

THE APPLICATION OF INTERNATIONAL TREATIES IN MACAO: AN HISTORICAL AND COMPARATIVE STUDY

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Abstract: There is no uniform practice regarding how international treaties may become part of a municipal legal system. The principle of dualism requires a state to positively adopt a treaty as part of its law if the treaty is to have legal effect. Monism is founded on the understanding that no legislative action is needed for the reception of an international treaty into a domestic legal system. The declaration that a state is bound by a treaty makes such treaty part of its local law, and a treaty ranks above all other sources of law except the constitution of the state. Macao generally adheres to monism and there are areas where treaties are received into the Macao legal system through legislation or administrative regulation, so that courts can apply such treaty provisions in dispute settlement. This article compares the practice of treaty application in Portugal, China, Macao and Hong Kong and concludes that modification of the monist theory in Macao has much to commend.

Keywords: *domestication of treaties; dualism; incorporation of treaties; human rights covenants; Macao Basic Law; monism; status of treaties in municipal law*

I. Introduction

International law plays a crucial part in any domestic legal system, because of the ever-increasing interdependence between nations, especially in the area of trade and commerce. While international legal order demands that all nations adhere to principles of international law, opinion is divided whether an international treaty must have direct effect in all the state parties to it so that the treaty becomes part of the national law binding state agencies and ordinary citizens/legal entities alike or whether each state must be free to decide how they would give binding effect to such treaty within their territory.

Monism essentially dictates that a treaty to which a state is a party is self-executing in that state, meaning as soon as a state officially declares that it is bound by a treaty the treaty becomes incorporated in its domestic law. This is because monism is founded on the belief that international law and municipal law

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constitute one legal sphere within which international law is superior to municipal law. This also means that in the event of a conflict between a treaty provision and a municipal legal provision the former prevails.

Dualism considers that international law and municipal law operate in separate spheres and therefore to become part of the municipal law a treaty must be domesticated by legislation. In other words, the treaty must be transformed into a local law. Dualism respects state sovereignty in that no treaty is self-executing and that, if adopted by a state through legislation, the treaty provisions so domesticated have equal legal force as other local legislation.

Portugal and Macao during the Portuguese rule followed monism. The People's Republic of China, to which Macao returned in 1999 to be made a Special Administrative Region, is regarded as embracing a mixed system of monism and dualism. On the other hand, the UK and Hong Kong during the British rule followed dualism. Upon becoming a Special Administrative Region of China in 1997, Hong Kong continues to follow dualist theory.

This article considers the legal position in Portugal, China, Macao and Hong Kong as regards their approach to incorporation of treaties in their jurisdictions. We consider different methods by which an international treaty is incorporated in local legislation, for instance by including a treaty or relevant parts of it in a schedule, by directing that in a certain area of law courts shall apply provisions of a treaty or by using a treaty as a model in the drafting of a local statute. This article will suggest that the trend towards assimilation of monism and dualism is advantageous to Macao.

This article is structured in the following order. In Section II, we consider the application and status of treaty law in Macao during the period of Portuguese rule. Section III considers the resumption of the exercise of sovereignty over Macao by China and examines how today international treaties become effective in Macao. Section IV focuses on how ICCPR, ICESCR and intentional labour conventions become effective in Macao, as specified in art. 40 of the Macao Basic Law. In Section V we compare the relative merits of monism and dualism. We will consider China's approach to treaty law becoming part of local legal system and the case of Hong Kong, which follows dualism. We conclude that monism has not been wholeheartedly embraced in China and that Macao will be receptive to the changed approach in China. We conclude that this is a welcome development.

II. Treaties in Macao Law: The Portuguese Period

In this section we will provide a snapshot of the history of Macao under the Portuguese rule¹ before we examine the legal position in relation to the application of international treaties and agreements in Macao.

1 For an excellent account of the history of Macao, see Paulo Cardinal, "Macao: The Internationalization of an Historical Autonomy" (2008) 41 (122) *Mexican Bulletin of Comparative Law* 637–689. See also F G Pereira, "Towards 1999: The Political Status of Macau in the Nineteenth and Twentieth Centuries" in R D Cremer (ed), *Macao: City of Commerce and Change* (Hong Kong: API Press, 2nd ed., 1991).

A. An outline of the period of Macao under Portuguese administration

Portuguese rule in Macao is said to consist of three phases.

- (i) The first period was between the Portuguese occupation of Macao in the 16th century and the mid-19th century. During this time Macao was governed by Portugal with China exercising some jurisdiction in Macao.
- (ii) The second period was from the mid-19th century, when Macao was considered a colony and later a Portuguese overseas territory.
- (iii) The third period began in the 1970s, when Portugal gave up on colonial ambitions and granted more autonomy to Macao. This period ended in 1999 when China resumed the exercise of sovereignty over Macao.

Macao, including the Macao Peninsula, Taipa Island and Coloane Island, was gradually occupied by Portugal after the mid-16th century. For around 300 years, from the mid-16th century to the end of the 18th century, Macao was a “mixed jurisdiction”, with both Portuguese and Chinese authorities exercising jurisdiction. Through this long period, the Chinese continued to collect certain land and customs taxes, and the Portuguese continued to pay rent for their occupation of Macao to China. This arrangement ended in 1849, when the Portuguese abolished the Chinese customs house and declared Macao’s “independence” from China. Thereafter Macao came to be considered a Portuguese colony.

In 1951 Portugal declared Macao a Portuguese “overseas territory”, directly under the central government of Portugal, in terms of both internal and external affairs. International agreements or treaties concluded by Portugal were extended to Macao.²

In 1974 the Portuguese Revolution ended Portugal’s era of colonialism. This change of Portuguese government policy led to diplomatic relations being established with China in 1979. Portugal began to confer on Macao more administrative and economic autonomy. Soon after the Revolution, Portugal adopted a new constitution in 1976 and enacted the Organic Statute of Macao, Law 1/76 dated 17 February 1976. The Organic Statute, the constitution of Macao, referred to Macao as a “Chinese territory under Portuguese administration”. The post-1976 period saw Macao gaining a certain degree of autonomy.

B. Application of international agreements and treaties in Macao

Article 3 of the Macao Organic Statute, which was regarded as the Constitution of Macao under Portuguese rule, provided as follows:

1. The sovereign bodies of the Republic of Portugal, with the exception of the courts, are represented in the Territory of Macao by the Governor.

² Before 1976 there were about 50 international treaties and agreements applicable to Macao along with Portugal, including notably GATT and the Multi-Fibre Agreement.

