisation’ (the growing impact of PRC and mainland citizens on the SAR). Various situations over the years, such as ‘baby formula issue,’ ‘maternity wards bed shortage,’ or the proposal of increasing the number of multiple-entry permits for PRC citizens,<sup>99</sup> led to many anti-Mainland (sometimes exaggerated) reactions, with some critics even saying that “when Mainland sneezes, we don’t just get cold, we develop pneumonia,”<sup>100</sup> and some of the protesters flying the British colonial flag of Hong Kong.<sup>101</sup> Similarly in Macau, a growing resentment towards ‘the strangers’ (i.e. non-Macanese) may be observed — for example the MSAR’s government policy of importing foreign, mainland, and Hong Kong workers, while the Macanese remain unemployed, led to May Day protests, *inter alia*, in 2008,<sup>102</sup> 2010, and 2012.<sup>103</sup>

At the end of this chapter, I would like to pose one more question: “What has the biggest impact on shaping the collective memory in Hong Kong and Macau today?”. Somewhat surprisingly, it is culture. Both SAR’s have built and supported numerous museums, monuments, and exhibitions in recent years, from faux statues promoting multiculturalism in Macau, to restoration of Portuguese heritage in this city,<sup>104</sup> to alterations in the exhibitions in Hong Kong Museum of History (the Tiananmen Massacre is now referred to there as an ‘incident’),<sup>105</sup> to creating an immense, and not yet

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<sup>99</sup> C. Jones, *supra*, note 80 23.

<sup>100</sup> A. Lo, ‘Be a Statesman CY, Not a Chameleon’ (*South China Morning Post* 2 October 2012) <[scmp.com/comment/article/1051863/be-statesman-cy-not-chameleon](http://scmp.com/comment/article/1051863/be-statesman-cy-not-chameleon)> accessed 20 February 2016

<sup>101</sup> C. Jones, *supra*, note 80, 30.

<sup>102</sup> A. Lo, *ibidem*, 15.

<sup>103</sup> B. Kam Kwan Kwong, *op.cit.* 7-8.

<sup>104</sup> J. Porter, *supra*, note 1, 81.

<sup>105</sup> R. Ignacio Diaz, D. Cheung and A. P. Lee, ‘The Mainland Connection: The Politics of Identity as Constructed by the Hong Kong Museum of History’ <[scalar.usc.edu/anvc/travel-and-culture-in-hong-kong-and-macau/what-my-journey-through-the-hong-kong-museum-of-history-taught-me-about-identity](http://scalar.usc.edu/anvc/travel-and-culture-in-hong-kong-and-macau/what-my-journey-through-the-hong-kong-museum-of-history-taught-me-about-identity)> accessed 13 March 2016.

finished 100 acres complex of West Kowloon cultural quarter in HK, which is supposed to house cultural facilities, museums, theatres, and exhibitions.<sup>106</sup>

Why do the governments support so many cultural actions, while at the very same time, heritage preservation groups have to fight, often failing (as in this year's case of Nga Tsin Wai village)<sup>107</sup> to maintain historic buildings standing in the way of new construction projects?<sup>108</sup> As Pierre Nora observes, the more contrived memory becomes, rendered up in artificial monuments, museums, and exhibits, the more the spontaneity of living tradition is attenuated.<sup>109</sup> These abstracted *lieux de mémoire* become “moments of history torn away from the movement of history, then returned; no quite life, not yet death, like shells on the shore when the sea of living memory has receded.”<sup>110</sup> These shells are ready to be filled with new collective memory, better suited to the official narrative than the old one. And it has to be remembered, that, though often underestimated, collective memories have a large impact on the present. Venturing to alter them may have unforeseen consequences — “for every society sets up images of the past. Yet to make a difference in society, it is not enough for a certain past to be selected. It must steer emotions, motivate people to act, be received; in short it must become a socio-cultural mode of action.”<sup>111</sup> As for now, despite the PRC's efforts to prove that Hong Kong has ‘an eternal and undisputable place within’ China's cultural history,<sup>112</sup> this induced collective memories have failed to “be received” and have been vocally rejected by most of the Hong Kongers.<sup>113</sup>

<sup>106</sup> H. Gérard, ‘Art and Culture: Hong Kong or the Creation of a Collective Memory’ in *China Perspectives*. Hong Kong Special Feature no. 2, [2007], 85.

