

Fundamental Political and Constitutional Norms: Hong Kong and Macau Compared*

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On 20 December 2009, President Hu Jintao praised Macau for its successful implementation of the One Country Two Systems model. This was interpreted by some as drawing an implicit comparison between Hong Kong and Macau with Beijing favouring the latter's interpretation and implementation of One Country Two Systems. This article evaluates the core values and autonomy entrenched within Hong Kong during British colonial rule and Macau during Portuguese colonial rule and ascertains the extent to which these factors have shaped the different modes of constitutional development in Hong Kong and Macau post-Handover. The author argues that the One Country Two Systems framework, with its emphasis on a 'high degree of autonomy' and 'life shall remain unchanged', means that any contemporary comparisons drawn between Hong Kong and Macau must take into account the unique (and very different) political and constitutional norms left behind by their respective colonial masters. The author argues that a more balanced view must be taken and that constitutional issues must also be viewed in light of norms established by the colonial rule of the past.

The Hong Kong Special Administrative Region (HKSAR) and the Macau Special Administrative Region (MSAR)¹ are politically unique for being the only two special administrative regions (SARs) within the People's Republic of China (PRC) administered by their respective Chief Executives (CEs) and enjoying a clear and significant degree of executive, legislative and judicial independence from the PRC. Their status is guaranteed by the Basic Law of Hong Kong Special Administrative Region (HKBL) and the Basic Law of Macau Special Administrative Region (MBL), each of which is seen by scholars as the mini-constitution of each SAR and the primary legal protector of their autonomy (Ghai, 1999: 137-142). Both the HKBL and the MBL stipulate that the territories are to 'exercise a high degree of autonomy'² and 'the previous capitalist system and way of life shall remain unchanged for 50 years'.³ Reading these two articles together, this means a large degree of the autonomy enjoyed by Hong Kong and Macau is a result of colonial rule and the autonomy granted to Hong Kong and Macau before their respective handovers.

In addition, while the articles of the HKBL and the MBL are also very similar (that is, most MBL articles correspond to similar, if not exactly worded, provisions in the HKBL), they also have significant differences.⁴ This article evaluates the core values and sense of autonomy entrenched within Hong Kong during British colonial rule and Macau during Portuguese colonial rule and to ascertain the role these factors played in shaping the differences in constitutional development of, and the degree of autonomy enjoyed by, Hong Kong and Macau under their respective Basic Laws. First, I will look at the period of British and Portuguese colonial rule and analyse the differences in powers

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¹ Macau is also spelled as Macao. The former is the reformed Portuguese spelling; the latter is the older form in Portuguese.

² The Basic Law of Hong Kong art 2, The Basic Law of Macau art 2

³ The Basic Law of Hong Kong art 5, The Basic Law of Macau art 5

⁴ For example, art 45 and art 68 of the Hong Kong Basic Law respectively state that the 'ultimate aim' is the election of the CE and Legislative Council by universal suffrage while the in corresponding articles of the Macau Basic Law (art 47 and art 68 respectively) this 'ultimate aim' is missing.

and rights that were granted to, and the differences in values instilled in, Hong Kong and Macau during this period. I then seek to define what is meant by autonomy, highlight the important aspects and norms of autonomous entities and analyse to what degree the HKBL and MBL meet these criteria of autonomy. Lastly, I discuss how the differences in the colonial rule of Hong Kong and Macau account for the differences in constitutional development after their respective handovers and explain why the PRC, when comparing its own administrative and legal system to that of the two SARS, may find Macau's development to be more compatible with what seems to have emerged as the prevailing Beijing vision for 'one country, two systems' (OCTS).⁵

Colonial Rule in Hong Kong and Macau

Although some scholars view Hong Kong as a unique place that cannot be easily compared to other colonies, to accept this statement as the complete truth would be overlooking the similarities in colonial development that Hong Kong shared with its neighbour Macau, another former European colony (Lo, 1995a: 254). These two neighbouring coastal enclaves on the South China coast were the last two vestiges of colonial rule in China. Their colonial masters long enjoyed friendly relations with each other and both were to become members of the European Union (EU).⁶ Both Hong Kong and Macau were also of great symbolic importance to China, as the Handover of Hong Kong was seen as closing the 'dark chapter on a century and a half of unequal treaties' forced onto China, while the return of Macau would mark the end of 'five centuries of European colonialism in Asia' (Chan, 2003:518). However, as striking as the similarities were the contrasts between the two colonies, with some describing Hong Kong as liberty and Macau as harmony.

The colonies also shared a very different fate. In Hong Kong, the Handover led to a 'crisis of confidence' while in Macau there was a 'sense of acceptance' and even 'relief' at the prospect of autonomous rule under OCTS (Chan, 2003: 493). While this part of the article can only modestly summarise the nature of Hong Kong and Macau's colonial rule, it will try to distinguish the major differences in colonial governance between the two, illustrate how these contrasts are preserved in their Basic Laws and explain how these led to very different outcomes during and after their respective Handovers.

The Political System

Executive and legislative relations

The political systems in colonial Hong Kong and Macau were both executive-dominant systems presided over by their Governors. This was carried over into the after Handover system for, according to Ma Ngok, the Chief Executive (CE) of Hong Kong in post-1997 (and, by analogy, the CE of Macau after 1999) was said to have 'extraordinary non-legislative powers' and powerful legislative powers that equated him to the third most powerful presidency in the world (Ma, 2002: 353).⁷ However, according to Ma, for much of Hong Kong's history, the Governor of Hong Kong's powers far exceeded both those ultimately conferred on the CE of HKSAR and those of his colonial counterpart in Macau. The Governor was the chair of the Legislative Council (Legco) giving him direct control of its agenda and

⁵ It should be noted that the OCTS is an on-going process that has been subject to much debate and re-interpretations of the principles it is meant to encapsulate since it was first devised. This article looks at the current views in light of over a decade of experience in Hong Kong and Macau. Examples from the literature on this debate include: Cheng, 2009 and Chang, 2007

⁶ The British and Portuguese have historically enjoyed harmonious diplomatic relations with each other since the establishment of the Anglo-Portuguese Alliance through the Treaty of Windsor in 1386. The alliance is said to be the oldest alliance in the world that is still enforced.

⁷ The Hong Kong and Macau systems are said to be closest in resemblance to a presidential system. Under this classification, the CE's powers are only behind the 1989 Chilean presidency and the Paraguayan presidency.

proceedings. The Legco could not impeach the Governor and even if it had such power, was unlikely to do so because, for much of its existence, the Legco was selected by the Governor himself. The Governor also enjoyed an unlimited power of veto over legislation and an unrestrained power to dissolve Legco (Ma, 2002: 352-353). Furthermore, before 1994, members of the Executive Council (Exco) that drafted and implemented government policies were also allowed to sit in Legco so there was typically no substantive opposition to the executive's decisions. It was not until the Patten reforms (see further below), introduced in the early 1990s, that this particular appointment system ended.

In contrast, although the Governor of Macau enjoyed similar dominance for much of Macau's history, he arguably had less power and his position was the first to be reformed. Traditionally, the Consultative Council (Macau's equivalent of Exco) had no overlap in membership with the Legislative Assembly (Macau's legislature) and, from 1955, had five of its ten members elected indirectly by functional constituencies (Lo, 1995b: 35).⁸ In addition, from 1976 onwards, one-third of the seats in the Legislative Assembly were directly elected by its citizens from geographic constituencies (GCs) (with another one-third elected through indirect elections by functional constituencies and another one-third appointed by the Governor of Macau) thus ending the Governor's dominance over the Legislative Assembly (Lo, 1995a: 257).⁹ This was well-illustrated during the rule of Governor Almedia e Costa in 1984, when the Governor was at 'loggerheads' with members of the Legislative Assembly who defiantly tried to amend administrative decrees without his approval. This triggered a constitutional crisis and forced him to unprecedentedly dissolve the assembly and order new elections (Lo, 1995a: 255-256).¹⁰ Ever since then, subsequent Governors of Macau have preferred to avoid confrontations with Macanese legislators through compromises, developing a more harmonious relationship between the executive and the legislature (Lo, 1995a: 263).

Nature of Governorship

The nature of the Governorship also differed between the two colonies. In Macau, the Organic Statute of Macau, enacted in 1976, stated that the Governor of Macau was appointed by the President of Portugal. The President was directly elected for a five-year term, and the Governor was directly responsible to the President alone and not to the Portuguese government or Parliament (Lam, 1991: 324). This close connection between the Portuguese presidency and Macau governorship meant that every change in presidency was followed by a change in the Governor of Macau. As a result, the office of the Governor of Macau was connected in a partisan way to the President and he was inevitably drawn into the politics of Portugal (Lam, 1991: 325).

This problem was further compounded by the fact that the Commander of the Security Force of Macau before 1990 was not directly responsible to the Governor but to the Portuguese military forces (Lam, 1991: 326-327).¹¹ This was a great concern, as conflicts between the Governor and the Commander stalled administrative efficiency as demonstrated by the 'Macau Incident' in March 1990. In this case, the security forces not only refused to clear a protest by hundreds of illegal immigrants campaigning in front of the Governor's House but actually regathered the crowd after the Governor managed to disperse them (Lam, 1991: 326).

The Governor of Macau was assisted by five secretaries (changed to seven by amendment to the Organic Statute in 1990), who were appointed and dismissed by the President on the Governor's advice (Lam, 1991: 326-327). However, there were no fixed functions assigned to each secretary and the extent

⁸ By contrast, there was such an overlap in membership between Exco and Legco in HK until 1993 and all members of Exco were appointed by the Governor of HK instead of being indirectly elected.