2. In relations with foreign countries and in the conclusion of international agreements or conventions (treaties), the representation of Macao is the responsibility of the President of the Republic, who may delegate it to the Governor [of Macao] in matters of exclusive interest to the Territory.
3. The application to the Territory of international agreements or conventions (treaties) for which the delegation referred to in the previous paragraph has not been granted shall be preceded by consulting the Territory's self-governing bodies [namely the governor and the Legislative Assembly].³

In accordance with the above provisions, when Lisbon would extend application of international agreements or conventions (treaties) to Macao, it had to first consult the Governor and the Legislative Assembly⁴ and then instruct the Macao Government to publish in the Official Bulletin of Macao the Decree of the President of Portugal which ordered the extension, the Decision of the Assembly of Portugal which approved the agreements or conventions (treaties) and the relevant texts. The Macao Organic Statute of 1976 provided that international agreements and treaties shall enter into force in Macao, except as otherwise provided, within a period of five days from their publication in the Official Bulletin.⁵

Delegation by the President of Portugal of their treaty-making power to the Governor in matters of exclusive interest to Macao was a rare occurrence, and only a small number of agreements were concluded by the Governor—mostly in the 1990s. For example, Macao concluded 17 bilateral agreements in civil aviation, one agreement in mutual legal assistance on criminal matters and one on foreign trade. These agreements were approved by the President of Portugal with the consent of the Chinese government. Consent of China was necessary because Macao was a “Chinese territory under Portuguese administration”. More importantly, the consent of the Chinese government would ensure that the treaties so approved would continue to be in force after the handover in 1999.⁶

The Organic Statute of Macao, while it provided for the mechanism for making Macao party to an international treaty or agreement, was silent on their ranking in the hierarchy of the legal system of Macao. Therefore, in considering the status of international treaties and agreements, one had to turn to the Constitution of Portugal for guidance. The Portuguese Constitution provides for the integration of international law into Portuguese law. As regards international treaties, the Constitution provides for them to be directly applicable in Portugal. It also provides for

3 Article 4 of Macao Organic Statute provides that the Governor and the Legislative Assembly are the governing bodies of the territory of Macao, with the Consultative Council also functioning alongside the former.

4 In July 1998 Portugal decided to extend application of 7 international agreements to Macao without consulting the Legislative Assembly as provided by the Macao Organic Statute. This led to a protest from some of the members of the Legislative Assembly.

5 See Macao Organic Statute art. 70.

6 The China-Portugal Joint Liaison Group established under the Joint Declaration facilitated negotiations for obtaining Chinese approval.

the primacy of international agreements and treaties which bind Portugal. These principles are enshrined in art. 8 of the Portuguese Constitution:

Article 8. International law

1. The norms and principles of general or common international law form an integral part of Portuguese law.
2. The norms contained in duly ratified or approved international conventions (agreements)⁷ come into force in Portuguese internal law once they have been officially published and remain so for as long as they are internationally binding on the Portuguese state.
3. The norms issued by the competent organs of international organizations to which Portugal belongs come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties.
4.

As art. 8 of the Portuguese constitution expressly declares, Portugal follows the doctrine of incorporation, meaning that international treaties to which Portugal is a party are directly applicable in Portugal as long as they have been duly approved by competent authority and published in the Official Bulletin.

The Organic Statute of Macao, which was regarded as the constitution of Macao under Portuguese rule, contained no provision comparable to art. 8 of the Portuguese Constitution. This gap was filled by drawing an analogy to the Portuguese situation.

When incorporated in Macao law, is an international treaty superior to local law? As regards Portugal, art. 277(1) enshrines the supremacy of the Constitution, when it provides as follows: “Norms that contravene the provisions of the Constitution or the principles enshrined therein are unconstitutional.” There is no further express constitutional provision regarding the ranking of locally applicable “norms”, such as international agreements, local laws and administrative regulations. As regards the ranking of international agreements, Francisco Ferreira de

7 Some English translations of the Portuguese Constitution use international “conventions” while others use international “agreements”. For instance, the version published by the Parliament of Portugal uses “conventions”: <https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf>, whereas the version published by the Constitute Project uses “agreements”: https://www.constituteproject.org/constitution/Portugal_2005.pdf. For consistency, we will use international “agreements” as this is the term that is used in the Constitution of China, as in art. 67(14)—the power of the National People’s Congress “to decide on the ratification or abrogation of treaties and important agreements concluded with foreign states”—and the Macao Basic Law, as in art. 138 “The application to the Macao Special Administrative Region of international agreements to which the People’s Republic of China is a member or becomes a party shall be decided by the Central People’s Government. . .”. In fact, “Legally, there is no difference between a treaty, a convention or a covenant. All are international legal instruments which, in international law, legally bind those States that choose to accept the obligations contained in them by becoming a party in accordance with the final clauses of these instruments.” See “Glossary of technical terms related to treaty bodies” <https://www.ohchr.org/en/treaty-bodies/glossary-technical-terms-related-treaty-bodies#treaty>.

Almeida observes that the Constitution of Portugal “has yet to resolve the problem of the relationship between international treaty (particular) law and ordinary national law. Despite this, legal theory for the most part favours the thesis of the supra-legal value of international treaties.”

De Almeida concludes that an international treaty or agreement, which is in force in Portugal, not only overrides any existing national law but that, on a reading of art. 8(2) of the Constitution, a national law enacted after the entry of an international treaty must yield to the treaty. De Almeida says the contrary is not a viable conclusion: “We can logically infer that if a national law were permitted subsequently to alter or revoke the rules of an international treaty law, they would cease to apply in the national order, despite continuing to bind the Portuguese state internationally.”⁸ De Almeida also finds support for superiority of treaties over local laws in art. 119 of the Constitution of Portugal, which lists legal instruments which must be published in the official journal, where laws concerning the Constitution are listed first, international agreements second and local laws third.⁹

In a 2020 decision on the local effect of a double taxation treaty to which Portugal was a party, the Supreme Administrative Court observed that Portugal is bound by an international treaty under the principle of the primacy of international law referred to in art. 8 of the Constitution of Portugal. The reference to “primacy of international law” reflects art. 8(2), which provides that an international agreement once it becomes part of national law shall “remain so for as long as they are internationally binding on the Portuguese state”. The Court also referred to the General Tax law, which expressly recognises the superiority of international law over domestic tax law. Article 1(1) of the General Tax Law provides as follows: “This law shall regulate the legal-tax relations, without prejudice to the provisions of European Union law and other rules of international law that are in force directly in the internal order or in special legislation.”¹⁰

Albino de Azevedo Soares too notes that there is no generally agreed view among scholars as to whether international agreements and treaties rank above local laws. After a careful analysis, he concludes that art. 8(2) is consistent with the view that an international treaty should rank above local law, in case of conflict. He argues, as de Almeida did, that if an international treaty binds Portugal there can be no reason why Portugal should be free to override its international obligations merely by passing a local law which is inconsistent with the state’s international treaty obligations¹¹. João Castro Mendes takes the same view and asserts that an

8 Francisco Ferreira de Almeida, “Portugal” in Dina Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: Oxford University Press, 2011), 500–514, 510.

9 *Ibid.*, 511.

10 Judgment of the Supreme Administrative Court No 3/2020, following the 2010 ruling of the Supreme Administrative Court No 462/10. The 2020 decision is available at <https://dre.pt/dre/detalhe/acordao-supremo-tribunal-administrativo/3-2020-144454621>

11 See Albino de Azevedo Soares, *Public International Law* (Faculty of Law of University of Macau, 2020), 63–68 (Chinese publication of the original publication in Portuguese).

international treaty is applicable in Portugal except where it conflicts with a constitutional provision.¹² Drawing an analogy with the situation in Portugal, Cristina Ferreira submits that as in Portugal the superiority of international treaties over local laws is one of the main characteristics and fundamental principles of the legal system of Macao, too.¹³

The Civil Code of Macao, enacted in August 1999 on the eve of the coming into force of the Macao Basic Law on 20 December 1999, seeks to clarify the situation when it provides in art. 1(3) that “the international agreements applicable in Macao prevail over ordinary laws.”