<sup>107</sup> Coconuts Hong Kong, ‘Heartbreak as historic Hong Kong village demolished to make way for development’ <[hongkong.coconuts.co/2016/01/29/heartbreak-historic-hong-kong-village-demolished-make-way-development](http://hongkong.coconuts.co/2016/01/29/heartbreak-historic-hong-kong-village-demolished-make-way-development)> accessed 17 February 2016.

<sup>108</sup> T. Chung, ‘Valuing Heritage in Macau: On Contexts and Processes of Urban Conservation’ in *Journal of Current Chinese Affairs* 38,1, [2009], 129-160.

<sup>109</sup> J. Porter, *supra*, note 1, 92.

<sup>110</sup> P. Nora, ‘Between Memory and History: Les Lieux de Mémoire’ in *Representations*. Special Issue: Memory and Counter-Memory no. 26, [1989], 12.

<sup>111</sup> A. Confino, ‘Collective Memory and Cultural History: Problems of Method’ in *The American Historical Review*, vol. 102 n.5, [1997], 1390.

<sup>112</sup> S. Lau, ‘New Debate Focuses on Hong Kong's Identity’ [2007] CNN 28 June, cited in: Carol Jones, *supra*, note 80, 32.

<sup>113</sup> C. Jones, *supra*, note 80, 32.

#### IV: CONCLUDING REMARKS

At the end of this paper, I would like to pose one more question — “What lies in store for Hong Kong and Macau, both in general and legal terms?”. The answer is not simple. No legal agreement regulates what will happen to the two SARs in 2047 and 2049, which means that “it is unclear whether the ultimate goal is to retain two equally thriving but different systems, or whether it is to assimilate Hong Kong [and Macau] into the mainland politically, legally, culturally and ideologically.”<sup>114</sup>

For some researches, the time of ‘one country, two systems’ is simply a period of transition, after which Hong Kong and Macau “will be treated as any other part of the country”,<sup>115</sup> because the Basic Law “by its own terms is to have a lifespan of 50 years from 1997 to 2047.”<sup>116</sup> Others, holding a more optimistic view, suggest that “it is legally possible for the constitutional game of Hong Kong to continue to operate under the Basic Law after 2047,”<sup>117</sup> adding that what happened in Hong Kong after 1997, was not a re-colonisation by China, but rather the end of colonialism.<sup>118</sup> The words of Deng Xiaoping regarding Hong Kong’s Basic Law, who in 1988 said that “[a]s a matter of fact, 50 years is only a vivid way of putting it. Even after 50 years our policy will not change either. That is, for the first 50 years it cannot be changed and for the second there will be no need to change it”,<sup>119</sup> may also give hope to the Hong Kongers (and, *per analogiam*, to the Macanese), especially when one remembers that China is in a completely different place today, than it was back in the day. Various scholars even see 2047 (and 2049) as an opportunity, rather than a threat, arguing that it will be possible to “protect the ‘one country, two systems’ concept”, at the same time getting rid “of any shackles imposed by any outdated provisions of the [...] Basic Law”.<sup>120</sup> Perhaps, if Hong Kong and Macau were then to put forth their own lists of proposed amendments to the Basic Laws (as

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<sup>114</sup> J. Chan, ‘Civil Liberties, Rule of Law and Human Rights: The Hong Kong Special Administration in its First Four Years’ in Lau Siu-kai (ed.) “The First Tung Chee-hwa Administration: The First Five Years of the Hong Kong Special Administrative Region”, The Chinese University Press, 2002, 89, 116.

<sup>115</sup> D. Gittings, *supra*, note 73, 39.

<sup>116</sup> R. J. Morris, ‘The Replacement Chief Executive’s Two-Year Term: A Pure and Unambiguous Common Law Analysis’, in *Hong Kong Law Journal*, vol. 35, [2005], 17, 24.

<sup>117</sup> B. Y. T. Tai, ‘Basic Law, Basic Politics: The Constitutional Game of Hong Kong’ in *Hong Kong Law Journal* vol. 37, [2007], 503, 577.

<sup>118</sup> D. F. Vukovich, ‘The End of Re-Colonization: on Hong Kong, Knowledge, and G.O.D’ in *Neohelicon* vol. 39, [2012], 167, 168-170.

<sup>119</sup> D. Xiaoping, “On the Question of Hong Kong” cited in: D. Gittings, *supra*, note 73, 49.

<sup>120</sup> D. Gittings, *supra*, note 73, 54.

some researchers suggest)<sup>121</sup>, it would enable them to finally free themselves from the fetters of colonialism....

