REVISITING THE MACANESE AMPARO OF FUNDAMENTAL RIGHTS: A QUEST UNDER THE SEARCHLIGHT OF THE PRINCIPLE OF CONTINUITY WITH A STOPOVER IN COMPARATIVE LAW*

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I. CONTEXT ...AND PRETEXTS

Macau, a tiny territory located in the South China sea, is a Special Administrative Region of the People's Republic of China (PRC), since the 20th December 1999, thus ending several centuries of Portuguese official dominance enjoying a high degree of autonomy, as eloquently announced both in the international arena *ex vi* the Joint Declaration of the Portuguese Republic and the People's Republic of China on the Question of Macau, signed in Beijing in 1987 - deposited jointly by both parties in the United Nations - and, domestically, in the *lato sensu* subnational constitution, the Basic Law of the Macau Special Administrative Region (SAR).

The Macau SAR possesses, along with Hong Kong, a singular status in both the comparative constitutional law fields and the international law one posing new and demanding challenges in both perspectives that are slowly motivating further research focused on Macau allowing new perspectives and the breaking of traditional outdated boundaries that were perceived has having dogma status.

The innovative and (outside the box) status and design of Macau, and Hong Kong, contributes greatly to the blurring of concepts such as federalism and territorial autonomy, or the rethinking of international law personality attached to territorial based entities besides states. Or, for example, the immunization – at least to a certain high degree – of its subnational legal system *vis-à-vis* the legal system of the sovereign including the non application of the vast majority of the norms of the PRC

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Constitution. The co-existence in China of One Country, Two systems, three legal systems (Mainland, Macau and Hong Kong) is a normative fact.

Another key note to address is the constitutive relevance and role of continuity, namely of the fundamental rights, as to be seen later on. Another key note is also the role of international law, in the form of the Joint Declaration of Macau, in creating and designing this cocktail of novelties and unconventional solutions.

Macau legal system was and is a continental legal one and particularly rooted in the Portuguese one hence carrying a *westernalized* system of fundamental rights[1] – in its norms, in its spirit, in its interpretation models, etc. - from its former status linked to Portugal to the present one. In some areas it even surpassed the level of *pro libertate* legal solutions of its former *tutor* (Portugal). That was the case of, for example, the law on religious freedom or the law on freedom of demonstration. The apex example of this surpassing phenomenon was, however, the Macanese Amparo.

Somehow enigmatically Macau had a *recurso de amparo* in force in its plenitude in its own legal system at least from 1991 until the ends of 1999. We emphatically use the adjective derived from enigma since neither the previous landlord neither the future full sovereign that is to say Portugal and the PRC, respectively, had any record of the amparo institute proper[2]. In this respect, Macau presented itself as a sort of an isolated island vis-à-vis the two sources of *Imperia* proclaiming the honour of being the holder – in positive differentiation - of this much appreciated and renowned remedy of fundamental rights.

II. THE AMPARO(S) AS A GLOBALIZED INSTITUTION

In addressing the subject of the amparo institution in a short and general overview one can, with HÉCTOR FIX-ZAMUDIO, declare, without any exaggeration, that the amparo in its several modalities and designations… presents itself as contribute to the human rights procedural

[1] In what refers to the fundamental rights topic this means that the philosophical and political foundations and approaches should be western ones rather than, for instance, socialist ones.

[2] Echoing the same surprise based on the amparo absence in Portugal, as well as the of the word in the Portuguese *iuris* terminology, HÉCTOR FIX-ZAMUDIO, *Evolución y perspectivas del derecho de amparo mexicano y su proyección supranacional* and, *El juicio de amparo mexicano. Su proyección en Latinoamérica y en los instrumentos internacionales*, both in Ensayos sobre el derecho de amparo, Porrúa/UNAM, 3 ed., Mexico, 2003, pp, 822 and 876, respectively.

law... of the same magnitude as the habeas corpus, the constitutional courts and the ombudsman.[3]

It seems relevant, and of good use, to bring in here some general considerations on the amparo and its impact on constitutionality in general and on fundamental rights particularly. The constitutional complaint (Article 93 Section 1 Subsection 4 of the Basic Law): it turns the Federal Constitutional Court into a "citizens' court". The access granted by the Federal Constitutional Court to everyone has profoundly increased the awareness of the citizens of the role of the Court vis-à-vis public authority[4] or, in the Latin American model of constitutional justice it takes outstanding status the amparo as a privileged mechanism of judicial guarantee of constitutional rights[5].

Some authors have used plastic expressions labelling the institute such as the magic associated to its name, the strong fascination that irradiates[6], a globalized phenomenon[7], or the undeniable expansive strength and an institution that goes hand in hand with the consolidation of the democratic freedoms[8], a undoubted proved capacity in the defence of the fundamental rights and a evident operationally and efficacy[9], or, the writ of amparo as a legal remedy that "could pierce the veil of impunity"[10] or a reference emphasizing that constitutional amparo is one of the most relevant contemporary juridical institutions in the defense of the human rights,

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[3] HÉCTOR FIX-ZAMUDIO *Amparo y tutela*, in Ensayos sobre el derecho de amparo, Porrúa/UNAM, 3 ed., Mexico, 2003, p 696.

[4] PETER HABERLE, *El recurso de amparo en el sistema germano-federal de jurisdicción constitucional*, in O direito de amparo em Macau e em direito comparado (coord. P. Cardinal), Special issue, Revista Jurídica de Macau, 1999, p 182.