III. Treaty Making and Treaty Application under the Basic Law

A. *Constitutional and legal status of Macao in China*

Portuguese rule in Macao ended when Macao became a Special Administrative Region of China in 1999.¹⁴ The Organic Statute of Macao ceased to apply and the Basic Law of Macao Special Administrative Region (Macao SAR) became the supreme law in Macao: art. 11 provides that “no law, decree, administrative regulations and normative acts of the Macao Special Administrative Region shall contravene [the Basic Law].” The Macao Basic Law itself is a national law of China, which was passed under art. 31 of the Constitution of China, which provides as follows: “The state may establish special administrative regions when necessary. The systems instituted in special administrative regions shall, in light of specific circumstances, be prescribed by laws enacted by the National People’s Congress.”

The Macao Basic Law declares that Macao SAR is “an inalienable part of the People’s Republic of China” (art 1), but with a special arrangement for it to enjoy a “high degree of autonomy.” Article 2 clarifies the concept of high degree of autonomy: “The National People’s Congress authorizes the Macao Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of [the Basic Law].”

The Macao Basic Law is founded on the unique principle of “One Country, Two Systems”. Essentially, Macao SAR is an integral part of China and Macao’s

12 See João Castro Mendes, *Introduction to the Study of Law* (Faculty of Law of University of Macau, 1998), 58–59 (Chinese publication of the original publication in Portuguese).

13 See Cristina Ferreira, “Comment on the Judgement of 2/2004 of Court of Final Appeals of Macao” (2015) 6 *Macao Legislature in Review* 129–140 (a publication in Chinese published by the Macao Legislature).

14 For Macao’s transition see Richard Louis Edmonds and Herbert S Yee, “From Portuguese Autonomous Territory to Chinese Special Administrative Region” (1999) 160 *The China Quarterly* 801–817; H S Yee and S H Lo, “Macao in Transition: Politics of Decolonisation” (1991) 31:10 *Asia Survey* 905; and Yash Ghai, “The Basic Law of the Special Administrative Region of Macau: Some Reflections” (2000) 49:1 *International and Comparative Law Quarterly* 183–198.

constitutional and legal order is part of the constitutional and legal order of China. However, Macao's constitutional status is unique: Macao is not an independent territory separate from China, nor is it similar to a state in a federal system of government. It is a part of the unitary state of China, with a high degree of autonomy to be exercised by Macao within the confines of the Basic Law.¹⁵

The "One Country, Two Systems" policy concerns not only the constitutional and legal order in Macao. It also means that, as provided in the Preamble to the Basic Law, "under the principle of 'one country, two systems', the socialist system and policies will not be practised in Macao." Article 5 of the Basic Law states: "The socialist system and policies shall not be practised in the Macao Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years." Elaboration of the unique aspects of Macao community, which may be different from those of China, are elaborated in Chapter V: "Economy" and Ch. VI: "Culture and Social Affairs" of the Basic Law.

The resumption of the exercise of sovereignty over Macao by China did not mark a complete break from the past: art. 8 of the Basic Law provides for the continuity of the existing legal order of Macao as long as it is consistent with the new constitutional order of the Macao SAR: "The laws, decrees, administrative regulations and other normative acts previously in force in Macao shall be maintained, except for any that contravenes [the Basic Law], or subject to any amendment by the legislature or other relevant organs of the Macao Special Administrative Region in accordance with legal procedures."

B. *Autonomy of Macao*

Article 11 enshrines the supremacy of the Basic Law in the Macao SAR: "In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practiced in the Macao Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental

15 See for a useful analysis Guobin Zhu, "The Composite State of China under 'One Country, Multiple Systems': Theoretical Constructions and Methodological Considerations" (2012) 10:1 *International Journal of Constitutional Law* 272–297. "Multiple systems" is a reference to the different regional units that are referred to in art. 30 of the Constitution of China, which is as follows: "The administrative division of the People's Republic of China is as follows:

- (1) The country is divided into provinces, autonomous regions, and municipalities directly under the Central Government;
- (2) Provinces and autonomous regions are divided into autonomous prefectures, counties, autonomous counties, and cities; and
- (3) Counties and autonomous counties are divided into townships, nationality townships, and towns. Municipalities directly under the Central Government and other large cities are divided into districts and counties. Autonomous prefectures are divided into counties, autonomous counties, and cities.

All autonomous regions, autonomous prefectures and autonomous counties are national autonomous areas".

This is supplemented by art. 31 which provides for the setting up of Special Administrative Regions, which currently are Hong Kong and Macao.

rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of [the Basic Law]. No law, decree, administrative regulations and normative acts of the Macao Special Administrative Region shall contravene [the Basic Law].”

The Macao Basic Law demarcates the legislative power of the Central Government of China and Macao. While legislation for Macao is enacted by its legislature, China has retained power to legislate for Macao by way of applying Chinese national laws in Macao. This power of the Chinese Central Government to legislate for Macao is confined to national laws “relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by [the Basic Law]”. Exceptionally, “[i]n the event that the Standing Committee of the National People’s Congress decides to declare a state of war or, by reason of turmoil within the Macao Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People’s Government may issue an order applying the relevant national laws in the Region”.

It has not been discussed in courts of Macao whether Chinese national laws extended to Macao rank over local legislation or whether international agreements and treaties would rank above Chinese national laws extended to Macao. In Hong Kong, the Court of Final Appeal has upheld the superiority of such national laws over local legislation.¹⁶ Given the Macao Court of Final Appeal’s ruling on the status of treaties that the Central Government has permitted to straddle the handover,¹⁷ Macao is certain to follow the lead given by its Hong Kong counterpart.

Macao SAR has independent judicial power, subject to the final power of interpretation of Macao Basic Law given to the Standing Committee of the National People’s Congress of China (especially arts. 82 and 143).

C. *Macao’s Powers in Relation to Treaty Making*

Chapter II of the Basic Law, which deals with the relationship between the Central Authorities and the Macao SAR, reserves defence and foreign affairs to the Central People’s Government, powers which are outside the autonomy of Macao. However, the Basic Law permits the Macao Government to exercise some powers relating to foreign affairs, by way of delegation.

16 In *HKSAR v Lai Chee Ying* (2012) 24 HKCFAR 33, the Hong Kong Court of Final Appeal examined the ranking in the Hong Kong legal system of the National Security Law of 2020, a national law specifically enacted for application in Hong Kong in exceptional circumstances of an emergency and national security. The Court of Final Appeal held that since courts of Hong Kong SAR have no authority to question the validity of legislative acts of the Chinese central government, they have no authority to declare that a national law extended to Hong Kong SAR is inconsistent with the Hong Kong Basic Law. For a discussion of the National Security Law, see Anton Cooray, *Constitutional Law in Hong Kong* (Netherlands: Kluwer, 5th ed., 2022), [879]–[897].

17 See n. 37 and text it indicates.

As regards foreign affairs, art. 13 provides that “[t]he Central People’s Government shall be responsible for the foreign affairs relating to the Macao Special Administrative Region” . . . but “authorizes the Macao Special Administrative Region to conduct relevant external affairs, on its own, in accordance with [the Basic Law]”.

As regards defence, art. 14 provides as follows: “The Central People’s Government shall be responsible for the defence of the Macao Special Administrative Region. The Government of the Macao Special Administrative Region shall be responsible for the maintenance of public order in the Region.”