⁹ It was not until 1985, nine years after Macau's legislative reforms, that elected seats were first introduced in HK's Legco.

¹⁰ It should also be noted that despite the Governor of Hong Kong being vested with the same power, it was never exercised from the time Hong Kong became a British colony in 1842 to the final days of colonial rule in 1997.

¹¹ In 1990, the Organic Statute of Macau was amended to create a Secretary for Security, who replaced the Commander of the Security Force of Macau, and who, in turn, was responsible to the Governor of Macau.

of their powers and jurisdictions were completely dependent on the Governor. This has been criticised as creating a administrative system that was largely 'improvised' and varied from time to time, with secretarial posts seen as 'spoils' given by the President to political supporters and friends (Lam, 1991: 327-330).

By comparison, all Governors of Hong Kong since Sir Murray MacLehose in 1971 (with the notable exception of the last governor, Governor Chris Patten) have been appointed from the ranks of career diplomats in Britain. This meant that the Governor of Hong Kong typically stayed out of politics back in the UK, allowing for more focus on colonial administration (Lam, 1991: 335). The Governor also doubled as the Commander-in-Chief of the British Forces in Hong Kong and the garrison was accountable to him. In addition, the responsibility, status and powers of principal Hong Kong officials were clearly divided with the Chief Secretary and the Financial Secretary serving as number two and number three in the government (Lam, 1991: 328-329). Although legally all officials were accountable to the Governor, the Governor was restrained by rules and established conventions in the civil service when appointing, promoting and dismissing officials; rules and conventions, which were lacking in colonial Macau (Lam, 1991: 344-346). From this review, we can see that the administrative system in Hong Kong was notably more developed, stable and less politicised than in Macau.

Constitutional development

When analysing the political system in colonial Hong Kong, the impact of Governor Patten's reforms (1994) of the power structure must be taken into account and, in particular, how these changes made for a more representative form of governance in the twilight of British colonial rule. The reforms entailed the barring of Executive Council members from sitting in Legco, the strengthening of the Legislative Council in the 1995 elections by increasing the number of directly elected seats to 20, replacing corporate voting by individual voters in the 21 existing functional constituencies and adding 9 extra function constituencies for voters not belonging to an existing functional group and devolving more power and resources to the directly elected district boards (Tsang, 2004: 255-257). Patten also introduced question-and-answer sessions in Legco, allowing legislators to act as a check on the executive and making the governor and principal officials accountable to Legco (Lo, 1995a: 260). Despite the stiff opposition to these reforms from Beijing, they are generally hailed as helping Hong Kong's polity become less 'colonial' and more pluralistic, with citizens more willing to participate in politics and holding colonial officials accountable and responsive to public demands (Lo, 1995a: 263).

In stark contrast, Macau's colonial government did very little to reform its political and civil service system in the same period. The reason for this passiveness, it is argued, stemmed from Lisbon's policy of maintaining friendly relations with the PRC, so as to not risk antagonising Beijing (Lo, 1995b: 26). While the Sino-British negotiations on Hong Kong (1982-1984) were mired by mistrust on both sides, the Sino-Portuguese negotiations on Macau (1986-1987) were described by Beijing's chief negotiator Zhou Nan as having proceeded 'very smoothly and harmoniously' as a discussion between 'partners' (Chan, 2003: 500-501). This was likely due to long-standing historical differences between British and Portuguese interaction with China. The British had seized Hong Kong in what China saw as 'gunboat diplomacy', while the Portuguese had initially settled in Macau with the consent of the imperial Ming, and later Qing, government, under a land-lease agreement (Chan, 2003: 496).¹² It was only after China's defeat by the British in the Second Opium War that the Portuguese negotiated the Treaty of Tientsin (1864) to secure Macau as their colony with 'perpetual occupation'. This right was granted by the Chinese in the 1887 Sino-Portuguese Treaty of Friendship and Trade (Chan, 2003: 494-497).¹³

¹² The first land-lease agreement was signed in 1573 with the Portuguese agreeing to pay an annual rent of 500 taels of silver to Zhongshan County (of which Macau was originally a part).

¹³ The 1887 Sino-Portuguese Treaty of Friendship and Trade is also known as the Lisbon Protocol.

After the 1974 Revolution in Portugal,¹⁴ the new Portuguese government in Lisbon had indicated that Portugal was willing to leave Macau and hand it back to the PRC but Beijing surprisingly refused this offer. In 1979, Portugal formally acknowledged the PRC's sovereignty over Macau and the colony's status was changed to 'Chinese territory under Portuguese administration' removing a huge roadblock in the Sino-Portuguese negotiations that followed (Chan, 2003: 498-501).

The Sino-British negotiations, however, proceeded less smoothly, with the British Prime Minister Margaret Thatcher trying to assert the validity of the three nineteenth-century treaties that ceded Hong Kong to the British but that the PRC saw as 'unequal treaties' and therefore illegitimate (Chan, 2003: 499).¹⁵ While Thatcher may have attempted to use the treaties as a ploy to enhance Britain's bargaining power, it instead stirred up Chinese nationalistic feelings over their perceived humiliation at the hands of the British imperialists. This bitter 'sovereignty contest' later poisoned Sino-British relations with mutual suspicion during the 1982-1984 negotiations and deepened the PRC's mistrust over British intentions with respect to Hong Kong in the run-up to the Handover (Chan, 2003: 500).

This difference in the ongoing diplomatic relations between their respective colonial masters and the PRC helps explain why the aim of the British colonial government under Governor Patten was to cultivate a more democratic and responsible culture in Hong Kong's political system (which he hoped would persist after 1997), while the Portuguese were more willing to forsake democratisation reforms, and maintain a relatively undeveloped polity in Macau, in order to protect Portugal's friendly diplomatic and business ties to the PRC (Lo, 1995a: 260-261).

The political institutions of Macau were initially more developed than those in Hong Kong, especially in the period 1976-1985. Later political developments in the period running up to the Handover, most notably the developments in Sino-British relations and Sino-Portuguese relations and the introduction of the Patten reforms in Hong Kong, enabled political institutions in Hong Kong to undergo comparatively rapid democratisation and development. This allowed Hong Kong to surpass Macau's level of democratic development. Administratively, as previously noted, Hong Kong was already far more developed in terms of effective institutional governance.

The Economy

The economic policies of colonial Hong Kong and Macau often 'mirrored' each other but for different reasons. In Hong Kong, the colonial government's economic policy centred upon the principle of 'positive non-interventionism', which many consider was a key to the development of Hong Kong's flourishing capitalist system. This policy resulted from the British Empire's aims that Hong Kong would serve as an imperial trading outpost focused, above all, on China. Non-interference with trading and related businesses was felt to be crucial policy norm to achieving these goals. In fact, Ngo argues that the entire colonial administration was designed to facilitate trade and that administering the colony and administering trade were 'two sides of the same coin' (Ngo, 1999b: 128). In addition, the fulfilment of this basic aim did not mean the British objected to local Chinese residents benefiting from the fruits of this scheme (Tsang, 2004: 197-198). The British colonial government's goals were mainly achieved through its low tax, free trade, free enterprise, low government spending and balanced budget policies.

The social elites

Chinese business elites also wielded immense sway over the Hong Kong government's economic policy. Due to the lack of democratic and representative political institutions, the Hong Kong government

¹⁴ The 1974 Portuguese Revolution, also known as the Carnation Revolution, was a left-leaning military coup that overthrew the authoritarian *Estado Novo* regime of the dictator Salazar, who had ruled Portugal since the 1920s. The first free elections were held in 1975 to amend the Portuguese Constitution and another election was held in 1976 to elect the first Constitutional government to replace the transitional government.

¹⁵ For more information see Wesley-Smith, 1998

adopted a policy of 'indirect rule' by selecting prominent members of the Chinese community to represent the Chinese viewpoint to enhance the administration's legitimacy in the eyes of the general populace, while giving the elites much the same power as elected representatives. This relationship was further enhanced through the fostering of close ties with local businessmen, identifying 'high flyers' among the younger civil servants and co-opting and actively lobbying them (Goodstadt, 2005: 34-36). The expatriate officials also viewed the social elite as an essential part of the colonial power structure by acting as a barrier between the officials and the 'menacing' Chinese majority. Many officials preferred the guidance of older, wealthier community leaders helping the government, rather than someone younger and poorer (Goodstadt, 2005: 36). The obvious manifestation of their influence was the tradition of economic non-interference coupled with low taxation, which, above all, benefitted the business professions and the rich in colonial Hong Kong. The maintaining of a balanced budget by the colonial government had come about from the historically longstanding need to avoid burdening the imperial treasury (Ngo, 1999b: 133).¹⁶

While the Portuguese administration in Macau also claimed to adopt a 'free-market' approach, the reasons for this varied from those of Hong Kong (Lam, 2002: 211-212). The Portuguese administration did adopt a policy of fiscal prudence coupled with low taxation similar to that applying in Hong Kong (Lam, 2002: 218). However, it was unlikely to have been a result of pressure from the Chinese business elites in Macau. Unlike Hong Kong, the Macau bureaucratic polity was secluded and channels of communication between the civil service and Chinese society few and ineffective (Lam, 1991: 323). This was exacerbated by the high numbers of 'non-permanent' and 'non-establishment' positions in the civil service as well as a notable presence of 'imported officials' from Portugal. This meant Macau civil servants changed frequently with 'imported officials' leaving as soon as their term was up, making it difficult for the policy-makers to connect with Chinese elites, let alone the general populace (Lam, 1991: 335, 340-342).