[5] See, for example, HÉCTOR FIX-ZAMUDIO, *El juicio de amparo Mexicano. Su proyección en Latinoamérica y en los instrumentos internacionales*, in Ensayos sobre el derecho de amparo, Porrúa/UNAM, 3 ed., Mexico, 2003, pp. 847 ff, JORGE ULISES CARMONA TINOCO, *Domestic and International judicial protection of fundamental rights: a Latin American comparative perspective*, forthcoming, One Country, Two systems, Three Legal Orders - Perspectives of Evolution –: Essays on Macau's Autonomy after the Resumption of Sovereignty by China, (Eds. P Cardinal/J. Oliveira), Springer.

[6] GARRIDO FALLA, *Tratado de Derecho Administrativo*, vol. I, 11ª ed., Tecnos, Madrid, pp. 368, ALEXANDRE SOUSA PINHEIRO/MÁRIO BRITO FERNANDES, *Comentário à IV Revisão Constitucional*, AAFDL, 1998, pp. 104, respectively.

[7] EDUARDO FERRER MAC-GREGOR, *Breves notas sobre el amparo Iberoamericano (desde el derecho procesal constitucional comparado,* El derecho de amparo en el Mundo, (ed Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor). Porruá/UNAM, 2006, p. 12.

[8] DIEGO VALADÉS, *Exordio*, p. XIII, in El derecho de amparo en el Mundo, (ed Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor). Porruá/UNAM, 2006.

[9] WLADIMIR BRITO, O *amparo constitucional*, in O direito de amparo em Macau e em direito comparado (coord. P. Cardinal), Special issue, Revista Jurídica de Macau, 1999 , p. 94.

[10] NERI JAVIER COLMENARES, apud Alexander Martin Remollino, Bulatlat, Vol. VII, No. 37, October 21-27, 2007.

democracy and the Rechtsstaat[11](État de Droit). We could – virtually in an unending way - borrow more from so many other authors from several varied geo-political contexts or could simply endorse a personal statement but we believe that the previous references speak for volumes in so many ways.

In relation to specific jurisdictions one can find depictions such as, for Spain, undoubtedly one of the key institutions of the constitutional order[12], as the Queen of the ways of access to the Federal Constitutional Court and being closely linked to the development of the Idea of the Rechtsstaat [13], in reference to Germany. In South Korea, it is well underlined the importance of the constitutional petition (an amparo model) in strengthening the fundamental rights, curving abuses of public powers and fulfilling the effective implementation of the fundamental rights[14]. Or, shifting continents, a superior valourative intention ex vi its creation by the Cape Verde Constitution[15].

It has irradiated to an increasingly number of states and expanded its traditional geography notably to the Eastern Europe area in a manner that in what concerns the «individual constitutional appeal» the openness of the constitutional jurisdiction systems is remarkable most specially when compared with the western European countries[16]. In fact, besides covering the vast majority of Central and South America, the amparo – although using different *nomen iuris* and specific procedural and substantive designs, thus varying in shape and depth – is to be found in western Europe like in Spain, Germany, and also in many central and eastern European states such

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[11] CARLOS AYALA CORAO/RAFAEL CHAVERO GAZDIK, *El amparo constitucional en Venezuela*, in El derecho de amparo en el Mundo, (ed Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor). Porruá/UNAM, 2006, p. 649.

[12] ENCARNA CARMONA CUENCA, *La crisis del recurso de amparo, - La protección de los derechos fundamentales entre el poder judicial y el Tribunal Constitucional*, U. Alcalá, 2005, p. 23.

[13] PETER HABERLE, *El recurso de amparo en el sistema de jurisdicción constitucional de la República Federal de Alemania*, El derecho de amparo en el Mundo, (ed Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor). Porruá/UNAM, 2006, p 726.

[14] AHN KYONG-WHAN, *The Constitutional Court and Legal Changes in Korea: Post 1987 Development* , in Derecho comparado Asia-México Culturas y Sistemas Jurídicos Comparados, (ed) José María Serna de la Garza, UNAM, 2007, pp. 59 ff

[15] JOSÉ LOPES DA GRAÇA, *O recurso de amparo no sistema constitucional cabo-verdiano*, Direito e Cidadania, 2, 1998, p 200.

[16] MICHELE MISTÓ, *La giustizia costituzionale nei Paeisi dell'Europa centro-orientale*, in La Giustizia Costituzionale in Europa, (Marco Olivetti/Tania Groppi, cura di), Giuffrè, Milano, 2003, p. 321

as Russia, Slovenia, Slovakia, Poland, in Asia[17] as in South Korea, Taiwan or, very recently, the Philippines and in Africa, Cape Verde[18].

It has also constituted itself as a strong motivator item for comparative constitutional law, it is undeniable that the interest of the European doctrine in studying the Latin-American constitutional justice systems was attracted most of all by the amparo[19]. On the other hand, this institution was itself involved in many operations of circulation between legal systems interacting, influencing and re-influencing, being a paradigm of import/export but also of re-importation of, first of all, the institution proper and then the concrete solutions and adaptations[20] to the legal systems in general and to the fundamental rights and constitutional review systems in particular.

In some legal systems that do not possess the amparo in its fundamental rights systems guarantees arsenal, it is possible however to underline the existence of some movements, namely in the constitutional doctrine, but also in some constitutional revisions processes[21] proposing its incorporation in the legal system such as in Portugal[22].