An important aspect of external affairs is the power to enter into international agreements and treaties. Article 3 of the Constitution of China provides as follows: “The State Council, that is, the Central People’s Government, of the People’s Republic of China concludes treaties and agreements with foreign States.” This recognises the general principle of international law that a sovereign state has authority to enter into international agreements and treaties. Not being sovereign powers, neither Hong Kong SAR nor Macao SAR has such inherent power. In order to confer some jurisdiction in relation to external affairs on Macao, in accordance with the “One Country, Two Systems” policy, the Macao Basic Law makes special provision conferring some power on the Macao SAR in relation to treaty making.

Chapter VII of the Macao Basic Law entitled “External Affairs” deals with the adoption and application of international treaties in Macao.

It provides for three categories of treaties.

- (i) The first category of international treaties are those treaties that apply to China, which have been extended to Macao. Article 138 of the Macao Basic Law provides as follows: “The application to the Macao Special Administrative Region of international agreements to which the People’s Republic of China is a member or becomes a party shall be decided by the Central People’s Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region.” International agreements in this category include both multilateral and bilateral treaties. Since 1999, China’s central government has extended several hundred multilateral treaties and agreements to Macao. However, the central government has extended only a limited number of bilateral treaties to Macao. Most of these treaties concern consular affairs between China and foreign states. After the decision is made, the local procedure to implement such agreements is relatively simple, as they need only to be published in the Official Bulletin of the Macao Government.
- (ii) The second category of treaties are those to which China is not party but which had been adopted in Macao before the handover in 1999. The second sentence of art. 138 of the Basic Law provides as follows: “International agreements to which the People’s Republic of China is not a party but which are implemented in Macao may continue to be implemented in the Macao Special Administrative Region.”

- (iii) The third category consists of treaties that Macao wishes to conclude. Where Macao considers that a certain international treaty is relevant to Macao, the Chinese government may authorise or assist the Macao Government to enter into a treaty which does not fall into the first or the second categories. This, the third category, consists of treaties that Macao wishes to be made applicable in Macao but which China is not a party to, where such treaty is of special relevance to Macao. The third sentence of art. 138 provides as follows: “The Central People’s Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements.”

Article 138 of the Macao Basic Law recognises that post-1999, international agreements that are applicable in Macao may be entered into either by China—by their extension to Macao—or by Macao with authorisation of China. Currently, more than 650 international treaties, international agreements, protocols and amendments apply to Macao in 17 areas, including but not limited to human rights, economy and finance and combating international crimes. Macao has also concluded more than 110 bilateral agreements in its own name.¹⁸

The authority of Macao to enter into international agreements and treaties is confined to certain fields. Article 136 of the Macao Basic Law provides as follows: “The Macao Special Administrative Region may, on its own, using the name ‘Macao, China’, maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural, science and technology, and sports fields.” While it is unclear what “appropriate fields” refers to, Macao’s competence to enter into agreements is not restricted to matters that are within the autonomy of Macao. There are agreements which Macao has entered into post handover which are not within the autonomy of Macao. Examples include agreements on judicial assistance and visa exemptions, as provided in arts. 94 and 140 of the Macao Basic Law. Under the Macao Basic Law, although such agreements are traditionally considered to fall within the purview of the Central Government, it can be said that the Basic Law arts. 94 and 140 clearly delegate such power to Macao.¹⁹ In practice, most of the agreements concluded under the name “Macao, China” are bilateral.

The basic framework of treaty making before and after the handover is similar. Portugal could extend a treaty to Macao and Macao itself could enter into Macao-specific treaties under delegated power, reflected in the post-handover period, when China could extend a treaty to Macao or permit Macao to enter into a Macao-specific treaty. The significant improvement in the post-handover period is that the Basic Law provides guidance regarding in what circumstances Macao

18 <https://www.io.gov.mo/cn/legis/int/multi>

19 In accordance with art. 117 of the Basic Law, Macao can also conclude agreements with foreign states on civil aviation.

may enter into treaties and international agreements on its own, reflecting the delicate demarcation of authority of the Central Government and Macao Government in respect of foreign/external affairs. The Basic Law also recognises the need for a smooth transition of the Portuguese overseas territory of Macao to a Special Administrative Region of China in respect of treaties that were in place in 1999.

IV. Implementation of the ICCPR and ICESCR

Article 40 of the Macao Basic Law stipulates that “the provisions of International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Macao shall remain in force and shall be implemented through the laws of the Macao Special Administrative Region”.

A. *A brief history*

It is useful to examine how art. 40 came to be included in the Macao Basic Law. We begin with the 1987 Joint Declaration between China and Portugal, which provided the guiding principles of the Basic Law. While the Joint Declaration refers to the principles underlying the application of international treaties in Macao after the handover, there is no reference to the application of the two international Covenants in Macao. The reason for this omission is that in 1987, Portugal had not yet extended the ICCPR and the ICESCR to Macao. In contrast the British Government had extended these two Covenants to Hong Kong in 1976 and thus art. XIII. “Basic Rights and Freedoms” of the Sino-British Joint Declaration contains the following provision: “The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.”

The drafting of the Macao Basic Law lasted from 1988 to 1993. During the drafting period, to show a cooperative spirit for a smooth transition, the Central Government of China engaged its Portuguese counterpart and sought its views on the content of the Macao Basic Law. When the Hong Kong Basic Law was adopted by the National People’s Congress of China in 1990, Portugal found that art. 39 of the Hong Kong Basic Law provided for the continued application of ICCPR and ICESCR in Hong Kong SAR. Portugal strongly supported the inclusion of a similar provision in the Macao Basic Law.

Portugal made some efforts in this regard. In December 1992 it extended the ICCPR and ICESCR to Macao when the Assembly of the Republic of Portugal passed Resolution No. 41/92. In addition, Portugal made several declarations and reservations to the two Covenants, including a requirement that “the provisions of ICCPR and ICESCR applicable to Macao shall be implemented in Macao, especially through local laws and regulations emanating from the governing bodies of Macao.”²⁰

20 See https://bo.io.gov.mo/bo/i/92/52/resoluar41_cn.asp

Moreover, Portugal raised the issue of the Covenants with China through the Joint Liaison Group, which had been established in accordance with the Joint Declaration and recommended that a similar article be added to the Macao Basic Law. China was very proactive and open to the idea, and it did not take a long time for the two sides to reach consensus²¹ at the Joint Liaison Group that if Portugal could complete its internal procedures concerning the extension of the application of the Covenants to Macao, then China would include a similar article in the text of the Macao Basic Law. With Portugal's internal procedures completed in December 1992, China fulfilled its promise in January 1993. The treaty-extension article found itself into the draft Basic Law through art. 40 and remained intact until the final adoption of the Macao Basic Law in March 1993.

Before the handover of Macao on 20 December 1999, China sent a Note Verbale to the United Nations Secretary-General, stating that "the ICCPR, which applies to Macao at present, will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999, and the provisions of the ICCPR which are applicable to the Macao Special Administrative Region shall be implemented in Macao through legislation of the Macao."²² It sent a similarly worded communication for the ICESCR.

From the preceding discussion, it is clear that before the 1999 handover, the Covenants were implemented mainly through local laws of Macao passed since the extension of the Covenants supplemented by the laws of Portugal, and after the handover, they became completely implemented through the local laws of Macao. The reason for that slight difference is that when Portugal extended the application of the Covenants to Macao in 1992, a considerable number of Macao's laws, such as the Penal Code, had been adopted by Lisbon. In contrast, since 1999, only a small number of national laws of China (relating to defence, foreign affairs and other matters outside the limits of Macao's autonomy) have been in force in Macao, through their listing in Annex III of the Basic Law. They include the following: Nationality Law of the People's Republic of China; Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities; Regulations of the People's Republic of China Concerning Consular Privileges and Immunities; and Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone.