In addition, the pool of Chinese elites that accounted for the bulk of the Macau's government tax income was a lot smaller when compared to Hong Kong, with two Chinese families principally controlling the reins of Macau's finances. Both were surnamed Ho. Stanley Ho, for the last 38 years of colonial rule, enjoyed a monopoly over the gambling industry held by his company Sociedade de Turismo e Diversões de Macau (STDM) and historically contributed between 60 to 70 percent of the Macau government's annual revenue income, and around 25 percent of Macau's GDP. Ho Yin (father of the first CE of Macau, Edmund Ho) owned a vast empire of banks, hotels, restaurants and transport companies, while acting as 'China's unofficial representative in Macau' (Gunn, 1996: 135, 144-145). Lam suggests the low taxation and free-market orientation was a result of Macau's small economy, a consequence of its limited size, making it reliant on external capital investment (which was attracted by low taxes and free capital movement) to power its growth, and the success of the gambling revenue, which eliminated the need to find other sources of government income from non-gambling taxes (Lam, 2002: 218, 221-222).

Economic independence

Hong Kong was unique in the sense that it liberated itself financially from the UK without achieving formal independence. To begin with, London did not pay much interest to its colonies save for major crises or when fundamental British interests were at risk (Goodstadt, 2005: 50). Second, colonial officials, mainly consisting of career civil servants, had to be sensitive to local economic interests as they lacked political legitimacy. They could not antagonise such interests lest it destabilised British rule. Therefore, the Governor and senior officials were quite prepared to clash with London for the sake of preserving Hong Kong's economic independence (Goodstadt, 2005: 50). With the decline of the

¹⁶ Although it could be argued that in practice, 'balanced budget' actually meant a 'surplus budget' in the eyes of the HK government, given the typical yearly account surpluses the government enjoyed.

British Empire in the 1950s, Hong Kong was able to free its annual budget and fiscal oversight from London and establish itself as an independent entity in world trade forums (Goodstadt, 2005: 49). This later cumulated in Hong Kong joining APEC in 1991 and being a founding member of the WTO in 1995. The territory was allowed to fix its own exchange rate to sterling from 1967, effectively allowing the territory to manage its monetary affairs (Goodstadt, 2005: 61). The most notable exercise of Hong Kong's economic autonomy, however, was in 1968 when it played a role in undermining the Sterling Area, eventually leading to the collapse of sterling as a reserve currency (Goodstadt, 2005: 61-64).¹⁷ In 1983, Hong Kong linked the Hong Kong dollar to the US dollar in order to protect Hong Kong's own economic interests. The colonial government made it very clear during its discussions on leaving the sterling zone and adopting the US dollar that London would only have a consultative role and the ultimate decision with respect to monetary policy now rested with Hong Kong (Goodstadt, 2005: 62).¹⁸

In Macau on the other hand, due to the (Portuguese) politicised nature of the governor, the secretaries and principal officials as discussed above, the government could not afford to completely ignore the economic realities in Portugal. Portuguese influence was particularly felt with respect to Macau's tax system, which for much of its colonial history was derived from that of Portugal (Lam, 2002: 222).¹⁹ It was not until 1975 – when Portugal started to view Macau as a 'special area' and not as a colony – that the Macau government was given greater self-governing power over economic and financial activities (Lam, 2002: 223). Even with greater financial autonomy, Portugal still played a major role in Macau's economy, especially during the final years of its colonial rule, by signing on its colony's behalf, dozens of bilateral and multilateral agreements with other countries and international organisations. Portugal also vowed to defend Macau's commercial interests in the European Union (EU), on which Macau's merchandise trade relied heavily (Lam, 2002: 215, 225). In addition, Macau, like Hong Kong, was a founding member of the World Trade Organisation (WTO) in 1995.

The Legal Systems

One of the most significant differences between the two colonies was their legal systems. As a British colony, Hong Kong adopted the common law system, while Macau's legal system was based upon the civil law (Continental law) model of Portugal. Beyond the generic differences of these two models, however, there also existed structural differences and differences in the 'spirit' of the rule of law that further distinguished Hong Kong and Macau's legal system from each other.

The Hong Kong legal system

The establishment of the rule of law and judicial independence has been an instrumental component of the 156 years of British rule in Hong Kong and is seen by many as its greatest legacy (Tsang, 2001: 1). From Governor Davis' vision of 'property and person secure under the protection of equal laws' in the colony's founding days to Governor Patten's more recent image of people who 'swam, walked, ran and climbed over barbed wire [to] enjoy the peace and safety guaranteed by the rule of law', various Hong

¹⁷ In 1968, 99 percent of the territory's official reserve was held in sterling, accounting for 15 percent of the sterling areas total balance at around US \$5.8 billion. A large portion of these funds were held by Hong Kong Bank (HSBC) in London. HSBC was classified as 'non-resident' and could convert the sterling funds into US dollars. The colonial government and the Bank jointly threatened to sell off these sterling reserves unless the UK authorities provided insurance against devaluation. The threat worked and the UK promised to indemnify HK for up to 90 percent of their loss in case of future devaluations. This effectively thwarted the aim of the Sterling Area and was one of the reasons for its later demise from 1972 onwards to 1979, when the UK lifted all exchange controls.

¹⁸ The HK Dollar was initially pegged to the US dollar at a rate of HK\$7.8 = US\$1 but was later changed in May 2005 to a narrow band of HK\$7.75-7.85 = US\$1.

¹⁹ Macau's tax system is very similar to that of Portugal. The money received from licences, for example the gambling licence, is considered a form of direct taxation along with an industrial tax (similar to the business registration fee), complementary tax (profits tax), professional/salary tax, urban property tax, gift and inheritance tax and a property transfer tax (which was later replaced by a stamp duty). Indirect forms of taxation included a tourism tax, stamp duties, consumption tax, and export tax in the form of revenue from certificates of origin.

Kong Governors have all hailed the rule of law as the foundation of Hong Kong's stability, prosperity and 'way of life' (Munn, 2001: 20).²⁰ In the words of Governor Patten:

The bedrock of [Hong Kong's] way of life is the rule of law that guarantees fair and equitable treatment for everyone... an independent judiciary in which every individual can have confidence. Because no one is above the law. No politician, no business leader, no Governor... the law serves everyone (Ghai, 2009: 18).

As Christopher Munn points out, British justice for the Chinese population was at times intrusive, repressive and discriminatory. This is illustrated by the requirement that jurors spoke English, which excluded a majority of the population from serving on the jury (Ngo, 1999a: 9), and the passing of the European District Preservation Ordinance of 1888 and the Peak Preservation Ordinance of 1904, which excluded Chinese from certain parts of the territory (Tsang, 2004: 48-49).²¹

It seems, though, that the 'spirit' of the rule of law did have roots planted from the very beginning. In 1857, this was illustrated in the celebrated case of baker Cheong Ah-lum, who he was put on trial in the Supreme Court of Hong Kong for lacing his bread with arsenic and supplying it to British expatriates in an attempt, apparently, to destroy the Hong Kong British community during the Second Anglo-Chinese War.²² At trial, despite Attorney General Chisholm Anstey vehemently seeking a conviction; the anger of the expatriate community; the Governor's wife Lady Bowring being one of the most severely-affected victims; and victims of the poisoning making up the seven member jury, the evidence proved inconclusive of guilt. Chief Justice J W Hulme instructed the jury that despite their anger, 'hanging the wrong man will not further the ends of justice' and the jury acquitted Cheong of the crime (Tsang, 2004: 53). This demonstrates that despite the racial discrimination, that sadly, was an inescapable part of colonial life, the British courts, when put to the test, did manage to embody the rule of law as we now understand it. As Leo Goodstadt explains, the reason the British were so keen on developing the rule of law was that it provided legitimacy to the colonial administration as a substitute for political reform. Hence, in 1982, then Hong Kong Attorney General John Griffiths claimed 'Britain's great gift to the world was not democracy' but 'the greater contribution has been the transplantation of... the Rule of Law' (Goodstadt, 2001: 181).

The Macau legal system

In Macau, the operation of the law was and remains structurally and procedurally different from that of Hong Kong due to the nature of the civil law system applying there. First, there were three branches of courts with separate jurisdictions (as opposed to Hong Kong courts where there is only one branch²³): the Court of Law of Macau (*Tribunal da Momarca de Macau*), which operates as a regular court; the Administrative Court (*Tribunal Administrativo de Macau*), which adjudicates on decisions related to municipalities and administrative authorities on administrative, fiscal, accounts and audit matters;

²⁰ Sir John Francis Davis was the second Governor of Hong Kong from 1844 to 1848.

²¹ The European District Preservation Ordinance of 1888 required certain districts to only build European-styled houses and the Peak Preservation Ordinance of 1904 specifically reserved the Peak as a residential area for expatriates only.

²² The Second Anglo-Chinese War was also known as the Second Opium War. Cheong Ah-lum was also found to have fled to Macau with his family the night before poisoned bread was distributed but was handed back to the British by the Portuguese authorities. Despite Attorney General Anstey preferring to have Cheong tried in a 'drumhead court-martial', which in special circumstances such as war could be convened to hear urgent charges of offences committed by civilians, Governor Bowring ultimately decided a trial by a jury was more appropriate. For more details of this case, see Tso, 2011. It should also be noted that British military personnel stationed in Hong Kong were subject to Court Martial justice for offences against military law.

²³ Excluding the non-court tribunals dealing with special cases, for example labour disputes and small claims, there is only one judicial branch in Hong Kong, which is divided into different levels of courts based on the nature of the case (for example, the amount sought in damages, the maximum sentence that can be given).

and the Court Martial (*Tribunal Militar de Macau*), which is responsible for trials involving military and similar offences (Afonso and Pereira, 1991: 293-294).²⁴

The courts in Macau also have greater independent investigative powers than courts in Hong Kong. For example within the Court of Law, there is the Court of Criminal Instruction headed by an examining judge for conducting the pre-trial inquiry. This judge is vested with wide powers to collect evidence with the support of the Judiciary Police, to validate and maintain the detention of suspects, to determine whether to release accused persons and even to dismiss the indictment if the judge believes that there is insufficient evidence to prove guilt (Afonso and Pereira, 1991: 293-294).