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[17] Macau is an open case as to be seen. On the other hand, it seems that, in spite of a different general background of common law, other cases could be added such as Nepal. On this, ANTÓNIO KATCHI, *As fontes do direito em Macau*, FDUM, Macau, 2006, pp. 172 and ff., BIPIN ADHIKARI/B.P. BHANDARI, *Quest for additional substance and procedures towards protection of fundamental rights in developing countries*, in O direito de amparo em Macau e em direito comparado (coord. P. Cardinal), Special issue, Revista Jurídica de Macau, 1999 , pp. 119 and ff.

[18] See, for an extensive list, *El derecho de amparo en el Mundo*, (ed Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor), Porruá/UNAM, 2006. In addition to this list of addressed legal systems one should include the cases of South Korea, Taiwan and the Philippines, as seen.

[19] GIANCARLO ROLLA/ELEONORA CECCHERINI, *Sritti di Diritto Costituzionale Comparato*, 3th ed., ECIG, Genova, 2005, p. 167.

[20] PAULO CARDINAL, *La institución del recurso de amparo de los derechos fundamentales y la juslusofonia – los casos de Macau y Cabo Verde*, El derecho de amparo en el Mundo, (ed Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor). Porruá/UNAM, 2006, p. 892. See also, GIANCARLO ROLLA/ELEONORA CECCHERINI, ob. and loc cit.

[21] See for example, JORGE MIRANDA, *A fiscalização da constitucionalidade – conceitos e problemas gerais*, in O direito de amparo em Macau e em direito comparado (coord. P. Cardinal), Special issue, Revista Jurídica de Macau, 1999, pp. 78 and forward.

[22] A strong recent movement in Portugal can be seen claiming the introduction of the amparo, albeit with the necessary adaptations including changes in the constitutional review mechanisms *maxime* in the non abstract/concrete one. See, for example, with probably the most thorough work in the subject, for a defense, JORGE REIS NOVAIS, *Em defesa do recurso de amparo constitucional*, Themis, vol. 10, 2005, pp. 91 and forward, also JOSÉ DE MELO ALEXANDRINO, *A estruturação do sistema de direitos, liberdades e garantias na Constituição Portuguesa*, Vol. II, Almedina, 2006, pp. 487 and 488, PAULO CARDINAL, *Direitos desamparados?*, Boletim da Ordem dos Advogados de Portugal, 21, 2002, pp. 60, and, on the other side, having doubts and leaning to the refusal of its consecration, namely considering the existence of a quasi-amparo, CARLOS BLANCO DE MORAIS, *Justiça constitucional. II*, Coimbra Editora, 2005, pp. 989 and forward and 1040 and forward, FERNANDO ALVES CORREIA, Direito Constitucional, Almedina, 2001, pp. 22 and forward, RUI MEDEIROS, *A decisão de inconstitucionalidade*, UCP, 1999, pp. 352 and forward. For a listing of the (most)

Some say that the amparo is in crisis; hence there is no reason for introducing (or reintroducing, in the case of Macau) an institution that is under attack. That might be so in several jurisdictions due, mostly, to it's extremely popularity among the citizens, after all, the beneficiary targets of this protective institution. However, one must point that in such countries, for example, Spain, Germany or Mexico, the driving objective is to reform the institute, to find ways of minimizing the problems brought by its wide use, and not to, by any way, simply eliminate it[23].

III. AMPARO IN ASIA

A few words on the Asia cases are due namely in order to dismantle possible lines of argumentation and denial of the adequacy of such mechanisms of protection of fundamental rights in the Asia geo-political context and its own cultural and juridical different background that would rather deny the accommodation of amparo institutes in their legal systems.

As one will see, besides other reasons, facts show that it is possible to give amparo to protect fundamental rights in Asian legal systems without rushing to conclude that it is distorting its social and cultural backgrounds.

In South Korea, constitutional complaints – a sort of amparo somehow rooted in the German model as its label indicates - are a relatively recent kind of constitutional litigation that was adopted when the

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authors pro and against the amparo in Portugal, and revealing a doctrinarian majority favoring the introduction of the amparo, JOSÉ DE MELO ALEXANDRINO. ob. e loc. cit.

[23] See, for example, ARAGÓN REYES, *Problemas del recurso de amparo*, PABLO PÉREZ TREMPS, *Tribunal constitucional, juez ordinario y una deuda pendiente del legislador*, both in Pablo Pérez Tremps (coord), La reforma del recurso de amparo, Tirant Lo Blanch, 2004, pp. 145 and forward and 177 and forward respectively, for the Spanish case, JUTTA LIMBACH, *Función y significado del recurso constitucional en Alemania*, Cuestiones Constitucionales, 3, 2000, pp. 67 and forward, affirming «*La supresión del recurso constitucional no está a discusión, ya que en los hechos los ciudadanos y las ciudadanas han internalizado "la peregrinación a Karlsruhe" a tal punto. "que ya no es posible imaginar nuestro sistema jurídico sin el recurso constitucional"*» p. 87, PETER HABERLE, *El recurso de amparo en el sistema germano-federal de jurisdicción constitucional*, cit., passim, for Germany; regarding Mexico, for example, HÉCTOR FIX-ZAMUDIO, *La reforma en el derecho de amparo*, in Ensayos sobre el derecho de amparo, Porruá/UNAM, 2003 and *El juicio de amparo mexicano. Su proyección en Latinoamérica cit.*, CARLOS NATARÉN, *Breves reflexiones sobre las funciones del amparo para efectos y las propuestas de su reforma*, in La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho, t. VII, Procesos constitucionales de libertad; Eduardo Ferrer Mac-Gregor, y Arturo Zaldívar Lelo de Larrea, (coord), Universidad Nacional Autónoma De México/Instituto Mexicano De Derecho Procesal Constitucional/Marcial Pons, 2008. The reform is also being an issue – but not the elimination – in other legal systems, such as in Argentina, JORGE REINALDO VANOSSI, *La expectativa de una nueva "Ley de Amparo"*, in idem, or in Nicaragua, FRANCISCO ROSALES ARGUELLO, *Propuesta de reforma a la Ley de Amparo de Nicaragua*, also in idem.