B. Drafting of art. 40

Next, we take a closer look at how art. 40 was drafted because doing so will help us understand how the Covenants are implemented.

Article 40 of the Macao Basic Law is a replica of art. 39 of the Hong Kong Basic Law. Therefore, it will be good to start with how art. 39 came to be included

21 See Basic Law Commission of the Standing Committee of the National People's Congress, "Compilation of Documents of the Drafting Committee of the Basic Law of the Macao Special Administrative Region of the People's Republic of China" (2011), 263.

22 See https://bo.io.gov.mo/bo/ii/2001/07/aviso16_cn.asp

in the Hong Kong Basic Law, drafting of which took place during the period 1985 to early 1990. During that time, China experienced a wave of democracy and social volatility. China and the UK argued often about the future of Hong Kong and how to handle the 1997 transition. The UK strongly recommended including a clause in the Hong Kong Basic Law addressing the Covenants, which the UK had already applied to Hong Kong. Many Hong Kong residents echoed this idea. Accordingly, the Chinese government took the recommendation seriously.

However, at that time, China was not a party to the ICCPR and the ICESCR,²³ and it was unclear whether China would join the Covenants in the future. The Covenants provide that they are only open for signature by any State Member of the United Nations or member of any of its specialised agencies, any State Party to the Statute of the International Court of Justice and any other State that has been invited to become a party by the General Assembly of the United Nations. The Covenants further state that their provisions extend to all parts of federal States without any limitations or exceptions. These provisions raise the following question: If China, as a sovereign state eligible to join the Covenants, was not a party at the time of the July 1997 handover of Hong Kong and its transition to a Special Administrative Region of China, could Hong Kong be a party to the Covenants on its own? Technically, the Covenants could not be applied to Hong Kong without China's participation.

To solve this problem, the drafters of the Hong Kong Basic Law found an ingenious solution. Instead of stating that the ICCPR and ICESCR would apply in Hong Kong, art. 39 would recognise that these covenants were already applicable in Hong Kong, providing as follows: "The provisions of ICCPR, ICESCR and international labour conventions as applied to Hong Kong shall remain in force." However, it was not the intention of China that the two covenants—ICCPR and ICESCR—would in their entirety have legal force in Hong Kong. This is evidenced by China's pre-July 1997 "diplomatic action" in sending a Note Verbale to the UN Secretary-General describing its position on international agreements and treaties concerning the handover and providing an annexe with a full list of the international agreements and treaties that would continue to apply to Hong Kong. That list did not include ICCPR and ICESCR.

The next problem to arise was that Hong Kong residents and the international community doubted whether the protection of human rights would be undermined after the handover. Accordingly, the Hong Kong Basic Law emphasised that the provisions of the Covenants would be implemented through local laws. This means that if local laws in conformity with the Covenants were in place, human rights protection would be guaranteed even without the application of the Covenants.

It is clear that the inclusion of art. 39 in the Hong Kong Basic Law was primarily the outcome of political considerations and diplomatic negotiations. It was not intended to take any position on how to manage the relationship between

23 China became a party to the ICESCR in 2001. China signed the ICCPR in 1998 but has not ratified it.

international treaties and local laws, nor was it intended to change the status quo in that regard. Being an exact copy of art. 39 of the Hong Kong Basic Law, art. 40 of the Macao Basic Law may also be considered as having the same legal effect as in Hong Kong.

C. Implementation of the two covenants in Macao

(i) Legislative level

At the legislative level, Macao implements the two covenants—ICCPR and the ICESCR—and international labour conventions through legislation as set out in art. 40 of the Macao Basic Law.

For instance, art. 39(1) of the *Criminal Code of Macao* of 1995 prohibits death penalty, life imprisonment and imprisonment for an unlimited or unspecified period; art. 176 of the Criminal Code provides that a person may not be deprived of their right to liberty or their right to security except in accordance with the principles of fundamental justice.

Article 237(a) of the *Code of Criminal Procedure*, which came into effect in 1997, provides that an individual may be held in detention by an organ of the criminal police for a maximum period of 48 hours and shall be presented to a judge of criminal jurisdiction for a summary hearing or interrogation. A person held in remand custody is entitled to be presented for prosecution within the shortest time possible compatible with the rights of defence. The Criminal Procedure Code protects many other rights, including the right to be secure against unreasonable search and seizure, the rights upon arrest or being charged with an offence, the right not to be subjected to cruel or unusual treatment or punishment and the right against self-incrimination.

Several other laws implement rights enshrined in the ICCPR and the ICESCR. For instance, *Law No. 2/93/M* titled “Assembly and Protest” regulates the right to assemble and demonstrate in public places; *Law No. 5/98/M* titled “Regulation on Freedom of religious belief, worship and profession of faith” is self-explanatory; *Law No. 3/2001* titled “Law on the Election of the Legislative Assembly” provides for election of members of the Legislative Assembly; *Law No. 3/2004* titled “Law on the Election of the Chief Executive” regulates the election of the Chief Executive; *Law No. 9/2006* titled “Law on the Primary Education” establishes the foundations of Macao’s non-higher education system; and *Law No. 11/2013* titled “Law on Protection of Cultural Heritage” safeguards Macao’s cultural heritage.

(ii) Executive level

The main executive measures in Macao are the adoption of regulations and the submission of periodic reports in accordance with the provisions of the Covenants. The Macao Government has adopted numerous regulations to implement the Covenants, including provisions ranging from civil and political rights to rights of an economic, social and cultural nature. Some random examples are: Administrative

Regulation 8/2010 titled “Detailed Implementing Rules on Hiring non-local labour workers;” Administrative Regulation 29 /2020 titled “Special Education System”; and Administrative Regulation 30/2020 titled “Detailed Implementing Rules on Social Housing”.

Macao’s periodic reports to the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights, which are submitted by the Chinese Government on behalf of Macao SAR, are noteworthy. The Macao Government has so far submitted two reports to the Human Rights Committee and three reports to the Committee on Economic, Social and Cultural Rights. Those reports and the concluding observations by the Committees provide information about what Macao has done to implement the Covenants and what more needs to be done in the future.²⁴

In general, the Macao Government’s attitude towards the Covenants and the Committees’ concluding observations are positive, as reflected in various statements and press releases by the government and its officials. For example, in a closing statement at the 135th Session of the Human Rights Committee on 15 July 2022, the head of the Macao delegation said that “Macao will continue to improve the relevant legal systems and optimise policies and specific measures. While making efforts internally, we are also willing to actively conduct dialogues and exchanges with all parties, learn from each other and continuously improve the level of human rights protection.”