However, unlike their Hong Kong counterparts, Macau courts are bound by the will of the legislature and interpret the wording of legislation using parliamentary history (*travaux préparatoires*) to ascertain the legislators' intention rather than the traditional English approach, which focuses on the aims and values conveyed through the wording of each statute (Menezes, 2009: 652). Furthermore, the jurisdiction of the Macau colonial courts was limited in certain matters. Decisions of Macau courts at first instance were appellable only to superior Portuguese courts with the Lisbon Court of Appeal (*Tribunal da Relação de Lisboa*) acting as the court of second instance and the Portuguese Supreme Court of Justice (*Supremo Tribunal de Justiça*) acting as the last instance court (Afonso and Pereira, 1991: 294). In addition, all civil and criminal actions involving the Macau Governor or his secretaries could only be pursued in the Court of Law of Lisbon (*Tribunal da Comarca de Lisboa*) and all civil cases and criminal charges relating to the offices of the judiciary and public prosecution could only be dealt with in the Lisbon Court of Appeal. All appeals against the acts of the Legislative Assembly or the Governor and his secretaries' lay in the sole jurisdiction of the Portuguese Supreme Administrative Court (*Supremo Tribunal Administrativo*) in Lisbon (Afonso and Pereira, 1991: 295).

These limitations meant that in colonial Macau, the Governor, his secretaries, the public prosecution, the Legislative Assembly and the judiciary were not exactly 'equal' before the law, if one uses Governor Patten's standard for the Hong Kong legal system, because the law treated them separately from ordinary Macau citizen by requiring civil and criminal acts against them be settled in Lisbon. It was not until 1989 that the Portuguese government, pursuant to the Sino-Portuguese Joint Declaration in preparation for the Handover, undertook to revise these limitations and set up higher courts of appeal in Macau (Afonso and Pereira, 1991: 295).²⁵

By contrast, Hong Kong already had a High Court of Justice and a Court of Appeal with unlimited civil and criminal jurisdiction well prior to 1997 by virtue of the Supreme Courts Ordinance 1975 – albeit with the Privy Council in London still serving as the court of last resort (Wesley-Smith, 1998: 69).²⁶

Beyond their differences, we also see that Macau's legal system faced a greater burden than Hong Kong in the run up to its Handover. The freshly-created higher courts lacked time to become fully accustomed to performing their new roles.²⁷ In addition, the lack of bilingual proficiency made it

²⁴ Since the 1999 Handover, the Court Martial (*Tribunal Militar de Macau*) has been abolished, while the remaining two branches are still in existence.

²⁵ It should be noted that British jurist AV Dicey, who had a profound influence on the development of British constitutional law, viewed separate courts and legal codes for government officials as one of the fundamental flaws of Continental law. For more information, see 'Chapter XII: Rule of Law Compared With Droit Administratif 1' in Dicey, 1915

²⁶ Before the Handover, the full court list in Hong Kong consisted of the District Court, the Supreme Court (consisting of the High Court of Justice and the Court of Appeal) and the Privy Council. After the 1997 Handover, the full court list consisted of the District Court, the High Court (consisting of the Court of First Instance and the Court of Appeal), and the newly-created Court of Final Appeal (CFA) based in Hong Kong that took over the Privy Council's functions.

²⁷ Prior to the 1999 Handover, the full court list in Macau consisted of Superior Council of Magistrates, Superior Council of Public Prosecutors, Court of Justice of Macao, Criminal Preliminary Hearing Court of Macao and Administrative Court of Macao. The higher courts located in Lisbon included the Constitutional Court of the Republic of Portugal, Supreme Administrative Court of the Republic of Portugal, Audit Court of the Republic of Portugal and Supreme Court of Justice of the Republic of Portugal. After the 1999 Handover, the full court list consisted of the Judiciary Council of Macao, Criminal

difficult to translate legal codes written only in Portuguese (Afonso and Pereira, 1991: 296-297). Although Hong Kong faced similar issues, it was arguably less problematic with higher courts already in existence and Chief Justice TL Yang enthusiastically initiating reforms to face the challenges of Hong Kong's Handover after taking office in 1987, including steps to introduce the Chinese language into local courts.

Social Aspects

Citizens in colonial Hong Kong and Macau were generally politically apathetic, partly a consequence of their adoption of the Confucian stance of deferring to authority and partly due to their 'refugee mentality' of viewing the territories as a 'borrowed place with borrowed time'. Despite this, the social culture in these two colonies varied greatly, as seen in their level of corruption, the role played by the media and development of political organisations (Lo, 1995a: 255).

Good governance and corruption

While the formation of the Independent Commission Against Corruption (ICAC) established in 1974 under Sir Jack Cater by Governor MacLehose is generally credited with attacking and largely eradicating public bureaucratic corruption within Hong Kong, especially amongst the Hong Kong Police Force, it is interesting to note the level of corruption before its formation. While petty corruption was common amongst the lower orders of the government, it was remarkable that, with a few exceptions, the higher administrative officers of the colony did not succumb to bribery despite the numerous opportunities present before the 1970s (Tsang, 2007: 110). This was largely due to the colonial practice of selecting administrative officers with the aim of building a 'meritocracy from...gentlemen of professional background'. The administrative officers were generally picked from 'a solid, though not rich, upper middle-class family' who went to one of the older universities and had the 'potential to become a leader...who could safely be sent to...wherever and could be relied upon to function with the minimum supervision and to act sensibly' (Tsang, 2007: 110).

This meant that most administrative officers who had dedicated their lives to becoming 'gentlemen-bureaucrats' saw corruption as below their level and were reluctant to engage in it. This resistance was further buttressed by adequate remuneration packages containing not only a good salary but also good living quarters, long leaves with pay, health benefits for them and their families as well as education provisions for their children, and a generous pension. The swelling of the administrative ranks by Chinese officers did nothing to change this, as no Chinese administrative officer would be promoted unless they embraced this *esprit de corps* (Tsang, 2007: 110-112).

As there were few vested interests for the administrative officers including most of the upper echelons of the police force, many of them were more than happy to co-operate with the ICAC to help root out corruption in their departments and 'do the right thing' for the government and the people (Tsang, 2007: 112-113).²⁸

In Macau, however, corruption was not only a 'fact of life' but had become a 'way of life'. In fact, Macau itself was founded on corruption with the Portuguese bribing local Chinese officials in the early days in order to preserve their hold on the colony (Chan, 2003: 495). While the colonial administration in Hong Kong viewed corruption as a threat to its legitimacy and started to actively combat it in the 1970s through the ICAC, corruption was so serious in Macau that it was politically risky to address it. Senior bureaucrats not only colluded with unethical members of the bourgeoisie but also with powerful

Preliminary Hearing Court, Court of First Instance, Court of Second Instance (Court of Appeal), Audit Court, Administrative Court and the Court of Final Appeal (CFA).

²⁸ An infamous exception was Peter F Godber, Kowloon's Deputy District Commissioner of Police before being caught in a bribery scandal in 1973, when it was discovered that he had amassed over HK\$ 4.3 million from bribe money. This scandal was one of the reasons leading to the creation of the ICAC. Although Godber managed to escape to the UK, in 1975 he was extradited to HK to face trial for corruption and was subsequently convicted and sentenced to 4 years imprisonment.

members of the triads, flush with money derived from a flourishing sex trade and the lucrative gambling industry (Lo, 1995a: 258).

The Portuguese colonial administrators lacked the culture of striving for 'good governance' seen in their British counterparts and their other colonies were also mired in corruption. The corruption problem was so serious that one legislator referred to Macau as like a 'rotten building' that would collapse if even a brick was removed from it (Lo, 1995a: 258). Therefore, in 1998 when PRC officials announced the deployment of the People's Liberation Army (PLA) in Macau, despite Lisbon's strong disapproval, it was welcomed by the Macau population, who felt the PLA was more reliable in combating the crime wave that was then running rampant in Macau (Chan, 2003: 513).

The media

Having a free press is not only a pre-condition for genuine, modern rule of law but the media also plays a crucial role in moulding the social fabric and shaping public opinion in any given polity. In Hong Kong, by 1993 there were 77 registered papers and 619 periodicals catering to 6.3 million people, although most were considered tabloids or specialised in horse racing information. By 1997, there were still around 20 'true newspapers' published daily representing many different views. This meant Hong Kong had one of the highest per capita concentration of papers worldwide (Cullen, 2001: 158).

Concerns about self-censorship appeared more evident in the Chinese media (for example, journalists and editors working for the pro-Beijing papers *Wen Wei Bao* and *Ta Kung Pao* were disciplined and even sacked for being critical of the PRC over the 1989 Tiananmen incident), there were also signs that the problem also existed in the English media. Hong Kong journalists working on the Mainland were, for example, intimidated by the jailing of *Ming Pao* reporter Xi Yang in 1994 for stealing 'state secrets'. Despite changes in ownership, especially before the Handover, it appears that the diversity, and effectiveness in disseminating information, of the media and press were not seriously halted. The Hong Kong population remained wellinformed during the later colonial era and attracted to bold investigative reporting with new newspapers continuing to emerge (Cullen, 2001: 159-161, 169). Encouraging signs included the establishment of *Apple Daily* in 1995. Despite the owner Jimmy Lai being a PRC immigrant, the paper became noted for its thorough coverage and independent stance, especially towards events in the PRC (Cullen, 2001: 161). It has been suggested that the Hong Kong government viewed tolerance of a vibrant 'free press' as conducive to their colonial rule, as critical views were often countered by opinions supporting the government (Lo, 1995a: 259). By contrast, the media in Macau was less plural than in Hong Kong. The Chinese media in Macau was dominated by pro-China forces and newspapers such as the *Macau Daily News* were often dubbed 'the mouthpiece of Beijing' (Lo, 1995a: 258). Moreover, the Chinese media was generally considered more supportive, and milder in its criticism, of the Macau government compared to the local Portuguese media, which was noted for its critical attacks on colonial regime policies and fondness for exposing government scandals (Lo, 1995a: 259). These factors may explain why the Macau government was reluctant to attempt the politically difficult task of encouraging a more pluralistic media. It appeared that all media was critical of the government from the beginning, and it was willing to tolerate a pro-China Chinese media provided it was less critical of the administration than its Portuguese counterpart.