Constitutional Court was established and borrowing words of the Constitutional Court itself:

> It is the most distinctive feature of the Constitutional Court. It may be considered a revival of the old "Shinmoonko" [a large drum for advancing the people's petitions, which existed in the Chosun Dynasty (A.D. 1392-A.D. 1910) and could be beaten by anyone who wanted to make a direct petition to the King].

Under the Constitutional Court Act, it is established that anyone whose fundamental rights guaranteed by the Constitution have been infringed through the exercise or non-exercise of governmental powers may petition the said court for relief. If a legislative act, presidential decree, ordinance or other law directly infringes upon an individual's fundamental or basic rights, the individual may file a constitutional complaint against the law itself. The Constitutional Court asserts that the constitutional complaints serve two functions: one, to protect the individual's fundamental rights and, two, to safeguard the Constitution.

Since the Korean amparo is viewed as a special and supplemental remedy for fundamental rights, those who want to file a constitutional complaint must exhaust all prior procedures to remedy the situation, if any is provided for by law. However, the Court has established some exceptions to this principle, which serves the latter function of constitutional complaints. For instance, if a case contains a significant constitutional issue, the merit of the case can still be heard, despite the fact that the petitioner did not exhaust all procedures.[24], As to the success of this new mechanism in terms of acceptance by the civil society one can say that currently in Korea, the proportion of constitutional complaint cases in comparison to the total number of all cases has been the highest.[25]

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[24] In http://www.ccourt.go.kr/home/english or, as an author said, «*Aujourd'hui, le recours constitutionnel joue un rôle très important pour garantir les droit de l'homme et les libertés en Corée*» JEON HAK-SEON, *L'application du principe de proportionnalité dans la Justice constitutionnelle en Corée*, paper, VIIth World Congress of the International Association of Constitutional Law, in Athens, Greece, June, 2007 http://www.enelsyn.gr/papers/w15/Paper%20by%20Prof.%20JEON%20Hak-Seon.pdf . See also, AHN, KYONG-WHAN, *The Constitutional Court cit.*, .CHEE YOUN HWANG, *Critics on the Constitutional Complaint against the Ordinary Courts' Judgements in Terms of Balancing and Proportionality Test in Korean Constitutional Review*, paper presented at the VIIth World Congress of the International Association of Constitutional Law, in Athens, Greece, June, 2007, http://www.enelsyn.gr/papers/ w15/Paper%20by%20Dr.% 20Hwang,% 20 Chee%20Youn.pdf

[25] CHEE YOUN HWANG, *Critics on the Constitutional Complaint cit.*

Regarding Taiwan, the role of the *Judicial Yuan* Court – the highest judicial organ[26]-in improving the human rights trough the amparo judicial interpretation mechanism is well acknowledge[27],. The Constitutional Interpretation Procedure Act, from 1993, establishes:

> A petition for an interpretation of the Constitution may be filed under one of the following circumstances: (2) Where an individual, a legal person, or a political party, having exhausted all judicial remedies provided by law, alleges that her/his/its constitutional rights have been infringed upon and thereby questions the constitutionality of the law or order applied by the court of last resort in its final decision;.

The judicial activism of the high instance has been considered a precious tool in the achievement of the Rule of Law and the protection of fundamental rights gaining, as some author says, widespread public support[28].

In the Philippines the amparo is still a newborn although already used in several high profile cases. The amparo writ was created[29], by the Rule on the Writ of Amparo,[30] which was approved by the Supreme Court on 25 September 2007. It's Section 1. Petition reads as follows,

> The petition for a writ of amparo is a remedy available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity.

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[26] Comprising 15 Grand Justices and these constitute the Council of Grand Justices as well as the Constitutional Court.

[27] CHANG-FA LO, *The Legal Culture and System of Taiwan*, Kluwer Law International, 2006, pp. 26 – 27, and 50 ff. See also TOM GINSBURG, *Judicial review in new democracies – Constitutional courts in Asian cases*, Cambridge UP, 2003, especially pp. 123 ff

[28] See TSUNG FU CHEN, *The Rule of Law in Taiwan*, in The rule of Law: Perspectives from the Pacific Rim, pp. 110 ff.

[29] It seems that the driving force of its creation was the necessity of trying to put an end to the high number of extrajudicial killings and enforced disappearances in the country. Hence, the Philippine Supreme Court uphold a pro-active role in defending the fundamental rights of citizens resorting to its constitutional competence to promulgate rules for the protection and enforcement of constitutional rights, *ex vi* the 1987 Constitution of the Republic, Art. VIII, Sec. 5[5]. On this power, of a traditional trend, see, for example, for an overview, JOAQUIN G. BERNAS, *The 1987 Constitution of the republic of the Philippines: a Commentary*, Rex Book Store, Manila, 2003, pp. 969 and ff., HECTOR DE LEON, *Philippine Constitutional Law -- Principles and cases*, vol. 2, Rex Book Store, Manila, 2004, p. 579.