The Legal Affairs Bureau of the Macao Government on 7 March 2023 issued a press release regarding the concluding observations of the Committee on Economic, Social and Cultural Rights, which included the statement that “the government attaches great importance to the Committee’s concluding observations and will take into account and properly follow up on the constructive recommendations made in the future governance. Under the framework of the Basic Law, the Macao SAR Government will continue to implement the relevant provisions of the Covenant and realize the spirit of the Covenant, constantly raising the level of economic, social and cultural development in the Macao SAR.”²⁵

(iii) Judicial level

The judiciary too plays an important part in implementing the two Covenants by way of interpreting and applying them in the course of litigation. According to the Office of the President of the Court of Final Appeal, from 2011 to 30 June 2020, the ICCPR was referred to in 5 cases in the Court of Final Appeal and 27 cases in the Court of Second Instance.²⁶ Between 2014 and 2020, the Court of Second

24 https://www.dsaj.gov.mo/dept/dadidir_tc.aspx

25 <https://www.gov.mo/pt/noticias/653844/>

26 See Macao’s reply to the List of Issues in Relation to the Second Periodic Report of Macao on the Implementation of the International Covenant on Civil and Political Rights. Some of the judgments are No. 10/2002, No. 2/2004, No. 39/2006, No. 21/2007, No. 36/2007 of the Court of Final Appeal and No. 210/2001, No. 173/2002, No. 174/2002, No. 250/2006 and No. 203/2007 of the Court of Second Instance.

Instance in five cases and the Court of Final Appeal in one case applied or invoked the provisions of the ICESCR.²⁷

D. Challenges of implementation: A recent example

The preceding discussion does not necessarily indicate that Macao's implementation of the Covenants is perfect. In February 2021, migrant workers from Myanmar working in Macao applied to the Macao Government to hold a demonstration against the military coup d'état that had taken place in their home country earlier that month. The local police authority dismissed their request, citing art. 40 of the Macao Basic Law, which provides that the provisions of the ICCPR, including the right to peaceful assembly, are enforced in Macao through local legislation, and that Macao's local legislation on the right to peaceful assembly only applies to residents of Macao, not to non-residents.²⁸

The police authority is correct that the ICCPR should be implemented through local laws. However, as we know, the well-known position of the UN Human Rights Committee is that "citizens and non-citizens have the right of peaceful assembly alike and it may be exercised by, for example, foreign nationals".²⁹ Therefore, when the local police authority dismissed the Myanmar workers' request in accordance with local legislation, it created the problem of how to fill the gap between the provisions of the ICCPR and local legislation.

V. Dualism and Monism in Macao: Future Directions

As clearly evident from the Macao Basic Law, Macao's handover to China has not generally changed the manner in which international treaties become part of the local legal system and are implemented. The difference in the operation of this mechanism in this area is that while before the handover Portugal had the power to enter into international agreements in respect of Macao, today it is China that has such power. Both before and after the handover, the sovereign state (Portugal/China) could delegate the treaty-making power to Macao. Additionally, art. 138(2) of the Macao Basic Law provides for the continuation of pre-existing international agreements that were effective in Macao. In this section, we will consider how international agreements and treaties take effect in the sovereign state, China, to show that China does not adhere strictly to the monist theory. We will then review how international agreements and treaties discussed in the preceding passages take

27 Macao's reply to the List of Issues relating to Macao for the 3rd Periodic Report Submitted by the People's Republic of China to the United Nations Committee on Economic, Social and Cultural Rights on the ICESCR.

28 See Chao Wang, "Implementation of the ICCPR in Macao since 1999: The Position of Aliens as an Illustration" (2021) 20:3 *Chinese Journal of International Law* 561–579.

29 General comment No. 37 (2020) of the Human Rights Committee on the right of peaceful assembly (art. 21).

effect in Macao and consider whether Macao should move in the direction of a much more qualified version of monism.

A. *Monism versus Dualism*

As originally conceived, monism and dualism are opposing theories of the relationship between international law and domestic law. Monism is founded on the principle that when a state decides to be bound by an international agreement it automatically becomes part of the local legal system because international law is a higher source of law. Monism sees international law and domestic law as part of a single legal system, with international law automatically taking precedence over domestic law where there is a conflict. All state agencies, including courts, must recognise the primacy of such international treaties. This is the theory of incorporation of international agreements as part of local law.

In contrast, dualism is founded on the premise that international law and domestic law operate in different spheres. A state which agrees to abide by an international treaty is under obligation to conduct its affairs consistently with such international agreement. However, if an international agreement is to become part of the local law which the community is bound to follow and courts are bound to enforce, it must be incorporated in local legislation or administrative regulation. This is known as the theory of transformation, according to which such international treaty now takes a new form: legislation or administrative regulation. The community is bound by the content of such international agreement not because it is in an international agreement that the state has entered into but because the content is now found in a domestic source of law.

Both monism and dualism have their advantages and disadvantages. Monism provides a more seamless integration of international law into domestic law, which can be useful in situations where international cooperation and compliance is important. However, it may also lead to conflicts between international law and domestic law, as international law may take precedence over domestic law. Dualism, while providing a clear separation between international law and domestic law, may make it more difficult to enforce international treaties in domestic legal proceedings, as the treaties must be transformed into domestic law first.

Although Hong Kong and Macao are Special Administrative Regions of China, their views on the relationship between international law and domestic law are very different, with Hong Kong adopting dualism and Macao adopting monism.

Just as the Macao Basic Law, the Hong Kong Basic Law does not contain any provision on how international agreements and treaties become part of the local legal system. The only exception is art. 39 of the Hong Kong Basic Law, the counterpart in Macao Basic Law being art. 40, in relation to the two Covenants—ICCPR and ICESCR—and labour conventions, which Hong Kong is required to implement by way of enacting local legislation.

Treaties that apply to Hong Kong—whether extended to Hong Kong by the sovereign state or entered into by Hong Kong under delegation—do not have direct

legal effect in Hong Kong: They are not “self-executing”. To be of legal effect in the Hong Kong legal system, they must be domesticated or transformed into legislation.³⁰

Reception of an international agreement into local law may take different forms. For instance, a law passed by the Hong Kong legislature may provide that certain matters shall be governed by an international treaty. The International Organizations and Diplomatic Privileges Ordinance (Cap. 190) provides a good example. Section 6 of that Ordinance provides as follows: “Notwithstanding any provision to the contrary contained in any Ordinance, the international custom relating to the immunities and privileges as to person, property or servants of sovereigns, diplomatic agents, or the representatives of foreign powers for the time being recognized by the People’s Republic of China shall, in so far as the same is applicable mutatis mutandis, have effect in Hong Kong.” This in effect provides that “international custom” in this area of law overrides any inconsistent local legislation. In this regard, it must be noted that the Regulations of the People’s Republic of China Concerning Consular Privileges and Immunities, enacted in 1990, has been extended to Hong Kong through its inclusion in Annex III of the Hong Kong Basic Law, which lists the national laws of China which are “to be applied in [Hong Kong SAR]”.

In *Democratic Republic of Congo v FG Hemisphere Associates LLC (No 2)*,³¹ it was held that Hong Kong should follow the doctrine of absolute state immunity that China recognises in preference to the common law doctrine of restrictive immunity. The court so decided after obtaining an interpretation of art. 13 of the Basic Law³² from the Standing Committee of the National People’s Congress.³³

A second method of domestication of international treaties is by incorporating the treaty provisions in a local law. For instance, the Sale of Goods (United Nations Convention) Ordinance (Cap. 641) of 2022 provides that the Convention has the force of law in Hong Kong (s. 4) and that “if there is any inconsistency between this Ordinance or the Convention and any other law, this Ordinance or the Convention prevails to the extent of the inconsistency” (s. 5).