Political organisations

The 1966 and 1967 riots had lasting reverberations for political organisations in both Hong Kong and Macau. The 1966 Hong Kong riot started off as peaceful demonstrations against a fare increase on the Star Ferry but soon escalated and resulted in a heavy government crackdown. The residual anger was quickly seized upon by pro-Communist/pro-Beijing forces in Hong Kong, inspired by the Cultural Revolution, and large demonstrations against colonial rule in 1967 resulted. Meanwhile, in December 1966, similar protests also sponsored by pro-Communist leftists, erupted in Macau but with very different consequences.

In Hong Kong, the British response was two-pronged. First, the authorities adopted a high-handed policy of destroying the pro-Communist forces and underground networks that connected them to the Chinese Communist Party (CCP) through crackdowns. Second, they initiated reforms such as labour and wage protection, creating the City District Officer Scheme and promoting Cantonese as an official language to help prevent any groups from taking advantage of the power vacuum resulting from the destruction of the pro-Communist forces in the riots (Lo, 1995a: 256).

In Macau, on the other hand, the colonial government was unable to handle the riots and their administrative capacity was greatly undermined. The Macau government had to apologise to the PRC for the death of some Macau citizens during clashes with the Macau police and even yielded to the PRC's request of banning pro-Nationalist (that is, Kuomintang) organisations in the territory (Lo, 1995a: 256). The pro-China/pro-Beijing forces were also able to take over the power vacuum left behind by the Portuguese colonial government resulting from the riots and the neighbourhood associations and working-class unions that they were affiliated with began performing governmental functions such as promoting the 'clean Macau campaign' that the Macau government had failed to achieve. These pro-China forces also played a vital role as a channel of communication between the Portuguese administrators and Chinese officials during the transitional period (Lo, 1995a: 256-257).

Reaction to the Handover

The social reaction to their respective Handovers also differed greatly. In Hong Kong, the political uncertainty over the tense Sino-British relations and the shocking events in and around Tiananmen Square in 1989 led to a crisis of confidence, evidenced by the mass exodus with long lines of local Chinese citizens standing overnight outside foreign consulates to apply for immigration.²⁹ In Macau, however, the return to China was received with greater acceptance. The perceived incompetence and corruption of the Portuguese colonial administrative coupled with high levels of crime, a relatively lower level of education, the lower global sensitivity of the Macanese, the cordial Sino-Portuguese relations, and the waves of immigration into Macau by mainland Chinese immigrants making up 35 per cent of the population meant that the retrocession was more warmly embraced than in Hong Kong (Chan, 2003: 515-516). The conferral of full Portuguese citizenship, along with Portuguese passports, to qualified Macau citizens also did much to assuage their fears (Chan, 2003: 502).³⁰ This may also explain why, despite public outbursts and mass demonstrations over the events on 4 June 1989 in Macau, the response there was comparatively less forceful than the Hong Kong public's response (Chan, 2003: 515).

Autonomy in the Hong Kong and Macau Basic Laws

In determining the norms associated with autonomy, I will make use of Professors Hannum and Lillich's article, 'The Concept of Autonomy in International Law' (Hannum and Lillich, 1981), in which they highlight the common aspects of autonomous entities. I then use the precepts set in that article to test the degree to which the HKBL and MBL (in operation) have, or have not, conferred a high degree of autonomy on the HKSAR and MSAR.

²⁹ While the British colonial administration did provide some Hong Kong residents with British citizenship and British passports, it was mostly limited to higher ranking members of the civil service. Instead, most Hong Kong residents held the British National (Overseas) (BNO) passports but these did little to calm the local population, as the BNO passports do not confer the right of abode anywhere outside Hong Kong.

³⁰ By virtue of Portugal's membership in the EU, the Portuguese passports had the added advantage of granting the right of abode in not only Portugal but also other EU member states.

Defining Autonomy

Hannum and Lillich concluded that ‘an essential element in the achievement of self-governing status’ is for the ‘freely and democratically expressed wishes of the people’ to be respected (Hannum and Lillich, 1981: 249). To achieve this, they determined that the minimum governmental powers an autonomous region need to possess are:

- a locally and popularly elected body with independent legislative power, although this power may be limited by a constitutional document;
- a locally-chosen chief executive possibly subject to approval from the autonomous government and who is responsible to the local electorate or legislature rather than the central authorities (Hannum and Lillich, 1981: 221);
- an independent local judiciary although ultimate judicial authority can be vested in courts responsible to the central authority (Hannum and Lillich, 1981: 228-229, 231);
- provisions to protect certain customs, practices and societal structures from central interference (Hannum and Lillich, 1981: 246); and
- specific provisions such that defence, foreign relations, international co-operations and agreements, taxation, regulation of currency and regulation of the banking system are the responsibility of the central government (Hannum and Lillich, 1981: 221, 228-232, 244, 246, 250, 251).³¹

The Hong Kong Basic Law and Macau Basic Law

While minimal standards of financial and judicial autonomy are generally met by the HKBL and the MBL, the political provisions in the Basic Laws fall short of the requirements set above. The insufficiency of the Hong Kong and Macau Basic Laws compared to the minimal political standard stem first from a legislature that is not popularly or fairly elected by the electorate. According to Annex II of the HKBL, which stipulates the prescribed method of formation referred to in art 68(3),³² at least half of Legco must consist of functional constituencies (FCs), who are not elected by universal and equal suffrage but are rather a limited group of people (usually professionals such as lawyers, doctors, accountants and business people) or business corporations in their specific functional constituencies.³³ As for the Legislative Assembly of Macau, Annex II of the MBL (which also stipulates the election method required by art 68)³⁴ states that ten of the 27 legislative seats are elected from FCs and seven legislative seats are filled by appointments of the Macau CE.

The Hong Kong CE and Macau CE are locally-chosen citizens as stipulated in HKBL art 44 and MBL art 46 respectively. Under HKBL art 43/ MBL art 45 however, each CE is not solely responsible to the local electorate or the legislature but is instead dually ‘accountable to the Central People’s Government and the Hong Kong/Macau Special Administrative Region.’³⁵ HKBL art 45 and MBL art 47 go further and state that the CEs must be ‘appointed by the Central Government’,³⁶ compromising the CE’s actual independence from the central authorities.

While arts 45 and 68 of the HKBL respectively state that the ‘ultimate aim’ is the election of the CE and Legislative Council by universal suffrage, in the corresponding articles of the MBL (arts 47 and 68 respectively) this ‘ultimate aim’ is missing. This might entail a lower level of political autonomy for Macau, at least insofar as the MBL is concerned, because the election by universal suffrage of the CE and legislature are necessary pre-requisites for satisfying Hannum and Lillich’s standard. While both

³¹ Although the imposition of local taxes is generally deemed within the jurisdiction of the autonomous territory.

³² The Basic Law of Hong Kong art 68

³³ Even with the pending enactment of the Hong Kong 2012 political reform package, the ratio of FCs to their popularly-elected geographical constituency legislators remains the same, save that the five new FC seats will be elected by (potentially around 3.2 million) voters who previously did not qualify to vote in any of the established FCs.

³⁴ The Basic Law of Macau art 68.

³⁵ The Basic Law of Hong Kong art 43, The Basic Law of Macau art 45.

³⁶ The Basic Law of Hong Kong art 45, The Basic Law of Macau art 47.

Hong Kong and Macau have yet to accomplished this, it is, at a minimum, eventually constitutionally guaranteed in Hong Kong's case (Lim, 2007: 741-750).³⁷

Despite the setback in the autonomous nature of the executive and legislative branches, autonomy of the judiciary and what might be termed international autonomy (especially relating to the economy) far exceeds the minimum required standards. In fact, such autonomy has been described as one of the 'most distinctive features' of the Basic Laws (Cardinal, 2009: 236-327). HKBL arts 19 and 85/ MBL arts 19 and 83 both echo the sentiment that the judiciary in both Hong Kong and Macau will be given 'independent judicial power'³⁸ and shall be 'free from any interference'.³⁹ However, Hong Kong and Macau differ radically in this respect from the norm applied in the PRC in respect to other autonomous regions in that they are vested with the 'power of final adjudication'⁴⁰ to be exercised by the Hong Kong Court of Final Appeal (HKCFA) and Macau Court of Final Appeal (MCFA) respectively. In other autonomous regions, the highest judicial body of the central government would be the one exercising this power.

The arrangements that defence⁴¹ and foreign affairs⁴² be conceded to the central government is within the normal standard, while allowing Hong Kong and Macau to participate in international organisations⁴³ goes beyond the minimum required by the Hannum Lillich model. The SARs are also unique in that they are responsible for their own fiscal policies such that they each maintain a balanced budget,⁴⁴ an independent taxation system that pursues the previous low tax policy⁴⁵ and their own monetary regulations over their own currency.⁴⁶ Therefore, from the express provisions of the Basic Law, we can see that Hong Kong and Macau, while enjoying less autonomy politically, enjoy great autonomy in terms of their economies and their legal systems, which notably exceed the minimum standards set out.