[30] A.M. No. 07-9-12-SC

> The writ shall cover extralegal killings and enforced disappearances or threats thereof. [31]

As can be seen, the scope of this amparo is very limited but it is not reduced solely to a habeas corpus, In its country of origin, the *recurso de amparo*, is of much broader application than what the Philippine Supreme Court has decided to adopt under the present Rule. It is also much broader in scope and application than the writ of habeas corpus, because the latter is limited to cases of illegal confinement or detention.[32] Justice Adolfo S. Azcuna defined the Philippine amparo as "a special constitutional writ to protect or enforce a constitutional right (other than physical liberty which is already covered by the writ of habeas corpus), in consonance with the power of the Supreme Court to adopt rules to protect or enforce constitutional rights."[33]

Apparently high hopes on this very new mechanism cohabit with tensions originated in some high public authorities[34] thus not allowing yet finding out whether or not the writ of amparo becomes an effective tool. Time will tell.

IV. THE CONTINUITY PRINCIPLE

A paramount principle in the Joint Declaration (and in the Basic Law) in general, as well as in the fundamental rights topic, is the principle of continuity:[35] 'The current social and economic systems in Macau will remain

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[31] Some other relevant norms are as follows: The petition may be filed by the aggrieved party or by any qualified person or entity in a given order, the petition may be filed on any day and at any time with the Regional Trial Court of the place where the threat, act or omission was committed or any of its elements occurred, or with the Sandiganbayan, the Court of Appeals, the Supreme Court, or any justice of such courts, the writ shall be enforceable anywhere in the Philippines. The petitioner shall be exempted from the payment of the docket and other lawful fees when filing the petition. The court, justice or judge shall docket the petition and act upon it immediately. Upon the filing of the petition, the court, justice or judge shall immediately order the issuance of the writ if on its face it ought to issue. The clerk of court shall issue the writ under the seal of the court; or in case of urgent necessity, the justice or the judge may issue the writ under his or her own hand, and may deputize any officer or person to serve it.

[32] FLAG, *Primer On The Writ Of Amparo*, 2007, http://philippines.ahrchk.net/pdf/PrimerOnWritOfAmparo.pdf .

[33] Apud , ISMAEL G. KHAN, *Writ of amparo protects citizens against abuses*, Inquirer, 2007. See also, NERI JAVIER COLMENARES, *Initial Analysis On The Philippine Amparo*, CODAL, 2007.

[34] See, for example, ALEXANDER MARTIN REMOLLINO. *The Writ of Amparo and AO 197*, cit.

[35] On this nuclear principle, among others, JORGE COSTA OLIVEIRA, *A continuidade do ordenamento jurídico de Macau na Lei Básica da futura Região Administrativa Especial*, Revista Administracão, nºs 19/20, 1993, PAULO CARDINAL, *O Regime Jurídico da Advocacia no Contexto da Lei Básica*, AAM, Macau, 1992, pp 71 - 77, idem, *The judicial guarantees of fundamental rights in the Macau legal system – a parcours under the focus of continuity and of autonomy* ARMANDO ISAAC, *Substantive constitutional restrictions on the limits to the sphere of jurisdiction of the Macau Special Administrative Region's Courts*, paper delivered to the 4th Comparative Constitutional Law Standing

unchanged, and so will the life style. The laws currently in force in Macau will remain basically unchanged.'[36].

As for the continuity dimensions, one has continuity of the social system and of the economic system and also continuity of the normative acts basically unchanged, also referred to as the principle of the inalterability of the essential. One of the main pillars of the transition is clearly proclaimed in this normative discourse — the principle of continuity —[37] and thus reinforcing the idea of it being based on the previous special identity of Macau.

At this point it is worth mentioning telegraphically some of the following ideas brought forward by Sun Wanzhong:

> The creation of new legislation imposes that it should be prudently taken into consideration the relationship between the Basic Law and the laws previously in force, but also the maintenance of the European continental legal system characteristic as a way of underlining the typical style of Macau, and it should be mentioned that one of the messages contained in the *One Country, Two Systems* principle is the admissibility of a regime left by a foreign state in the condition that it is not in violation of the Basic Law.[38]

The principle of continuity does not affirm itself as absolute, meaning that the principle of continuity does not have to be construed as meaning intangibility. It does not claim as synonymous with intangibility inasmuch as the contracting parties had intended to prevent an undesirable

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Committee Conference, Bangkok, May, 1999, pp 46 ff. For the Hong Kong case, YASH GHAI, *The continuity of laws and legal rights and obligations in the SAR*, Hong Kong Law Journal, Vol. 27, 2, 1997, where the author clearly states that '[t]hese issues need careful consideration when there is a change of sovereignty to ensure certainty and clarity in the new legal regime and that the vested rights are maintained [...] These considerations are particularly important in Hong Kong where the basic intention as reflected in the Sino-British Joint Declaration and the Basic Law is to maintain stability and prosperity by continuing most aspects of previous systems, particularly of the laws', pp 136-137.