A third method is for Hong Kong to pass legislation giving legislative effect to an international agreement by incorporating the main features of an international agreement, adapting it to the local circumstances. Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap. 413), Dumping at Sea Ordinance

30 See generally Wan Pun Lung, “Application and Conclusion of Treaties in the Hong Kong Special Administrative Region of the People’s Republic of China: Sixteen Years of Practice” (2013) 12:3 *Chinese Journal of International Law* 589–612.

31 (2011) 14 HKCFAR 395 (CFA).

32 Article 13 provides that the Central People’s Government shall be responsible for the foreign affairs relating to the Hong Kong SAR, and the Central People’s Government authorizes the Hong Kong SAR to conduct relevant external affairs on its own in accordance with the Basic Law.

33 This interpretation was appended to the decision of the Court of Final Appeal as Annex 1. For an illuminating discussion of this case, see Wan Pun Lung, “International Law before the Courts of the Hong Kong Special Administrative Region of the People’s Republic of China—Twenty Years On” (2019) 9:1 *Asian Journal of International Law* 10–19.

(Cap. 466) and Protection of Endangered Species of Animals and Plants Ordinance (Cap. 586) provide examples from environmental law. The last-mentioned Ordinance was enacted in 2017, repealing and replacing the Animals and Plants (Protection of Endangered Species Ordinance) (Cap. 187), which had been enacted in 1976. The 1976 Ordinance, which gave effect to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, was found not to be fully compliant with the Convention, and the replacement Ordinance was passed to ensure full compliance with the Convention.³⁴ The Protection of Endangered Species of Animals and Plants Ordinance reproduces in its Sch. 3 not the whole of the Convention but only “the relevant parts of the Convention instruments, with or without modification, that have force of law in Hong Kong”.

While an international agreement or treaty which has not been incorporated by legislation has no legal effect in the municipal legal system, such international agreements are relevant in interpreting local legislation. As the Hong Kong Court of Final Appeal observed in *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743 (CFA) [43]:

It has long been established under Hong Kong law (which follows English law in this respect), that international treaties are not self-executing and that, unless and until made part of our domestic law by legislation, they do not confer or impose any rights or obligations on individual citizens. It is a principle of construction that where a domestic statute is ambiguous and is capable of bearing different meanings, which may in turn conform or conflict with the treaty, the court will presume that the legislature intended to legislate in accordance with applicable international treaty obligations. But where the statute is clear, the court’s duty is to give effect to it whether or not that would involve breach of a treaty obligation.

Courts have also observed that when interpreting an Ordinance which has been enacted to implement an international treaty, a purposive approach must be adopted to make the implementation of the parent treaty meaningful.³⁵

The starting point in Macao in respect of application in Macao of international agreements or treaties is monism. An international treaty or agreement becomes part of local law automatically when it is published in the official Bulletin.³⁶

34 See Legislative Council Brief, Protection of Endangered Species of Animals and Plants (Amendment) Bill 2017. https://www.legco.gov.hk/yr16-17/english/bills/brief/b201706024_brf.pdf

35 See eg Junter JA in his dissenting judgment in *Attorney-General v Yau Kwok-Lam, Johnny* [1988] 2 HKLR 394 (CA), 407. The court was dealing with the Animals and Plants (Protection of Endangered Species) Ordinance (Cap. 187) of 1976, repealed and replaced in 2017 by the Protection of Endangered Species of Animals and Plants Ordinance (Cap. 586). See text indicated by n. 34.

36 Articles 3(6) and 5(1) of Law 3/1999 of 20 December 1999 require international agreements applicable to Macao to be published in the Official Bulletin. For more details see “Core Document Forming Part of the Reports of States Parties”. https://www.dsaj.gov.mo/download/dadidir/Doc/HRICORECHN2010MAC/HRI-CORE_Document%202001_C.pdf

As we have seen at the start of this article, the position before the handover in 1999 was that international treaties ranked above local laws, as affirmed by art. 1(3) of the *Civil Code of Macao*, which provides that “international agreements applicable in Macao prevail over ordinary laws”. This rule applied to all international agreements and treaties that bound Macao, whether entered into by Portugal and extended to Macao or whether entered into by Macao in the exercise of its delegated treaty making power. Since the handover, Macao has continued to follow this principle, despite an observation by the Court of Final Appeal, which we will discuss immediately below, that being a local statute the Civil Code has no authority to confer a status higher than legislation to international agreements.

The decision of the Court of Final Appeal of Macao in 2004 has considered the ranking of an international treaty, to which China is not a party, but which had been implemented in Macao at the time of handover in 1999. The Court of First Instance had decided that given the supremacy of international law over domestic law, a provision in the Commercial Code of Macao of 1999 which conflicted with the Geneva Convention Providing for a Uniform Law on Letters and Promissory Notes, which has been in force in Macao since 1960, was invalid. The Court of Final Appeal affirmed the decision and observed that if such international treaties and local laws have an equal hierarchical position, a local law could revoke or amend an international treaty.³⁷

B. Treaty application in China

Our discussion on treaty application in Macao during the Portuguese period in Section II began with an overview of the ranking of international treaties in the Portuguese legal system since the situation in Macao was not clear. It is appropriate that in discussing the situation in Macao after the handover we examine China’s approach to treaty application.

As in Portugal, in China scholarly opinion is divided on whether monism or dualism provides the right answer. Wan Tieya, an eminent Chinese jurist and former Judge of the International Criminal Tribunal for the Former Yugoslavia, is critical of monism as being in conflict with state sovereignty.³⁸ On the other hand, Cao Jianming, Vice Chairman of the Standing Committee of the National People’s Congress 2018–2023, is critical of dualism because of its overly formal approach.³⁹ What we find in China today is a system which borrows from both monism and dualism.⁴⁰

37 The Court of Final Appeal’s decision is available at <https://www.court.gov.mo/sentence/zh-53590d0a72513.pdf>

38 Wan Tieya, *International Law* (Beijing: Law Press, 1995), a publication in Chinese.

39 Cao Jianming, *Public International Law* (Beijing: Law Press, 1998), a publication in Chinese.

40 See Bjorn Ahl, “Chinese law and International Treaties” (2009) 39 *Hong Kong Law Journal* 737–752 and “China’s Perspectives on Public International Law: Selective Adaptation of International Treaties and the Community of Common Destiny Concept” (2021) 64:1 *German Yearbook of International Law* 97–116. The concept of “a community of common destiny” is now referred to as “a community of shared future for mankind”. On this concept see Chao Wang, “A Community of Shared Future for

In most cases, when a treaty is ratified by the National People's Congress, the relevant government agency will draft a law to incorporate the treaty into the local legal system. These implementing laws are enacted, in the form of either a law passed by the National People's Congress or an administrative regulation made by the State Council.