It is also worth noting that, while the HKBL and MBL are similarly worded, there are also significant dissimilarities especially on the emphasis towards culture and the law. In the MBL, there is a stronger focus on the protection of cultural and social rights, providing protection for human dignity,⁴⁷ the right to obtain travel documents,⁴⁸ freedom to engage in education,⁴⁹ protection for the rights and interests of women⁵⁰ and protection for the interests and culture of residents of Portuguese descent,⁵¹ all absent in the HKBL. In contrast, the HKBL specifically provides protections against 'arbitrary or unlawful deprivation of the life,'⁵² right to a fair trial,⁵³ trial by jury⁵⁴ and right to confidential legal advice,⁵⁵ all rights associated with maintaining the rule of law.⁵⁶

³⁷ As Lim argues, 'ultimate' means 'eventual' and universal suffrage 'must' be granted. It does not give a license to defer universal suffrage indefinitely.

³⁸ The Basic Law of Hong Kong art 19, The Basic Law of Macau art 19.

³⁹ The Basic Law of Hong Kong art 85, The Basic Law of Macau art 83.

⁴⁰ The Basic Law of Hong Kong art 82, The Basic Law of Macau art 84.

⁴¹ The Basic Law of Hong Kong art 14, The Basic Law of Macau art 14.

⁴² The Basic Law of Hong Kong art 13, The Basic Law of Macau art 13.

⁴³ The Basic Law of Hong Kong art 152, The Basic Law of Macau art 137.

⁴⁴ The Basic Law of Hong Kong art 107, The Basic Law of Macau art 105.

⁴⁵ The Basic Law of Hong Kong art 108, The Basic Law of Macau art 106.

⁴⁶ The Basic Law of Hong Kong arts 111 and 112, The Basic Law of Macau arts 108 and 109.

⁴⁷ The Basic Law of Macau art 30.

⁴⁸ The Basic Law of Macau art 33.

⁴⁹ The Basic Law of Macau art 37.

⁵⁰ The Basic Law of Macau art 38.

⁵¹ The Basic Law of Macau art 42.

⁵² The Basic Law of Hong Kong art 28.

⁵³ The Basic Law of Hong Kong art 87.

⁵⁴ The Basic Law of Hong Kong art 86.

⁵⁵ The Basic Law of Hong Kong art 35.

⁵⁶ For a full list comparing the textual differences between the HKBL and MBL, please refer to: Young, 2009: 686-687.

The various textual differences (as well as similarities) discussed here not only highlight the degrees of autonomy enjoyed by the HKSAR and MSAR but, as discussed below, have also had a substantive effect in shaping the development of the two SARs post-Handover.

The Colonial Legacy and Fundamental Political and Constitutional Norms

The Basic Laws as 'Freezing Devices'

The most notable feature of the autonomous models of HKSAR and MSAR as stipulated by their Basic Laws is how they are so closely based on their colonial models. The lack of political development in the HKBL and MBL is arguably a continuation of the 'executive-led' government that has always been in place in colonial Macau and that was also present in colonial Hong Kong before the Patten reforms. By granting vast powers to the CEs of the HKSAR and MSAR, the HKBL and MBL has in effect created a strong and powerful executive, which was the 'political structure during colonial times' (Chen, 2005: 9-10).⁵⁷

The economic norms and freedoms enjoyed by the SARs under their respective Basic Laws (such as the right to regulate its own currency, membership of some international forums, passing of a balanced budget and independent system of low taxation) were freedoms and practices that were introduced into Hong Kong and Macau by their colonial administrations and merely carried over post-Handover.⁵⁸

The judicial system remains relatively unchanged in Hong Kong, with rules in common law and equity still being applied to the territory,⁵⁹ with the exception of final appeals heard by the HKCFA instead of the Privy Council in London. Even so, art 92 of the HKBL allows members of the judiciary to be recruited from other common law jurisdictions.⁶⁰ For Macau, the changes were more drastic with the creation of the higher courts to try cases that were previously the jurisdiction of the Lisbon courts. Nevertheless, laws, decrees, administrative regulations and other normative acts of the civil law system previously in force in colonial Macau were maintained.⁶¹

The HKBL and MBL tend to reflect the social conditions and attitudes within colonial Hong Kong and Macau. As Portuguese culture allowed intermarriage (indeed encouraged it), there was a sizeable population of (mixed-race) Macanese in colonial Macau (Zepp, 1991: 159-161).⁶² In addition, the Portuguese culture remained strong and distinct from Chinese culture in Macau (Zepp, 1991: 162). Thus the Portuguese negotiators focus on protecting the rights of Portuguese and Macanese residents was reflected in the MBL, which lists as a fundamental right protecting the interests and culture of residents of Portuguese descent and having respect for their customs and cultural traditions.⁶³ There was comparatively less intermarriage in Hong Kong. Instead the focus of the HKBL tended to be on rights relating to the rule of law, which was a cherished principle in colonial Hong Kong.

One may therefore see that the HKBL and the MBL as 'freezing' or 'refrigerating' devices for their respective SARs. The freedoms and autonomy enjoyed under the Basic Laws were established long before the 1997 and 1999 Handovers. By attempting to 'freeze' the Hong Kong and Macau political societies as they were at the moment of their respective Handovers, the Basic Laws intended to ensure

⁵⁷ Chen believes that arts 43, 48-51, 60, 62, 74 and 76 of the HKBL (which corresponds to arts 45, 50-53, 62, 64, 75 and 78 of the MBL) have the effect of making the political structure an "executive-led" system'.

⁵⁸ Although it should be noted that in Hong Kong's case, the economic freedoms and practices were largely achieved as result of British imperial policies or British Hong Kong's struggle for autonomy achieved under the British colonial administration. For Macau, some freedoms were actually introduced by the Portuguese colonial administration pursuant to the decolonisation policy after the 1974 Portuguese Revolution.

⁵⁹ The Basic Law of Hong Kong art 8.

⁶⁰ The Basic Law of Hong Kong art 92.

⁶¹ The Basic Law of Macau art 8.

⁶² Macanese refers to racially mixed people with both Portuguese and Chinese heritage.

⁶³ The Basic Law of Macau art 41.

the political, economical, legal and social aspects of Hong Kong and Macau would remain largely unchanged from their colonial model for (possibly) the next 50 years (or, at least, would change only gradually). As Professor Yash Ghai explains, the creation of a liberal economy but a restrictive political order based on a 'truncated version of legality' greatly appealed to the PRC. Given that the colonial models had achieved a similar result, the PRC was probably content with leaving things as they were when formulating the Basic Laws (Ghai, 1999: 498).⁶⁴

While many of the provisions in the HKBL and MBL captured and reflected the fundamental norms and values present in the Hong Kong and Macau societies at the time of drafting, this does not mean their goal is to keep both cities at a standstill. In fact, the principle of gradual and orderly transition towards democratisation incorporated into certain provisions within the HKBL (though notably absent in the MBL) implies the opposite is true. Any scope for development anticipated by the Basic Laws, however, has been significantly compromised by contemporary political realities which have slowed down, if not halted, much of the progress anticipated in the Basic Laws.⁶⁵ This in turn has served to only further reinforce the 'freezing' effect observed in post-Handover Hong Kong and Macau.

A 'Correct Road' to 'One Country Two Systems' (OCTS)?

On 20 December 2009, during a visit to the MSAR in celebration of the 10th anniversary of Macau's Handover, President Hu Jintao praised Macau for its successful implementation of the OCTS model and declared it was sticking to the 'correct road' (Xinhua, 2009). This was interpreted by some in Hong Kong as drawing an implicit comparison between the HKSAR and MSAR, with Beijing favouring the MSAR's interpretation of OCTS to the HKSAR's. There was also debate as to whether these comments underlined Beijing's desire for the HKSAR to follow the MSAR's example in enacting the controversial art 23 legislation on anti-subversion (Lee, 2009).

I will first explain the reasons why Beijing might see Macau's post-Handover development as more compatible with its vision for OCTS, as compared to developments in Hong Kong, and seek to account for these in light of the fundamental political and constitutional norms resulting from the British and Portuguese colonial legacies. I then argue that a 'balanced' view should be adopted when comparing the HKSAR and MSAR and that appreciation must be given to the unique historical differences between Hong Kong and Macau when any comparison is made.

Reasons why Beijing may prefer Macau to Hong Kong: the political model

The reasons why Beijing might prefer Macau's implementation are manifold. To begin with, the PRC political model is more closely related to the Portuguese colonial model for Macau, which carried over to the MSAR, compared with the British colonial model on which the HKSAR is based. In the PRC, there is no 'separation of powers' doctrine between the executive, legislature and judiciary but rather a 'principle of unity in deliberation and execution' (Chen, 2004: 51). Although the National People's Congress (NPC) is constitutionally the 'supreme organ of state power', the real administration of the NPC's decisions is actually left to the Central People's Government (CPG),⁶⁶ which is the 'executive body with the highest organ of state power' (Chen, 2004: 50-51).⁶⁷ Therefore, there is a unity of powers, with the executive dominating over, and enjoying close relations with, the legislature.

⁶⁴ For more discussions on this topic, please refer to: Tso, 2011.

⁶⁵ For example, HKBL Annex II only provides the voting methods for the formation of the second and third Legco and allows for amendment to such methods after 2007 (MBL Annex II allows for amendment after 2009). However, the failure of the Hong Kong government and the pan-democratic camp to reach a compromise on the 2005 political reform package meant that the fourth Legco had to be constituted using the same method stipulated in HKBL Annex II as applying to the third Legco.