Maybe, in 2047, the history will once more repeat itself, and instead of a doomsday, we will simply see a continuation of a process which started long before 1997....<sup>122</sup> I would like to finish with the words of prof. Robert C. Berring of UC Berkeley, whom I asked about the future of Hong Kong last year. In January 1997, prof. Berring wrote an intriguing article ‘Farewell to All That’, in which he argued that “there is too much to tempt the current leadership, too many profits to be skimmed, too much to do. [...] One thing is certain: the checkered history of Hong Kong as a free-wheeling, open city is drawing to a close.”<sup>123</sup> Today, admitting (happily) that he was wrong, he says: “Hong Kong has done much better than I had hoped. The continued vitality of the Common Law amazes me. The people of Hong Kong have challenged the Party but have always known when to stop. When a government faces a group of people who refuse to obey, e.g. refuse to disband a demonstration and go home, the whole system is stressed. In the Tiananmen Massacre, the demonstrators stood fast. The government brought down its fist. The Hong Kong people have understood that by dispersing they live to fight another day.”<sup>124</sup>

However, prof. Berring finished his small disquisition on a much more sombre note, remarking that “the current drift of things bodes ominously for Hong Kong as Party leadership wants more unity and less static. China [still] can handle Hong Kong as it wants. [...] Hong Kong operates at sufferance. [...] When there is no enforcement, the treaty [i.e. Joint Declaration] will melt in the heat of conflict [and] China will act as it sees fit. This is dangerous for Hong Kong.”<sup>125</sup>

However, it seems that as for this day, the authorities do not want to do anything radical. Speaking about the forthcoming elections in a rare interview earlier this year, Feng Wei, the deputy director of the Hong Kong and Macau Affairs Office in Beijing said that “it will be normal that several radical young people [i.e. representatives of the

<sup>121</sup> D. Gittings, *supra*, note 73, 55.

<sup>122</sup> D. Gittings, ‘Changing expectations: How the rule of law fared in the first decade of the Hong Kong SAR’ <[hub.hku.hk/bitstream/10722/193250/1/Content.pdf](http://hub.hku.hk/bitstream/10722/193250/1/Content.pdf)> accessed 19 February 2016

<sup>123</sup> R. C. Berring, ‘Farewell to All That’ in *Loyola of Los Angeles International and Comparative Law Review*, vol. 19, [1997], 431, 446-447.

<sup>124</sup> Personal correspondence with prof. Robert C. Berring, July 2015.

<sup>125</sup> *Ibidem*.



pan-democratic camp] will be returned as lawmakers (in September).”<sup>126</sup> Let’s hope that this will be the case, and that (looking from the 2016 perspective), neither the ‘fishball riots,’<sup>127</sup> nor the disappearance of the booksellers<sup>128</sup> and the refusal to register Hong Kong National Party before the 2016 elections,<sup>129</sup> but rather the Umbrella Movement will be the indicator of Hong Kong and Macau’s future.

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<sup>126</sup> Coconuts Hong Kong, ‘Beijing expects young pro-democracy ‘radicals’ to become Hong Kong lawmakers’ <[hongkong.coconuts.co/2016/03/15/beijing-expects-young-pro-democracy-radicals-become-hong-kong-lawmakers](http://hongkong.coconuts.co/2016/03/15/beijing-expects-young-pro-democracy-radicals-become-hong-kong-lawmakers)> accessed 19 March 2016.

<sup>127</sup> S. Moss, ‘Is Hong Kong really rioting over fishball stands?’ <[theguardian.com/lifeandstyle/shortcuts/2016/feb/09/hong-kong-fish-ball-revolution-china-riot](http://theguardian.com/lifeandstyle/shortcuts/2016/feb/09/hong-kong-fish-ball-revolution-china-riot)> accessed 23 March 2016.

<sup>128</sup> Coconuts Hong Kong, ‘Lee Bo back in Hong Kong, according to Hong Kong police’ <[hongkong.coconuts.co/2016/03/24/lee-bo-back-hong-kong-according-hong-kong-police](http://hongkong.coconuts.co/2016/03/24/lee-bo-back-hong-kong-according-hong-kong-police)> accessed 23 March 2016.

<sup>129</sup> Coconuts Hong Kong, ‘Hong Kong government threatens *action* against independence party’ <[hongkong.coconuts.co/2016/03/31/hong-kong-threatens-action-against-independence-party](http://hongkong.coconuts.co/2016/03/31/hong-kong-threatens-action-against-independence-party)> accessed 31 March 2016.