[36] Joint Declaration, Article 2(4) and see also I and III of Annex I with some differences in the language of the late norms.

[37] REQUEJO PAGÉS, *Las normas preconstitucionales y el mito del poder constituyente*, CEPC, 1998, elaborates on the continuity as a principle as well as on constitution versus continuity and, among several other important reflections that may apply to the Macau case, says that continuity does not suffer a bigger fracture with a new Constitution compared to the erosion that may happen due to the normal activity of the constituted powers.

[38] *A Lei Básica da RAEM e a construção do sistema jurídico de Macau*, Boletim da Faculdade de Direito, Macau, 13, 2002, p 54.

sclerosis of the legal system.[39] In truth, this characteristic of elasticity of the principle of continuity — although limited one must say — consists an added guarantee to the effective survival of the legal system since it allows the legal system, without abdicating from its essential characteristics, to adapt to the natural and unexpected evolutions of the social system where it is inserted.[40]

The limit to the fullness of the principle of continuity cannot be reduced only to the thesis of the maintenance of the laws save in that aspects that oppose the Basic Law or in that it will be subject to subsequent alterations. Otherwise, that will simply mean carrying out the emptiness of that apex principle and consequently rendering it useless. One has to admit the possibility of the introduction of those alterations not being permissible as these alterations consubstantiate basic changes.[41] With this, we intend to mean that the general principles that characterize/shape the Macau legal system cannot be disregarded as well as the diverse legal regimes — for example, of the fundamental rights in general and of each right in itself — they cannot have its ratio deviated or overwhelmed. In other words, the essential content of a given juridical regimen will have to be respected and kept.

Thus, the principle of continuity — of the present social and economic systems and, in order to secure this, the laws currently in force will remain basically unchanged — constitutes the master guarantee of the transition process as we envisaged it. This principle is reinforced in Annex 1, III, of the Joint Declaration, which states that following the establishment of the Macau SAR, the laws, decree-laws, administrative regulations, and other normative acts previously in force in Macau shall be maintained unless they contravene the Basic Law or are subject to any amendment by the Macau legislative body. The Macau Basic Law contains an identical provision.

The apparently paradoxical relationship — transition versus continuity — can be defined as a political and diplomatic formula created to

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[39] PAULO CARDINAL, *Os direitos fundamentais em Macau no quadro da transição: algumas considerações*, Cuestiones Constitucionales, 14, 2006, p 32.

[40] If it is the *veritas* that the legal system will have to be maintained although not in absolute terms, then it is not any less true that it could only be modified in respect to the limits established for and in the Join Declaration.

[41] LOK WAI KIN seems to be purporting a somewhat similar idea by proposing a difference between the *spirit* of the laws and its basic value as opposed to the specific writing of the normative rules. The latter would be changeable. One can assume that the former would not, *Impacto da Lei Básica da RAEM na concepção do Direito de Macau*, Boletim da Faculdade de Direito, Macau, n.º 13, 2002, p 61.

ensure some balance between the resumption of sovereignty by a sovereign state and the respect for the history, culture (including the legal culture), and specific identity of Macau. It also acts as a vote of confidence in the future by respecting the past. So, if it is true that we faced a change in the landlord in Macau, it is also true that the transition will not eliminate what existed before December 1999 but, on the contrary, it will be maintained.

Besides the general principle of continuity, the Joint Declaration and the Basic Law state that all fundamental rights and freedoms will be ensured and thus ensuring an autonomic dimension of the principle of continuity, which reinforces it in this field. The continuity principle is the guideline and hence the idea of *permanent* fundamental rights in spite of the transition and the transfer of sovereignty process.[42]

Summarizing we can conclude of a triptych dimension of the continuity principle: continuity of the life-style, continuity of the legislation and, continuity of the fundamental rights.

V. DISCONTINUITY IN AMPARO

In designing the judicial machinery for fundamental rights application, the principle of effective judicial protection – and its corollaries[43] - is of utmost importance in this field, and it was well dictated before the transfer of sovereignty and it seems to have survived relatively well, at least as for example, to what concerns the opinion of the Second Instance Court, in ruling 166/2003, where it is stated, namely that it is not difficult to see in article 36 of the Basic Law the establishment of the principle of plenitude on the judicial guarantee, and, it is established a general principle of effective judicial protection to safeguard all subjective juridical positions as well as a special principle that guarantees all the access

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

[43] See a listing in, HÉCTOR FIX-ZAMUDIO, *Effectiveness of Human Rights Protection Instruments*, Mexican Law Review, 1, 2004, in which is presented several principles or sub principles that cooperate in the aim of an effective protection of fundamental rights such as, access to Justice, the right to procedural action, due process of law, competent, independent and impartial Judge or Court, simple and brief procedure, reasonable term and undue delays, compliance and enforcement of International decisions about rights protection and fundamental freedoms.

to the administrative justice. It proceeds, by stating that it is expressly guaranteed the access to Law, the access to courts and the access to juridical information. This is what one can label as a *friendly* fundamental rights ruling in the well known sense used by, for example, *Gomes Canotilho.*

One can conclude for the existence of a general principle of effective judicial protection in paragraph 1 of 36 whilst the second paragraph points to a specific effective judicial protection in the field of administrative justice[44], a field, needless to say, very prone to litigation on fundamental rights. One should point that by effective judicial protection we do not refer merely to the guarantee proclaimed to allow the access to the courts, it must be an (potential) effective protection provided by the courts thus involving, namely an intrinsic connection between substantive rights and procedural, instrumental ones[45].