⁶⁶ The Central People's Government is synonymous with the State Council according to art 85 of the 1982 Constitution of the People's Republic of China.

⁶⁷ The NPC only meets annually and when it is not in session, its functions are taken up by the Standing Committee of the National People's Congress (NPCSC) which meets every two months.

In Macau, the executive enjoys strong control over the Legislative Assembly as seven of the twenty-nine legislators are directly appointed by the Macau CE,⁶⁸ ensuring their co-operation. In addition, the tradition of maintaining a harmonious relationship between the executive and the legislature practiced by all Governors of Macau, after Governor Almedia e Costa, has also carried over post-Handover. By contrast, all seats in the Hong Kong Legco are directly elected by GCs or indirectly elected by FCs. This means the Hong Kong CE has no direct institutional support in Legco and even pro-establishment legislators occasionally challenge the executive's authority (Cheung, 2007: 25).⁶⁹ In addition, the HKCFA in *Lau Cheong & Another v HKSAR*⁷⁰ clearly held that the '[Hong Kong] Basic Law enshrines the principle that there must be a separation of powers as between the executive, the legislature and the judiciary.'⁷¹

Beijing preference for Civil Law as opposed to Common Law

Beijing is also more familiar with the approach taken to interpretation by the Macau courts, as both Macau and the PRC follow the European civil law tradition, as opposed to the common law approach to interpretation adopted by the Hong Kong courts.

In *HKSAR v Ma Wai-kwan David*,⁷² Mortimer VP expressed his belief that Chinese and common law principles were converging and there were no 'inherent difficulties arising between the two traditions' (Ghai, 2009: 30) and Nazareth VP stated that the 'purposive approach' to interpretation applied by the Hong Kong courts also existed in the PRC (Ghai, 2009: 30). It is nevertheless, questionable whether these views still hold true in light of subsequent case developments and the fierce criticisms of *Ma*, especially by the HKCFA in *Ng Ka Ling v Director of Immigration*⁷³ where it expressly rejected the *Ma* approach. In *Ng Ka Ling* and subsequently in *Chan Kam Ng v Director of Immigration*,⁷⁴ the HKCFA seemed to apply a common law emphasis to 'purposive approach' by following common law principles in adjudicating (Ghai, 2009: 30-31). The HKCFA's position was made clear in *Director of Immigration v Chong Fung Yuen*,⁷⁵ where it held that the 'purposive approach' was based on the principles of common law such that legislative intent should only be gathered from the language of the HKBL in light of the context and purpose. The task of the court was not to 'ascertain the intent of the law maker' but rather to 'ascertain what was meant by the language used and to give effect to the legislative intent as expressed in the language' (Ghai, 2009: 32). Therefore, the HKCFA was able to exclude the 'wayward opinions' of the Preparatory Committee that were subject to political considerations and notions of *travaux preparatoires*, as the deliberations on the drafting of the HKBL were closely guarded by the PRC, and instead sought to emphasis common law techniques of interpretation in order to maintain the integrity of the Hong Kong legal system (Ghai, 2009: 32-34).⁷⁶ This common law approach by the HKCFA has, in the words of Sir Anthony Mason NPJ, 'intensified tensions inherent in the law of "One Country, Two Systems"' (Mason, 2006:16-17). According to

⁶⁸ The Basic Law of Macau Annex II

⁶⁹ A recent example of this is over the 2011 Budget. Despite the government's initial tough stance that it would not directly handout HK\$6000 to Hong Kong citizens and instead put such an amount into the Mandatory Provident Fund (accessible to pensioners only after they reach 65 years of age) to avoid creating inflation, after a meeting with the pro-establishment legislators who were in support of direct handouts and held over half the seats in Legco, the government quickly backtracked its position in favour of direct handouts of the HK\$6000.

⁷⁰ [2002] HKLRD 612.

⁷¹ Ibid at 641.

⁷² [1997] HKLRD 761.

⁷³ [1999] 1 HKLRD 315.

⁷⁴ [1999] 1 HKLRD 304 - per Bokhary PJ.

⁷⁵ [2001] 2 HKLRD 533.

⁷⁶ Attempts to introduce '*travaux preparatoires* in the conventional sense' were also rejected at the Court of First Instance per Keith J in *Cheung Lai Wah (An Infant) v Director of Immigration* [1997] 3 HKC 63 and by the Court of Appeal per Chan CJHC in *Chan Kam Nga v Director of Immigration* [1998] 1 HKLRD 752

Professor Yash Ghai this was partly because Beijing viewed the common law as ‘something of a mystery [which] seems indeed like a conspiracy’ (Ghai, 2009: 49).

There has also been no major conflict between the MCFA and the NPCSC to date. The ‘right of abode’ controversy in Hong Kong saw the HKSAR government turning to the NPCSC in order to invalidate aspects of the HKCFA’s decision in *Ng Ka Ling* by way of re-interpretation, triggering a constitutional crisis which led to the undermining of Hong Kong’s much-cherished judicial independence (Chan, 2003: 503). Macau, however, was spared any similar pain most of all, because the MBL was unambiguous in spelling out the criteria as to who qualified for the right of abode, which clearly excluded the people seeking the right of abode in Hong Kong (Chan, 2003: 503).⁷⁷ In addition, after the Handover, the MCFA has placed significant restrictions on the use of constitutional reviews and the writ of *amparo* against the government (Cardinal, 2009: 260-264).⁷⁸ This means that, more than ever, resolution of political and social issues in Macau will likely depend on the political process and the MSAR government, rather than the Macau courts. This is also more in line with the PRC system. Beijing prefers to deal with issues as political, rather than as legal, matters, because the outcome of the latter is a lot more uncertain (Ghai, 2009: 49). Furthermore, in the only written court ruling on the interpretation of the MBL by Macau courts, the judge appeared to suggest that the MBL can be subverted by the PRC Constitution. In the Court of Second Instance (equivalent to the Court of Appeal), Justice Dias Azedo stated that:

...the Basic Law being a law of the PRC’s legal order enacted in ‘accordance with the Constitution of the People’s Republic of China’...ought to be interpreted in accordance with the aforesaid Constitution and remainder of its legal order, notwithstanding the specificities stemming from the ‘principle of one country, two systems’... (Menezes, 2009: 631)⁷⁹

As the PRC Constitution can be amended at anytime by the NPC, and has, indeed, been subject to rather frequent amendments,⁸⁰ the position of Justice Dias Azedo appears to not only explicitly undermine the principle of OCTS but also drastically reduces Macau’s judicial autonomy by making it vulnerable to the political considerations of the NPC. Justice Dias Azedo’s opinion was both dissenting and obiter, and therefore might not be definitive, but as Menezes noted, debate on the interpretation of the MBL has been sorely lacking amongst the judiciary, practitioners and academics in the MSAR (Menezes, 2009: 631). The stance of the Hong Kong courts is, however, in direct contrast to Justice Dias Azedo, with the HKCFA unanimously holding in *Ng Ka Ling* that it held the right to interpret the constitutionality of NPC and NPCSC acts in accordance with the HKBL.⁸¹ Even after the NPCSC re-interpretation, and the HKCFA’s subsequent clarification in *Ng Ka Ling v Director of Immigrations (No.2)*,⁸² the HKCFA did not retreat from this position but only accepted that it cannot question the authority of the NPC and NPCSC ‘to do any act which is *in accordance with the provisions of the Basic Law and the procedure therein*’ (emphasis added).⁸³ This left open the question on the Hong Kong

⁷⁷ For comparison, see The Basic Law of Hong Kong art 24(2) and The Basic Law of Macau art 24(2)

⁷⁸ A writ of *amparo* is a remedy for the protection of constitutional rights found in certain civil law jurisdictions as an effective and inexpensive instrument for protecting individual rights. An *amparo* action is intended to protect all basic rights of the individual save for physical liberty (which is instead protected by *habeas corpus*) and may be invoked by any individual when he believes that his constitutional rights are being violated.

⁷⁹ Quoting from the dissenting opinion of Justice Dias Azedo in Court Ruling ‘TSI-A-33-2005VP, 27/04/2006, Proc 223/05’

⁸⁰ The current PRC Constitution adopted by the NPC in 1982 has been subject to amendments in 1988, 1993, 1999 and 2004; not to mention that there have been three previous PRC Constitutions, in 1954, 1975 and 1978, which were superseded in turn.

⁸¹ [1999] 1 HKLRD 315 at 337.

⁸² [1999] 1 HKLRD 577.

⁸³ [1999] 1 HKLRD 578.

court's power to strike down acts inconsistent with the HKBL or to pronounce NPC and NPCSC acts as being consistent with the HKBL.⁸⁴

The political opposition

The political opposition to the PRC and the push for greater freedoms, liberties and democratisation is also stronger in Hong Kong compared to Macau. This is because after the 1966 riots in Macau the pro-Beijing forces were able to consolidate their power as the dominant (non-government) political force in Macau. Prior to the 1999 Handover, the main struggles in the Legislative Assembly were between pro-Beijing forces and the pro-Macanese forces with the liberal democratic forces reduced to only a small minority. With the fading of the pro-Macanese forces after the Handover, the influence of the pro-Beijing members naturally strengthened and to this day they hold a great sway over the Legislative Assembly (Chan, 2003: 506). The Portuguese also did not introduce significant political reforms, leaving the polity relatively underdeveloped (Chan, 2003: 506). The MSAR government's strong hold over the society was further assisted by the relatively smaller population in Macau, which is more homogenous and easier to manage.