The Constitution of China, while it declares in art. 5 that "No laws or administrative or local regulations may contravene the Constitution",⁴¹ does not contain a provision regarding the status of international treaties and agreements in the Chinese legal system.⁴² In the absence of a constitutional provision, we have to turn to laws, regulations, departmental rules and judicial interpretations of China which provide for treaty application, which are not uniform. Uniform rules have not been formulated on how to deal with the relationship between treaties and national laws. We can find in these rules four approaches to the reception of treaties into the Chinese legal system. They are as follows:

(i) A treaty can be directly applied and prevails over law, regulations and departmental rules

Article 189 of the 1982 Civil Procedure Law (for Trial Implementation) provides that "if an international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those found in this Law, the provisions of the international treaty shall apply, unless the provisions are ones on which China has declared reservations". This article was retained in the 1991 Civil Procedure Law and kept intact as art. 267 in the latest 2021 amendment.⁴³ Such a formal provision acknowledges direct treaty application and that treaties form a part of the Chinese legal system, with a higher place in the hierarchy than law, regulation and departmental rule. Since 1982, this approach is most commonly seen in laws on civil and commercial matters.⁴⁴

(ii) A treaty can be applied directly without its legal standing explicitly provided

Article 9 of the 1982 Trademark Law provides that "where a foreigner or foreign enterprise applies for trademark registration in China, the matter shall be handled

Mankind in the Global Pandemic Era: Towards a Normative Consensus or Authoritarian International Law?" (2022) 15:2 *Journal of East Asia and International Law* 315.

41 See for the English language version of the Constitution of China the website of the National People's Congress of the People's Republic of China. http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content_1372963.htm

42 The Law of the PRC on the Procedure of the Conclusion of Treaties of 1990 deals with the procedure for entering into treaties and agreements with foreign governments. http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383893.htm

43 The Civil Procedural Code of the PRC (amended in 2021). For English translation see <http://www.lawinfochina.com/display.aspx?lib=law&id=19&CGid=>

44 Other examples include art 95 of the Law on Negotiable Instruments, art 268 of the Maritime Law, art 3 of Special Maritime Procedure Law and art 58 of Enterprise Income Tax Law.

in accordance with any agreement concluded between the country to which the applicant belongs and the People's Republic of China, or any international treaty to which both countries are parties, or on the basis of the principle of reciprocity".

This legislative provision enables a dispute to be resolved by applying a treaty provision, but it does not go on to discuss how to deal with any possible inconsistency between the treaty and national laws. This approach can be found in some other laws, regulations and departmental rules.⁴⁵

(iii) A treaty can be directly applied, but for supplementary use only

This approach is rarely seen in the Chinese legal practice. The regulation "Measures on the Use of the Sign of the Red Cross" jointly issued by the State Council and the Central Military Commission in 1996 provides a good example. Article 23 of the regulation provides that "the matters that are not stipulated in these Measures regarding the protective use of the Red Cross emblem shall be handled in accordance with the relevant provisions of the Geneva Conventions and their Additional Protocols". In accordance with this article, the Geneva Conventions and their Additional Protocols can be directly applied, but only for supplementary use. In other words, if sufficient, the provisions of the 1996 Measures should be followed, without checking whether they contradict relevant conventions and protocols.

(iv) A treaty cannot be applied directly, nor its legal standing be explicitly provided

Some treaties do not apply directly in China. They must be first transplanted into the Chinese legal system.

The WTO Agreements provide a classic example. Article 7 of the judicial interpretation "Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of International Trade Administrative Cases" provides that the "people's court shall, in the hearing of international trade administrative cases, follow the laws and administrative regulations of the People's Republic of China, as well as the local regulations, which relate to or affect the international trade, enacted by the local legislatures within the statutory legislative authority". This provision of the judicial interpretation makes no reference to the WTO Agreements that China has joined, clarifying that the WTO Agreements cannot be applied directly in China.⁴⁶

45 Other examples include art 8 of the Fisheries Law, art 27 of Anti-Money Laundering Law, art 45 of the Notary Law, art 56 of the Customs Law and art 5 of the Law on the Exclusive Economic Zone and the Continental Shelf. Some departmental rules also follow a similar formula; eg art. 4 of Measures for the Administration of Overseas Investment by the Ministry of Commerce provides that "when making overseas investment, an enterprise may not violate any international treaty or agreement concluded or acceded to by the People's Republic of China".

46 See Chao Wang, "China's Treaty Compliance with the WTO: Perspectives of Selective Adaptation and Institutional Capacity" (2019) 6:1 *Journal of International and Comparative Law* 139–152.

The reception in China of international human rights treaties provides another example. No provisions regarding the applicability and the legal standing of international human rights treaties are found in China's laws and regulations. It appears that human rights treaties are not intended to be directly applicable and do not form part of the Chinese legal system. In justifying the enactment of the Women's Rights Protection Law, an official statement made by the Internal and Judicial Affairs Committee (now the "Supervisory and Judicial Affairs Committee") of the National People's Congress of China adopted a transformational approach and observed that its obligations under the Convention on the Elimination of All Forms of Discrimination against Women were duly reflected in the Women's Rights Protection Law:

[The Convention on the Elimination of All Forms of Discrimination against Women] not only stipulated the various rights of women but also required States parties to enact laws based on their own conditions to ensure full development and progress. China is one of the signatories to the convention. . . . Now, enacting the Women's Rights Protection Law, which is comprehensive and has Chinese characteristics, will have far-reaching influence worldwide, and China's women's movement will enter a new stage of full-fledged development as well.⁴⁷

China's approach to treaty application cannot be labelled monist or dualist. Rather, treaties can only be enforced directly or indirectly when they are given effect to by domestic laws. If there is a municipal law which clearly provides that certain treaties are applicable locally, then such treaty can be regarded as "directly applicable", but this should be considered as dualist rather than monist.

C. *Future directions*

In the pre-handover period in Macao, the consensus was that, as expressly stated in the Constitution of Portugal, international treaties become part of the Portuguese legal system without any legislative declaration to that effect. Macao adopted the same incorporation approach as evident from art. 70 of the Macao Organic Statute of 1976, which provided that international agreements and treaties enter into force in Macao, except for a special declaration, within a period of five days of their publication in the Official Bulletin. The Constitution of China contains no comparable provision. The answer to the question whether a particular international treaty has become part of the Chinese legal system depends on (i) whether there is a legislative provision which makes a particular international treaty or international treaties in general applicable to the subject matter governed by such legislation, as seen earlier, or (ii) whether the Supreme People's Court has issued a guidance on

47 Remarks by ZOU Yu, Vice-Chairman of the Internal and Judicial Affairs Committee of the National People's Congress, 11 Official Bulletin of the State Council (27 March 1992), 393, available at www.gov.cn/gongbao/shuju/1992/gwyb199211.pdf.

applicability of an international treaty. For instance, the Supreme People's Court issued a notice on the implementation of the Hague Service Convention requiring lower courts not to accept any foreign judicial assistance request if it does not satisfy the requirements of the Convention.⁴⁸

The Chinese approach is seen more as a hybrid system borrowing features from monism and dualism, the balance tilted in favour of dualism, which is more assertive of the sovereignty of the state allowing it to self-impose limitations on its legislative supremacy by bringing in international obligations set out in international treaties, which are beneficial such as by facilitating international trade transactions.

This Chinese approach of relying on legislation to incorporate international agreements and treaties finds support in art. 40 of the Macao Basic Law, which imposes an obligation on Macao to implement the ICCPR, ICESCR and labour conventions through legislation, a practice which, as we saw earlier, prevailed in Macao before the handover in 1999.

There is much to say in favour of allowing a state to decide on a case-by-case basis to incorporate treaty provisions in local law so that courts can interpret and apply them in the process of dispute settlement. This would be the application of an international treaty in the domestic sphere. Where no such transformation has taken place, the state is answerable to the international community for breaches of treaties to which it is a party. That would be the state's obligations in the international sphere. In that sense the modification of the monist approach is a welcome development.

48 See Bjorn Ahl, "China's Perspectives on Public International Law" (n. 40).