As stated before, our *parcours* is to be done under the focus of continuity and it is at that light that most of the following should be understood. The continuity lighthouse implies that one has to resort to the analysis of what was previously in force, its scope, its idiosyncrasy, its correlation within the system – procedural versus substantive.

It is deposited however in the courts the ultimate and perhaps the noblest function of defending the fundamental rights[46] especially when other mechanisms failed or are simply insufficient. A fundamental right is after all a right and it will have no less protection than those normal ordinary rights such as, for example, the normal machinery established in a Civil Procedure Code.

With the continuity light one can find a rupture with the previous system concerning the judicial mechanisms protecting fundamental rights[47].

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[44] LINO RIBEIRO, *A justiça administrativa no contexto da Lei Básica da RAEM*, Boletim da Faculdade de Direito, 13, 2002, p. 225

[45] Cfr. namely, GOMES CANOTILHO/VITAL MOREIRA, *Constituição da República Portuguesa Anotada*, vol. I, Coimbra Editora, 2007,, p. 416

[46] *A propos* it is never too much, regarding whichever legal system and whatsoever object (e.g., criminal law, constitutional law, private law) to recall here the famous aphorism brought by J.C. GRAY, «*The difference between the judges and Sir Isaac is that a mistake by Sir Isaac in calculating the orbit of the earth would not send it spinning round the sun with an increased velocity* .In the words of BENJAMIN N. CARDOZO «*The sentence of today will make the right and wrong of tomorrow. If the judge is to pronounce it wisely, some principles of selection there must be to guide him among all the potential judgments that compete for recognition*»., *The Nature of the Judicial Process*, The Storrs Lectures Delivered at Yale University, Yale University Press, 1921, p. 21.

[47] See, for the system before the transfer of sovereignty, PAULO CARDINAL, *Os direitos fundamentais em Macau* cit., pp 38 ff.

Among that small army of procedural institutes, one had the amparo and, operating indirectly but effectively, the constitutionality appeal. However, the year 2000 revealed itself as negative evolution for and from the courts competences on both fields. In fact, with a few and short rulings[48], the Court of Final Appeal in the aftermath of the transfer drew a deadly blow to both institutions. It was the understanding of the court that neither the amparo neither the compatibility of norms with the constitutional order could be exercised.

On adjudicating the amparo appeals, the Court demonstrated it lends more weight to formalistic aspects – the revocation of the Law where the amparo was inserted – than to constitutional principles such as the continuity one, the prohibition of recession, and of the effective protection, as well as other elements as the functional nature of the amparo norm, the nature of fundamental right of the amparo, and the existence of specific scope amparo appeals in Macau. As Jorge Miranda clearly affirms, "on the light of the Joint Declaration the institution subsists in the Macau legal system."[49] Even tough one can still reaffirm that juridically it is possible to defend the continuation of the amparo appeal the truth is that without law and with such a *negationist* judicial decisions the general amparo is, by the laws of facts, extinct. It is an *in memoriam* activity writing a paper on it[50], but still a useful task.

On the other hand, it seems, from the subtext, that the court may have mistakenly taken the amparo as a mechanism of judicial review, in the sense of a procedure envisaged to attack norms. It is clear that that's not the amparo philosophy, particularly in Macau.

One of the most significant component of the Macau's legal system individuality, in other words, a component of the "second system" was thus in a very simple manner putted overboard, at least in the eyes of some courts. In this sense we affirm the rupture, both in the amparo - although not totally as to be seen - and in the constitutionality appeal. As far as one

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[48] Basically, 8/2000, 4/2000, for the constitutionally review and 1/2000, 2/2000, for the amparo.

[49] *Manual de Direito Constitucional*, Cóimbra Editora, 2001, VI, p 56. We also affirmed the survival of the amparo as technically sustainable, *La institucion del recurso de amparo de los derechos fundamentales y la juslusofonia – los casos de Macau y Cabo Verde*, in El derecho de amparo en el Mundo, pp. 891 ff and *O amparo macaense de direitos fundamentais vis-a-vis as decisões judiciais*, in O Direito de Amparo em Macau e em Direito Comparado, Macau Law Journal, special issue, 1999, pp 353 ff. As did ARMANDO ISAAC, in, for example, *Do amparo da continuidade (constitucional) à continuidade do recurso de amparo em Macau*, umpublished.

[50] For further developments see ours *La institucion del recurso de amparo de los derechos fundamentales y la juslusofonia, cit.*, pp. 921 and ff.

knows, Macau was one of the many legal systems around the Globe to introduce the amparo of fundamental rights but it was the first and only to eradicate it in modern times[51].

The principle of effective protection is of utmost importance in this field, and it was well dictated before the transfer of sovereignty and it seems to have survived relatively well. Significantly, there are in force in the Macau legal system today *unlabelled/ clandestine* amparo appeals. In the laws regulating the fundamental rights of assembly and demonstration (Law 2/93), and that on data protection (Law 8/2005), reinforced judicial mechanisms for the protection of those fundamental rights that are shaped in the amparo model, as easily seen from both its normative text and from the preparatory works, are established.[52] In the last case for example, the competence is given to the Court of Final Appeal and it is restricted to the issue of violation of a fundamental right, urgent and *per saltum,* and the doctrine of article 7 of the Civil Procedure Code[53] is applicable[54].