By comparison, the Hong Kong population is much larger and more diverse. The pan-democratic camp in Hong Kong is also better organised and commands a sizeable minority in the Legco.⁸⁵ The Hong Kong polity is also better developed, with the Patten reforms providing a key turning point. Today the majority of the public yearn for a more representative form of governance and are more willing to hold the HKSAR government accountable for its mistakes.⁸⁶

The difference in the two societies may explain why Hong Kong society was so resistant to the enactment of new national security provisions under HKBL art 23. For Beijing, revised anti-subversion laws under art 23 were important to protect its own interests. An attempt by the HKSAR government to legislate under art 23 met stiff opposition from the Hong Kong public who feared that the new law would curb their political rights and civil liberties (Scott, 2005: 289-292). Coupled with government blunders such as its handling of the SARS virus outbreak and discontent over social issues, it culminated in over half a million people marching in protest against art 23 on 1 July 2003. The HKSAR government had to eventually shelve the security law indefinitely (Scott, 2005: 292-294). In contrast, the MSAR's attempt to enact a security law under MBL art 23 (in 2009) was successful and met far less resistance than did its Hong Kong counterpart.

A balanced view

One may easily get the impression that because the HKBL and MBL are similarly worded, that the HKSAR and MSAR should be developing along parallel paths but to rely on this view would be to misunderstand Hong Kong and Macau.

For one thing, while the articles in the HKBL and MBL are similar, they are not identical; there are significant differences in each Basic Law that tend to reflect the values of the society on which they

⁸⁴ In fact, the HKCFA has, in effect, already done this in *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907, where the HKCFA did arguably exercise a power to confirm a NPCSC act (the adding of the Law of the People's Republic of China on the National Flag to Annex III of the HKBL) by holding that the National Flag Ordinance, which gives effect to the national flag law, as compatible with the HKBL.

⁸⁵ The pan-democratic camp currently controls twenty-three of the sixty seats in Legco. This accounts for over one-third of the Legco seats and gives the pan-democratic camp a 'veto' over any constitutional changes to the HKBL, which would require at least a two-thirds approval from Legco as stipulated by art 159 of the Hong Kong Basic Law (and other relevant articles). In contrast, the pan-democrats in Macau only control four of the twenty-nine seats in the Legislative Assembly.

⁸⁶ In a 2006 survey commissioned by the National Democratic Institute and conducted by the Hong Kong Transition Project, for example, 71 percent of citizens surveyed indicated that they supported or strongly supported the direct election of the Hong Kong CE and 66 percent supported or strongly supported the direct election of all Legco seats. For more information, please see: (Hong Kong Transition Project, 2006: 69-71).

operate. In the HKBL, we see there is a greater emphasis on the rule of law, whereas the MBL instead stresses cultural and social values not found in the HKBL. This is especially true if one views the Basic Laws as 'freezing' devices. The Basic Laws are in fact freezing two very different societies with vastly different attitudes towards the PRC at the time of the Handover. In Hong Kong, the break-down in the Sino-British negotiations led many to fear for the future of Hong Kong post-Handover. This fear was further exacerbated by the shocking events in 1989 in Tiananmen Square (Chan, 2003: 500, 515). In addition, the Hong Kong population was diverse and greatly cherished the civil liberties and freedoms it had often struggled to obtain under British rule – especially after they were rapidly expanded during the Patten era shortly before the 1997 Handover. Once these liberties were given to the Hong Kong people, it became very hard to take them away. All these factors contributed to the 'crisis of confidence' before the Handover. While it may have been dampened since then, the lack of confidence has yet to permanently fade away.

In contrast, the Macau population was able to welcome the 1999 Handover because of the strong pro-Beijing elements already entrenched in Macau society since the 1966 riots. Ordinary Macau citizens were also reassured by the cordial and friendly relations between their colonial master, Portugal, and the PRC, which facilitated a smooth retrocession. There was also no mass exodus from Macau, unlike in Hong Kong before the Handover, because the Portuguese colonial government conferred full Portuguese citizenship and passports on qualified Macau citizens. This in effect gave the Macau population an important form of security, as they could stay in Macau for the meantime, while the passport allowed them to get out if things took a turn for the worse (Chan, 2003: 515-517). Hence there was no widespread fear of the Handover and once the economy took off post-Handover, the retrocession to the PRC was viewed in a more positive way.

While Beijing would no doubt prefer the approach taken by the Macau courts in interpreting the MBL, rather than the common law approach taken by Hong Kong courts in interpreting the HKBL, it must nevertheless appreciate the historical differences between the two legal systems that have carried over to the post-Handover SARs. The Chinese government's position on the Basic Laws is a Kelsenian monist position according to which both the HKBL and the MBL are subordinate to the PRC Constitution as the two BLs are derived from the latter (Chan, 2011: 7), a view that appears to be shared by Justice Dias Azedo above. However, as Menezes (2009: 637) argues, the proposition put forward by Justice Dias Azedo is fundamentally 'weak' as it ignores the political context of the MBL, based on the Sino-Portuguese Joint Declaration (SPJD) (and the HKBL based on the Sino-British Joint Declaration (SBJD)) (Menezes, 2009: 637). The SPJD and SBJD were not solely Chinese creations but a political compromise between the PRC and Portugal and the UK with international contours. Therefore, the PRC cannot amend the HKBL or MBL merely by amending its own constitution via the NPC because the PRC has an obligation under the international treaties to implement the HKBL and MBL as agreed (Menezes, 2009: 636). It should also be noted that although the HKBL and the MBL were results of a political compromise, its authors did not create a 'compromised legal system' where PRC law is fused with the existing Hong Kong/Macau legal system. Rather the HKBL and MBL sought to retain both former colonies' legal systems as much as politically and functionally feasible and hence the concept of OCTS (Menezes, 2009: 636-639). Furthermore, by accepting the legislation previously enforced, setting up independent courts of final adjudication in the two SARs, and emphasising the principle of continuity in regards to the two different legal systems, it must be accepted that the Basic Laws would operate differently even if they are similarly worded (Menezes, 2009: 652). Therefore, any interpretation of the HKBL and MBL should be made on the basis of principles of continuity and autonomy, with the traditions of the two different systems respected.

Conclusion

The colonial legacies of Britain and Portugal have played a significant role in shaping the differences we see in Hong Kong and Macau today. As each Basic Law seeks to preserve the old colonial system as

much as it can where possible, there is no doubt that constitutional issues must be viewed in light of the colonial rule of the past. There is great value to be found in understanding the relationships between the branches of government, the distribution of power and the institutional operation of Hong Kong and Macau in colonial times.

While some Chinese commentators may prefer Macau's system to Hong Kong's, we must take a more balanced approach in the comparison and realise each system has its own advantages and drawbacks. For example, the problem of corruption, which the PRC has been very serious about tackling in recent years, still plagues Macau, as seen by the arrest of former Macau Secretary for Transport and Public Works, Ao Man-long, in 2006 and his subsequent conviction in 2008 for bribery (Lau, 2008). Ao was later tried and convicted in May 2012 in relation to separate counts of bribery and money laundering. The extent and monetary amount involved were so large that the President of the MCFA, Justice Sam Hou-fai, noted 'no other officials involved in corruption in Asia and other countries can compare' (Cheung, 2012). This arguably is partly a result of the chronic culture of corruption present during Portuguese colonial rule. Understandably the pressure to tackle corruption is a constant and ever-present challenge for any government, and recent investigations conducted by the ICAC in Hong Kong into allegations of corruption and/or misconduct of high profile individuals in both the government and big business highlight this. Formal charges brought for the alleged bribery against former Chief Secretary Rafael Hui and executives of Sun Hung Kai Properties, Hong Kong's largest property developer (including its co-chairmen, property tycoon brothers Thomas and Raymond Kwok) highlight the continuing challenges faced by Hong Kong. When compared to the longstanding and persistent corruption issues in Macau, however, the solid foundations laid down during the British colonial era have allowed Hong Kong to fare better when such problems are encountered. One partner of a leading Hong Kong law firm went as far as to praise the boldness and efficiency with which the ICAC arrested and charged Hui and the Kwok brothers. He argued that this actually casts Hong Kong in a 'very good light', as it shows that 'no one is above the law. I don't think you can say that about the rest of China or indeed about many places in the world' (England, 2012).

While there may be lessons to be learned from each other, neither Hong Kong nor Macau should feel pressured to converge and change into the other. At their core, the Hong Kong and Macau societies are very different in many ways. We must also remember the small but very significant differences in both their Basic Laws. These differences, in total, strongly suggest that the future envisioned for the HKSAR and MSAR were (and are) not the same. In addition, the 'freezing effect' of the Basic Laws on Hong Kong and Macau means that these differences are likely to continue into the future. Further, even with regard to similarly-worded provisions in the HKBL and MBL, it is likely that their future impact and effect would be significantly different for each territory, as the implementation of such provisions would have to be built on the complex and extensive foundations laid down during their respective colonial eras. Although there may be areas of convergence seen in the subsequent development of Hong Kong and Macau, we are equally (if not more likely) to see clear, distinct divergences in their progress as influenced by their respective histories.

When making any contemporary comparisons between the HKSAR and MSAR, it is perhaps best to keep these longstanding differences in political and constitutional norms in mind. The differences between Hong Kong and Macau may best be described in the context of 'nature and nurture'. The nature of Hong Kong and Macau may be very similar as they share a close geographical proximity and have strong Chinese influences. However, they were each nurtured by a very different colonial past, which shaped their own unique and distinct system within the OCTS context today. Hong Kong and Macau will continue to be a paradox of 'so alike and yet so different'.

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Legal Instruments

Hong Kong

The Basic Law of Hong Kong.

Macau

The Basic Law of Macau.

PRC

Constitution 1982 (as amended in 1988, 1993 and 2004).