It may be affirmed that there is a deficit to the continuity principle with the eradication of the amparo (and of the constitutional review). Not a total discontinuity however. There is also a deficit to the rich catalogue of fundamental rights in the sense that the broad scope of enunciation of fundamental rights is not corresponded in the same measure to the judicial mechanisms available. However, the judicial mechanisms in force are more than a *prima facie* analysis could presuppose, namely by the existence of the *clandestine* amparo appeals and the obligation of courts to not allow normative violations of the Basic Law[55].

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[51] We acknowledge the fate of the Spanish 1931 Constititution amparo under the Franco rule until the democratic constitution of 1978, in which it suffered almost annihilation.

[52] Respectively, Parecer n.º 1/93, CACDLG, and Parecer 3/II/2005, 3 Committee, stating that the committee feels that in fundamental rights, rules should be created that provide reinforced protection. For further elaboration see our *Os direitos fundamentais* cit.

[53] A crucial principle applicable in the Macau legal system and enshrined in this article 7 of the Civil Procedure Code and that is, in the absence of adequate procedural machinery, the judge shall determine the practice of the necessary acts that are more adequate in achieving goal of the process.

[54] On this see also CRISTINA FERREIRA, *The Europeanization of Law*, placing the inominated amparo in the context of an institute created in that law «*to guarantee effective judicial protection*», forthcoming, One Country, Two Systems, Three Legal Orders – Perspectives of Evolution –: Essays on Macau's Autonomy after the Resumption of Sovereignty by China, P.Cardinal/J.Oliveira (eds), Springer.

[55] See, for example, in the field of administrative law, in article 100, 1, a) of the Administrative Process Code, whereby any person who has a fundamental right violated or fear that his right will be violated can address the court to order the public authorities to adopt a given action or stop adopting a given action in order to assure the exercise of the right at stake. And, in the Civil Code with its para chart of fundamental rights, article 67 prescribes that everyone has the right to be protected and to demand for necessary and adequate measures, as well as preventive measures, to be taken in order to stop the menace on his rights. Since

One firmly believes that there is nothing – of a juridical nature or of a political one - in the Macau legal system nor in its autonomic *status quo* that points into the direction of not (re)introducing a amparo mechanism. Quite the opposite, one can add. In fact, the legal history of Macau and the continuity principle claim an amparo mechanism (with or without the same label that existed before December, 1999), as well as the fact that, in our days, one has, at least, two unlabeled amparo, as seen, in two relevant fundamental rights fields: rights to privacy and rights to meet and demonstrate.

On the other hand, the rich catalogue of fundamental rights should be also richly mirrored in the procedural guarantees catalogue. One could also see that the amparo institution is neither alien nor unnatural to Asian legal systems (with success and/or high expectations) and to say otherwise is to resort to untrue argumentation that only serves to artificially dismiss mechanisms that effectively reinforce – or have the potential to - the rights on the society and its defence vis-à-vis the public powers..

The methods to (re)introduce the general amparo – if not by judicial labour resorting to the elements exposed before – could be either by a specific law on the amparo or instead inserting a chapter on the amparo on a law that, generally and comprehensively, establishes the rules on general principles, exercising, and limiting the limitations of the fundamental rights.

We could introduce here a (small) challenge: why not (re)create the general amparo appeal[56] - thus consolidating the access to justice and the right to a procedural action[57] - and also initiate a *friendlier,* and with openness, constitutional review thus contributing to the consolidation of a *Rechtsregion.*

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at least several of those rights of the para chart are fundamental rights, this judicial process is also one of fundamental rights.

[56] We have been proposing it for several years such as, for example, in *The judicial guarantees of fundamental rights in the Macau legal system – a parcours under the focus of continuity and of autonomy,* forthcoming, One Country, Two Systems, Three Legal Orders – Perspectives of Evolution –: Essays on Macau's Autonomy after the Resumption of Sovereignty by China, P.Cardinal/J.Oliveira (eds), Springer, as well as others, for example, JORGE REIS NOVAIS, *As restrições aos direitos fundamentais na ordem jurídica de Macau*, paper presented at the *Segundas Jornadas de Direito e Cidadania da Assembleia Legislativa – direitos fundamentais – consolidação e perspectivas de evolução,* 2008. See also the references of LEONEL ALVES, *Síntese das Segundas Jornadas de Direito e Cidadania do Assembleia Legislativa – direitos fundamentais – consolidação e perspectivas de evolução.* In the press the proclamation or suggestion to create an amparo is also found, see for example, SEVERO PORTELA, *Democratas, temperados e realistas*, Hoje Macau, 31-10-2008, p. 13.

[57] Dimensions of extreme relevance as pointed by HÉCTOR FIX-ZAMUDIO, *Effectiveness of Human Rights Protection Instruments*, Mexican Law Review, 1, 2004.

In truth, if it is correct to assert that the existence of amparo *per se* does not guarantee that a given legal system is based on freedom, justice and truly upholds the fundamental rights. it is nevertheless evident that its consecration constitutes a rather emblematic step and an important clue that the above mentioned values are present or, at least, are in the near horizon. The strength of the amparo institutions around the globe is not possible to deny and can, and should, be anchors of *pro libertate* systems.

If Macau already is considered in the region to be a lighthouse in fundamental rights substantively speaking why not upgrade the SAR to that same role in the fundamental rights system's other face of the coin: the adjective-procedural one.

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